IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Monifa J. STERLING, Lance Corporal (E-3) U.S. Marine Corps, *Appellant*.	CORRECTED BRIEF OF *AMICI CURIAE* ALEPH INSTITUTE, ET AL., IN SUPPORT OF APPELLANT USCA Dkt. No. 15-0510/MC Crim. App. No. 201400150

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Interest of the Amici Curiae

The *amici curiae* are individuals and organizations with extensive personal and professional experience concerning the free exercise of religion in the U.S. military. As discussed in more detail in *amici*'s motion to file this brief, the *amici* consist of the Aleph Institute; the Anglican Church in North America, Jurisdiction of the Armed Forces and Chaplaincy; the Assemblies of God; The Church of Jesus Christ of Latter-day Saints; Major General Bentley B. Rayburn, USAF (Retired); Chaplain (Brigadier General) Douglas E. Lee, U.S. Army (Retired); John L. Schlageter, General Counsel of the Archdiocese for the Military Services, USA; Major Kamal Singh Kalsi, D.O., U.S. Army Reserves; the Lutheran Church-Missouri Synod; the National Association of Evangelicals; the North American Mission Board Chaplaincy of the Southern Baptist Convention; Imam Talib M. Shareef; and the Rabbinical Council of America.

All of the institutional *amici* have an ongoing relationship with the military as faith groups responsible for certifying (or "endorsing") individual chaplains for military service. Further, almost all of *amici*'s chaplain endorsers are veteran senior military chaplains, with decades of experience providing for the religious needs of all service members at all levels of command and in geographic regions worldwide. The individual *amici* likewise have deep personal experience in military religious liberty

matters, resulting from their responsibilities as senior-level commanders or religious leaders, or, in the case of one party, from obtaining a ground-breaking religious accommodation from the military. *Amici* and the chaplains that many of them endorse have served in every branch of the military and in every major U.S. conflict since Vietnam.

Amici contend that the lower court's interpretation of a key federal civil rights statute—the Religious Freedom Restoration Act ("RFRA")—is flawed and dangerous. The same is true of the lower court's finding that commanders may preemptively censor religious expression because religion is inherently "divisive." The court's ruling incentivizes command-distracting strife, abandons the military's heritage of robust religious pluralism, and degrades mission accomplishment and unit cohesion. *Amici* urge this Court to repudiate the lower court's ruling, protect the rights of religious service members afforded by RFRA, and preserve the military's rich legacy of mission accomplishment in a pluralistic religious environment.

Summary of the Argument

Since before the founding of the nation, the U.S. military has uniquely and effectively accommodated religious speech and exercise, to the benefit of both mission accomplishment specifically and our nation generally. The lower court's decision threatens that heritage.

The lower court's ruling concerns a junior Marine's exercise of religion. The Marine, Lance Corporal (LCpl) Sterling, is a nondenominational Protestant Christian. She posted three small strips of paper containing the same seven-word scripture verse in her workspace: "No weapon formed against me shall prosper." JA111-13 (paraphrase of *Isaiah* 54:17). She posted the verses in a rough triangular format to remind her of the Trinity (the Christian doctrine that there is one God who exists as three distinct persons: Father, Son, and Holy Spirit). *Id.* She testified without contradiction that she did so as an exercise of her faith. *Id*. The scriptures were primarily visible only to her and, at the relevant time, were posted at a desk that was not shared with any other Marines. JA115, 166.[1] Other nearby Marines had similar, albeit nonreligious, personal items posted in their workspaces, such as career accolades and pictures of family. JA056, 166-67. Yet LCpl Sterling was ordered to remove her verses and, when she declined, was court-martialed for disobedience. JA002.

The lower court rejected LCpl Sterling's argument that her religious exercise was protected by the Religious Freedom Restoration Act ("RFRA"). JA005. Although RFRA expressly protects

[1] *See* JA115:
Q: Lance Corporal Sterling, just to be very clear, at the period that these signs were on your desk, was your desk shared at that point?
A: No, it was not.

"any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), the court somehow twisted that language to conclude that RFRA covers only exercises that are at least "part of a system of religious belief." JA005. Otherwise, the court reasoned, RFRA would allow individuals to exercise beliefs that are "grounded *solely* upon subjective ideas about religio[n]," leaving courts with no "reference point" to judge whether the exercise "is indeed religious." *Id.*

The lower court separately rejected LCpl Sterling's argument that there was not a valid reason to require her to remove her scriptures in the first place. The record reveals no evidence that the messages were any more disruptive than the nonreligious messages on other Marines' desks and, indeed, no evidence that her messages caused any disruption at all. But the court ruled that, because religion is inherently "divisive" and "contentious," commanders may categorically and preemptively censor religious speech to avoid even the "risk" that others might be "expose[d]" to it. JA006.

