Nos. 10-56634 and 10-56813

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,

Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA et al.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICI CURIAE THE CHURCH OF GOD OF PROPHECY CHAPLAINCY MINISTRIES, THE CONSERVATIVE CONGREGATIONAL CHRISTIAN CONFERENCE, GRACE CHURCHES INTERNATIONAL, THE INTERNATIONAL ASSOCIATION OF EVANGELICAL CHAPLAINS, THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, MINISTRY TO THE ARMED FORCES OF THE LUTHERAN CHURCH - MISSOURI SYNOD, THE NATIONAL ASSOCIATION OF EVANGELICALS CHAPLAINS COMMISSION, AND THE PRESBYTERIAN AND REFORMED JOINT COMMISSION ON CHAPLAINS AND MILITARY PERSONNEL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the *amici* is a corporation that issues stock or has a parent corporation that issues stock. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

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THE INTERESTS OF THE AMICI CURIAE

The *Amici Curiae* are largely religious organizations that endorse chaplains to the Armed Forces: the Church of God of Prophecy Chaplaincy Ministries, the Conservative Congregational Christian Conference, Grace Churches International, the International Conference of Evangelical Chaplain Endorsers, Ministry to the Armed Forces of the Lutheran Church - Missouri Synod, the National Association of Evangelicals Chaplains Commission, and the Presbyterian and Reformed Joint Commission on Chaplains and Military Personnel. They endorse more than one hundred active-duty military chaplains and are representatives of faith groups which have more than tens of thousands of churches and millions of members.

One of the *amici*, the International Association of Evangelical Chaplains, is not an endorsing agency, but rather is a voluntary association of evangelical Christian chaplains from chaplaincies worldwide, including the U.S. military.

Both parties to this appeal consented to *amici*'s filing of this brief.

FED. R. APP. P. 29(C)(5) STATEMENT

Amici state that (A) no counsel for any party authored the brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person—other than counsel for *amici*—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Since 10 U.S.C. § 654 (hereafter "§ 654") has been repealed and the transition away from it is already in effect, this appeal is not about whether § 654 must be struck down as a violation of the Plaintiff-appellees' constitutional rights. Rather, this appeal is about whether § 654 can be congressionally repealed in an orderly manner that protects the mission of the Armed Forces and the rights of Service members, or if a judicially-imposed striking of § 654 is required. While *amici* believe that both manners of rescinding § 654 will likely harm military religious liberty, they are concerned that the judicial route, which prevents the transitional training and policies that seek to limit losses to religious liberty, will be particularly harmful.

Amici submit that § 654 should have been evaluated and upheld under rational basis scrutiny, given that the interests identified in § 654 are eminently rational. Notably, while § 654 has been repealed, the law repealing it did not refute Congress's prior findings supporting it and leaves it in effect until military leadership certifies to the President that repeal will not cause the harms identified in those findings. *See* Public Law No. 111-321 § 2(c). Given that congressional

hearings are being scheduled to revisit the repeal decision, it is possible that those findings may remain in effect.[1]

Further, *amici* believe that the protection § 654 affords military religious liberty provides an additional ground for both upholding the law and rejecting the Plaintiff-appellees' invitation to strike § 654 via the blunt instrument of a broad facial challenge. Military religious liberty is an important government interest. The government has a constitutional duty to provide for the rights to free exercise of religion of Service members in its Armed Forces, especially those facing certain danger and high risks of death, which it does primarily through its chaplain corps. Further, the government benefits from the morale improvement and unit cohesion created by chaplaincy ministry. Section 654 protects these interests from the conflict that official military support and recognition of open bisexual and homosexual conduct would create, and is therefore rationally related to the government's interest in preserving religious liberty. Accordingly, this Court should uphold the law and allow the legislative attempts to balance competing interests to move forward.[2]

[1] *See* http://www.airforcetimes.com/news/2011/01/military-wilson-reinstate-dont-ask-dont-tell-010611w/; last visited March 3, 2011.

[2] The *amici* support the Defendant-appellants' argument that § 654 does not violate the First Amendment. *See*, *e.g.*, Docket Entry 3-1 at 14.

I. IN THE CONTEXT OF A FACIAL CHALLENGE, 10 U.S.C. § 654 MUST BE EVALUATED BASED ON WHETHER IT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS.

