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.	BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, JEWISH SOCIAL POLICY ACTION NETWORK, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE.
	Crim.App. Dkt. No. 201400150
	USCA Dkt. No. 15-0510/MC

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

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INTEREST OF THE *AMICI CURIAE*

The *amici* joining this brief are religious, religious-liberty, and civil-rights organizations that share a common commitment to preserving religious freedom and preventing religious discrimination. *Amici* have a substantial interest in ensuring that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, remains a powerful tool to protect the rights of individuals to worship and practice their faiths as they see fit. *Amici* file this brief in order to assist the Court in correctly interpreting and applying RFRA in the military context so that the fundamental rights of servicemembers that RFRA protects are not undercut or trivialized.

The *amici* are Americans United for Separation of Church and State, the Jewish Social Policy Action Network, and People for the American Way Foundation. Descriptions of each appear in the Appendix and in the accompanying motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Citizens do not relinquish their fundamental rights when they don a military uniform. But the exercise of those rights is conditioned on the military's need for order, discipline, unit cohesion, morale, and mission readiness — not to mention the government's constitutional obligation to comply with the Establishment Clause of the First Amendment. The Religious Freedom

Restoration Act, as implemented by Department of Defense Instructions, strikes the correct balance, providing a reasonable process for servicemembers to request and receive religious accommodations without degrading the ability of the armed forces to protect and defend the nation.

Lance Corporal Monifa Sterling asserts a right under RFRA to post signs in violation of direct orders without being subject to discipline. Her claim fails both because she did not meet the prerequisite of proving a substantial burden on her religious exercise and because the military had compelling interests and its actions were narrowly tailored to meet those interests.

LCpl Sterling did not satisfy RFRA's prerequisite because she did not request an accommodation in accordance with military regulations and does not contend that having to request an accommodation in order to receive one is a substantial burden on religious exercise. It isn't. If being expected to comply with orders when one has not asked for a religious accommodation were a substantial burden on religious exercise in the military, servicemembers could ignore orders from superiors with impunity; RFRA would always be an available escape-hatch to avoid the consequences of disobedience. Such a system would impede the military's efforts to address valid accommodation requests, invite belated and dubious RFRA claims, and overwhelm the courts-martial with demands for

strict judicial scrutiny. Doubts would then arise about the genuineness of all accommodation requests, undercutting the very values that RFRA was designed to protect. None of that would be good for religious freedom or military discipline.

LCpl Sterling also failed to satisfy RFRA's prerequisite because she did not prove, or even contend, that the posting of signs was a religious exercise or that requiring her to remove the signs pressured her to alter or violate her religious beliefs. Rather, she testified that the signs were a response to contentious relationships with those in her chain of command. Any burden here was trivial — and it was not, as LCpl Sterling herself described, a burden on religious exercise in all events.

But even if there had been a substantial burden, it would have been justified, and hence RFRA would be satisfied. The signs that LCpl Sterling posted were antagonistic toward her chain of command, so the military's compelling interest in good order and discipline was threatened. Equally important, LCpl Sterling posted the signs in a military office to which Marines must report to receive a service necessary to the performance of their assigned duties, so religious displays in that environment would be official religious endorsements that violate the Establishment Clause. Accordingly, the military had both the authority and the duty to

ensure that the signs stayed down. And given LCpl Sterling's pattern of disobedience and determination to repost the signs against orders, nothing short of disciplinary proceedings would have achieved that end.

LCpl Sterling and her *amici* would have this Court believe that her appeal is about the heavy hand of government coming down on an individual for privately practicing her faith. It is not. Though sometimes imperfect in execution, the military has a rich tradition of respecting and defending religious freedom. That tradition is not under attack here. LCpl Sterling was not punished for her piety. She was punished for ignoring orders, only some of which dealt with the signs, and none of which were the subject of a request for a religious accommodation. RFRA protects religious freedom, which is a cornerstone of our constitutional order. To argue that it also licenses bare disobedience in the military trivializes that fundamental right. The decision of the Navy-Marine Corps Court of Criminal Appeals should be affirmed.

STATEMENT OF THE CASE

LCpl Sterling refused to report to duty. She refused to wear the required uniform. And rather than resolving contentious relationships with her supervising noncommissioned officer and others in her chain of command, she posted signs in a public workspace, where Marines came to receive support services, declaring: "No

weapon formed against me shall prosper." When her supervisor ordered her to remove the signs, she refused – twice. Only when LCpl Sterling was on the stand at her court-martial did she mention that the signs contained [altered] Bible quotations; and only on appeal did she assert a claim that her posting of the signs and subsequent refusals to remove them are protected under RFRA. It is on those facts that her convictions rested.

