IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	Crim.App. Dkt. No. 201400150
Monifa J. STERLING, Lance Corporal (E-3) U.S. Marine Corps Appellant	)	USCA Dkt. No. 15-0510/MC

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

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682, fax -7687
Bar no. 31714

MARK K. JAMISON
Colonel, United States Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax -7687
Bar no. 31195

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STATUTES AND RULES

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I.

THE SUPREME COURT HAS HELD THAT THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA) PROVIDES "VERY BROAD PROTECTION" FOR RELIGIOUS LIBERTY. THE NMCCA, HOWEVER, CONSTRUED THE TERM "EXERCISE OF RELIGION" IN RFRA NARROWLY, HOLDING THAT RFRA ONLY APPLIES TO CONDUCT THAT IS "PART OF A SYSTEM OF RELIGIOUS BELIEF" AND CATEGORICALLY DOES NOT APPLY TO CONDUCT A PERSON SUBJECTIVELY BELIEVES TO BE "RELIGIOUS IN NATURE." DID THE NMCCA ERR IN NARROWLY CONSTRUING "EXERCISE OF RELIGION" AND THUS FAILING TO APPLY RFRA?

II.

APPELLANT'S UNCONTRADICTED TESTIMONY ESTABLISHED THAT SHE POSTED THREE SMALL COPIES OF A BIBLICAL QUOTATION AT HER WORKSPACE TO INVOKE THE PROTECTION OF THE CHRISTIAN CONCEPT OF THE "TRINITY." EVEN UNDER THE NMCCA'S IMPROPERLY NARROW VIEW OF RFRA, WAS APPELLANT'S CONDUCT AN "EXERCISE OF RELIGION" SUCH THAT THE NMCCA SHOULD HAVE APPLIED RFRA?

III.

THE NMCCA HELD THAT ORDERS TO REMOVE THE BIBLICAL QUOTATIONS HAD A VALID MILITARY PURPOSE BECAUSE IT IS "NOT HARD TO IMAGINE" THAT POTENTIAL EXPOSURE TO THE QUOTATIONS "MAY RESULT" IN ADVERSE IMPACT TO ORDER AND DISCIPLINE, AND THE PARTICULAR QUOTATION "COULD BE" INTERPRETED AS COMBATIVE, DESPITE NO EVIDENCE THAT ANY MARINE WAS IN FACT DISTRACTED OR DISMAYED BY THE QUOTATIONS. DOES SUCH SPECULATION SUPPORT A VALID MILITARY PURPOSE FOR THE ORDERS TO REMOVE THE BIBLICAL QUOTATIONS?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012 ed.). Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3), provides the Court with jurisdiction over this case.

Statement of the Case

A panel of members with enlisted representation sitting as a special court-martial convicted Appellant, contrary to her pleas, of failure to go to her appointed place of duty, disrespect toward a superior commissioned officer, and four specifications of disobeying a noncommissioned officer. Articles 86, 89, 91, UCMJ, 10 U.S.C. §§ 886, 889, 891 (2012). The Members sentenced Appellant to reduction to pay-grade E-1 and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Appellant explicitly invoked protection of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*, for the first time on direct review before the Navy-Marine Corps Court of Appeals. (Appellant's Br. 25, Aug. 8, 2014.) Following briefing and oral argument, the lower court affirmed the findings and sentence in an unpublished opinion. *United*

States v. Sterling, No. 201400150, 2015 CCA LEXIS 65 (N-M. Ct. Crim. App. Feb. 26, 2015).

Appellant filed a timely Petition for Grant of Review with this Court.

Statement of Facts

A. Appellant refused to comply with multiple direct orders to remove three identical signs from her shared workspace. Nothing in the Record supports that anyone but Appellant knew they were religious in nature.

Staff Sergeant Samantha Alexander, USMC, was Appellant's supervisor. (R. 179-80.) Appellant, along with two other Marines, worked for Staff Sergeant Alexander at the S-6 section of the Eighth Communications Battalion. (R. 179-80, 235-36.)

