IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, *Respondent,* *- versus -* **MONIFA J. STERLING,** Lance Corporal (E-3), U.S. Marine Corps, *Petitioner.*	USCA Dkt. No. 15-0510/MC N-MC CCA Dkt. No. 201400150 Date: 23 June 2015

***AMICUS CURIAE* BRIEF OF**

THE MILITARY RELIGIOUS FREEDOM FOUNDATION

In Support of Neither Party

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TO THE HONORABLE JUDGES OF THE
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ISSUES PRESENTED

I. **DID PETITIONER PRESERVE THE *RELIGIOUS RESTORATION FREEDOM ACT* [RFRA][1] ISSUE WHERE SHE DID NOT COMPLY WITH THE APPLICABLE DOD AND NAVY INSTRUCTIONS REQUIRING THAT SHE FIRST REQUEST SPECIFIC RELIGIOUS ACCOMMODATIONS?**

II. **DID PETITIONER *WAIVE* THE RFRA ISSUE BY FAILING TO GIVE HER COMMAND THE OPPORTUNITY TO FIRST CONSIDER WHETHER OR NOT SHE WAS ENTITLED TO ANY RFRA ACCOMMODATIONS, AND IF SO, DETERMINE WHAT SUCH ACCOMMODATIONS WOULD BE?**

III. **EVEN IF THE RFRA ISSUE WAS LEGALLY PRESERVED, DOES IT PROVIDE PETITIONER ANY BASIS FOR JUDICIAL RELIEF WHERE THE PUBLIC DISPLAY OF THREE "SIGNS" CONTAINING A "BIBLE VERSE" IN HER COMMON, PUBLIC WORK AREA, ON A U.S. MILITARY INSTALLATION PROPERTY OF THE U.S. GOVERNMENT, IS NOT *PER SE* PROTECTED "SPEECH?"**

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[1] 42 U.S.C. § 2000bb *et seq.*

STATEMENT OF THE CASE

Amicus accept Petitioner's *Statement of the Case*.

STATEMENT OF FACTS

Amicus accept Petitioner's *Statement of Facts*, but primarily focuses on the following:

1. "[Petitioner] printed three copies of the biblical quote 'no weapon formed against me shall prosper' on paper in 28 point font or smaller. The [Petitioner] then cut the quotes to size and taped one along the top of the computer tower, one above the computer monitor on the desk, and one above the in-box."[2]

2. Petitioner "testified that ... she posted the quotation in three places to represent the Christian trinity."[3]

3. Petitioner was *not* charged with any offense relating to her posting of the religious signs.

4. "At trial, the parties referred to these pieces of paper as 'signs.' The signs were large enough for those walking by her desk to read them."[4]

5. "[T]he record indicates the existence of a contentious relationship between the [Petitioner] and her command, prior to the charged misconduct."[5]

6. Petitioner did not seek any type of religious "accommodation" pursuant to either DoD Instruction [DoDI] 1300.17 (2009 ed.)[6] or Secretary of the Navy

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[2] *United States v. Sterling*, 2015 WL 832587, *1 (NMCCA 2015)[Unpub.].

[3] *Id.*

[4] *Id.*

[5] *Id.* at *6.

[6] The 2009 version - in effect when Petitioner was charged - read at ¶ 4 in relevant part:

> It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on
>
> (continued...)

Instruction [SECNAVINST] 1730.8B (2012), *prior to* posting her "signs" or *after* being ordered to remove them.

7. The Navy-Marine Corps Court of Criminal Appeals [NMCCA] did not address Petitioner's failure to seek an accommodation *vis-a-vis* whether the claimed RFRA violations were properly preserved for appellate review.[7]

8.

THIS IS 28 POINT FONT

9. At all relevant times, Petitioner was on active duty with the USMC, drawing pay and allowances and subject to the UCMJ, while serving and working at Camp Lejeune, NC, U.S. Government property.

SUMMARY OF ARGUMENT

It is also urged that the requisite criminal intent was lacking since petitioners were motivated by religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under a claim of religious sanction.[8]

[I]f a driver is stopped for speeding, the fact that she is a believer or that she is late for church does not relieve her of the obligation to abide by speed limits.[9]

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[6] (...continued)
mission accomplishment, military readiness, unit cohesion, standards, or discipline.

