IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, U.S. DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF THE CASE

The federal courts have long been reluctant to involve themselves in the internal affairs of the military, particularly where judicial interference would encroach upon expert military judgment. Underlying this deferential approach are two related concerns: first, a respect for the separation of powers, given that, under our constitutional scheme, "the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." Gilligan v. Morgan, 413 U.S. 1, 10 (1973); and second, a recognition that the judicial resolution of intramilitary disputes — which would call on soldiers to testify against one another, and officers to testify about the details of their commands — poses a distinct threat to the unique hierarchical and disciplinary structure of the military. Ricks v. Nickels, 295 F.3d 1124, 1129 (10th Cir. 2002). Here, Plaintiffs' principal allegations — that Specialist Dustin Chalker was improperly required by his command to attend certain Army events — squarely implicate these concerns, touching directly on the validity of particular duty orders and the Army's authority to control and discipline its forces.

Specialist Chalker alleges that the Establishment Clause and the Religious Test Clause were violated when his chain of command required him to attend three military ceremonies where what he describes as a "sectarian Christian prayer" was offered. As relief, he does not assert that ceremonial prayer at military events is impermissible — but, rather, that he should be excused from attending such events. Even though this precise relief is available through existing Army regulations, which provide for religious accommodations absent an adverse impact on military necessity, Specialist Chalker did not request such an accommodation before any of these three events. What is more, after these events, rather than filing a complaint with his chain of command — or his unit's Equal Opportunity Advisor, or a Chaplain, or an Inspector General, or anyone else authorized by

Army regulations to field such a complaint — Specialist Chalker instead contacted the Military Religious Freedom Foundation, which filed this lawsuit. As a result, Specialist Chalker's commander was unaware of Specialist Chalker's desire to be excused from these three events; the Army was deprived of the opportunity to promptly investigate the underlying allegations and take appropriate action; and Specialist Chalker missed out on the most efficient way to resolve his complaint.

In view of these defects, there is no need for the Court to reach the merits of this case. As an initial matter, Specialist Chalker's failure to exhaust his intramilitary remedies bars review of his claims under the doctrine of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), adopted by the Tenth Circuit in Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981). Further, his claims are nonjusticiable under the Mindes doctrine because judicial review would interfere with Army operations and intrude on command decisions entrusted to military judgment. Even if the Court were to reach the merits, however, Plaintiffs fail to state a claim for two additional reasons. First, the Army has expressed its judgment that its current regulations strike the proper balance between the religious freedoms of soldiers and chaplains, and that further regulation of chaplain-led prayer would implicate unit cohesion — an exercise of professional military judgment that warrants deference from this Court. Second, the tradition of chaplain-led prayer at military ceremonies, which dates back to the Founding, is deeply embedded in our Nation's history and culture, and is closely related to the types of invocational prayers found consistent with the Establishment Clause in Marsh v. Chambers, 463 U.S. 783 (1983), and Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc).

Finally, Plaintiffs raise a host of sweeping allegations of a "pattern and practice" of impermissible support for religion within the Department of Defense, ranging from the official endorsement of private religious organizations to the display of religious symbols on military property. But Plaintiffs identify no person, least of all Specialist Chalker, who is affected by the

alleged practices, and these allegations are precisely the kind of generalized grievances that are routinely rejected by the federal courts.

For all of these reasons, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

STATEMENT OF FACTS

Dustin Chalker is a Specialist in the U.S. Army who is posted at Fort Riley, Kansas. Am. Compl. ¶ 11. He asserts that he is an atheist who "does not voluntarily participate in religious services, ceremonies or rituals" at Fort Riley or other military installations. Id. According to the Complaint, Specialist Chalker was required by his chain of command to attend three events where what he describes as "sectarian Christian prayer" was delivered. Id. ¶¶ 8-10. The first, described in the Complaint as a "formation" on December 5, 2007, id. ¶ 10, was actually a welcome home ceremony that took place upon the return of Specialist Chalker's unit from a deployment in Iraq, Decl. of CPT Kenneth Jones ¶ 4 (annexed as Ex. A). The second, described in the Complaint as a "change of command" ceremony on February 7, 2008, Am. Compl. ¶ 9, was actually a "re-patching" ceremony — a similar, but rarer event that takes place perhaps once in a unit's lifetime, Jones Decl. ¶ 5. The third, described in the Complaint as a "barbeque" on May 16, 2008, Am. Compl. ¶ 8, was actually part of the 1st Engineer Battalion's Organization Day, an annual event held to commemorate the history and traditions of the unit and to build esprit de corps, Jones Decl. ¶ 6. The Complaint alleges that the prayer at the re-patching ceremony was delivered by the battalion chaplain, but it does not indicate who offered the prayers at the other two events. Am. Compl. ¶¶ 8-10. It is silent as to the content of the prayers, and does not indicate what made them "sectarian" or "Christian." Id.

Specialist Chalker alleges that he "sought relief from mandatory attendance" at these events "through his chain of command" but did not attain "satisfactory results." Id. ¶ 11. The Complaint

does not indicate how, when, or from whom he allegedly sought such relief. As explained below, soldiers must submit requests for religious accommodation to their immediate commander. Army Regulation ("AR") 600-20 ¶ 5-6(4)(h)(2).[1] Specialist Chalker did not submit such a request with respect to any of the three events alleged in the Complaint. Jones Decl. ¶ 3. Indeed, Specialist Chalker's commander was not aware of Specialist Chalker's desire to be excused from these events until this lawsuit was filed in September 2008. Id. ¶ 7.

Specialist Chalker also alleges that he sought relief through the Army's equal opportunity process, and that he "exhausted this alternative remedy but has obtained no substantial relief." Am. Compl. ¶ 12. However, soldiers must submit equal opportunity ("EO") complaints within 60 days of the alleged incident, AR 600-20 ¶ D-1(b)(5), and Specialist Chalker did not file an EO complaint regarding any of these three events. Decl. of SFC Dennis McQuay ¶ 3 (annexed as Ex. B).

Specialist Chalker did file an EO complaint regarding a fourth event not mentioned in the Complaint: a change in command ceremony that took place on November 25, 2008. McQuay Decl. ¶ 4. Before that event, however, Specialist Chalker requested that his command excuse him from attending. Jones Decl. ¶ 8; McQuay Decl. ¶ 4. His commander granted that accommodation request, and Specialist Chalker was not required to attend. Jones Decl. ¶ 8; McQuay Decl. ¶ 4. Curiously, Specialist Chalker filed an EO complaint the next day, claiming that he had suffered religious discrimination. McQuay Decl. ¶ 4. As relief for this EO complaint, Specialist Chalker sought to prohibit government-led prayers during all military ceremonies — relief that is not requested in this lawsuit. Id. ¶ 4; see Am. Compl. ¶¶ 17-18. Specialist Chalker's EO complaint of religious discrimination was determined to be unfounded, and he was apprised of the requirements for filing

[1] Current versions of all Army regulations cited in this brief are available online at http://www.army.mil/usapa/epubs (all Internet addresses last visited Apr. 7, 2009).

an administrative appeal. McQuay Decl. ¶ 5. He did not appeal. Id. Instead, Plaintiffs filed an Amended Complaint in this action, asserting that Specialist Chalker had "exhausted" his intramilitary remedies. Am. Compl. ¶ 12.

QUESTIONS PRESENTED

1. Do Plaintiffs have standing to challenge a purported "pattern and practice" of impermissible support of religion within the Department of Defense where they fail to identify any person who is harmed by those practices?

2. Are Specialist Chalker's claims barred under the doctrine of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), adopted by the Tenth Circuit in Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), because he failed to exhaust his intramilitary remedies?

3. Are Specialist Chalker's claims nonjusticiable under the Mindes doctrine because judicial review would interfere with military operations and intrude on command and disciplinary decisions committed to military judgment?

4. Should the Court decline to substitute its judgment for that of the Army regarding chaplain-led prayer at military ceremonies in view of the deference owed to professional military judgments and the deferential standards applied to review of military regulations under the First Amendment?

5. Is the tradition of chaplain-led prayer at military ceremonies, which dates back to the Founding and is closely related to the types of invocational prayers approved in Marsh v. Chambers, 463 U.S. 783 (1983), and Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc), consistent with the Establishment Clause?

STANDARD OF REVIEW

In reviewing a facial challenge to the existence of subject matter jurisdiction under Rule 12(b)(1), the Court must accept the well-pled allegations of the Complaint as true. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995). However, in assessing its jurisdiction, the Court has wide discretion to consider extra-pleading facts, such as those set forth in affidavits, and if necessary may resolve disputed jurisdictional facts, without converting the motion to one for summary judgment. See id. at 1003. Standing and justiciability are properly challenged under Rule 12(b)(1). See Utah v. Babbitt, 137 F.3d 1193, 1203 n.12 (10th Cir. 1998) (standing is jurisdictional); Wright

& Miller, 5B Federal Practice and Procedure: Civil § 1350 (3d ed. 2004) ("Courts have recognized a variety of other defenses . . . when considering a Rule 12(b)(1) motion, including claims that . . . the subject matter is one over which the federal court should abstain from exercising jurisdiction.").

To withstand a motion to dismiss under Rule 12(b)(6), a complaint "must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007)). The "mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." Id. (citation omitted). A complaint that is "no more than 'labels and conclusions' . . . 'will not do.'" Id. (quoting Twombly, 127 S. Ct. at 1965).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SEEK REVIEW OF THEIR "PATTERN AND PRACTICE" ALLEGATIONS

The doctrine of standing imposes two sets of restraints on the exercise of federal judicial power: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies "judicially self-imposed limits" on the jurisdiction of the federal courts. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). Together, these requirements ensure that the federal courts "exercise power only in the last resort," Allen v. Wright, 468 U.S. 737, 752 (1984), and that legal questions are resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

To establish Article III standing, a plaintiff must demonstrate the familiar elements of: (1) an

injury in fact; (2) causation; and (3) redressability. Lance v. Coffman, 127 S. Ct. 1194, 1196 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)). As the parties invoking the Court's jurisdiction, Plaintiffs bear the burden "clearly to allege facts demonstrating" each of these three elements. Warth v. Seldin, 422 U.S. 490, 518 (1975). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997).