Both rulings are wrong.

First, as a matter of simple statutory interpretation, the posting of Christian scripture verses by a Christian service member arranged to represent a Christian symbol unquestionably qualifies as a "religious exercise" protected by RFRA. And the court's reason

for its contrary conclusion—that RFRA protects only exercises that are "part of a system of belief" lest courts be overrun with subjective religious claims—is triply wrong. It is wrong that RFRA is so limited, wrong that RFRA is otherwise *un*limited, and wrong that posting scriptures is not an established part of religions worldwide—including LCpl Sterling's.

Second, categorical bans on religious speech, especially ones that are borne of open hostility toward religious expression, are unconstitutional. The government can have no valid interest, much less a compelling one, in "preemptive" censorship of religious expression driven merely by the perception that religion is inherently "divisive" and "contentious." The court's contrary ruling turns controlling federal law on its head. By law, religious speech receives *more* protection than standard office discourse, not less. This is in no small part because, as this case shows, religious speech often needs protection more—particularly when the religious expression is unfamiliar to government officials.

Finally, treating religion as a problem to be solved instead of a right to be protected ignores the military tradition of protecting robust religious pluralism. That tradition addresses disagreements about religion through mutual respect instead of enforced silence and has long provided objective, practical benefits to mission accomplishment and unit cohesion in a way that the lower court's ruling cannot.

Argument

I. The lower court erred in ruling that LCpl Sterling's religious exercise was not protected by RFRA.

Congress enacted the Religious Freedom Restoration Act to "provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (citing 42 U.S.C. § 2000bb ("RFRA")). To this end, RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis supplied); *see also id.* at § 2000bb-2(4). This includes religious exercise by service members: "Congress specifically intended RFRA to apply to the military." *Singh v. McHugh*, --- F.Supp.3d ---, 2015 WL 3648682, at *12 (D.D.C. June 12, 2015); *accord* DoDI 1300.17 (incorporating RFRA standard).

LCpl Sterling's posting of three identical, seven-word Bible verses in a Trinitarian symbol on her work space is indisputably an exercise of her religion. JA111-13. Thus, the court should have evaluated whether the military violated RFRA by forcing LCpl Sterling to remove the verses from her workspace. But the lower court refused to recognize posting scripture verses as a "religious exercise" at all because it did not perceive that to be "part of a system of religious belief." JA005. Ruling otherwise, the court reasoned, would open a Pandora's box and leave courts at the mercy of service members' "subjective ideas about religio[n]." *Id.*

But as a matter of statutory interpretation and clear Congressional intent, the court was plainly wrong about RFRA's scope. It was also wrong that adopting RFRA's plain meaning would make RFRA unmanageable. And it was wrong that the posting of scripture is not a part of a system of religious belief.

A. RFRA protects "any" religious exercise, not just exercises that are part of a system of belief.

Congress could not have been clearer that RFRA's protective balancing test encompasses "*any* exercise of religion." 42 U.S.C. § 2000cc-5(7)(A)(emphasis supplied). "Any" means any. To erase all confusion, Congress instructed courts that "religious exercise" must be "construed in favor of a broad protection" and "to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* at § 2000cc-3(g). In fact, RFRA's "system of religious belief" language stands for the exact opposite of what the lower court held: religious exercise *need not* be part of "a system of religious belief" to merit RFRA's protection. *Id.* at § 2000cc-5(7)(A); *see also* JA005. Free-exercise laws protect "idiosyncratic" beliefs just as much as "beliefs which are shared by all of the members of a religious sect." *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981)); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) (emphasizing the importance of

the "full, entire, and practical freedom for all forms of religious belief and practice").

B. Enforcing RFRA as Congress intended is not unmanageable.

Recognizing LCpl Sterling's "religious exercise" does not open a legal Pandora's box. That was precisely the kind of nebulous fear that Congress rejected when it enacted RFRA. *Hobby Lobby*, 134 S. Ct. at 2760-61 (noting Congress rejected concerns that RFRA would require "exemptions from civic obligations of almost every conceivable kind"). Instead, Congress recognized that such "slippery-slope concerns" simply "echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006).

RFRA stands for the rejection of that approach and the adoption of "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* at 436 (quoting 42 U.S.C. § 2000bb(a)(5)). That balance has been successfully struck for over two decades now, including in the context of protecting religious speech in the military. *Hobby Lobby*, 134 S. Ct. at 2759 (noting Congress passed RFRA in 1993); *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (applying RFRA to protect speech by Jewish, Catholic, and Muslim chaplains); *see also* DoDI 1300.17.

