IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, U.S. JUSTICE FOUNDATION, FAITH AND ACTION, PUBLIC ADVOCATE OF THE UNITED STATES, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, INSTITUTE ON THE CONSTITUTION, E. RAY MOORE, CHAPLAIN, LT. COLONEL, U.S. ARMY RESERVE RET., AND CAPT GEORGE P. BYRUM, CHC, USN, (Ret.) IN SUPPORT OF APPELLANT
Appellee,	)	
v.	)	
MONIFA J. STERLING,	)	
Appellant.	)	
	)	
	)	Crim. App. Dkt. No. 201400150
	)	USCA Misc. Dkt. No. 15-0510/MC

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

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STATEMENT OF THE CASE

Marine Lance Corporal Monifa Sterling printed and taped a paraphrase of Isaiah 54:17 at three places around her workspace: "No weapon formed against me shall prosper." The three locations were designed to represent the Trinity, that is, the three persons of the Godhead — Father, Son, and Holy Spirit. No visitors to Sterling's workplace ever testified that they were "distracted, annoyed, or agitated" by the verses. *See* Appellant's Brief at 2-6. Nevertheless, in May 2013, Staff Sergeant Alexander ordered Sterling to remove the verses, but when Sterling did not, Alexander removed and discarded them herself. The next day, Sterling replaced the signs, and Alexander once again ordered Sterling to remove them, and again Alexander discarded them when Sterling did not. *See id.*

Sterling was charged with disobeying Alexander's orders. Sterling argued that Alexander's orders were unlawful as a violation of her right to free exercise of religion as protected by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, and lacked a valid military purpose. Nevertheless, the military trial judge instructed the court-martial members that the orders were lawful. The court-martial found Sterling guilty of multiple charges and sentenced her to a bad-conduct discharge and reduced her pay grade from E-3 to E-1. At issue in this appeal is one specification (count) of disobeying the lawful

orders of a noncommissioned officer. *See id.*

Sterling appealed her conviction and sentence to the Navy-Marine Corps Court of Criminal Appeals ("NMCCA"). On appeal, Sterling reasserted her defenses that Alexander's orders were unlawful because they constituted a violation of the First Amendment's Free Exercise Clause/RFRA and lacked a valid military purpose. *See id.* at 8.

The NMCCA rejected Sterling's arguments, holding that, although Sterling's posting of the verses may have been religious, they were not a "religious exercise" because they were not "part of a system of religious belief." United States v. Sterling, 2015 CCA LEXIS 65, *14 (NMCCA 2015). The court below determined that "[p]ersonal beliefs, grounded solely upon subjective ideas about religious practices 'will not suffice' because courts need some reference point to assess whether the practice is indeed religious." *Id.* Furthermore, the NMCCA held that Alexander's orders had a valid military purpose because, as the military judge had determined, "a government desk festooned with religious quotations ... could have a divisive impact to good order and discipline." *Id.* at *17. The language of the Bible verses, the court held, "'could easily be seen as contrary to good order and discipline.'" *Id.*

Sterling petitioned this Court to grant review of this case, and this Court granted review on October 28, 2015.

SUMMARY OF ARGUMENT

The order to Marine Lance Corporal Sterling to remove her religious signs was unlawful because it violated the Navy's policies and procedures for handling matters of religious accommodation, specifically DODI 1300.17 and SECNAV Instruction 1730.8B. Although Sterling invoked these instructions, the NMCCA erroneously equated this reliance on DODI 1300.17 with an invocation of the Religious Freedom Restoration Act, even though the DOD instruction antedated RFRA and provides broader protections.

The NMCCA faulted Sterling for failing to request a religious accommodation in this case, but SECNAV Instruction 1730.8B imposes no such requirement or obligation. In Carmichael v. U.S., 66 Fed. Cl. 115, 125 (Fed. Cl. 2005), the court held that religious accommodation principles apply "irrespective of whether the member specifically requested such an accommodation."

Furthermore, Sterling's Staff Sergeant impermissibly failed to involve her commanding office and no military chaplain was consulted in the decision to order Sterling to remove her signs. Moreover, Sterling's chain of command offered her no alternative means for her religious exercise as required by DODI 1300.17.