While the Supreme Court has "always insisted on strict compliance" with standing requirements, it has cautioned that the inquiry must be "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-20 (1997). "Where, as here, a party alleges that an executive agency is violating the Constitution, the court is required to be extremely cautious in deciding to hear the claim." Raytheon Aircraft Co. v. United States, 435 F. Supp. 2d 1136, 1157 (D. Kan. 2006).

A. Plaintiffs Lack Standing to Challenge the Purported "Pattern and Practice" of Impermissible Support of Religion Within the Department of Defense Because They Fail to Establish That Specialist Chalker — or Anyone Else — Has Personally Been Injured by Those Alleged Practices

Plaintiffs allege that there is a "pattern and practice of constitutionally impermissible promotions of religious beliefs within the Department of Defense." Am. Compl. ¶ 14. Plaintiffs enumerate a variety of these purported practices, including: the use of military personnel and equipment for religious events; the official endorsement of private religious organizations; granting private religious organizations access to military installations; permitting displays of religious symbols on military property; and allowing military e-mail accounts to be used for religious purposes. Id. Although Plaintiffs do not specifically ask the Court to enjoin these supposed practices, see id.

¶ 17-18, they presumably will argue that these "pattern and practice" allegations suffice to create standing where it does not otherwise exist. However, Plaintiffs' burden to establish that they are in danger of sustaining a concrete and particularized injury requires far more specificity. See Lujan, 504 U.S. at 563 (the "'injury in fact' test requires . . . that the party seeking review be himself among the injured"); Raines, 521 U.S. at 819 ("[A] plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him.").

In O'Shea v. Littleton, 414 U.S. 488 (1974), for example, the plaintiffs alleged that a county magistrate and judge were engaged in a pattern and practice of unconstitutional conduct in the administration of the criminal justice system. As is the case here, no named plaintiff was "identified as himself having suffered any injury in the manner specified." Id. at 492, 495. Because the complaint thus alleged injury "in only the most general terms," and the threat of a specific injury to the individual plaintiffs was too speculative, the Supreme Court found that standing was lacking. Id. at 495; see also id. at 496 ("We thus do not strain to read inappropriate meaning into the conclusory allegations of this complaint."). The Court reached a similar conclusion in Warth v. Seldin, 422 U.S. 490, 518 (1975), holding that the petitioners lacked standing to bring a constitutional challenge to a zoning ordinance because their complaint did not set forth allegations demonstrating how they were individually affected by the ordinance. See id. at 516-17.

The Complaint in this case likewise fails to connect its nebulous "pattern and practice" allegations to Specialist Chalker in any manner. Plaintiffs allege no facts to demonstrate that Specialist Chalker has ever personally been subjected to any of these practices, let alone that there is a "real and immediate threat" that he will face them in the future. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). In fact, Plaintiffs allege no facts to establish that any particular soldier has

been, or will be, subjected to these practices.[2] As the Court found in O'Shea and Warth, such nonspecific and conclusory allegations are simply insufficient to establish standing. See also Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 821 (10th Cir. 1999) ("[T]o satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish his own injury in fact.") (citation omitted); Phelps, 122 F.3d at 1326 (facts necessary to support standing "cannot be inferred argumentatively from averments in the pleadings").

Absent any allegation that the purported practices harm Specialist Chalker in an individualized, concrete way, Plaintiffs are left to assert that they are injured by their mere perception that such practices exist. But this objection, without more, is nothing but a generalized grievance that Defendant's conduct violates the Constitution, and the Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984). Establishment Clause claims are not exempt from this principle. Valley Forge, 454 U.S. at 487 ("[A] claim that the

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[2] The Military Religious Freedom Foundation ("MRFF") has no greater standing than does Specialist Chalker. MRFF asserts no injury to itself as an organization; rather, its standing is premised on injuries allegedly suffered by the only one of its members it identifies in the Complaint: Specialist Chalker. See Am. Compl. ¶ 2. As such, MRFF could have associational standing only if, among other requirements, Specialist Chalker "would otherwise have standing to sue in [his] own right." Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 1099 (10th Cir. 2006) (citation omitted). Thus, MRFF's participation in this lawsuit does not affect the standing analysis.

Moreover, even if MRFF could establish standing, its "pattern and practice" claims would be precluded by Rule 41(a)(1)(B), which provides that "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." MRFF has already voluntarily dismissed under Rule 41(a)(1)(i) two federal lawsuits raising the "pattern and practice" claims alleged here. See MRFF v. Gates, No. 07-2444-JWL (D. Kan.), Am. Compl. ¶ 14 (Sept. 25, 2007), Notice of Voluntary Dismissal (Feb. 21, 2008); Hall v. Welborn, No. 08-2098-JWL (D. Kan.), Compl. ¶ 26 (Mar. 5, 2008), Notice of Voluntary Dismissal (Oct. 10, 2008). Accordingly, the second of these dismissals "operates as an adjudication on the merits" that bars MRFF from bringing these claims yet a third time.

Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal [such] discoveries in federal court."). As in Valley Forge, although Plaintiffs suggest that their vague "pattern and practice" accusations are evidence of constitutional error, they "fail to identify any personal injury suffered by them as a consequence." Id. at 485. Thus, these allegations do not make out an "injury sufficient to confer standing under Article III." Id.

B. Plaintiffs' Proposed Injunction Would Not Redress Any Concrete Injury

As relief for their "pattern and practice" allegations, Plaintiffs seek an injunction that would prevent the Department of Defense, and all its civilian and military personnel, from "interfering with the rights of [Specialist] Chalker and those similarly situated" to be "free of compulsory religious practices" and "free of imposition of a religious test." Am. Compl. ¶¶ 17-18. In short, Plaintiffs ask the Court to issue an injunction requiring Secretary Gates to ensure that all Department of Defense employees respect the First Amendment rights of all 1.4 million active-duty servicemembers.[3]

It is well established that such generic "obey the law" injunctions are inappropriate. Keyes v. Sch. Dist. No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990). Here, the proposed injunction would redress nothing, for Defendant is, of course, already obligated to comply with the Constitution. See SEC v. Warren, 583 F.2d 115, 121 (3d Cir. 1978) (affirming dissolution of injunction requiring defendants to merely "obey the law" in the future, "a requirement with which they must comply regardless of the injunction"). Moreover, such an injunction could not be squared with Rule 65(d), which requires that every injunction must "state its terms specifically" and "describe in reasonable

[3] U.S. Department of Defense, Active Duty Military Personnel Strengths by Regional Area and by Country (Dec. 31, 2008), available at http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0812.pdf.

detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C); see Keyes, 895 F.2d at 668 & n.5 (striking an injunction requiring defendants "to use their expertise and resources to comply with the constitutional requirement of equal education opportunity for all"). Because it is not within the Court's power to issue the proposed injunction, the relief that Plaintiffs request for their "pattern and practice" allegations would not redress any concrete injury.

For these reasons, Plaintiffs lack standing to seek review of their "pattern and practice" allegations.

II. PLAINTIFFS' CLAIMS ARE NONJUSTICIABLE

The tradition of judicial deference to the internal affairs of the military has a long pedigree. In Reaves v. Ainsworth, 219 U.S. 296 (1911), the Supreme Court, in declining to review an Army medical board's decision that the plaintiff was medically unfit for service, said: "To be promoted or to be retired may be the right of an officer, . . . but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army." Id. at 306. Decades later, in Orloff v. Willoughby, 345 U.S. 83 (1953), in refusing to review an Army doctor's claim that his duty assignments were discriminatorily made, the Supreme Court announced the oft-cited principle that "judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States." Id. at 93-94. Likewise, in Gilligan v. Morgan, 413 U.S. 1 (1973), the Supreme Court declined to address a challenge to various training and operations decisions of the Ohio National Guard, finding it "difficult to conceive of an area of governmental activity in which the courts have less competence." Id.

This is not to say that the federal courts have no role in reviewing military decisionmaking. Indeed, the Supreme Court has recognized that "members of the military community enjoy many of

the same rights and bear many of the same burdens as do members of the civilian community." Parker v. Levy, 417 U.S. 733, 751 (1974). Nevertheless, consistent with the judiciary's reluctance to second-guess judgments requiring military expertise, inundate the courts with servicemembers' complaints, and interfere with military readiness, the Tenth Circuit has recognized that "[t]he role of the federal judiciary with respect to the internal affairs of the military is narrow and restricted." Schulke v. United States, 544 F.2d 453, 455 (10th Cir. 1976); see also Hanson v. Wyatt, 540 F.3d 1187, 1199 (10th Cir. 2008) (cautioning against "judicial review of military matters without clear authority from Congress").

To determine whether a claim implicating the internal affairs of the military is justiciable, the Tenth Circuit applies the test devised by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). See Lindenau v. Alexander, 663 F.2d 68, 70 (10th Cir. 1981) (adopting Mindes); see also Daugherty v. United States, No. 02-5146, 2003 WL 21666677, at *4-5 (10th Cir. July 17, 2003) (unpublished) (applying Mindes). Under the Mindes doctrine, "a court contemplating review of an internal military determination" must first determine "[1] whether the case involves an alleged violation of a constitutional right, applicable statute, or regulation, and [2] whether intra-service remedies have been exhausted." Lindenau, 663 F.2d at 71 (citation omitted). If that two-factor threshold test is satisfied, the court must then weigh the following four factors: "[1] the nature and strength of the challenge to the military determination, [2] the potential injury to the plaintiff if review is refused, [3] the type and degree of anticipated interference with the military function, and [4] the extent to which military discretion or expertise is involved in the challenged decision." Id.

