

No. 16-814

IN THE
Supreme Court of the United States

MONIFA J. STERLING,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

**BRIEF OF *AMICI CURIAE* RETIRED
GENERALS SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the existence of a forced choice between what religion and government command is necessary to establish a “substantial burden” under the Religious Freedom Restoration Act.

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are retired general officers of the United States Armed Forces. They are deeply interested in this case because their decades of military leadership have led them to conclude that service members' freedom to exercise religion is essential to military success. *Amici* also took an oath to support and defend the Constitution

¹ Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief to counsel for all parties. Petitioner's counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondent's counsel of record consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

and believe that the decision below strikes at the heart of the first fundamental right protected by the Bill of Rights—religious liberty. In *amici*'s judgment, the decision below threatens the military's ability to fulfill its mission and thus poses a question of national significance that calls out for this Court's review.

Lieutenant General (Ret.) Michael Gould served in the U.S. Air Force for 38 years, where he was the 18th Superintendent of the U.S. Air Force Academy (2009-2013). Before that, he served in a number of positions, including as Director of Operations and Plans, U.S. Transportation Command, Scott Air Force Base, Illinois (2008-2009); Commander, 2nd Air Force (2005-2008); and Air Force aide to the President (1990-1992).

Lieutenant General (Ret.) James H. Pillsbury served in the U.S. Army for 38 years. He retired as the Deputy Commanding General of the U.S. Army Material Command. He served in various positions throughout his career, including Platoon Leader, Company Commander, Battalion Commander, and Assistant Division Commander (Support), 10th Mountain Division (Light).

Lieutenant General (Ret.) William G. Boykin served in the U.S. Army for 36 years. He served 13 years in the Delta Force and five years as the U.S. Deputy Undersecretary of Defense for Intelligence.

Vice Admiral (Ret.) William "Dean" Lee served in the U.S. Coast Guard for more than 35 years, where he retired as Commander, Coast Guard Atlantic Area, Defense Force East and Department of Homeland Security Joint Task Force-East. He had seven command assignments and served at various units on the Atlantic, Pacific, and Gulf coasts.

Lieutenant General (Ret.) Richard "Tex" Brown served in the U.S. Air Force for 34 years. He retired as acting Assistant Vice Chief of Staff, Headquarters, U.S. Air Force. He has commanded an operational fighter

squadron, a composite wing and fighter wing, and the Air Force Personnel Center.

Major General (Ret.) Cecil Richardson served in the U.S. Air Force for 41 years. He served as Russian interpreter and intercept operator for six years before being ordained as a chaplain. He served as both Deputy Air Force Chief of Chaplains (2004-2008) and the 16th Chief of Chaplains of the U.S. Air Force (2008-2012).

Major General (Ret.) Felix Dupre served in the U.S. Air Force for over 33 years. He retired as Commander, Air Force Operational Test and Evaluation Center. During his career, he commanded an operations support squadron, a fighter squadron, a fighter operations group, and two fighter wings.

Major General (Ret.) Jack Catton, Jr. served in the U.S. Air Force for over 31 years. A command pilot and instructor, General Catton logged over 2,650 flying hours in single-seat fighter aircraft. He commanded at the squadron, group, and wing level with tours in the continental U.S., Europe, and the Pacific. In addition to his operational assignments, he served on the Air Staff, NATO Staff, Joint Staff, and as Inspector General of Pacific Air Forces. General Catton's Air Force career culminated at Air Combat Command as the Director of Requirements, where he was responsible for the definition of operational requirements for the Combat Air Forces and the oversight of 260 modernization programs.

Brigadier General (Ret.) James Walker served in the U.S. Marine Corps for 33 years, holding various command and staff positions around the world. His final military assignment was in the Pentagon as the senior military attorney for the Marine Corps.

Brigadier General (Ret.) Orwyn Sampson served in the U.S. Air Force for 32 years. He spent 27 of those years at the U.S. Air Force Academy, where he was involved in all four of the "pillar" mission elements: In-

structor and Coach in the Department of Athletics; Assistant AOC and Member of the Military Review Committee with the Commandant of Cadets; Professor and Researcher on the Faculty; and Officer Sponsor of the Cadet Fellowship of Christian Athletes.

Brigadier General (Ret.) Richard F. Abel served in the U.S. Air Force for 29 years, including as Director of the Air Force Academy's Admissions Liaisons Office (1972-1973); Director of Public Affairs, U.S. Pacific Command (1975-1978); Special Assistant to the Chairman of the Joint Chiefs of Staff (1978-1980); and Director of Public Affairs, Office of the U.S. Secretary of the Air Force (1980-1985).

Brigadier General (Ret.) Gary M. Jones served in the U.S. Army for over 28 years, including as Commander of the U.S. Army Special Forces Command; Deputy Director of the Central Intelligence Agency's Counter-Terrorism Center; and Commander of the 3rd Special Forces Group (Airborne).