Every federal court of appeals to decide a facial challenge to 10 U.S.C. § 654 has reject the challenge and upheld the law's constitutionality. *See, e.g., Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008). But the district court below disregarded this overwhelming authority, largely because it incorrectly applied the intermediate scrutiny test from *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), to evaluate the Plaintiff-appellees' facial challenge.

As an initial matter, *amici* must express their disagreement with *Witt*. *Amici* believe that decision improperly ignored the judicial deference that must be given to military personnel decisions at the programmatic level, and that its imposition of an as-applied heightened scrutiny standard that will harm the military's ability to regulate its troops, particularly on sensitive issues of sexual conduct. With that said, *amici* understand that this Court may feel itself bound by *Witt*, and argue that *Witt* is sharply distinguishable from this case.

The most fundamental distinction here is that this case solely presents a broad facial challenge to § 654. Since § 654 legitimately regulates certain forms of sexual behavior, like public or coercive homosexual acts, it is insulated from a facial challenge in a way that it was not from the as-applied challenge presented in *Witt*. *Cook*, 528 F.3d at 56; *United States v. Salerno*, 481 U.S. 739, 745 (1987)

(requiring that a facial challenge must show that "no set of circumstances exists under which the Act would be valid."). Thus, the district court's decision below should be reversed. The decision should also be reversed, as *amici* argue below, for its incorrect application of *Witt*'s heightened scrutiny test to decide a facial challenge.

1. *Witt*'s Intermediate Scrutiny Test Only Controls As-Applied Challenges to 10 U.S.C. § 654.

Witt developed an intermediate scrutiny test based on this Court's interpretation of *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* found that a statute applied to criminalize the petitioner's sexual practices with another consenting adult male in his own home violated his liberty interest to be free from state prohibition of the "most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567. Similarly, *Witt* addressed a plaintiff who "never had sexual relations while on duty or on the grounds of any Air Force base," "never told any member of the military that she was homosexual," and lived with her same-sex partner at a home about 250 miles away from her duty station. *Witt,* 527 F.3d at 809-10. Even when she was being investigated about whether she engaged in homosexual behavior, she refused to reveal whether she did. *Id.* Like *Lawrence*, *Witt* addressed wholly private conduct.

Applying *Lawrence*'s holding regarding private consensual actions between adults in the home, the *Witt* court subjected § 654 to a form of heightened scrutiny

and reversed the district court's dismissal of the plaintiff's case. *Witt* at 821. This Court required that its form of scrutiny be used only for as-applied challenges. *Id.* at 819 ("[W]e hold that this heightened scrutiny analysis is as-applied rather than facial."). Thus, *Witt* was consistent with *Lawrence* in the sense that the latter issued its holding regarding an as-applied challenge that presented a clear-cut case of an exclusively private matter between adults.

Section 654 solely regulates conduct, and is designed to avoid the documented problems that Congress found open homosexual behavior creates in the conditions of forced same-sex intimacy common in the military. *Id.* at (a)(15).[3] And while *Witt* dealt with private adult circumstances 250 miles away from one's military duties, the Plaintiff-appellees seek here to subject § 654 to *Witt*'s scrutiny even though their challenge is a broad facial challenge going to the heart of purely military activity. Moreover, *Lawrence*, upon which *Witt* relied, explicitly limited its holding to *private* liberty concerns and did not find that the branches of the United States military must give official recognition or support for open adult sexual conduct. *Id.*, 539 U.S. at 578 (stating that its holding did not address "public conduct" or "involve whether the government must give formal recognition" to homosexual relationships). Thus, *Witt*'s test should not apply to

[3] The Senate Report noted that even if the Supreme Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)—as it later did in *Lawrence*—for private civilian life, "this would not alter the committee's judgment as to the effect of homosexual conduct on the armed forces." S.Rep. 103-112 at 287.

the Plaintiff-appellees' broad facial challenge in this case, and the rational basis approach used by both this Court and other circuits for facial challenges should control. *See, e.g., Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc).

Further, using rational basis scrutiny to evaluate facial challenges to § 654 ensures that Congressional and military regulations receive the lofty judicial deference they are due. *Rotsker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[J]udicial deference to … congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (recognizing that, in the context of the military, "[i]t is difficult to conceive of an area of governmental activity in which courts have less competence.").

