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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Date: April 26, 2010 Time: 2:00 p.m. Place: Courtroom of Judge Phillips

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INTRODUCTION

Plaintiff Log Cabin Republicans ("LCR") seeks to challenge the constitutionality of a duly enacted statute, 10 U.S.C. § 654 ("Section 654"), yet it has not satisfied its burden of demonstrating associational standing sufficient to present a cognizable case or controversy. In particular, LCR has yet to identify by name a current member of LCR who has been harmed by discharge from military service under Section 654, despite this Court's 2006 order requiring LCR to do so.

Even if LCR had come forward with such a member as required, its challenge to Section 654 on due process and First Amendment grounds fails. LCR has not met its burden to demonstrate there are no legitimate applications of the policy that Congress could have rationally considered in passing Section 654. Moreover, LCR's due process challenge is governed by the most deferential form of review – rational basis review – as this Court long ago settled in its June 9, 2009 Order. Under a facial challenge governed by rational basis review, the only relevant consideration is whether, under the text of Section 654 and its legislative history, Congress could have rationally concluded that the statute furthered legitimate government interests. It is thus of no consequence that LCR has sought to introduce over three thousand pages of supplemental information critical of the policy promoted by Section 654, much of it post-dating the statute's enactment.[1] Nor can LCR transmute its facial challenge into a First Amendment claim. LCR fails to identify a single LCR member discharged because the military used that person's statement in violation of the First Amendment. Indeed, courts have upheld as valid the military's use of statements to create a rebuttable presumption regarding a propensity to engage in homosexual acts.

[1] As set forth in Exhibit 11, moreover, many of the issues of fact set forth in LCR's Statement of Genuine Issues are based upon inadmissible evidence.

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As we noted in our opening brief, and as the President has stated unambiguously, this Administration and LCR agree that Section 654 should be repealed. Yet, while this Administration believes the policy enacted by Section 654 is wrong, it also recognizes that this strongly-held view does not abrogate the Executive's responsibility, through the Department of Justice, to "take Care that the Laws are faithfully executed," U.S. Const., Art. II, Sec. 3, which includes defending the constitutionality of duly enacted statutes.[2] Nor does the Administration's efforts to effect repeal compel the conclusion that Section 654 is irrational and, therefore, unconstitutional. To the contrary, Section 654 is constitutional if Congress could have had a rational basis for enacting it in 1993 notwithstanding the Administration's present efforts to seek its repeal, and both district and appellate courts have repeatedly upheld the statute on this ground.

At bottom, LCR's suit invites this Court into an ongoing policy discussion between the political branches. This Court should decline the invitation.[3] LCR presses the most abstract of challenges: a facial suit alleging organizational standing on behalf of members who are either "honorary" or anonymous. It is intervention into precisely this sort of inchoate dispute that an Article III court should avoid.

ARGUMENT

I. LCR Has Failed To Establish Associational Standing

The law of this case as to standing is set forth in the Court's March 2006 Order (Doc. 24). There, the Court said "considering the Court's need to ensure [that] a live controversy exists, LCR is ordered to identify, by name, at least one of

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[2] The Department of Justice has a longstanding and bipartisan tradition of defending federal statutes where reasonable arguments can be made in support of their constitutionality, even if the Executive Branch disagrees with a particular statute as a matter of policy, as it does here.

[3] As the Court is aware, the Department of Defense is currently assessing the impact of repeal on military recruitment, retention and readiness.

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its members injured by the subject policy . . . . a named member must submit a declaration establishing that he or she: (1) is an active member of the organization . . . (Doc. 24 at 17). LCR asserts that both John Alexander Nicholson and John Doe are "active members" of LCR such as to comply with this Order (Doc. 140 at 6). In fact, neither individual satisfies the requirements of the Order or establishes associational standing for LCR. Because the Court lacks subject-matter jurisdiction, Defendants are entitled to summary judgment.

LCR acknowledges that Mr. Nicholson never paid dues to LCR before the filing of the First Amended Complaint ("FAC") on April 28, 2006, or even before his deposition in this case on March 15, 2010 (Doc. 141 at 5; Nicholson Dep. at 9:14-10:7, Mar. 15, 2010, Exhibit 2 to Doc. 136).[4] Indeed, Mr. Nicholson paid no dues until the eve of Defendants' motion for summary judgment, and did so only after Defendants told LCR that Defendants' motion would demonstrate that Mr. Nicholson had not paid dues and thus was not a bona fide member of LCR.