The NMCCA erroneously claimed that for a religious exercise to be "rooted in religion," the Free Exercise guarantee "requires the practice be 'part of a system of religious belief.'" United

States v. Sterling, 2015 CCA LEXIS 65, at *14 (NMCCA 2015). However, RFRA actually states exactly the opposite, and the Supreme Court held in Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993) that "the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons." The NMCCA did not rule that the content of the signs presented a threat to good order and discipline, but rather found the signs impermissible because the language was derived from the Holy Bible and was religious.

Lastly, even assuming Sterling's actions were not based on religious beliefs, those are not the only sort of beliefs protected by law. Section 533 of the FY 2013 NDAA mandates that "the Armed Forces shall accommodate [the] beliefs of a member of the armed forces reflecting the ... conscience, moral principles, or religious beliefs of the member." Even assuming Sterling's posting was not religious in nature, but simply some other form of expression, then her chain of command should have been governed by DODI 1325.06 to preserve a "Service member's right of expression ... to the maximum extent possible."

ARGUMENT

I. THE ORDER TO STERLING TO REMOVE HER RELIGIOUS SIGNS WAS UNLAWFUL BECAUSE IT VIOLATED THE NAVY'S POLICIES AND PROCEDURES FOR HANDLING MATTERS OF RELIGIOUS ACCOMMODATION.

In its decision below, the United States Navy-Marine Corps

Court of Criminal Appeals ("NMCCA") assessed the legality of the order to Sterling to remove her religious signs from her workspace. The court first examined whether "the order violated [Sterling's] right to exercise her religion," and second, whether "the order lacked a valid military purpose." *Id.* at 11. The court concluded that (i) the Religious Freedom Restoration Act ("RFRA") did not apply (*id.* at 15), (ii) there was a valid military purpose to the order (*id.* at 19), and thus (iii) the orders were lawful. *Id.*

However, as Sterling pointed out in her Supplement to her Petition to this Court ("Pet."), she also "invoked Department of Defense Instruction (DODI) 1300.17, Accommodation of Religious Practices within the Military Services." Pet. at 6. The NMCCA apparently equated this reliance on DODI 1300.17 with an invocation of RFRA, but that was error. Although DODI 1300.17 was updated in January 2014 to incorporate RFRA, it pre-dated RFRA, and employs broad language to "[p]rescribe[] policy, procedures, and responsibilities for the accommodation of religious practices in the Military Services." *Id.* at 1.

Implementing DODI 1300.17, the Department of the Navy issued SECNAV Instruction 1730.8B, entitled "Accommodation of Religious Practices," which is designed "[t]o provide policy and guidance for the accommodation of religious practices within the

Department of the Navy...." *Id.*[1] Simply put, the court below treated Sterling's claim as limited to a First Amendment/RFRA claim for accommodation of her right to display her signs. But DOD and the Department of the Navy official policies and rules also require accommodation of religion, and this presents a claim separate and distinct from Sterling's First Amendment/RFRA claim.

A. DODI 1300.17 and SECNAVINST 1730.8B Apply to This Case.

The NMCCA faulted Sterling for failing to request a religious accommodation in this case. U.S. v. Sterling at 15.[2]

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[1] The Department of the Navy has not yet updated SECNAVINST 1730.8B to comply with Section 533 of the National Defense Authorization Act of 2013 ("NDAA") and the updated DODI 1300.17. A recent IG Report notes that "[a]s of May 2015, the update was under review by the Assistant Secretary of the Navy for Manpower and Reserve Affairs." *See* "Rights of Conscience Protections for Armed Forces Service Members and Their Chaplains," p. 11, Inspector General, U.S. Department of Defense, July 22, 2015 ("IG Report"). The IG Report also notes that the "U.S. Marine Corps [] stated they were prepared to update applicable Marine Corps orders and regulations as necessary after the publication of the updated regulation from the Department of the Navy." *Id.*

[2] Typically, persons requesting religious accommodations seek exemption from various standing requirements or orders, or ask to be provided with something special such as time, space, or items related to the practice of their religion. Religious accommodations routinely involve such things as the wearing of the uniform, the wearing of religious apparel, dietary needs, religious observances, or exemptions from medical practices. *See* SECNAVINST 1730.8B at 2. Sterling, however, never asked to be provided with anything special, such as a place to worship, time off to attend services, or a special diet. And presumably there is no standing order in the Marines about posting pieces of paper on computer monitors, or otherwise "festooning" one's desk with items like family pictures, calendars, motivational prints, or post-it notes. So it would not appear that there was anything from which Sterling could have asked to be exempted, even if she had so desired.

