
IN THE
SUPREME COURT OF THE UNITED STATES

SIDD FINCH,

Petitioner,

v.

**MAXWELL KLINGER, SECRETARY OF
THE ARMY, et al.**

Respondent.

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) **ORDER GRANTING PETITION**
) **FOR WRIT OF CERTIORARI**
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit in the Above-Captioned Case:

The petition is hereby GRANTED on the following questions:

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

/s/ _____
Christopher Glauser
Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 07--3113

SIDD FINCH

Appellant

versus

MAXWELL KLINGER, SECRETARY OF THE ARMY, et al.

Appellee.

Appeal from the United States District Court
For the District of Woodbury

BEFORE CHARLES NORRIS, JEANNE CLAUDIA VAN DAMME, AND JOHN WAYNE, CIRCUIT JUDGES.

OPINION BY C. NORRIS, CIRCUIT JUDGE, IN WHICH J. WAYNE JOINS.

I. Introduction.

The Reverend Sidd Finch, a chaplain in the United States Army, brought this suit against Maxwell Klinger in his capacity as Secretary of the Army, seeking injunctive relief to restore Chaplain Finch to his pastoral duties and to expunge a Non-Punitive Letter of Reprimand from his record. The complaint also seeks a declaration that the Army's regulation of the content of a chaplain's faith group worship and Army Regulation AR 165-1, 4-4(b)(1)(1) violate the Free Exercise, Free Speech and Establishment Clauses of the First Amendment, and the Religious Freedom Restoration Act. This suit raises issues of first impression in this Circuit. To resolve these issues, we must determine whether AR 165-1, 4-4(b)(1)(1), regulating Army chaplains' proselytizing activities, is permissible or required under the First Amendment or under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.* (RFRA). We must also consider the extent to which the First Amendment or RFRA affect the Army in regulating the religious services conducted by a U.S. Army Chaplain.

The following facts are undisputed. Appellant and plaintiff Chaplain (CPT) Sidd Finch is a commissioned officer in the United States Army Chaplain Corps, holding the rank of Captain, and stationed with the First Infantry Division, Second Brigade (the “Dagger Brigade”) in Schweinfurt, Germany. Chaplain Finch completed a Masters in Divinity at Harvard in 2000, and in 2001 he was ordained a minister in *God’s Flock*, an evangelical Protestant Christian denomination that is a Department of Defense-approved religious endorsing organization. Shortly after his ordination, Rev. Finch decided to enter the Army and joined the Army Chaplain Corps in 2002. He received the required “fully-qualified” ecclesiastical endorsement from God’s Flock as a prerequisite to entering the Army chaplaincy. As a condition of entering the chaplaincy, Chaplain Finch signed the following statement:

While remaining faithful to my denominational beliefs and practices, I understand that, as a chaplain, I must be sensitive to religious pluralism and will provide for the free exercise of religion by military personnel, their families, and other authorized personnel served by the Army. I further understand that, while the Army places a high value on the rights of its members to observe the tenets of their respective religions, accommodation is based on military need and cannot be guaranteed at all times and in all places.

U.S. Army, Office of the Chief of Chaplains, Form #13 “Statement of Understanding of Religious Pluralism in the U.S. Army” (hereafter Form 13).

In July of 2007, Chaplain Finch was deployed to South Korea with the “Dagger Brigade” to patrol the 155 mile, heavily armed “Demilitarized Zone” buffering North and South Korea.¹ Dagger Brigade is commanded by Colonel Sherman T. Potter. Chaplain Finch was attached to a battalion of roughly 1,000 soldiers, in a camp assigned to patrol the “Bridge of No Return” outside of Panmunjom, a village overlooking the North-South Border.² Chaplain Finch’s supervising Brigade Chaplain is a Roman Catholic priest, Chaplain Patrick Mulcahy, who holds the rank of Lieutenant Colonel and who was stationed fifty miles away in Seoul. Chaplain Mulcahy rotated through the various camps to provide Catholic services such as Mass and confession every other month. However, due to the relative isolation of Chaplain Finch’s battalion, he was effectively the sole chaplain for the 1,000 soldiers in his battalion. As the battalion chaplain, Chaplain Finch was responsible for conducting denominational worship services for about 30 service members from his endorsing organization, God’s Flock; conducting weekly collective Protestant worship services (worship services where a chaplain from one Protestant denomination prepares and leads the worship services for congregants from a broad range of Protestant faith groups) for about 200-300 soldiers; providing religious education, pastoral care, and family and personal counseling; providing morals and leadership training; and in general providing for the free exercise needs of all 1,000 soldiers assigned to him.

Chaplain Finch saw himself as “the thumb on the pulse of the unit” – “the link” between the enlisted men and their commanders. Chaplain Finch updated his commanders on the “psychological, physical and spiritual welfare” of the soldiers. According to Chaplain Finch, the soldiers in the Battalion were “not a touchy-feely group,” and “not very interested in seeking

¹ Dagger Brigade had recently returned from a deployment to the “Sunni Triangle” of Iraq.

² Panmunjom is known as the “tourist trap” of the North-South border – each year, thousands of tourists stop through Panmunjom to peer at North Korean soldiers.

formal counseling” when they first arrived in Panmunjom. In order to provide informal settings where soldiers would feel safe to informally discuss their “psychological, physical and spiritual” needs in one-on-one settings, Chaplain Finch began what he referred to as his “Barbershop Ministry” and his “XBOX Ministry.” In his “Barbershop Ministry,” Chaplain Finch would offer free haircuts once a month to the enlisted soldiers, and while cutting their hair he would talk to them about their lives. Similarly, Chaplain Finch would invite soldiers over to his tent to play XBOX games on an XBOX video game console donated by God’s Flock. In this informal setting, he would engage the soldiers in discussions about their personal lives. Many soldiers first met Chaplain Finch through these “alternative” ministries, and consequently returned to Chaplain Finch for advice on personal or spiritual matters. Chaplain Finch stated that as a result of his “alternative ministry” outreach efforts, he “probably spend[s] 20-30 hours a week counseling soldiers. In an average week, [he spends] no more than 10 hours conducting bible studies, seminars, and worship services.”