Brigadier General (Ret.) David K. "Bob" Edmonds served in the U.S. Air Force for over 28 years, retiring as Deputy Director for Operations, Operations Team Two, National Military Command Center. He has served in numerous flying positions, both as an instructor pilot and operations officer. He led 45 combat missions with the 53rd Tactical Fighter Squadron during Operation Desert Storm.

SUMMARY OF ARGUMENT

The history and tradition of the U.S. military demonstrates a strong, unbroken commitment to protecting and facilitating service members' right to free exercise of religion. National defense depends on the good order, discipline, and moral character of those who serve. Every soldier brings a personal moral framework to military service. When the military protects, nourishes, and facilitates soldiers' religious exercise, those personal moral

frameworks combine with professional duty, enhancing good order and discipline throughout the military. When the military suppresses soldiers' exercise of their most deeply held religious beliefs, it removes an important driver of good order and discipline that historically has sustained our armed forces.

Religious faith has inspired and continues to inspire many men and women to join military service, particularly men and women from minority communities. It also provides strength and support to soldiers during their service. By clamping down on religious exercise in the military context, the decision below erodes a vital strength of the U.S. military—the animating religious beliefs of its members.

Members of the military must take an oath seeking God's assistance in protecting the Constitution. It is perverse to require them to take that oath only to unreasonably restrict religious exercise in the military context. If left uncorrected, the decision below will undermine the military's ability to defend the Nation. Accordingly, this case poses a question of national significance, and certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW WILL UNDERMINE THE MISSION OF THE U.S. MILITARY

A. The decision below will undermine good order and discipline

In allowing special restrictions on the free exercise of religion in the military context, the decision below reasoned that the exercise of diverse religious beliefs may threaten the good order and discipline necessary to a strong national defense. Pet. App. 13-14. But religious exercise *facilitates*—and certainly does not undermine—good order and discipline. Soldiers are *obligated* to obey orders by law, but they are *motivated* to obey orders by

the personal moral frameworks they bring with them to military service. Good order and discipline are maximized when soldiers' legal obligation and personal motivation combine to foster the good character necessary to secure a strong national defense.

1. Permitting the free exercise of religion promotes the integration of the legal and moral aspects of good order and discipline, forging authentic character development that can be relied on in the heat of battle. For this reason, the Nation's military leaders have long sought to facilitate rather than restrict religious faith and exercise in military members.

Then-Colonel George Washington provided for the religious needs of his troops. In 1758, during the French and Indian War, Virginia created regimental chaplaincies at his request. See 1 Anson Phelps Stokes, *Church and State in the United States* 268 (1950). On July 29, 1775, the Continental Congress authorized military chaplains for the Continental Army and provided for their compensation. *Id.* at 271. The following year, General Washington ordered the "Colonels or commanding officers of each regiment to procure Chaplains accordingly; persons of good Characters and exemplary lives." *Ibid.*

President Franklin D. Roosevelt embodied this proactive approach to facilitating the free exercise of soldiers' deeply held religious beliefs. In a fireside chat, for example, he assured "every father and every mother who ha[d] a son in the service" that "we will never fail to provide for the spiritual needs of our officers and men under the Chaplains of our armed services." Fireside Chat 23: *On the Home Front* (Oct. 12, 1942).

Similarly, General George Patton's words to a chaplain demonstrate his commitment to free religious exercise as essential to national defense:

Chaplain, I am a strong believer in Prayer. There are three ways that men get what they want: by planning,

by working, and by praying. Any great military operation takes careful planning, or thinking. Then you must have well-trained troops to carry it out: that's working. But between the plan and the operation there is always an unknown. That unknown spells defeat or victory, success or failure. It is the reaction of the actors to the ordeal when it actually comes. Some people call that getting the breaks; I call it God. God has His part, or margin in everything. That's where prayer comes in * * *. A good soldier is not made merely by making him think and work. There is something in every soldier that goes deeper than thinking or working—it's his "guts." It is something that he has built in there: it is a world of truth and power that is higher than himself. Great living is not all output of thought and work. A man has to have intake as well. I don't know what you [call] it, but I call it Religion, Prayer, or God.

James H. O'Neill, *The True Story of the Patton Prayer*, 19 The Military Chaplain No. 2 at 2 (1948).

General George C. Marshall likewise explained:

I look upon the spiritual life of the soldier as even more important than his physical equipment. The soldier's heart, the soldier's soul, the soldier's spirit, are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his country in the end. * * * It's morale—and I mean spiritual morale—which wins the victory in the ultimate, and that type of morale can only come out of the religious nature of the soldier who knows God and who has the spirit of religious fervor in his soul.