LCR asserts, nonetheless, that its board of directors had made Mr. Nicholson an "honorary member" of LCR pursuant to its bylaws when it filed the FAC (Doc. 141 at 5; Doc. 140 at 7); (Doc. 144 Ex. A at 2). But the record contains no evidence that the national board of directors ever granted "honorary membership" to Mr. Nicholson, and his recent payment of dues strongly suggests to the contrary.

Moreover, the "honorary membership" provision is in conflict with LCR's own articles of incorporation. A corporation (including a nonprofit corporation such as LCR) owes its legal existence to its articles of incorporation and to governmental approval of those articles. *See* D.C. Code § 29-101.48; *see also Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 84-86 (D.D.C. 2008). By contrast, a corporation's bylaws, which constitute the "rules adopted for the

[4] LCR does not dispute that "[s]tanding is determined as of the commencement of litigation." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002).

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regulation or management of [its] affairs," are not submitted for governmental approval. *See* D.C. Code § 29-301.02(5). Under the laws of the District of Columbia where LCR is incorporated, a nonprofit corporation has power "[t]o make and alter bylaws, *not inconsistent with its articles of incorporation* or with the laws of the District of Columbia, for the administration and regulation of the affairs of the corporation[.]" *See id.* § 29-301.05(12) (emphasis added). Thus, in the event of a conflict between a corporation's articles of incorporation and its bylaws, the articles must prevail. *See, e.g., Nevada Classified School Employees Ass'n v. Quaglia*, 177 P.3d 509, 511 (Nev. 2008); *Aglikin v. Kovacheff*, 516 N.E.2d 704, 712 (Ill. App. 1987).

Exhibit 8 to this reply is a certified copy of the articles of incorporation currently on file for LCR with the Government of the District of Columbia. Under the heading "Membership Organization," the articles provide:

> The corporation shall be a membership organization, subject to the provisions of the District of Columbia Nonprofit Corporation Act. The corporation shall have *one membership class*. Members of the corporation shall be individuals who . . . *make a financial contribution to the corporation each calendar year*. . . .

(Exhibit 8 hereto at 2, emphasis added.) LCR's articles of incorporation include no provision allowing the board of directors to create any other type of member or to grant "honorary" membership. Therefore, the provision to that effect in the organization's bylaws is "void," *see Nevada Classified School Employees Ass'n*, 177 P.3d at 511, and Mr. Nicholson, who admittedly had not made any "yearly contribution" to LCR when the FAC was filed, cannot give LCR standing.

LCR also asserts that Mr. Nicholson satisfies the "indicia of membership," citing *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 828-29 (5th Cir. 1997) (Doc. 140 at 7-8). That concept does not apply here, however. In *Friends of the Earth*, the court cited *Hunt v. Washington State Apple Advertising*

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Comm'n, 432 U.S. 333 (1977), for the proposition that an organization "lack[ing] formal membership" can nevertheless establish associational standing to represent the interests of persons who function as members. *See* 129 F.3d at 828. Unlike the plaintiff organizations in *Hunt* and *Friends of the Earth*, LCR is, pursuant to its own articles of incorporation, "a membership organization," and there is no allegation that it lacks legal members; rather, the dispute here is whether one specific individual satisfied the requirements for "formal membership" when Plaintiff filed its FAC.

Furthermore, Mr. Nicholson does not satisfy the specific "indicia of membership" referred to in *Hunt*: he does not "finance [LCR's] activities" (at least not before the Defendants challenged his status), and there is no indication that he has voted for, or served as, any officer of the organization. *See* 432 U.S. at 344-45; *see also Friends of the Earth*, 129 F.3d at 829 ("The Court in *Hunt* looked to who elected the governing body of the organization and who financed its activities."). What the late payment of dues and the "honorary membership" and "indicia of membership" arguments show, if anything, is that LCR has sought to manufacture membership after the fact in an effort to try to satisfy standing. *Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (claim to associational standing is "weakened" if members were "manufactured . . . after the fact" for purposes of the litigation).