The lower court "le[ft] for another day what impact, if any, the failure to first request an accommodation will have on the lawfulness of an order to refrain from engaging in one [sic]."[3] *Id.* at 15 n.17. Apparently, the NMCCA believed that SECNAVINST 1730.8B and DODI 1300.17 apply only when a formal written request for a religious accommodation has been made, and that the chain of command is somehow exempted from its obligation to accommodate religious exercise when no such request has been made.

But SECNAVINST 1730.8B imposes no such requirement or obligation, stating only that when personnel do request an accommodation, they "must submit their request in writing through their chain of command to their commanding officer...." *Id.* at 7. SECNAVINST 1730.8B gives service members **the option to apply** for a formal, written accommodation that the IG Report asserts should be valid for the member's entire period of service. *See* IG Report at 18. It most certainly does not say the opposite — that when no such request is made, the Department of the Navy has no duty to comply with SECNAVINST 1730.8B or to accommodate

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[3] This issue was the focus of the *Amicus Curiae* Brief of The Military Religious Freedom Foundation ("MRFF") filed on June 23, 2015 in support of neither party, at the petition stage in this Court. (Petitioner's religious accommodation argument "overlooks the fatal flaw — Petitioner failed to comply with DoDI 1300.17 ... and SECNAVINST 1730.8B....") The MRFF *amicus* brief argues that "Petitioner's command lacked the opportunity to even consider any form or type of possible accommodation, much less grant such...." *Id.* at 4. Like the NMCCA, the MRFF *amicus* brief erroneously assumes this case is based only on the First Amendment and RFRA. *Id.* at 5.

religious practices.[4]

B. Carmichael v. United States Supports Applying SECNAVINST 1730.8B to this Case.

In 1996, Chief Petty Officer David Alan Carmichael asked his commanding officer to forward a letter to the Chief of Naval Personnel ("CNP"), in which Carmichael asked that his Military Personnel Identification Number ("MPIN"), which was his Social Security Number, be changed. Carmichael v. U.S., 298 F.3d 1367, 1370 (Fed. Cir. 2002). Carmichael's letter stated that his religious beliefs led him to object to the use of his Social Security Number. *Id.* When Carmichael's commanding officer refused to forward the letter, Carmichael sent it directly. *Id.* While Carmichael's letter "stated his religious conviction," he never specifically asked his commanding officer for a "religious accommodation" pursuant to SECNAVINST 1730.8. *See id.*

The CNP denied Carmichael's request to change his MPIN, and in doing so he "did not refer to Carmichael's letter as a request for religious accommodation, nor ... address the Navy's religious accommodation policies." *Id.* Because of this refusal, Carmichael was unable to re-enlist without violating his religious convictions, and was terminated from the Navy on what

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[4] Indeed, it would be quite astonishing if a service member is required — by Navy policy — to apply for and obtain prior consent in order to exercise what most Americans would think to be a basic right that the military is required to respect by both the Constitution and statute.

the Navy claimed was a "voluntary" basis. Carmichael brought suit, claiming that his termination was "involuntary," on the ground that the Navy had "fail[ed] to follow its own rules...." *Id.* at 1372.

Agreeing with Carmichael, the U.S. Court of Appeals for the Federal Circuit ruled that it was irrelevant that Carmichael had not formally applied for an accommodation. Rather, the court held that:

> [t]he whole point of the religious accommodation policy is for the Navy to make exceptions to its otherwise generally-applicable rules in order to accommodate an individual service member's religious convictions..... Were it otherwise, the Navy's religious accommodation policy would be eviscerated. [*Id.* at 1374.]

Moreover, the court noted that "the Navy determined that the generally appropriate level of command for approval for requests for religious accommodation is the commander or commanding officer." *Id.* at 1373.

In Carmichael's case, the court of appeals ruled that the question turned on "whether the Navy wrongfully failed to apply its own religious accommodation procedures to Carmichael." *Id.* Most importantly, the court held, even assuming Carmichael's request was not a proper request for religious accommodation directed at the proper parties:

> the CNP would still be obliged to consider religious accommodation of such requests. The Navy's policy, and indeed the policy of all of the military services, is to accommodate the doctrinal or traditional observances of the religious faith practiced by the individual

members.... [*Id.* at 1375.]

Regardless of at which level or the context within which the decision is made, "the Navy's own policy mandates that the **decision-maker at least consider whether an accommodation is possible**...." *Id* (emphasis added).