Joint Publ'n 1-05, *Religious Ministry Support for Joint Operations*, Joint Chiefs of Staff, at II-3 (Aug. 26, 1996).

Courts have likewise long recognized that the military must affirmatively facilitate—not arbitrarily restrict—the free exercise of religion. “[H]aving uprooted the sol-

diers from their natural habitats [the military] owes them a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense.” *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985).

2. Free exercise of religion is essential to military success. The military is unique in demanding obedience to orders even in life and death situations. See Col. William Winthrop, *Military Law and Precedents* 571 n.100 (2d ed. 1920) (“The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the army.”). Such unflinching obedience, particularly in times of extreme stress, is not possible from soldiers who must suppress their most deeply held moral beliefs when they don the uniform. Cf. *Katcoff*, 755 F.2d at 228 (“In the opinion of top generals of the Army and those presently in the chaplaincy, unless chaplains were made available [to troops facing danger], the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly.”). Only when a soldier’s personal moral discipline develops and flourishes alongside his commitment to legal duties can he be expected to obey even when life and death hang in the balance. That is because a person’s “system of beliefs defines who a person is, what [a] person stands for, serves as a guide for determining behavior—especially in ambiguous and chaotic situations—and also provides the courage and will to act in accordance with one’s beliefs and values.” Don M. Snider & Alexander P. Shine, *A Soldier’s Morality, Religion, and Our Professional Ethic: Does the Army’s Culture Facilitate Integration, Character Development, and Trust in the Profession?*, 6 U.S. Army War College Professional Military Ethics Monograph Series 3 (James G. Pierce ed., 2014) (quotations omitted).

A service member's personal religious beliefs also provide support and solace during the difficult times that military service often brings. Recent studies show that a combat veteran's reliance on prayer and religion increases as combat intensifies or as negative experiences arise. See Brian Wansink & Craig S. Wansink, *Are There Atheists in Foxholes? Combat Intensity and Religious Behavior*, 52 *J. Religion & Health* 768, 771, 773 (2013). A few specific examples are illustrative. Jeffrey Struecker was one of the Army Rangers who fought in the firefight with a Somali warlord memorialized in the movie, *Black Hawk Down*. He credits his faith in God for his ability to return to the firefight to check the status of the downed helicopter. See *Return to Mogadishu, Remembering Black Hawk Down*, YouTube (Sept. 12, 2013), <https://www.youtube.com/watch?v=bTfMpqOXANE>.

John McCain likewise found comfort in prayer and religion during his five years in captivity as a prisoner of war in the Hanoi Hilton. He explained that "prayer helped" and that his religious faith "sustained [him] in many times of trial." John S. McCain, *John McCain, Prisoner of War: A First-Person Account*, U.S. News & World Rep. (Jan. 28, 2008), <http://www.usnews.com/news-/articles-/2008/01/28/-john-mccain-prisoner-of-war-a-first-person-account?-page=5>.

Religion, moreover, affords solace when a fellow service member dies, whether in peacetime or wartime. One non-military study demonstrated that those "profess[ing] stronger spiritual beliefs * * * resolve[d] their grief more rapidly and completely after the death of a close person" than those without any belief. Kiri Walsh et al., *Spiritual Beliefs May Affect Outcome of Bereavement: Prospective Study*, 324 *BMJ* 1551, 1551 (2002). This is no less the case in the armed forces. See Albert L. Smith, *Coping with Death and Grief: A Strategy for Army Leadership* 19 (2009), <http://www.dtic.mil/dtic/tr/fulltext->

/u2/a361181.pdf (describing the important role religion plays in helping grieving service members).

In sum, the decision below, while claiming the mantle of U.S. military history and tradition, is fundamentally at odds with both. From the time of the Revolutionary War onward, the military has displayed a strong and continuous commitment to proactively protecting service members' right to freely exercise their religion. That commitment flows from an equally longstanding recognition that a soldier's faith is vital to his success in military life and thus to the national defense he secures for his country. By relegating that vital bulwark of national security to the status of a distraction deleterious of good order and discipline, the decision below gets things exactly backwards and threatens to undermine the military's mission.

B. The decision below will undermine the military's ability to recruit and retain the best possible fighting force

1. Since the Revolutionary War, the military's commitment to protecting and nourishing the free exercise of service members' religious beliefs has made the military a model of diversity and religious pluralism for the Nation:

[Among the advantages of life in the Revolutionary] army * * * was that those who served * * * came in contact with men of different religious bodies from different parts of the country and gained respect for them. They increasingly felt that they were fighting not for their colony only, but for the united colonies which were to form a new nation. 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 * * * met in the same camps

and gained a new idea of the need and possibility of religious tolerance.