In early August, Private First Class BJ Hunnicut, who had recently met Chaplain Finch through the “XBOX Ministry,” approached Chaplain Finch while both men were off duty and asked for some “friendly advice.” Hunnicut told Chaplain Finch that “this deployment is a place that... kills hope” and that he felt “tricked by the military when [he] was deployed to Korea” immediately after an extended tour in Iraq, and that the long deployments had caused his “marriage to fall apart.” After counseling Hunnicut for a while, Chaplain Finch asked Hunnicut if he belonged to a particular faith. Hunnicut said that he “had never attended any church” and Chaplain Finch reportedly finished the conversation by “pray[ing] that [Hunnicut] would be guided to Jesus that [he] may regain his hope” and that “the Lord [would] heal [Hunnicut’s] marriage through his saving grace.”

The following day, Hunnicut complained about the encounter to his Platoon Sergeant Walter O’Reilly who e-mailed Hunnicut’s concerns to the Brigade Chaplain, Chaplain Mulcahy. Hunnicut explained that he “felt uncomfortable” by Chaplain Finch’s “desire to church [him]” and that he “did not realize [he] was going in for a sermon” when he went to talk to Chaplain Finch about his marital problems. Chaplain Mulcahy’s investigation of the incident revealed that Chaplain Finch regularly concluded his formal and informal counseling sessions with prayers, often calling for non-Protestants to be “saved” or “healed.” Chaplain Finch also regularly initiated discussions regarding Protestant doctrines during conversations with soldiers who participated in the XBOX and barbershop “ministries.” In an e-mail exchange between Chaplain Finch and Chaplain Mulcahy regarding the prayers, Chaplain Mulcahy accused Chaplain Finch of “unauthorized proselytizing” and “taking advantage of a soldier who is lower in rank” and ordered Chaplain Finch to stop. Chaplain Finch replied that “it is my duty as a Christian to bring hope and the Word to all those who are in need of it... I cannot in good conscience stop.”

After consultation with Chaplain Mulcahy, Colonel Potter chose to issue a Non-Punitive Letter of Reprimand, which would remain in Chaplain Finch’s personnel file and trigger future action if Chaplain Finch failed to abide by its conditions. The Letter of Reprimand cited a recently promulgated Army regulation regarding proselytizing by chaplains:

Proselytizing by Chaplains. Some religions encourage adherents to spread their faith at every opportunity. To avoid the possibility or appearance of undue influence or

exploitation due to superior/subordinate relationships, a chaplain may not explicitly encourage army personnel or their dependents, who are not of the chaplain's faith group, to adopt the chaplain's faith, unless such encouragement occurs as part of a faith group worship service or religious instruction that the personnel or dependents have specifically and voluntarily chosen to attend.

AR 165-1, 4-4(b)(1) (Jan. 6, 2007)³.

Colonel Potter's Letter of Reprimand included the following statement:

Your proselytizing conduct threatened the good order, discipline and readiness of your unit. Be advised that the U.S. Army will not tolerate similar conduct in the future. If I become aware of such conduct, you will be punished swiftly for violation of AR 165-1, 4-4(b)(1).

No sooner had the ink dried on Chaplain Finch's Letter of Reprimand when on August 28, 2007, Brigade Commander Colonel Potter received an e-mail from the "Military Religious Liberties Foundation"⁴ reporting that "we have received reports from Catholic soldiers in your Brigade that one of your chaplains has been spreading anti-Catholic propaganda." Colonel Potter asked Chaplain Mulcahy to investigate. According to Chaplain Mulcahy's report, Chaplain Finch's sermons contained "specific, derogatory references to basic beliefs of Catholicism." Among the specific complaints of denigration in Chaplain Mulcahy's report to Colonel Potter were the following:

"Chaplain Finch regularly preached the doctrine of '*sola scriptura*,' or biblical primacy, to his God's Flock congregation. Chaplain Finch defined the doctrine of biblical primacy as 'the Bible alone is the primary and final authority for Christian doctrine.'"

According to several accounts, Chaplain Finch's sermons regularly contrasted his faith's belief in biblical primacy with the beliefs of the Roman Catholic Church, which he described as "errantly relying on authorities and traditions outside the bible to understand the Word and Will of God."⁵

"In a recent sermon on 'moral laxity in the modern world,' Chaplain Finch preached that the 'Roman Catholic tradition of celibate priests is another example of why the Bible must be the supreme and final authority on the Word of God... celibacy is not in the Bible – the Bible teaches that we are to be fruitful and multiply – celibacy is a doctrine of man and not of the Bible, and when man creates his own rules, terrible, terrible things happen.' Chaplain Finch then described the Roman Catholic priest sex abuse scandals as an example of the 'danger of non-biblical authority.'"

³ The complete text of the relevant Army Regulations can be found in the attached Section 1 of the Joint Appendix.

⁴ The Military Religious Liberties Foundation is a self-described "watchdog... safeguarding the free exercise of religion in the religiously pluralistic Armed Services"

⁵ For a description of *sola scriptura*, see http://en.wikipedia.org/wiki/Sola_scriptura

In an e-mail exchange between Chaplain Mulcahy and Chaplain Finch, Chaplain Mulcahy told Chaplain Finch that “I have no problem with your doctrine of biblical primacy so long as you are not being divisive and destroying the reputations of other faiths.” Mulcahy also said that “I am merely asking that you preach without implying that you are the only source of truth.” Chaplain Finch responded that “I respect your views and enjoy working with you as my Brigade Chaplain [but] I cannot in good conscience change my sermons.”

Chaplain Mulcahy concluded in his report to Colonel Potter that “based on the prior proselytizing incident and now, his denigration of other faiths, Chaplain Finch cannot be trusted with pastoral duties.” Colonel Potter, acting through an Article 15 Non-Judicial Punishment, relieved Chaplain Finch of all pastoral duties, and recalled him to Seoul where he was assigned to work in a Family Services Center. Colonel Potter’s charges stated that:

Chaplain Finch has been charged and punished for violating Article 134 of the Uniform Code of Military Justice, threatening the good order, discipline, and unit readiness of the military and bringing discredit on the U.S. Army through his abuse of worship services to denigrate other faiths and for failing to preach in a pluralistic manner. Chaplain Finch also violated AR 165-1, 4-4(b)(1) prohibiting proselytizing of deployed troops.”

Chaplain Finch contends that Colonel Potter and Chaplain Mulcahy violated his rights under the First Amendment and the Religious Freedom Restoration Act by bringing the above charges against him because of the religious content of his sermons. He also contends that the Army’s proselytizing regulation -- AR 165-1, 4-4(b)(1) -- violates the Free Exercise and Establishment Clause of the First Amendment, as well as the Religious Freedom Restoration Act.⁶ Chaplain Finch sought injunctive relief to restore him to his pastoral duties and to expunge the Non-Punitive Letter of Reprimand from his record. He also sought a declaration that the Army may not regulate the content of the faith group worship of chaplains and that AR 165-1, 4-4(b)(1) violates the Free Exercise, Free Speech and Establishment Clauses of the First Amendment, and the Religious Freedom Restoration Act. The District Court denied Chaplain Finch’s requests for injunctive and declaratory relief. For the following reasons, we affirm.

