

Nos. 10-56634, 10-56813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOG CABIN REPUBLICANS,
Plaintiff-Appellee/Cross-Appellant,

vs.

UNITED STATES OF AMERICA, AND ROBERT M. GATES, SECRETARY
OF DEFENSE,

Defendants-Appellants/Cross-Appellees.

On Appeal From the United States District Court
for the Central District of California
No. CV 04-08425-VAP(Ex)
The Honorable Virginia A. Phillips

BRIEF FOR *AMICI CURIAE* FORUM ON THE MILITARY CHAPLAINCY,
ET AL., SUPPORTING PLAINTIFF-APPELLEE LOG CABIN
REPUBLICANS AND URGING AFFIRMANCE

REV. SILVIO NARDONI (48395)
539 Brand Boulevard, Suite 501
Glendale, CA 91203
Telephone: 818/550-1800
818/550-1850 (fax)

ERIC ALAN ISAACSON (120584)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/338-4519
619/231-7423 (fax)
SUSAN KAY WEAVER (137601)
11440 Meadow Creek Road
El Cajon, CA 92020
Telephone: 619/368-4562
619/749-1304 (fax)

Attorneys for *Amici Curiae*: Forum on the Military Chaplaincy; General Synod of
the United Church of Christ; the Most Reverend Katharine Jefferts Schori,
Presiding Bishop of the Episcopal Church; Universal Fellowship of Metropolitan
Community Churches; Unitarian Universalist Ministers Association; Unitarian
Universalist Association of Congregations; Unitarian Universalist Legislative
Ministry, California; California Council of Churches; California Faith for Equality;
and Retired Chaplains

Log Cabin Republicans v. United States of America, and Robert M. Gates
Ninth Circuit Nos. 10-56634, 10-56813

CORPORATE DISCLOSURE STATEMENT

The Forum on the Military Chaplaincy is an unincorporated association that issues no stock and that is controlled by no publicly traded corporation.

Other corporate and associational *amici* joining this brief are not-for-profit religious organizations that similarly issue no stock and are not controlled by any publicly traded corporation:

California Council of Churches

California Faith for Equality

General Synod of the United Church of Christ

Unitarian Universalist Association

Unitarian Universalist Ministers Association

Unitarian Universalist Legislative Ministry, California

Universal Fellowship of Metropolitan Community Churches

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF <i>AMICI</i>	4
III. ARGUMENT	12
A. DADT’s Abolition Poses No Threat to Religious Liberty.....	12
B. DADT Abridges Religious Liberty	25
IV. CONCLUSION.....	32

TABLE OF AUTHORITIES

Page

CASES

Barghout v. Bureau of Kosher Meat & Food Control,
66 F.3d 1337 (4th Cir. 1995)24

Commack Self-Service Kosher Meats, Inc. v. Weiss,
294 F.3d 415 (2d Cir. 2002).....24

County of Allegheny v. ACLU,
492 U.S. 573 (1989).....24

Katcoff v. Marsh,
755 F.2d 223 (2d Cir. 1985).....1, 27, 28

Kedroff v. St. Nicholas Cathedral,
344 U.S. 94 (1952).....24

Larson v. Valente,
456 U.S. 228 (1982).....28

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976).....24

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1872)24

Zorach v. Clauson,
343 U.S. 306 (1952).....28

STATUTES, RULES AND REGULATIONS

United States Constitution,
First Amendment1, 12

10 U.S.C.
§654..... *passim*
§654(b)(3)29

Federal Rule of Appellate Procedure 29.....1

Department of the Army, AR 165-1, 12 ¶3-2b(6),
(available online at http://www.chapnet.army.mil/Documents/r165_1.pdf)12

Page

Department of Defense, DoDD 1304.28, *Instruction: Guidance for the Appointment of Chaplains for the Military Departments* (June 11, 2004).....1, 3

Department of the Air Force, AFI 52-101, *Planning and Organizing*, May 10, 2005, updated through March 14, 2008, 2, (available online at <http://www.af.mil/shared/media/epubs/AFI52-101.pdf>)12

Department of the Navy, SECNAVINST 1730.7D, 5, ¶5.e.(3) (available online at <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1730.7D.pdf>)13

Association of Professional Chaplains, Code of Ethics §§130.11, 130.13.....14

SECONDARY AUTHORITIES

Acceptance of Openly Lesbian, Gay, and Bisexual Persons in the United States Military, <http://www.uua.org/socialjustice/socialjustice/statements/14263.shtml>8

About The Association of Professional Chaplains, <http://www.professionalchaplains.org/index.aspx?id=95>.....14

Association of Professional Chaplains Says Repeal of “Don’t Ask, Don’t Tell” Would Have No Bearing on Chaplains’ Ministry,” (<http://www.professionalchaplains.org/uploadedFiles/pdf/MilitaryChaplaincy11012010.pdf>).....14

Alpert, Rebecca T. & Sue Levi Elwell *Introduction* in *LESBIAN RABBIS: THE FIRST GENERATION* (Piscataway, New Jersey: Rutgers Univ. Press, 20001)27

ALPERT, REBECCA T., *WHOSE TORAH? A CONCISE GUIDE TO PROGRESSIVE JUDAISM* (New York & London: The New Press, 2008)28

Bisexual, Gay, Lesbian, and Transgender Community, <http://www.uua.org/visitors/justicediversity/6252.shtml>.....25

Bushatz, Amy, *Troop Divorce Rates Level in 2010* (online at <http://www.military.com/news/article/troop-divorce-rates-level-in-2010.html>)18

CATECHISM OF THE CATHOLIC CHURCH ¶2384 (Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997) *passim*

	Page
Chottiner, Lee, <i>Shifting the Balance</i> , The Jewish Chronicle, August 20, 2010 (http://www.thejewishchronicle.net/view/full_story/3202014/article-Shifting-the-balance).....	16
THE CODE OF CANON LAW IN ENGLISH TRANSLATION (London: Collins Liturgical Publications, 1983)	26
Congregation for the Doctrine of the Faith, <i>Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons</i> (Vatican City: Libreria Editrice Vaticana, 2003)	21, 23
Evangelical Lutheran Church in America News Service, <i>ELCA Assembly Opens Ministry to Partnered Gay and Lesbian Lutherans</i> , August 21, 2009 (available at http://www.elca.org/Who-We-Are/Our-Three-Expressions/Churchwide-Organization/Communication-services/News/Releases.aspx#&&a=4253).....	26
HALL, LYNN K., COUNSELING MILITARY FAMILIES: WHAT MENTAL HEALTH PROFESSIONAL NEED TO KNOW (New York: Routledge, Taylor & Francis, 2008).....	18
HARVEY, JOHN F., HOMOSEXUALITY AND THE CATHOLIC CHURCH: CLEAR ANSWERS TO DIFFICULT QUESTIONS (West Chester, Pennsylvania: Ascension Press, 2007)	21
Hefling, Kimberly, <i>For Women in Military, an Elevated Divorce Rate</i> , Washington Post, March 11, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031006049.html	18
HOUSE, H. WAYNE, ED. DIVORCE AND REMARRIAGE: FOUR CHRISTIAN VIEWS (Downers Grove, Illinois: Intervarsity Press/Spectrum Multiview Books, 1990).....	21
<i>A History of All Souls Church, Unitarian</i> , http://www.all-souls.org/information/history.php	31
<i>Jewish Welfare Board Jewish Chaplain Council, THE MILITARY CHAPLAIN</i> , Vol. LXX14, No. 4 (July-September 2006), at 8-10 (online at http://www.mca-usa.org/wp-content/uploads/2009/08/July2006.pdf0).....	16
<i>Marriage Equality: Standing on the Side of Love</i> , http://www.all-souls.org/socialjustice/marriage-equality.php	31
<i>Marriage</i> , http://www.uua.org/visitor/worship/ceremonies/6973.shtml (last updated Nov. 8, 2010)	28