2. 10 U.S.C. § 654 Is Rationally Related to Congress's Interest in Maintaining an Optimal Fighting Force.

To pass constitutional muster, § 654 need only "be rationally related to legitimate government interests." *Washington, et al. v. Glucksberg, et al.*, 521 U.S. 702, 728 (1997). Rational-basis review is "a paradigm of judicial restraint," and not "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313-14 (1993) (citation omitted). A law analyzed under rational-basis review has "a strong presumption of validity," *see id*. at 314; "the burden is upon the challenging party to negat[e] any

reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd. of Tr. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (quotations omitted). Rational-basis review does not require that a law be crafted with precision; "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequity." *Heller v. Doe,* 509 U.S. 312, 320 (1993) (internal quotation omitted).

When Congress enacted § 654 after long debate and careful consideration, including repeated consultation with military leaders, it found that open homosexual conduct creates "an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." *Id.* at (a)(15). As *Witt* recognized, it is "clear" that these interests are "important." *Witt*, 527 F.3d at 821. Since § 654 prevents harm to those interests by proscribing precisely the conduct that threatens them, it is rationally related to the interests. Accordingly, § 654 survives scrutiny.

Further, the interests undergirding § 654 stand to be substantially jeopardized by the Plaintiff-appellees' judicial push to accelerate a complex legislative and administrative process, thereby undermining the military's ability to properly transition from the policy that has been in place in some form since

George Washington commanded the Continental Army.[4] *See, e.g.*, 11/1/2010 Order Granting the Motion to Stay the District Court's Injunction, Docket Entry 24 at 6 ("We…conclude that the public interest in ensuring orderly change of this magnitude in the military…strongly militates in favor of a stay."). Of particular concern to the *amici* is the damaging effect it would have on military religious liberty. Under the sworn affidavit of the Secretary for Defense and Personnel Readiness, implementing repeal will require substantial training and the changing of "dozens" of regulations, including those protecting the "rights and obligations of the Chaplain corps," to avoid "significant disruption to the force." *See* Docket Entry 3-6 at ¶¶ 21, 26. The judicial striking of § 654 sought by Plaintiff-appellees' will undoubtedly jeopardize those crucial efforts.

II. TO SUPPORT SERVICE MEMBERS' FIRST AMENDMENT RIGHTS TO FREEDOM OF RELIGION, CHAPLAINS MUST REMAIN FREE TO EXPRESS THEIR FAITH GROUP'S RELIGIOUS BELIEFS ON SEXUAL BEHAVIOR.

To understand the threat that a judicial striking of § 654 poses to military religious liberty, it is necessary to consider the primary means through which the military secures its members' free exercise rights—the chaplaincy.[5]

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[4] George Washington, *The Writings of George Washington*, John C. Fitzpatrick, ed. (Washington, D.C.: U.S. Government Printing Office, 1932), Vol. XI, pp. 83-84.

[5] Department of Defense Directive 1304.19.4.1.

Since the military compels Service members to go to regions of the world where their own faith communities are not available to them, it is a "crucial imperative" that the government make provision for their 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"). The military does so through the chaplaincy, a diverse and pluralistic body of officers who have the unusual distinction of being the only constitutionally-compelled military specialty. Without chaplains, moving military personnel, compelled to follow military orders, "to areas of the world where religion of their own denominations is not available to them" would violate their rights secured under the Religion Clauses of the First Amendment. *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985). "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.* at 232; 234.

To avoid this violation of religious liberty, our nation has provided chaplains for its fighting men and women since before it *was* a nation. *Id.* at 225. The chaplaincy mission has always been to "[p]rovide religious support to America's [military] across the full spectrum of operations[, a]ssist the Commander in

ensuring the right of free exercise of religion[, and p]rovide spiritual, moral, and ethical leadership."[6]

To fulfill this mission, chaplains must be "ready to move simultaneously with the troops and to tend to their spiritual needs *as they face possible death*" in order to ensure that Service members are not "left in the lurch, religiously speaking." *Katcoff,* 755 F.2d at 228 (emphasis added). As chaplains go where ever Service members do, they not only meet religious needs, but also help with the many substantial stressors of military life: short-notice moves, following difficult and demanding orders, lengthy separations from family, deployments to foreign countries with language and cultural barriers, and life-or-death decisions and actions, just to name a few. *Id.* at 226-34, 236-37. By fulfilling both religious and troop support roles, chaplains are directly responsible for improving morale, and thus imperative to supporting our collective "national defense." *Id.* at 228. Thus, it is of little wonder that the chaplaincy is an unwavering constitutional mandate.