[7] As the NMCCA noted, Petitioner "never told her SSgt that the signs had a religious connotation and never requested any religious accommodation to enable her to display the signs." *Sterling,* 2015 WL 832587, *5. The Court then stated, "We leave for another day what impact, if any, the failure to first request an accommodation will have on the lawfulness of an order...." *Id.* at n.17.

[8] *Cleveland v. United States,* 329 U.S. 14, 20 (1946).

[9] Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the* Religious Freedom Restoration Act *Is Bad Public Policy,* 9 Harv. L & Pol'y Rev. 129, 131 (2015).

This is a case about *conduct*, not speech. It is a case about *misconduct*, not the "Free Exercise" of religion. It is a case where Petitioner now claims that her misconduct (as applicable here) is cloaked within the penumbra of the First Amendment's "Free Exercise" clause and RFRA. Petitioner's criminal misconduct at issue here was not "symbolic speech," *i.e.*, her posting the religious signs, but rather her violating presumptively legal orders from her superiors. But, Petitioner did not make (and therefore did not preserve) a "symbolic speech" argument below, so it is not now properly before this Court.

Petitioner's real problem – and why this Court should not grant review herein – is more basic. She did not preserve the arguments that she now makes before this Court, *i.e.*, that her conduct was a protected "exercise of religion" and therefore, should have been accommodated by the USMC. That argument overlooks the fatal flaw – Petitioner failed to comply with DoDI 1300.17 (2009 ed.) and SECNAVINST 1730.8B (2012), by *first* requesting religious accommodations from her command before gambling that her conduct would thereby be accommodated. By not making such a request, Petitioner's command lacked the opportunity to even consider any form or type of possible accommodation, much less grant such if the command deemed it warranted.

Finally, even if *arguendo*, her arguments are somehow deemed "preserved," Petitioner errs by ignoring the legislative history of the RFRA which expressly recognized the unique nature of military

discipline and that RFRA was not intended to change the "significant deference" the judiciary must give to military authorities. This case did not arise in a *civilian* setting with *civilian* parties – it involved active-duty Marines, *on-duty*, on base, in a common work area frequented by other military members whereby Petitioner first posted non-neutral *religious* signs,[10] and then defied the order of her USMC supervisor to remove the signs. It is the *military context* of Petitioner's conduct – even if deemed symbolic speech – that she is ignoring:

> A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has *some potential* to affect the entity's operations. [Emphasis added].[11]

The orders by Petitioner's NCO did not "substantially burden" Petitioner's religious practices.[12] Therefore, neither the First Amendment nor RFRA support her arguments and this Court should respectfully deny review.

LEGAL BACKGROUND

Proper analysis of Petitioner's claims requires some historical background. In *Parker v. Levy*,[13] the Court reiterated three important (and relevant) principles. *First*, "This Court has long

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[10] *See, e.g., McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005), holding that the First Amendment requires governmental "neutrality" among religions *and* between religion and nonreligion.

[11] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* was a "Free Speech" employment-related case, not involving religion.

[12] RFRA, 42 U.S.C. § 2000bb-1(a), establishes the "substantial burden" standard.

[13] 417 U.S. 733 (1974).

recognized that the military is, by necessity, a specialized society separate from civilian society."[14] Petitioner does not challenge this premise. *Second,* "[The UCMJ] and the various versions of the Articles of War which have preceded it, regulate aspects of the ***conduct*** of members of the military which in the civilian sphere are left unregulated."[15] Petitioner's arguments about her conduct, *viz.,* posting Biblical signs in her military, common-area, workplace and then refusing orders to remove them, fly in the face of this *Parker* principle. *Third,*

> While 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. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[16]

Petitioner's arguments overlook – if not reject - this premise.

After *Parker,* the Supreme Court's next significant First Amendment decision *vis-a-vis* the military, was *Goldman v. Weinberger,*[17] the "yarmulka" case. There the Court reiterated the principles enumerated in *Parker*:

> Our 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. The

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[14] *Id.* at 743.

