Docket No 07–3113

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term 2008

SIDD FINCH,

Petitioner,

v.

MAXWELL KLINGER,
SECRETARY OF THE ARMY, et al.

***Respondent*.**

ON WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

ATTORNEYS FOR RESPONDENT

Sarah Donini (Issue 1; whether the anti-proselytizing regulation violated Petitioner's constitutional or RFRA rights)
Benjamin Greiving (Issue 2; whether the regulation of Petitioner's sermons violated his constitutional or RFRA rights)

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1. To what extent does the First Amendment or the Religious Freedom Restoration Act affect the armed services in regulating the proselytizing conduct of military chaplains?
2. To what extent does the First Amendment or the Religious Freedom Restoration Act affect the armed services in regulating the content of a military chaplain's worship services?

OPINIONS BELOW

The decision of the Court of Appeals for the Thirteenth Circuit affirming the decision of the United States District Court for the District of Woodbury is available at *Finch v. Klinger*, No 07–3113 (13th Cir. 2007). The bench order of the District Court denying Petitioner's requests for injunctive and declaratory relief is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered in 2007, and this Court granted certiorari in 2007. This Court has jurisdiction under 28 U.S.C. § 1331 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I.

The Religious Freedom Restoration Act provides in pertinent part that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless such a burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2006).

STATEMENT OF THE FACTS

Deployed far from home, assigned to patrol the "Bridge of No Return" separating North and South Korea, Private First Class B.J. Hunnicut was losing hope. *Finch v. Klinger*, No 07–3113 Slip. Op. at 3 (13th Cir. 2007). Isolated from other units, faced with constant fear and a long deployment, Hunnicut felt his world and his marriage back home slipping away from him. *Id*. at 2, 3. Needing somewhere to turn for advice, he approached the unit's only chaplain, whose duties included personal counseling. *Id*. at 2, 3. Instead of the "friendly advice" he was seeking, Hunnicut felt uncomfortable when Chaplain Finch prayed for Hunnicut to "find Jesus" and for "the Lord [to] heal [Hunnicut's] marriage through his saving grace." *Id*. at 3. Hunnicut was so upset by Chaplain Finch's behavior he consulted with his Platoon Sergeant the very next day. *Id*.

Platoon Sergeant O'Reilly was concerned, and related the incident to Finch's supervisor, Brigade Chaplain and Roman Catholic priest Patrick Mulcahy. *Id*. at 2, 3. Chaplain Mulcahy's investigation found that Finch often ended informal "counseling sessions," where he invited soldiers for a monthly haircut or to play XBOX, with prayers "calling for non-Protestants to be 'saved' or 'healed.'" *Id*. at 3. In response, Chaplain Mulcahy instructed Finch to stop this "'unauthorized proselytizing' and 'taking advantage of a soldier who is lower in rank.'" *Id*. In blatant disregard for his superior's request, Finch refused to stop proselytizing, and was issued a Non-Punitive Letter of Reprimand citing AR 165-1, 4-4(b)(1)(1), which prohibits chaplains from proselytizing. *Id*. at 3, 4. The Regulation in question sought to avoid instances of exploitation of lower ranked officers and to avoid undue influence. *Id*. at 3, 4. Finch violated the regulation, and was reprimanded for threatening "the good order, discipline and readiness" of his unit. *Id*. at 4.

Almost immediately, the Brigade Commander received correspondence from the Military Religious Liberties Foundation reporting complaints by soldiers that Chaplain Finch was

"spreading anti-Catholic propaganda." *Id*. In his sermons Finch preached the doctrine of "*sola scriptura*," the belief that "the Bible alone is the primary authority for Christian doctrine," and also made several comments implying the general "moral laxity" of Catholic priests. *Id*. Chaplain Mulcahy found that Finch had made "specific, derogatory references to basic beliefs of Catholicism" and requested that Finch present his beliefs without "being divisive and destroying the reputations of other faiths." *Id*. at 4, 5. However, Finch refused to adhere to his superior's request. *Id*. at 5. Finch's superior officer, Colonel Potter, found that the derogatory sermons violated Article 134 of the Uniform Code of Military Justice, because they "threaten[ed] good order, discipline, and unit readiness . . . and [brought] discredit on the U.S. Army . . . ." *Id*.

Based on these multiple incidents, Chaplain Finch was relocated to Seoul to work in a Family Services Center. *Id*. Chaplain Finch instigated this action in the United States District Court for the District of Woodbury seeking injunctive relief to restore him to his previous pastoral duties and to expunge the non-punitive Letter of Reprimand from his record. *Id*. Finch also sought a declaration by the Court that both the anti-proselytizing regulation and the Army's regulation of his sermons violated his rights under the First Amendment and the Religious Freedom Restoration Act ("RFRA"). *Id*. The District Court denied Finch's claims and the Court of Appeals for the Thirteenth Circuit affirmed. *Id*.

SUMMARY OF THE ARGUMENT

I. The Army's anti-proselytizing regulation is constitutional, and was rightfully applied to Petitioner here. The regulation does not violate Petitioner's Free Exercise right, nor does it violate any standard set forth in RFRA, nor does it violate the Establishment Clause.

The Army regulation is both written and applied neutrally, and applies to any proselytizing behavior. Therefore, it does not target any specific religious viewpoint. The anti-

proselytizing regulation does not infringe on Petitioner's right to freely exercise his religion. It only furthers the Army's compelling interest of protecting soldiers against pressure and exploitation by overzealous chaplains.

Furthermore, the anti-proselytizing regulation does not violate the standard set forth in RFRA. First of all, because the military is separate from civilian society, the language of RFRA does not apply to the Army here. However, even if the Army must show a compelling interest under the RFRA analysis, clearly the goal of ensuring military readiness justifies the regulation.

Finally, Petitioner's Establishment Clause claim must also be dismissed. Because military service may inevitably restrict the free exercise rights of soldiers, the military chaplaincy is an accommodation of those religious rights. Therefore, the anti-proselytizing regulation sets an outer boundary for chaplains, and is applied neutrally to all religions. The regulation is necessary to ensure that chaplains do not violate the Establishment clause. For all these reasons, the anti-proselytizing regulation is constitutional and Petitioner's claims should be dismissed.