	Page
Miles, Donna, <i>Service Programs Strive to Strengthen Military Marriages, Curb Divorce</i> (online at http://www.defense.gov/news/newsarticle.aspx?id=52194)	18
Ostling, Richard N., Barbara Dolan & Dennis Wyss, <i>Religion: The Battle over Gay Clergy</i> , TIME, Nov. 13, 1989	25
<i>Rabbi Sherwin Wine</i> , The Guardian, Sept. 18, 2007 (online at http://www.guardian.co.uk/news/2007/sep/18/guardianobituaries.religion)	27
<i>Religious Organizations Support “Don’t Ask, Don’t Tell”</i> (online at http://www.hrc.org/issues/military/14345.htm)	13
<i>Repeal “Don’t Ask Don’t Tell,”</i> http://www.uua.org/socialjustice/socialjustice/statements/31606.shtml	8
<i>Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell”</i> (“Comprehensive Working Group Report”) at 135-36 (November 30, 2010) (available online at http://www.defense.gov/home/features/ 2010/0610_gatesdadt/DADTReport_FINAL_20101130%28secure-hires%29.pdf)	12
<i>Social Policy Statements on LGBT Concerns</i> , http://www.ucc.org/lgbt/statements.html	6
<i>Stances of Faiths on LGBT Issues: United Church of Christ</i> , http://www.hrc.org/issues/religion/5055.htm	26
<i>The Conservative Movement on LGBT Issues</i> , http://www.jewishmosaic.org/page/load_page/51	27
<i>The Reconstructionist Movement on LGBT Issues</i> , http://www.jewishmosaic.org/page/load_page/58	27, 28
<i>The Reform Movement on LGBT Issues</i> , http://www.jewishmosaic.org/page/load_page/50	27, 28
Tabachnick, ‘Toby, <i>Don’t Ask Don’t Tell’ repeal troubles chaplains</i> , The Jewish Chronicle, December 27, 2010 (online at http://www.thejewishchronicle.net/view/ full_story/10792500/article-%E2%80%98Don%E2%80%99t-Ask- Don%E2%80%99t-Tell%E2%80%99-repeal-troubles-chaplains-?	17
Tabachnick, Toby, <i>Not So Comfortable</i> , The Jewish Chronicle, December 27, 2010 online at http://thejewishchronicle.net/view/full_story/10792510/article-Not-so- comfortable)	17

	Page
EPISCOPAL CHURCH (USA), TO SET OUR HOPE ON CHRIST: A RESPONSE TO THE INVITATION OF THE WINDSOR REPORT ¶135, at ¶1.7 (New York: Episcopal Church, 2005)	26
U.S. CONFERENCE OF CATHOLIC BISHOPS, COMPENDIUM – CATECHISM OF THE CATHOLIC CHURCH ¶349 (Washington, D.C.: Libreria Editrice Vaticana, 2006).....	20
U.S. CONFERENCE OF CATHOLIC BISHOPS, UNITED STATES CATHOLIC CATECHISM FOR ADULTS at p. 407 (Washington, D.C.: Libreria Editrice Vaticana, 2006)	23
<i>Unitarian Universalist Leaders Applaud Signing of DC Equal Marriage Legislation</i> , Dec. 18, 2009, http://www.uua.org/news/newssubmissions/154024.shtml	31
WENHAM, GORDON J. & WILLIAM E. HETH, JESUS AND DIVORCE (Eugene, Oregon: Wipf & Stock, rev. ed. 2009)	31

I. INTRODUCTION¹

This brief is filed on behalf of the Forum on the Military Chaplaincy joined by retired chaplains and religious organizations, several of which act as endorsers of military chaplains.²

Amici filing this brief support both the district court’s ruling that the “Don’t Ask Don’t Tell” (“DADT”) policy of 10 U.S.C. §654 is unconstitutional, and the legislative determination that it must be repealed. The government, to its credit, has not sought to defend the discriminatory policy’s constitutionality – suggesting instead that the process of repeal chosen by Congress provides a permissible remedy.

That leaves to several pro-DADT *amici* the task of defending the indefensible, in three briefs filed by certain elements of the religious right. The National Legal Foundation’s brief claims it is “dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was

¹ All parties have consented, pursuant to FRAP 29, to the filing of this brief. No party’s counsel authored any part of this brief. No one other than *amici* and their counsel contributed money to fund the preparation or submission of this brief.

² “Before an applicant may be appointed to the position of chaplain he must receive endorsement from an ecclesiastical endorsing agency recognized by the Armed Forces Chaplains Board” *Katcoff v. Marsh*, 755 F.2d 223, 225 (2d Cir. 1985); see DoDD 1304.28 *Instruction: Guidance for the Appointment of Chaplains for the Military Departments*, ¶E.2.1.7. The Unitarian Universalist Association, United Church of Christ, and Episcopal Church endorse chaplains.

built,” inducing it to appear “on behalf of the many Americans who believe courts continue to erode historic and foundational principles of law.”³ Defrocked Alabama Chief Justice Roy S. Moore’s Foundation for Moral Law says it is similarly “dedicated to defending the inalienable right to acknowledge God and the moral foundation of American law,” which Chief Justice Moore purports to find in scriptural passages such as Leviticus 18:22 and Romans 1:26-27, and in ancient screeds asserting that men who lay with men must be put to death.⁴

Joining them are several endorsers of evangelical chaplains, including the Church of God of Prophecy Chaplaincy Ministries and International Conference of Evangelical Chaplain Endorsers. Of three thousand or so active-duty U.S. military chaplains, these organizations say they are responsible for endorsing “more than one hundred,” some of whom are presumably members of the International Association of Evangelical Chaplains, which has added its name to their brief.⁵ These avowedly anti-gay *amici* thus know that Department of Defense regulations already requires military chaplains to “serve a religiously diverse population,” and that chaplains of various faith traditions and denominational affiliations must cooperate with one another. The

³ National Legal Foundation *Amicus* Brief (Dkt Entry 64-1) at 1.

⁴ Foundation for Moral Law *Amicus* Brief (Dkt Entry 62) at 1, 9-10.

⁵ Church of God of Prophecy *Amicus* Brief (Dkt Entry 63) at 1.

endorsers have agreed to this: “Religious Organizations that choose to participate in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.”⁶ They have agreed, moreover, to provide chaplains that “support directly and indirectly the free exercise of religion” by *all* members of the military services and their family members in a “pluralistic environment” where “a plurality of religious traditions exist side-by-side.”⁷

The pro-DADT endorsers now appear to urge that the military’s longstanding policy of religious pluralism, to which they have previously agreed, is no longer acceptable to them and must give way to their own anti-gay dogma. For they say they are deeply worried that DADT’s repeal poses a grave threat to the “military religious liberty” of chaplains who believe that gay men and lesbian women must be shunned and ostracized if they cannot be altogether silenced.