Furthermore, subsumed within the definition of "religious exercise" are two crucial qualifiers that define the bounds of a protected exercise: first, the exercise must be *religious*; second, it must be *sincere*. *Hobby Lobby*, 134 S. Ct. at 2774 n.28. Together, these limitations serve to ensure that RFRA only protects what Congress intended to protect.

1. To be protected, an exercise must be "religious."

RFRA only protects exercises "based on a religious belief" and not those based on "some other motivation." *Holt*, 135 S. Ct. at 862. Non-religious beliefs or ways of life, "however virtuous and admirable, may not" rely on RFRA or the Religion Clauses to avoid "reasonable state regulation." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Thus, to enjoy RFRA's legal protections, "the claims must be rooted in religious belief." *Id.*

Yoder did not, as the lower court mistakenly suggested, reject legal protections for personal religious beliefs in favor of systematic, well-established ones. That would violate the Religion Clauses. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (rejecting as unconstitutional law that favored "well-established churches" over "churches which are new"). Rather, *Yoder* stands for the important rule that the Free Exercise Clause—like RFRA—protects "only beliefs rooted in religion" and not in other fields, such as philosophy, politics, or science. *Thomas*, 450 U.S. at 713. Thus, had LCpl Sterling's small sign been a philosophical

proclamation of Polonius's "To thine own self be true," she could not have claimed RFRA's protection. *See* William Shakespeare, *Hamlet* act 1, sc. 3.

2. To be protected, an exercise must be "sincere."

Nor need courts fear that LCpl Sterling could have professed a faith in Shakespeare to protect her Polonian sign. That's what RFRA's sincerity requirement guards against—opportune declarations of devotion that consist more of convenience than conviction. Courts are "seasoned appraisers of the 'motivations' of parties," including whether a religious belief is being "asserted in good faith." *U.S. v. Manneh*, 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008). They can use that same aptitude to reject beliefs that, unlike sincere religious faith, have no genuine relation to "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342 (1890). Free exercise guarantees are the product of a "struggle for religious liberty . . . through the centuries," one where "men have suffered death rather than subordinate their allegiance to God to the authority of the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). Courts rightly refuse insincere attempts to appropriate this hard-earned right.

C. Posting scripture verses is a well-established form of religious exercise.

The lower court was badly mistaken that posting scripture verses for constant personal review is merely an "individual preference" and not "part of a system of religious belief." JA005. Religious scriptures "comprise a large part of the literature of the world" and are believed by adherents to be divinely inspired words "full of power and truth." Encyclopædia Britannica Online, *Scripture*, http://www.britannica.com/topic/scripture (last visited Dec. 16, 2015). Some faiths identify scripture as being a virtual incarnation of God.[2] And almost every religious tradition, including LCpl Sterling's, emphasizes the fundamental importance of scripture in a believer's life.[3]

Religious scriptures' near-paramount importance to religion was the major reason they were transcribed from their oral-tradition roots or—in the case of scripture that started in textual form—

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[2] *See, e.g.*, *John* 1:1 (NIV) ("In the beginning was the Word, and the Word was with God, and the Word was God."); *see also Siri Guru Granth Sahib* 982 ("The word is the embodiment of the Enlightener").

[3] *See, e.g.*, *Deuteronomy* 8:3 ("[M]an does not live on bread alone, but on every word that comes from the mouth of the Lord"); The Qur'an, *Surah* 26:192 (Wahiduddin Khan, trans., Goodward Books 2014) (identifying the Qur'an as "revelation from the Lord of the Universe"); *II Timothy* 3:16 ("All Scripture is God-breathed and is useful for teaching, rebuking, correcting, and training in righteousness") (NIV); *I Nephi* 15:24 ("[W]hoso would hearken unto the word of God, and would hold fast to it, they would never perish"); *see also Psalm* 119 (a sacred text to Jews, Muslims, and Christians alike, *Psalm* 119 is the longest chapter of the Bible, a 176-verse acrostic poem entirely focused on the crucial importance scripture in every facet of life).

compiled for posterity. *See, e.g.*, *The Translation of the Meanings of Sahih al-Bukhari* ¶ 4986-87 (Muhammad Muhsin Khan, trans., Darussalam Pubs. 1997) (describing the importance of the Qur'an and its transcription from oral tradition into a single book). It is also why many religious groups emphasize scripture memorization and structure worship services around the reading of scripture. *Id.* at ¶ 5027 ("The Prophet said, 'The best among you (Muslims) are those who learn the Qur'an and teach it (to others).'"); *see also Colossians* 3:16 (NIV) (exhorting the early Christian church to gather together and recite "the message of Christ" and "psalms").