In this case, Plaintiffs' claims falter at Mindes's threshold step because Specialist Chalker failed to pursue, let alone exhaust, his intraservice remedies with respect to any of the three events alleged in the Complaint. Even if he had, however, Plaintiffs' claims would be barred under

Mindes's balancing test because judicial intervention would interfere with Army operations and infringe upon command and disciplinary matters committed to military judgment.[4]

A. Specialist Chalker's Claims Are Barred under the Mindes Doctrine Because He Failed to Exhaust His Intramilitary Remedies

"The special status of the military has required, the Constitution has contemplated, Congress has created, and [the Supreme] Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." Chappell v. Wallace, 462 U.S. 296, 303-04 (1983). Acting within that plenary authority, Congress "has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." Id. at 302.

The resulting system provides several expansive and, at times, overlapping mechanisms for servicemembers to seek redress of grievances such as those raised by Specialist Chalker. For example, soldiers who feel they have been wronged by their commanding officer, and are refused relief by that officer, have a statutory right to complain to any superior commissioned officer, who must submit the complaint to the officer exercising general court-martial jurisdiction for an

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[4] This is an action for injunctive relief against federal officials. Bivens has no application to such official capacity claims for injunctive relief. Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). A proper Bivens claim lies for (1) damages against a federal officer sued in his (2) individual capacity. See Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10th Cir. 2005) ("[A] Bivens claim lies against the federal official in his individual capacity — not, as here, against officials in their official capacity."); Ricco v. Conner, 146 Fed. Appx. 249, 253 (10th Cir. 2005) (unpublished) ("Bivens is best understood as providing only a cause of action for damages."). Suits for injunctive relief such as this one will not lie against federal officials in their individual capacities, because it is only the government, through its officials, that can provide the relief sought: compliance with the Constitution. Hatfill v. Gonzales, 519 F. Supp. 2d 13 (D.D.C. 2007) (collecting cases). Thus, Plaintiffs' claims lie against Defendant in his official capacity alone and, as such, run against the United States. See Farmer v. Perrill, 275 F.3d 958, 963 (10th Cir. 2001) ("[A]ny action that charges such an official with wrongdoing while operating in his or her official capacity as a United States agent operates as a claim against the United States."). Accordingly, Plaintiffs' citation of Bivens, see Am. Compl. ¶ 1, is inapposite.

investigation. 10 U.S.C. § 938. In addition, servicemembers who feel that their religious freedoms have been infringed can request a religious accommodation from their commander, and can file a complaint through their branch's Equal Opportunity Program. Specialist Chalker did not invoke any of these intramilitary remedies before filing this lawsuit.

1. Army regulations provide for the accommodation of religious practices, absent an adverse impact on military necessity, where the requirements of a soldier's faith conflict with his normal availability for duty

In recognition of "the rights of members of the Armed Forces to observe the tenets of their respective religions," it is Department of Defense policy that "requests for accommodation of religious practices should be approved by commanders" unless accommodation would have "an adverse impact on military readiness, unit cohesion, standards, or discipline." DOD Directive ("DODD") 1300.17 ¶ 3.1 (Feb. 3, 1988).[5] Under this policy, the Secretary of each branch of the Armed Forces is directed to prescribe rules requiring commanders to consider the following factors in determining whether to grant a particular request for accommodation:

1. The importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale, and cohesion.
2. The religious importance of the accommodation to the requester.
3. The cumulative impact of repeated accommodations of a similar nature.
4. Alternative means available to meet the requested accommodation.
5. Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.

Id. ¶ 4.1. While "individual consideration of specific requests for accommodation is necessary" in

[5] Available at https://www.infantry.army.mil/eo/PUBS/d130017p.pdf. This directive, which was operative at all times relevant to this lawsuit, was cancelled and replaced by DOD Instruction ("DODI") 1300.17 on February 10, 2009.

Current versions of all DOD Directives cited in this brief are available online at http://www.dtic.mil/whs/directives/corres/dir.html. Current versions of all DOD Instructions cited in this brief are available online at http://www.dtic.mil/whs/directives/corres/ins1.html.

view of the "different mission requirements of each command," consideration of these factors is "intended to promote standard procedure for resolving difficult questions involving accommodation of religious practices." Id. ¶ 4.2. However, although these factors are intended to "guide[] the exercise of command discretion," they contain "[n]othing [that] shall be interpreted as requiring a specific form of accommodation in individual circumstances." Id. ¶ 3.2.

Consistent with this directive, Army regulations allow for religious accommodations with respect to matters ranging from personal appearance to dietary, medical, and worship practices. AR 600-20 ¶ 5-6(g). With respect to worship practices, the regulations recognize that religious accommodations may be available where the requirements of a soldier's faith conflict with his normal availability for duty. Id. ¶ 5-6(g)(1). Such requests will be approved unless accommodation would be precluded by "unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health" — factors referred to as "military necessity." Id. ¶ 5-6(g)(1); see id. ¶ 5-6(a). Accordingly, while the regulations reaffirm the high value placed on soldiers' free exercise rights, they recognize that the accommodation of religious practices "must be examined against military necessity and cannot be guaranteed at all times." Id. ¶ 5-6(a).

The process for requesting a religious accommodation is governed by regulation. An accommodation request must be submitted to the soldier's immediate commander, who has 10 working days to respond. Id. ¶ 5-6(g)(4)(h). Should the request be denied, the regulations provide for an extensive appeals process. To appeal, the soldier must submit a memorandum describing the nature of and basis for the requested accommodation, and may include additional statements or doctrinal declarations to support the request. Id. ¶ 5-6(g)(4)(h)(5). The soldier is then interviewed by a chaplain, who will evaluate the basis for and sincerity of the request, and may make a recommendation concerning disposition of the appeal. Id. ¶ 5-6(g)(4)(h)(6). The appeal is then

reviewed by a legal advisor, who may likewise make a recommendation. Id. ¶ 5-6(g)(4)(h)(7). The appeal will then be forwarded through each level of command. Id. ¶ 5-6(g)(4)(h)(5), (8). If at any level of command the appeal is granted, written notice of approval of the accommodation is forwarded to the soldier; if the appeal is denied, it is automatically forwarded to the next level of command. Id. ¶ 5-6(g)(4)(h)(8). If the appeal is denied at all levels of command, it is forwarded to the Deputy Chief of Staff, G-1 — who manages personnel policies across all Army components — who has 30 days to render a final decision, from which no appeal lies. Id. ¶ 5-6(g)(4)(h)(9)-(11).

2. The Army's Equal Opportunity Program is a comprehensive system that protects soldiers' religious freedoms

The Army also has a comprehensive Equal Opportunity Program that is separate from, but complementary to, its religious accommodation regulations. In accordance with Department of Defense policy, which recognizes that "[u]nlawful discrimination . . . is contrary to good order and discipline and is counter-productive to combat readiness and mission accomplishment," DODD 1350.2 ¶¶ 4.2, 4.6, E2.1.16, the Secretary of each branch of the Armed Forces is directed to develop policies to prevent unlawful discrimination, to establish procedures governing the submission and investigation of complaints of discrimination, and to ensure that appropriate disciplinary action is taken if such complaints are substantiated. Id. ¶¶ 4.1, 6.2. Accordingly, Army regulations set forth the Army's policy to "provide EO and fair treatment for military personnel . . . without regard to race, color, gender, religion, [or] national origin, and [to] provide an environment free of unlawful discrimination and offensive behavior." AR 600-20 ¶ 6-2(a). Commanders are responsible for implementing the EO Program within their units, and are required to publish command-level EO policy statements, assign EO personnel to their staffs, conduct periodic EO "climate assessments" of their units, and train soldiers about their EO rights and responsibilities. Id. ¶ 6-3(i).

A central part of the Army's EO Program is its comprehensive Complaint Processing System. An aggrieved soldier may make either an informal or a formal EO complaint. An informal complaint is unwritten, and is typically resolved through "discussion, problem identification, and clarification of the issues" with the help of another unit member or someone in the soldier's chain of command. Id. ¶ D-1(a)(1). If the soldier is dissatisfied with the resolution of an informal complaint, his sole recourse is to file a formal complaint. DODD 1350.2, ¶ 6.2.10. Unlike informal complaints, formal complaints "require specific actions, are subject to timelines, and require documentation of the actions taken." AR 600-20, ¶ D-1(b)(1). To "ensur[e] the availability of witnesses, accurate recollection of events, and timely remedial action," soldiers generally must file formal complaints within 60 days of the alleged incident. Id. ¶ D-1(b)(5).

To facilitate prompt resolution of EO issues at the lowest possible level, soldiers are encouraged to submit EO complaints through their chain of command; however, a soldier may also submit a complaint through a number of other channels, including: (1) someone in a higher echelon of his chain of command; (2) his unit's EO Advisor; (3) an Inspector General; (4) a Chaplain; (5) medical agency personnel; or (6) the Staff Judge Advocate. Id. ¶¶ 6-3(k)(14) & D-2 (incorporating id. ¶ D-1(a)(2)). Upon receipt of a formal complaint, a commander has 14 days to conduct an investigation, either personally or through an investigating officer. Id. ¶ D-5. The commander must also implement a plan to protect the complainant from reprisal, id. ¶ D-4(c), and must give the complainant periodic feedback on the status of the investigation. Id. ¶ D-7(b).

If the complaint is substantiated, it is a commander's duty to take corrective action. Id. ¶ 6-3(i)(17). Violations of EO policy, like violations of any lawful order, subject the offender to a wide range of potential punishments. Possible administrative sanctions include formal counseling, letters of reprimand, withholding of privileges, unfavorable performance reviews, administrative reduction

in rank, transfer to another unit, bar to reenlistment, and discharge from the Army. Id. ¶ D-7(a)(1)(a). Moreover, sufficiently serious breaches of EO policy are punishable under the Uniform Code of Military Justice, id. ¶ D-7(a)(1)(b); for example, under Article 92 (failure to obey an order or regulation), Article 133 (conduct unbecoming), and Article 134 (bringing discredit upon the Armed Forces). See Army Pamphlet 350-20 ("Unit Equal Opportunity Training Guide"), ¶ 6-3 & fig. 6-1. Charges under the UCMJ may lead to nonjudicial punishment under Article 15, or may result in a conviction by court martial. See AR 600-20, ¶ D-7(a)(1)(b).