Staff Sergeant Alexander testified that Appellant sat at a shared desk. (R. 180.) The S-6 section was a shared office space, and included other sections and Marines such as the Information Management Office and the Comptroller. (R. 180.) Appellant's job included assisting Battalion Marines, at her desk, with Common Access Card (CAC) issues. (R. 307, 340.)

In May 2013, Staff Sergeant Alexander was preparing for "a 96"——a four-day holiday weekend. (R. 181.) Staff Sergeant Alexander testified that her routine was to "always check my area before I leave. You know, keep it clean." (R. 181.)

That day as she inspected her office and her subordinates'

spaces, she noticed something new: "there [were] signs that were in numerous places on the desk." (R. 181). Three signs on 8 1/2" by 11" paper had been mounted in different locations across Appellant's shared workspace. (R. 183, 269, 309.) All three signs were identical, and each read: "No weapon formed against me shall prosper." (R. 308.) Nothing in the Record supports that the signs identified themselves as Biblical references, or that anyone but Appellant knew that they were.[1]

Staff Sergeant Alexander testified that they were large enough to be legible both to passers-by, and to those seated at the desk whenever Appellant was tasked with assisting them. (R. 184.)

When she saw the signs, she did nothing immediately, but after the long weekend, she informed Appellant "that they *needed to be removed due to the fact that it wasn't just her desk*; it was being shared by the other junior Marine." (R. 181.)

Appellant did not remove the signs. (R. 181.) Testifying on the Record, Appellant testified "I don't remember her ordering me to take them down," but admitted that she did not remove them. (R. 340-41.)

At the end of the day, Staff Sergeant Alexander again

[1] The United States is unware of any English, or other, version of the Bible, from which this is a direct quote. At best, it appears to be a modified version of a Biblical quote.

checked the office spaces for cleanliness, and found the signs still there. (R. 181.) Staff Sergeant Alexander removed the signs herself, and discarded them. (R. 181.)

The next day, as Staff Sergeant Alexander "r[a]n in and out of the office" during the day, she noticed that the signs were again mounted and displayed in multiple locations across the shared workspace. (R. 181.) Staff Sergeant Alexander ordered Appellant a second time to remove the signs. (R. 181.)

Appellant again did not remove the signs. (R. 181.)

Later, finding the signs still there, Staff Sergeant Alexander again removed the signs herself. (R. 182)

Nowhere on the Record, during trial on the merits or during litigation concerning the signs, does anything support that Appellant told anyone that the signs were Biblical quotations or otherwise religious. (R. 179-183, 280, 288, 291-93, 306-313, 340-41, 355-56.) Nothing in the Record supports that anyone besides Appellant knew the signs were related to a Biblical quotation. And nothing in the Record supports that Appellant informed anyone in her command or in the Department of Defense that the signs had religious significance to her, or that she had mounted them for a religious purpose.

The first time the Record supports that Appellant informed anyone the signs had religious significance was on February 1,

2014, during litigation of Appellant's Motion as to the lawfulness of the May 2013 order to remove the signs. (R. 266.) Nothing in the Record supports that Appellant told anyone about the signs' religious nature until *nine months* after she refused to remove the signs.

The Members convicted Appellant of two specifications of Article 91, willful disobedience of the lawful order of a staff noncommissioned officer. (R. 392.)

B. Appellant refused to obey an order to wear the Uniform of the Day.

In August 2013, Staff Sergeant Robert Morris, USMC, a Marine with an intelligence military occupational specialty, was Appellant's superior noncommissioned officer. (R. 187.) Staff Sergeant Morris noticed Appellant was "out of uniform," and so ordered her to wear "her service uniforms as directed by the Commandant of the Marine Corps." (R. 187.)

Appellant refused to obey this order. (R. 188.) She insisted that a medical chit she had received from base "sports medicine" excused her from complying. (R. 188.)

Staff Sergeant Morris investigated further. (R. 188.) He discovered, after discussing the matter with sports medicine, that in fact Appellant "[was] able to wear her service uniform." (R. 188.)