⁶ Department of Defense, DoDD 1304.19, Directive: Appointment of Chaplains for the Military Departments, ¶4.2 (June 11, 2004).

⁷ Department of Defense, DoDD 1304.28, *Instruction: Guidance for the Appointment of Chaplains for the Military Departments*, ¶¶6.1.2, E2.1.8, E3.1.3.3 (June 11, 2004).

With this brief, the Forum on the Military Chaplaincy and its fellow *amici* respectfully submit that acknowledging DADT's unconstitutionality poses no threat to anyone's religious liberty. To the contrary, it is DADT that abridges religious liberty, by imposing anti-gay dogma offensive to many religious organizations, by preventing military chaplains from ministering to the needs of service members whose faith communities are welcoming and affirming to gays and lesbians, by excluding those faith communities' gay and lesbian clergy from the military chaplaincy, and by condemning the same-sex marriages celebrated in many of America's churches and synagogues.

II. IDENTITY AND INTEREST OF *AMICI*

Amicus curiae **Forum on the Military Chaplaincy** is an unincorporated association led by retired military chaplains whose membership also includes clergy, lay leaders, veterans, and concerned citizens committed to free and diverse religious expression. Since 2005 the Forum has sought to provide resources and advocacy for a military chaplaincy that is committed to and expressive of the sacred values of personal integrity, selfless compassion, respect for others, and excellence in leadership. The Forum supports the Chiefs of Chaplains in their constitutional duty to secure the free exercise of religion for all of America's service members, to achieve denominational balance and symmetry with the Chaplain Corps, to provide an inclusive, socially and spiritually responsive program of training and education, and to

extend a welcome and affirming presence to the troops and military families that they are called to serve. The Forum held its fifth annual meeting, in Washington, D.C., on March 18, 2011.

Amicus Curiae **General Synod of the United Church of Christ** is the representative body of the national setting of the United Church of Christ (UCC) and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by the General Synod as described in the Bylaws of the UCC, and ex officio delegates. The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world.⁸ The UCC has 5,600 churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a heritage of concern for equal rights, often being the first among Christian bodies to take courageous stands for justice for

⁸ <http://www.ucc.org/> (accessed April 3, 2011).

lesbian, gay, bisexual and transgender people.⁹ At its 19th General Synod in 1993, the UCC expressly urged an end to the ban against gays and lesbians in the military.¹⁰

Amicus curiae the **Most Reverend Katharine Jefferts Schori**, is Presiding Bishop, Chief Pastor, and Primate of the Episcopal Church, also known as the Protestant Episcopal Church in the United States of America, a hierarchical religious denomination with nearly 7700 worshipping congregations in the United States and other countries that has a long history of supporting the inclusion and fair treatment of gay and lesbian persons within the Church and in society. That position extends to the right of such persons to serve this country, openly and with pride, in all of its many offices and positions, including service in our Armed Forces. The Church's interest in the specific context of the case at bar stems in significant part from the Church's extensive experience with endorsing male and female members of the Church's ordained clergy for service as chaplains to members of the Armed Forces in this country and abroad, in peace-time and in conflict, in battle and behind the lines. Pursuant to the Church's bylaws or "canons," the Presiding Bishop is "charged with the responsibility for . . . speaking for the Church as to the policies, strategies and

⁹ *Social Policy Statements on LGBT Concerns*, <http://www.ucc.org/lgbt/statements.html> (accessed April 3, 2011).

¹⁰ <http://www.ucc.org/assets/pdfs/1993call.pdf> (accessed April 3, 2011).

programs authorized by the General Convention,” the Church’s legislative body. *See* Episcopal Church Canon I.2(4)(a)(1). In this capacity, Bishop Jefferts Schori respectfully urges this Court to affirm the judgment of the court below.

Amicus curiae **Universal Fellowship of Metropolitan Community Churches** (“MCC”), with 250 congregations and 43,000 adherents, is the largest Christian denomination ministering primarily to gay, lesbian, bisexual, and transgendered people.¹¹ DADT both operates to discourage active-duty military men and women from openly participating in MCC churches, and has excluded most MCC members – and practically all of its clergy – from military service.

Amicus curiae **Unitarian Universalist Association (UUA)** is a denomination formed in 1961 by the union of the American Unitarian Association and the Universalist Church of America, two denominations with deep roots in American history, whose membership today comprises more than 1,000 congregations nationwide, ranging from recently organized congregations to many of America’s founding churches, which first gathered in the 1600s so that the Pilgrims and Puritans could pursue their faith in freedom.¹² In 1993, the UUA General Assembly passed a Resolution of Immediate Witness calling for an end to the ban on lesbian, gay, and

¹¹ <http://mccchurch.org/> (accessed April 3, 2011).

¹² <http://www.uua.org> (accessed April 3, 2011).

bisexual persons serving in the U.S. military.¹³ In 2007, the UUA General Assembly passed an Action of Immediate Witness calling for repeal of “Don’t Ask, Don’t Tell.”¹⁴

Amicus curiae **Unitarian Universalist Ministers Association** is an organization comprising ministers granted fellowship by the Ministerial Fellowship Committee of the UUA, and other ministers serving Unitarian Universalist institutions.¹⁵

Amicus curiae **Unitarian Universalist Legislative Ministry, California**, is a statewide justice ministry that cultivates and connects leaders and communities to empower the public voice of those who share Unitarian Universalist values, and that vigorously opposes institutionalized discrimination on the basis of sexual orientation.¹⁶

¹³ *Acceptance of Openly Lesbian, Gay, and Bisexual Persons in the United States Military*, <http://www.uua.org/socialjustice/socialjustice/statements/14263.shtml> (accessed April 3, 2011).

¹⁴ *Repeal “Don’t Ask Don’t Tell,”* <http://www.uua.org/socialjustice/socialjustice/statements/31606.shtml> (accessed April 3, 2011).

¹⁵ <http://www.uuma.org/> (accessed April 3, 2011).

¹⁶ <http://www.uulmca.org/> (accessed April 3, 2011).

Amicus curiae **California Council of Churches** is an organization of California's Christian churches representing the theological diversity in the State's mainstream and progressive communities of faith.¹⁷ Its membership comprises more than 6,000 California congregations, with more than 1.5 million individual members, drawn from 21 denominations spanning the mainstream Protestant and Orthodox Christian communities.

Amicus curiae **California Faith for Equality** is a multi-faith coalition whose mission is to educate, support, and mobilize California's faith communities to promote equality for LGBT people, many of whom have been deeply wounded by their own faith communities, and to safeguard religious freedom.¹⁸ As a multi-faith organization, it respects and values the wisdom and perspectives of every faith tradition, including both those that recognize same-sex marriage as a religious rite, and also those that do not. Formed in 2005, California Faith for Equality formally incorporated in October 2009.

Amici curiae retired chaplains are retired members of the United States military chaplaincy who support the Forum on Military Chaplaincy's efforts on behalf of free and diverse religious expression:

¹⁷ <http://www.calchurches.org> (accessed April 3, 2011).

¹⁸ <http://cafaithforequality.org> (accessed April 3, 2011).

Chaplain Ronald C. Anderson (Colonel), U.S. Army National Guard (Ret). Chaplain Anderson retired in 1994 as Division Chaplain, 49th Armored Division, Texas Army National Guard, after 25 years of service in the Texas and District of Columbia U.S. Army National Guard.