The regulations also provide for an extensive appeals process. A soldier dissatisfied with the resolution of a complaint can appeal to the next highest commander in his chain of command. Id. ¶ D-8. Once an appeal is filed, the original investigating commander has 3 days to refer the appeal to the next highest commander, who then has 14 days to act on the appeal. Id. ¶ D-8(b)-(c). Further appeals can be taken up through the chain of command to the brigade level, from which an appeal lies to the General Court-Martial Convening Authority, whose decisions are final. Id. ¶ D-8(c), D-9.

Finally, the entire complaint submission and resolution process is subject to multiple layers of oversight and follow up. First, a commander must report any formal complaint to the General Court-Martial Convening Authority within 3 days of its receipt, and must submit periodic progress reports until the complaint is resolved. Id. ¶ D-4(a). Second, an EO Advisor must conduct a follow-up assessment of all formal complaints, substantiated or not, within 45 days of a final decision, and must then present his findings to the commander within 15 days. Id. ¶ D-10. Third, all formal complaints are reported by each command in quarterly and annual reports. Army Pamphlet 350-20, ¶ 8-5(c). Fourth, even where a complaint is unsubstantiated, a commander must determine whether the allegations are indicative of problems that might benefit from EO initiatives or other leadership actions. AR 600-20, ¶ D-7(a)(2).

3. Strict application of the Mindes exhaustion requirement reinforces principles of inter-branch comity and avoids nullifying the intramilitary remedial mechanisms designed by Congress and the Executive Branch

In view of this expansive framework of intramilitary remedies, strict application of the Mindes exhaustion requirement is particularly appropriate. Generally speaking, exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 550 (10th Cir. 2001) (citation omitted). Federal resources are conserved, and separation-of-powers concerns respected, when agencies are given the opportunity to bring their expertise to bear on complex problems, and perhaps correct their own errors, before judicial intervention. See id. These concerns are magnified in the military context, where the Supreme Court has emphasized the need to "limit litigation that could undermine the unique hierarchical and disciplinary structure of the military" and has repeatedly recognized that "governance and oversight of the military have been constitutionally committed to Congress and the executive branch." Ricks v. Nickels, 295 F.3d 1124, 1129 (10th Cir. 2002).

Insistence on exhaustion reinforces these principles of inter-branch comity and avoids nullifying the intramilitary remedial mechanisms designed by Congress and the Executive Branch. Accordingly, courts in this Circuit and elsewhere have insisted on exhaustion in the military context. See Thornton v. Coffey, 618 F.2d 686, 691-92 (10th Cir. 1980) (pre-Lindenau) (guardsman asserting race-based discrimination claim required to "resort first to the [Board for Correction of Military Records ("BCMR")] to allow 'the military an opportunity to exercise its own expertise'") (citation omitted); Gorsline v. U.S. Army Reserve, No. 93-3209, 1993 WL 525674, at *1 (10th Cir. Dec. 21, 1993) (unpublished) (affirming dismissal of wrongful discharge claim as a "nonjusticiable military controversy" because reservist failed to exhaust remedies before the BCMR); Williams v. Wilson, 762 F.2d 357, 360 (4th Cir. 1985) ("Under the Mindes . . . analysis, [the plaintiff's] failure to exhaust

intraservice administrative remedies made his federal claim a nonjusticiable military controversy."); Guerra v. Scruggs, 942 F.2d 270, 276-77 (4th Cir. 1991) (reversing grant of preliminary injunction because plaintiff failed to exhaust intramilitary remedies under Mindes); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986) (under Mindes, "exhaustion is a prerequisite to judicial review" of personnel grievances appealable to the BCMR); see also Duffy v. United States, 966 F.2d 307, 311 (7th Cir. 1992) (servicemembers typically "will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies") (citation omitted).

Here, it cannot be disputed that Specialist Chalker failed to exhaust. He did not request a religious accommodation to be excused from attending any of the three events alleged in the Complaint, Jones Decl. ¶ 3, and he does not allege otherwise. Nor did he file a formal EO complaint about any of these three events. McQuay Decl. ¶ 3. And while Specialist Chalker did file an EO complaint regarding a fourth event that is not mentioned in the Amended Complaint, that apparent attempt to exhaust is ineffective for four independent reasons. First, Specialist Chalker filed the EO complaint only after filing this lawsuit. Cf. Simmat, 413 F.3d at 1237; United Tribe, 253 F.3d at 550. Second, the EO complaint was filed more than six months after the most recent of the three events alleged in the Amended Complaint — and nearly a year after the most distant of those events — far outside the 60-day window imposed by Army regulations to "ensur[e] the availability of witnesses, accurate recollection of events, and timely remedial action." AR 600-20 ¶ D-1(b)(5). Third, the EO complaint requested different, and much broader, relief than Specialist Chalker requests in this lawsuit. Indeed, prior to the event that was the subject of the EO complaint, Specialist Chalker requested, and received, a religious accommodation, and was excused from attending that event, Jones Decl. ¶ 8 — and thus, by following the Army's religious accommodation regulations, received the precise relief that he requests in this lawsuit. And fourth, Specialist Chalker declined to

administratively appeal the resolution of his EO complaint, and thus never actually exhausted that remedy. At bottom, Plaintiffs now ask the Court to order relief that Specialist Chalker never requested from the Army before filing this lawsuit, and that plainly is available under existing regulations — a failure to exhaust by any definition.

The Army's religious accommodation regulations and EO Program — with their complaint procedures, investigation timelines, appeal rights, and oversight and follow-up measures — work together to achieve the Army's goal of protecting soldiers' religious freedoms. But the command cannot be expected to remedy grievances that it is not made aware of. Accordingly, while the Army's EO regulations extend a number of rights to soldiers, they also charge soldiers with a key responsibility: "Individuals are responsible for . . . [a]dvising the command of any . . . unlawful discrimination complaints and providing the command an opportunity to take appropriate action to rectify/resolve the issue." AR 600-20 ¶ 6-9(b)(1). In an organization as immense and widely dispersed as the Army — with more than 500,000 active-duty personnel, more than 200,000 of whom are deployed in and around Iraq and Afghanistan, see supra n.3 — it is essential that each soldier live up to this duty. Indeed, to overlook Specialist Chalker's failure to exhaust would effectively void this provision. The Court should hesitate long before taking that step.

Because Specialist Chalker has failed to meet Mindes's threshold exhaustion requirement, the Court should find his claims nonjusticiable.

B. Specialist Chalker's Claims Are Nonjusticiable under Mindes Because Judicial Review Would Interfere with Military Operations and Intrude on Command and Disciplinary Decisions Committed to Military Judgment

Even if Specialist Chalker had exhausted his intramilitary remedies, his claims would be nonjusticiable under Mindes's balancing test, which weighs "[1] the nature and strength of the challenge to the military determination, [2] the potential injury to the plaintiff if review is refused,

[3] the type and degree of anticipated interference with the military function, and [4] the extent to which military discretion or expertise is involved in the challenged decision." Lindenau, 663 F.2d at 71 (citation omitted). This test "essentially balances the interests of the parties, with a preference against interference in the military." Costner v. Okla. Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987).

To be sure, several categories of military action generally remain justiciable under Mindes. For example, courts may review the constitutionality of statutes, regulations, and executive orders related to the military, including selective service induction procedures; determine whether military officials have acted outside the scope of their statutory powers or violated their own regulations; and review court-martial convictions alleged to be constitutionally defective. Lindenau, 663 F.2d at 71 (citing Mindes, 453 F.2d at 199-201).[6]

No such claim is raised in this case. Plaintiffs do not purport to challenge any statute or regulation, and do not allege that the Army has violated its regulations. Instead, they challenge the constitutionality of three discrete duty orders that allegedly required Specialist Chalker to attend particular command events, on the ground that an impermissibly "sectarian" prayer was offered at those events. Plaintiffs thus raise heavily fact-intensive claims that implicate not only the military's control over its forces, but also its disciplinary authority over soldiers, including chaplains, whose actions allegedly infringed Specialist Chalker's religious freedoms. Such a challenge is nonjusticiable under Mindes. Indeed, there is a "vast difference" between judicial review of the

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[6] Courts may also review BCMR decisions for arbitrariness under the standards of the Administrative Procedure Act, see Clinton v. Goldsmith, 526 U.S. 529, 539 (1999) (citing 5 U.S.C. §§ 704, 706), and a determination by the Secretary of a military Department not to convene a special selection board where an officer was not considered by a promotion board due to administrative error, or was considered by a promotion board in a materially unfair manner, see 10 U.S.C. § 628(g). These provisions, however, have no application in this case.

constitutionality of a regulation or statute of general applicability and judicial review of such discrete military decisions. "In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which Feres [v. United States, 340 U.S. 135 (1950),] and Chappell are premised." Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989). Accordingly, if the Court finds it necessary to reach this issue, it should find Plaintiffs' claims nonjusticiable under Mindes.

Applying the Mindes factors here, first, in order to prevail on the merits and to secure the requested injunction, Plaintiffs would have to establish that military necessity — that is, considerations such as "unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health," AR 600-20 ¶ 5-6(a) — could never, under any circumstances, permit the Army to require Specialist Chalker to attend an event at which a "sectarian" prayer might be offered. That result is foreclosed by Goldman v. Weinberger, 475 U.S. 503, 507 (1986), which recognized that a servicemember's religious freedoms are limited by military necessity, and that courts must give "great deference" to military judgment regarding the "relative importance of a particular military interest." See infra Part III.A (discussing Goldman). Moreover, Plaintiffs' conclusory assertions that Specialist Chalker was exposed to "sectarian Christian" prayer — without alleging any facts to indicate what made those prayers "sectarian" or "Christian" — are precisely the sort of "labels and conclusions" that, after Twombly, simply "will not do" to push a claim across the line from "conceivable" to "plausible." Robbins, 519 F.3d at 1247 (quoting Twombly, 127 S. Ct. at 1965).