Though the military must embrace chaplains to serve the many religious denominations represented within the military, it cannot determine who is or is not a qualified representative of a particular religious denomination, and the government has neither authority nor competence to evaluate religious

[6] The Army Chaplaincy Strategic Plan, 2009-2014, p. 1.

qualifications. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (government may not become entangled in matters touching upon "questions of discipline, or of faith, or ecclesiastical rule, custom, or law"); *HEB Ministries v. Texas Higher Educ. Coordinating Board*, 235 S.W.3d 627, 643 (Tex. 2007).

Thus, each specific faith group—through organizations like the *amici*—must endorse and send a particular chaplain to the military to act as its representative to the members of that faith group serving in the Armed Forces.[7] 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. 10 U.S.C. § 437. This ensures the chaplain's loyalty must be first to his faith community which he represents and from which he is "on loan" to the military.

And because the armed forces willingly embrace the diversity of the chaplains who seek to serve their country and the Service members of each specific faith group, the military must protect each chaplain's ability to properly fulfill their

[7] DOD Instruction 1304.28, "Guidance for the Appointment of Chaplains for the Military Departments," 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.

¶ E.2.1.7 (emphasis added).

role. To this end, important regulations historically safeguarded chaplains' right to conduct ministry activities consistent with their faith group's beliefs.[8] However, in light of Congress's actions with § 654, these regulations no longer sufficiently protect chaplains from the coming threat to their ministry as evidenced by the Chairman of the Joint Chiefs of Staff who suggested that Service members who disagree with the repeal of § 654 should "find another place to work."[9] Thus, the imminence of the threat to chaplains to perform their constitutionally mandated duties is clear. Accordingly, discretion must be left to Congress and military officials to routinely revise the implementation of new policy in order to properly attempt to remediate the inevitable conflicts. But a judicial mandate from this Court would not provide that flexibility, and leave the chaplaincy in peril.

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[8] *See* 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); *Naval Regulation 0817* (same); *Air Force Instruction 52-101* § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets . . . ."), § 3.2.2.1 ("Chaplains will conduct services that are within the scope of their personal faith tenets and religious convictions."); *Army Regulation 165-1* § 4-4(e) ("Chaplains are authorized to conduct rites, sacraments, and services as required by their respective denomination. Chaplains will not be required to take part in worship when such participation is at variance with the tenets of their faith.").

[9] *See*, *e.g.*, http://www.foxnews.com/politics/2010/12/02/mullen-troops-balk-change-gay-service-policy-job/.

III. A JUDICIAL DECLARATION THAT 10 U.S.C. § 654 IS UNCONSTITUTIONAL WOULD UNDERMINE THE ABILITY OF THE MILITARY TO LIMIT THE HARM TO RELIGIOUS LIBERTY POSED BY ALTERING THE MILITARY'S POLICIES REGARDING SEXUAL BEHAVIOR.[10]

The current Congressional action regarding § 654 will create a significant conflict between many chaplains and the military's new approach towards sexual behavior. A statutory repeal is preferable to an abrupt judicial ruling striking § 654 predicated on a broad constitutional sanction all forms of sexual behavior. The former can be adjusted to meet military needs and realities, as well as to somewhat accommodate competing considerations like religious liberty. But the latter would inflexibly limit the military's ability to efficiently manage the consequences imposed on it.

Amici's chaplains share their faith group's perspective that the Bible provides their rule for life and requires them to seek, share, and defend the objective truth it reveals. As military shepherds, they have an obligation to defend their flock from error and warn them of spiritually dangerous behaviors. Chaplains can no more deny these faith tenets and religious duties than a commander can deny his military obligations.

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[10] Much of the following section is drawn from a letter signed by 66 veteran chaplains, many of them decorated and battle-seasoned senior officers, sent to President Obama to explain the religious liberty issues with repeal. The letter can be viewed at http://adfwebadmin.com/userfiles/file/DADTletter%209_16_10.pdf; last visited on February 26, 2011.