Staff Sergeant Morris returned to the company office, and again ordered Appellant to return home and put on her service uniform. (R. 188.)

A second time, Appellant refused. (R. 188.) Staff Sergeant Morris then escorted Appellant to the most senior enlisted in the unit, the company first sergeant, and explained his interaction with Appellant. (R. 188.)

First Sergeant Frank Robinson, USMC, then ordered Appellant a third time to wear the correct uniform of the day, which had been directed by the Commandant of the Marine Corps. (R. 167.)

Appellant refused to obey this order as well, stating that "that was an order she couldn't follow." (R. 167.)

Appellant was charged and Members convicted Appellant of two specifications of Article 91, disobeying the order of a staff noncommissioned officer. (R. 392.)

C. The next month, Appellant refused to obey multiple orders to distribute vehicle passes to families of Marines that were forward deployed.

On September 13, 2013, First Sergeant Robinson ordered Appellant to distribute vehicle passes, at the base entrance, to civilian family members of Marines deployed to Afghanistan. (R. 167-68, 177.) The passes enabled family members to access the base and greet Sailors and Marines returning from the deployment. (R. 171, 200.) Appellant told First Sergeant

Robinson "that she wasn't going to do it." (R. 168.)

After being informed of the situation, Major Mary Flatley, USMC, a Marine with twenty-nine years' military service, proactively asked the First Sergeant to bring Appellant to her so that she could "you know, talk some sense into her, reason with her, to make sure that she goes to her appointed place of duty on Sunday." (R. 198-99.)

Major Flatley met with Appellant. (R. 168.) Major Flatley tried to explain why it was so important that Appellant fulfil that duty:

> [W]e have Marines coming back from Afghanistan——or, and their families are coming on base. We need someone at the Pass and ID to sit there and handout passes to the families. And so you have been selected to do that.

(R. 200.) Major Flatley walked around her desk to hand the passes to Appellant. (R. 200, 261.)

A second time, Appellant refused the order: "I'm not going to be there. I'm going to . . . take my meds and I'm going to be sleeping that day." (R. 169, 200-01.)

Major Flatley then called First Sergeant LaRochelle into the office. (R. 201.) She directed both first sergeants to begin writing a charge sheet on Appellant. (R. 201.) Appellant informed Major Flatley she was recording the conversation. (R. 201.)

Major Flatley told Appellant that, as she was recording the conversation, she would give Appellant a "second chance." (R. 201.) She then gave Appellant the same order, while being recorded by Appellant: "Your appointed place of duty is at the gate, all right? At pass and ID, to handout passes to the Marines' families that were coming from Afghanistan. Do you understand that?" (R. 168-69, 201.)

Appellant declined to obey the order a third time: "Yes, ma'am, I do... [but n]o, ma'am, I'm not [going to be there]. I am going to take my meds and sleep and go to church." (R. 169, 200, 261). But Appellant's assigned gate duty did not begin until 1600 on Sunday. (R. 205.)

As Appellant's colleague and Defense witness testified, Major Flatley knew about Appellant's wish to attend church, and stressed to Appellant that there would be no conflict: her gate duty would occur "after church." (R. 261.) Furthermore, Appellant's medications permitted her to fulfill the gate duty so long as she was sitting down. (R. 207, 211.) Major Flatley understood this too: she told Appellant that she could both take the medication, and carry out her duty at the gate sitting down. (R. 261.)

Instead of complying, Appellant turned to another lance corporal standing nearby and asked if she needed to obey her

superior officer's orders. (R. 169.) The lance corporal did not encourage Appellant to disobey the orders. (R. 169.) Yet Appellant nonetheless refused, telling Major Flatley that "she wasn't going to take them." (R. 169.)

Appellant never showed up at the duty hut to distribute passes. (R. 191-93.) Because of this, Corporal Vanessa Greene, USMC, was directed to fulfill the duty to assist families of the Marines and Sailors returning from deployment. (R. 191-93.)

