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RE: Religious Liberty in Today's Military

Thank you for the opportunity to present testimony concerning the impact of recent Department of Defense policies on religious liberty for service members in general and evangelical chaplains in particular.

By way of introduction, the Chaplain Alliance for Religious Liberty (“CALL”) is a private, non-profit association that exists to protect religious liberty by ensuring that chaplains remain empowered to provide for the freedom of religion and conscience that the U.S. Constitution guarantees to all chaplains and those whom they serve. We speak on behalf of more than 2,700 uniformed chaplains, more than one half of all uniformed chaplains, across all branches of the military.

The military is a unique State institution that may, by law and by necessity, make uniquely comprehensive demands over individual service members that it cannot make over any other free member of society. The demands that the State is empowered to make can and often do infringe service members’ liberties, including their constitutionally protected religious liberty. Our Nation has a history, though, of working hard to protect and accommodate military religious liberty, a tradition which has limited restrictions on service members’ ability to live their faiths. Indeed, the military chaplaincy was established before the founding of our Nation precisely to ensure the free exercise of faith for all service members and their families. Thus, in keeping with the best of our national traditions, our military has long been a place where citizens could, as the Army Chaplain Corps’ motto states, serve *Pro Deo et Patria*—for God and Country.

But our government has been retreating from that history of accommodation, enacting new policies without considering the harm to religious liberty and occasionally even taking affirmatively hostile actions toward faith. The vast majority of these blows to religious expression have come in the context of matters of sexual ethics, specifically homosexuality. The Obama Administration has quietly but steadily created a type of sexual orientation non-discrimination requirement for

the military. Further, the Administration has vocally adopted a pro-homosexuality position. Both broad developments have created conflicts with service members and chaplains who hold traditional religious views on marriage and sexuality: that sex is meant for marriage, and marriage means a union between a man and a woman.

Crucially, the conflict for chaplains has not concerned *whom* they serve but *how* they serve. Every chaplain is duty-bound to respectfully provide for the religious needs of all service members, including those who do not share or even oppose their beliefs. But chaplains must, as a matter of both law and conscience, make this provision while remaining distinct representatives of their faith groups, representatives who teach, preach, counsel, and advise in accordance with their faith group's beliefs. While there is no question chaplains will continue to serve all service members, there is increasing reason to be concerned that the government will not allow them the freedom to do that job as the Constitution requires. And that diminution in liberty will in turn harm the rights of those whom chaplains exist to serve: service members.

DISCUSSION

I. The military makes unique demands of its service members and has a unique system to provide for the religious liberty needs of its Service members.

To understand the current threat to military religious liberty, it is necessary to first consider the unique military context and the means by which the military accommodates its members' right to religious liberty.

A. The military's mission creates unique burdens on service members.

As the Supreme Court has explained, "the military is, by necessity, a specialized society separate from civilian society."¹ To accomplish its mission, the military "must insist upon a respect for duty and a discipline without counterpart in civilian life," an insistence that drills into every service member an "instinctive obedience, unity, commitment, and esprit de corps."² Far from the celebration of individual liberty that marks civilian society and our Nation's legal traditions, "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"³

¹ *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

² *Goldman*, 475 U.S. at 507 (internal citations and quotation marks omitted).

³ *Id.* (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

This military emphasis on service over self and on its vital mission creates unique stressors on service members: short-notice moves, personal stress from following demanding orders, lengthy separations from family, deployments to foreign countries with language and cultural barriers, and, perhaps most significantly, life-or-death decisions and actions.⁴ Further, not only does the military impose special obligations on its members, it also creates a special, set-apart community for them. “[U]nlike virtually all other professions . . . [the military] constitutes a distinct community, providing even in domestic bases virtually all facets of ordinary life: from housing, schools, and healthcare to shopping, recreation, and entertainment.”⁵ This set-apartness of mission and life means that “there is simply not the same [individual] autonomy” in the military “as there is in the larger civilian community.”⁶

An immediate consequence of this diminished autonomy is an attendant diminution in personal liberty, including religious liberty. “The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment,” which can mean the military need not accommodate even fairly benign religious conduct such as wearing unobtrusive religious apparel.⁷ Thus, in *Goldman v. Weinberger*, the Supreme Court rejected a Jewish service member’s claim that the Free Exercise Clause required the military to permit him to wear a yarmulke despite regulations to the contrary.⁸