Thus, on remand, the U.S. Court of Claims rejected the Navy's argument that SECNAVINST 1730.8 was irrelevant "simply because plaintiff failed to request such relief." Carmichael v. U.S., 66 Fed. Cl. 115, 125 (Fed. Cl. 2005). On the contrary, the court held that religious accommodation principles apply "**irrespective of whether the member specifically requested such an accommodation.**" *Id.* (emphasis added).

C. The Department of the Navy Policy to Accommodate Religious Practices Whenever Possible Was Violated in This Case.

DODI 1300.17 states that "[t]he DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions or to observe no religion at all." *Id.* at 2. Along the same lines, SECNAVINST 1730.8B states that the Department of the Navy will "mak[e] every effort to accommodate religious practices absent a compelling operational reason to the contrary." *Id.* at 1.

Viewed correctly, then, any analysis of the legality of the order for Sterling to remove her signs from her workspace necessarily entails an examination of the rules and policies set

forth by DODI 1300.17 and SECNAVINST 1730.8B. Indeed, both the Department of Defense and the Department of the Navy have made it abundantly clear how the chain of command should treat service members engaged in religious exercise. SECNAVINST 1730.8B states that "[t]he guidelines in this instruction **shall** be used in the exercise of command discretion concerning the accommodation of religious practices." *Id.* at 2 (emphasis added). If Sterling's chain of command violated those basic rules, then the order to Sterling to remove her signs could not have been a lawful one.

1. Sterling's Staff Sergeant Impermissibly Failed to Involve Her Commanding Officer in the Decision to Order Sterling to Remove Her Signs.

SECNAVINST 1730.8B requires that religious accommodation responsibilities, first and foremost, "rest[] entirely with the commanding officer." *Id.* at 2. The IG Report states that "[c]ommanding officers" are the first line in making decisions about religious expression, and that they are to be assisted in their decisions "based on the guidance of chaplains, noncommissioned officers, legal officers, or Equal Opportunity office staff." IG Report at 6. Indeed, the IG Report notes that in order to comply with Section 533, it is "required [that] military commanders ... balance the needs of individual service members against the necessity of mission accomplishment." IG Report at 9. Additionally, SECNAVINST 1730.8B requires training for command personnel, stating that "[t]he CNO and CMC shall

incorporate relevant materials on ... policies [and] this instruction ... in curriculum for command, judge advocate, chaplain and similar courses of instruction and orientation." *Id.* at 8.

Although requiring decisions be made at the command level, the IG Report notes that such matters unfortunately "were frequently delegated to the lowest level of authority," and that many of these persons "were unaware of updated Service guidance regarding religious accommodations" and "unaware of regulation changes." IG Report at 19, 21. That was certainly the case here. It does not appear that Sterling's commanding officer was involved in any way in the decision to order her to remove her signs. *See* 2015 CCA LEXIS 65, *3. In this case, it was Staff Sergeant ("SSgt") Alexander who observed Sterling's religious signs, and it was SSgt Alexander — not her commanding officer — who twice ordered Sterling to remove them. *Id.* Both times, likely unknowingly, Sterling's Ssgt acted in violation of the Navy's procedures governing religious accommodations.

2. The USMC Violated Policy in Failing to Consult a Military Chaplain With Respect to Sterling's Religious Exercise.

Sterling's chain of command also violated DOD and Department of Navy policy by failing to consult with a military chaplain about Sterling's religious exercise. SECNAVINST 1730.8B states that "[t]he Chaplain Corps' capabilities are critical to the

commander's ability to successfully meet the requirement for the free exercise of religion set forth in the U.S. Constitution." *Id.* at 1. Indeed, DOD recognizes that "Chaplains are the Navy's only trained professional religious accommodators." *Id.* DOD Directive 1304.19 explains that chaplains exist to (i) "advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution;" (ii) "assist commanders in managing Religious Affairs;" and (iii) "serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations." *Id.* at 2.

The IG Report states that "[m]ilitary chaplains assist commanders at all levels of command by giving advice ... and assisting with request processing." IG Report at 3. The IG Report continues that "[c]haplains ... facilitate the expression of rights of conscience or religious beliefs...." IG Report at 6.