Given scripture's importance, it comes as no surprise that many faiths encourage believers to take scripture everywhere. For instance, an oft-repeated teaching in the Jewish Tanakh (first appearing in the Torah, and then repeated in the Nevi'im and the Ketuvim) is the *Shema*, which is still recited in Jewish evening prayer services. The *Shema* includes the exhortation to ensure that the Torah's commandments become deeply ingrained by meditating about them at all times—"when you sit at home and when you walk along the road, when you lie down and when you get up." *Deuteronomy* 6:4-9; *see, e.g.*, Internet Sacred Text Archive, *Evening Service for Sabbaths and Festivals*, http://www.sacred-texts.com/jud/spb/spb15.htm (last visited Dec. 16, 2015) (listing evening prayer); *accord Joshua* 1:7-8; *Psalm* 1:2; *Proverbs* 7:1-3;

The Qur'an, *Surah* 3:191 (Wahiduddin Khan, trans., Goodward Books 2014). This teaching is accepted as sacred by Muslims and Christians, meaning it is scripture to almost 4 billion people—over half of the world's population. *See* Pew Research Center, *The Future of World Religions: Population Growth Projections, 2010-2050*, Demographic Study (Apr. 2, 2015), http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/ (listing religious population worldwide).

Not infrequently, incorporating scripture into everyday life has taken the form of small excerpts of scriptural texts written on whatever believers could get their hands on: parchments, doorframes, gates, stones, pottery, and even "palm-leaf stalks." *Sahih al-Bukhari* ¶ 4986; *see also Deuteronomy* 6:4-9 (encouraging believers to put scripture "as symbols on your hands and bind them on your foreheads" and write them "on the doorframes of your houses and on your gates"); Matthew Henry, Deuteronomy, *Volume I: Commentary on the Whole Bible* 587 (1706) (noting that, because there were "few written copies of the whole law" available in early Israel, the practice of "writ[ing] some select sentences of the law . . . in scrolls of parchment" was common). Indeed, the Jewish custom of physically wearing strips of scripture on one's forehead was common in Jesus's day, *see Matthew* 23:5, and continues through the present among Orthodox Jewish communities.

The bottom line is that many faiths, including LCpl Sterling's, instruct adherents to incorporate scripture into every part of their lives. *See, e.g.*, *I Timothy* 4:13 (NIV) ("devote yourself to the public reading of Scripture"). Thus, far from being "solely based on individual preference," JA005, LCpl Sterling's religious exercise of posting Bible verses at her workstation in a Trinitarian symbol is rooted in rich theological soil.

It is also very commonplace. One of the "five major areas" of regularly re-occurring religious accommodations in the military is carrying "copies of religious symbols or writing" on a service member's person. Army Reg. 600-20 § 5-6*h*(4)(d). The issue comes up so often that such accommodations are *preemptively* authorized so long as the religious items are "neat and conservative" and do not "interfere with performance of military duties," such as by impairing operation of weapons, posing a safety hazard, or undermining effectiveness of protective clothing. *Id.* at § 5-6*h*(4)(a). Similarly, displays of religious icons or messages at work are so run-of-the-mill in the civilian context that the EEOC has specific guidance for how to accommodate them, including a broad rule that nonobtrusive displays like LCpl Sterling's must generally be permitted. *See* EEOC, *Example 49 Display of Religious Objects By an Employee*, Section 12: Religious Discrimination (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html. The

court was simply wrong to treat LCpl Sterling's religious exercise as a purely subjective and idiosyncratic belief.

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Building on the Founders' insight that "the Civil Magistrate is [not] a competent Judge of Religious truth," Congress ensured that RFRA did not allow courts to second-guess whether a sincere religious exercise is a part of a "system" of religious beliefs. *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 41 n.31 (1947) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)). This Court should uphold that principle here and reject the lower court's analysis.

II. There is no valid government interest, much less a compelling one, in preemptively censoring religious speech.

Finding that a religious exercise has been burdened by the government does not end the RFRA analysis. Once the believer has shown a substantial burden on her religious exercise, the burden shifts to the government to show that burdening that specific exercise is the least restrictive means of accomplishing a compelling government interest. *Hobby Lobby*, 134 S. Ct. at 2767.

The court below did not reach the "compelling government interest" standard because it erred on the religious exercise question. JA005. But it addressed a similar issue when analyzing whether there was a "valid military purpose" in forcing LCpl Sterling to remove her scripture verses. On that issue, the court

held that religious speech is so inherently "divisive" and "contentious" that commanders may "preemptively" "require that the work center remain relatively free" of religious expression to avoid the "imagine[d]" "risk" of a "divisive impact." JA006.

That kind of frankly anti-religious rationale runs directly contrary to constitutional and statutory protections for religious speech, threatens minority and unfamiliar religions and religious beliefs, and is out of step with the military's history of robust religious pluralism.