B. The chaplaincy is the means of lifting much of the burden on religious liberty created by military life.

Although the military may, as a part of its mission, diminish some aspects of religious liberty, it may not extinguish it. Indeed, since the military can burden the religious free exercise of service members by, among other things, ordering them to go to regions of the world where their faith communities are not available to them, it is a “crucial imperative” that the government make provision for service members’ religious needs.⁹ And since before its birth, our Nation has admirably addressed this imperative via the establishment of the chaplaincy, a diverse and pluralistic body of

⁴ *Katcoff v. Marsh*, 755 F.2d 223, 226-34, 236-37 (2d Cir. 1985); accord Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 89, 119 (2007) (“[T]he military presents service members with a range of stresses . . . that are unique, especially those related to participation in combat”).

⁵ Tuttle, *supra* at n.4, at 119.

⁶ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (quoting *Goldman*, 475 U.S. at 507).

⁷ *Goldman*, 475 U.S. at 507, 509-10.

⁸ *Id.* at 510 (holding superseded in part by Congressional revision of the regulations, 10 U.S.C. § 774).

⁹ *Adair v. England*, 183 F. Supp. 2d 31, 51 (D.D.C. 2002).

officers.¹⁰ Without chaplains, the burdens of military life—particularly being compelled to move “to areas of the world where religion of [service members’] own denomination[] is not available to them”—would infringe service members’ rights secured under the Religion Clauses of the First Amendment.¹¹

To protect these fundamental human rights, chaplains go wherever service members go. They serve on military bases here in the U.S. and around the world. They serve during peace and they serve during wartime on the front lines. They nurture the living, care for the wounded, and honor the dead.¹² Among Army chaplains alone, nearly 300 have lost their lives in service to God and country.¹³

One of those chaplains—Chaplain Emil Kapaun—was posthumously awarded the Medal of Honor just last year for his service and sacrifice during the Korean War. Chaplain Kapaun exposed himself to enemy fire to care for wounded soldiers and drag them to safety; refused opportunities to escape from the enemy so he could continue to provide care; provided spiritual, physical, and moral support to his fellow captives; and continued to do so despite continuous and harsh punishment from his captors.¹⁴ One of Chaplain Kapaun’s last acts was to conduct a forbidden Easter sunrise service.¹⁵

Chaplains have continued that emphasis on providing for our service members through our modern wars today, joining service members in repeat deployments to Iraq and Afghanistan. But although chaplains serve the most religiously diverse organization in the world, they are not generic “religious” officers, but rather representatives of specific faith groups.¹⁶ This is necessary to ensure that service members of specific faith groups have chaplains from those specific faith groups to meet their religious needs.¹⁷ While the military must obtain chaplains to serve the

¹⁰ *Cutter*, 544 U.S. at 722 (identifying military chaplains as the means by which “the Federal Government[] accommodate[es] . . . religious practice by members of the military.”); *Katcoff*, 755 F.2d at 225 (noting that military chaplains have been protecting religious liberty since before our Nation’s founding).

¹¹ *Katcoff*, 755 F.2d at 234.

¹² *See* Army Field Manual 1-05, Religious Support (October 2012) at 10, *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_05.pdf (last visited April 19, 2013).

¹³ *See* U.S. Army Webpage on Chaplain (Capt.) Emil J. Kapaun, *available at* <http://www.army.mil/medalofhonor/kapaun> (last visited April 19, 2013).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004) (chaplains serve simultaneously as “a professional representative of a particular religious denomination and as a commissioned [military] officer.”) (citation omitted).

¹⁷ *Katcoff*, 755 F.2d at 232.

many specific faith groups represented within the military, it has neither the authority nor competence to determine whether an individual qualifies as a representative of a particular religious group. As the Supreme Court reiterated last year in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, “civil court[s]” should not “make . . . judgment[s] about church doctrine” and the importance of religious beliefs.¹⁸

Thus, the military must rely upon each specific faith group to endorse particular chaplains to act as its representative to the members of that faith group serving in the Armed Forces.¹⁹ If a chaplain ever ceases to faithfully represent his religious organization, the faith group can rescind its endorsement, at which point he ceases to be a chaplain and must generally be separated from the military.²⁰

To protect a chaplain’s role as a faith group representative, and thereby the chaplain’s usefulness to the military, Congress and the military have crafted safeguards to keep chaplains from being forced to engage in ministry activities that violate their faith group’s beliefs.²¹ For instance, Jewish chaplains need not (and cannot) conduct Mass for Catholic service members. That commitment to protecting the ability of service members and chaplains to serve their country without denying their faith was embodied recently in the passage of a law mandating the broad accommodation of religious belief.²²

¹⁸ 132 S. Ct. 694, 715 (2012) (Alito, J., concurring). *See also* *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 n.31 (1947) (rejecting the notion that “the Civil Magistrate is a competent Judge of Religious truth” (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785))).