II. The regulation of Petitioner's sermons does not violate the Free Exercise Clause. Article 134 is a neutral law of general applicability and was applied against Petitioner to further valid governmental interests. Furthermore, Petitioner's claim is not a "hybrid" constitutional claim that would require this Court to apply a stricter level of scrutiny, because Petitioner's Free Speech claim and his Free Exercise claim are dubious. Even if this Court applies strict scrutiny, the Army's regulation was constitutional: Petitioner's sermons posed a direct threat to the compelling governmental interests of unity and discipline and maintaining the accommodating role of the chaplaincy.

For similar reasons, Petitioner's RFRA claim fails. First, RFRA is not intended by its express language to apply to claims like Petitioner's. Even if RFRA does apply, the Army's

actions were lawful because they were the least restrictive means to achieve compelling governmental interests.

Petitioner's Free Speech rights were not violated by the Army's regulation. Because Petitioner is a government employee and his sermons were made in pursuance of his official duties, the restrictions on his speech were constitutional. Even if Petitioner's sermons were not made in the course of his official duties, the Army's strong interests in maintaining the role of the chaplaincy outweighed Petitioner's interests in speaking. Petitioner's speech is given less weight under this analysis because it was not on a matter of public concern and it affected close working relationships.

Finally, the Army's regulation of Petitioner's sermons was not an unconstitutional establishment of religion. Because the Army's restriction preserved the religiously pluralistic atmosphere of religion, it was applied neutrally with regards to religion and was therefore constitutional. Furthermore, the restriction of Petitioner's sermons prevented an Establishment Clause violation because the failure to regulate the sermons would have amounted to government endorsement of Petitioner's particular religious views.

ARGUMENT

I. Regulating the conduct of military chaplains is authorized and within the power of the armed forces.

The judgment of the Court of Appeals should be affirmed because both the Army's anti-proselytizing regulation and its regulation of Petitioner's sermons were constitutional acts. The Army's actions against Petitioner occurred in the context of the military's longstanding tradition of pluralistic camaraderie, which the chaplaincy was designed to foster and protect. Naval Commander William Wildhack provides an illustration of this admirable tradition from World War II. CDR William A. Wildhack III, *Navy Chaplains at the Crossroads: Navigating the*

Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection, 51 Naval L. Rev. 217, 218 (2005) (citation omitted). A Jewish rabbi, a Catholic priest, and two Protestant ministers—all Army chaplains—were onboard a transport when German torpedoes attacked the ship. *Id.* As the ship went down, the four chaplains worked among the wounded, calming them and handing out life jackets without regard to who belonged to which faith. *Id.* Since its inception, the chaplaincy's mission has been to effectively meet the religious needs of the military, a pluralistic society consisting of those belonging to numerous religious sects and denominations. *See Katcoff v. Marsh*, 755 F.2d 223, 226 (2d Cir. 1985). The two regulations the Army applied against Petitioner in this case are essential for chaplains to accomplish that mission.

Military chaplains, including Petitioner, are government agents who serve to accommodate the Free Exercise needs of the military population. Petitioner is fully aware of his accommodating role as a chaplain, as evidenced by a commitment he voluntarily signed stating that he would be "sensitive to religious pluralism" and that his job was to "provide for the free exercise of religion by military personnel . . . ." U.S. Army, Office of the Chief of Chaplains, Form #13 Statement of Understanding of Religious Pluralism in the U.S. Army ("Form 13"). Form 13 reflects the fine line the military walks between not violating the Establishment Clause while simultaneously accommodating the Free Exercise rights of military personnel. Given the chaplaincy's unique role, the Army's actions functioned to preserve the fine balance between the constitutional rights of the military personnel in Petitioner's unit and Petitioner's own individual rights, all within the bounds of the Establishment Clause.

Furthermore, the Army's actions in this case were necessary to the military's overarching mission. Under its powers granted in Article I, Section 8 of the United States Constitution,

Congress established the Army to "preserve[e] the peace and security, and provid[e] for the defense, of the United States . . . ." 10 U.S.C. § 3062(a) (2006). 10 U.S.C. § 3073 (2006) establishes the Army chaplaincy, and the Department of Defense explains that chaplains "will administer or arrange for rites and sacraments for military personnel . . . *according to the respective beliefs and conscientious practices of all concerned*." 32 C.F.R. § 510.1 (2007) (emphasis added).

The regulations that were applied against Petitioner serve at least two crucial interests the military must consider in completing its constitutional mission. First, both the anti-proselytizing regulation and the regulation of derogatory religious speech serve the interest of maintaining the delicate balance between not violating the Establishment Clause while accommodating soldiers' Free Exercise needs. Also relevant here are the military values of "instinctive obedience, unity, commitment, and esprit de corps," recognized by this Court in numerous cases, including *Goldman v. Weinberger*. 475 U.S. 503, 507 (1986). Due to the critical nature of the military's mission, and the seriousness of the interests at stake, this Court should give great deference to the decisions of the military commanders in this case. *Id*. Under any analysis, however, the Army's actions here are distinctly constitutional, and Petitioner's claims must be dismissed.

II. The Army's regulation prohibiting proselytizing by chaplains is constitutional and does not violate RFRA.

A. The anti-proselytizing regulation is a neutral law of general applicability, and does not violate the Free Exercise Clause.

The Supreme Court's prevailing analysis for First Amendment Free Exercise Clause challenges dictates the dismissal of Petitioner's claim. Following its ruling in *Employment Division v. Smith*, this Court has repeatedly held that neutral laws of general applicability which serve a legitimate government interest are presumptively valid, even if such a law places an incidental burden on the free exercise of religion. *Employment Division v. Smith*, 494 U.S. 872,

881 (1990); *see also Goldman*, 475 U.S. at 508. The Court of Appeals correctly applied the test promulgated in *Smith*, holding that the Army's anti-proselytizing regulation is constitutional because it is applied neutrally and serves a legitimate military interest. *Finch v. Klinger*, No 07–3113 at 7; *see Smith*, 494 U.S. at 880-881. Because the military is separate from the rest of society and serves a unique purpose, military decisions deserve substantial judicial deference. *Goldman*, 475 U.S. at 508.

Goldman, similar to this case, involved a Free Exercise claim against the United States Air Force. *Id*. at 504. As an Armed Forces employee, Goldman, a Jewish Rabbi who refused to remove his yarmulke indoors, violated an Air Force regulation requiring that no headgear be worn indoors except by armed security police. *Id*. at 505. Because Goldman refused to comply with the Air Force regulation, his superior recommended that his term of active duty should not be extended. *Id*. Goldman brought suit alleging the Air Force regulation violated his First Amendment right to freely exercise his religion. *Id*. The *Goldman* Court held that the military's goal of achieving unity and discipline outweighed any burden on Goldman's free exercise rights. *Id*. at 510. Here also the Army's imperative mission of ensuring safety, readiness, and the well-being of the soldiers clearly outweighs whatever incidental burden Petitioner feels.