Second, the potential injury to Specialist Chalker if review is denied is minimal, as the relief he requests here is already available through existing intramilitary channels, which he failed to invoke before filing this lawsuit. See supra Part II.A. Third, judicial inquiry into the facts underlying

Plaintiffs' allegations would be an invasive and time-consuming exercise, possibly involving discovery into events that took place more than a year ago, and perhaps "requir[ing] members of the Armed Services to testify in court as to each other's decisions and actions." Ricks, 295 F.3d at 1129 (citation omitted); see United States v. Stanley, 483 U.S. 669, 682-83 (1987) (avoiding "the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands"). Moreover, potential witnesses, who may have been redeployed, and may well be on tour in Iraq or in other critical areas, would inevitably be distracted from their primary duties.

Fourth, judicial review would insert the Court to an untenable degree into command decisions, requiring it to second-guess particular duty orders, see Orloff, 345 U.S. at 94 ("we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service"), and to substitute its judgment for a commander's with respect to questions of military necessity, such as the importance of universal attendance at a particular event for morale and unit cohesion, see United States v. Shearer, 473 U.S. 52, 58 (1985) (declining to require commanders "to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions"). Judicial review would work a similar intrusion into military disciplinary matters, including whether chaplains should be counseled or disciplined for offering prayers that are impermissibly proselytizing, or denigrating to other faiths, and thus contrary to their duties to function in a pluralistic environment and to protect the religious freedoms of all servicemembers. See DODI 1304.28 ¶ 6.1.2; AR 165-1 ¶4-4(h). Indeed, as the Supreme Court has recognized, even asking "the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters." Stanley, 483 U.S. at 682.

The policies underlying the judiciary's usual deference to military decisionmaking are all the more important during this time of actual combat, as judicial review would unjustifiably disrupt

military operations, divert crucial resources, and, ultimately, "stultify the military in the performance of its vital mission." Mindes, 453 F.2d at 199-201. For these reasons, the Court should hesitate to insert itself into the command and disciplinary decisions implicated here, and should decline review of Plaintiffs' claims.

III. THE COURT SHOULD DEFER TO PROFESSIONAL MILITARY JUDGMENT REGARDING CHAPLAIN-LED PRAYER AT MILITARY CEREMONIES

As noted above, Plaintiffs do not purport to challenge the constitutionality of any statute or Army regulation. However, the military judgments that Plaintiffs call into question take place in the context of a complex statutory and regulatory scheme, the oversight of which is constitutionally committed to the legislative and executive branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Thus, should this Court perceive Plaintiffs' claims as challenging any of those provisions, an additional measure of deference is warranted.

A. The Supreme Court Has Repeatedly Recognized That Judicial Review of Military Regulations Is Far More Deferential than Review of Regulations Designed for Civilian Society, Including Where First Amendment Freedoms Are Implicated

The Supreme Court has long held that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." Parker v. Levy, 417 U.S. 733, 758 (1974). Indeed, "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Accordingly, judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Id.

Consistent with these principles, the Supreme Court has repeatedly deferred to legislative and executive judgments in rejecting constitutional challenges in the area of military affairs. For example, in Parker v. Levy, 417 U.S. 733, 758-59 (1974), the Court approved military regulation of soldiers' disrespectful speech under the Uniform Code of Military Justice, even where the same speech would be constitutionally protected in the civilian community. The Court has also deferred to military judgments banning political speeches on military bases and restricting the distribution of leaflets, Greer v. Spock, 424 U.S. 828, 838 (1976), and imposing prior restraints on the right to circulate petitions, Brown v. Glines, 444 U.S. 348, 357 (1980).

The Court has likewise approved regulations limiting the free exercise of religion in the military. In Goldman v. Weinberger, 475 U.S. 503 (1986), which rejected a Jewish airman's challenge to an Air Force regulation that prevented him from wearing a yarmulke, the Court announced that "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." Id. at 507 (emphasis added). In that case, the challenged regulation reflected the "considered professional judgment" of the Air Force that "standardized uniforms encourage[] the subordination of personal preferences and identities in favor of the overall group mission." Id. at 508. In rejecting the airman's contentions that wearing an unobtrusive yarmulke would not threaten military discipline, and that the Air Force's assertion to the contrary was unsupported by actual experience, scientific study, or expert opinion, the Court deferred to "the military's perceived need for uniformity," id. at 509-10 (emphasis added), describing the courts as "ill-equipped" to second-guess military judgments regarding "the impact upon discipline that any particular intrusion upon military authority might have," id. at 507 (citations omitted). Although the Court recognized that this result would make military life "more

objectionable" for some, id. at 509, it emphasized that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service,'" id. at 507 (quoting Orloff, 345 U.S. at 94).

B. Deference To Professional Military Judgment Is Appropriate Here

The cause for deference to professional military judgment is similarly strong here. In 2006, the Navy and Air Force issued new guidelines that would have required chaplain-led prayers at military ceremonies to be "non-denominational" or "non-sectarian" in nature. SECNAVINST 1730.7C ¶ 6(c) (Feb. 21, 2006); U.S. Dep't of Air Force, Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force ¶ 6 (Feb. 9, 2006). The Army, by contrast, did not revise its guidelines on the subject. They then provided — as they do today — that:

> 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.

AR 165-1 ¶4-4(h). Although no statute or Army regulation explicitly regulates the content of particular prayers, each chaplain is required to "function in a pluralistic environment," DODI 1304.28 ¶ 6.1.2; see DODD 1304.19 ¶ 4.2, must facilitate the free exercise rights of all personnel, regardless of religious affiliation, AR 165-1 ¶4-4(h), and has the duty to confront the command when the religious rights of any soldier are affected, id. ¶ 1-4(d).

Following the implementation of the new Navy and Air Force guidelines, the House of Representatives passed a bill that would have amended the U.S. Code to ensure that military chaplains "shall have the prerogative to pray according to the dictates of the chaplain's own conscience, except as must be limited by military necessity, with any such limitation being imposed in the least restrictive manner feasible." H.R. 5122, 109th Cong. § 590 (as passed by House on May

11, 2006). The Senate version of the bill, however, contained no parallel provision. The provision was the subject of considerable debate, which focused largely on safeguarding the religious freedoms of servicemembers and chaplains serving in a pluralistic environment, and on the chaplaincies' role in fostering unit cohesion. See, e.g., H.R. Rpt. No. 109-452, at 331, 499-500 (May 5, 2009); 152 Cong. Rec. H2510 (May 11, 2006) (statement of Rep. Slaughter) (noting concerns over both protecting the rights of soldiers "of every faith and no faith" and over "micromanag[ing] how a chaplain administers faith on a battlefield"); id. H2516 (statement of Rep. Israel) (noting implications for "national security that depends on unit cohesion and allowing our local commanders to make fundamental personnel decisions and ensure good order and discipline").[7]

In attempting to resolve the difference between the two bills, the conference committee considered the views of the Department of Defense — which opposed the House provision, concerned that it would marginalize chaplains and erode unit cohesion — and the chiefs of chaplains of the Army, Navy, and Air Force, each of whom expressed similar concerns. See 152 Cong. Rec. S9715 (Sept. 19, 2006) (statement of Sen. Warner); 152 Cong. Rec. S10634 (Sept. 29, 2006) (statement of Sen. Levin) (chiefs of chaplains of all branches concerned that the House provision "would limit chaplain effectiveness and erode unit cohesion"). Moreover, the Chief of Chaplains of

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[7] See also, e.g., 152 Cong. Rec. H2362 (May 10, 2006) (statement of Rep. Matsui); id. (letter from Chief of Navy Chaplains describing the Department of Navy's concerns with the House provision); 152 Cong. Rec. H2513 (May 11, 2006) (statement of Rep. Skelton, Ranking Member of House Armed Services Committee); id. H2515 (statement of Rep. Udall); id. H2516 (statement of Rep. Hunter, Chairman of House Armed Services Committee); 152 Cong. Rec. E952 (May 24, 2006) (statement of Rep. McCollum); 152 Cong. Rec. H7983 (Sept. 29, 2006) (statement of Rep. Israel) ("[P]roper balance between religious expression and tolerance in the military . . . is not just an issue of tolerance, . . . it is an issue of good order and discipline and unit cohesion."); id. S10634 (Sept. 29, 2006) (statement of Sen. Levin) (noting importance of balance between chaplains' right to "adhere to the tenets of their respective faiths" while demonstrating "sensitivity, respect, and tolerance for all faiths").

the Army — which, unlike the Navy and Air Force, had not revised its guidelines — expressed the judgment that Army Regulation 165-1 properly strikes "a balance between a chaplain's right to freely express his or her own personal religious beliefs and the chaplain's duty to ensure that every soldier is afforded his or her 'free exercise' rights under the Constitution." 152 Cong. Rec. S9717 (Sept. 19, 2006). Accordingly, the Army saw "no reason to provide additional guidelines concerning chaplains and public prayer since [Army Regulation] 165-1 is sufficient." Id.

Ultimately, the conference committee excluded the House provision from the bill. However, it included language in the conference report that — although not having the force of law, see Roeder v. Islamic Republic of Iran, 333 F.3d 228, 236-37 (D.C. Cir. 2003) — directed the Secretaries of the Navy and the Air Force to rescind their new regulations and reinstate prior policies that, like the Army regulations, did not regulate the content of ceremonial prayer. H.R. Conf. Rpt. 109-702, at 739 (Sept. 29, 2006). The conference report directed no changes to Army Regulation 165-1. Id.; see 152 Cong. Rec. H7973 (Sept. 29, 2006) (statement of Rep. Matsui) (conference report "maintains a critical role of our military chaplains and what they play in the spiritual lives and health of our troops. In a time of war, we cannot afford to change the rules in ways which may degrade readiness and unit cohesion.").