LCpl Sterling worked in the Marine Headquarters Group at Fort Lejeune. (JA13.) Her desk adjoined two others in an open-plan cluster (JA42), and two or three other Marines, including her supervisor, Staff Sergeant Alexander, shared the workspace during the relevant period (JA42, 110). Marines would come to LCpl Sterling and sit at client chairs at the cluster (JA111) to resolve problems with their Common Access Cards (JA2).

LCpl Sterling had ongoing difficulties with others at work, including SSgt Alexander. (JA43, 139.) At trial, she described the friction between them as "a mixture of female-to-female thing" and "a cultural/racial thing" that dated back to boot camp (JA138-139) – though SSgt Alexander did not remember her from there (JA47) – and that later also "turned into a little bit of a religious thing" (JA139-140). Believing that "these people" – i.e., SSgt Alexander and others in the chain of command – were "picking on [her]," LCpl Sterling posted three signs in large type around her workstation

bearing the "No weapon" statement. (JA113-114.) The signs were visible to those "[s]eated at the desk or while walking past." (JA46; *see* JA159 (finding that servicemembers coming to desk for assistance could see the signs).) The signs did not note that the words were a modified Bible quotation, and LCpl Sterling did not testify that she informed SSgt Alexander or anyone else of that fact.[1] LCpl Sterling testified that the three postings reminded her of the Trinity, fortifying her against those who purportedly were picking on her. (JA114.)

According to LCpl Sterling's testimony, SSgt Alexander recognized the signs' confrontational tone. (JA116.) SSgt Alexander testified that she deemed the signs inappropriate in the shared workspace, and ordered LCpl Sterling to remove them. (JA43.) When LCpl Sterling ignored that order, SSgt Alexander removed them herself. (*Id.*) The next day, LCpl Sterling reposted them. (*Id.*) Again, SSgt Alexander told her to remove them; again, LCpl Sterling refused. (*Id.*)[2]

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[1] Although JA116 is ambiguous as to whether LCpl Sterling was saying that she told SSgt Alexander that the signs were religious or was instead explaining to the trial court her own unspoken view of the interaction, LCpl Sterling's later testimony (at JA144-145) makes clear that she meant the latter.

[2] LCpl Sterling's opening brief and those of some of her *amici* misread the record, stating about the signs that SSgt Alexander told her in a "nasty manner" to "[t]ake that S-H-I-T" down. (JA116-117.) That interaction occurred at an entirely different time and concerned entirely different materials. (*See* JA116.) LCpl Sterling

At her court-martial, LCpl Sterling explained for the first time that the language on the signs was biblical. She also complained that she was being "singled out" by the superiors whose various orders she had disobeyed. (JA166-172.) She stated: "It's not as if I think I'm being picked on, I know I'm being picked on." (JA172.)

She was convicted on one count of "failing to go to her appointed place of duty, [one count of] disrespect towards a superior commissioned officer, and four specifications of disobeying the lawful order of a noncommissioned officer." (JA1.) Only two of the six counts related to the signs. (JA13.)

On appeal, LCpl Sterling for the first time asserted a claim that her conduct with respect to the signs was protected by RFRA. The Navy-Marine Corps Court of Criminal Appeals upheld the convictions on all counts, determining that LCpl Sterling had "brazenly scoffed" at the "instinctive obedience, unity, commitment, and esprit de corps" on which the military depends. (JA10 (citing *Goldman v. Weinberger*, 475 U.S. 503 (1986)).) The court concluded that neither RFRA nor the Free Exercise Clause protected the signs because they were not a "religious exercise" or "part of a system

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later testified that "I don't remember [SSgt Alexander] ordering me to take [the signs] down," and that SSgt Alexander had merely asked "why I had them there." (JA145.) SSgt Alexander, meanwhile, testified that she ordered the signs removed but did not raise her voice, make aggressive actions, or use profanity. (JA154.)

of religious belief." (JA5.) Because the signs were merely "personal reminders that those she considered adversaries could not harm her," the court held, her RFRA claim failed. (*Id.*)

ARGUMENT

RFRA provides that government may not "substantially burden" the "exercise of religion." 42 U.S.C. § 2000bb-1(a). Congress later clarified that this protection extends to "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). A claimant must therefore prove that some religious exercise was substantially burdened. *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). If so, the government must show that the challenged official action advanced "a compelling governmental interest" and was "the least restrictive means of furthering that governmental interest." 42 U.S.C. § 2000bb-1(b). LCpl Sterling's claim fails under every step of this analysis.

LCpl Sterling cannot show any substantial burden because she failed to follow military regulations that required her to request an accommodation and follow orders until it was acted upon. She does not challenge those procedures as unreasonable, and they aren't. Hence, her religious exercise was not substantially burdened by having to follow orders or ask to be exempted from them. Additionally, because she identifies her conduct as expression,

not religious exercise, there was nothing to be substantially burdened for purposes of RFRA.