As understood by the *amici*, the Bible defines certain sexual behavior as sinful and warns that those who unrepentantly practice homosexual behavior—like those who unrepentantly practice other forms of sin—cannot inherit the kingdom of God. *See, e.g.,* I Corinthians 6:9, Romans 1:24-32, Leviticus 18:22.[11] Indeed, hundreds of religious leaders in civil life—including those from faith communities that supply many Armed Forces chaplains—recently signed the Manhattan Declaration, which stated their reasoned and conscientious opposition to extra-marital sexual behavior.

> Because we honor justice and the common good, we will not...bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's. [12]

As representatives of the *amici*'s faith groups, chaplains endorsed by *amici* have this same obligation to render to God what is His, which includes speaking the truth about the unrepentant practice of sexual behavior outside of marriage and

[11] This understanding is consistent with millennia of orthodox Christian theology. *See, e.g.*, Catechism of the Catholic Church § 2357: "Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered.'" *See also* the Southern Baptist Convention: "Homosexuality is not a valid alternative lifestyle. The Bible condemns it as sin." SBC.net, Position Statement on Sexuality, http://www.sbc.net/aboutus/pssexuality.asp (last visited Feb. 15, 2010).

[12] *See Manhattan Declaration*, http://www.manhattandeclaration.org/the-declaration (last visited March 19, 2010).

its serious consequences. To do anything less would be a failure of their responsibilities as chaplains and would destroy their role as religious representatives of the *amici*. Further, respect for the humanity and welfare of those who might seek counseling or advice from *amici*'s chaplains on sexual behavior will compel them—albeit in a circumspect and reasonable manner—to fully state Scriptural truth on the issue.

Amici are not saying that their chaplains are unwilling to minister to those who engage in sinful sexual behavior, who disagree with them about the morality of that behavior, or who are from other faith backgrounds. To the contrary, *amici* and their chaplains firmly believe that God loves everyone, created every person in His image, desires that everyone should hear of and receive the Truth, and that He calls His people to speak that Truth. Further, chaplains are duty-bound to cheerfully serve everyone who comes to them for ministry to the full extent that they can without violating their beliefs, and *amici* expect their chaplains to fulfill that duty. But affirmatively condoning conduct that God says is harmful and sinful would both violate chaplains' religious calling and betray Service members relying on them for Godly counsel.

This robust representation of orthodox Christian belief conflicts with the orthodoxy espoused by those who advocate for extra-Biblical forms of sexual behavior. For example, homosexual activists Marshall Kirk and Hunter Madsen

said about those who believed in "orthodox religion," "[o]ur primary objective regarding diehard homohaters of this sort is to cow and silence them."[13] This conforms with other disturbing statements about driving Biblically-based beliefs about sexual behavior out of public life.[14]

Nor is the lack of reverence for religious liberties position restricted to advocacy organizations. Commissioner Chai Feldblum of the Equal Employment Opportunity Commission—one of the highest federal officials charged with enforcing nondiscrimination laws—openly stated that she sees the conflict between religious liberty and sexual autonomy as a zero-sum game.[15] Disturbingly, she cannot conceive of a single scenario in which pleas for religious liberty, grounded

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[13] Marshal Kirk and Hunter Madsen, *After the Ball: How America will conquer its fear & hatred of gays in the 90s* (New York, NY: Plume/Doubleday 1990 (emphasis in original), p. 176.

[14] *See*, *e.g.*, *Lambda Legal: Weakened ENDA Means Less Protection for Everyone* (available at http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html) ("Congress should treat religiously held beliefs that being gay is sinful just as it treated religiously held beliefs that women are unequal and that segregation was God's law. It should uphold a person's right to believe it, but should keep it out of the workplace." Of course, such attempts to tar Christians as bigots dishonors the generations of Christians and, in particular, pastors who *led* the efforts to abolish slavery worldwide. It also dishonors other Christians who marched with the Reverend Martin Luther King, Jr. to silence the evil echoes of slavery, and defames other generations of Christians who saw the movement for women's suffrage as grounded in Scriptural Truth.