A. Religious speech receives special *protection*, not targeted disapproval.

To be sure, honest and authentic religious speech necessarily distinguishes itself from other faiths and beliefs. This can and does cause offense. One approach to minimizing offense is encapsulated in the long and sordid history of "government suppression . . . directed *precisely* at religious speech." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Under this approach, religious expression is treated as a form of toxic unprotected speech, a cousin to sexual obscenity or incitements to riot.

But the First Amendment rejects that categorical discrimination against religion. Instead, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* And laws

like RFRA actually provide heightened protection specifically and solely for religious expression. *See Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005) (accepting that laws like RFRA may give "greater protection to religious rights than to other constitutionally protected rights.").

Perhaps nowhere is this more clear than in the U.S. military, which has created an entire branch—the chaplaincy, the second-oldest branch in the military—solely to "accommodat[e] religious practice by members of the military." *Cutter*, 544 U.S. at 722; *accord* DoDI 1300.17(4) (stating that the military "places a high value on the rights of members of the Military Services to observe the tenets of their respective religions."). Indeed, the unusual and extensive demands of military life affirmatively require the chaplaincy's support for service members' religious exercise. *Katcoff v. Marsh*, 755 F.2d 223, 226-34, 236-37 (2d Cir. 1985) (finding that the chaplaincy's existence was compelled by both of the Religion Clauses). And Congress has recently and repeatedly re-affirmed its commitment to uniquely protecting service members' religious expression. *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (2012); National Defense Authorization Act for Fiscal Year 2014 § 532 Pub. L. No. 113-66 (2013) (clarifying that § 533 fully protected religious *expression*, not just belief).

Thus, contrary to the lower court, religious speech isn't subject to special governmental limitation, but rather enjoys full—and often enhanced—protection from governmental censorship. Accordingly, water-cooler conversation at Camp Lejeune about the Carolina Panthers' undefeated record should not enjoy more leeway than similarly-timed conversations about faith. *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) (rejecting government employee speech regulation that favored discussing football over religion). Nor should personal desktop decorations of family or career accolades be presumptively more permissible than simple scriptural messages. *See* JA166-67.

B. Establishing a categorical ban on religious speech is illegal and harmful.

The "meager" record below is devoid of any evidence of actual workplace disruption from LCpl Sterling's small strips of scripture. JA006. Yet the lower court adopted a broad rule allowing commanders to "preemptively" prevent "exposur[e] to biblical quotations in the military workplace" that "risk" an "imagine[d] . . . divisive impact." JA006. That ruling sends a signal that commanders may censor expression just because it is religious. Such a rule runs squarely contrary to the broad constitutional requirement that religion be given—at minimum—equal treatment by governmental officials. Further, it would increase the risk of unit discord by allowing some service members to hector the command

into censoring religious speech the service members don't like. That will inevitably disadvantage minority or unpopular faiths, which history teaches are more likely to be the target of misunderstanding and disfavor.

1. Categorically disfavoring religious expression because of its religious content is impermissible.

To be sure, commanders have latitude to regulate the workplace to prevent actual harassment or disruption. *See, e.g.*, *Tucker*, 97 F.3d at 1209. But the court below did not even require proof of actual division and instead allowed commanders to "preemptively" and categorically censor religious speech *just because it is religious*. That is a clear violation of free exercise laws. *Id.* at 1212, 1214 (flatly rejecting "the constitutionality of a flat ban on religious speech"—including "display of religious materials"—"by and among employees who work in a government office"). It is not even "reasonable"—much less valid or compelling—to adopt a rule "forbid[ding] only the posting of religious information and materials." *Id.* at 1215.

The "minimum requirement" of the First and Fourteenth Amendments is that a law not discriminate against religion "on its face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). This is because "deny[ing] equal treatment to a [person] on the grounds that [she] conveys religious ideas is to penalize [her] for being religious. Such unequal treatment is

impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004). Targeting religious speech just because of its religious nature is a "blatant" form of unconstitutional discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Tucker*, 97 F.3d at 1216 (condemning religious speech bans in the workplace as viewpoint discrimination).

What's more, the lower court's rule turned explicitly on the perceived offense caused by "exposur[e] to biblical quotations." JA006. Courts have long recognized and rejected this kind of rule as adopting a "heckler's veto," "one of the most persistent and insidious threats to first amendment rights." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). What is "divisive" or "contentious" is necessarily a subjective judgment that exists primarily in the eye of the beholder. Allowing officials to preemptively silence "imagine[d]" offensive speech, JA006, would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971); *accord Snyder v. Phelps*, 562 U.S. 443, 448 (2011). Thus, the lower court's ruling encourages enterprising service members to game the system. If all it takes is a bit of dissension in the ranks to silence a viewpoint that a service member doesn't like, dissension will not be in short supply.