In all events, the military has compelling interests in preventing divisive, disruptive displays in facilities where other Marines must go to receive necessary services. And if this Court determines that the signs were a religious exercise, the military also had a compelling interest in avoiding the Establishment Clause violations attendant with religious displays in such settings. Removing the signs was the only practicable means to serve the military's compelling interests.

A. There Was No Substantial Burden On Religious Exercise.

To trigger strict scrutiny under RFRA, LCpl Sterling must first show that her religious exercise was substantially burdened. *Holt*, 135 S. Ct. at 862; *accord*, *e.g.*, *Mahoney v. U.S. Marshals Serv.*, 454 F. Supp. 2d 21, 38 (D.D.C. 2006). It was not, for at least two reasons. First, military regulations required LCpl Sterling to request an accommodation and follow orders while awaiting a determination. That procedure was not a substantial burden, and LCpl Sterling does not contend that it was. Yet she did not follow the rules. That should end the matter. Second, being forbidden to post displays in the workplace did not "put[] substantial pressure on [LCpl Sterling]. . . to violate [her] beliefs" (*Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 718 (1981)), nor did it

force her to choose between practicing her faith and performing her duties as a Marine. If there were any burdens here, they were "slight, negligible, or *de minimis*," and hence insufficient to satisfy RFRA's substantial-burden prerequisite. *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 248 (D.C. Cir. 2014), *cert. granted sub nom. Roman Catholic Archbishop of Wash. v. Burwell*, 136 S. Ct. 444 (2015).

1. Having to request a religious accommodation is not a substantial burden in the military.

In 2008, the Secretary of the Navy implemented an Instruction requiring the Navy and Marine Corps to "mak[e] every effort to accommodate religious practices absent a compelling operational reason to the contrary." SECNAVINST 1730.8B(1) (2008); *accord* SECNAVINST 1730.8B(1) (2012). The Instruction directs that accommodations be granted unless they would "have an adverse impact on military readiness, individual or unit readiness, unit cohesion, health, safety, discipline, or mission accomplishment." SECNAVINST 1730.8B(5) The Instruction also establishes procedures for seeking accommodations and for appealing adverse decisions. *Id.* These procedures appropriately ensure broad protections for servicemembers' religious liberty, without abandoning the "habit of immediate compliance with military procedures and orders" (*Goldman*, 475 U.S. at 508) on which lives and missions depend.

The 2013 and 2014 National Defense Authorization Acts directed the Secretary of Defense to issue DoD-wide regulations addressing religious practices of servicemembers. *See* Pub. L. No. 112-239, § 533 (2013); Pub. L. No. 113-66, § 532(b) (2013). The Secretary therefore revised DoD Instruction 1300.17 to implement RFRA. The revised Instruction, like Navy Instruction 1730.8B, (i) requires formal requests for accommodations; and (ii) provides that "[s]ervice members submitting requests for accommodation of religious practices [must] comply with the policy, practice, or duty from which they are requesting accommodation . . . unless and until the request is approved." (JA254 (DoD Instruction 1300.17(4)(e), (g)).)

LCpl Sterling did not request an accommodation from the orders to remove the signs; she did not obey orders and respect the chain of command while awaiting a decision on the request that she never made; she did not even tell anyone that the messages on the signs were religious (*see* n.1, *supra*). Hence, her superiors had no hint that she might want or need a religious accommodation for anything.

LCpl Sterling now binds herself to DoD Instruction 1300.17 and does not contend that the procedures that the Instruction mandates (and that she declined to follow) are substantial burdens

on religious exercise.[3] When reasonable procedures for requesting and obtaining religious accommodations exist, servicemembers should not be able to ignore them and then argue that they are substantially burdened under RFRA by the military's failure to intuit and grant an unrequested accommodation. Whatever the statutory term "substantial burden" entails, it cannot be a substantial burden not to have received an accommodation that LCpl Sterling never let anyone know she wanted.

If asserting RFRA rights after trial were good enough to justify disobedience, servicemembers could "brazenly" disregard direct orders (JA10) without explanation. Should they ever be tried for insubordination, they could always announce a RFRA claim after the fact, unwind the proceedings, and get a do-over – with strict judicial scrutiny on their side. The resulting incentives to flout orders rather than follow appropriate procedures would be highly detrimental to military order, discipline, and mission-readiness. And the incentives to assert sham religious justifications at trial whenever one was in jeopardy would be almost overwhelming. What is more, belated RFRA claims would clog the courts-martial with needless insubordination prosecutions when ordinary, mine-run

[3] Although the amendment to DoD Instruction 1300.17 came after LCpl Sterling had already ignored direct orders and been brought up on charges, Navy Instruction 1730.8B predated her conduct and imposed the same requirements.