Justice Rehnquist recognized in *Goldman* that judicial deference is at its greatest point when reviewing military decisions and regulations, and that "military regulations challenged on First Amendment grounds" receive much greater deference than their civilian counterparts. *Id*. at 507-508. The Court acknowledged that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id*. at 507. Just as the Air Force regulation in *Goldman* was held constitutional, this Court should give similar deference to the Army's anti-proselytizing regulation and its application to Petitioner.

Goldman illustrates the current state of the law as applied to Free Exercise challenges to military decisions. Applying this Court's analysis in *Employment Division v. Smith* also results in the dismissal of Petitioner's Free Exercise claim. The *Smith* test applies to a Free Exercise challenge if, as here, the challenged legislation is neutral and of general applicability. *Smith*, 494 U.S. at 878. *Smith* involved the dismissal of two employees of a private drug rehabilitation center. *Id*. at 874. Because they ingested peyote as part of a religious ritual at their Native American Church, they were fired for "work-related 'misconduct.'" *Id*. at 882-83. When they were denied unemployment compensation, they brought suit, alleging their constitutional right to free exercise has been violated. *Id*. at 874.

The United States Supreme Court dismissed the free exercise claim and upheld the state action. *Id*. at 890. Religious beliefs do not excuse compliance with an "otherwise valid law prohibiting conduct that the state is free to regulate." *Id*. at 879. Because the legislation was not aimed at any particular religion and was applied neutrally, it was not invalid because it had an incidental impact on an individual's religious practice. *Id*. at 885. Like the law in *Smith*, here the Army's anti-proselytizing regulation applies to all proselytizing, and does not target Petitioner's specific religious viewpoints. *Finch v. Klinger*, No 07–3113 at 4. Similarly, following *Smith*, the Army anti-proselytizing regulation here should be upheld. The *Smith* analysis applies to most First Amendment Free Exercise challenges, except in the rare case where legislation is aimed at a particular religion. *See Smith,* 494 U.S. at 878.

Clearly, the *Smith* rule would not apply to provisions aimed at a specific religious practice. *Id*. at 878. For example, Justice Scalia wrote that it would be unconstitutional to ban "bowing down before a golden calf." *Id*. at 878. Such a prohibition would seek to ban religious beliefs and would not be neutral, and so the *Smith* test would not apply. *See id*. at 878. Such a

situation arose in *Church of Lukumi Babalu Aye v. City of Hialeah*. 508 U.S. 520 (1993). There, the City enacted ordinances banning the slaughter of animals within city limits, but with numerous exceptions. *Id*. at 528. The Court held that the ordinances were not neutral, but were aimed specifically at the Santeria religious practice of ritual animal sacrifice. *Id*. at 532-533. Once the Court determined that the ordinances were unlike the neutrally applied law in *Smith*, they had to be justified by a compelling government interest and narrowly tailored to advance that interest. *Id*. at 532.

Here, the *Smith* test clearly applies to Army Regulation 165-1, 4-4(b)(1). The regulation prevents the exploitation of any and all soldiers, and thus is not aimed at a particular religion. Therefore, the Army regulation is unlike the Hialeah ordinance, which targeted a particular religious practice. The rule prohibits proselytizing by any chaplain regardless of viewpoint. Moreover, this is unlike Justice Scalia's "golden calf" example where a ban stems from disfavor of particular beliefs. In contrast, the Army regulation satisfies important military goals of unity and readiness, and is both viewpoint neutral and of general applicability.

Because it is both written and applied neutrally, the Army regulation in question resembles the legislation in *Smith*. As the Court of Appeals found, AR165-1, 4-4(b)(1) is a rule of general applicability, and is not aimed at a particular religion. As in *Smith*, where any violation of the statute was punishable regardless of motivation, the Army regulation also punishes all proselytizing, regardless of a particular religious motive. This is evidenced by the fact that Petitioner Finch was not reprimanded for the substantive content of his viewpoint, but for the unacceptable act of proselytizing itself. *Finch v. Klinger*, No 07–3113 at 4. Because the Army regulation here is a neutral, generally applied law that serves a legitimate government interest, this Court should apply the *Smith* test. Here, the Army has an important interest in

protecting the well-being of soldiers, as well as protecting a cohesive unified unit stationed abroad. The Army regulation is therefore unequivocally valid, regardless of the incidental effect it may have on Petitioner.

Furthermore, the Army here is entitled to the strong deference given to military decisions illustrated in *Goldman*. As the *Goldman* Court held, maintaining order and unity within a unit is a legitimate and necessary military goal. Additionally, the Army's interests here far exceed those of the Air Force in *Goldman*, where the military sought uniformity. In the instant case, the Army seeks to avoid overt and subtle coercion and exploitation of lower ranking soldiers and to preserve the delicate accommodating role of the chaplaincy. Petitioner's unsolicited proselytizing made Private Hunnicut and many others extremely uncomfortable, and left them with nowhere to turn for future advice. *Finch v. Klinger*, No 07–3113 at 3, 8. At risk here is the constant readiness of a unit deployed overseas, as well as the mental and physical health of the individual soldiers. As this Court held in *Smith*, a legitimate government action, such as the Army's anti-proselytizing regulation here, will not be invalidated due to an incidental effect on an individual's religious practices. Therefore, this Court should affirm the holding of the District Court; that the Army regulation is constitutional.

B. RFRA is not applicable to Petitioner's claim; but even if RFRA is applicable, the anti-proselytizing regulation does not violate RFRA.

Petitioner's claim under the RFRA also fails, as the very language of RFRA is inapplicable to Petitioner's claim. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006). RFRA provides in pertinent part that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless such a burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

This Court held that RFRA was unconstitutional as it applied to the states under the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Limited by its express language and intended purpose, RFRA, while arguably still applicable to the federal government, is inapplicable to Petitioner's claim. In the alternative, if RFRA is expanded to the facts of this case, Petitioner's claim fails under RFRA's established standard of review.