II. The Army’s Chaplaincy Program as an Accommodation of Religious Exercise

Before we proceed to the specific claims, we must find a place for the chaplaincy somewhere “in the joints” between the Establishment Clause and the Free Exercise Clause. *See Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 669 (1970). Chaplain Finch’s secular employer is the federal government – not usually permitted by our regular canons of Establishment Clause jurisprudence to directly provide worship services, religious instruction, pastoral counseling, to construct houses of worship, or to purchase and disseminate religious materials. Yet “striking down [the military chaplaincy] might seriously interfere with certain religious liberties also protected by the First Amendment.” *See School District of Abington Township v. Schempp*, 374 U.S. 203, 296 (1963) (Brennan, J., concurring).

⁶ Chaplain Finch does not deny that his conduct violated AR 165-1, 4-4(b)(1). In an e-mail, Chaplain Finch conceded to Chaplain Mulcahy that he violated the regulation but said that “Regardless of your regulations, it is my duty as a Christian to bring the Word to all those who are in need of it. I was exercising my First Amendment rights when I invited PFC Hunnicut to embrace God in order to save his marriage.”

The Supreme Court has provided almost no direction on how we should evaluate Religion Clause questions involving the military chaplaincy. Only in *Marsh v. Chambers*, 463 U.S. 783 (1983), did the Supreme Court consider the constitutionality of a state-funded legislative chaplaincy, and justified the institution on historical grounds. Unfortunately, *Marsh* is insufficient for our purposes, as we are confronted with a robust military chaplaincy program very dissimilar to the short, non-sectarian prayers offered by the legislative chaplains in *Marsh*.

Chaplain Finch's claims, and the military's defenses, raise issues as to the degree of latitude that the Free Exercise and Establishment Clauses afford the military when operating a chaplaincy program whose overall purpose is to assure the free exercise of religion of Army service members and their dependents. Army Regulation 165-1, Chaplain Activities in the United States Army, 4.4 (March 25, 2004) (hereafter cited as AR 165-1).

We view the military chaplaincy as a religious accommodation of service members' free exercise of religion. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 226 n.10 (1963) (Brennan, J., concurring). Although the Second Circuit in *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) suggested that the military chaplaincy is an accommodation constitutionally required by the Free Exercise Clause, we believe that *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) indicates that the Free Exercise Clause does not constitutionally require that service members' free exercise rights be accommodated. See, e.g. *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 34 (D.D.C. 2007) (holding that the military chaplaincy exists as a permissive, not constitutionally required, accommodation of the military-imposed burdens on service members' free exercise rights); *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 452 (8th Cir. 1988) (analyzing county hospital chaplaincy as a permissive accommodation). Rather, Congress has enacted a permissible legislative accommodation and deferred to the military regarding the precise contours of that accommodation. We view these issues through that prism.

III. Army Proselytizing Regulation AR 165-1, 4-4(b)(1)

A. Free Exercise Clause

Chaplain Finch claims that AR 165-1, 4-4(b)(1), regulating the proselytizing activities of chaplains, violates the Free Exercise Clause, or in the alternative, the Religious Freedom Restoration Act, because it restricts his "duty as a Christian to bring the Word to all those who are in need of it." The U.S. Army argues that the Establishment Clause requires that it regulate chaplains' proselytizing activities. The Army also argues that the regulation furthers its interest in maintaining good order, loyalty, and unit readiness.

1. Standard of Review

In *Larsen*, the court identified the appropriate standard of review and corresponding test for evaluating Free Exercise claims within the context of the chaplaincy. 486 F. Supp. 2d at 31-34. As *Larsen* held, and we agree, judicial review of challenges to military programs is "far more deferential than constitutional review of similar laws or regulations designed for civilian

society.” *Id.* (citing *Goldman v. Weinberger*, 475 U.S. 503, 508, (1986) (“when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest”). In *Goldman*, the Court held constitutional a generally applicable Air Force regulation that prohibited a Jewish service member from wearing a yarmulke, a traditional Jewish head covering. In doing so, the Court deferred to the military’s interest in a policy that fostered “uniformity” and “discipline.” *Id.* *Goldman* proposes a “relaxed standard of review” in which a military program or regulation is valid if “legitimate military ends are sought to be achieved” and the program “is designed to accommodate the individual right to an appropriate degree.” *Larsen*, 486 F. Supp. 2d at 33-34 (citing *Goldman*, 475 U.S. at 505).

2. The Army’s ends are legitimate.

In *Goldman*, the Court found as a legitimate military end the military interest in uniformity and discipline. We find that AR 165-1, 4-4(b)(1) has a legitimate purpose to “avoid undue influence or exploitation” of service members or dependents.⁷ Additionally, Colonel Potter’s letter of reprimand stated that Chaplain Finch’s activities affected the “good order and discipline” of the battalion, likely in reference to the fact that Chaplain Finch’s conduct had made at least PFC Hunnicut uncomfortable with the proselytizing.

3. AR 165-1 accommodates a chaplain’s right to proselytize to an appropriate degree.

The second question is whether the program is designed to an appropriate degree to accommodate the individual right. This question, we believe, gets to the heart of the conflict between Chaplain Finch’s Free Exercise claim and the Army’s Establishment Clause defense. The Army contends, and we agree, that if it were to accommodate Chaplain Finch’s free exercise rights as a private citizen to engage in proselytizing, the effect would be to implicate the Establishment Clause in Chaplain Finch’s role as an agent of the government. The proselytizing regulation, AR 165-1, 4-4(b)(1), is designed to ensure that the chaplaincy accommodates service members’ free exercise of religion while not devolving into “unlawful fostering of religion.” *Freedom From Religion Foundation, Inc. v. Nicholson*, 469 F. Supp. 2d 609, 618 (W.D. Wis., 2006) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-335 (1987)). See also *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986) (finding that the Veteran’s Administration “must ensure that the existence of the chaplaincy does not create Establishment Clause problems”).