religious accommodations would have been granted had they been but requested. Just as the default under RFRA and military regulations is and ought to be that religious exercise should be respected, so too should the default be that the military receives notice and the opportunity to implement valid accommodation requests in ways that do not interfere with mission-readiness. Indeed, even when accommodations are denied, there should be regularized procedures, not self-help strategies, to address erroneous determinations without sacrificing military preparedness.[4]

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[4] Indeed, there are such procedures, as *Singh v. McHugh*, 109 F. Supp. 3d 72 (D.D.C. 2015), demonstrates. In that case, a Sikh man went through valid channels seeking an exemption from ROTC grooming and dress regulations. *Id.* at 75-76. When his request was formally and finally denied, he successfully brought suit under RFRA. *Id.* at 75-76. LCpl Sterling's *amici* rely on *Singh* to show that RFRA may require accommodations by the military – and that is certainly true. But process also matters, because the military cannot function when servicemembers act as a law unto themselves. *Singh* was a triumph for religious liberty within the unique context of the military, and it is rightly celebrated as such. Rank disobedience it was not.

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015), likewise does not justify insubordination. *Abercrombie* was a Title VII employment-discrimination case in which the civilian employer (a clothing retailer) saw that the plaintiff (a Muslim woman) wore a headscarf, assumed (correctly) that she did so for religious reasons, further assumed that if she were hired as a sales associate she would seek a religious exemption from the store's grooming policy (though she did not request one), and decided not to hire her because it did not want to have to accommodate her Muslim garb. The Supreme Court held that no accommodation request was necessary under Title VII because the employer's unlawful religious discrimination inhered not in denying an unrequested accommodation but in "mak[ing] an applicant's

2. Having to remove religious displays from a government office is not a substantial burden.

LCpl Sterling also has not identified any pressure to change her beliefs or any other substantial burdens resulting from the orders to remove the signs. She was and is free to believe as she wishes, and there is no suggestion that she was ever inhibited in her ability to pray, to engage in devotional acts, to possess sacred objects, to study her faith, or to do anything else to practice her religion. At most, she was prevented from using a government office to publicize in religious terms her unhappiness with her superiors. Again, if the term "substantial burden" is to mean anything, it must mean more than *that*.

"It is not the case that every activity which could be cast as 'religiously motivated' is the kind of exercise of religion protected by RFRA." *Mahoney*, 454 F. Supp. 2d at 38 (citing *Henderson v. Kennedy*, 253 F.3d 12, 16-17 (D.C. Cir. 2001)). What is more, RFRA protects only actions that are "sincerely based on a religious belief." *Holt*, 135 S. Ct. at 862. RFRA "does not relieve a complaining adherent of the burden of demonstrating the honesty and accuracy of [her] contention that the religious practice at issue is important to the free exercise of [her] religion." *Adkins v.*

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religious practice, confirmed or otherwise, a factor in employment decisions" when it refused to hire her. *Id.* at 2034.

Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) (explaining identical test under Religious Land Use and Institutionalized Persons Act).

Thus, the D.C. Circuit held that enforcement of a ban on selling T-shirts on the National Mall did not substantially burden the rights of an evangelical religious group under RFRA – even though the group's members, unlike LCpl Sterling, contended that their conduct was in fulfillment of a fundamental tenet of their faith (namely, the duty to spread the Gospel). *See Henderson*, 253 F.3d at 14. The court held that because the "ban on sales on the Mall [was] at most a restriction of one of a multitude" of alternative ways to proselytize, and therefore it neither forced the group's members to engage in conduct that violated their beliefs nor prevented them from proselytizing generally, the substantial-burden requirement was not met. *Id.* at 17.

Here, similarly, LCpl Sterling was not forced to abandon her belief in God, the Bible, or the Trinity – the only beliefs that she has identified (JA79, 111, 166). She was merely prevented at work from employing "one of a multitude" of means to express her views about her superiors using religious phrasing. *See Henderson*, 253 F.3d at 17. To be sure, she argues that her belief in the Bible, the Trinity, and God is both central to her religion and historically accepted. (Br. at 18-24.) No one could reasonably dispute any of that. But she did not testify and does not argue

that it is any tenet or practice of her faith to display Bible quotations at work, thus making her claim even weaker than the one in *Henderson*. Adorning the office with signs inveighing against perceived adversaries in her chain of command may have given her comfort, but that does not make it protected religious exercise.