First Sergeant Robinson testified that "it was, to me, the most disrespectful thing I had witnessed from a Marine of junior rank to a more senior... commissioned officer." (R. 170.)

Under cross-examination, Appellant agreed that nothing in the medical evaluation reports that Appellant entered into evidence, (Def. Ex. 3), supported that she could not sit at the front gate while taking her medications. (R. 272, 277.) Appellant also conceded that she told nobody about the excuses she recited at trial for not fulfilling her duty: that she claimed to have taken her medication earlier than usual that day; and about her prediction that she would have a migraine headache. (R. 277.)

Appellant claimed the medical instructions that supported her actions were not in writing, but were verbal directions to: "use common sense." (R. 278.)

Accordingly, Appellant again chose to not obey military orders.

Based on her refusal to comply with Major Flatley's repeated orders, Appellant was charged and Members convicted Appellant of Article 86, failure to go to an appointed place of duty, and Article 89, disrespect toward a superior commissioned officer. (R. 392.)

D. Litigation of Appellant's Motion concerning the three signs.

Appellant filed no motion to dismiss any charge under RFRA at any time during or after trial. (R. 109, 111.) During trial, Appellant moved to litigate the lawfulness of the orders to remove the three signs from her shared workspace. (R. 266.) An Article 39(a) session was held to litigate the motion. (R. 266-295.)

Appellant submitted, without explanation, Department of Defense Instruction (DoDI) 1300.17 (Jan. 22, 2014), as an exhibit during the Article 39(a) session to litigate the lawfulness of the order to take down the signs. (R. at 271; Appellate Ex. XXXVI.)

Appellant never argued her RFRA claim to the Military Judge, nor did she reference her burden under RFRA. However, the Instruction she submitted as evidence cited RFRA as a

reference, and quoted language directly from RFRA. (Appellate Ex. XXXVI at 1, 3.) The first explicit claim that RFRA protected her disobedience was before the Navy-Marine Corps Court of Criminal Appeals——fifteen months after refusing to remove the signs, and six months after her willful disobedience when she informed the Military Judge that the signs had religious significance. (Appellant's Br. 25, Aug. 8, 2014.)

During the Motions session and under questioning by her Defense Counsel, Appellant for the first time asserted that the signs were religious. Appellant testified that the three signs were on 8 1/2" by 11" pieces of paper. (R. 269.) Appellant testified that the signs "are a bible scripture; they're from—— of a religious nature." (R. 270.) She likewise said: "I did a trinity, because I'm a religious person." (R. 307.) And again later, she stated: "Because I'm a religious person, trinity. I have my protection of three around me." (R. 310).

When asked if she was Christian, Appellant replied: "Nondenominational, but yes." (R. 270.)

Appellant did not claim that she had notified anyone that the signs were religious, but instead argued that the order was unreasonable: "I don't feel that they were of outstanding nature, they weren't huge." (R. 269.) During argument on the Motion, Appellant claimed that the Staff Sergeant's order was

unlawful merely because they were religious, but made no claim that she had requested a religious accommodation to her superiors pursuant to the Department of Defense Instruction. (R. 280.) Instead, she argued: "I'm not bothering anybody; I'm not untidy... I haven't been bothering anyone. I obviously don't understand why I'm being picked on." (R. 280.) The Military Judge verbally ruled on the Motion, denying the Defense Motion to Dismiss the Charge relating to the three signs. (R. 362.) The Military Judge found the order to remove the signs lawful, that visitors to the office that Appellant assisted at her desk could see the signs, and that the language could adversely affect good order and discipline, thus that the order was "directly related to the maintenance of good order and discipline of a service." (R. 362.)

The Military Judge made no Findings of Fact or Conclusions of Law under RFRA about: whether Appellant's beliefs were sincere; whether they were an "exercise of religion"; or, whether there was a "substantial burden" on Appellant's practices. (R. 362.) Although the Military Judge found that Appellant's actions "could easily be seen" to be contrary to good order and discipline, the Judge made no Conclusions of Law about whether the Government had a compelling interest in issuing the order to Appellant to remove the signs. (R. 362.)

