

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,	)	MOTION FOR LEAVE TO FILE BRIEF
	)	<i>AMICUS CURIAE</i> OF CITIZENS
Appellee,	)	UNITED, CITIZENS UNITED
	)	FOUNDATION, U.S. JUSTICE
	)	FOUNDATION, FAITH AND ACTION,
	)	PUBLIC ADVOCATE OF THE UNITED
v.	)	STATES, INC., CONSERVATIVE
	)	LEGAL DEFENSE AND EDUCATION
	)	FUND, INSTITUTE ON THE
	)	CONSTITUTION, E. RAY
	)	MOORE, CHAPLAIN, LT. COLONEL,
MONIFA J. STERLING,	)	U.S. ARMY RESERVE RET., AND
Lance Corporal (E-3)	)	CAPT GEORGE P. BYRUM, CHC,
U.S. Marine Corps,	)	USN, (Ret.) IN SUPPORT OF
	)	APPELLANT
Appellant.	)	
	)	Crim. App. Dkt. No. 201400150
	)	USCA Misc. Dkt. No. 15-0510/MC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR  
THE ARMED FORCES:

Citizens United, Citizens United Foundation, U.S. Justice  
Foundation, Faith and Action, Public Advocate of the United  
States, Inc., Conservative Legal Defense and Education Fund,  
Institute on the Constitution, E. Ray Moore, Chaplain, Lt.  
Colonel, U.S. Army Reserve Ret., and Capt George P. Byrum, CHC,  
USN, (Ret.) by and through their undersigned counsel, pursuant to  
CAAF Rule 26(a)(3), respectfully move this Court for leave to  
file the *amicus curiae* brief in support of appellant filed  
contemporaneously with this motion.

### **Nature of the Amici**

Citizens United and Public Advocate of the United States, Inc. are exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, U.S. Justice Foundation, Faith and Action, and Conservative Legal Defense and Education Fund are exempt from federal income tax under IRC section 501(c)(3). Institute on the Constitution is an educational organization. E. Ray Moore, Lt. Colonel, U.S. Army Reserve Ret., served as an Army Chaplain and was placed on retired status in July 1999. CAPT George P. Byrum, CHC, USN, (Ret.) served in the Chaplain Corps of the U.S. Navy, assigned to the Marine Corps during Desert Shield/Desert Storm and for three other tours.

### **Statement of Movants' Interest**

Each of the organizational movants was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, and the accurate construction of state and federal constitutions and statutes. E. Ray Moore, Lt. Colonel, U.S. Army Reserve Ret., is now retired from active status, but spent years as a Chaplain working on matters involving religious liberty and religious expression in the Army, and continues to have a deep interest in religious liberty and issues related to

Chaplains in the U.S. Military. CAPT George P. Byrum, CHC, USN, (Ret.) is now retired from active status, but had a long career as a Chaplain working with the Marine Corps. He now serves as an Elder of Triad Christian Fellowship in Winston Salem, N.C.

Movants have an interest in the proper construction and application of the Constitution and laws of the United States, and believe that this case involves several important issues related to that interest. Movants recognize that this case is of importance to the rights of service members to the free exercise of their religion. Some movants have been litigants in federal court litigation involving First Amendment rights, and all organizational movants have been *amici curiae* in federal court litigation involving First Amendment rights. In addition, the U.S. Justice Foundation defended the First Amendment rights of Marine Sergeant Gary A. Stein in San Diego, California in 2012.<sup>1</sup>

#### **Relevance of Amici's Arguments to the Disposition of the Case**

Movants believe that their perspective on the issues in this case will be of assistance to the Court in deciding the issues presented. They anticipate that their *amicus curiae* brief, while generally supporting appellant's arguments, will examine two determinative issues that have not been fully developed by the

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<sup>1</sup> See, e.g., <http://lawandfreedom.com/wordpress/sergeant-gary-a-stein-v-colonel-c-s-dowling-et-al-complaint-and-motion-for-temporary-restraining-order-in-the-united-states-district-court-for-the-southern-district-of-california/>

parties.