Thus, here, as in Goldman, current Army regulations reflect the "considered professional judgment" of the Army that chaplain-led prayer may be appropriate at certain military ceremonies. Goldman, 475 U.S. at 508; AR 165-1 ¶4-4(h). Moreover, as it expressed to Congress in 2006, it is the judgment of the Army that current regulations strike the proper balance between the religious freedoms of soldiers and chaplains, and that further regulation of chaplain-led prayer would implicate unit cohesion — judgments to which this Court owes "great deference." Goldman, 475 U.S. at 507; see 152 Cong. Rec. S9717 (Sept. 19, 2006); 152 Cong. Rec. S10634 (Sept. 29, 2006) (statement of

Sen. Levin). Plaintiffs thus invite the Court to regulate what military officials, in the exercise of their professional judgment, have expressly determined not to further regulate. Given the "far more deferential" standards applied to review of military regulations under the First Amendment, Goldman, 475 U.S. at 507, and the Supreme Court's admonition that it is not for the judiciary to second-guess military expertise regarding "the impact upon discipline that any particular intrusion upon military authority might have," id., this Court should not substitute its judgment for that of the Army on this issue based on the objections of a single soldier.

IV. THE TRADITION OF CHAPLAIN-LED PRAYER AT MILITARY CEREMONIES IS CONSTITUTIONAL

Even if the Court were to reach the merits of this case, it is clear that chaplain-led prayer at military ceremonies — a tradition that dates back to the Founding — is constitutional.

A. Any Establishment Clause Challenge to Chaplain-led Prayer at Military Ceremonies Is Foreclosed by the Supreme Court's Decision in Marsh v. Chambers and the Tenth Circuit's Decision in Snyder v. Murray City Corp.

In Marsh v. Chambers, 463 U.S. 783 (1983), the Supreme Court rejected an Establishment Clause challenge to the Nebraska state legislature's practice of beginning each of its sessions with a prayer offered by a chaplain paid out of public funds, observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." Id. at 786. In Snyder v. Murray City Corp., 159 F.3d 1227, 1233 (10th Cir. 1998) (en banc), the Tenth Circuit "read Marsh as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call 'legislative prayer' does not violate the Establishment Clause." To the contrary, "it would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers." Id. (citation omitted). As demonstrated below, the tradition of chaplain-

led prayer at military ceremonies is just as "deeply embedded" in our Nation's history and is closely analogous to such invocational prayers, and there is no persuasive reason to distinguish it from the legislative prayers approved in Marsh.

1. Our Nation's tradition of chaplain-led prayer at military ceremonies dates back to the Founding

As the Court observed in Marsh, "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." Id. at 786. Thus, the Court explained, "the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." Id. at 787. Later, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," id. at 787-88, and a "statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789." Id. at 788 (citation omitted). Just three days later, the Court noted, "final agreement was reached on the language of the Bill of Rights." Id. (citation omitted).

In view of this history, the Supreme Court concluded that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment." Id. at 788 (footnote omitted). The Court explained: "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." Id. at 790; see also id. at 788 (noting that the practice of legislative prayer begun by the First Congress has "continued without interruption ever since that early session of Congress"). Marsh thus established that, under such circumstances, chaplain-led legislative prayer

"is not . . . an 'establishment' of religion," but "a tolerable acknowledgment of beliefs widely held among the people of this country." Id. at 792.

Chaplain-led prayer at military ceremonies, like legislative prayer, originated at the Founding and has continued to this day. When the Continental Army was formed in 1775, the chaplains that had been attached to the militia and volunteer forces of the 13 colonies became part of our first national army. P. Thompson, 1 The United States Army Chaplaincy xix, 106 (1978). On July 29, 1775, the Continental Congress directed that a Continental Army chaplain be paid. Id. at 106-07 (citing 2 Cont. Cong. Jour. 220 (1775)). And within a year, with Congress's approval and funding, General George Washington directed that commanders procure a chaplain for each regiment of the Continental Army. Id. at 110 (citing 5 The Writings of George Washington From The Original Manuscript Sources 244-45 (J. Fitzgerald ed. 1932)); see generally Katcoff v. Marsh, 755 F.2d 223, 225 (2d Cir. 1985).

General Washington directed his chaplains to perform divine services every Sunday, and he expected his officers "by their attendance to set an example to their men." J. Brinsfield, Our Roots for Ministry: The Continental Army, George Washington, and the Free Exercise of Religion, Mil. Chaplains' Rev. 23, 27 (Nov. 1987) (citation omitted). Indeed, he went so far as to direct that "neglect [of this order] will be considered not only a breach of orders, but a disregard of decency, virtue, and religion." R. Honeywell, Chaplains of the United States Army 58 (1958) (citation omitted). Washington likewise directed that most Army celebrations begin with a prayer or address by a chaplain. Id. at 60; Brinsfield, supra, at 27. For example, when the Declaration of Independence was read to the Continental Army in 1776, Washington directed his chaplains to offer prayers. Brinsfield, supra, at 27. When General Burgoyne surrendered his British troops after the Battle of Saratoga in October 1777, Washington ordered a celebration at which the chaplains presented "short

discourses." Honeywell, supra, at 60; Brinsfield, supra, at 27. And when word arrived in May 1778 that France had allied itself with the United States, the chaplains at Valley Forge "offered up a thanksgiving" and "delivered suitable discourses." Honeywell, supra, at 60; Brinsfield, supra, at 27. One such discourse, delivered by chaplain John Hurt, concluded:

> You, my fellow-soldiers, are the hope of your country; to your arms she looks for defence, and for your health and success her prayers are incessantly offered. Our God has heard them . . . . Let us then join in one general acclamation to celebrate this important event; and while our voices proclaim our joy, let our hearts glow with gratitude to the God of nations, who is able to help us, and whose arm is mighty to save.

Thompson, supra, at 221, 291. Similarly, in April 1783, upon hearing that a peace treaty had been signed with Great Britain, Washington assembled his men at Newburgh, New York — the last encampment of the Continental Army — and directed chaplain John Gano to read the proclamation and to offer a prayer of thanksgiving "to Almighty God for all His mercies, particularly for His . . . causing the rage of war to cease among the nations." General Orders of George Washington Issued at Newburgh 78 (reprint of 1909 ed.); see Brinsfield, supra, at 27; Honeywell, supra, at 70.

The First Congress — the same Congress that wrote the First Amendment — not only appointed legislative chaplains, but also established a tradition of clergy-led prayer at presidential inaugurations — which, of course, are also military change-of-command ceremonies in which a new Commander in Chief is installed. See Newdow v. Bush, 355 F. Supp. 2d 265, 270 n.5, 286-87 (D.D.C. 2005). Shortly after President Washington was sworn in in 1789, in accordance with resolutions passed by the Senate and House of Representatives, see S. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2106 (1996) (citation omitted), members of the Senate and House accompanied him to St. Paul's Chapel, where Bishop Samuel Provoost, Chaplain of the Senate, read prayers from the Episcopal Book of Common Prayer. Id. at

2107; M. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. Church & State 573, 587 (1982). The Book of Common Prayer prescribed the order for daily morning and evening prayer, including specific prayers and Bible readings — prayers that generally contained sectarian theological content.[8] Washington himself offered the following prayer during his first inaugural address: "It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, at 2 (1989).

That same Congress also authorized the commission of the first chaplain of the regular United States Army. Act of Mar. 3, 1791, ch. XXVIII, § 5, 1 Stat. 222. The next day, President Washington appointed John Hurt, who three years earlier had delivered the above-quoted prayer at Valley Forge. H. Norton, 2 The United States Army Chaplaincy 1 (1977). Within a decade, the first Navy chaplain had been appointed. A. Stokes, 3 Church and State in the United States 123 (1950). In 1799, Congress passed legislation providing that the "commanders of ships of the United States, having on board chaplains, are to take care, that divine service be performed twice a day, and the sermon preached on Sundays." Act of March 2, 1799, ch. XXIV, 1 Stat. 709. And in 1800, Congress directed, even more pointedly, that naval commanders "cause all, or as many of the ships company as can be spared from duty, to attend at every performance of the worship of Almighty God." Act of April 23, 1800, ch. XXXIII, 2 Stat. 45. Thus, as with legislative prayer and inaugural prayer, it is

[8] The contents of the Book of Common Prayer in use during this time period are available at http://justus.anglican.org/resources/bcp/bcp.htm.

simply inconceivable that the members of the First Congress, who drafted the Establishment Clause, thought it to prohibit chaplain-led prayer at military ceremonies, having passed legislation not only approving that practice, but indeed requiring servicemembers to attend divine services. See Marsh, 463 U.S. at 790 (the Supreme Court has recognized that actions of the First Congress are "contemporaneous and weighty evidence" of the Constitution's "true meaning") (citation omitted); see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936) (construction "placed upon the Constitution . . . by the men who were contemporary with its formation" is "almost conclusive") (citation omitted).

These traditions have, in many respects, continued to the present day. Clergy-led prayer has been a part of every presidential inauguration — and thus a part of the installation of every new Commander in Chief — in the Nation's history. See Newdow, 355 F. Supp. 2d at 286-87. Moreover, although these prayers have often been delivered by clergy of several different faiths, they have frequently been sectarian, with references to Jesus or the Trinity. Id. In addition, every President who has delivered an inaugural address has himself referred to God or a Higher Power. Id.; Epstein, supra, at 2107-08.[9] Other examples abound. In December 1944, during the Battle of the Bulge, when overcast weather had grounded desperately needed Allied air forces, General George Patton asked the chaplain of the Third Army, James O'Neill, to compose a prayer for fair weather. The resulting prayer read:

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[9] See also Inaugural Addresses of the Presidents of the United States, supra; First Inaugural Address of William J. Clinton, 29 Weekly Comp. Pres. Docs. 77 (Jan. 20, 1993); Second Inaugural Address of William J. Clinton, 33 Weekly Comp. Pres. Docs. 63 (Jan. 20, 1997); First Inaugural Address of George W. Bush, 37 Weekly Comp. Pres. Docs. 209 (Jan. 20, 2001); Second Inaugural Address of George W. Bush, 41 Weekly Comp. Pres. Docs. 74 (Jan. 20, 2005); Inaugural Address of Barack H. Obama, 2009 Daily Comp. Pres. Docs. No. 00001 (Jan. 20, 2009).