As the U.S. District Court for the District of Columbia explained in *Wilson v. James*, 2015 WL 5952109 (D.D.C. Oct. 13, 2015), there is a critical difference between religious beliefs and conduct expressing those beliefs. Wilson was a member of the Utah Air National Guard. He sent an e-mail to the Executive Assistant to the Commandant of Cadets at West Point, decrying weddings of same-sex couples in the Academy's chapel as a "mockery to God" and a "slap in the face to us who have put our lives on the line for this country." *Id.* at *1-2. The court rejected Wilson's RFRA challenge to the discipline imposed over the e-mail, concluding that Wilson was not genuinely alleging a burden on his religious exercise. *Id.* at *8. There was no doubt that Wilson believed marriage of same-sex couples to be a sin, or that his religiously grounded views about the proper uses of the Academy chapel were being offended. But his e-mail was merely expression of those beliefs to an officer outside his chain of command, which military regulations permissibly forbade. "[P]ublicly voic[ing] his dissent about homosexuality or same-sex marriage" did not preclude action against

Wilson, the court held, because religious belief "does not become a protected religious exercise under RFRA simply because Plaintiff expressed it through speech." *Id.*; *see also Mahoney*, 454 F. Supp. 2d at 38 (rejecting RFRA claim where plaintiffs wished to engage in religious speech but did not allege that the speech was "part of the exercise of their religion").

So too here. As the court below recognized, the signs that LCpl Sterling posted were not, and LCpl Sterling did not describe them as, "'part of a system of religious belief'"; they were expression, not exercise. (JA5 (quoting 42 U.S.C. § 2000cc-5(7)(A)).) RFRA's protections are not limited to those who belong to an established religious denomination or hold well-defined, mainstream religious beliefs. But a claimant must do more than mention a few general beliefs in order to state a valid claim for an accommodation: She must show that her conduct was a religious exercise arising out of her faith – which LCpl Sterling did not do.

Simply put, RFRA requires more than the bare assertion that an action is "religious in nature" (JA5) – i.e., that it somehow touches on religion. For if that were all that RFRA required, the statutory prerequisite of a substantial burden on religious exercise would be meaningless; any mention of RFRA or religion would automatically trigger strict scrutiny. The guardsman in *Wilson*

would have had a right to send the e-mail to the Academy Commandant's office (and to make his subsequent Facebook attack on his commanding officer) because he was motivated by his religiously based disapproval of same-sex couples. Similarly, a Marine who believed that Jesus died for his sins (or that Allah is supreme, or that God does not exist) could wear a printed T-shirt expressing that view in lieu of the required uniform of the day, and could wantonly and without consequence ignore orders to change clothes. That is not what RFRA is meant to protect.[5] Yet LCpl Sterling's claim amounts to nothing more.[6]

Nor was being disciplined for disobeying direct orders a substantial burden on her religious exercise any more than it would

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[5] *Singh*, 109 F. Supp. 3d 72, does not suggest otherwise. The plaintiff there demonstrated that, for Sikhs, wearing a turban is an important devotional act – a religious exercise; failing to wear the turban would "dishonor[] and offend[] God." *Id.* at 75-76. Wearing a printed T-shirt or sending an e-mail or posting signs to chide imagined adversaries in one's chain of command presumptively is not.

[6] Additionally, RFRA requires that "the relevant exercise of religion [be] grounded in a sincerely held religious belief" and "not some other motivation." *Holt*, 135 S. Ct. at 862. *Amici* do not doubt the sincerity of LCpl Sterling's belief in God, the Trinity, and the Bible. But she was required to show that the conduct for which she seeks an accommodation – the posting of signs in the workplace – was the practice of those religious beliefs and not something else. She testified to the contrary, explaining that the signs were her way of addressing problems with her superiors. Her claim thus fails under RFRA for that reason also. *Cf. United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) (listing cases recognizing that sincerity is a factual question, and upholding finding that defendants' religious claims were pretextual).

have been a substantial burden to fine (or even arrest) the plaintiffs in *Henderson* for selling T-shirts on the National Mall. LCpl Sterling was punished both for disregarding orders to remove the signs and for disobeying other, unrelated orders with no asserted religious element of any kind. Because she did not request a religious accommodation, did not identify a religious practice, and did not explain that the signs were religious, the Marine Corps had no opportunity even to consider whether some arrangement could be made to satisfy her. Ignoring orders without bothering to explain oneself is not conduct that RFRA was designed to make sacrosanct.

B. The Compelling-Interest And Least-Restrictive-Means Tests Are Satisfied.

Even if LCpl Sterling had met the substantial-burden prerequisite, which she did not, the military has compelling interests not just in ensuring that servicemembers follow orders, but also in forbidding displays in public spaces in military facilities when those displays either are confrontational and disrespectful to commanders or are official governmental endorsements of religion. And ordering that the signs be removed (and taking disciplinary action against LCpl Sterling for putting them back up and for disobeying other, unrelated orders) was the least restrictive means to further those interests.

1. The governmental interests are compelling.

a. Congress and the courts have consistently recognized that the military has a compelling interest in good order and discipline that RFRA does not compromise. *See*, *e.g.*, H. Rep. No. 108-88 (JA269); S. Rep. No. 103-111, at 12 (JA271). That interest is straightforwardly at stake here.