[15] *Id.* at 749 [emphasis added].

[16] *Id.* at 758.

[17] 475 U.S. 503 (1986).

> 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.[18]

The Court went on to state:

> In the context of the present case, 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.[19]

The Court concluded by noting that the "First Amendment [did] not require the military to accommodate" then Captain Goldman's desire to wear his yarmulka while on-duty and in uniform.[20] Here, Petitioner rejects that premise, claiming that the First Amendment's "Free Exercise" Clause and RFRA *require* accommodation of her Biblical signs in her common-area, military workspace.

Petitioner's arguments fail to accurately consider the rather specific *legislative history* surrounding the enactment of RFRA in 1993, which rejects her premise that RFRA legislatively overruled or significantly curtailed the *Parker* and *Goldman* holdings. Furthermore, purely civilian cases such as *Burwell v. Hobby Lobby Stores, Inc.*,[21] extensively relied upon by Petitioner, provide little (if any) guidance in the *military* context of this case.

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[18] *Id.* at 507.

[19] *Id.*

[20] *Id.* at 509-10.

[21] 134 S.Ct. 2751 (2014).

First, the House *Committee on the Judiciary* issued House Report 103-88 (May 11, 1993)["House Report"], on RFRA, which stated:

> The Committee recognizes that the religious liberty claims in the context of ... the military present far different problems ... than they do in civilian settings.... [M]aintaining discipline in our armed forces, [has] been recognized as [a] govermental interest[] of the highest order.[22]

The Senate's *Committee on the Judiciary*, issued a more detailed analysis in Senate Report 103-11 (July 27, 1993)["Senate Report"] in a section captioned as "Application of the Act to the Military:"

> The courts have always recognized the compelling nature of the military's interests in these objectives [maintaining good order, discipline, and security] in the regulation of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. ***The committee intends and expects that such deference will continue under this bill.*** [emphasis added][23]

Amicus respectfully submit that, as applicable herein, the legislative history of RFRA is quite clear that the *Parker* and *Goldman* principles noted above, control the issues herein.

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[22] House Report at 8.

[23] Senate Report at 11-12.

ARGUMENT

I.

PETITIONER DID *NOT* PRESERVE THE *RELIGIOUS RESTORATION FREEDOM ACT* ISSUE WHERE SHE DID NOT COMPLY WITH THE APPLICABLE DOD AND NAVY INSTRUCTIONS REQUIRING THAT SHE FIRST REQUEST SPECIFIC RELIGIOUS ACCOMMODATIONS.

Both the DoD and Navy have sought to accommodate, consistent with military necessities and good order and discipline, the principles of *Parker, Goldman* and to the extent feasible, RFRA. DoDI 1300.17 (2014), provides:

> 4. **POLICY.** It is DoD policy that:
> a. The DoD places a high value on the rights of members of the members of the Military Services to observe the tenets of their respective religions *or to observe no religion at all*.
> * * *
> c. DoD has a compelling government interest in mission accomplishment, unit cohesion, good order, discipline, health, safety, on both the individual and unit levels. ... [emphasis added].

Subparagraph "f" of ¶ 4, specifically addresses "Requests for accommodation," something that Petitioner never made in this case.

Likewise, SECNAVINST 1730.8B (2012), paragraph 5, sets out DON policy, *viz.*, to accommodate "when these doctrines or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion ... discipline, or mission accomplishment." Paragraph 5(c), sets for the requirement of first seeking an accommodation and how such requests are to be handled. Petitioner at no time made any such request. As NMCCA found:

> Petitioner "never told her SSgt that the signs had a religious connotation and never requested any religious accommodation to enable her to display the signs." *Sterling*, 2015 WL 832587, *5.

As such, Petitioner failed to preserve her alleged RFRA issue below and it is now not properly before this Court.

II.

PETITIONER *WAIVED* HER RFRA ISSUE BY FAILING TO GIVE HER COMMAND THE OPPORTUNITY TO FIRST CONSIDER WHETHER OR NOT SHE WAS ENTITLED TO ANY RFRA ACCOMMODATIONS, AND IF SO, DETERMINE WHAT SUCH ACCOMMODATIONS WOULD BE.