Chaplain Charles D. Camp (Colonel), U.S. Army (Ret). Chaplain Dennis Camp served on active duty for 26 years, retiring in 1996. His military education includes, but is not limited to, Chaplains Officer Basic and Advanced Courses, Combined Armed Services Staff School, Armed Forces Staff College, and the resident course of the Army War College. During his career, his culminating assignments were: Division Chaplain-First Cavalry Division (Desert Storm), Fifth Army Staff Chaplain, and the Director of Personnel and Ecclesiastical Relations in the U.S. Army Chief of Chaplains Office (The Pentagon).

Chaplain Robert L. Campbell (Colonel), U.S. Army (Ret). Chaplain Campbell was ordained in 1955. Key military assignments have included the Command Chaplain, United States Army Europe, and Command Chaplain of the Army's Health Services Command, for a total of 27 years as a military chaplain.

Chaplain Michael Curd (Major), U.S. Army (Ret). Chaplain Curd retired as Deputy Staff Chaplain of Brooke Army Medical Center in San Antonio after a distinguished career in healthcare chaplaincy.

Chaplain Paul W. Dodd (Colonel), U.S. Army (Ret). Chaplain Dodd served 21 years on active duty, and ten years in the Army Reserve and National Guard. Active-duty military assignments include the Division Support Command Chaplain, 101st Airborne Division (Air Assault); Area II Support Activity Staff Chaplain, Camp Page, Republic of Korea; Deputy Post Chaplain and Senior Protestant Pastor, Fort Myer, Military District of Washington, D.C.; Chief, Department of Ministry and Pastoral Care (DMPC), 130th Station Hospital, Heidelberg, Germany; Deputy Chief, DMPC, Walter Reed Army Medical Center; Chief, DMPC, Brooke Army Medical Center, Fort Sam Houston, TX.; and Command Chaplain, U.S. Army Medical Command in San Antonio.

Chaplain John F. Gundlach, CAPT, CHC, USN (Ret). Chaplain Gundlach served on active duty 23 years and retired in 1997.

During his naval career his assignments included Senior Chaplain of the aircraft carrier USS FORRESTAL (CV59); Advanced Course Officer at the Naval Chaplains School in Newport, Rhode Island; Director of Manpower, Community Management, and Recruiting on the staff of the Navy Chief of Chaplains, where he also served on the Personnel Advisory Group of the Armed Forces Chaplain Board; Claimant Chaplain for the Chief of Naval Operations and District Chaplain for Naval District Washington. In his current position as Minister for Government and Professional Chaplaincies for the United Church of Christ, he is the Ecclesiastical Endorser and pastor for denominational clergy serving in the military, Department of Veteran Affairs, and Federal Bureau of Prisons.

Chaplain John W. Price (Colonel), U.S. Army National Guard (Ret). Chaplain Price is a graduate of the Officer Basic Chaplain Course, the Officer Advanced Chaplain Course, and the Army's Command and General Staff College.

Chaplain Jerry L. Rhyne (Colonel), USAF (Ret). Chaplain Rhyne spent 23 years as a Protestant Chaplain for the United States Air Force. In his first ten years of military assignments he provided spiritual guidance and pastoral care, rites and rituals in military community chapels and his last twelve years he served as staff chaplain at all levels of Air Force chaplaincy, including four years in the Office of Chief of Chaplains for the US Air Force. His last military assignment was at Wilford Hall Medical Center, a 1000 bed facility and teaching hospital with staff of nearly 4500, serving as Director of Pastoral Care which included Clinical Pastoral Education for seven chaplains a year.

Chaplain Henry P. Roberson (Lieutenant Colonel), U.S. Army (Ret). Chaplain Roberson was a parish priest for seven years before entering active duty with the U.S. Army. He served at various stateside posts and Germany, concluding his military service with a tour in Bosnia.

III. ARGUMENT

A. DADT's Abolition Poses No Threat to Religious Liberty

Contentions that DADT's demise threatens religious liberty are entirely groundless.

The Comprehensive Working Group Report on repeal of DADT observes that the Defense Department's "existing policies regarding individual expression and free exercise of religion by Service members are adequate," and that "existing policies on chaplain's protections and obligations" already "strike an appropriate balance between protecting a chaplain's First Amendment freedoms and a chaplain's duty to care for all."¹⁹ Existing regulations state that chaplains "will not be required to perform a religious role . . . in worship services, command ceremonies, or other events, if doing so would be in variance with the tenets or practices of their faith."²⁰ Nonetheless chaplains are to "care for all Service members, including those who claim no religious

¹⁹ *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"* ("Comprehensive Working Group Report") at 135-36 (November 30, 2010) (available online at http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130%28secure-hires%29.pdf (accessed April 3, 2011)).

²⁰ Department of the Army, AR 165-1, 12, ¶3-2b(6) (available online at http://www.chapnet.army.mil/Documents/r165_1.pdf (accessed April 4, 2011)); *see also* Department of the Air Force, AFI 52-101, *Planning and Organizing*, May 10, 2005, updated through March 14, 2008, 2, ¶2.1 (available online at <http://www.af.mil/shared/media/epubs/AFI52-101.pdf> (accessed April 4, 2011)).

faith, facilitate the religious requirements of personnel of all faiths, provide faith-specific ministries, and advise the command.”²¹

The duty to care for all service members is fundamental to the ministry of military chaplains. Captain John F. Gundlach, a retired military Navy chaplain, and current United Church of Christ endorser observes, “As military chaplains, we routinely work with service members whose faith traditions and belief systems are different from ours. The idea that repeal of DADT will infringe on our religious liberty is insulting to all the serving chaplains who professionally minister to and with people of diverse beliefs every day.”²²

The Association of Professional Chaplains, with more than 4,000 members the largest organization of professional chaplains in the United States, has similarly stated that “the beliefs of a faith group about homosexuality do not preclude a chaplain from serving ‘both God and the U.S. armed forces,’ as claimed by some retired military

²¹ SECNAVINST 1730.7D, 5, ¶5.e.(3) (available online at <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1730.7D.pdf> (accessed April 4, 2011)).

²² *Religious Organizations Support “Don’t Ask, Don’t Tell” Repeal*, April 28, 2010 (online at <http://www.hrc.org/issues/military/14345.htm>) (accessed March 24, 2011).

chaplains who do not want the ‘don’t ask, don’t tell’ policy revoked.”²³ The Association’s Code of Ethics requires that its own board-certified chaplains, most of whom serve schools, hospitals, and other nonmilitary institutions, shall minister to and serve people without discrimination on the basis of sexual orientation, and prohibits chaplains from imposing their own personal doctrinal positions or spiritual practices on those whom they serve.²⁴

²³ *Association of Professional Chaplains Says Repeal of “Don’t Ask, Don’t Tell” Would Have No Bearing on Chaplains’ Ministry,*” (<http://www.professionalchaplains.org/uploadedFiles/pdf/MilitaryChaplaincy11012010.pdf>) (accessed April 3, 2011); *see also* <http://www.hrc.org/15027.htm> (accessed April 3, 2011).