LCpl Sterling had contentious relationships with SSgt Alexander and other superiors. She therefore posted signs in a common workspace announcing, in essence, that she would triumph over these adversaries. (*See* JA5.) Though SSgt Alexander in all likelihood did not know (because she was not told) that the signs contained Bible quotations, she did, according to LCpl Sterling's testimony, understand the point that LCpl Sterling was trying to make with the signs. She also knew that the Marines who shared the workspace and those who came for assistance would see the signs. She therefore had ample reason to order that the signs be removed.

LCpl Sterling asserts that under *Burwell v. Hobby Lobby Stores*, *Inc.*, 134 S. Ct. 2751 (2014), "reliance . . . on broad notions of maintaining good order and discipline is . . . plainly insufficient" as a compelling interest. (Br. at 27.) But in recognizing that RFRA has a role to play within the armed forces, Congress did not cast aside military discipline. Quite the contrary. "[M]aintaining discipline in our armed forces . . . [has]

been recognized as [a] governmental interest[] of the highest order." (JA269 (H. Rep. No. 108-88 (House Report on RFRA)).) Congress was confident that RFRA "[would] not adversely impair the ability of the U.S. military to maintain good order, discipline and security," because "[t]he courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services." (JA270 (S. Rep. No. 103-111 at 12 (Senate Report on RFRA)).) Congress "intend[ed] and expect[ed] that such deference will continue." *Id*. *Hobby Lobby*, which was a RFRA challenge to the Affordable Care Act's insurance-coverage mandate by a private, civilian employer, changes nothing.

Equally meritless is LCpl Sterling's contention that SSgt Alexander could not order removal of the signs based on her own determination that they were inappropriate but instead needed to wait for *other* Marines to complain. The UCMJ authorizes punishment of any "enlisted member who . . . treats with contempt or is disrespectful in language or deportment toward a . . . noncommissioned officer." *See* 10 U.S.C. § 891. SSgt Alexander was LCpl Sterling's immediate supervisor; LCpl Sterling says that the signs were about those, like SSgt Alexander, whom she believed were picking on her; and SSgt Alexander recognized that the signs were disrespectful. So too were LCpl Sterling's decision to ignore a direct order to remove the signs and her reposting of them after SSgt Alexander

took them down. It simply cannot be that a superior who is disrespected by a subordinate is powerless to take action until the subordinate disrespects *someone else*.

b. When, as here, signs are on display in a government facility where they are visible to other government employees and to those who come to the office to receive government services, the government, not any individual, gets to control the message. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651 (9th Cir. 2006); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249-50 (2015) (because automobile license plates are government speech, state is entitled to deny group's requested message); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to speak for itself, . . . [to] say what it wishes, and to select the views that it wants to express." (internal quotation marks and citations omitted)). Governmental entities "need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). And "the government has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it," because such displays "may be interpreted as

representing the views of the state." *Berry*, 447 F.3d at 651 (internal quotation marks omitted).

c. The government's need to regulate the messages displayed in its offices is especially great when those messages are religious. When a government employee delivers government services face-to-face and yet chooses to post religious signs, the employee creates "a real danger of entangling the [government] with religion" and sends the message that the government favors and endorses the religious message, in derogation of the Establishment Clause of the First Amendment. *Berry*, 447 F.3d at 651. And the government's interest in avoiding Establishment Clause violations is a compelling one. *E.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3d Cir. 2008); *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 475 (2d Cir. 1999); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

If this Court were to disagree with the arguments in Part A, *supra*, and deem the signs a religious exercise, these Establishment Clause concerns would be directly and concretely implicated. In that case, the government's compelling interest and constitutional duty to avoid official religious endorsements in a Marine facility would more than justify the orders to remove the signs.

Indeed, even if these considerations played no role in SSgt Alexander's decision to order removal of the signs, the military was on notice of its authority and constitutional duty to ensure that the signs stayed down from at least the moment on the stand when LCpl Sterling identified them as Bible quotations. LCpl Sterling's ongoing efforts to stay in the Marine Corps while demanding license to post religious displays at work meant that the military's compelling interest and duty under the Establishment Clause undeniably came into play at that point if not before.

Thus, in a case startlingly similar to this one – except that it arose in the far less regimented environment of civilian government – the Ninth Circuit held that an employee in a Social Security office had no right to post religious displays at the computer workstation where he served clients, because viewers "might reasonably interpret the presence of visible religious items as government endorsement of religion." *Berry*, 447 F.3d at 652. Here too, Marines who recognized the signs' religious content (which SSgt Alexander apparently did not, but based on LCpl Sterling's arguments at least some other Marines surely did) reasonably would view the signs as putting the Marine Corps's stamp of official approval on the religious beliefs so expressed. Indeed, in the context of this government office, Marines who recognized the signs to be religious might well conclude that the Marine Corps

prefers LCpl Sterling's faith over others, that those who share that faith will receive favorable treatment, or that those who do not share that faith are disfavored. *See*, *e.g.*, *Friedman v. Bd. of Cty. Comm'rs*, 781 F.2d 777, 778-79 (10th Cir. 1985) (en banc) (holding that county seal with religious content violated Establishment Clause).[7] The danger is especially pronounced because of the antagonistic – indeed, militaristic – tone of the signs (which, according to LCpl Sterling, SSgt Alexander recognized, so others surely would also).