Petitioner cannot now, after-the-fact, argue that her command acted illegally or that the orders to remove her Biblical signs were illegal or invalid, when she never preserved the issue before her command – which *could have* granted accommodations had they been given the opportunity to do so, under First Amendment and RFRA principles. She thus *forfeited* this claim,[24] and therefore, there is no legal basis to grant her *Petition for Review.*

Indeed, as Petitioner herself admits:

> At trial, LCpl Sterling moved to dismiss the specifications alleging that she willfully disobeyed SSgt Alexander's orders to remove the Bible quotations. (R. at 266.) LCpl Sterling argued that SSgt Alexander's orders were unlawful because they violated her right to free exercise of religion and lacked a valid military purpose. (R. at 280, 288.)[25]

The problem however is that she never made any requests for

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[24] *See, e.g., Wood v. Milyard,* 132 S.Ct. 1826 (2012)[failing to preserve an issue at trial forfeits it]; and *United States v. Gudmundson,* 57 M.J. 493 (CAAF 2002)["failure to preserve" concept].

[25] *Supplement to Petition for Review* at 6.

religious accommodations; at trial she did not raise any issue as to why she should be somehow *excused* from complying with the pre-conduct request for accommodation per both the DoDI and SECNAVINST; nor did she attack either the DoDI or SECNAVINST as being violative of RFRA or that it superceded those instructions and thus, inapplicable to her.

RCM 905(e), governs this and states:

> Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.[26]

Petitioner nowhere addresses, much less argues why RCM 905(e) does not now bar her from raising these issues on appeal. *See, e.g., United States v. Vazquez,* 72 M.J. 13, 24 (CAAF 2013)(Stucky, J., concurring in result).

Indeed, Petitioner's failure to preserve the RFRA issue and her subsequent forfeiture pertaining to the DoD and DON accommodation instructions, raises the issue as to whether there is even a proper "case or controversy" here under Article III, § 2, U.S. Const. As the Court held in *Already, LLC v. Nike, Inc.,* 133 S.Ct. 721 (2009):

[26] While the Rule uses the word "waiver," as *Milyard, supra,* notes, in this case it was a forfeiture. Under either definition, the issue is not properly before this Court.

"In our system of government, courts have 'no business' deciding legal disputes or expounding the law in the absence of such a case or controversy." *Id.* at 726. That burden is on Petitioner and she has not addressed it.

III.

EVEN IF THE RFRA ISSUE WAS LEGALLY PRESERVED, IT DOES NOT PROVIDE PETITIONER ANY BASIS FOR JUDICIAL RELIEF WHERE THE PUBLIC DISPLAY OF THREE "SIGNS" CONTAINING A "BIBLE VERSE" IN HER COMMON, PUBLIC WORK AREA, ON A U.S. MILITARY INSTALLATION PROPERTY OF THE U.S. GOVERNMENT, IS NOT *PER SE* PROTECTED "SPEECH."

A.
Context

Petitioner's arguments all suffer from the same fatal flaw - they ignore the *context* of her misconduct. In the context of the First Amendment's Free Exercise clause, "Conduct remains subject to regulation for the protection of society."[27] Here, the context is a purely military setting - a Lance Corporal with "a contentious relationship between the [Petitioner] and her command[28], prior to the charged misconduct."[29] Petitioner then posted three signs in her common-area, military workplace and U.S. Government property, with a biblical quotation: "no weapon formed against me shall prosper."

In this context, according to the NMCCA opinion:

> "the orders were given because the workspace in which the accused placed the signs was shared by at least one other person[,] [t]hat other service

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[27] *Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940).

[28] The record reflects that her supervisor was a Staff Sergeant.

[29] *Sterling* at *6.