Regarding John Doe, LCR is incorrect in asserting that "the Court need not conclude that both Mr. Nicholson and [John] Doe have standing" (Doc. 140 at 6); in reality, LCR cannot rely on an anonymous member. As noted above, this Court has ordered LCR "to identify, *by name*, at least one of its members injured by the subject policy" (Doc. 24 at 17, emphasis added), stating it "is not convinced that the threat of investigation *or discharge* justifies the failure to identify a member having standing to assert the claims presented in this action" (Doc. 24 at 17, emphasis

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added). Thus, LCR's identification of the anonymous "John Doe" does not satisfy the Court's prior ruling on associational standing.[5]

II. Defendants Are Entitled To Judgment On Plaintiff's Facial Due Process Challenge

A. LCR Cannot Carry Its Burden Under Its Facial Challenge

Even if LCR could establish standing, its facial substantive due process challenge to Section 654 would still fail. LCR ignores that its "facial challenge to a legislative Act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, binding Ninth Circuit precedent already has held that, based on justifications offered by the military, Congress could have rationally determined that the statute "further[ed] military effectiveness by maintaining unit cohesion, accommodating personal privacy and reducing sexual tension." *Philips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997). In light of that holding, LCR cannot carry its heavy burden and for this reason alone summary judgment is appropriate.[6]

B. LCR Cannot Carry Its Burden Under Rational Basis Review

LCR also ignores this Court's ruling that LCR may not "rely upon [the] heightened scrutiny standard [adopted in *Witt v Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008)] as the Ninth Circuit limited this standard to as-applied

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[5] In any event, John Doe himself lacks standing as Section 654 has never been applied to him, and there is no "real and immediate" threat of future application. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983) ("It is the *reality* of the threat of . . . injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.") (emphasis in original). John Doe's "fear[ ] that challenging the constitutionality of [Section 654], and/or making [his] own name or identity known . . . will subject [him] to investigation and discharge . . . ," (Doc. 140 at 8), is not a proximate threat of injury sufficient to create standing.

[6] The fact that Section 654 has been upheld by every Circuit to consider it in as-applied and facial challenges belies the argument that there are "no set of circumstances" in which the statute would be valid. *See e.g.*, *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008).

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challenges"; LCR's challenge is governed instead by the most deferential form of review available – the rational basis test (Doc. 83 at 17). In determining whether a law satisfies rational basis review, the court "must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote the purpose?" *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981).

LCR does not dispute that the first of these questions already has been answered by the Ninth Circuit. *See Witt* 527 F.3d at 821 ("applying heightened scrutiny to DADT in light of current Supreme Court precedents, it is clear that the government advances an important governmental interest"). With respect to the second question, the Supreme Court has made it clear that "whether *in fact*" a law "will accomplish its objectives is not the question." *Western & Southern Life Ins. Co*., 451 U.S. at 671-72 (emphasis in original). The question, instead, is whether Congress "*rationally could have believed*" that the statute "would promote its objective." *Id*. (emphasis in original). And LCR does not dispute that the Ninth Circuit's binding precedent in *Philips* precludes a showing to the contrary.

1. The Court Already Has Ruled That Rational Basis Applies

Given that these legal principles fatally undermine its facial challenge to Section 654, LCR attempts to re-litigate the Court's ruling that rational basis review applies (Doc. 140 at 9-11), arguing that *Witt* and *Lawrence v. Texas*, 539 U.S. 558 (2003), require heightened review. But, as noted, this Court already has ruled that LCR's facial challenge is governed by rational basis review and not heightened review (Doc. 83 at 17). And while LCR contends that *Witt* found *Lawrence* to require intermediate review in as-applied challenges (Doc. 140 at 10), this Court's ruling makes clear that intermediate review is not required where, as here, only a facial challenge is made.

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LCR's claim that heightened review is required because Section 654 is based upon animus (Doc. 140 at 11-12), moreover, must fail under binding Ninth Circuit precedent. The *Philips* court distinguished Section 654 from the statute at issue in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which LCR cites for support, stating that it disagreed Section 654 was "based upon 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable' by the military." 106 F.3d at 1429 (*quoting Cleburne*, 473 U.S. at 448). Defendants agree that a "bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (Doc. 140 at 12, *quoting Romer*, 517 U.S. at 634); such is not the case here, however, as binding Ninth Circuit precedent in *Witt* reaffirmed.