RFRA is clearly inapplicable to Petitioner's claim. The Act, in § 2000bb(a)(4), bemoans that *Smith* removed the requirement that the government show a compelling interest whenever it burdens religion, then in § 2000bb(b)(1) states that the Act's purpose is "to restore the compelling interest test" which the Court used to invalidate government regulations in *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The express purpose of RFRA, then, is to remedy the perceived failure of the *Smith* court to require the government to establish a compelling interest in cases like *Smith*, *Yoder*, and *Sherbert*, where a government regulation of general applicability impacts private conduct. Petitioner's claim does not implicate this expressly stated statutory purpose.

Petitioner's claim is far removed from the intended application of RFRA. RFRA was intended to apply to cases such as *Smith, Sherbert* and *Yoder*, which all involved government regulation of private conduct rather than military rules or restrictions. This Court has repeatedly recognized the military as separate from civilian society, and as a result treated First Amendment challenges to military action differently. In *United States v. Johnson*, the Court stated, "In every respect the military is, as this Court has recognized, a 'specialized society.'" 481 U.S. 681, 690-91 (1987) (internal citation omitted). Nothing in RFRA indicates that rules within the "specialized society" of the military are subject to the same standard of review as their civilian counterparts. *See Goldman*, 475 U.S. at 507. RFRA's requirement that the government establish

a compelling interest is also irrelevant to Petitioner's claim. The Army unit has a heightened interest in maintaining the health and readiness of the soldiers. Because this case does not involve the regulation of private conduct contemplated by RFRA and because the government's interest here is compelling, the language of RFRA is not applicable to the Petitioner's claim.

Even if the scope of RFRA is expanded to apply to military decisions, RFRA states that claims brought under the Act must be analyzed under the compelling interest test used by the Court prior to *Smith*. 42 U.S.C. § 2000bb(b). In numerous cases, including *Goldman v. Weinberger*, this Court used an analysis like that proposed by RFRA to uphold government restrictions on religious practices where the regulation was of general applicability and the government asserted a compelling interest. *Goldman*, 475 U.S. 503, 506-08. The Army's interests here are extremely compelling, as military decisions dictate a unit's ability to operate effectively. Here, Petitioner's unauthorized proselytizing had to be curtailed to ensure the safety and readiness of the unit. *Finch v. Klinger*, No 07–3113 at 4-5. As in *Goldman*, this Court should "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman,* 475 U.S. at 507. Though this Court applied the same level of scrutiny as that mandated by RFRA to the Air Force regulation, the compelling interest in uniformity of soldiers outweighed the individual interest of Goldman. *Id*. The Army's interest here is much stronger than was the Air Force's goal in maintaining uniformity in *Goldman*. The Army regulation clearly targets a compelling interest and should be upheld as was the statute in *Goldman*.

Even under the strictest of tests, this military action meets the compelling government interest standard because avoiding proselytizing is a compelling government interest. Here, the ability of the military to operate effectively is certainly a compelling interest, as evidenced by the

military's establishment by the United States Constitution. Here, the soldiers expressed overt discomfort and alarm at the unsolicited and unwanted proselytizing behavior of Petitioner. *Finch v. Klinger*, No 07–3113 at 3. They complained of his repeated inappropriate conduct to their superior officer, and their mental anguish and spiritual disappointment jeopardized the readiness of the unit. *Id*. Petitioner's actions directly interfered with the indispensable mission of the United States Army, as well as threatened the health and safety of one thousand soldiers within his brigade.

Military decisions deemed necessary to ensure the unity, good will, morale and mental health of soldiers stationed far from home and in constant threat of attack target a compelling interest. This Court has held that the best way to avoid a compelling danger is to ban it. *See Greer v. Spock*, 424 U.S. 828, 840 (1976) (military commanders have discretion to ban what they feel threatens loyalty, discipline or morale of troops). Here, the anti-proselytizing regulation targets only unsolicited attempts by chaplains to impel vulnerable soldiers to transform their religious views. *Finch v. Klinger*, No 07–3113 at 4. Because RFRA is generally inapplicable to Petitioner's claim here, this Court should uphold the anti-proselytizing regulation. Even if it applies, the Army's anti-proselytizing regulation is narrowly tailored to further a compelling military interest. Therefore, the regulation is constitutional and Petitioner's claim fails.

C. The anti-proselytizing regulation allows the Army to accommodate the Free Exercise needs of a pluralistic society through the chaplaincy, and therefore does not violate the Establishment Clause.

Army Regulation 165-1, 4-4(b)(1) is constitutional, and Petitioner's Establishment Clause claim must be dismissed. Because the regulation, as part of the whole military chaplaincy, alleviates the militarily-imposed burden placed on soldiers' free exercise, it is an acceptable accommodation of religion. *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 457 (8th Cir. 1988) (Holding that when free movement is restricted by the state, government efforts to rectify

those religious burdens are appropriate). Furthermore, the Army regulation should be upheld because it is applied neutrally to all religious sects. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). If, however, the Court applies either the three-pronged test from *Lemon v. Kurtzman* (dealing with indirect government funding of private religious institutions), the endorsement test from *Lynch v. Donnelly* (regarding publicly funded religious displays) or the coercion test from *Lee v. Weisman* (dealing with psychological coercion in an educational setting), the Army's actions survive constitutional scrutiny. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Lee v. Weisman*, 505 U.S. 577 (1992); *Lynch v. Donnelly*, 465 U.S. 668 (1984). The military chaplaincy closely resembles the situation in other accommodation cases such as *Zorach v. Clauson*. 343 U.S. 306. Because the anti-proselytizing regulation rectifies a militarily-imposed burden on free exercise and is neutrally applied to all religious sects, the Army's actions here are constitutional.

Because the situation here resembles that in *Zorach*, this Court should apply a similar analysis to the Army regulation. *Zorach* involved an Establishment clause challenge to a school program which released children during the school day to receive religious education. *Id*. at 308. Parents decided whether their children would remain at school or be released to participate in the program, which was funded by the religious organizations. *Id*. at 308-09. Once this court determined the program was a constitutional accommodation of religion, it rejected traditional Establishment Clause analyses. *Id*. at 311. Because the school program constituted an accommodation of religion, this Court upheld the program, stating that the Bill of Rights does not require "hostility to religion." *Id*. at 315. The Court held that this particular accommodation was constitutional because it was neutral in its application to religious sects. *Id.* at 314.