It is well settled that the government has both the authority and the duty to prevent such Establishment Clause violations. *See*, *e.g.*, *Berry*, 447 F.3d at 657; *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) (religious materials at service counter in postal unit created impermissible appearance of official religious endorsement); *Knight v. Conn. Dep't of Pub. Health*, 275

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[7] The en banc Tenth Circuit explained these concerns over religious endorsement this way:

> A person approached by officers leaving a patrol car emblazoned with [a religious] seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

Friedman, 781 F.2d at 782. None of that has any place in the U.S. Armed Forces.

F.3d 156, 164-66 (2d Cir. 2001) (Establishment Clause concerns justified reprimand of sign-language interpreter and home-healthcare worker who promoted religious messages to clients receiving state services); *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990) (to avoid Establishment Clause violation, public school had authority to order teacher to remove Bible and religious poster from classroom); *see generally Rodriguez v. City of Chi.*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, J., concurring) ("When the business of the employer is to protect the public safety, the maintenance of public confidence in the neutrality of the protectors is central to effective performance[.]").

What was true for the civilians in *Berry* and the other cases must be doubly so in the military. *Cf. United States v. Wilson*, 33 M.J. 797, 799 (A. Ct. Crim. App. 1991) ("the needs of the armed forces may warrant regulation of conduct that would not be justified in the civilian community"); *see generally United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (recognizing that commanding officers' ability to exercise control over "the morale, discipline, and usefulness of members of a command" is "directly connected with the maintenance of good order in the service"). Here, other Marines had no choice but to go to LCpl Sterling's desk to resolve problems with their Common Access Cards in the performance of their assigned duties. Indeed, it is highly likely

that some were under explicit orders to do so. The Establishment Clause guarantees that they cannot be subjected to an unwanted governmental display of religion that is contrary to their own beliefs on pain of the penalty that they would suffer if they disregarded orders or otherwise failed to perform their duties.

Indeed, so strong is the governmental interest in avoiding these unconstitutional infringements of third parties' religious liberty that the government may restrict employee conduct that creates a significant risk of Establishment Clause liability even when it is not certain that the courts would find a constitutional violation. As the Second Circuit put it: "In discharging its public functions, the governmental employer must be accorded some breathing space to regulate in this difficult context. For his part, the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as a private citizen." *Marchi*, 173 F.3d at 476.

If LCpl Sterling were correct that RFRA prohibited SSgt Alexander from ordering her to remove religious displays from a Marine facility, then RFRA would trump the government's obligations under the Establishment Clause. No statute has so great a reach. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 724 F.3d 230, 239 (D.C. Cir. 2013) ("The rule of priority

contained in the Supremacy Clause is straightforward: The Constitution trumps those statutes and treaties which are inconsistent with it." (citing *Reid v. Covert*, 354 U.S. 1, 16-17 (1957)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803)).

Free-exercise law does not permit LCpl Sterling to force the government to "run the gauntlet of either being sued for not respecting an employee's rights . . . or being sued for violating the Establishment Clause." *Berry*, 447 F.3d at 650. LCpl Sterling is and ought to be free to practice her religion. But so are all other Marines. Had the government allowed desks at the MHG to be "festooned with religious quotations" (JA6), it would have been at grave risk of violating the constitutionally protected rights of all other Marines to be free from religious pressure to conform — not to mention allowing a divisive and disruptive atmosphere along religious lines that could interfere with the accomplishment of the military's mission. Nothing in RFRA, its sister-statute RLUIPA, or the case law interpreting them even hints at a right of individual servicemembers to compel the military to travel that misguided and ultimately unlawful path. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.").

2. The military employed the least restrictive means to achieve its ends.

With compelling interests at stake, the question is whether the military could have "achieved its desired goal[s]" by "other means" "without imposing a substantial burden on [LCpl Sterling's] exercise of religion." *Hobby Lobby*, 134 S. Ct. at 2780. It could not.

The only practicable options available to the military were to order LCpl Sterling to remove the signs or to have someone else remove them. SSgt Alexander tried both, but to no avail. She ordered LCpl Sterling to take the signs down, but LCpl Sterling ignored her. She then removed the signs herself, but LCpl Sterling put up yet more in response. At that point, there was simply no recourse but to institute disciplinary proceedings.