¹⁹*See* DOD Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments (“DOD Instruction 1304.28”), Enclosure 2, § E2.1.7 (emphasis added).

²⁰*See* DOD Instruction 1304.28 at § 6.5 (stating that the process for separating the chaplain from service begins “immediately” upon the endorser’s withdrawal of endorsement).

²¹*See, e.g.*, 10 U.S.C. § 6031(a) (“An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.”) (statute for Navy chaplains); Air Force Instruction 52-101 § 2.1 (“Chaplains do not perform duties incompatible with their faith group tenets”); Army Reg. 165-1 § 3-5(b) (“Chaplains are authorized to conduct religious services, rites, sacraments, ordinances, and other religious ministrations as required by their respective faith group. Chaplains will not be required to take part in religious services, rites, sacraments, ordinances, and other religious ministrations when such participation would be at variance with the tenets of their faith.”).

²² *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (“§ 533”) (entitled “[p]rotection of rights of conscience of members of the Armed Forces and chaplains of such members.”).

II. Military religious liberty is facing a growing and unprecedented conflict.

Our Nation's effort to accommodate service members' religious needs has been remarkably successful and "follows the best of our traditions."²³ That tradition of accommodation has given wide latitude for religious freedom in the military—a latitude that is necessary to allow the broad practice of religious belief that faith requires. Religious believers exercise their faith "not only [via] belief and profession but [also] the performance of (or abstention from) physical acts," including religious associations, actively sharing religious beliefs with non-believers, and avoiding (or condemning) conduct understood as immoral.²⁴

Engaging in such expressions of faith is often a religious duty, one that particularly extends to protecting the institution of marriage and the family. Under the traditional Christian view, which is broadly supported across other religions, sex is permissible only within the context of marriage, and marriage exists only between a man and a woman. *See, e.g., Genesis 2:24, Matthew 19:5, 1 Corinthians 6:16.* The Supreme Court has both recognized and affirmed that view as "the sure foundation of all that is stable and noble in our civilization."²⁵ Over one hundred religious leaders, including those from CALL's faith groups and from other faith communities that supply the majority of Armed Forces chaplains, recently joined hundreds of thousands of other Americans and publicly acknowledged their firm religious duty to broadly protect that "sure foundation."²⁶

Thus, service members who share and chaplains who represent those beliefs must both live and express their faith group's teaching on the nature of marriage and family. When faced with circumstances that require them to treat any sexual union other than one between a man and a woman as the equivalent of marriage, such service members and chaplains will be required by conscience to abstain. To do anything less would be a failure of their duty to God and, for the chaplains, would destroy their role as religious representatives of their faith groups. But adhering to this basic and long-respected duty to God is growing increasingly difficult in the military.

²³ *Zorach v. Claiborn*, 343 U.S. 306, 314 (1952) (praising the State's efforts to accommodate, and thus respect, the "spiritual needs" of citizens).

²⁴ *See Emp't. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

²⁵ *See Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (lauding "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony").

²⁶ *See* The Manhattan Declaration at 9, *available at* http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf (last visited Jan. 24, 2013).

A. Service members and chaplains are being punished for expressing their faith on marriage and the family.

Just a few years ago, it would have been unfathomable to discipline a service member or chaplain for respectfully expressing the view that marriage should be between a man and a woman or that sexual behavior should be reserved for marriage. Indeed, those expressions would have been (and in most ways still are) consistent with military, federal, and state constitutional, statutory, and regulatory law. But what was once unfathomable is becoming commonplace. Just in the weeks since this Commission's hearing, CALL has learned of situations where:

- A service member received a severe and possibly career-ending reprimand from his commanding officer for respectfully expressing his faith's religious position about homosexuality in a personal religious blog;
- An enlisted service member received career-ending punishment for sending personal invitations to his promotion party which mentioned that he would be providing food from Chick-fil-a due to his respect for the Defense of Marriage Act;²⁷
- A senior military official at Fort Campbell sent out a lengthy email officially instructing officers to recognize "the religious right in America" as a "domestic hate group" akin to the KKK and Neo-Nazis because of its opposition to homosexual behavior;²⁸
- An Army equal-opportunity officer gave a Power Point training presentation that listed "Evangelical Christians," "Catholics," and "Ultra-Orthodox [Jews]" as "Religious Extremist[s]" alongside the KKK and Al Qaeda.²⁹

Similarly, within the last two years, CALL knows of situations in which:

²⁷ See *Military Under Fire*, Marriage Anti-Defamation Alliance, March 8, 2013, at 3:50 to 4:20 available at <http://marriageada.org/military-under-fire/> (last visited April 17, 2013).