Applying similar reasoning, the Eighth Circuit addressed an Establishment Clause challenge to chaplains at a healthcare facility in *Carter v. Broadlawns Medical Center*. 857 F.2d

448. There, the accommodation of religion was deemed constitutional because it rectified a state-imposed burden on Free Exercise, caused by the fact that the patients were unable to leave the facility. *Id*. at 457. The court cited the fact that the chaplains refrained from engaging in proselytizing behavior as a reason to uphold the constitutionality of the program. *Id*. at 451. The chaplaincy was upheld as a constitutional accommodation of the patients' free exercise needs. *Id*. at 456.

This Court should refine the analysis used for Establishment Clause challenges to free exercise accommodations, including the military chaplaincy. In both *Zorach* and *Broadlawns*, programs constituting government involvement with religion were held to be constitutional. As in those cases, the traditional tests for Establishment Clause challenges are not helpful here. Therefore, the Army regulation in question here should be assessed using an analysis similar to that in *Zorach*. The Army regulation should be upheld as constitutional because it is part of an accommodation of religion that rectifies a burden on the free exercise of soldiers. Moreover, the Army regulation is neutral regarding all religious sects, and exists to accommodate the free exercise of religion by prohibiting chaplains from pressuring soldiers to join their sect. Just as the *Broadlawns* court cited the lack of proselytizing as a reason for upholding the chaplaincy, this Court should likewise hold the Army regulation prohibiting proselytizing as constitutional.

In the alternative, the Army regulation is constitutional even if this Court chooses to apply one of the traditional analyses. When faced with an Establishment Clause challenge, this Court has typically categorized a given scenario into one of three types. If the facts involve government funding of religious activities, this Court has applied the *Lemon* analysis. *Lemon*, 403 U.S. at 605. If a case involves government-approved religious displays, this Court has applied the "endorsement test." *Lynch*, 465 U.S. 668, 683. Finally, if a case involves public

school activities, this Court has applied the "coercion test." *Lee,* 505 U.S. 577, 587. Although this case does not lend itself to any of the traditional frameworks, it would survive any of them if applied.

This Court has applied the *Lemon* test to Establishment clause cases involving government funding of religious activities. *Lemon*, 403 U.S. at 605. The *Lemon* test requires legislation to have a secular purpose, a primarily secular effect, and minimal government entanglement with religion. *Id.* at 612-613. Because the military chaplaincy is a government accommodation of religion, it would seemingly constitute an "entanglement" with religion and fail the third prong of the *Lemon* test. *See Katcoff,* 755 F.2d 223 (holding military chaplaincy is constitutional accommodation of religion). However, the Army regulation here can be found to be constitutional when properly examined under the *Lemon* test. The anti-proselytizing regulation clearly has a secular purpose: to ensure unity and peace within military units, as well as to provide an atmosphere where soldiers and chaplains are comfortable discussing and counseling personal matters. Additionally, the regulation has a secular effect and does not foster excessive entanglement in religion. On the contrary, the regulation ensures that the Army does not violate the Establishment Clause. If the Army were to allow chaplains to proselytize without limits, as Petitioner contends it should, the Army would be both funding and endorsing the particular religious views of its agents, the chaplains. Not only would Petitioner's actions violate the Establishment clause, they would also constrict the free exercise of the other soldiers.

In addition to the *Lemon* test, the Endorsement test of *Lynch v. Donnelly* does not seem helpful in evaluating the accommodation model of the chaplaincy either. In *Lynch*, the city of Pawtucket's winter holiday display included a crèche (a Christian nativity scene), which was challenged on Establishment Clause grounds. *Lynch*, 465 U.S. at 671. The Court held that the

display did not violate the Establishment Clause because any benefit the crèche provided to a religion was "indirect, remote, and incidental." *Id.* at 683. This Court should likewise hold that the Army regulation is not a government endorsement of religion. The Army regulation is in place to prevent the appearance that the military endorses a particular religion. Petitioner's unchecked proselytizing would lead soldiers to conclude that the military not only allows, but endorses Petitioner's message.

Finally, this Court has promulgated a "coercion test" that evaluates whether participants are effectively "coerced" by the government into participating in a religious practice. *Lee*, 505 U.S. 577, 587. In *Lee,* a student alleged that a religious invocation and benediction at high school graduation violated the Establishment Clause. *Id*. 581. The Court held that the invocation at graduation amounted to psychological coercion to participate in religion. *Id*. at 588. Although attendance was not technically mandatory, the court held that "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory." *Id*. at 586.

The coercion test does not lend itself to the purposes of the military chaplaincy. Petitioner volunteered to join the military chaplains, a religious position, and cannot now claim he was "coerced" into participating in religious activity. However, if this Court chooses to apply the coercion test, usually reserved for pubic school activities, the Army regulation does not amount to coercion. The regulation does not coerce Petitioner into participating or supporting a particular religious message. Ironically, the actions of Petitioner himself more closely resemble coercion than does the Army regulation. Similar to the plaintiff in *Lee v. Weisman*, the soldiers here felt coerced into listening to Petitioner's religious views when they visited him for counseling, advice, or to play XBOX or get a haircut. Therefore, inaction by the Army here (as Petitioner demands) would actually amount to an Establishment Clause violation. The danger of

exploitation exists regardless of the fact that Petitioner addressed Hunnicut off-duty, because military commanders are seen as authoritative commanders at all times of the day. RALPH D. HOPKINS, CONFESSIONS OF A MILITARY/CIA RETIREE 167 (2004). Like the school children in *Lee*, the soldiers have no option of leaving the base, and so constitute a captive audience. This Court should find that Petitioner's proselytizing, if left unchecked, would amount to unconstitutional coercion of an effectively captive audience. Therefore, the Army regulation is clearly constitutional, and is a necessary measure to prevent Petitioner, as an agent of the government, from violating the Establishment Clause.

The chaplaincy exists to accommodate the soldiers' free exercise needs. Because the military chaplaincy is a constitutional accommodation, it is analogous to other governmental accommodation of religion cases such as *Zorach* and *Broadlawns*. Applying the test from those cases, the Army regulation is an accommodation of the soldiers' free exercise rights and is applied neutrally to all religious sects. Therefore, the Court of Appeals dismissal of Petitioner's Establishment Clause claim should be affirmed.