Finally, the Military Judge made no Conclusions of Law as to the accommodation and Department of Defense Instruction issue, or whether the Government employed the "least restrictive means." (R. 362.)

Appellant never testified, and nothing in the Record supports, that Appellant informed anyone that the signs were religious. Nothing in the Record supports that anyone but Appellant knew the signs were religious. Nor does anything in the Record support that Appellant sought religious accommodation for the signs in accordance with the requirements of the Department of Defense Instruction.

E. The Department of Defense requires servicemembers to provide notice of and to request accommodation of religious practices prior to disobeying orders or refusing to comply with military duties.

At the time Appellant placed the signs in her shared workspace, a Department of Defense Instruction governed how to request exceptions to military duties based on religion, "Accommodation of Religious Practices Within the Military Services." DoDI 1300.17 (Feb. 10, 2009). The Instruction stated that "The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions." *Id.*

The Instruction stated that "It is DoD policy that requests

for religious accommodation should be approved when accommodation would not adversely affect mission accomplishment, including military readiness, unit cohesion, good order, discipline, or any other military requirement." *Id.* The Enclosure to the Instruction prescribed procedures for military commanders to approve requests by servicemembers for special accommodations based on a servicemembers' religious practices. *Id.*

While Appellant's trial was ongoing and prior to the Article 39(a), UCMJ, session to litigate Appellant's Motion, the Department of Defense updated the Instruction to explicitly include reference to the Religious Freedom Restoration Act (RFRA). DoDI 1300.17 (Jan. 22, 2014). The new Instruction, which Appellant provided as an appellate exhibit to the Military Judge, explicitly quoted the text of RFRA, but otherwise continued to place the burden on servicemembers to make specific requests for religious accommodation through their chain of command. *Id.*; (Appellate Ex. XXXVI).

Per the 2009 Instruction's requirement, the Secretary of the Navy promulgated Secretary of the Navy Instruction (SECNAVINST) 1730.8B (Oct. 2, 2008), "Accommodation of Religious Practices." It provides Department of the Navy procedures for requesting accommodations on the basis of religion. *Id.* It

prescribes detailed procedures for requests, including a procedure for appealing denials of accommodation requests. SECNAVINST 1730.8B(5)(a-d).

It also directs that absent unusual circumstances, "All requests for accommodation ... shall be approved or denied... within 1 week of the date of request." SECNAVINST 1730.8B(5)(c).

Under the section entitled "Responsibilities," the Navy Instruction directs: "Members seeking religious accommodation must submit their request in writing through their chain of command to their commanding officer..." SECNAVINST 1730.8B(5)(a), 11(a).

Nothing in the Record supports that Appellant notified her commanding officer, or anyone, about the religious nature of the signs. Nothing in the Record supports that Appellant made any request for accommodation.

Argument

I.

APPELLANT FAILS TO ESTABLISH GOOD CAUSE. FIRST, THE LOWER COURT IS NOT A TRIAL COURT, AND THE MILITARY JUDGE MADE NO FINDINGS OF FACT CONCERNING RFRA. SECOND, EVEN ASSUMING THE LOWER COURT ERRED, ITS NON-PRECEDENTIAL MISINTERPRETATION DOES NOT MERIT RELIEF, GIVEN THAT EVEN IF APPELLANT'S "EXERCISE OF RELIGION" WAS SINCERE, NOTHING IN THE RECORD SUPPORTS RELIEF UNDER RFRA. APPELLANT DOES NOT ARGUE OTHERWISE.

An appellant must demonstrate good cause to warrant a grant of review. Article 67, UCMJ, 10 U.S.C. § 867; C.A.A.F. R. 21(a). Further, an appellant must demonstrate with particularity why the errors assigned are materially prejudicial to her substantial rights. C.A.A.F. R. 21(b)(5); *see also* Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012).