[15] *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 (2006) (stating that the conflict was a "zero-sum game" where "society should come down on the side of protecting" homosexual conduct.)

in the First Amendment, would survive any form of claim for so-called "sexual liberty".[16]

Civilians are already experiencing widespread conflict between religious liberty and legal regimes protecting all forms of sexual behavior. Christian prison chaplains have been disciplined for refusing to turn their worship service over to individuals who openly engage in homosexual behavior,[17] Christian counselors have been punished for declining to counsel same-sex couples,[18] Christian voluntary organizations have been discriminated against by governmental entities for requiring organizational leadership to share their religious beliefs on sexual

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[16] *See, e.g.,* http://www.alliancealert.org/2009/09/14/obama-picks-chai-r-feldblum-for-eeoc-commission/ and http://downloads.frc.org/EF/EF07I18.pdf recounting the Ms. Feldblum's statement that, when religious liberty and homosexual conduct conflict, "I'm having a hard time coming up with any case in which religious liberty should win."

[17] *Akridge v. Wilkinson*, 178 Fed. Appx. 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); *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).

[18] *Ward v. Wilbanks*, 2009 WL 4730457 (E.D. Mich. 2009) (where a Christian counseling student declined to provide counseling for a same-sex sexual relationship and, when she refused to take "remediation training" from her government school to change her religious "belief system" on homosexual behavior, was dismissed from the school's counseling program); *see also Walden v. Center for Disease Control*, Case No. 1:08-CV-02278-JEC (N.D. Ga. 2008) (Even though she promptly and professionally referred the client to another counselor who addressed the client's concerns in an "exemplary" fashion, a Christian counselor was fired by her private employer because she respectfully declined to provide counseling that would have facilitated a same-sex sexual relationship).

behavior,[19] Christian businesses have been fined for declining to promote extra-Biblical sexual behavior,[20] Christian organizations have been penalized for choosing not to allow their facilities to be used for marriage-like ceremonies that do not conform to the Biblical view of marriage,[21] and Christian ministries have been shuttered by the government for refusing to change their successful and century-old adoption programs to place children in motherless or fatherless homes.[22] These are just a few examples of the ongoing conflict in the civilian world, and a conflict that will assuredly now appear within our armed forces.

If anything, the uniquely close relationship between military chaplains and the government will only intensify this divisive phenomenon, likely creating sharp

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[19] *See, e.g., Christian Legal Soc'y v. Martinez*, 130 S.Ct. 795 (2009) (where a Christian society at a public law school was discriminated against by the school because the society required its leadership to abide by certain religious beliefs, including a prohibition on extra-marital sexual conduct like homosexual behavior. The school based its discriminatory action on its "non-discrimination" policy that protected homosexual behavior).

[20] *Elane Photography v. Willock*, HRD No. 06-12-20-0685 (N.M. Human Rights Comm'n 2008) (where a small photography business owned and operated by a young Christian couple was fined over $6,000 for refusing to photograph a same-sex commitment ceremony, even though same-sex "marriage" and civil unions are illegal in New Mexico).

[21] *Bernstein v. Ocean Grove Camp Meeting Assoc.*, N.J. Div. on Civ. Rights, No. PN34XB-03008 (2008) (where a United Methodist church campground had its tax exempt status revoked for failing to allow its facilities to be used for same-sex commitment ceremonies).

[22] *See*, *e.g.*, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp (recounting Massachusetts's revocation of the Catholic Charities of Boston's adoption licensure for refusing to violate explicit Catholic doctrine by putting children in same-sex homes).

and widespread clashes. The potential problem areas are numerous, including: preaching and teaching; religious worship services; personal, relational, and marital counseling; administration of marriage-building and recovery programs; administration of affirmative action instruction that includes "sexual orientation" as a newly protected class; ethical and moral input to commanders; and employment decisions for ministry workers. While the military does have some religious liberty protections in place for chaplains, many of these are limited to worship services and, thus, do not address most concerns. *See* Footnote 9, *supra* (listing relevant regulations).[23] Further, after completing an extensive review of the challenges posed by repeal of § 654, the military admitted that, even in the context of core religious expression, the protections afforded by current regulations create "boundaries that are not always clearly defined."[24]

These unclear boundaries leave many pressing questions unanswered. Will the Army Chaplaincy's *Strong Bonds* program, which exists to strengthen Army marriages, be forced to include same-sex couples?[25] Will chaplains with orthodox

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[23] Chaplain training materials being distributed by the Army about repeal implementation already recommend that chaplains who have moral objections to repeal should consider this time "an opportunity for vocational reflection"—that is, they should either get in line or get out. *See* Army Tier 1 Training Presentation.