²⁴ Code of Ethics of the Association of Professional Chaplains, §§130.11, 130.13 (available online at <http://www.professionalchaplains.org/uploadedFiles/BCCI/7%20APC%20Code%20of%20Ethics.pdf>) (accessed April 4, 2011). The Association of Professional Chaplains includes over 4,000 members, from more than 150 faith groups, and advocates for quality chaplaincy care of all persons in health-and-human-service settings, including the military. *See About the Association of Professional Chaplains* (<http://www.professionalchaplains.org/index.aspx?id=95>) (accessed April 3, 2011). “Chaplaincy,” explains the Association’s president-elect Valerie Storms, “is grounded in the common belief in the dignity of every person and the ability of each person to experience the presence of a loving Creator in a time of crisis, hardship or circumstances that bring them into the presence of a chaplain. We do not work as promoters of a particular faith tradition but as ministers of hope to all in need.” *Association of Professional Chaplains Says Repeal of “Don’t Ask, Don’t Tell” Would Have No Bearing on Chaplains’ Ministry,*” (<http://www.professionalchaplains.org/uploadedFiles/pdf/MilitaryChaplaincy11012010.pdf>) (accessed April 3, 2011).

The anti-gay *amici* nonetheless suggest that repeal of DADT threatens military chaplains' right to follow portions of the Levitical holiness code to which some subscribe. Both Chief Justice Moore and the anti-gay endorsers cite the proscription of Leviticus 18:22, in particular, stating that one ought not "lie with a man as one lies with a woman."²⁵

Yet they fail to note that the holiness code of Leviticus 11-26 directly proscribes many other things as well. It bans eating either rabbit or pork: "You must not eat their meat or touch their carcasses; they are unclean for you." Lev. 11:7-8(NIV). Dining on shellfish – or even on catfish, which of course lack scales – is similarly proscribed: "And since you are to detest them, you must detest their carcasses. Anything living in the water that does not have fins and scales is to be detestable to you." Lev. 11:11-12 (NIV).

Military chaplains are entitled to take these proscriptions very seriously, and to hew to them – despite the military's acceptance of service members who openly consume bacon and shrimp, or who relish Southern-fried catfish. Indeed, most of the

²⁵ Lev. 18:22 (NIV); *see* Foundation for Moral Law *Amicus* Brief at 10 (citing Leviticus 18:22); Church of God of Prophecy *Amicus* Brief at 15 (similarly citing Leviticus 18:22).

U.S. Military's Jewish Chaplains are Orthodox rabbis.²⁶ Yet the religious liberty of these Orthodox Jewish chaplains is hardly threatened by the fact that they must work to serve the needs of Christians and Reform Jews who do not feel themselves bound by Levitical proscriptions – whether relating to diet or sexuality.

The Jewish Welfare Board (JWB) Jewish Chaplains Council, which serves as the endorsing body for Jewish military chaplains, comprises rabbis from the Rabbinical Assembly (Conservative), the Rabbinical Council of America (Orthodox), and the Central Conference of American Rabbis (Reform), and meets with three active-duty Jewish chaplains constituting the Chaplains Advisory Group.²⁷ “Even though the rabbis from each denomination have differing views of homosexuality,” the online *Jewish Chronicle* reports, “they were able to agree that the repeal of the law [DADT] would not affect their abilities to serve as military chaplains, said Rabbi

²⁶ Lee Chottiner, *Shifting the Balance*, the Jewish Chronicle, August 20, 2010, (online at http://www.thejewishchronicle.net/view/full_story/3202014/article-Shifting-the-balance (accessed April 3, 2011) (reporting that although most Jewish military personnel are not Orthodox Jews, roughly 70% of Jewish military chaplains are Orthodox rabbis).

²⁷ See *Jewish Welfare Board Jewish Chaplain Council*, THE MILITARY CHAPLAIN, Vol. LXX14, No. 4 (July-September 2006), at 8-10 (online at <http://www.mca-usa.org/wp-content/uploads/2009/08/July2006.pdf> (accessed April 3, 2011)).

Harold Robinson,” a Rear Admiral, U.S. Navy (Ret.), and director of the Jewish Chaplains Council.²⁸

“At our meeting a year ago, we came up with a formal position for the Pentagon,” said Robinson. “Each [branch of Judaism] sees the matter of homosexuality differently. But the role of our chaplains is pretty much unaffected by that. On a daily basis, we deal with people who do all sorts of things we might be uncomfortable with, whether it’s not keeping kosher, or not keeping Shabbat or infidelity. We’re especially used to dealing with people who aren’t Jewish, and follow their own moral law. We meet everyone in terms of their own personal needs.”²⁹

If an Orthodox or Conservative rabbi’s religious liberty is not threatened by the military service of many Christians and Reform Jews – who tend to openly ignore Levitical dietary rules – it is difficult to see why religious liberty of Orthodox Jewish chaplains, or even of evangelical Christian chaplains, might be seriously threatened by the presence of military personnel who do not pretend to follow the Levitical holiness code in other respects.

²⁸ Toby Tabachnick, ‘*Don’t Ask Don’t Tell*’ repeal troubles chaplains, The Jewish Chronicle, December 27, 2010 (online at http://www.thejewishchronicle.net/view/full_story/10792500/article-%E2%80%98Don%E2%80%99t-Ask-Don%E2%80%99t-Tell%E2%80%99-repeal-troubles-chaplains-? (accessed April 3, 2011)); *see also* Toby Tabachnick, *Not So Comfortable*, The Jewish Chronicle, December 27, 2010 (online at http://thejewishchronicle.net/view/full_story/10792510/article-Not-so-comfortable (accessed April 3, 2011)).

²⁹ *Id.*

The anti-gay *amici* also worry that the Army Chaplaincy's "*Strong Bonds* program, which exists to strengthen Army marriages," might one day "be forced to include same-sex couples," and that the opportunity to strengthen same-sex relationships would somehow deprive chaplains of an important religious-liberty interest.³⁰ Maintaining stable military families is undoubtedly an important objective, with divorce rates among military personnel disturbingly high. According to some reports, over three percent of married military personnel may divorce in any given year.³¹ Though many may remarry, preserving existing marriages is legitimately a high priority.³²

³⁰ Church of God of Prophecy *Amicus* Brief at 20.

³¹ See Amy Bushatz, *Troop Divorce Rates Level in 2010* (reporting that since the start of Operation Enduring Freedom, military personnel's annual divorce rate "has increased from 2.6 percent in 2001 to 3.6 percent in 2009," and "remained at 3.6 percent in 2010") (online at <http://www.military.com/news/article/troop-divorce-rates-level-in-2010.html> (accessed April 3, 2011)); Donna Miles, *Service Programs Strive to Strengthen Military Marriages, Curb Divorce*, Armed Forces Press Service, Dec. 4, 2008 ("Military divorce rates rose by .1 percent – to 3.4 percent – during fiscal 2008 Military-wide, 25,700 marriages ended in divorce last year.") (online at <http://www.defense.gov/news/newsarticle.aspx?id=52194> (accessed April 3, 2011)); Kimberly Hefling, *For Women in Military, an Elevated Divorce Rate*, Washington Post, March 11, 2011 ("Last year, 7.8 percent of women in the military got a divorce, compared with 3 percent of military men, according to Pentagon statistics.") (available online at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031006049.html> (accessed April 3, 2011)).