A. Federal Circuits have viewed establishing a RFRA defense in criminal cases as a two-step process. The first step requires an accused to lay a factual predicate. If the accused lays that factual predicate, the burden shifts to the Government to demonstrate, as a matter of law, a least restrictive means and compelling interest.

RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). A request for an accommodation must be sincerely based on a religious belief and not some other motivation. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (citing

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n. 28 (2014)).

Federal Circuits have held that determining whether there has been a violation of RFRA "requires a two-step analysis." *See, e.g., United States v. Lafley*, 656 F.3d 936, 939 (9th Cir. 2011). A person claiming a violation "must first establish a prima facie case by showing that the government action at issue 'works a substantial burden on his ability to freely practice his religion.'" *Id.* (citation omitted). This requires that the claimant "(1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his sincerely held religious beliefs is substantially burdened." *United States v. Zimmerman*, 514 F.3d 851, 852 (9th Cir. 2007).

It does not matter whether a religious belief itself is central to the religion, but only that "the adherent [ ] have an honest belief that the practice is important to his free exercise of religion." *Moussazadeh v. Tex. Dep't of Crim. Justice,* 703 F.3d 781, 790-791 (5th Cir. 2012) (quoting *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 131 S. Ct. 1651 (2011)). Whether a burden is "substantial" under RFRA has been held to be a question of law, not a question of fact. *See Mahoney v. Doe*,

642 F.3d 1112, 1121 (D.C. Cir. 2011).

If the claimant satisfies these requirements, "the challenged government action may nonetheless be upheld if the government 'demonstrates' that the action 'is in furtherance of a compelling governmental interest' and is implemented by 'the least restrictive means.'" *Lafley*, 656 F.3d at 939 (quoting 42 U.S.C. § 2000bb-1(b)).

B. The Military Judge made no findings as to "exercise of religion." The lower court is not a factfinding court and its opinion is unpublished, thus its parsimonious interpretation of "exercise of religion" is of no moment.

Checking for sincerity and religiosity is important to weed out sham claims; the religious objection must be both sincere and religious in nature. *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (citing *United States v. Seeger*, 380 U.S. 163, 184-86 (1965)). And Congress was confident of the ability of the federal courts to weed out insincere claims. *Hobby Lobby*, 134 S. Ct. at 2774. But, "the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations... Indeed, that inquiry is prohibited." *Korte*, 735 F.3d at 683 (citations

omitted).

The Military Judge made none of the RFRA-required findings as to the sincerity of Appellant's religious beliefs or whether placing the signs was an "exercise of religion." (R. 362.) Appellant never explicitly raised RFRA at trial. Instead, she merely claimed the orders were illegal because the signs were religious. But the trial judge——not the Navy-Marine Corps Court of Criminal Appeals——is the factfinder in the military court system entitled to make findings of fact and assessments of credibility for motions to dismiss under RFRA. *Cf. United States v. Ginn*, 47 M.J. 236, 242-43 (C.A.A.F. 1997).

Despite this, the Court of Criminal Appeals assumed that RFRA had been raised and proceeded to make findings that Appellant's actions did not constitute an "exercise of religion." *Sterling*, 2015 CCA LEXIS 65, *14-*15. The core of Appellant's argument that this Court should grant the petition is Appellant's objection to the lower court's legal interpretation of "exercise of religion." (Appellant's Supp. 16-17.)

But even assuming RFRA was sufficiently raised at trial by Appellant's submission of Appellate Exhibit XXXVI, the Military Judge made none of the factual findings that seem to be required for a prima facie RFRA defense. *See, e.g., Zimmerman*, 514 F.3d

at 852 (listing the prongs of a prima facie case of a RFRA defense including scope of belief, that the beliefs are religious, that the beliefs are sincerely held, and that the beliefs have been substantially burdened). Further, the Navy-Marine Corps Court of Criminal Appeals is not a factfinding court outside its limited statutory factual sufficiency powers. Thus, it was without congressional authorization to make findings of fact as to the sincerity of Appellant's claim that she had placed the signs to "invoke the Trinity." *See United States v. Ginn,* 47 M.J. 236 (C.A.A.F. 1997).