²⁸ See Todd Starnes, *The Army's List of 'Domestic Hate Groups'*, FOX News, April 10, 2013, available at <http://radio.foxnews.com/toddstarnes/top-stories/the-armys-list-of-domestic-hate-groups.html> (last visited April 17, 2013).

²⁹ See Nicola Menzie, *Evangelical Christianity, Catholicism Labeled 'Extremist' in Army Presentation*, The Christian Post, April 6, 2013, available at <http://www.christianpost.com/news/evangelical-christianity-catholicism-labeled-extremist-in-army-presentation-93353/> (last visited April 17, 2013).

- A chaplain was relieved of his command over a military chapel because, consistent with the Defense of Marriage Act’s definition of marriage, he could not allow same-sex weddings to take place in the chapel;³⁰
- An enlisted service member was threatened and denied promotion by a senior NCO for expressing—during a personal conversation—his religious belief in support of traditional marriage;
- A chaplain who asked senior military officers whether religious liberty would be protected in the wake of the repeal of the law against open homosexual behavior in the military was told to “get in line” or resign;³¹
- A chaplain was pulled from receiving a previously scheduled career advancement because, during the legislative debate, he forwarded an email respectfully explaining the possible negative ramifications of repealing on the chaplain corps.³²

These attacks on religious liberty may be abated somewhat by the recently enacted statutory protections for service members’ and chaplains’ rights of conscience. The provision, § 533 of the 2013 National Defense Authorization Act, requires the military to “accommodate the . . . conscience, moral principles, or religious beliefs” of service members and chaplains and prohibits the military from using such beliefs “as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.” Unfortunately, the President has indicated his opposition to the conscience protections,³³ and the Secretary of Defense has only last week issued guidance in obedience to § 533’s command that he “issue regulations implementing the protections afforded by this section.” Indeed, at a Congressional hearing last year that addressed military religious liberty concerns, the Secretary of Defense seemed to be entirely unaware of § 533.³⁴

At a minimum, the government must fulfill its statutory duty required by § 533. But even the most robust regulatory enforcement of § 533, and of similar laws guaranteeing military religious liberty, such as the Religious Freedom Restoration Act, will not be enough. As long as orthodox religious believers are being called

³⁰ See CALL Statement, *DADT Repeal Immediately Creates Major Problems*, available at <https://s3.amazonaws.com/media.gracechurches.com/downloads/Chaplain+Alliance/2012-09-17+Chaplain+Alliance+News+Release.pdf> (last visited April 17, 2013).

³¹ *Id.*

³² See *Military Under Fire*, *supra* at n.27, at 4:21 to 4:44.

³³ See Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 Daily Comp. Pres. Docs. 00004, p. 1 (Jan. 2, 2013).

³⁴ See Todd Starnes, *Pentagon Grilled About Christians in Military*, FOX News, April 12, 2013, available at <http://radio.foxnews.com/toddstarnes/top-stories/pentagon-grilled-about-christians-in-military.html> (last visited April 18, 2013).

“domestic hate groups” and being compared to the KKK and Al Qaeda simply for their faith’s long-held beliefs about marriage and family, the military will be abandoning its duty to protect religious liberty for service members. This kind of poisonous climate—which is often mirrored in the culture at large through implicit and explicit comparisons between traditional religious sexual ethics and racism—should have no place in our military. Its continuation not only offends religious liberty, it threatens the unity and *esprit de corps* that is necessary to a functioning military.

B. The Supreme Court has made matters worse by judicially constitutionalizing same-sex marriage as a fundamental right and sexual orientation as a protected class.