It is readily apparent that commanders are to consult military chaplains on matters of religious accommodation, because chaplains are the only persons who possess the training and expertise to ensure that First Amendment and Section 533 rights are protected, and that DOD and Department of the Navy policy and guidelines are followed. Indeed, no military chaplain would have

sanctioned the crude order in this case to "'take that S-H-I-T off your desk or remove it or take it down.'" Pet. at 5.

3. Even if Sterling Was Properly Ordered to Remove Her Signs, Her Chain of Command Should Have Sought Alternative Means for Her Religious Exercise.

DODI 1300.17 requires that in making determinations about religious exercise, "military commanders should consider ... [a]lternative means available to meet the requested accommodation." *Id.* at 7. Similarly, SECNAVINST 1730.8B requires that when religious accommodation is "precluded by military necessity, commanders should seek reasonable alternatives." *Id.* at 8. No alternatives whatsoever were considered in this case. No one ever offered Sterling an alternative way to engage in her religious activity.[5] On the contrary, the order to Sterling was unequivocal. *See* Pet. at 5.

As the NMCCA noted, "the military judge ruled: 'the orders were given because the workspace in which the accused placed the signs was shared by at least one other person...." *Id.* at 11-12. If that were so,[6] Sterling simply could have been instructed to remove the signs when she was not on duty or when not using the desk, so that they would not be visible to the other Marine who allegedly shared her desk.

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[5] *See* Brief on Behalf of Appellant (Dec. 14, 2015), p. 12.

[6] *See* Petition at 5 ("Sterling testified ... that she did not share a desk with anyone else in May 2013....")

The trial court also claimed that "'other service members come to [the] accused's workspace for assistance at which time they could have seen the signs.'" 2015 CCA LEXIS 65, *12. There was never any evidence of this actually occurring (*see* Pet. at 7), but even if it were true that other Marines could see Sterling's signs, there were alternatives that should have been considered. For example, Sterling could have oriented the signs or placed an obstruction in a way that only she could see the signs, printed them in a font small enough that others could not read them, *etc*.[7]

Simply, there was no effort made by Sterling's chain of command to limit the scope of the order so that "good order and discipline" could be maintained while at the same time preserving Sterling's religious exercise to the maximum extent possible.

II. THE NMCCA IMPERMISSIBLY AFFIRMED THE ORDER AGAINST STERLING BECAUSE HER CONDUCT WAS RELIGIOUSLY BASED.

A. The Government May Not Discriminate Against Conduct Because It Is Undertaken for Religious Reasons.

As discussed in Section III below, the NMCCA erroneously claimed that for a religious exercise to be "rooted in religion," the Free Exercise guarantee "requires the practice be 'part of a system of religious belief.'" Sterling at *14. As Petitioner ably argues, this is an erroneous statement of law. *See* Pet. at

[7] Indeed, Sterling testified that the signs "were 'only for [her]' and not intended to 'send a message to anyone but' herself." Pet. at 4.

10-17. As authority for its claim, the NMCCA cites 42 U.S.C. Section 2000cc-5(7)(A), which actually states exactly the opposite: that "'religious exercise' includes **any** exercise of religion, **whether or not** compelled by, or central to, a system of religious belief." *Id.* (emphasis added).

As the Supreme Court ruled in Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) ("Babalu"):

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct **because it is undertaken for religious reasons**. [*Id.* at 532 (emphasis added).]

Even putting aside whether Sterling's conduct was "'part of a system of religious belief," there is no doubt that it was "conduct ... undertaken for religious reasons." *See* NMCCA Op. at *14. Indeed, the NMCCA found that Sterling "taped a biblical quotation in three places around her workstation, organized in a fashion to 'represent the trinity.'" *Id.* at *14.

The principal First Amendment question, then, is whether the NMCCA sanctioned the order to Sterling **because** her signs were religious in nature. The answer is "yes."

Indeed, the NMCCA observed that the trial court had found only that the signs "could easily be seen as contrary to good order and discipline," but failed to explain why that was so. *Id.* at *16. The NMCCA noted that the judge's "meager findings of fact fail to illuminate" his reasons for this finding. *Id.* at

16. Thus, the only place to seek out the justification for the orders is the NMCCA's opinion, which revealed the sparse basis for its decision when it noted that "we are able to glean from the record sufficient information to affirm...." *Id.* at 17.

The NMCCA justified the order to Sterling on two grounds. *Id.* at 17, 18. The first reason the NMCCA gave, however, is exactly what Babalu prohibits — justifying the order to Sterling **because** her conduct was religious in nature. That illegitimate justification pervades the Court's opinion, and requires reversal.