> members come to [the] accused's workspace for assistance at which time they could have seen the signs." The military judge determined that the signs' quotations, "although ... biblical in nature ... could easily be seen as contrary to good order and discipline." [internal footnotes omitted].[30]

But, there are additional, contextual factors here. As noted, Petitioner *twice* refused a direct order from her supervisor [a SSgt] to remove the signs. So, we have a Lance Corporal [E-3], on Base in a USMC common work-area with other Marines, on-duty, in uniform, refusing to comply with direct orders from her Staff Sergeant [E-6] supervisor. That is the antithesis of "good order and discipline." What is a USMC supervisor to think? If they were in a combat situation and Petitioner refused to follow direct orders, chaos (to include death) could result and the mission would fail. This is the context that Petitioner overlooks. While Petitioner is certainly entitled to her religious beliefs, here it is the context of her conduct that she seeks to excuse by a belated claim of religious accommodation. Specifically, whether or not her supervisor found the biblical signs threatening or defiant, in the applicable context here, there was no First Amendment "privilege." Or as the Court has instructed:

> Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.[31]

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[30] *Sterling*, 2015 WL 832587 at *4.

[31] *McCreary*, 545 U.S. at 868.

B.
Conduct

> Although the freedom to believe is absolute, the freedom to act in accordance with one's belief, like the right to free speech, is not absolute and may be subject to government restriction. [citation omitted][32]

Here, Petitioner's putting up three biblical signs in her military work-space and then refusing direct orders from her NCO supervisor to remove them, is the conduct at issue. As noted "[c]onduct remains subject to regulation for the protection of society."[33] The "society" here was the USMC and Petitioner's specific unit - it was not a civilian work-place. As *Parker* and *Goldman* hold, the military, because of its unique status, can regulate the conduct of servicemembers that would be otherwise unconstitutional in most civilian settings other than prisons.[34]

Perhaps the most analogous *non-military* case is *Morse v. Frederick.*[35] There, during a school sanctioned event, student Frederick publicly displayed a banner stating, "BONG HiTS 4 JESUS" (sic). When his principal ordered him to take the banner down, he refused. He was then suspended for ten days because the principal felt that the message encouraged illegal drug use contrary to the district's anti-drug abuse policy. Frederick sued for a violation

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[32] Schauss, *Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services,* Army Lawyer, 17 (February 2013).

[33] *Cantwell,* 310 U.S. at 304.

[34] *But see, Holt v. Hobbs,* 135 S.Ct. 853 (2015), where the Court reversed the decisions of prison officials and lower courts denying prisoner Holt's request for a religious accommodation, *i.e.,* to grow a half-inch beard. Unlike Petitioner here, Holt had specifically requested a religious accommodation.

[35] 551 U.S. 393 (2007).

of his First Amendment rights.

Like *Parker, Goldman* and their progeny, *Morse* also involved a "specialized" segment of society - public school students. While *Morse* did not involve any "free exercise" of religion issue, it is however, instructive. It was Frederick's *conduct* that was at issue, *i.e.,* his refusal to obey the order of his principal. *Morse's* import here is not the message on his banner, rather it was the Court's re-affirmation that certain specialized segments of society, *e.g.,* the military, prisons and public schools, are entitled to "significant deference" by the judiciary.

The *Morse* Court framed the issue:

> The question then becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.[36]

And again, it is the *context* that allows the regulation of *conduct.* Thus, *Morse* held that schools may regulate some student speech that could not be lawfully regulated "outside the school context...."[37] The reason being that, "the military and schools both have unique characteristics that distinguish them from society at large."[38]

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[36] 551 U.S. at 403.

[37] *Id.* at 405.

[38] Mason & Brougher, CRS Report for Congress, *Military Personnel and Freedom of Religious Expression: Selected Legal Issues,* 4 (2010); available at: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA521221 [last accessed: 21 June 15].

C.
Symbolic Speech

> The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.[39]

While Petitioner now hints that her conduct below should be protected in the context of "symbolic speech," she did not make and therefore did not preserve, that argument below.