As unacceptable as things have become since the repeal of Don’t Ask, Don’t Tell, since the Supreme Court’s decision that constitutionalized same-sex marriage, the situation has become far worse. Indeed, in requesting that the Supreme Court strike down DOMA based on a broad constitutional sanction of either same-sex marriage or sexual orientation as a suspect class, the United States argued that traditional sexual morality is animus-based, and has explicitly relied on the ruling against anti-miscegenation laws in *Loving v. Virginia*.³⁵

If traditional religious beliefs and practices on marriage and the family become the constitutional equivalent of animus-based racism, service members who order their lives around those beliefs and practices could be forced to choose between their faiths or their careers. Similarly, chaplains who represent CALL’s various faith groups could face tremendous pressure to self-censor when teaching about marriage and family, topics that are vitally important to fully meeting service members’ religious needs.

The reason for this is fairly simple: the military has no tolerance for racists, and so service members who are openly racist are not service members for long.³⁶ If traditional religious views on marriage and family become the constitutional equivalent of racism, the many service members whose traditional religious beliefs shape their lives will likely be forced out of the military.

The harm to military religious liberty would be felt in at least two broad ways. The first would be the weeding out of service members who hold traditional

³⁵ 388 U.S. 1 (1967). See Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 13, noting that the United States has argued that DOMA was enacted based on “animus.”

³⁶ See, e.g., Sec’y of the Air Force Memorandum at 1 (condemning as intolerable discrimination on the basis of, *inter alia*, race, and instructing Airmen to oppose it); available at <http://www.af.mil/shared/media/document/AFD-110510-017.pdf> (last visited Jan. 24, 2013).

religious beliefs about marriage and the family. Service members are evaluated for promotion and retention via processes, such as Officer Evaluation Reports, which specifically ask whether the service member under consideration promotes the military's equal opportunity policy.³⁷ That inquiry may, for the first time, prove toxic for many devoutly religious service members since the Supreme Court held that traditional religious beliefs about marriage are irrational and impolitic. Even if nothing directly negative was put into such Reports, the lack of the superlative commendations that are necessary for advancement may be enough to permanently stall a service member's career. And in the military, if a service member is not on the way up, he is on the way out.³⁸ Thus, traditional religious service members and chaplains may slowly find their promotion ceilings decreasing, their range of service possibilities shrinking, and their careers ending.

The second form of negative pressure on religious may arise from situations where a service member's or, more often, a chaplain's military duty will force him into a direct conflict with his religious beliefs. The military's marriage-building programs stand out as particularly problematic for both commanding officers and chaplains. Congress authorized these programs to provide chaplain-led support for the marital relationship between active duty service members and their spouses.³⁹ Thus, for instance, the Army chaplaincy provides, with the full support of commanding officers, a marriage enrichment program known as Strong Bonds.⁴⁰ Strong Bonds courses instruct married couples on how to strengthen and renew their marital bonds. While Strong Bonds is not a religious program, its marital instruction is currently congruent with traditional religious beliefs about marriage as the union of one man and one woman, and Strong Bonds is protected by DOMA from having to run contrary to those beliefs.⁴¹ But that may almost certainly have to change since the Supreme Court forced same-sex marriage on the country. If marriage programs like Strong Bonds are bluntly restructured by this broad constitutional mandate to treat same-sex unions as the equivalent of marriages, many chaplains and commanding officers who personally administer the programs may face a direct conflict with their faith.

³⁷See Army Officer Evaluation Report at 2 (asking whether the evaluated officer "promotes dignity, consideration, fairness, and EO [i.e., equal opportunity]," available at http://armypubs.army.mil/eforms/pdf/A67_9.PDF (last visited Jan. 25, 2013); see generally Army Regulation 623-3, Evaluation Reporting System.

³⁸ See 10 U.S.C. § 632 (providing that, in most instances, an officer who twice fails to be selected for promotion must be discharged).

³⁹ See 10 U.S.C. § 1789.

⁴⁰See Army Strong Bonds Home Page, available at <http://www.strongbonds.org/skins/strongbonds/home.aspx> (last visited Jan. 24, 2013).

⁴¹See Rachel Swans, *Military Rules Leave Gay Spouses Out in Cold*, N.Y. Times, Jan. 19, 2013, http://www.nytimes.com/2013/01/20/us/gay-spouses-face-a-fight-for-acceptance-in-the-military.html?pagewanted=1&_r=1 (last visited Jan. 25, 2013).