> Almighty and most merciful Father, we humbly beseech Thee, of Thy great goodness, to restrain these immoderate rains with which we have had to contend. Grant us fair weather for Battle. Graciously hearken to us as soldiers who call upon Thee that armed with Thy Power, we may advance from victory to victory, and crush the oppression and wickedness of our enemies, and establish Thy justice among men and nations. Amen.

G. Metcalf, With Cross and Shovel: A Chaplain's Letters from England, France, and Germany 183-85 (1957). General Patton distributed the chaplain's prayer to every soldier in the Third Army, together with his own Christmas greeting, which concluded: "May God's blessing rest upon each of you on this Christmas Day." Id. Similarly, in August 1990, at the beginning of Operation Desert Storm, General Norman Schwarzkopf released a brief message of encouragement to all the troops under his command. It ended: "My confidence in you is total. Our cause is just! Now you must be the thunder and lightning of Desert Storm. May God be with you, your loved ones at home, and our country." J. Brinsfield, 7 United States Army Chaplaincy, Part Two, at 123 (1997). General Schwarzkopf then asked the command chaplain, David Peterson, to offer a prayer to the generals and colonels he had assembled in the war room. The chaplain called on God to bless the soldiers and guide their safe return, to give the commanders insight and wisdom to make sound decisions, and to provide for a quick and decisive victory, and closed: "[W]e commit our ways to you and wait upon the Lord. In the name of the Prince of Peace we pray. Amen." Id. at 124.

Thus, the historical record demonstrates that the practice of chaplain-led prayer at military ceremonies traces back to the Founding and, like the invocational prayers approved in Marsh, has continued without interruption since the military chaplaincies were first established by Congress.

2. Plaintiffs allege no facts from which the Court could conclude that any chaplain-led prayer constituted proselytization

Marsh also refutes the contention that chaplain-led ceremonial prayer violates the Establishment Clause to the extent that any particular prayer might reference monotheistic

terminology or beliefs. In approving legislative prayer in Marsh, the Supreme Court rejected the argument that the Nebraska legislature had violated the Establishment Clause by selecting a Presbyterian chaplain whose prayers were in the "Judeo-Christian tradition," declaring: "We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church." 463 U.S. at 793. The Marsh Court stressed that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." Id. at 794-95.

A speaker's inclusion in a prayer of specific religious references, such as the name of a particular deity, does not by itself constitute proselytization. As the Tenth Circuit observed in Snyder, "all prayers 'advance' a particular faith or belief in one way or another" in the sense that "the act of praying to a supreme power assumes the existence of that supreme power." Snyder, 159 F.3d at 1234 n.10. Nevertheless, Marsh undoubtably permits reference to "a particular concept of God" — indeed, the Judeo-Christian God — that is not universally shared. What Marsh forbids is "proselytization" — that is, "aggressive" efforts to "convert citizens to particular sectarian views." Id.

Moreover, as Marsh recognized, where a prayer constitutionally may be said in connection with an official government ceremony, the speaker must be allowed some leeway to pray within his or her own faith tradition, if only as an accommodation to his or her religious obligations. See Marsh, 463 U.S. at 791-92 (approving legislative prayers from the "Judeo-Christian tradition"); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-145 (1987) (noting that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause") (footnote omitted). To hold otherwise would effectively require that prayers not be religious at all, or require the courts to prescribe the form and content of

permissible ceremonial prayers, which the First Amendment would certainly not allow. See Lee v. Weisman, 505 U.S. 577, 588 (1992) (government may not "direct[] and control[] the content of the prayers" at public events); Engel v. Vitale, 370 U.S. 421, 425 (1962) (it is "no part of the business of government to compose official prayers").

Here, although Plaintiffs assert that Specialist Chalker was exposed to "sectarian Christian" prayer during three military ceremonies, they allege no facts from which the Court could conclude that any chaplain-led prayer constituted proselytization. See Robbins, 519 F.3d at 1247 (burden on plaintiff to "frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief") (quoting Twombly, 127 S. Ct. at 1965). Rather, Plaintiffs' sole objection appears to be that some of those prayers were specifically Christian in nature. However, even if the alleged prayers did invoke Judeo-Christian faith traditions, Marsh and Snyder establish that such references are permissible acknowledgments of widely held beliefs. See also Newdow, 355 F. Supp. 2d at 288-89 (no indication that inaugural prayers, although at times "sectarian and specifically Christian in nature," are intended to "affiliate or proselytize under any reasonable definition of those words"). The Establishment Clause simply does not require the "extirp[ation] from public ceremonies [of] all vestiges of the religious acknowledgments that have been customary at civic affairs in this country since well before the founding of the Republic." Chaudhuri v. Tennessee, 130 F.3d 232, 236-37 (6th Cir. 1997), cert. denied, 523 U.S. 1024 (1998); accord Tanford v. Brand, 104 F.3d 982, 985 (7th Cir. 1997) (upholding, under Marsh, invocation and benediction at public university graduation ceremony).

3. Marsh, not Lee v. Weisman or Santa Fe, controls this case

Plaintiffs may argue that this case is controlled not by Marsh, but by the Supreme Court's decisions in Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School District v. Doe,

530 U.S. 290 (2000). However, the coercion analysis applied in Lee and Santa Fe is properly confined to the public secondary school context, and thus has no application here. In Lee, for example, which invalidated a policy permitting prayer at public secondary school graduation ceremonies, the Court repeatedly emphasized the unique coercive pressures on schoolchildren. 505 U.S. at 586, 588, 596. Likewise, in Santa Fe, which struck down a policy permitting student-led prayer at high school football games, the Court stressed the "immense social pressure" that pushes schoolchildren to conform, especially in matters of social convention. 530 U.S. at 311. Thus, as the Tenth Circuit recently recognized, "[s]ocial pressure to participate in a religious exercise . . . has been treated as an injury in fact only in a public school context" given the "unique impressionability of schoolchildren." Habecker v. Town of Estes Park, 518 F.3d 1217, 1226 (10th Cir. 2008) (citing Lee and Santa Fe); see also Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1032 (10th Cir. 2008) (the "school context may raise particular endorsement concerns, because of the pressure exerted on children by the law of imitation") (citation omitted). The circumstances here are markedly different, not least because Specialist Chalker is an adult, not a schoolchild, and is presumably not susceptible to such pressures. Indeed, "[f]or a mature adult and admitted atheist, coercion would seem unlikely in any setting." Newdow, 355 F. Supp. 2d at 278. Hence, this case is controlled by Marsh, rather than Lee or Santa Fe.

4. Chaplain-led prayer at military ceremonies would survive the Lemon test, were it applicable

In approving ceremonial prayer in Marsh, the Supreme Court did not apply the Lemon[10] test,

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[10] Lemon v. Kurtzman, 403 U.S. 602 (1971), stated that a law would survive an Establishment Clause challenge if it (1) has "a secular legislative purpose," (2) has a "principal or primary effect" that "neither advances nor inhibits religion," and (3) does not "foster an excessive government entanglement with religion." Id. at 612-13 (quotation marks and citation omitted). In Agostini v. Felton, 521 U.S. 203 (1997), the Court refined the "Lemon test" to treat the "excessive

and, accordingly, this Court need not do so here. See also Snyder, 159 F.3d at 1232. The practice of chaplain-led prayer at military ceremonies, however, easily satisfies that test, which, as modified, focuses on whether government action has a secular purpose and secular effects.

First, as the Tenth Circuit has noted, government acknowledgments of religion in public life, such as the legislative prayers upheld in Marsh, "'serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'" Id. at 1233 (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)); see also Marsh, 463 U.S. at 792 ("To invoke Divine guidance on a public body . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

The lower courts have reached the same conclusion in upholding the constitutionality of public ceremonial prayers. See Chaudhuri, 130 F.3d at 236 ("[a] prayer may serve to dignify or to memorialize a public occasion"); Tanford, 104 F.3d at 986 (invocation and benediction prayers at university graduation "serve legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs"). Consistent with these cases, chaplain-led prayer serves the permissible secular purpose of solemnizing military ceremonies in a manner that, as explained above, reflects a historical practice that dates back to the Founding.

Second, the primary effect of chaplain-led prayer is neither to promote nor to advance religion. In cases involving ceremonial government acknowledgments of religion, the "primary effects" prong of the Lemon test turns on the perceptions of an objective, reasonable observer, not on the reaction of "isolated nonadherents," or whether "some people may be offended," or even

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entanglement" inquiry as "an aspect of the inquiry into a statute's effect." Id. at 222-23; see also Weinbaum, 541 F.3d at 1030-31.

"whether some reasonable person might think [the government] endorses religion." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring). That objective observer is charged with an awareness of our "unbroken history" (Lynch, 465 U.S. at 674) of similar references to the Nation's religious heritage in, for example, the Declaration of Independence ("Creator"), the National Anthem ("God"), on our coins ("In God we trust"), and in the Constitution itself ("Year of our Lord"). See McCreary County v. ACLU, 545 U.S. 844, 866 (2005) (rejecting standard of "an absentminded objective observer" for "one presumed to be familiar with the history of the government's actions and competent to learn what history has to show"). That objective observer is likewise charged with an understanding of the role of chaplain-led prayer "in our Nation's cultural landscape," see Elk Grove, 542 U.S. at 35, 38 (O'Connor, J., concurring), to solemnize military ceremonies in a manner tracing back to the earliest days of our Nation. Viewed in this context, chaplain-led prayer at military ceremonies involves no greater appearance of endorsement of religion than any of the other ceremonial references to God that are ubiquitous in our nation's history and culture. Thus, even if it were to apply the Lemon test, the Court should reject any challenge to chaplain-led prayer at military ceremonies.