“Unleashing a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients” violates the Establishment Clause. *Baz*, 782 F.2d at 709. See also *Anderson v. Laird*, 466 F.2d 283, 284 (D.C. Cir. 1972) (prohibiting military academies from requiring mandatory chapel attendance). The regulation is designed to ensure that the Army,

⁷ See, e.g. General John P. Jumper, *Chief’s Sight Picture: Airmen, Spiritual Strength and Core Values* (June 28, 2005), available online at <http://www.af.mil/library/airforcepolicy2/2005/july.asp> (“sharing personal beliefs in a professional setting... where leaders are performing their duties in a chain of command or in a superior-subordinate relationship, can easily become improper influence about personal matters”).

through the chaplaincy, does not supply or promote the religious content during the interactions between chaplains and service members, particularly in the sensitive context of counseling where a service member is essentially a captive audience. In *Wallace v. Jaffree*, 472 U.S. 38, 67-84 (1985), the Court invalidated an Alabama statute that requires public school students to observe a “moment of silence” for “meditation or voluntary prayer.” In Justice O’Connor’s concurrence, she differentiated between a permissible accommodation – such as a statute requiring the observation of a moment of silence – from an impermissible one, where the state supplies and promotes religious content for the moment of silence. *Id.* (O’Connor, J., concurring). When a military chaplain proselytizes a service member in a counseling setting, the government is supplying and promoting religious content within the counseling setting. Chaplain Finch evidenced a pattern of supplying the religious content to his counseling services by finishing with unsolicited prayers and calling on non-Protestants to be “saved.”

Particularly disconcerting is the context in which Chaplain Finch’s proselytizing of Hunnicut occurred. Chaplain Finch lured soldiers to open up to him through his “Barbershop” and “XBOX” ministries. After meeting Chaplain Finch through the XBOX ministry, Hunnicut approached Chaplain Finch for informal marital counseling, but got much more than he bargained for when Chaplain Finch used the informal counseling for his own religious purposes. We agree with the Army that a per se prohibition on chaplains’ proselytizing activity will help prevent similar abuses of counseling services. The supervisory safeguards of formal clinical counseling may often be absent in a deployed setting. *See e.g. Broadlawns*, 857 F.2d at 456 (emphasizing the role of supervision of chaplains to ensure that the religious content of volunteer chaplains’ contact with patients was determined by the patients in accordance with Clinical Pastoral Education standards).

The regulation is particularly sensitive to the possibility that certain interactions between chaplains and other service members may result in “undue influence or exploitation.” The Establishment Clause prohibits psychological coercion to participate in state-sponsored religious activities. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (recognizing that the Establishment Clause prohibits psychological coercion to participate in school sponsored prayer). We defer to military judgment that deployed settings involve “heightened stress and vulnerability.” Soldiers in such settings, like patients in a hospital, are likely to “deal with existential questions and similar issues dealing with the meaning of life.” *Freedom From Religion Foundation*, 469 F. Supp. 2d at 613 (discussing the guidelines of Clinical Pastoral Education in the context of VA chaplaincy). AR 165-1, 4.4.(b) functions as a safeguard to prevent chaplains from taking advantage of the vulnerability of soldiers in order to promote a particular religious agenda.

B. Religious Freedom Restoration Act Claim

Chaplain Finch also asserts claims under the Religious Freedom Restoration Act (“RFRA”). In pertinent part, RFRA prohibits the government from substantially burdening an individual’s exercise of religion, “even if the burden results from a rule of general applicability,” 42 U. S. C. §2000bb–1(a), unless the government “demonstrates that application of the burden to the person (1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest,” §2000bb–1(b).

We agree with Chaplain Finch that, notwithstanding *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding RFRA unconstitutional as applied to the states), RFRA is a valid exercise of Congress’s authority as it applies to the federal government. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 438 (2006) (applying RFRA to application of Controlled Substances Act prohibition on the use of *hoasca* tea, a tea used in Brazilian religious ceremonies). Our agreement with Chaplain Finch ends there. The purpose of RFRA is to create a statutory right of action to “restore” pre-*Smith* free exercise law. 42 USCS § 2000bb(a)(4), (b)(1). We find that in restoring the pre-*Smith* compelling interest test, RFRA incorporated within it the *Goldman* standard. Therefore our analysis is the same as for Chaplain Finch’s free exercise claim. Chaplain Finch’s RFRA claim also fails.

C. Establishment Clause Claim

Chaplain Finch claims that AR 165-1, 4-4(b)(1) is unconstitutional because its primary effect is to inhibit his practice of religion in violation of the Establishment Clause. *See McDaniel v. Paty*, 35 U.S. 618 (1978) (Brennan, J., concurring) (finding that the “exclusion [of clergy from the legislature] manifests patent hostility... not neutrality respecting, religion” and therefore violates the Establishment Clause). This claim is the same as Chaplain Finch’s Free Exercise Clause argument, and therefore is repetitious. We find no violation of the Establishment Clause.

IV. Army Regulation of Worship Services

Chaplain Finch poses three distinct, but interrelated questions regarding the punitive measures that were taken against him for the allegedly derogatory content of his sermons. First, Chaplain Finch contends that the Army violated the Establishment Clause by prohibiting him from preaching the doctrine of sola scriptura, or biblical primacy, and requiring that he preach in a particular “pluralistic” manner. Second, Chaplain Finch argues that the Free Exercise Clause – or, in the alternative, RFRA – requires that the government accommodate his right to freely exercise his religion by preaching biblical primacy. And third, Chaplain Finch argues that the Free Speech Clause acts as an additional check on the Army’s ability to regulate the content of his worship services. The Army contends that Chaplain Finch’s role as a chaplain requires that it regulate his speech pursuant to the Establishment Clause and in light of the Army’s concern for good order and discipline. We analyze Chaplain Finch’s claims in turn.

A. Free Exercise Clause

Chaplain Finch argues that the Army impermissibly applied UCMJ Article 134’s prohibition on activities that threaten “good order or discipline” to discriminate against religious doctrines that it found objectionable. 10 U.S.C.S. § 934, Art. 134 (2007). We reiterate the *Goldman* standard that governs our analysis of Chaplain Finch’s free exercise claims. A military program or regulation is valid if “legitimate military ends are sought to be achieved” and the program “is designed to accommodate the individual right to an appropriate degree.” *Larsen*, 486 F. Supp. 2d at 33-34 (citing *Goldman*, 475 U.S. at 505). Colonel Potter articulated the legitimate ends sought by the military in regulating Chaplain Finch’s worship services – to

maintain “the good order, discipline, and unit readiness of the military” and avoid “bringing discredit” on the Army.