³² See LYNN K. HALL, *COUNSELING MILITARY FAMILIES: WHAT MENTAL HEALTH PROFESSIONALS NEED TO KNOW* 98 (New York: Routledge, Taylor & Francis, 2008)

Yet military chaplains representing America's largest denomination, the Roman Catholic Church, are bound by their own Church's doctrine to disapprove of the legal marriages of quite a few military personnel. For though many married military personnel have both divorced and remarried, and though many others have a spouse whose previous marriage was legally dissolved by divorce, the Roman Catholic Church pronounces divorce "a grave offense against the natural law" and condemns remarriage by, or to, a divorced person as "public and permanent adultery."³³ Its doctrine is clear: "Between the baptized, 'a ratified and consummated marriage cannot be dissolved by any human power or for any reason other than death.'"³⁴ Its *Catechism* emphasizes that

the Church maintains that a new union cannot be recognized as valid, if the first marriage was. If the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God's law.

("it is estimated that at least one third of all married [military] personnel are in a remarriage").

³³ CATECHISM OF THE CATHOLIC CHURCH ¶2384 (Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997) ("*Divorce* is a grave offense against the natural law. . . . Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery[.]").

³⁴ *Id.* ¶2382 (quoting CODEX IURIS CANONICI, canon 1141); see THE CODE OF CANON LAW IN ENGLISH TRANSLATION, canon 1141 (London: Collins Liturgical Publications, 1983) ("A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death.").

Consequently, they cannot receive Eucharistic communion as long as this situation persists. For the same reason, they cannot exercise certain ecclesial responsibilities. Reconciliation through the sacrament of Penance can be granted only to those who have repented for having violated the sign of the covenant and of fidelity to Christ, and who are committed to living in complete continence.³⁵

“The remarriage of persons divorced from a living, lawful spouse is not permitted by God’s law as taught by Christ,” according to the U.S. Conference of Catholic Bishops.³⁶ This Church doctrine means that Roman Catholic priests “cannot recognize the union of people who are civilly divorced and remarried.”³⁷ People who divorce and remarry, according to Roman Catholic orthodoxy, “cannot receive sacramental absolution, take Holy Communion, or exercise certain ecclesial responsibilities as long as their situation, which objectively contravenes God’s law, persists.”³⁸ And some prominent evangelical Protestant voices take much the same position, insisting that Biblical scripture prohibits both divorce and remarriage – while other Protestant evangelicals say that divorce is permitted but remarriage is not, and

³⁵ *Id.* at ¶1650.

³⁶ U.S. CONFERENCE OF CATHOLIC BISHOPS, UNITED STATES CATHOLIC CATECHISM FOR ADULTS 290 (Washington, D.C., U.S. Conf. of Catholic Bishops, 2006).

³⁷ U.S. CONFERENCE OF CATHOLIC BISHOPS, COMPENDIUM – CATECHISM OF THE CATHOLIC CHURCH ¶349 (Washington, D.C.: Libreria Editrice Vaticana, 2006).

³⁸ *Id.*

still others contend that divorce and remarriage both may be permissible in a variety of circumstances.³⁹

But if America's largest religious denomination is one that clearly regards both divorce and same-gender sexual relations as grave offenses against natural law,⁴⁰ that disregards both civil marriages of the legally divorced and civil marriages of same-sex couples as equally null and void,⁴¹ with civil remarriage of divorced persons amounting to "public and permanent adultery,"⁴² and that commands both divorced

³⁹ See generally H. WAYNE HOUSE, ED., *DIVORCE AND REMARRIAGE: FOUR CHRISTIAN VIEWS* (Downers Grove, Illinois: Intervarsity Press/Spectrum Multiview Books, 1990); see also GORDON J. WENHAM & WILLIAM E. HETH, *JESUS AND DIVORCE* (Eugene, Oregon: Wipf & Stock, rev. ed. 2009).

⁴⁰ Compare CATECHISM OF THE CATHOLIC CHURCH ¶2384 ("Divorce is a grave offense against the natural law.") (quoting CDF, *Personal humana* 8), with CATECHISM OF THE CATHOLIC CHURCH ¶2357 (stating "that 'homosexual acts are intrinsically disordered.' They are contrary to the natural law.").

⁴¹ Compare CATECHISM OF THE CATHOLIC CHURCH ¶1650 ("a new union cannot be recognized as valid, if the first marriage was"), with Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* at p. 4 (Vatican City: Libreria Editrice Vaticana, 2003) ("marriage exists solely between a man and a woman"), and with JOHN F. HARVEY, *HOMOSEXUALITY AND THE CATHOLIC CHURCH: CLEAR ANSWERS TO DIFFICULT QUESTIONS* 65 (West Chester, Pennsylvania: Ascension Press, 2007) (asserting that "the Holy See refuses to use the term 'gay marriage' because in no way is a same-sex union a true marriage" under Roman Catholic doctrine).

⁴² CATECHISM OF THE CATHOLIC CHURCH ¶2384 (Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997) ("Contracting a new union, even if it is recognized by

persons and gays and lesbians to lead lives of chastity and celibacy,⁴³ it is difficult to see how the presence of openly gay and lesbian people in the military could be expected to cause greater problems for “military religious liberty” than does the open and notorious presence of many legally remarried divorced persons. And if disagreement among evangelical Christians on the legitimacy of both divorce and remarriage poses no threat to religious liberty in the military chaplaincy,⁴⁴ it is hard to see how disagreement on same-sex relationships could threaten the religious liberty either of evangelical chaplains who disapprove of gay love, or of service members for whom they must care.

The anti-gay endorsers’ brief fails to mention divergent views among Christians concerning divorce and remarriage. It omits mention of the Roman Catholic Church’s position on divorce and remarriage even when it quotes the *Catechism of the Catholic*

civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery. . .”).

⁴³ Compare CATECHISM OF THE CATHOLIC CHURCH ¶1650 (reconciliation possible for divorced persons only if they have repented and “are committed to living in complete continence”) with CATECHISM OF THE CATHOLIC CHURCH ¶2359 (“Homosexual persons are called to chastity.”).

⁴⁴ See *supra* note 39.

Church's statement that "homosexual acts are intrinsically disordered."⁴⁵ Somehow their brief also manages to omit the *Catechism*'s very next paragraph, warning that gay and lesbian people "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."⁴⁶

Unjust discrimination is exactly what the anti-gay *amici* demand, as somehow essential to their own religious liberty. Yet neither the Roman Catholic chaplaincy's religious liberty, nor their own, is any more threatened by the repeal of DADT than it is by the presence in active-duty military ranks of the divorced-and-remarried.

Neither does repealing DADT "effectively establish preferred religions or religious beliefs," as the anti-gay endorsers suggest.⁴⁷ They seem to think their own faith traditions' doctrinal restrictions may be inscribed in federal military policy, with

⁴⁵ Church of God of Prophecy *Amicus* Brief at 15 n.11 (quoting CATECHISM OF THE CATHOLIC CHURCH ¶2357).

⁴⁶ CATECHISM OF THE CATHOLIC CHURCH ¶2358; *see also* U.S. CONFERENCE OF CATHOLIC BISHOPS, UNITED STATES CATHOLIC CATECHISM FOR ADULTS at p. 407 (Washington, D.C.: Libreria Editrice Vaticana, 2006) (quoting ¶2358); Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* 5 (Vatican City: Libreria Editrice Vaticana, 2003) (Opposing legal recognition of same-sex unions as contrary to Church doctrine and natural law but emphasizing: "Nonetheless, according to the teaching of the Church, men and women with homosexual tendencies 'must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided.'") (quoting ¶2358).

