No. 12-307

In the Supreme Court of the United States

UNITED STATES,
Petitioner
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, ET AL., IN SUPPORT OF THE BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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INTEREST OF AMICI[1]

The *amici curiae* are primarily religious organizations that serve as official representatives of their faith groups to certify chaplains for service in the U.S. Armed Forces. This function, known as "endorsement," is required by the Armed Forces as a prerequisite to accepting a chaplain for service in the military. The endorser *amici* endorse more than 2,250 military chaplains serving on Active Duty or in the Reserve Component—well over one-third of the military's chaplains. The endorser *amici* represent faith groups that have more than 29,600,000 members and more than 68,000 churches. Each endorser *amici* maintains an active relationship with the military and with its endorsed chaplains through an endorsing agent. Almost all of *amici*'s endorsing agents are military veterans, most of whom served as chaplains. Thus, *amici* not only have an official and ongoing relationship with the Armed Forces and its chaplaincy, they are largely represented by individuals who have served in the military. *Amici* bring that wealth of experience to bear in this brief and speak as representatives of the military chaplains who could be harmed by the Court's ruling in this case.

The endorser *amici* are: North American Mission Board Chaplaincy Services (which is the military's largest single endorser), Presbyterian and Reformed Commission on Chaplains and Military Per-

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[1]No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel financially contributed to the preparation or submission of this brief. All parties consented to the filing of this brief; the letters of consent are attached to this brief.

sonnel, Lutheran Church-Missouri Synod Ministry to the Armed Forces, Military Chaplain Commission of the Evangelical Church Alliance, Chaplaincy of Full Gospel Churches, Chaplain Commission of the American Counsel of Christian Churches, and the endorsing agencies of the Anglican Church in North America, Conservative Baptists of America, Associated Gospel Churches, Evangelical Free Church of America, Christian and Missionary Alliance, International Church of the Foursquare Gospel, General Association of Regular Baptist Churches, Grace Churches International, Baptist Bible Fellowship International, Plymouth Brethren, Church of God of Prophecy, Fellowship of Grace Brethren Churches, Christian Communion International, Conservative Congregational Christian Conference, and Episcopal Missionary Church.

The lead *amicus*, the Chaplain Alliance for Religious Liberty ("CALL"), is an association of endorsing agencies that works to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. CALL has over 25 endorsing agency members, many of whom are signatories to this brief. CALL's leadership served for decades in the military, generally as chaplains, and all of the leadership still serve as endorsing agents for their faith groups.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since before our Nation's founding, the military chaplaincy has existed for a single purpose: providing for the free exercise of faith for all service

members and their families. As the official endorsing agents for their faith groups' military chaplains, *amici* have a similar, and similarly singular, purpose for this brief: protecting military religious liberty.

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, 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 that history of accommodation is now facing the threat of being replaced by a constitutional mandate requiring many service members and chaplains to serve God *or* country. If this Court accepts the United States' and Windsor's view that the Constitution mandates that Federal Government recognize same-sex marriage or accord sexual orientation heightened scrutiny, that view will quickly work drastic change to military policy. And the close relationship between the military and service members means that service members' individual liberties are particularly sensitive to military policies. Combining that sensitivity with the institutional diminution of

service members' religious liberties, it is very likely that service members who hold traditional religious beliefs on marriage and family will face, for the first time, military policies and duties that sharply hostile to their beliefs.

This unprecedented conflict would likely take place most quickly and clearly in the chaplaincy, the military institution that exists to protect military religious liberty. Crucially, the conflict for chaplains would not concern *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, if military policy becomes directly antithetical to their beliefs on the fundamental issues of marriage and family, chaplains will find their hands tied as to how they can serve. On a wide variety of issues, including some that are very important to military families, it seems likely that military policy would directly conflict with a chaplain's responsibility to provide the full spectrum of religious counsel.