We find that the Army regulated Chaplain Finch to “an appropriate degree” to achieve its aims of maintaining good order, discipline, and unit readiness. The very purpose of an accommodation is to relieve a government-imposed burden on religious exercise. *See Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“public institutions can [] make adjustments of their schedules to accommodate the religious needs of the people”). As a chaplain, Chaplain Finch is supposed to relieve the burdens imposed by the military on the religious exercise of service members. *See DoD Instruction 1304.28, 6.1.2* (August 7, 2007) (requiring chaplains to “support directly and indirectly the free exercise by all Members”). The Army must not permit the chaplaincy to devolve into an Establishment Clause violation, rather than a permissible accommodation. The Establishment Clause affirmatively requires that the Army police the content of a chaplain’s speech, to the extent that such speech demonstrates a preference by the government for a particular sect. *Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (Blackmun, J.) (“Whatever else the Establishment Clause may mean ... it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed including a preference for Christianity over other religions”). The chaplain is the government’s agent of accommodation, and he has sworn an oath to “be sensitive to religious pluralism and [to] provide for the free exercise of religion by military personnel.” Form 13. As an agent of the government, Chaplain Finch may not express exclusivist doctrines, such as biblical primacy, without violating the Establishment Clause. In addition, the Army has interests in preventing its agents from denigrating specific faiths and accusing other service members of “moral laxity,” as Chaplain Finch did with his explicit attacks on Catholicism. We cannot reconcile Chaplain Finch’s obligation to provide for the free exercise needs of all of the soldiers in his battalion, with his blatant attacks on the Catholic service members in his own battalion. Additionally, his stereotypes of sexual abuse by Catholic priests can only serve to undermine the Brigade’s trust in Chaplain Mulcahy.

B. Religious Freedom Restoration Act

As we have previously discussed, we believe that RFRA does not change the standard of review for Free Exercise claims by agents of the Armed Forces. Chaplain Finch’s RFRA claim fails for the same reason as his Free Exercise Claim.

C. Free Speech Clause

Chaplain Finch argues that the Army’s application of UCMJ 134 to ‘censor’ his preaching of *sola scriptura* violated his First Amendment right to free speech. He also alleges that the Army’s assertion that he “preach in a pluralistic manner,” or “preach the Word without [] implying [he is] the only source of truth” constitutes compelled religious speech.

We conclude that Chaplain Finch’s sermons constituted job-related speech under his statutory obligation to conduct worship services and, therefore, are not protected by the Free Speech Clause. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) (“When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for

First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”). In *Garcetti*, Ceballos, the deputy district attorney, lacked First Amendment protection for his speech because he “did not act as a citizen” when he “conduct[ed] his daily activities... by writing a memo.” *Id.* at 1959. As a chaplain, Finch also “[does] not act like a citizen” when he carries out his statutory duty to conduct worship services. 10 U.S.C. § 3547(a). The bread and butter of what defines the chaplains’ job-related speech would be speech related to the chaplain’s fundamental statutory obligation to conduct worship services. In light of *Garcetti*, the Army may censor the job-related speech of its chaplains, or it may compel its chaplains to deliver specific messages when those messages are job related. Chaplain Finch’s compelled speech claims similarly fail under *Garcetti*, as the Army may compel its own employees to deliver its preferred messages when those messages are job-related.

Chaplain Finch argues, and the dissent agrees, that a chaplain’s job-related speech is somehow different from that of other federal employees. Unfortunately, Chaplain Finch can only cite *Rigdon v. Perry*, 962 F. Supp. 150 (D. DC. 1997), a district court case, for this proposition. *Rigdon* may have been correctly decided based on the state of the law in 1997, although we have significant doubt about that, but *Garcetti* has significantly undermined the logic behind the decision.

D. Establishment Clause

According to Chaplain Finch’s theory, the Army has applied UCMJ 134 to justify selective censorship of officially *disfavored* religious doctrines, thus discriminating among religions in violation of the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (finding impermissible discrimination among religions where Minnesota legislature chose to disfavor charitable organizations, particularly certain churches, that received less than fifty percent of their funds from their own membership). Finch asserts that the charges that he “preach in a pluralistic manner,” and Chaplain Mulcahy’s request that “[he] preach the Word without [] implying [he is] the only source of truth,” represent a government-imposed theological requirement of the equality of all religions.

We find no merit in Chaplain Finch’s claims. The Army did not disfavor a particular religious doctrine – the Army disfavored bigotry that threatened unit cohesion and brought discredit on the armed services when an outside organization received complaints that an officer of the Army was spreading anti-Catholic propaganda. As to Chaplain Finch’s claim that the order to “preach in a pluralistic manner” manifests a government-established theology, Chaplain Finch cannot now complain of the obligation he freely assumed when he joined the chaplaincy and signed Form 13, agreeing to work in the pluralistic society of the military.

The Army has not violated any of Chaplain Finch’s rights under the First Amendment or the Religious Freedom Restoration Act. The judgment of the district court is therefore affirmed.

J.C. VAN DAMME, DISSENTING.

The majority has grossly misunderstood the dual role of a chaplain as both a staff officer and a religious leader. By deemphasizing a chaplain’s role as a “religious leader” and overstating the Establishment Clause concerns associated with a chaplain’s role as an officer, the

majority has radically restricted the ability of military chaplains to freely exercise their own religious beliefs and to facilitate the religious beliefs of the soldiers whose congregations have endorsed them. I dissent for the following reasons.

I. Anti-Proselytizing Regulation

A. Free Exercise Clause

I would apply heightened scrutiny to Chaplain Finch's free exercise claim against the anti-proselytizing regulation, rather than the deferential *Goldman* standard of review. In *Goldman*, a Jewish Air Force officer sought an exemption from a rule of general applicability – a dress code that applied to all Air Force personnel. With AR 165-1, 4-4(b)(1), the Army has not enacted a “rule of general applicability” but rather has targeted a particular religious exercise – proselytizing – for exclusion. It is well-settled that a law is neutral and of general applicability only if it does not “infringe upon or restrict practices because of their religious motivation” and if it does not “in a selective manner impose burdens only on conduct motivated by religious belief.” *Church of the Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520, 532 (1993).

“A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 532. It is disingenuous for the Army to claim that a new regulation explicitly targeting religiously motivated activities is necessary to avoid concerns of “undue influence or exploitation.” The anti-proselytizing regulation cites “superior/subordinate” relationship concerns and “good order and discipline” concerns as the “compelling” justifications. Yet several regulations of general applicability already exist under which the Army could address those concerns if they arose, without having to prohibit proselytizing. Those regulations include UCMJ 134 (permitting sanctions against activities that prejudice the “good order and discipline” of a unit), and AR 600-20 (prohibiting relationships between soldiers of differing rank if they are, or are perceived to be, exploitative or coercive in nature). The Army cannot claim that it has a compelling interest in specifically prohibiting religious conduct where its concerns have already been addressed by existing regulations. The fact that the Army chose to target religiously-motivated personal expressions of faith by chaplains indicates “animus” against religion.