This conflict illustrates a chaplain's complete willingness to serve whoever needs care, but not however the military demands. Chaplains represented by CALL want to minister to service members who are in same-sex sexual relationships on any number of issues, but they cannot treat those relationships as the equivalent of marriage without violating both their conscience and their endorsement.⁴² Since the constitution is now interpreted to mandate same-sex marriage, the military will probably be required to do the same with its marriage enrichment programs, with a likely result of forcing CALL's chaplains and those of faith groups with similar beliefs—together, half of military chaplains—out of an entire category of chaplaincy service.

Because their military and religious duties call them to express their religious beliefs regularly and in a number of different ways, chaplains may likely face a number of similar direct conflicts. For instance, chaplains may be disciplined for refusing to turn their worship services over to individuals who unrepentantly engage in sexual behaviors that the chaplains' faith group understands as immoral.⁴³ Chaplains may be punished for declining to privately counsel same-sex couples on certain matters relating to a couple's relationship⁴⁴ or for counseling them according to their faith group's traditional religious beliefs on marriage.⁴⁵ Chaplains with traditional religious beliefs who, as is commonplace now, are

⁴²See, e.g., Southern Baptist Endorsed Chaplains/Counselors in Ministry, Statement Regarding Ministry Expectations at 2, available at <http://www.namb.net/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590121959&libID=8590121973> (last visited Jan. 24, 2013) (statement by the NAMB, the military's largest endorser, that its chaplains may not participate in "marriage enrichment . . . training" if doing so would "endorse[] . . . homosexuality.") (last visited Jan. 24, 2013); accord Manhattan Declaration, *supra* at n.6 (confirming that religious believers cannot treat same-sex sexual unions as the equivalent of marriage).

⁴³See *Akridge v. Wilkinson*, 178 F. App'x. 474 (6th Cir. 2006) (upholding a prison's punishment of a prison chaplain for refusing to allow an openly homosexual prisoner to lead a worship service); accord *Phelps v. Dunn*, 965 F.2d 93 (6th Cir. 1992) (allowing a volunteer prison chaplain to be sued for refusing to permit an openly homosexual prison inmate to take a leadership role in chapel services).

⁴⁴See *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (addressing a government university's requirement that a counseling student violate her religious beliefs and affirm homosexual relationships); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir.2011) (same).

⁴⁵See Daniel Blomberg, *Mounting Religious Liberty Concerns*, Daily Caller, Aug. 6, 2010, <http://dailycaller.com/2010/08/06/mounting-religious-liberty-concerns-in-dont-ask-dont-tell-attack-grow-with-new-revelations-from-active-duty-chaplain/> (last visited Jan. 24, 2013) (recounting the experience of a U.S. military chaplain serving in a foreign military that recognizes same-sex marriage; the chaplain, after a private and amicable counseling discussion with one service member that briefly discussed the chaplain's religious beliefs on homosexuality, was threatened with punishment by a senior officer for expressing those beliefs).

required to advise their commander about questions of sexual ethics or to teach ethics courses at military schools, may be punished for expressing their convictions in those capacities. Chaplains, who are often entrusted with hiring civilians for military ministry positions such as Sunday School, may be punished if they continue to allow their religious beliefs to inform their hiring choices.

Even in the context of chaplains' performing religious services, where statutory and regulatory protections of religious liberty are at their height, it remains to be seen what would happen if the Commander-in-Chief decides to ban chaplains from sharing traditional religious views on marriage and family, as the Clinton administration did on the topic of partial-birth abortion.⁴⁶ Currently, such a restriction would violate the chaplains' free exercise and free speech rights guaranteed by a plethora of constitutional, statutory, and regulatory provisions. Yet after a sea change as fundamental as the constitutional redefinition of marriage, it is unclear whether those protections for religious liberty could trump what may be seen as the legal equivalent of racism.⁴⁷

Each of these direct conflicts injures not only chaplains, but also—and more importantly—those whom they serve. It cannot be overemphasized: *restrictions on chaplains are restrictions on the service members whom chaplains exist to serve*. If chaplains representing faith groups with traditional religious beliefs on marriage and family are removed from or kept from roles that, after a constitutional redefinition of marriage, would be prone to experiencing conflict—such as administering the Strong Bonds program—then they, the faith groups they represent, and the service members whose religious beliefs they serve will all see that as direct government hostility to their faiths. The Federal Government would effectively establish preferred religions or religious beliefs within the military.⁴⁸

This broad harm to military religious liberty is emphatically a result of judicially constitutionalizing a radical redefinition of marriage and family. By contrast, when CALL, along with numerous veteran chaplains and many other endorsing

⁴⁶In *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), the court held unconstitutional the Executive's attempt to censor chaplain sermons encouraging congregants to write Congress about pending legislation on partial-birth abortion.