III. The Army's regulation of Petitioner's sermons was constitutional and did not violate RFRA.

A. The Army's regulation of Petitioner's sermons did not violate his Free Exercise rights.

The Army's (specifically Chaplain Mulcahy's) regulation of Petitioner's sermons did not violate Petitioner's rights under the Free Exercise Clause. Like the Army's rule against proselytizing, Article 134 is a neutral law of general applicability that incidentally impacted Petitioner's religious conduct when applied. 10 U.S.C. § 934, Art. 134 (2006) ("Article 134"). As such, the statute is presumptively valid if it serves a legitimate governmental interest. *Employment Division v. Smith*, 494 U.S. at 878. Even if this Court applies a heightened standard of review, the Army's actions in applying Article 134 against Petitioner were the least restrictive

means to achieve a compelling governmental interest. Therefore, whether this Court applies the rule from *Smith* or the stricter standard from *Sherbert*, Petitioner's claim under the Free Exercise Clause fails.

The application of Article 134 to Petitioner here parallels the application of the rule at issue in *Smith*, and the Army's actions here should be upheld as constitutional for the same reasons the state's actions were validated in *Smith*. As in *Smith*, where the effect on the employees' religion stemmed from a ban on "work related 'misconduct,'" Article 134 is a neutral prohibition on "disorders and neglects to the prejudice of good order and discipline in the armed forces." *Smith*, 494 U.S. at 874; 10 U.S.C. § 934. The aim of Article 134, to promote "good order and discipline" in the military, has been recognized time and again by this Court as a significant governmental interest that is essential to the military's constitutional mission. *See, e.g., Goldman v. Weinberger*, 475 U.S. at 507; *Greer v. Spock*, 424 U.S. 828, 837-38 (1976). Here, several soldiers in Petitioner's brigade, Petitioner's supervising brigade Chaplain, and the Brigade's colonel all concluded that Petitioner's sermons contained specific statements which denigrated other faiths in a way that was destructive to military order and discipline. *Finch v. Klinger*, No 07–3113 at 4-5. Therefore, the Army constitutionally applied Article 134's neutral and valid prohibition to regulate the inflammatory portions of Petitioner's sermons.

Petitioner does not raise the type of "hybrid" Free Exercise claim briefly mentioned by the *Smith* Court and relied upon by the dissent below. The only time this Court has applied a heightened standard of review to a "hybrid" Free Exercise claim was in the case of *Wisconsin v. Yoder*. 406 U.S. 205 (1972). There, the challengers of the state's actions claimed that a statute which burdened their exercise of religion also violated their constitutional right to educate their children. This Court should not extend the "hybrid" doctrine to any and all cases where a person

raises multiple constitutional challenges. In *Yoder*, a state compulsory attendance law burdened the challengers' religious practices and their control over their children's education, and the Yoders claimed the statute violated their First and Fourteenth Amendment rights. *Id*. at 209. The Court agreed, holding the Wisconsin law unconstitutional. *Id*.

Here, Petitioner's Free Speech claim is dubious at best. Petitioner is a government employee whose speech was in pursuance of his official duties and was therefore unprotected. Petitioner's speech took place in the context of his role as a government agent of accommodation. Petitioner's main responsibility as an army chaplain is to ensure that other soldiers are able to freely engage in the exercise of religion, and the Army's regulation of his sermons directly furthers that goal. Rather than Petitioner's Free Exercise rights, it is the Free Exercise rights of the other soldiers in his unit that are at stake in this case. Petitioner should not be able to rely on a tenuous Free Speech claim to raise the standard of review to be applied to a similarly weak Free Exercise claim, and the hybrid analysis is therefore inappropriate in this case.

If, however, this Court determines that Petitioner's claim merits a more stringent standard of review, the Army' actions are still constitutional. The Army's actions survive the strict scrutiny standard applied by the Court in *Yoder* and *Sherbert*—the regulation of Petitioner's sermons was justified by a compelling government interest. This Court should give deference to the professional judgment of Petitioner's two military superiors who determined that Petitioner's inflammatory speech was threatening to good order and discipline. *Goldman*, 475 U.S. at 507. Even if this Court does not give deference to that determination, the record presents objective reasons Petitioner's sermons warranted regulation. The importance of discipline in the military

has been recognized by this Court as essential to the fulfilling of the military's constitutionally imposed mission. *See Greer v. Spock*, 424 U.S. at 837-38.

Petitioner's sermons effectively passed negative judgment on his supervising officer, an example with potentially dire consequences in a context where respect for commanding officers could literally be a matter of life or death. Petitioner's sermons, presenting the doctrine of *sola scriptura* and Petitioner's beliefs about the Catholic Church (including the "moral laxity" of celibate Catholic priests), were divisive and denigrating. *Finch v. Klinger*, No 07–3113 at 4-5. Chaplain Mulcahy's concern and the aim of the Army's regulations was not Petitioner's beliefs or doctrines themselves, but the inflammatory manner in which they were presented. *Id*. at 5.

Because Petitioner's sermons had divisive and destructive effects, the Army reasonably required Petitioner to refrain from preaching in a way that denigrated members of other faiths, including his supervising officer. This Court recognized in *Goldman* the vital importance of discipline and unity in the military. The Army has a second interest here that applies especially to its chaplains: Petitioner is not only a representative of God's Flock when he preaches his sermons, he is an agent and employee of the government whose primary role is to accommodate other soldiers' Free Exercise rights. The Army's requirement that Petitioner's sermons not denigrate the religious beliefs and practices of other soldiers directly targets the Army's role in maintaining the accommodating purpose of the chaplaincy.

B. RFRA is not applicable to Petitioner's claim; but even if RFRA is applicable, the Army's regulation of Petitioner's sermon contents did not violate RFRA.

Just as RFRA is inapplicable to the anti-proselytizing regulation, RFRA is not applicable to the Army's regulation of the content of Petitioner's sermons. RFRA's express purpose is to require the government to show a compelling interest. Here, the statute is inapplicable to Petitioner's claim because the decisions of multiple military officers in this case are evidence

that compelling military interests were at stake, and those decisions should be given the greatest deference by the court. *Goldman*, 475 U.S. at 507. Furthermore, as addressed above, RFRA is intended by its language to apply to cases like *Employment Division v. Smith*, and *Wisconsin v. Yoder*, where a government regulation impacts private religious conduct. Here, a military rule prohibiting behavior which undermines the key military interests of good order and discipline was applied against Petitioner, an agent of the military and a government employee. Because Petitioner's claim stands in stark contrast to the type of cases RFRA was enacted to address, the Court should affirm the Court of Appeals' dismissal of Petitioner's RFRA claim.