⁴⁷ Church of God of Prophecy *Amicus* Brief at 22.

“religious liberty” apparently meaning freedom to force others to follow the anti-gay endorsers’ religious rules. But it is this very characteristic of DADT that violates establishment-clause principles, under which our “government may not promote or affiliate itself with any religious doctrine.”⁴⁸ The government cannot constitutionally choose to impose the anti-gay endorsers’ traditions and doctrines on others; it cannot promote their particular views about what is kosher or holy, or ordained by God.⁴⁹ For our “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”⁵⁰ The anti-gay endorsers say that government ought not to become “entangled in matters touching upon ‘questions of discipline, or of faith, or ecclesiastical rule, custom, or law.’”⁵¹ But that is *exactly* what DADT does, by imposing their dogma on all.

⁴⁸ *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989).

⁴⁹ *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1346-49 (4th Cir. 1995) (Luttig, J., concurring).

⁵⁰ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710-11 (1976) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872)); accord *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114 (1952).

⁵¹ Church of God of Prophecy *Amicus* Brief at 12.

B. DADT Abridges Religious Liberty

DADT's repeal poses no threat to religious liberty, or to military chaplains' ability to perform their constitutionally mandated duties. The real threat to religious liberty is DADT itself.

No religious movement suffers more under DADT than the Universal Fellowship of Metropolitan Community Churches, the largest Christian denomination ministering primarily to gay, lesbian, bisexual, and transgendered people, with 250 congregations and 43,000 adherents. As a practical matter, DADT has operated to exclude *the entirety* of this denomination's American clergy from serving their country as military chaplains. DADT also has operated to exclude many MCC members from military service, and it doubtless has discouraged gay and lesbian service men and women from expressing their faith by openly affiliating with what might be taken to identify them as members of a "gay church."

Many Unitarian Universalist clergy also are excluded by DADT from the military chaplaincy, for a substantial minority of the denomination's ministers are openly gay or lesbian.⁵² And a growing number of mainline denominations also are

⁵² *Bisexual, Gay, Lesbian, and Transgender Community*, <http://www.uua.org/visitors/justicediversity/6252.shtml> (accessed April 3, 2011); ("Unitarian Universalism . . . ordains openly bisexual, gay, lesbian, and transgender clergy. Our LGBT clergy (who are permitted to partner or marry) participate fully as pastors in some of our largest congregations."); *see also* Richard N. Ostling, Barbara

pleased to ordain openly gay and lesbian clergy. The United Church of Christ has done so for decades.⁵³ The Episcopal Church has openly gay and lesbian priests and bishops.⁵⁴ The Evangelical Lutheran Church similarly ordains openly gay ministers.⁵⁵

Dolan & Dennis Wyss, *Religion: The Battle over Gay Clergy*, TIME, Nov. 13, 1989 (“The Unitarian Universalists openly welcome gay clergy.”) (available online at <http://www.time.com/time/magazine/article/0,9171,959025,00.html> (accessed April 3, 2011)).

⁵³ *UCC Firsts*, <http://www.ucc.org/about-us/ucc-firsts.html> (accessed April 3, 2011) (1972 ordination of Rev. William R. Johnson); *Stances of Faiths on LGBT Issues: United Church of Christ*, <http://www.hrc.org/issues/religion/5055.htm> (accessed April 3, 2011) (“In 1972, the UCC became the first mainline Protestant denomination to ordain an openly gay minister, the Rev. William R. Johnson In 2003 there were approximately 300 openly gay or lesbian UCC ministers, according to Johnson.”); *see also* Ostling, Dolan & Wyss, *supra* note 52 (noting that the United Church of Christ ordained its first openly gay clergyman in 1972).

⁵⁴ *See* EPISCOPAL CHURCH (USA), TO SET OUR HOPE ON CHRIST: A RESPONSE TO THE INVITATION OF THE WINDSOR REPORT ¶135, at ¶1.7 (New York: Episcopal Church, 2005) (“affirm[ing] the eligibility for ordination of those in covenanted same-sex unions”) (available online at <http://www.episcopalchurch.org/documents/ToSetOurHopeOnChrist.pdf> (accessed April 3, 2011)).

⁵⁵ *See* Evangelical Lutheran Church in America News Service, *ELCA Assembly Opens Ministry to Partnered Gay and Lesbian Lutherans*, August 21, 2009 (available at <http://www.elca.org/Who-We-Are/Our-Three-Expressions/Churchwide-Organization/Communication-services/News/Releases.aspx#&&a=4253> (accessed April 3, 2011)).

The Conservative, Reform, Reconstructionist, and Humanist movements in American Judaism all feature openly gay and lesbian rabbis.⁵⁶

It is by no means clear that excluding all these holy men and women from service as military chaplains advances anyone's religious liberty. In fact, it does quite the opposite. Their exclusion deprives service members of the counseling and care of chaplains endorsed by denominations that some may prefer – thereby undermining the very free-exercise rationale for the military chaplaincy.⁵⁷ The exclusion of MCC ministers, in particular, clearly violates the principle that “government must be neutral

⁵⁶ *The Conservative Movement on LGBT Issues*, http://www.jewishmosaic.org/page/load_page/51 (accessed April 3, 2011) (noting that the Conservative Movement's American rabbinical schools “allow openly LGB students”); *The Reform Movement on LGBT Issues*, http://www.jewishmosaic.org/page/load_page/50 (accessed April 3, 2011) (the Reform Movements Central Conference of American Rabbis in 1990 formally endorsed acceptance of gay and lesbian rabbis); http://www.jewishmosaic.org/page/load_page/58 (“policies concerning the Reconstructionist rabbinate are fully inclusive of LGBT people”) (accessed on April 3, 2011); *Rabbi Sherwin Wine*, *The Guardian*, Sept. 18, 2007 (online at <http://www.guardian.co.uk/news/2007/sep/18/guardianobituaries.religion>) (accessed April 3, 2011) (obituary noting that Rabbi Sherwin J. Wine, who “was initially a chaplain in the U.S. Army,” and who founded the Humanistic movement, was an openly gay man); *see also* Rebecca T. Alpert, Sue Levi Elwell *Introduction*, in *LESBIAN RABBIS: THE FIRST GENERATION 18-21* (Piscataway, New Jersey: Rutgers Univ. Press, 2001).

⁵⁷ *See Katcoff*, 755 F.2d at 237.

when it comes to competition between sects.”⁵⁸ “This principle of denominational neutrality has been restated on many occasions,”⁵⁹ and surely it applies to the military chaplaincy.⁶⁰

The anti-gay *amici*'s worry that gay or lesbian couples might seek marriage counseling should highlight another important point: DADT seriously abridges religious liberty by condemning military men and women to expulsion from service upon entering marriages celebrated in Unitarian Universalist, in United Church of Christ, and in Metropolitan Community Churches, or in Reform or Reconstructionist synagogues. Committed gay and lesbian couples are welcome to marry in many of those denominations' churches and synagogues.⁶¹ Yet DADT requires the expulsion

⁵⁸ *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

⁵⁹ *Larson v. Valente*, 456 U.S. 228, 246 (1982).

⁶⁰ *See Katcoff*, 755 F.2d at 231 (quoting *Zorach*).