Additionally, the anti-proselytizing regulation conflicts with the purposes and justifications for the military chaplaincy. The Army has justified the existence of the chaplaincy as an institution on the grounds that service in the military (and in particular, being deployed to dangerous settings) results in tension for soldiers including “separation from their homes, loneliness when on duty in strange surroundings involving people whose language or customs they do not share, fear of facing combat or new assignments, financial hardships, personality conflicts, and drug, alcohol or family problems” *Katcoff*, 755 F.2d at 228. The Army has argued that the chaplaincy exists in order to “alleviat[e]” the aforementioned “serious stresses” through the same “counseling and spiritual assistance” that a soldier might find at home. *Id.* The failure to provide spiritual support in such strenuous circumstances “would diminish morale, thereby weakening [] national defense.” *Id.* It is disingenuous for the Army to advance, on the one hand, a compelling interest in the spirituality of its soldiers in order to defend the chaplaincy from a

constitutional attack in *Katcoff*, and then to wrap itself in the cloak of secularism to defend itself from a Free Exercise claim by one of its own chaplains who sought to “alleviate[.]” “serious stresses... attributable largely to [PFC Hunnicut’s] military service.” *Id.* The Army’s overly broad anti-proselytizing regulation would effectively prohibit a military chaplain from responding to the spiritual challenges faced by soldiers except in the most formal of settings – faith group worship services. Chaplain Finch spends the great bulk of his time providing informal counseling.

B. Establishment Clause Claim

The Army’s anti-proselytizing regulation, AR 165-1, 4-4(b)(1), impermissibly inhibits Chaplain Finch’s religious practice by forcing him to choose between following “[his] duty as a Christian to bring the Word to all those who are in need of it” and being punished for violating the anti-proselytizing regulation, or abandoning his beliefs in obedience to a government regulation. *See McDaniel v. Paty*, 35 U.S. 618 (1978) (Brennan, J., concurring) (finding a statute impermissibly inhibited religion because it “influenced” a minister to “abandon his ministry as the price of public office”). Although I agree with the majority that this Establishment Clause claim echoes his Free Exercise Clause claim, in my mind this but demonstrates the harmony of the two clauses in condemning the Army’s actions.

C. Religious Freedom Restoration Act

The majority barely gives lip service to the Religious Freedom Restoration Act, assuming that the analysis would be the same under the *Goldman* standard. I again question the applicability of *Goldman*’s deferential standard of review, inasmuch as Congress effectively overrode the decision by statute. Additionally, a careful reading of the statute demonstrates that the rights within the statute need not “subsume” *Goldman*. RFRA does not specify that the statute adopts all pre-*Smith* law – merely that it adopts, as a federal statutory right of action for free exercise claims, the compelling interest test “as set forth in *Sherbert v. Verner*, 374 U. S. 398 (1963) and *Wisconsin v. Yoder*, 406 U. S. 205 (1972).” 42 U. S. C. §2000bb(b)(1). In *Sherbert*, the Court allowed a religious exemption from a state law denying unemployment benefits to individuals who refused to work Saturdays. 374 U. S. at 410 (emphasis added). In *Yoder*, the Court exempted a group of Amish children from compulsory school attendance. I find no language in either *Yoder* or *Sherbert*, or in the statute itself, that a RFRA claim should be analyzed under a deferential *Goldman* standard rather than the statute’s own compelling interest standard.

Chaplain Finch should succeed on his RFRA claim because the Army has substantially burdened his practice of religion and has failed to demonstrate a compelling purpose for doing so. 42 U. S. C. §2000bb(b). *See also Uniao Do Vegetal*, 546 U.S. at 438 (applying RFRA to federal government). The Army’s proselytizing regulation substantially burdens Chaplain Finch’s core “duty as a Christian to bring the Word to all those who are in need of it,” as Chaplain Finch explained in protest to the regulation. As previously discussed under my Free Exercise analysis, the Army fails to demonstrate that the anti-proselytizing regulation actually advances a compelling government interest. Other neutral regulations exist that already address the government’s concerns regarding undue influence or exploitation of service members. A regulation targeting proselytizing does not advance a compelling interest that is unique from

those advanced by the other regulations. Additionally, the Army's compelling interests seem questionable when the Army now seeks to prohibit Army chaplains from providing spiritual guidance to soldiers suffering from the serious stresses of military service, considering that the Army previously defended the chaplaincy from constitutional attack by arguing that chaplains were necessary to provide spiritual guidance to soldiers suffering from the serious stresses of military service. *See Katcoff*, 755 F.2d at 228 (defending the chaplaincy as an institution necessary to support morale and strengthen the national defense). Therefore, I do not find that the government has identified a compelling interest in regulating a chaplain's interpersonal religious conversations.

II. Army Censorship of Worship Services

A. Free Exercise

I would apply a heightened standard of review to Chaplain Finch's Free Exercise Claim rather than the deferential standard under *Goldman*. At issue in *Goldman* was a dress code regulation of general applicability that infringed upon the plaintiff's free exercise rights. The majority argues that that Chaplain Finch has been reprimanded for his sermon under UCMJ 134, a neutral rule of general applicability, and therefore the more deferential standard established by *Goldman* should apply. However, in *Smith*, the Supreme Court suggested that a Free Exercise Claim "in conjunction with other constitutional protections, such as freedom of speech" may bar application of a neutral, generally applicable law which restricts religiously motivated actions. 494 U.S. at 881. I am convinced that Chaplain Finch is likely to succeed on his Free Speech claim regarding the Army's same punishment. I would therefore apply a heightened standard of review to his "hybrid" Free Exercise claim. *See, e.g. Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

Even under the majority's more deferential *Goldman* test, the Army has failed to accommodate to an "appropriate degree" Chaplain Finch's right to preach his endorsing organization's doctrines to his own congregants. I find the court's analysis confusing, to say the least.