First, these *amici* believe that in this case the United States Marine Corps violated certain policies and procedures put in place by the Department of Defense and the Department of the Navy, which govern the exercise of religious freedom by service members. This issue was raised by appellant in the trial court, but was not addressed by the NMCCA below. Supported by case precedent from the United States Court of Appeals for the Federal Circuit, *amici* contend that the order requiring removal of appellant's Biblical display was unlawful because it was issued and implemented contrary to the Defense and Navy Departments' rules and procedures governing religious accommodation.

Second, *amici* address a Free Exercise argument based on the facts of this case on grounds that are different from the RFRA and free exercise arguments raised by appellant. This brief will bring to this Court's attention a ruling by the U.S. Supreme Court that the government may not "prohibit conduct because it is undertaken for religious reasons," and argue that such prohibition of religious conduct is precisely what NMCCA did below.

Although this Court's rules do not require the movants to seek the consent of the parties, as a courtesy, counsel for movants sought such consent. Counsel for Petitioner Sterling consented to the filing of this *amicus curiae* brief. Counsel for

the appellee advised counsel for movants that they do not consent.<sup>2</sup>

*Amici* believe that the issues raised in this case, and in their brief, are especially important for today's military, as it continues to become more diverse in ethnicity, with service members coming from a wide variety of religious, socio-economic, and political backgrounds. Service members need to know that

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<sup>2</sup> Counsel for these *amici curiae* received the following response to their request for consent from the government: "we do not consent to the filing of an amicus brief. We would have to see the brief first before we granted consent--happy to reconsider at that time. The upcoming CAAF rule on consent contemplates that we need to review the brief before we grant consent." Counsel for these *amici* believe the government's reasons to be unsupported by court rule or prevailing practice. First, the proposed CAAF rule is just that -- only proposed, not now in effect. Second, even if the proposed rule were now in effect, it does not "contemplate [that the government needs] to review the brief before we grant consent." Actually, the proposed rule itself confirms that the Court "retains the authority to decide all requests to file amicus briefs" regardless of whether the parties consent. ("While party consent is not a guarantee that the brief will be accepted, lack of consent is not a guarantee that it will be rejected." 80 *Fed. Reg.* No. 218 at 69951 (Nov. 12, 2015).) Third, particularly with the Christmas holiday, this *amicus* brief was not finalized until after hours on the deadline for its filing, and therefore the government could not be provided a copy of the brief in advance, even if that were the accepted practice. However, the request to read an *amicus* brief before consenting may be unique in these counsel's decades of *amicus* brief litigation in federal and state courts. Indeed, counsel for these *amici* have received consent from the Solicitor General in scores of U.S. Supreme Court and federal appellate cases in which the government was involved as a party, and never once do counsel recall that a copy of the brief was requested by the government before consenting. Moreover, only twice, once in 1982 and once in 1983, when *amicus* briefs were relatively unusual, can counsel for these *amici* recall government counsel refusing consent in an appellate case -- until now.

they will be protected by the policies and procedures designed to accommodate these differences while maintaining good order and discipline among service members.

**Conclusion**

For the foregoing reasons, movants pray that their motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

MICHAEL CONNELLY  
U.S. JUSTICE FOUNDATION  
932 D Street, Suite 3  
Ramona, CA 92065-2355  
  
J. MARK BREWER  
BREWER & PRITCHARD, P.C.  
Three Riverway, 18th Floor  
Houston, TX 77056  
Tele: (713)209-2950  
brewer@bplaw.com

/s/ William J. Olson  
WILLIAM J. OLSON  
(CAAF Bar No. 20422)  
ROBERT J. OLSON  
HERBERT W. TITUS  
(CAAF Bar No. 35711)  
JEREMIAH L. MORGAN  
JOHN S. MILES  
WILLIAM J. OLSON, P.C.  
370 Maple Avenue West, Suite 4  
Vienna, Virginia 22180-5615  
Tele: (703) 356-5070  
FAX: (703) 356-5085  
wjo@mindspring.com

Counsel for *Amici Curiae*

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on December 28, 2015, and that a copy of the foregoing was transmitted electronically via email to counsel for the parties on December 28, 2015.

/s/ William J. Olson  
William J. Olson  
William J. Olson, P.C.  
370 Maple Avenue West, Suite 4  
Vienna, Virginia 22180-5615  
Tele: (703) 356-5070