Federal law rejects such gamesmanship. Instead of inviting hecklers to hector commanders into anti-religious censorship, as the lower court's ruling did, laws like RFRA and the First Amendment require that government restrict the hectoring long before silencing peaceful speech. *Hobby Lobby*, 134 S. Ct. at 2780 (only permitting government to burden religious exercise if no other alternative will serve the government's interest); *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005). This rule against heckler's vetoes fully applies to protect religious speech. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001) (rejecting "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what" others might perceive). Indeed, the Constitution rejects the notion that "adult citizens"—here, Marines!—are undone by mere exposure to religious expression. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (noting that "adult citizens" are presumed by law to be "firm in their own beliefs" and able to tolerate exposure to others' expression of faith).

2. Encouraging religious censorship will disadvantage minority and unfamiliar faiths.

All religions can suffer from some forms of misunderstanding and disfavor. *Spencer v. World Vision Inc.*, 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring) (explaining how religious activities from a variety of faiths can be misperceived by

outsiders). But minority religions are often foreign to officials and judges, lack political and financial clout to defend against confusion, and thus are particularly susceptible to suffering unfair restrictions on their faith.

History shows that lack of familiarity breeds its own form of contempt. For instance, the ruling Roman upper-class believed that the tiny early Christian church was home to "cannibalistic, incestuous, ass-worship[pers]." J. David Cassel, *Defending the Cannibals*, 57 Christian History & Biography 12 (1998), http://www.ctlibrary.com/ch/1998/issue57/57h012.html (last visited Dec. 16, 2015). This misperception was due to confusion about the then-minority faith's Eucharist (celebrating Jesus's command to "Take, eat: this is my body, which is broken for you," *I Corinthians* 11:24); their greeting of "brothers" and "sisters" with a "holy kiss" (*I Corinthians* 16:20); and the Roman belief that Christians, deemed a sect of Judaism, had followed donkeys across the desert to find water during the exodus from Egypt. Cassel, *supra.* And such prejudicial ignorance made it easier for officials to persecute and discriminate against early Christians—and use them as scapegoats, as Nero notoriously did for the fire that consumed much of Rome. *Id.*

Similarly, the Protestant majority in the U.S. during the late 1800s worried that Irish Catholic immigrants would subvert the Republic, and so enacted laws that discriminated against Catholic

religious expression and favored Protestant religious expression. These laws—known as "Blaine Amendments"—have now been recognized by a majority of the U.S. Supreme Court as being an intentional effort to discriminate against a politically unpopular minority religious group. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting); *accord Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (calling the Blaine Amendments "born of bigotry" and a "shameful" period of American history that the plurality "d[id] not hesitate to disavow"). Related anti-Catholic sentiment played a role in the 1960 presidential election of John F. Kennedy. *See* Speech to the Greater Houston Ministerial Association (Sept. 12, 1960), http://www.npr.org/templates/story/story.php?storyId=16920600 (last visited Dec. 9, 2015) (Kennedy's speech addressing the "religious issue" stalking his campaign).

Many minority faiths currently suffer from a similar lack of understanding and ensuing discrimination. *See, e.g.*, *Lukumi*, 508 U.S. at 521 (rejecting a law that deliberately targeted only Santeria beliefs); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003) (striking down an ordinance enacted out of "fear" that "Orthodox Jews [would] move to Tenafly" and "take over"; one resident "voiced his 'serious concern' that 'Ultra-Orthodox' Jews might 'stone [ ] cars that drive down the streets on the Sabbath.'"); *LeBlanc-*

Sternberg v. Fletcher, 67 F.3d 412, 431 (2d Cir. 1995) (addressing a case of "animosity toward Orthodox Jews as a group" where citizens had incorporated a village and stated that "the reason [for] forming this village is to keep people like you [*i.e.*, Orthodox Jews] out of this neighborhood"); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 862, 869 (E.D. Wis. 2004) (considering beliefs of a religious school that was "based on traditional Indian spiritual and cultural principles" and emphasizing the "conceptual difficulties" posed by Native American religious beliefs to "conventional western-religious thought"). Just recently, a Sikh temple in California was vandalized with vulgar statements about the terrorist group ISIS. *See* Louis Casiano Jr., *20-year-old arrested in Buena Park Sikh temple vandalism*, The Orange County Register (Dec. 10, 2015), http://www.ocregister.com/articles/park-695653-temple-arrested.html. Sikhs have no connection to ISIS whatsoever, yet ignorance and confusion about the appearance of Sikh men (who wear unshorn beards and turbans) not infrequently leads to such attacks.