2. The Proceeding Plaintiff Proposes Is Precisely The Type Of Proceeding That Rational Basis Review Is Designed To Prevent

Attempting to avoid summary judgment, LCR proposes to take the congressional debate to the courts (Doc. 140 at 14-21). But congressional determinations subject to rational basis review are precisely the sort of fact-based policy determinations that are not subject to judicial second-guessing. Although Congress is a representative legislature that is not required to engage in any fact-finding before enacting legislation, here Congress heard testimony from dozens of witnesses over a five-month period, "receiv[ing] a broad variety of views." S. Rep. 112 at 270, 1993 WL 286446. At bottom, LCR disagrees with Congress' decision to credit certain testimony over other testimony – a decision that by definition should not be subject to judicial second-guessing under rational basis review.

"The testimony of numerous military leaders, the extensive review and deliberation by Congress, and the detailed findings set forth in the Act itself provide a 'reasonably conceivable state of facts,' to uphold the Act." *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998) (*quoting Heller*, 509 U.S. at 320). That legislative choice is not subject to judicial "fact finding" – and may be based

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on "rational speculation unsupported by evidence or empirical data." *Philips*, 106 F.3d at 1425 (quotations and citations omitted). "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id*. (same). This is especially so when, as here, legislative action is taken under the "congressional authority to raise and support armies and [to] make rules and regulations for their governance[.]" *Id*.[7]

In any event, LCR offers nothing that contradicts that Congress could have rationally determined that the statute promoted military effectiveness, notwithstanding LCR's disagreement with that conclusion. Although LCR's experts disagree with Congress' determination that such considerations are sufficient to determine policy, that is a decision that Congress alone may make.

3. The Statute Must Be Evaluated At The Time of Enactment

Rational basis must be evaluated at the time of enactment of Section 654, and not based upon changed circumstances. LCR argues (Doc. 140 at 14) that *Northwest Austin Mun. Util. Dist. No. 1. v. Holder*, ___ U.S. ___, 174 L Ed. 2d 140, 129 S. Ct. 2504, 2512 (2009), permits a court to reevaulate whether a statute has a rational basis based on changed circumstances. LCR is incorrect. The Supreme Court in *Northwest Austin* did not endorse changed circumstances as a basis for reconsidering the rational basis of a statute; in fact, the Court never reached the constitutionality of the statute in that case.[8] The Court did reaffirm, "that judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Id*. at 2513 (quoting *Blodgett*

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[7] Contrary to LCR's assertion (Doc. 140 at 13), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) does not alter the principles of deference on military matters. In fact, the Supreme Court in *Hamdi* specifically reaffirmed that the judiciary "must accord the greatest respect and consideration to the judgments of military authorities in [military] matters[.]" 542 U.S. at 534.

[8] To the extent the Court considered changed circumstances, it did so to interpret a recently re-authorized provision of the statute at issue in that case, not as part of a constitutional analysis employing rational basis review.

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v. Holden, 275 U.S. 142, 147-48 (1927)). LCR has provided no case in which a court has held that a statute, rational when passed, suddenly became irrational and unconstitutional on its face because of changed circumstances. LCR makes only a token effort to distinguish the string of authority holding to the contrary (Doc. 140 at 15-16 n.15).[9]

LCR's real argument appears to be that the statute was irrational when passed (Doc. 140 at 15-17). But that claim must fail. Congress could have rationally concluded that Section 654 promoted military effectiveness based on the record before it, as the Ninth Circuit (and other circuit courts have) found in precedent upholding the law.

For all of these reasons, Defendants are entitled to summary judgment.

III. Defendants Are Also Entitled To Judgment On Plaintiff's First Amendment Challenge

Under Section 654 and the implementing regulations, a member of the military may not be discharged for statements alone. Only where a service member is unable to rebut the presumption that he or she "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts" will discharge potentially follow (Doc. 25 Ex. A at 18, Ex. B at 32, Ex. C at 35).

In pressing its claim, LCR ignores the facts regarding John Alexander Nicholson and John Doe, the two members on whom LCR relies for standing. Mr.

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[9] LCR's assertion (Doc. 140 at 4) that the Government fails to provide Gen. Powell's recent official statement regarding DADT is beside the point; Gen. Powell's statement is available at: http://www.facebook.com/GenPowell#!/GenPowell?v=app_2347471856. Moreover, as explained above, the relevant constitutional inquiry for a facial due process challenge is the evidence Congress considered in 1993. For instance, the Executive Branch, as expressed by President Obama, now takes a different position regarding Section 654 than that expressed by Presidents Clinton and Bush. Yet that change in perspective, while it may chart a new policy course that could lead to repeal of the statute, neither changes the evidence on which Congress relied in 1993 nor compels the conclusion that Congress was irrational in reaching its conclusions regarding the necessity of the statute.