Stokes, *supra*, at 268. By living and working together, religiously diverse troops in the Revolutionary Army anticipated the promise of religious pluralism, freedom, and non-establishment that would become a hallmark of the American experiment. President George Washington explained the importance of the military in fostering this pluralism in a letter to Alexander Hamilton:

[T]he Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was no cause for those jealousies & prejudices which one part of the Union had imbibed against another part * * *. What, but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary intercourse, would not have accomplished what Seven years association in arms did.

Letter from Pres. George Washington to Alexander Hamilton (Sept. 1, 1796), <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-01-01-02-0906>.

2. The decision below threatens to undermine religious pluralism and, in the process, to rob the military of the diverse fighting force best-suited to securing the national defense. The U.S. military, a microcosm of the Nation itself, is strikingly religious. See *Sch. Dist. Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive

historically from religious teachings.”); see also Paul Taylor et al., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era*, Pew Research Center 3 (Paul Taylor et al. eds., 2011) (“In their religious affiliation, veterans are roughly comparable to the general population.”). According to the Defense Equal Opportunity Management Institute, nearly 70% of military service members are Christian, Jewish, or Muslim, and over 74% of military members profess some form of religious faith. *Religious Diversity in the U.S. Military*, Military Leadership Diversity Commission, Issue Paper No. 22 at 2 (2010).

Indeed, religion is often one of the strongest motivations for serving in the military. A recent study that examined data from the National Longitudinal Study of Adolescent Health concluded that there are “several notable and robust associations between religious identity and military enlistment.” Amy M. Burdette, *Serving God and Country? Religious Involvement and Military Service Among Young Adult Men*, 48 *J. Sci. Study Religion* 794, 803 (2009). The study also found that “[t]hose who are ‘nonreligious’ consistently exhibit lower odds of enlistment in comparison to their ‘highly religious evangelical’ counterparts.” *Id.* at 802.

3. Restricting religious exercise in the military will uniquely impair the military’s ability to recruit a racially and ethnically diverse corps of service members. Over 70% of male African-American service members say that religion is important or very important in their lives. See *Religious Diversity in the U.S. Military*, *supra*, at 4. The percentage is nearly 83% for female African-American service members; indeed, over 60% of female African-American service members state that religion is *very important* in their lives. *Ibid.* Likewise, nearly 65% of female Asian service members say that religion is important or very important in their lives. *Ibid.* Over 54%

of male Asian-American service members place a similar value on religion. *Ibid.* Among Hispanic service members, over 52% of males and over 58% of females say that religion is important or very important in their lives. *Ibid.* By contrast, less than 50% of non-Hispanic white service members report that religion is important or very important. *Ibid.*

The CAAF's misguided attempt to promote good order and discipline at the expense of soldiers' fundamental rights will do just the opposite. By unreasonably restricting the religious liberties so highly valued by minority communities in particular, the decision below will frustrate the military's efforts to recruit qualified minority service members, ultimately jeopardizing the military's vitally important national-defense mission. Cf. Brief for Lt. General Julius W. Becton, Jr. et al. as *Amici Curiae* Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (arguing that the ability to recruit a racially diverse officer corps is a compelling national-security interest); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing the general officers' *amicus* brief). And while the CAAF's hostility toward religious liberty in the military is a marked departure from the U.S. military's steadfast, centuries-old commitment to facilitating and promoting free exercise by soldiers, examples of similar hostility have been on the rise since 2011. See Snider et al., *supra*, at 10-15 (documenting evidence of "the evolving culture of hostility toward religious presence and expression" in the military from 2011 to 2014).

II. SOLDIERS WHO SWEAR TO UPHOLD THE CONSTITUTION SHOULD BE AFFORDED THE CONSTITUTION'S PROTECTIONS FOR RELIGIOUS LIBERTY

Enlistees and officers are required to take an oath to "support and defend the Constitution" that invokes God's aid in fulfilling their oath. The oath for enlistees states:

I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. *So help me God.*

10 U.S.C. § 502 (emphasis added). Officers swear a similar oath. See 5 U.S.C. § 3331. It is anomalous to recognize that soldiers must rely on God to defend the Constitution while restricting the constitutional rights of soldiers to call on God in the course of their duties. The decision below upholds burdens on the free exercise of religion that are prohibited by the Constitution and RFRA. Service members who defend the Constitution are entitled to enjoy, in full measure, the first liberty guaranteed by the Constitution.

For that reason, *amici* agree with petitioner that immediate review is critical to protect the free-exercise rights of U.S. military personnel. As petitioner correctly explains, the CAAF exercises wholly discretionary review over military appeals, and this Court may only review cases that the CAAF has decided on the merits. See Pet. 36 (citing 10 U.S.C. § 867 & 28 U.S.C. § 1259). Thus, if certiorari is not granted now, the decision below will likely be enshrined as a permanent precedent, depriving American service members of the liberties that they are sworn to defend.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted.

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