Even if RFRA is applicable to the regulation, however, Petitioner's claim fails under the standard of review the statute establishes. A RFRA claim must be analyzed under the compelling interest test used by the Court to adjudicate Free Exercise claims prior to *Smith*. 42 U.S.C. § 2000bb(b). That is, if the government regulation substantially burdens religious practice, it must be justified by a compelling governmental interest. *Goldman v. Wienberger* was a pre-*Smith* case that illustrates this approach. In *Goldman*, the plaintiff's military commanders determined that his refusal to conform to dress code regulations threatened the military's interests in unity and discipline among the ranks. *Goldman*, 475 U.S. at 504, 508.

As in *Goldman*, Petitioner's military superiors determined after a careful review of the circumstances that Petitioner's conduct violated Article 134 and undermined the interests of good order and discipline. *Finch v. Klinger*, No 07–3113 at 4-5. That determination should be given great deference by the courts. Moreover, the record presents ample evidence that Petitioner's speech was reasonably viewed as derogatory towards other religions and had a divisive effect. The complaints received by the Military Religious Liberties Foundation from soldiers in Petitioner's unit are evidence that Petitioner's speech threatened the unity and morale

of the unit. *Id*. at 4. Article 134, as it was applied to Petitioner, advanced the compelling interest of preserving "obedience, unity, commitment, and esprit de corps" within the military ranks. *See Goldman*, 475 U.S. at 507.

Even if RFRA is applicable to this case and establishes a stricter standard of review than the pre-*Smith* treatment of claims arising in the military context, the Army's actions in regulating Petitioner's sermons furthered a "compelling governmental interest" and were the "least restrictive means" of advancing that interest. 42 U.S.C. § 2000bb-1. The compelling interest the military sought to achieve through regulating Petitioner's sermons has been discussed at length and is well established in this Court's jurisprudence. The regulation here also satisfies the second prong of the RFRA test, because it was the "least restrictive means" of achieving the interests at stake. As with the anti-proselytizing regulation discussed above, the Army's regulation of Petitioner's sermons directly prevented the serious harm that such inflammatory teachings pose to the well-being of the military. The regulation narrowly targeted the harm it sought to correct. Chaplain Mulcahy even stated that Petitioner could rightfully preach on the doctrines in question as long as he did so in a way that did not "destroy[] the reputations of other faiths." *Finch v. Klinger*, No 07–3113 at 5. Chaplain Mulcahy's request was the least restrictive means by which the Army could advance the compelling interests of unity and religious pluralism within the military while allowing Petitioner a significant amount of leeway in what he was permitted to teach. Because the Army's regulation of Petitioner's sermons survives even the strictest level of scrutiny, the Court of Appeals' dismissal of Petitioner's claim under RFRA should be affirmed.

C. The disciplinary actions taken against Petitioner did not violate his Free Speech rights under the First Amendment.

The Army's regulation of Petitioner's sermons did not violate his Free Speech rights. The speech of a government employee is unprotected when, as here, the employee is speaking on

behalf of the government and the speech is made pursuant to his or her official duties. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006); *Rust v. Sullivan*, 500 U.S. 173 (1991). Because Petitioner is a government employee who spoke pursuant to his official duties as an army chaplain, his speech was unprotected under the First Amendment and the Army's disciplinary actions against him were entirely appropriate. Even if this Court finds that Petitioner's speech was not made pursuant to his official duties, it was nonetheless unprotected under the balancing test this Court established in *Pickering v. Board of Education* and *Connick v. Myers*. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). That is, the Army's interests in promoting unity, discipline, and an atmosphere of religious pluralism far outweighed Petitioner's interest in commenting on matters of public concern (which his speech did not). The government's interest is particularly strong in this case because Petitioner's role as an army chaplain requires him to have a close working relationship with his superiors. *Connick* at 151 .

The dismissal of Petitioner's Free Speech claim should be affirmed principally because Petitioner was, like the employee in *Garcetti*, a government employee whose speech was made in pursuance of his official duties. *Garcetti* involved a government employee who claimed that his government employer initiated retaliatory employment actions against him because of a memo he wrote which he claimed was protected by the First Amendment. *Garcetti*, 126 S. Ct. at 1956. The Court held that the memo which led to the employee's discipline was unprotected because writing such memos was "part of what . . . he was employed to do." *Id.* Here, the speech which led to Petitioner's discipline was also "what he was employed to do"—the sermons to the God's Flock congregation were only made due to Petitioner's employment as an army chaplain.

Similarly, the speech of a government employee is afforded no First Amendment protection if the employee speaks as a representative of the government. *Rust v. Sullivan*, 500 U.S. 173, 194, 198-99. In *Rust*, family planning services receiving federal funds were prohibited from employing abortion as a method of family planning. *Id*. at 178. The Court in *Rust* held that this restriction on the grantees' speech was constitutional because it merely required the fund recipients to express the government's preference for childbirth over abortion within the context of their role as government grantees. *Id*. at 194. Here, the Army's restrictions on Petitioner's speech relate directly to Petitioner's role as a government agent of Free Exercise accommodation. As Form 13 makes clear, Army chaplains exist to "provide for the free exercise of religion by military personnel . . . ." As in *Rust*, the restrictions on Petitioner's speech here directly relate to Petitioner's duties as a representative of the government, and his speech is therefore unprotected.

Even if this Court finds that Petitioner's speech was not made pursuant to his official duties or due to his responsibility as a government agent of accommodation, his First Amendment rights are outweighed by the Army's interests in restricting the content of his sermons. If a government employee's speech is not on a matter of public concern, the court should give the government employer "wide latitude" in making employment decisions. *Connick*, 461 U.S. at 146. Whether speech is on a matter of public concern is determined in the context of all the circumstances revealed by the record. *Id.* at 147-48. Here, precedent demonstrates that Petitioner's speech was not on a matter of public concern.

For example, in *Pickering v. Board of Education*, the Court found that speech was on a matter of public concern where the government employee, a school teacher, published his opinion about the school district's appropriation of funds in a local newspaper. 391 U.S. at 572-

73. Conversely, the Court in *Connick* found that an employee's speech was not on a matter of public concern where an Assistant District Attorney prepared a survey pertaining to the competence and reputation of her supervisors, which she distributed to other workers in the office. 461 U.S. at 148. Of particular importance in *Connick* was the fact that "close personal relationships" were essential to the functioning of the employee's office. *Id.* at 151-152.