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Nicholson was discharged because he expressly declined to rebut the presumption created by his statement of homosexuality (Nicholson Dep. 51:1-9, 62:2-63:3, Exhibits 40 & Ex. 41, Exhibits 6 & 7 to Doc. 136), not merely because of his statement alone.[10] Similarly, given that John Doe remains in the military, he necessarily "was [not] discharged, [nor in light of the statute and Directives] is he subject to discharge, merely for a self-identifying statement regarding his homosexuality" (Doc. 83 at 23-24). Pursuant to the Court's Order permitting LCR to establish facts regarding Nicholson and Doe (Doc. 83), this evidence now compels resolution of the First Amendment claim in Defendants' favor.

Nevertheless, LCR argues that Section 654 "chill[s] constitutionally protected speech" (Doc. 22-23), particularly with regard to John Doe. The concept of a "chill" on protected speech under the First Amendment, however, is meant to protect against vague or overbroad laws that leave citizens uncertain as to the speech to which it applies. *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 889 (2010). Section 654, by contrast, is very narrow and very specific in its application to any pertinent statement by a service member.
10 U.S.C. 654(b).

Further, LCR attempts to set forth information regarding the experiences of other present or former service members (Doc. 140 at 24). Specifically, LCR cites a spreadsheet purporting to reflect responses to an anonymous Internet-based survey of its members regarding their experiences with the "Don't Ask, Don't Tell" policy (Doc. 140 at 24; Doc. 141 at 56; Doc. 147 Ex. B). That spreadsheet, however, is hearsay and does not appear to be covered by any hearsay exception.

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[10] The circumstances that prompted Mr. Nicholson to make that decision are not relevant to the constitutional inquiry here (Doc. 140 at 22-23). In any event, it is not correct to say that Mr. Nicholson had to choose between a dishonorable discharge and declining to rebut the presumption created by his statement of homosexuality (Doc. 140 at 22-23). Under Army regulations, a discharge for homosexual conduct can be a dishonorable discharge only in certain circumstances that did not apply to Mr. Nicholson. *See* Army Regulation 635-200, ¶ 15-4, *available at* http://www.apd.army.mil/USAPA_PUB_pubrange_P.asp (Exhibit 9 hereto).

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Moreover, Terry Hamilton, chairman of LCR's national board, testified that the organization made no effort to verify the accuracy of the statements collected in response to the survey (Hamilton Dep. 45:23-46:1, Mar. 13, 2010, Exhibit 10). Mr. Hamilton was also unable to say that any of the individuals responding to the survey – or any other member of Log Cabin Republicans – had been discharged solely because of a statement (Hamilton Dep. 48:10-51:2; 57:15-63:20, Exhibit 10).[11]

Lastly, LCR cites a series of "Hypothetical Teaching Scenarios" produced by Defendants for the proposition that "a servicemember who advocates, in a public, off-base forum for repeal of DADT is subject to discharge on that basis alone" (Doc. 140 at 24, *citing* LCR App. at 1758-63). Yet, the training item in question does not state that such advocacy would constitute grounds for discharge, but rather that a commander should inquire into whether such advocacy was intended as a statement of homosexuality giving rise to a presumed propensity to engage in homosexual acts (LCR App. at 1763). And LCR ignores the statement at the beginning of the training document clearly explaining that the scenarios "are for training purposes only . . . are not meant to prescribe 'correct' outcomes [and] do not . . . create any substantive or procedural rights" (LCR App. at 1758).

CONCLUSION

For the foregoing reasons, and for those stated in Defendants' opening memorandum, Defendants are entitled to summary judgment.

[11] Plaintiff also lacks standing to pursue this claim. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476 n.14, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) (where organization relies on associational standing, "its claim to standing can be no different from those of the members it seeks to represent"). There is no reason to believe this principle applies only in the context of taxpayer standing (Doc. 140 at 24). *See Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 260 n.4, 261-62 (3th Cir. 2009) (noting that plaintiffs expressly eschewed reliance on taxpayer standing).

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