B. The NMCCA Justified the Order to Sterling Solely Because The Signs Were Religious.

First, the NMCCA noted that "the signs [sic] verbiage was biblical in nature." *Id.* at 17. Second, the NMCCA claimed that "the desk was shared with another Marine, and the signs were visible to other Marines who came to the ... desk for assistance." *Id.* Third, the NMCCA claimed that "other Marines coming to the desk for assistance **would be exposed to biblical quotations** in the military workplace." *Id* (emphasis added). Fourth, the NMCCA concluded, this viewing of religious words "may result [in a] divisive impact to good order and discipline ... when a service member is compelled to work at a government desk

festooned with religious quotations, especially if that service member does not share that religion."[8] *Id.*

Conspicuously, the NMCCA did not address the content of Sterling's signs, other than to say that the "verbiage was biblical." *Id.* at 17. Only in its second justification did the NMCCA address the content of the signs, claiming it was subversive ("combative"). *Id.* at 18. In its first justification, the NMCCA did not care what the content of the signs was — only expressing concern that the signs were religious in nature, indicating that it would not have mattered to the court if, for example, the signs had said "Jesus loves you."

The NMCCA did not rely on the signs' content as the threat to good order and discipline, but only the fact that the language was derived from the Holy Bible. One can infer from the court's analysis, then, that the basis for its upholding of the order was the religious — Biblical — nature of the signs. Thus, the NMCCA unconstitutionally justified the order to remove the signs "**because** [the signs were posted] **for religious reasons**." *See* Babalu at 532.

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[8] It would be hard to imagine that the NMCCA would find a Star Wars poster with the Jedi slogan "may the Force be with you" to be offensive to other Marines who might view it, even though that too apparently is religious in nature. *See* IG Report at 2. But if Star Wars posters are permissible, then perhaps it was not just the general religious-ness of Sterling's signs which caused the NMCCA's angst, but the fact that Sterling's signs conveyed a Christian message in particular.

Summing up, it appears that the action taken against Sterling "target[ed] [her] religious beliefs," which as the Supreme Court stated in Babalu "is never permissible." *Id.* at 533. Although the concern for "good order and discipline" is facially neutral, "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt." *Id.* at 534. This case, like Babalu, "compels the conclusion that suppression" of Sterling's religious beliefs and practices was the object of the action taken against her. *Id.*

III. EVEN IF STERLING'S BELIEFS WERE NOT "ROOTED IN RELIGION," THEY WERE STILL PROTECTED BY LAW.

The NMCCA appeared to believe that the only issue in this case was whether RFRA applied, noting that "'[o]nly **beliefs rooted in religion** are protected by the Free Exercise Clause....'" 2015 CCA LEXIS 65, at *14 *citing* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981). Based on that premise, the NMCCA rejected Sterling's claim because "[w]hile her explanation at trial may invoke religion, there is no evidence that posting signs at her workstation was an 'exercise' of ... religion." *Id.* at 14.[9]

[9] It is important to recall what Sterling did — posting a quotation derived from a Bible verse at her workstation. As her Petition noted, "[i]f this conduct is not 'part of a system of religious belief,' it is hard to imagine what is." Pet. at 20. Indeed, if the Armed Forces now considers "Jedis" to be a "faith group" (IG Report at 2), surely Bible verses still count too.

A. The Order to Sterling Violated Section 533 of the NDAA of 2013.

Even assuming, *arguendo*, that religious beliefs are the only sort of beliefs protected by the Free Exercise Clause, and even assuming that Sterling's actions were not based on religious beliefs, those are not the only sort of beliefs protected by law. Indeed, Section 533 of the NDAA of 2013 mandated that "the Armed Forces shall accommodate [the] beliefs of a member of the armed forces **reflecting** the ... **conscience**, **moral principles**, **or religious beliefs** of the member." 10 USCS prec § 1030 (Protection of Rights of Conscience of Members of the Armed Forces and Chaplains of Such Members) (emphasis added). The updated DODI 1300.17, effective January 22, 2014, was issued "implementing the protections afforded by Section 533" (IG Report at 10), and Section 4.b states that "the Military Departments will accommodate individual expressions of sincerely held beliefs (**conscience**, **moral principles**, **or religious beliefs**) of Service members in accordance with the policies and procedures in this instruction." *Id.* (emphasis added). Additionally, the IG Report notes that these categories "encompass[] traditional religious groups ... and groups with **nonreligious** systems of belief...." IG Report at 2-3 (emphasis added). Thus, even if the NMCCA did not believe that Sterling's beliefs were "rooted in religion," they were still protected by law and by Navy policy.