⁴⁷Notably, in each of these instances where chaplains may face conflict, commanding officers may also be subject to punishment if chaplains cross the newly created constitutional lines. This is because it is commanders who are ultimately responsible for protecting the free exercise rights of service members under their command, and they use chaplains to fulfill that responsibility. See Army Reg. 165-1 §§ 1-6(c), 1-9. Indeed, to limit any vulnerability to perceived constitutional line-crossing by their chaplain-agents, some commanders may feel pressured to restrict chaplains even more than the constitutional rules require.

⁴⁸ *Rigdon*, 962 F. Supp. at 164 (finding that a military policy allowing Catholics of one belief on abortion to share that belief while ordering Catholics of a contrary belief to remain silent impermissibly “sanctioned one view of Catholicism . . . over another.”).

organizations, raised similar religious liberty concerns during the debate about repealing 10 U.S.C. § 654,⁴⁹ Congress and the military had the capacity to respond with solutions. First, they determined that sexual orientation should not be treated as a protected class akin to race.⁵⁰ Second, Congress passed a statute ensuring that religious liberty must be protected and accommodated in the post-repeal military.⁵¹ Since the Supreme Court has declared same-sex marriage the law of the land, we are concerned that such compromise measures will be lost, as will the capacity for democratically derived protections of religious liberty in this area of the law.

C. One other issue: Meaning of Evangelize and ability of service members to share their faith

Last May the Department of Defense issued very troubling statements suggesting “proselytizing” by service members is impermissible harassment, without ever defining the term, “proselytize”. While the DoD eventually backed off, admitting that “evangelizing” is permissible; the Air Force never clarified a statement that making someone “uncomfortable” is a sufficient basis for shutting down “evangelizing.” Chaplains, as well as all service members who come from “Evangelical Traditions”, hold an obligation to share the “Good News” (the basic meaning of the word, Gospel) with others. While it is understood that respect for others and common decency of when to share and when to be silent must be followed, we remain concerned about this issue and await further guidance from the services on the meaning of these key words.

⁴⁹See Letter from Sixty-Six Veteran Chaplains on Religious Liberty Concerns with Repeal of 10 U.S.C. § 654, http://adfwebadmin.com/userfiles/file/DADTletter%209_16_10.pdf (last visited Jan. 24, 2013) (letter to President, Congress, and military from sixty-six veteran chaplains raising religious liberty concerns with repeal and urging adoption of broad religious liberty protections); *see also* Letter from Chaplain Endorsers on Hosting Same-Sex Weddings in Military Chapels <http://oldsite.alliancedefensefund.org/userdocs/ChaplainEndorsersLetter.pdf> (last visited Jan. 24, 2013) (letter from endorsing agents to Chiefs of Chaplains urging adoption of broad religious liberty protections in wake of repeal).

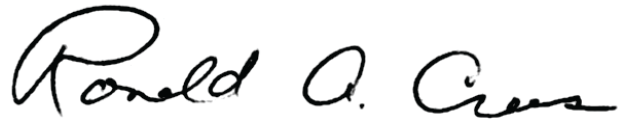
⁵⁰See, e.g., Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell” at 137, *available at* [http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf) (last visited Jan. 25, 2013) (“[I]n the event of repeal, we do *not* recommend that the Department of Defense place sexual orientation alongside race, color, religion, sex, and national origin as a [protected] class”).

⁵¹ See National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239.

CONCLUSION

Our nation has a long and admirable history of celebrating and protecting the religious liberty of those who give their lives to protect ours. We must not abandon that heritage now. The military is duty-bound to take steps to remedy the current unfavorable climate for religious liberty. We ask the House Armed Services Committee to continue to advocate for religious liberty protections for chaplains and those they serve.

Respectfully,

A handwritten signature in black ink that reads "Ronald A. Crews". The signature is written in a cursive style with a large initial 'R'.

Chaplain (COL) Ronald A. Crews, USA (Ret.)
Executive Director
Chaplain Alliance for Religious Liberty

A handwritten signature in black ink that reads "delle". The signature is written in a cursive style with a large initial 'd'.

Chaplain (BG) Douglas E. Lee, USA (Ret.)
Chairman, Executive Committee
Chaplain Alliance for Religious Liberty