Put in stark terms, if laws affirming marriage as the union of one man and one woman are invalidated as irrational and unconstitutional, then service members and chaplains belonging to and espousing the views of faith groups that support traditional marriage would not only be marginalized, but also would be forced to choose between their duty to obey

God and their chosen vocation of serving their country.

Many of the *amici* raised similar concerns when our Nation considered repeal of 10 U.S.C. § 654, the law popularly known as Don't Ask, Don't Tell. While Congress and the President ultimately determined to repeal the law, they did so in a way that declined to raise sexual orientation to a protected class and respected the definition of marriage in Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"). Further, at the urging of *amici* and others, Congress passed a law to help protect military religious liberty post-repeal. But if this Court strikes down DOMA via the changes to our constitutional law that the United States and Windsor request, that will not only sweep aside the carefully calibrated efforts to balance religious liberty with competing interests, it will also intrude into the lives and lived convictions of our Nation's religious service members. We respectfully submit that this Court should refrain from making such a change.

ARGUMENT

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 threat that a judicial declaration of DOMA's unconstitutionality poses 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 this Court has explained, "the military is, by necessity, a specialized society separate from civilian society." *Goldman* v. *Weinberger*, 475 U.S. 503, 506-07 (1986) (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)). 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 espirit de corps." *Goldman*, 475 U.S. at 507 (internal citations and quotation marks omitted). 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.'" *Id.* (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953)).

This military emphasis on service over self and on its vital mission create 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. *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"). 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." Tuttle, *supra*, at 119.

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

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. *Goldman*, 475 U.S. at 507, 509-10. Accordingly, judicial "review of military regulations challenged on First Amendment grounds is *far more deferential* than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507 (emphasis added); *see also id.* (courts considering "a particular restriction on religiously motivated conduct" must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."). Thus, in *Goldman*, this 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. *Id.* at 510 (holding

superseded in part by Congressional revision of the regulations, 10 U.S.C. § 774).

In sum, the military's unique mission and its unique relationship with service members justify some significant restrictions on even our Nation's most fundamental freedoms.

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. *Adair* v. *England*, 183 F. Supp. 2d 31, 51 (D.D.C. 2002) ("making religion available to soldiers qualifie[s] as a crucial imperative"). And our nation has admirably addressed this imperative since before its birth via the establishment of the chaplaincy, a diverse and pluralistic body of officers. *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).

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 in-

fringe service members' rights secured under the Religion Clauses of the First Amendment. *Katcoff*, 755 F.2d at 234. "Unless the [military] provided a chaplaincy it would deprive the [service member] of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion." *Id.*

Chaplains, though, are not generic "religious" officers, but rather representatives of specific faith groups. *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); *accord* Army Regulation 165-1, Army Chaplain Corps Activities ("Army Reg. 165-1") at § 4-3(a) ("Army chaplains have a dual role as religious leaders and staff officers."). This is necessary to ensure that service members of specific faith groups have chaplains from those specific faith groups to meet their religious needs. *Katcoff*, 755 F.2d at 232. But though the military must obtain chaplains to serve the 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. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring) (rejecting an argument that "civil court[s]" should "make . . . judgment[s] about church doctrine" and the importance of religious beliefs); *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)); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (government may not become entangled in matters touching upon "questions . . . of faith, or ecclesiastical rule, custom, or law").

Thus, the military must rely upon each specific faith group, through organizations like the *amici*'s, to endorse particular chaplains to act as its representative to the members of that faith group serving in the Armed Forces.[2] If a chaplain ever ceases to faithfully represent his religious organization, the organization can rescind their endorsement, at which point he ceases to be a chaplain and must generally be separated from the military.[3]

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

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[2]*See* DOD Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments ("DOD Instruction 1304.28"), establishes the process that allows religious organizations to provide chaplains to meet the religious needs of their members:

> **Endorsement**. The internal process that religious organizations use when designating RMPs [Religious Ministry Professionals] *to represent their religious organizations to the Military Departments* and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context.