B. If Sterling's Religious Exercise Were Considered As Simply "Acting Out," Then DODI 1325.06 Was Violated.

The NMCCA and the military judge clearly believed that Sterling's posting of her signs was a rebellious act designed to antagonize her superiors, rather than a legitimate exercise rooted in religious beliefs. The military judge decided that "'although ... biblical in nature [the signs] could easily be seen as contrary to good order and discipline.'" 2015 CCA LEXIS 65, *12.[10] The NMCCA filled in the gaps between these "meager findings of fact" — "[t]he implication is clear — the junior Marine sharing the desk and the other Marines coming to the desk for assistance would be exposed to biblical quotations in the military workplace." 2015 CCA LEXIS 65, *17. But that concern is no justification for the actions taken against Sterling.

The NMCCA believed that simply viewing some words on a piece of paper may have a "divisive impact to good order and discipline ... when a service member is compelled to work at a government desk festooned with religious quotations, especially if that

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[10] Of course, there are a whole host of Bible verses that Sterling could have posted at her desk, and that the military may not have liked:

- "But if thou shalt indeed obey his voice, and do all that I speak; then I will be an enemy unto thine enemies, and an adversary unto thine adversaries." Exodus 23:22
- "Thou shalt not kill." Exodus 20:13
- "but whosoever shall smite thee on thy right cheek, turn to him the other also." Matthew 5:39

There are numerous Scriptural passages, taken either in or out of context, that might not be aligned with the military's goals in a particular situation.

service member does not share that religion." *Id.* Then the NMCCA tried to bootstrap its action against religious belief by invoking Sterling's behavior:

> **While locked in an antagonistic relationship** with her superiors — a relationship surely visible to other Marines in the unit — placing visual reminders at her shared workspace that 'no weapon formed against me shall prosper' could certainly undercut good order and discipline. **When considered in context**, we find that the verbiage in these signs **could be interpreted as combative**. [*Id.* (emphasis added).]

Even if that were the case — that Sterling was acting out — and her posting was not religious in nature, but simply some other form of expression, then her chain of command should have been governed by Department of Defense Instruction 1325.06, "Handling Dissident and Protest Activities Among Members of the Armed Forces." DODI 1325.06 states that "[a] Service member's right of expression should be preserved to the maximum extent possible...." *Id.* at 1. Thus, the presumption is that expression is to be permitted unless there is a compelling reason to stop it. DODI 1325.06 states that for "on-post demonstrations and similar activities," a commander can prohibit activities that could either "(1) Result in interference with or prevention of orderly accomplishment of the mission of the installation or facility; or (2) Present a clear danger to the loyalty, discipline, or morale of the troops." *Id.* at 8.

In this case, no one has even alleged the first ground for prohibition — that the mission at Sterling's facility was

interfered with or not carried out because she posted a Bible verse at her desk. Even if Marines were not able to obtain their access cards and visitors may not have been getting their parking passes, that concern related to other issues — such as Sterling's refusal of orders to work (*see* Sterling, *8-*9) — which have nothing to do with Sterling's Biblical signs.

This case, then, could be said to involve the second ground for prohibition, whether Sterling's posting of her signs "[p]resent[s] a **clear danger** to the loyalty, discipline, or morale of the troops." However, the predicate for that prong was never established in this case, where the military judge alleged that Sterling's behavior "**could**" counter good order and discipline, and the NMCCA stated that the signs "**could be** interpreted as combative" and that a "divisive impact ... **may** result." Sterling at *17 (emphasis added). The Petition noted that this "string of hypotheses ... does not support a determination of a valid military purpose." Pet. at 22-23. But neither do such "speculative conclusion[s]" (Pet. at 22) amount to a "clear danger." "Clear" means "free from doubt; sure." Black's Law Dictionary, Eighth Edition, Thompson-West, 2004. At most, the action against Sterling was based on a theory about what "**could** have happened" — that was a wholly insufficient basis for the NMCCA's decision.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on December 28, 2015, and that a copy of the foregoing was transmitted electronically via email to counsel for the parties on December 28, 2015.

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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 5,504 words.

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