The court has expressed a concern that the chaplaincy as an institution not "devolve" into an Establishment Clause violation. Yet neither the court nor the Army has clearly articulated a standard for what a chaplain may or may not say to his congregation. I am unclear what "magic words" trigger the government interest in regulating the chaplain's speech to prevent this alleged devolution into an Establishment Clause violation. Was Chaplain Finch reprimanded for preaching an exclusivist doctrine – in his case, *sola scriptura*? If so, I wonder what faith group would not qualify for similar punishment. Or was it Chaplain Finch's general rejection of the Catholic Church? Or was it his specific condemnation of the priest abuse scandal, in the context of his sermon on *sola scriptura* and moral laxity? In my view, it is precisely this type of censorship that would turn the chaplaincy from a legitimate accommodation of religion – allowing members of God's Flock to come and hear the doctrines of their faith from one ordained to preach them – into an Establishment Clause violation, in which the government is unnecessarily and inexorably entangled in line item vetoes of particular religious doctrines that outside hecklers find offensive. *See Larson v. Valente* 456 U.S. 228, 254 (1982) (prohibiting

“religious gerrymandering” by Minnesota legislature which disfavored churches whose fundraising practices it found obnoxious). The Army, just as civil courts, should be “forbidden” from “interpreting and weighing church doctrine.” *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440 (1969).

In *Hartmann v. Stone*, 68 F.3d 973, 985-986 (6th Cir. 1995) the Sixth Circuit limited the scope of *Goldman*’s deference to the military regarding questions of religious practice by holding that the military may not deny the free exercise rights of day care providers, even though the day care was provided on base, because the day care was provided within the homes of civilians. An appropriate accommodation of Chaplain Finch’s free exercise rights would embrace the “dual role” of a chaplain, not confound it, and recognize the distinctly separate sphere that a chaplain occupies when he is preaching his endorsing organization’s beliefs to his endorsing organization’s constituents, within the confines of his endorsing organization’s worship services. Just as the court should not use the *Goldman* standard to justify an incursion into religious activities in on-base day care programs, the court should not use *Goldman* to justify an intrusion into on-base faith group worship.

Finally, the Army’s Establishment Clause justification for regulating Chaplain Finch’s faith group worship is unfounded. When chaplains conduct religious services, they do not do so “under the color of military authority” but rather act in their religious capacity. *Rigdon v. Perry*, 962 F. Supp. at 160 (finding chaplains conducting worship “surrounded by all the accouterments of religion [] are acting in their religious capacity, not as representatives of the military”).

B. Religious Freedom Restoration Act

The Army’s regulation of Chaplain Finch’s worship service substantially burdens his ability to function in his capacity as a “religious leader” of God’s Flock. The Army has censored Chaplain Finch, an ordained reverend of God’s Flock, from preaching core doctrines of his faith. As a chaplain of the U.S. Army, Finch was not “hired to perform secular duties by a secular employer” and fired because of his religious practices; rather, Chaplain Finch was “hired so that he might practice his religion in the service of a secular employer – and was fired when his employer did not approve of his doing exactly that.” *See Baz v. Walters*, 782 F.2d 701, 705 (7th Cir. 1986).

The Army fails RFRA’s compelling interest requirement because the Army tolerates much more “robust” and potentially offensive types of speech from its service members, such as political speech, than the religious speech that the Army now seeks to curb through UCMJ 134. *See, e.g. Uniao Do Vegetal*, 546 U.S. at 438 (holding the Federal Government failed to advance a compelling interests in prohibiting *hoasca* tea, a substance used in a Brazilian religious ceremony, where the government had exempted peyote from the Controlled Substances Act). In *Rigdon*, military chaplains of various faiths challenged an order prohibiting them from encouraging their congregants to contact Congress regarding partial birth abortions. 962 F. Supp. at 161. Although the military claimed that such “political” speech by chaplains could potentially undermine “loyalty,” “order,” and “discipline,” the District Court held that “compelling interests advanced by the military are outweighed by the military chaplains’ right to autonomy in determining the religious content of their sermons, especially because the defendants have failed to show how the speech restriction as applied to chaplains advances these

interests.” *Id.* at 162. The court noted that the military regularly tolerates political speech much more rigorous and potentially offensive to the military than the sermon speeches that the military sought to censor. *Id.* at 161. Similarly, the U.S. Army regularly tolerates speech much more offensive than that spoken by Chaplain Finch to his congregants. Additionally, censoring Chaplain Finch from sharing his faith group’s doctrines with his own faith group is unlikely to advance the military’s interest. Presumably, Chaplain Finch’s congregants attend his sermons to hear those doctrines and are unlikely to be offended by his statements.

C. Free Speech Clause

A chaplain’s speech during worship services does not constitute job-related speech under *Garcetti*. In *Garcetti*, the Court announced a two-step analysis to determine whether a federal employee would be afforded constitutional protections for his speech. The first question is whether the employee is speaking as a private citizen on a matter of public concern. If the answer is no, the employee has no First Amendment claim; if the answer is yes, the federal employer may still restrict the employee’s speech if the restriction is imposed on speech that has some potential to affect the ability of the government to operate efficiently and effectively. *Garcetti*, 126 S. Ct. at 1960. Applying the *Garcetti* test, I find that the Army, when hiring chaplains, has carved out a special space for chaplains, allowing them to speak not as agents of a secular employer during worship services, but rather as private agents of their endorsing organizations. *See* AR 165-1, 4-3(a) (recognizing the “dual role” of chaplains as “religious leaders and staff officers”). A host of Army regulations demonstrate that chaplains are not regular employees during worship services, but rather are acting in their private role as “religious leaders. For example, the Army guarantees that chaplains will “not be required to take part in worship when such participation is at variance with the tenets of their faith.” *See* AR 165-1, 4.4(e).

To the extent that Chaplain Finch was acting in his special role as an agent of his endorsing organization rather than as an agent of the government when conducting worship services, restrictions of his speech should be evaluated as content-based restrictions on private religious speech. *Rigdon v. Perry*, 962 F. Supp. 150, 164-165 (D. DC. 1997) (striking down regulations prohibiting chaplains from urging congregants to contact members of Congress regarding partial birth abortion legislation). Content-based restrictions on speech are only justified if they serve a compelling interest and are narrowly tailored to achieve that end. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (holding that “religious worship” is protected as speech).

It is equally clear to me that the Army may not turn a chaplain into a “courier[] for ideological messages” such as religious pluralism. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that New Hampshire law punishing citizens for covering up the phrase “LIVE FREE OR DIE” on license plates compelled individuals to be “couriers for ideological messages” and thus violated the First Amendment).

With respect to both proselytizing and worship, the Army has violated Finch’s rights under RFRA and the First Amendment. I would grant Chaplain Finch his requested relief. Accordingly, I respectfully dissent from the court’s judgment.