* * * * *

In sum, the lower court's creation of a preemptive censorship rule subverts rather than advances legitimate government interests. The government cannot, and has no valid interest in, categorically treating religion as a disruptive pariah.

III. The military's history of accommodating religious faith provides a better path forward than the lower court's approach.

At root, both of the lower court's errors stemmed from a perception that broadly protecting religious exercise would harm mission accomplishment and unit cohesion. But history and logic both show that that perception is counter-factual. Indeed, the military's early and successful experiments in robust religious pluralism helped nurture our country's ensuing constitutional and cultural commitment to religious liberty.

A. Protecting authentic religious expression in a pluralistic fashion is deeply ingrained in our military tradition.

Even before our nation had fully grasped the promise and potential of religious liberty as a means of settling religious conflict and advancing the fundamental human right to freely seek God, our nation's military was practicing it. The lesson of military history is that protecting robust religious pluralism *works*, and that is nowhere better illustrated than in the military's three chaplain corps.

While many of the nation's founders came to this country seeking to freely exercise their own faith, they did not always extend that freedom to others. As under the lower court's approach, religion was seen as divisive, and the perceived solution to that division was the officially enforced subtraction of unpopular religious viewpoints. Thus, several states had established

churches, along with the religious coercion attendant to them. The earliest settlers in Virginia, an officially Anglican colony, attended twice-daily services on pain of losing daily rations, whipping, and of six months of hard-labor imprisonment. George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew*, app. 1 at 412 (1947). While Virginia eased those laws, versions of them remained until 1776, and similar laws existed in Connecticut and Massachusetts until 1816 and 1833, respectively. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 521, 513 (Burt Franklin 1970) (1902).

Military service was one of the key catalysts for breaking out of this paradigm and placing our nation on its current trajectory. In 1758, during the French and Indian War, Colonel George Washington saw that his Virginia militia included non-Anglicans, such as Baptists, and requested that Virginia create a chaplain corps that could minister to the varied faith-specific needs of his troops. 1 Anson Phelps Stokes, *Church and State in the United States* 268 (1950). This was remarkable: Virginia imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horsewhipped others for the same offense. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2118, 2166 (2003). Yet Virginia responded to Washington's call with both Anglican

chaplains and chaplains from minority religious groups, and it specifically protected minority chaplains' ability to "celebrate divine worship, and to preach to soldiers." Stokes, *supra*, at 268. Later, as commander of the Continental Army, Washington showed the success of his original effort by "giv[ing] every Regiment an Opportunity of having a chaplain of their own religious Sentiments." *Id.* at 271.

This experience of official support for authentic religious diversity had a powerful effect on the assembled service members, who were "Massachusetts Congregationalists, Rhode Island Baptists, New York Episcopalians and Dutch Reformed, New Jersey Presbyterians, Pennsylvania members of many small Protestant sects . . . , Maryland Roman Catholics, and a scattering of Jews." *Id.* at 267-68. This kind of "intermingling of men of different religious faiths . . . had not before taken place in America except in a few of the larger cities." *Id.* at 268. That exposure, coupled with the parallel "important" experience of having diverse, faith-specific chaplains willingly serving "all the men in their regiment," was dynamic. *Id.* It impressed upon the young nation "a new idea of the need and the possibility of religious tolerance." *Id.*

That same robust respect for authentic religious pluralism is reflected in the modern U.S. military chaplaincy. Every chaplain is duty-bound to respectfully provide for the "nurture and practice

of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of [Service Members] and their Families"—including those who do not share the chaplain's beliefs and may even oppose them. Army Reg. 165-1 § 3-2(a); *accord* Air Force Instruction 52-101 § 1; OPNAV Instruction 1730.1E § 4(a). But chaplains must, as a matter of law and conscience, make this provision while remaining distinct, faithful representatives of their faith groups who preach, teach, and counsel according to their faith group's beliefs. *See*, *e.g.*, 10 U.S.C. § 6031(a) ("An officer of the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member."); Air Force Instruction 52-101 § 3.2.3; Army Reg. 165-1 § 3-5(b).

Thus, if a Hindu service member needs a copy of the Vedas or a Catholic service member needs a rosary or a Muslim service member needs a prayer mat, then a Baptist chaplain for those service members must willingly and promptly provide for those religious needs. But if the Catholic service member needs a specific religious service to be performed, such as a Mass or a confession, then the Baptist chaplain cannot personally perform that service. This is necessary to respect the faith of the Catholic service member, the Baptist service members who share the chaplain's faith and rely on his religious support, and the faith of the chaplain personally. Notably, though, while the Baptist chaplain will not perform the Catholic sacrament, he will find a priest who can.