B. Exposure to Chaplain-led Prayer at Military Ceremonies Does Not Constitute a "Religious Test" for Public Office in Violation of Article VI of the Constitution

Plaintiffs' Religious Test Clause claim fails for similar reasons. Specialist Chalker asserts that his being required to attend military ceremonies that include a chaplain-led prayer constitutes the "constructive" imposition of a religious test for public office in violation of Article VI's Religious Test Clause. See U.S. Const. art. VI, cl. 3 ("[N]o religious test shall ever be required as a qualification to any office or public trust under the United States."). Notably, he does not allege that he has ever actually been required to submit to a religious test — that is, "to profess a belief or

disbelief in any religion," Torcaso v. Watkins, 367 U.S. 488, 495 (1961) — at any time, whether as a condition to enlisting in the Army, accepting a promotion, or otherwise. Thus, Plaintiffs' Complaint is deficient on its face to state a claim under the Religious Test Clause. See Robbins, 519 F.3d at 1247 (burden on plaintiff to "frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief") (quoting Twombly, 127 S. Ct. at 1965).

In any event, the Religious Test Clause does not prohibit any government conduct that is not already barred by the First Amendment's Establishment and Free Exercise Clauses. See Anderson v. Laird, 316 F. Supp. 1081, 1093 (D.D.C. 1970) ("The Court having determined that there is no violation of the Establishment Clause in the mandatory attendance [by service academy cadets at chapel services], it necessarily follows that there can be no violation of the test oath prohibition."), rev'd on other grounds, 466 F.2d 283 (D.C. Cir. 1972); see also L. Tribe, American Constitutional Law § 14-2, at 1155 n.1 (2d ed. 1988) ("As a practical matter, the [Establishment and Free Exercise] [C]lauses are dispositive in cases challenging alleged 'religious tests'; hence the religious test clause is now of little independent significance."). Because chaplain-led prayer at military ceremonies does not violate the Establishment or Free Exercise Clauses, it must therefore be considered consistent with Article VI.

CONCLUSION

Specialist Chalker ignored his best avenue for relief: asking the Army to redress his grievances before asking this Court to intervene. See, e.g., Simmat, 413 F.3d at 1237 (agency review "typically moves much more quickly than federal litigation" and can provide the "swiftest and most effective remedies"). He now seeks judicial review of particular duty orders, review that would interfere with military operations and intrude on command and disciplinary decisions that are committed to military judgment, subject to the oversight of Congress and the Executive Branch, not

the courts. Moreover, he asks the Court to substitute its judgment for that of the Army with respect to chaplain-led prayer at military ceremonies — a tradition that is deeply embedded in our Nation's history and, like other tolerable acknowledgments of widely-held religious beliefs, fully consistent with the Establishment Clause.

For all of these reasons, the Court should grant Defendant's motion and dismiss this action in its entirety.

Dated: April 9, 2009

Respectfully submitted,

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ELECTRONICALLY FILED

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, U.S. DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

INDEX OF EXHIBITS
TO DEFENDANT'S MOTION TO DISMISS

EXHIBIT	DESCRIPTION
A	Declaration of CPT Kenneth R. Jones
B	Declaration of SFC Dennis D. McQuay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, U.S. DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

EXHIBIT A
TO DEFENDANT'S MOTION TO DISMISS

Declaration of CPT Kenneth R. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, US DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

DECLARATION OF CAPTAIN KENNETH R. JONES

I, Captain Kenneth R. Jones, hereby declare as follows:

1. I was the Company Commander for the 41st Clearance Company, 1st Engineer Battalion, at Fort Riley, Kansas, from April 11, 2007, to November 26, 2008. Specialist Dustin Chalker was a combat medic in my company during my entire time in command. As the Company Commander, I was the lowest-level commander in Specialist Chalker's chain-of-command. I was responsible for all matters pertaining to the leadership, management, and accountability of my company and its soldiers, including approving or disapproving requests for religious accommodation submitted pursuant to Army Regulation 600-20 ¶ 5-6.

2. I have read the complaint that Plaintiffs Specialist Dustin Chalker and the Military Religious Freedom Foundation filed in the above-captioned case.

3. I am aware that, in the complaint, Plaintiffs allege that Specialist Chalker was required to attend three events — specifically, on December 5, 2007, February 7, 2008, and May

16, 2008. I did not receive a request for religious accommodation from Specialist Chalker for any of these events.

4. The event on December 5, 2007, described in the complaint as a "formation," was actually a welcome home ceremony that took place upon the return of Specialist Chalker's unit to the United States following a deployment in Iraq as part of Operation Iraqi Freedom. Such ceremonies typically commemorate a unit's accomplishments in theater, celebrate its return home, mark the homecoming transition for soldiers and their families, and honor fallen and wounded members of the unit.

5. The event on February 7, 2008, described in the complaint as a "change of command" ceremony, was actually a "re-patching" ceremony in which the Soldiers of the 1st Engineer Battalion replaced their 1st Infantry Division Patch with the 555th Engineer Brigade Patch. Although the two types of ceremonies are similar in many respects, a re-patching ceremony is in some ways more formal, meaningful, and rare. Typically in a re-patching ceremony, a unit that has formerly fallen under one division or brigade, perhaps for many years, removes that division's or brigade's patch and places another division's or brigade's patch on its uniform. The unit's flags change out, and the Soldiers within that unit are now officially a part of the new organization. Although change in command ceremonies generally occur every two years for each commander, re-patching occurs rarely — perhaps once in a unit's lifetime.

6. The event on May 16, 2008, described in the complaint as a "barbeque," was actually part of the 1st Engineer Battalion's Organization Day. A battalion Organization Day is typically an annual event held that is held to commemorate the history and traditions of the unit, and to build unit morale and esprit-de-corps. It is the Army's equivalent to a country fair for a

battalion's soldiers and families, and generally features athletic events, equipment displays, and a picnic lunch.

7. I first learned about Specialist Chalker's concern with these events on September 25, 2008, when I was informed that Specialist Chalker had filed this lawsuit.

8. On November 25, 2008, I was informed that Specialist Chalker had requested to be excused from a change-in-command ceremony scheduled for the next day. I approved Specialist Chalker's request for accommodation, and he was not required to attend.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28 day of March 2009.

CAPTAIN KENNETH R. JONES
Senior Observer/Controller
Camp Atterbury Joint Maneuver Training Center
Camp Atterbury, Indiana
United States Army

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, U.S. DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

EXHIBIT B
TO DEFENDANT'S MOTION TO DISMISS

Declaration of SFC Dennis D. McQuay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, US DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

DECLARATION OF SERGEANT FIRST CLASS DENNIS D. McQUAY

I, Sergeant First Class Dennis D. McQuay, hereby declare as follows:

1. I am the Equal Opportunity Advisor for 1st Brigade, 1st Infantry Division, at Fort Riley, Kansas. Pursuant to Army Regulation 600-20 ¶ 6-3, in this capacity, I advise the brigade commander on equal opportunity issues, and assist the brigade command in carrying out the Army's Equal Opportunity ("EO") Program. Specifically, I am responsible for, among other things, conducting EO training within the brigade; assisting in the resolution of EO issues and concerns for Soldiers within the brigade; providing guidance to Soldiers who wish to file an EO complaint, to include referring them to another agency for assistance; monitoring company and battalion-level EO representatives as they carry out the Army's EO Program at their level; ensuring proper command EO climate and assisting with all command climate assessments; and serving as the primary resource for EO matters within the brigade. I have served as the Brigade EO Advisor since October 5, 2007, and serve full-time in this position.

2. I have read the amended complaint that Plaintiffs Specialist Dustin Chalker and the Military Religious Freedom Foundation filed in the above-captioned case.

3. I am aware that, in the amended complaint, Plaintiffs allege that Specialist Chalker was required to attend three events — specifically, on December 5, 2007; February 7, 2008; and May 16, 2008. Pursuant to Army Regulation 600-20 ¶ D-1(b)(5), a soldier has 60 days from the date of the alleged incident to file an EO complaint. Specialist Chalker did not file an EO complaint regarding any of these three events.

4. Specialist Chalker did file an EO complaint on November 26, 2008, regarding a change-in-command ceremony that had taken place on the previous day, November 25, 2008. Although Specialist Chalker had requested that his command excuse him from attending that event, and although the command had granted his request, Specialist Chalker claimed that he had nevertheless suffered religious discrimination. As relief for his EO complaint, Specialist Chalker requested that the Army prohibit government-led prayers during all military ceremonies. As the Brigade EO Advisor, I assisted Specialist Chalker in filing his EO complaint.

5. On December 24, 2008, the brigade commander, Colonel Eric Wesley, informed Specialist Chalker through a written memorandum that his EO complaint had been determined to be unfounded. Pursuant to Army Regulation 600-20 ¶ D-8(a), a soldier dissatisfied with the resolution of an EO complaint has 7 days to appeal. Colonel Wesley detailed the appeal requirements, including this time limit, in his December 24, 2008, memorandum to Specialist Chalker. Specialist Chalker did not appeal the resolution of his EO complaint.

6. I handle every EO complaint within the brigade, and have done so since assuming my duties as the Brigade EO Advisor in October 2007. I can affirm that between October 2007

and the present, Specialist Chalker has filed only one EO complaint: the November 26, 2008, complaint. Prior to filing this lawsuit, he had never filed an EO complaint.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of March 2009.

Dennis D. McQuay

SERGEANT FIRST CLASS DENNIS D. McQUAY
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