[24] *See* the CRWG Support Plan for Implementation at pg. 80; *available at* http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport-SPI_FINAL_20101130(secure-hires).pdf; last visited on February 28, 2011.

[25] *See* http://www.strongbonds.org/skins/strongbonds/home.aspx; last visited February 28, 2011 (explaining that Strong Bonds "is a chaplain-led

beliefs be allowed to offer advice on sexual ethics to commanders or able to teach ethics courses at military schools, as they do now? Will chaplains be able to reference their orthodox beliefs when hiring civilians for military ministry positions? What will happen when chaplains are approached by a service member engaged in homosexual behavior and asked to provide counsel on that behavior?[26] Can chaplains counsel such a person to cease the homosexual conduct, like they can counsel Service members to cease adultery or fornication? And what happens if the Commander-in-Chief decides to ban chaplains from speaking on homosexual conduct, even in the context of religious services, as the Clinton administration attempted regarding the topic of partial-birth abortion?[27]

The military, and perhaps Congress, will have to address these issues clearly and sensitively to avoid significant losses of religious liberty for chaplains—which

program…which builds relationship resiliency," primarily in the context of marriage. The program started in 1999 and preliminary outcomes indicate a fifty percent reduction in divorce and an increase in marital satisfaction for participants).

[26] *See* http://dailycaller.com/2010/08/06/mounting-religious-liberty-concerns-in-dont-ask-dont-tell-attack-grow-with-new-revelations-from-active-duty-chaplain/; last visited February 28, 2011 (recounting the experience of a U.S. military chaplain serving in a foreign military that permits open homosexual conduct. The chaplain, after a private and amicable counseling discussion with one service member that touched briefly on homosexual conduct, was threatened with punishment by a senior officer).

[27] In *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), the court rejected the Clinton administration's attempt to censor chaplains from encouraging their congregants to write Congress about pending legislation to change abortion laws as unconstitutional. Unfortunately, chaplains may have less freedom if what they seek to challenge is established military policy.

necessarily means losses of liberty for Service members. For instance, if chaplains are limited in teaching and counseling on their beliefs, then the men and women in uniform who share their faith and rely on their guidance will face a reduction in the free exercise of their faith. Likewise, if chaplains are kept from roles that are prone to generate conflict—such as administering the Army's Strong Bonds program—then they, the faith groups they represent, and the Service members whose religious beliefs they serve will all be marginalized. The Armed Forces would then effectively establish preferred religions or religious beliefs in violation of the Establishment Clause.[28]

Notably, the harm to religious liberty will not occur in a vacuum: both readiness and troop levels could be collateral damage as well. Chaplains' services are integral to maintaining high morale, which is in turn a necessary ingredient of military readiness. *Katcoff,* 755 F.2d at 228. Marginalizing a large group of chaplains will unavoidably harm readiness by diminishing morale. Similarly, making orthodox Christians—both chaplains and servicemen—into second-class Soldiers, Sailors, Airmen, Marines, and Guardsman whose sincerely-held religious beliefs are comparable to sexism cannot help morale, recruitment, or retention.

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[28] *Rigdon*, 962 F. Supp. at 164 (finding that application of military policy to allow Catholics of one belief on abortion to speak out while Catholics of a contrary belief must remain silent "sanctioned one view of Catholicism…over another.")

CONCLUSION

Replacing the U.S. military's centuries-old policy restricting sexual behavior with a broad judicial declaration that Service members engaged in such behavior have a fundamental right to do so will have jarring results on the military. One of the first casualties will be chaplains' and Service members' religious liberty. *Amici* believe that the best way to protect religious liberty—and avoid the distinct risk that the constitutionally-protected free exercise rights of our Service members become the equivalent of invidious discrimination—is simply to retain § 654. But if a repeal must take place, it should do so according to the orderly guidelines established by Congressional and military leaders, guidelines that can be responsive to the religious liberties of chaplains and Service members in ways that a judicial decision cannot.

Dated: March 04, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B).

The foregoing was prepared in 14-point Times New Roman, a proportionally spaced font, and according to the word-count function of Microsoft Word 2007 contains 5,552 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 04, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 04, 2011.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 04, 2011.

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