Symbolic speech is *conduct* conveying a message, that has long been viewed as potentially protected under the First Amendment.[40] *Black* however, stands for the proposition that not all symbolic speech falls within the First Amendment's protections. *Black* involved a criminal prosecution of some KKK members who, contrary to a Virginia statute, conducted a "cross-burning." But, "[t]he fact that cross burning is symbolic expression, however, does not resolve the constitutional question."[41] As the Court concluded, "A ban on cross burning carried out with the intent to intimidate is... proscribable under the First Amendment."[42]

However, we must again return to the *context* of Petitioner's conduct. Had she posted her religious signs in her barrack's room or inside of her personal car, there would be no legitimate question that such conduct is fully protected by the First

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[39] *Virginia v. Black,* 538 U.S. 343, 358 (2003).

[40] *See, e.g., United States v. O'Brien,* 391 U.S. 367 (1968)["draft card" burning]; and *Texas v. Johnson,* 491 U.S. 397 (1989)["flag burning" case].

[41] *Black,* 538 U.S. at 361.

[42] *Id.* at 363.

Amendment. Indeed, *Amicus* would fully support Petitioner in *that context.* But, here we have a scenario where she posted biblical signs, in a common, military work-area, on U.S. Government property, while on duty and in uniform where other military members - to include her supervisor - would be exposed to the overtly religious message, threat or not. And in that *context,* under the totality of circumstances, this was *not* protected "symbolic speech."

D.
Due Deference

> In the military context ... the Supreme Court has recognized that military decisions are entitled to a higher level of deference so that the military may maintain order and discipline within its ranks.[43]

RFRA's legislative history clearly shows that Congress, while tinkering with the proper scope of judicial review in the *civilian* context, clearly intended that in the *military* context, *Parker* and *Goldman's* "deference will continue under this bill."[44] Petitioner's failure to address this *caveat* to her RFRA arguments cannot be overlooked by this Court however. Furthermore, as one post-RFRA academic article notes, "it is well established that the government has greater latitude in restricting military members speech than would be permissible in the civilian sector."[45] More specifically,

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[43] Mason & Brougher, *supra,* at 4.

[44] Senate Report, *supra,* at 11-12.

[45] Fitzkee & Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses,* 59 A.F. Law Rev. 1, 31 (2007)[citing *Parker v. Levy, supra*].

as pertinent herein, those authors conclude: "Military superiors certainly have the authority to issue a content-neutral prohibition on all on-duty speech that does not pertain to official business."[46]

While Petitioner correctly notes that the legislative history of RFRA does address the military context, she fails to note that both the House and Senate Reports on RFRA maintained the traditional judicial "due deference" standard to the military's decisions in this regard.[47] The "compelling governmental interest" here is both constitutional, *viz.*, avoiding violations of the First Amendment's "Establishment Clause;" and second, the military's *raison d'être*:

> DoD has a compelling government interest in mission accomplishment, unit cohesion, good order, discipline, health, safety, on both the individual and unit levels. ...[48]

Whether or not Petitioner's supervisor could "over-ride" this DoD Instruction is not the issue, as clearly any accommodations required approval by her commander *consistent* with both the DoDI and SECNAVINST. But again, Petitioner never made any requests for accommodation for her command to consider and she cannot ignore the context of her actions - something that her chain-of-command had a *bone fide* interest in for purposes of maintaining good order and discipline. The issue is not the scope of RFRA or its broad protections of religious liberty in the *civilian* community. Rather,

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[46] *Id.* at 34.

[47] *Supplement to Petition for Review,* at 13.

[48] DoDI 1300.17, ¶ 4(c),(2014).

it is its *limited* application to an active-duty, on-duty, Marine.

CONCLUSION

For the reasons stated, the Court should respectfully *deny* the Petition for Review. Because of the "preservation" issues, this case is not an appropriate vehicle for the Court to use to address the issues raised. [4,293]

DATED: 23rd day of June, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 26, & 37

1. This Pleading complies with the type-volume limitations of Rule 21(b) and Rule 26 because it contains **4,293** words [4,500 allowed], as counted by WordPerfect, Version X4's "Word Count" function;

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DATED: 23 June 2015

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Sterling*, USCA Dkt. No. 15-0510/MC, was electronically filed with the Court and served upon Petitioner's Counsel and Government Appellate Counsel on **23 June 2015.**

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