Enclosure 2, § E2.1.7 (emphasis added).

[3]*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).

group's beliefs.[4] Thus, 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. *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239 (section entitled "[p]rotection of rights of conscience of members of the Armed Forces and chaplains of such members.").

II. If this Court upholds the decision below, service members who adhere to traditional religious beliefs on marriage and family will likely be penalized and marginalized, and the chaplaincy's efforts to protect religious liberty will face severe conflicts.

Our Nation's effort to accommodate service members' religious needs has been remarkably successful and "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (praising the State's efforts to accommodate, and thus respect, the "spiritual needs" of citizens). But a judicial overruling

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[4] *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.").

of DOMA based on a broad constitutional sanction of either same-sex marriage or sexual orientation as a suspect class threatens to upset this history of accommodation. If, for instance, 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 will likely be forced to abandon either their faiths or their careers.[5] Similarly, chaplains who represent *amici*'s 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. Short of a constitutional amendment, there likely would be little that either the military or Congress could do after the fact to remedy the loss of religious liberty.

As this Court has recognized, 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 even condemning) conduct understood as immoral. *See Emp't. Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990). Engaging in such conduct is often a religious duty, one that particularly extends to protecting the institution of marriage and the family. Under the traditional religious view, sex is permissible only within the context of marriage, and marriage exists only between a man

[5] *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."

and a woman. *See*, *e.g.*, *Genesis* 2:24, *Matthew* 19:5, *1 Corinthians* 6:16. This Court has both recognized and affirmed that view as "the sure foundation of all that is stable and noble in our civilization." *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"). Over one hundred religious leaders, including those from *amici*'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."[6]

Thus, service members who share *amici*'s beliefs and chaplains who represent those beliefs must both live and share 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 the *amici*. But to adhere to their duty to God may, if this Court accepts the United States' and Windsor's arguments, jeopardize their continued service in the military.

While the cause of this jeopardy is discussed in detail in the amicus briefs of The Becket Fund for Re-

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

ligious Liberty and of Catholic Answers, it is fairly simple to explain here: the military has no tolerance for racists, so service members who are openly racist are not service members for long.[7] And if the 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 be forced out of the military.

This dynamic will exist in the civilian world, especially among government employees, but it will play out with particular force in the military. *Goldman*, 475 U.S. at 507 (noting that the military is a world "without counterpart in civilian life," where obedience to unity and mission must be "instinctive"). Protecting its unique mission allows the military to exercise its "considered professional judgment" in determining what policies must be subject to immediate and unwavering compliance. *Id.* at 509. If this Court constitutionally mandates same-sex marriage or establishes sexual orientation as a suspect class, that determination will surely and quickly transform military policy. And if the First Amendment does not ensure that service members may deviate from policy on matters such as the wearing of small and unobtrusive religious garments, *id.* at 510, it seems unlikely that military policy changes based on this Court's interpretation of our Nation's fundamental law could be judicially flexed enough to accommodate dissenting religious believers.

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[7] *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).

A. Many service members' careers would likely be stifled and terminated.

The harm to military religious liberty will be felt in at least two broad ways. The first, as *amici*'s collective centuries of military experience instructs, would be the weeding out of service members who hold traditional 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.[8] If this Court declares irrational and impolitic traditional religious beliefs about marriage, that inquiry would, for the first time, prove toxic for many devoutly religious service members. Even if nothing directly negative was put into such Reports, the lack of the superlative commendations that are necessary for advancement would 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. *See* 10 U.S.C. § 632 (providing that, in most instances, an officer who twice fails to be selected for promotion must be discharged). Thus, traditional religious service members and chaplains would slowly find their promotion ceilings decreasing, their range of service possibilities shrinking, and their careers ending. By

[8] *See* 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.

contrast, service members and chaplains who accept the new constitutional orthodoxy would likely be viewed as "team players" with upward potential, leaving behind those whose faith prevents them from falling in line.