JOINT APPENDIX – SECTION I

Form 13, Statement of Understanding of Religious Pluralism in the U.S. Army

While remaining faithful to my denominational beliefs and practices, I understand that, as a chaplain, I must be sensitive to religious pluralism and will provide for the free exercise of religion by military personnel, their families, and other authorized personnel served by the Army. I further understand that, while the Army places a high value on the rights of its members to observe the tenets of their respective religions, accommodation is based on military need and cannot be guaranteed at all times and in all places.

DoD Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments

6.1.2. The [Religious Ministry Professional] is willing to function in a pluralistic environment, as defined in this Instruction, and is willing to support directly and indirectly the free exercise of religion by all members of the Military Services, their family members, and other persons authorized to be served by the military chaplaincies.

E2.1.8. Pluralistic Environment. A descriptor of the military context of ministry. A plurality of religious traditions exist side-by-side in the military.

Army Regulation 165-1, Chaplain Activities in the United States Army (Excerpted Provisions⁸)

3–2. Religious requirements, services, and attendance

a. Participation of Army personnel in religious services is strictly voluntary. However, Army personnel may be required to provide logistic support before, during, or after worship services or religious programs.

3–3. Religious services on military installations

a. The Army recognizes that religion is constitutionally protected and does not favor one form of religious expression over another. Accordingly, all religious denominations are viewed as distinctive faith groups and all soldiers are entitled to chaplain services and support.

...

4–3. Professional status of chaplains

a. Army chaplains have a dual role as religious leaders and staff officers. Their duties are prescribed by law, DOD policy, Army regulations, religious requirements, and Army

⁸ For the full text of AR 165-1, visit Chaplain Activities in the U.S. Military http://www.army.mil/usapa/epubs/pdf/r165_1.pdf

mission. In performing their duties, chaplains do not exercise command, but exercise staff supervision and functional direction of religious support personnel and activities (title 10, United States Code, section 3581).

b. The chaplain is a qualified and endorsed clergy person of a DOD recognized religious denomination or faith group.

c. Chaplains are noncombatants and will not bear arms.

d. The proper title for a chaplain is “chaplain” regardless of military rank or professional title. When addressed in writing, the chaplains rank will be indicated in parentheses (see AR 25–50 and AR 600–20).

e. Commanders will detail or assign chaplains only to duties related to their profession. Chaplains may perform unrelated duties in a temporary military emergency. Chaplains may volunteer to participate or cooperate in nonreligious functions that contribute to the welfare of the command...

4–4. Religious responsibilities

a. Chaplains are required by law to hold religious services for members of the command to which they are assigned, when practicable (10 USC 3547). Chaplains provide for religious support, pastoral care, and the moral and ethical wellbeing of the command.

b. Each chaplain will minister to the personnel of the unit and facilitate the “free-exercise” rights of all personnel, regardless of religious affiliation of either the chaplain or the unit member.

(1) *Proselytizing by Chaplains.* Some religions encourage adherents to spread their faith at every opportunity. To avoid the possibility or appearance of undue influence or exploitation due to superior/subordinate relationships, a chaplain may not explicitly encourage army personnel or their dependents, who are not of the chaplain’s faith group, to adopt the chaplain’s faith, unless such encouragement occurs as part of a faith group worship service or religious instruction that the personnel or dependents have specifically and voluntarily chosen to attend.

...
d. When conducting religious services, a chaplain will wear the military uniform, vestments, or other appropriate attire established by church law or denominational practice; (chaplains scarf, stole, or tallit may be worn with the uniform) (see AR 670–1).

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.

...

h. Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer, or benediction. Such occasions are not considered to be religious services. Chaplains will not be required to offer a prayer, if doing so would be in variance with the tenets or practices of their faith group.

i. Chaplains will not accept fees for performing ministrations, sacraments, pastoral and family counseling, and ordinances, which are part of their official military duty. Accepting gifts is subject to guidance of DODD 5500.7–R.

...

k. The chaplain is a teacher of religion and provides religious instruction. The chaplain is responsible to the commander for the religious education program. The staff chaplain will integrate the religious education efforts of subordinate chaplains in the [Command Master Religious Plan] CMRP.

l. Chaplains will contribute to the spiritual well-being of soldiers and families of the command by:

- (1) Developing a pastoral relationship with members of the command by:
 - (a) Taking part in command activities.
 - (b) Conducting programs for the moral, spiritual, and social development of soldiers and their families.
 - (c) Visiting soldiers during duty and off-duty hours.
 - (d) Calling on families in their homes, as appropriate.
- (2) Being available to all individuals, families, and the command for pastoral activities and spiritual assistance.
- (3) Contributing to the enrichment of marriage and family living by assisting in resolving family difficulties.
- (4) Providing pastoral counseling in CFLC and through family life ministry.

4–5. Staff responsibilities

a. Chaplains are staff officers and have direct access to the commander. (see AR 10–5, Field Manual (FM) 100–22, and FM 101–5). Chaplains will advise the commander and staff on matters of religion, morals, and morale, to include—

- (1) The religious needs of assigned personnel.
- (2) The spiritual, ethical, and moral health of the command, to include the humanitarian aspects of command policies, leadership practices, and management systems.

(3) Plans and programs related to the moral and ethical quality of leadership, the care of people, religion, chaplain and chaplain assistant personnel matters and related funding issues within the command.

(4) Construction of religious facilities.

(5) Chaplain activities publicity.

b. Chaplains will coordinate, integrate, and supervise all chaplain activities, religious services, ministries or observances, and the use of facilities subject to the approval of the commander [including delineated activities].

Uniform Code of Military Justice Article 134, General Article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C.S. § 934, Art. 134

Army Regulation 600-20, Army Command Policy⁹

4-14. Relationships between Soldiers of different rank

b. Relationships between Soldiers of different rank are prohibited if they—

(1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.

(2) Cause actual or perceived partiality or unfairness.

(3) Involve, or appear to involve, the improper use of rank or position for personal gain.

(4) Are, or are perceived to be, exploitative or coercive in nature.

(5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.*

⁹ The full text of AR 600-20 is available online at http://www.army.mil/usapa/epubs/pdf/r600_20.pdf

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings. The Congress finds that--

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this Act are--

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 USCS § 2000cc-5].

§ 2000bb-3. Applicability

(a) In general. This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act [enacted Nov. 16, 1993].

(b) Rule of construction. Federal statutory law adopted after the date of the enactment of this Act [enacted Nov. 16, 1993] is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious belief unaffected. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment Clause unaffected

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.