⁶¹ *Marriage*, <http://www.uua.org/visitor/worship/ceremonies/6973.shtml> (accessed April 3, 2011); Mike Schuenemeyer, *Marriage Equality and the UCC*, http://www.ucc.org/lgbt/issues/marriage-equality/#Marriage_Equality_and_the_UCC (accessed April 3, 2011); <http://marriage.mccchurch.org/home/about> (accessed April 3, 2011); *The Reform Movement on LGBT Issues*, http://www.jewishmosaic.org/page/load_page/50 (accessed April 3, 2011); and *The Reconstructionist Movement on LGBT Issues*, http://www.jewishmosaic.org/page/load_page/58 (accessed April 3, 2011); *see also* REBECCA T. ALPERT, *WHOSE TORAH? A CONCISE GUIDE TO PROGRESSIVE JUDAISM* 33 (New York & London: The New Press, 2008) (noting that “many rabbis have begun to

from military service of anyone who has “married or attempted to marry a person known to be of the same biological sex.” 10 U.S.C. §654(b)(3). The anti-gay amici think this somehow advances religious liberty.

The anti-gay *amici* seem to forget standard accounts of America’s unfolding religious liberty, beginning with the story of Pilgrims who sailed on the Mayflower in 1620, that they might escape the Old World’s established religious institutions in order to worship on their own terms, and of the Puritans who in the next decade followed the Pilgrims to a New World – for much the same reasons.

Two vibrant congregations descend from the Pilgrims who landed at Plymouth Rock in 1620 and celebrated the First Thanksgiving in 1621. The Pilgrims’ First Parish Church in Plymouth, Massachusetts has held forth at the top of Town Square since the early 1600s.⁶² And the Church of the Pilgrimage, separated by schism in 1801, stands next door.⁶³ One church is affiliated with the Unitarian Universalist Association, and the other in the United Church of Christ. Both welcome committed

perform same-sex marriages,” and that “[a]ll major non-Orthodox groups are on record supporting civil marriages for same-sex couples”).

⁶² <http://plymouthuu.org> (accessed April 3, 2001).

⁶³ <http://8townsquare.org/index1.html> (accessed April 3, 2011).

same-sex couples to marry, as does the First Church in Boston that John Winthrop conceived as the beacon light of his Puritans' shining "City Upon a Hill."⁶⁴

The First Church in Salem,⁶⁵ which first gathered in 1629 and saw two members put to death in the witchcraft hysteria of 1692, and its sister congregation, the First Church of Danvers, Congregational, which first gathered in 1672 as the Church in Salem Village where the witchcraft hysteria later began,⁶⁶ similarly welcome same-sex couples to marry. One congregation is affiliated with the Unitarian Universalist Association, and the other with the United Church of Christ. Both understand the harm that religious people may inflict on others whom they fear as somehow different.

Gay and lesbian couples are similarly welcome to marry at the United First Parish Church (Unitarian) of Quincy, Massachusetts,⁶⁷ first gathered in 1636 as a branch of the First Church in Boston and independent since 1639, whose church structure provides the resting place of several prominent members: President John Adams, his wife, Abigail Adams, their son, President John Quincy Adams, and his

⁶⁴ <http://www.firstchurchboston.org/> (accessed April 3, 2011).

⁶⁵ <http://www.firstchurchinsalem.org/> (accessed April 3, 2011).

⁶⁶ <http://www.firstchurchdanvers.org/weddings.htm> (accessed April 3, 2011).

⁶⁷ <http://www.ufpc.org/> (accessed April 3, 2011).

wife, Louisa Catherine Adams.⁶⁸ And All Souls Church, Unitarian,⁶⁹ whose founding members in 1821 included the then-future U.S. president John Quincy Adams, future U.S. Vice President John C. Calhoun, and U.S. Capitol architect Charles Bulfinch,⁷⁰ was proud in December 2009 to host the ceremony at which Mayor Adrian M. Fenty signed the bill legalizing same-sex marriage in the District of Columbia.⁷¹

Many American congregations, whether of the United Church of Christ, the Unitarian Universalist Association, the Union for Reform Judaism, the Jewish Reconstructionist Federation, or the Universal Fellowship of Metropolitan Community Churches, enthusiastically welcome committed same-sex couples to join in religious rites of marriage. Neither the sanctity of marriage, nor religious liberty, is enhanced by dishonoring those marriages, as DADT currently does.

⁶⁸ http://www.ufpc.org/same_sex_marriage.htm (accessed April 3, 2011).

⁶⁹ <http://www.all-souls.org/> (accessed April 3, 2011).

⁷⁰ *A History of All Souls Church, Unitarian*, <http://www.all-souls.org/information/history.php> (accessed April 3, 2011).

⁷¹ *See Marriage Equality: Standing on the Side of Love*, <http://www.all-souls.org/socialjustice/marriage-equality.php> (accessed April 3, 2011); *Unitarian Universalist Leaders Applaud Signing of DC Equal Marriage Legislation*, Dec. 18, 2009, (online at <http://www.uua.org/news/newssubmissions/154024.shtml> (accessed April 3, 2011)).

IV. CONCLUSION

The decision below should be affirmed.

DATED: April 4, 2011

Respectfully submitted,

ERIC ALAN ISAACSON

s/ ERIC ALAN ISAACSON

ERIC ALAN ISAACSON

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/338-4519

SUSAN KAY WEAVER

s/ SUSAN KAY WEAVER

SUSAN KAY WEAVER

11440 Meadow Creek Road
El Cajon, CA 92020
Telephone: 619/368-4562
619/749-1304 (fax)

REV. SILVIO NARDONI

s/ REV. SILVIO NARDONI

REV. SILVIO NARDONI

539 Brand Boulevard, Suite 501
Glendale, CA 91203
Telephone: 818/550-1800
818/550-1850 (fax)

Attorneys for *Amici Curiae*: Forum on the Military Chaplaincy; General Synod of the United Church of Christ; the Most Reverend Katharine Jefferts Schori, Presiding Bishop of the Episcopal Church; Universal Fellowship of Metropolitan Community Churches; Unitarian Universalist Ministers Association; Unitarian Universalist Association of Congregations; Unitarian Universalist Legislative Ministry, California; California Council of Churches; California Faith for Equality; and Retired Military Chaplains

CERTIFICATE OF COMPLIANCE

The undersigned counsel certified that the BRIEF FOR *AMICI CURIAE* FORUM ON THE MILITARY CHAPLAINCY, ET AL., SUPPORTING PLAINTIFF-APPELLEE LOG CABIN REPUBLICANS AND URGING AFFIRMANCE uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 6,993 words according to the word count provided by Microsoft Word 2003 word processing software.

s/ ERIC ALAN ISAACSON

ERIC ALAN ISAACSON

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on April 4, 2011, I electronically filed the foregoing document: BRIEF FOR AMICI CURIAE FORUM ON THE MILITARY CHAPLAINCY, ET AL., SUPPORTING PLAINTIFF-APPELLEE LOG CABIN REPUBLICANS AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

4. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Austin R. Nimocks
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, DC 20001

J Pietrangelo II
P.O. Box 548
Avon, OH 44011

Joseph Zernik
2231 South Court
Palo Alto, CA 94301

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 4, 2011, at San Diego, California.

s/ ERIC ALAN ISAACSON

ERIC ALAN ISAACSON