B. Service members and, more often, chaplains would face direct conflicts between military duties and religious conviction.

The second form of negative pressure on religious would 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. *See* 10 U.S.C. § 1789. Thus, for instance, the Army chaplaincy provides, with the full support of commanding officers, a marriage enrichment program known as Strong Bonds.[9] 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

[9] *See* Army Strong Bonds Home Page, *available at* http://www.strongbonds.org/skins/strongbonds/home.aspx (last visited Jan. 24, 2013).

beliefs.[10] But that would almost certainly have to change if this Court accepts the United States' and Windsor's invitation to constitutionalize their view of marriage. If marriage programs like Strong Bonds are bluntly restructured based on a broad constitutional mandate to treat same-sex unions as the equivalent of marriages, chaplains and commanding officers from *amici*'s faith groups who personally administer the programs would face a direct conflict with their faith.

This conflict illustrates a chaplain's complete willingness to serve whomever needs care, but not however the military demands. *Amici*'s chaplains 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.[11] If the constitution is interpreted to mandate same-sex marriage,

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[10]*See* 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).

[11]*See*, *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).

though, the military will probably be required to do the same with its marriage enrichment programs, with a likely result of forcing *amici*'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 would 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.[12] Chaplains may be punished for declining to privately counsel same-sex couples on certain matters relating to a couple's relationship[13] or for counseling them according to their faith group's traditional religious beliefs on marriage.[14] Chaplains with traditional reli-

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[12]*See 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).

[13]*See 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).

[14]*See* 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-

gious beliefs who, as is commonplace now, are 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 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.[15] Currently, such a restriction would violate not only the chaplains' free exercise and free speech rights guaranteed by a plethora of constitutional, statutory, and regulatory provisions, but also—and more importantly—the religious liberty rights of the service members to whom the chaplain was preaching. Yet after a sea change as fundamen-

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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).

[15]In *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.

tal as the constitutional redefinition of marriage, it is unclear whether those protections for religious liberty could trump what would be seen as the legal equivalent of racism.[16]

Each of these direct conflicts injure not only chaplains, but also—and more importantly—those whom they serve. 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. *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."). And service members, locked in a close relationship with the

[16]Notably, 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.

government that features diminished First Amendment protections, *see Goldman*, 475 U.S. at 507, would have little effective recourse to restore their ability to both live their faith and serve their county.

This broad harm to military religious liberty is emphatically a feature of the United States' and Windsor's effort to constitutionalize their view of marriage and family. By contrast, when *amici*, along with numerous veteran chaplains and many other endorsing organizations, raised similar religious liberty concerns during the debate about repealing 10 U.S.C. § 654,[17] 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.[18] Second, Congress passed a statute ensuring that religious liberty must

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[17]*See* 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).

[18]*See*, *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 (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").

be protected and accommodated in the post-repeal military. *See* National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239. But if this Court strikes DOMA on constitutional grounds, not only would such compromise measures likely be lost, so also would that whole capacity for democratically derived protection of religious liberty in this area of the law.

CONCLUSION

Replacing the only definition of marriage that federal law has ever known with a broad judicial declaration that the Constitution mandates a contrary definition will have jarring results on the military. One of the first casualties will likely be service members' and chaplains' religious liberty. *Amici* believe that the best way to protect religious liberty—and avoid the distinct risk that the religious beliefs of many of our service members might become the equivalent of invidious discrimination—is simply to retain DOMA. But if repeal must ever take place, it should come via Congress, which, unlike the judiciary, can structure the repeal in a way that is responsive to the religious liberties of service members and chaplains. *Amici* urge this Court to avoid jeopardizing the constitutional rights of the men and women who have given their liberty, and are willing to give their lives, to protect their fellow citizens' constitutional rights.

For the foregoing reasons, *amici* respectfully request that this Court reverse the Second Circuit's decision and uphold DOMA's constitutionality.

Respectfully submitted.

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