LCpl Sterling's litany of supposedly less restrictive alternatives is fanciful. Asking other Marines in the open-plan workspace if they objected or asking LCpl Sterling to post the display only during her shift would not have made the signs less disrespectful to SSgt Alexander, who sat at one of the desks. And the signs were potentially offensive and disruptive to Marines who came to the office for assistance and who could not practicably all be polled on arrival to see how they felt about the display. Adding a notation that the signs contained a Bible quotation would not have made them any less defiant toward LCpl Sterling's chain

of command (and indeed, the addition would have made them obviously religious and thus forbidden under the Establishment Clause). Nor would making them smaller: Because LCpl Sterling did not even hint at the time that these large, public, confrontational postings were meant to be purely personal reminders, religious or otherwise, SSgt Alexander could not have supposed that tiny signs might be an option. And because LCpl Sterling did not say that there was religious exercise at issue – which there wasn't – neither SSgt Alexander nor others in the chain of command had any plausible basis to think that they might be required to respond to a Marine who "brazenly scoffed" at direct orders (JA10) by negotiating a compromise. The Uniform Code of Military Justice does not work that way. Nor should RFRA.

* * *

The fundamental right of servicemembers to practice their faiths is not open to dispute. It is also not implicated by this case. The government has the right to regulate displays in its offices; and when the displays are religious, the government *must* regulate them. The Marine Corps did no more than what was necessary to ensure good order and discipline and avoided constitutional violations. RFRA provides critical safeguards against official interference with religious practice; it does not strip commanders of all authority to order their troops, and it does not trump the

government's constitutional obligations to respect the religious-freedom rights of all.

CONCLUSION

The judgment of the Navy-Marine Corps Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and served electronically on Michael D. Barry (mberry@libertyinstitute.org), counsel for Lance Corporal Sterling, and Brian K. Keller (brian.k.keller@navy.mil), counsel for the United States, on January 29, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,980 words.

2. This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in 12-point Triplicate, a monospaced typeface, at 10 characters per inch, using Microsoft Word 2013.

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APPENDIX

THE *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United is a national, nonsectarian public-interest organization that works to protect the rights of individuals and communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United advocated for the passage of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and regularly participates as a party, as counsel, or as an *amicus curiae* in cases arising under these statutes. Notably, Americans United filed an *amicus* brief in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), proposing the factors for the test of religious accommodations that the Supreme Court adopted.

Americans United regularly advocates for religious-liberty rights in the armed forces. For example, Americans United investigated and issued a report on religious bias and discrimination at the U.S. Air Force Academy (*see* http://tinyurl.com/AirForceReport) that led to creation of a DoD task force to address those issues. Americans United also successfully represented the widow of a deceased Wiccan servicemember in a suit to compel the Department of Veterans Affairs to provide a government-issued grave marker bearing the Wiccan emblem of belief. *See Circle Sanctuary*

v. Nicholson, No. 3:06-cv-00660 (W.D. Wis.). And Americans United has submitted written testimony to Congress advocating for religious accommodations in the military to safeguard the religious liberty of all servicemembers.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived almost exclusively in countries in which they were a minority faith and were dependent on the tolerance of civil society and the willingness of governments to accommodate their unique religious practices. In Europe especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion, or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. In the context of this case, JSPAN believes that striking the right balance between the rights of the government and the rights of the individual are important in enabling members of all minority faiths to participate fully in civic life by being able to serve in the American military without facing undue burdens on their faith.

Under the Religious Freedom Restoration Act, the military has responded by lightening the burden on observant Jews who want to serve their country, such as by providing special rations, loosening dress codes, and granting Jews the ability to observe their Sabbath and other holy days. Other accommodations have been granted to members of other faiths. JSPAN's interest in this case is to ensure that reasonable accommodations continue to be available to protect religious minorities. If those seeking accommodations can be immune from punishment for disobeying a direct order, the effect will be to undermine the willingness and ability of the military to provide the broad range of accommodations that Jews and other minority religions count on. In the long run, everyone loses if the proper balance cannot be struck. It is precisely because of our concern to ensure that accommodations remain available that we support reasonable rules to require that someone seek an accommodation rather than respond through open defiance.

Deeply committed to protecting the interests of minority faiths and all those who wish to express themselves on matters of conscience, JSPAN recognizes that a careful balance needs to be struck so that requests for accommodation can be addressed in procedurally proper ways and do not become either after-the-fact justifications that undermine the legitimate needs of the armed

services or reasons to limit otherwise reasonable accommodations when they can be granted.

People for the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle of the Religious Freedom Restoration Act and the Free Exercise Clause of the Constitution as a shield for the exercise of religion, protecting individuals of all faiths. Indeed, PFAWF's advocacy affiliate, People For the American Way, was deeply involved in drafting and helping secure the enactment of RFRA. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to attack other important interests when actual religious free exercise has not been substantially burdened, and accordingly joins this brief.