A bracing example of this pluralism in action came during World War II. In February 1943, a U.S. Army transport ship filled to capacity with deploying soldiers had finished most of its trip across the Atlantic when, just after midnight, it was torpedoed by a German submarine. *See* John Brinsfield, *Chaplain Corps History: The Four Chaplains* (Jan. 28, 2014), http://www.army.mil/article/34090/Chaplain_Corps_History__The_Four_Chaplains/. Four Army chaplains—a Methodist pastor, a Jewish Rabbi, a Roman Catholic priest, and a Dutch Reformed minister—quickly began helping the wounded and disoriented soldiers. They helped distribute lifejackets and, when the lifejackets ran out, gave away their own life jackets to the next four soldiers in line. They were last seen going down with the ship, "arms linked[,] braced against the slanting deck," and "offering prayers and singing hymns." *Id.*

Protecting authentic religious identity in a respectfully pluralistic environment is *the* historically tested means of handling religious differences in the military. *Amici* urge this Court to decline the lower court's invitation to turn back the clock.

B. Protecting religious expression enhances mission accomplishment.

While religious expression need not be "useful" to merit the full legal protection that it enjoys, the fact is that protecting

military religious liberty provides significant benefits to mission accomplishment.

For instance, protecting religious liberty has given the military access to service members "from numerous religious traditions, including Christian, Hindu, Jewish, Muslim, [and] Sikh" traditions, which Congress found this year to have "contribute[d] to the strength of the Armed Forces." *See* National Defense Authorization Act for Fiscal Year 2016 § 528, Pub. L. No. 114-92 (2015). Having a religiously diverse force means having access to service members who are more familiar with and more able to effectively interact with many allies and enemies. *See, e.g.*, Army Reg. 165-1 § 1-5*b* ("In many nations of the world, religious beliefs influence perceptions of power, diplomacy, law, and social customs."). It also gives the military the ability to recruit from religious groups who possess unique skills that enhance mission accomplishment. For instance, the Army recruited and accommodated an observant Sikh, Simran Preet Lamba, through the Military Accessions Vital to the National Interest program for his language skills in Punjabi and Hindi. *See* https://meeks.house.gov/press-release/reps-maloney-meeks-hail-armyrsquos-accommodation-recruitrsquos-articles-faith-simran; *see also Singh*, 2015 WL 3648682, at *21 (listing high praise from Lamba's superior officers for his "exceptionally meritorious service").

Relatedly, permitting discriminatory censorship of religious speech or treating religion as inherently "divisive" sends a message to religious service members and potential recruits that there's something wrong with them and their faith. This, in turn, places an unnecessary, non-mission-related impediment to retaining and recruiting top-notch Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

Finally, providing support for service members to access their faith resources enhances their ability, at a personal level, to obtain the moral courage and wisdom necessary to make the hard decisions and overcome the extreme obstacles that are standard-issue realities of military life. This is why the military sends chaplains wherever service members go, including outside the wire. One example is Chaplain Emil Kapaun, whom President Obama recently posthumously awarded the Medal of Honor. *See* Colleen Curtis, *President Obama Awards Medal of Honor to Father Emil Kapaun*, the White House President Barack Obama: Blog (Apr. 11, 2015), https://www.whitehouse.gov/blog/2013/04/11/president-obama-awards-medal-honor-father-emil-kapaun-0. Chaplain Kapaun, a Catholic, was on the front lines of the Korean War and, during a particularly heavy firefight, refused opportunities to escape so he could stay with his men. He and many fellow soldiers were eventually captured. At the prison camp, Kapaun regularly visited, prayed for, and sacrificially served the men to keep their spirits

up. Kapaun did not survive the camp. One of those who did later reported that it was Kapaun's prayers and service that "kept a lot of us alive." *Id.*

Conclusion

The National Cemetery Administration of the Department of Veteran's Affairs provides sixty different types of permanent headstones to accommodate primarily religious traditions, including Sikh, Shinto, Muslim, Baha'i, and Buddhist faiths. *See* U.S. Dept. of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://www.cem.va.gov/hmm/emblems.asp (last visited Dec. 16, 2015). Under the lower court's analysis, such robust expressions of clear religious belief are inherently divisive, a problem best solved via whitewashing. But RFRA, clear constitutional precedent, and military tradition reject that approach. As individuals and organizations who have invested and continue to invest themselves in protecting religious freedom for the men and women of our Armed Forces, *amici* respectfully urge this Court to reject and correct the lower court's errors.

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CERTIFICATE OF SERVICE

I certify that on January 8, 2016, I caused the foregoing amicus brief to be electronically delivered to this Court, and that a copy was electronically delivered to counsel listed below.

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with the type-volume limitations of Rule 26(d) because it contains 6939 words;

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