Unlike the government employee in *Pickering,* who made statements published in a newspaper about education funding, Petitioner's speech was made only to other Army personnel, and the subject of his speech was his own religious opinions. Furthermore, unlike the employee in *Pickering*, Petitioner's speech is directly related to the functioning of the government agency in which he is employed: Petitioner's speech was found to have a direct impact on the chaplaincy's overall mission of accommodating soldiers' Free Exercise rights in the pluralistic society of the military. Also, like the District Attorney's office in *Connick*, "close personal relationships" between Petitioner and the other personnel in his unit are essential to the Army's mission and Petitioner's effectiveness as a chaplain. Due to the crucial nature of the Army's mission and the importance of the chaplain's role as an agent of accommodation who must balance the religious needs of hundreds of soldiers, any action by a chaplain that damages the "close personal relationships" between the chaplain and the other members of his or her unit is afforded less constitutional protection. Because the Army's actions against Petitioner in this case were taken in response to speech on a private matter that threatened the close personal relationships crucial to the Army's functioning, the dismissal of Petitioner's Free Speech claim should be affirmed.

D. The regulation of Petitioner's sermon contents did not violate the Establishment Clause.

The Army's regulation of Petitioner's sermons was not an unconstitutional establishment of religion under the First Amendment. The Army's actions here furthered a constitutional accommodation of the soldiers' Free Exercise needs, and were neutral in their application towards religious sects. *See Zorach v. Clauson*, 343 U.S. 306, 314. The Army's actions are constitutional when analyzed under a framework like that applied by the Court in *Zorach*, where, like here, government accommodation of individual Free Exercise rights was held constitutional. If, however, the Court applies either the test from *Lemon v. Kurtzman* or the coercion test from *Lee v. Weisman*, the Army's actions survive constitutional scrutiny.

The Army's regulation of Petitioner's speech survives the *Zorach* test, that government accommodations of religion must be neutral in their application to religious sects. As Chaplain Mulcahy recognized in this case, Army chaplains are responsible for maintaining the delicate atmosphere of religious pluralism the office of the chaplaincy was created to preserve. *Finch v. Klinger*, No 07–3113 at 5. As part of the government's accommodation of religion through the chaplaincy, specific regulations of chaplains must reflect those values of pluralism and be neutral in their application towards religious denominations. Here, the restrictions on Petitioner's sermon content served to prevent Petitioner from undermining the Army's atmosphere of pluralism. In fact, Petitioner's sermons, in their explicit and implicit preference for one religious sect and denigration of all others, represent a greater violation of the Establishment Clause than the Army's restriction of those sermons.

The test articulated by the Court under *Lemon v. Kurtzman* would seem to be the inappropriate standard by which to analyze Petitioner's claim. The *Lemon* Court's stated purpose in developing its test was to "draw lines with reference to . . . sponsorship, financial support, and

active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612 (internal quotation marks omitted). However, if the Court determines that the *Lemon* test would be appropriate here, the Army's actions are constitutional. Under *Lemon*, a government action is constitutional if it has a secular purpose, produces a secular effect, and does not foster excessive entanglement with religion.

First, the regulation of Petitioner's speech had a secular purpose—to facilitate good order and discipline in the military by preventing Petitioner from derogating the beliefs of his commanding officer and other soldiers. *Finch v. Klinger*, No 07–3113 at 5. Second, the regulation had a secular effect—the removal of Petitioner from his unit produced the cohesiveness and unity that the Army requires to effectively operate. *Id*. Finally, the particular restriction of Petitioner's speech in this case reduced the government's entanglement with a particular religious viewpoint. The restriction of Petitioner's sermons was expressly for the purpose of maintaining government neutrality with respect to religion. Therefore, to the extent *Lemon* might be applicable to this case the government's actions survive the test.

The "coercion test," used by the Court in *Lee v. Weisman* to determine whether prayer at a school graduation violated the Establishment Clause, would also seem to be a poor fit for cases arising in the context of the chaplaincy. In *Lee* and subsequent cases utilizing the coercion test, the Court emphasized that the age of those challenging the government action made the danger of coercion especially pronounced. In *Lee*, for example, the Court was especially concerned about the "public pressure, as well as peer pressure" on students to attend their high school graduation, and the perception of "the dissenter of high school age . . . that she is being forced by the state to pray . . . ." *Lee*, 505 U.S. at 593. The coercion test seems particularly inapplicable in this case because Petitioner, an Army chaplain whose entire duty consists of providing religious

services, would be in the absurd position of arguing that the restrictions on his speech coerced him to participate in religion.

Even if the Court applies the coercion test here, the Army's actions are nonetheless constitutional. The Court in *Lee* held that the government could not "persuade or compel" students to participate in religious exercises. *Id.* at 599. In the first place, there is much less danger here that Petitioner would feel psychologically coerced to participate in any religious exercise than the students in *Lee*. Besides the obvious differences between the high school students in *Lee* and Petitioner regarding their respective age and susceptibility to peer pressure, there is no question that Petitioner volunteered to be a chaplain and to be sensitive to the atmosphere of religious pluralism in the Army, as evidenced by his agreement to the terms of Form 13. *Finch v. Klinger*, No 07–3113 at 2. Furthermore, the Army did not attempt to positively "persuade or compel" Petitioner to adopt or preach a particular doctrine. Rather, the Army requested Petitioner to refrain from preaching in a manner that undermined the unity and discipline of his unit and with relation to his superiors.

CONCLUSION

Both precedent and public policy concerns support the dismissal of all Petitioner's First Amendment and RFRA claims. The Army's failure to regulate Petitioner's sermon and unauthorized proselytizing would result in military funding and endorsement of the particular religious views of its agents, the chaplains. Not only would Petitioner's position violate the Establishment clause, but it would also prohibit the free exercise of the other soldiers. The ability of the other soldiers to freely exercise their religion directly depends on the accommodating role of the military chaplain. If soldiers are uncomfortable speaking with a chaplain who continuously pressures them to convert or denigrates other faiths, they will be unable to freely exercise their

religious beliefs. The critical mission of the United States Army cannot be jeopardized by the harmful actions of Petitioner. For these reasons, the dismissal of all Petitioner's claims by the Court of Appeals must be affirmed.

Respectfully submitted,

Team 1R

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Team Member # 1, Issue I

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Team Member # 2, Issue II