Regardless of whether the lower court correctly analyzed Appellant's "exercise of religion" claim, it was not empowered to judge credibility or sincerity as to the RFRA claim, and was restricted to a *de novo* review of whether the Military Judge correctly applied the law. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). Sincerity "is, of course, a question of fact." *United States v. Seeger,* 380 U.S. 163, 185 (1965).

It is here that Appellant's argument fails. Reviewed *de novo,* as demonstrated below, the Record compellingly demonstrates that no evidence supports the remaining prongs of a defense under RFRA. *Cf. Ginn,* 47 M.J. at 248 (discussing the limits of the lower appellate courts' factfinding powers, and when undisputed new factual issues may be resolved by those

courts). Appellant presented no evidence of a "substantial burden." This Court should reject the Petition, as Appellant has demonstrated no substantial prejudice or good cause.

C. No good cause exists, and no factfinding or advisory opinion is necessary. Appellant suffered no substantial prejudice: (1) Appellant fails to establish a substantial burden, as she never notified anyone, requested an accommodation, or objected to complying with the Departmental instructions; (2) Appellant does not dispute the military's compelling interest in good order and discipline; and (3) the Department of Defense Instruction correctly conveys RFRA and the meaning of "exercise of religion" to servicemembers.

Even assuming the substance of Appellant's trial objection citing to religion was sufficient to raise a defense under RFRA, remanding for full analysis of whether Appellant's posting of the signs was a sincere "exercise of religion" is unnecessary. *United States v. True,* 28 M.J. 1, 3 (C.M.A. 1989) (noting the substance, not form, of rulings and pleadings is controlling).

At trial, Appellant presented evidence only that the signs were "religious" in nature——not that her *practice* of religion was substantially burdened. As demonstrated, she failed to establish a prima facie case of the remaining RFRA prongs; thus this Court need not remand merely for an exhaustive and proper analysis by the trial court of the "exercise of religion" or other RFRA prongs. *Cf. United States v. Harrow,* 65 M.J. 190, 201, 202 (C.A.A.F. 2007) ("we need not resolve the issue of

error where, as here, the question of prejudice is easily decided.").

Nor need this Court grant the Petition merely to instruct lower Courts how to develop nascent military law on the application, in courts-martial, of the Religious Freedom Restoration Act. The Department of Defense Instruction, particularly as revised in 2014, conveys what must be proved and how accommodations may be sought.

II.

> NO GOOD CAUSE EXISTS, AS APPELLANT MADE NO PRIMA FACIE CASE OF A RFRA VIOLATION. SHE INTRODUCED NO EVIDENCE OF A SUBSTANTIAL BURDEN. DEPARTMENT OF DEFENSE AND DEPARTMENT OF NAVY POLICY IS CLEAR: RELIGIOUS PRACTICES MAY BE ACCOMMODATED, BUT SERVICEMEMBERS MUST FIRST REQUEST ACCOMMODATION. APPELLANT'S BELATED AND SELF-SERVING JUSTIFICATION FOR BLATANT INSUBORDINATION MAKES THIS AN INAPPROPRIATE VEHICLE FOR MANDATING HOW MILITARY APPELLATE AND TRIAL COURTS SHOULD ANALYZE RFRA CLAIMS.

A. Nothing in the Record supports a *prima facie* case of a "substantial burden," given that Appellant was not forced to choose between exercising her religion or punishment. Appellant could have followed the order, or sought accommodation. Appellant did neither.

To trigger strict scrutiny under RFRA of Government action, a defendant must: (1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his

sincerely held religious beliefs is substantially burdened. *See, e.g., Zimmerman*, 514 F.3d at 854.

Government action substantially burdens religion when it "[p]uts substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Review Board of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), or requires an individual to choose between "either abandoning his religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U. S. 599, 605 (1961); *see Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070–71 (9th Cir. 2008) (en banc) (applying the same test under RFRA); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (same). Thus a practice that offends a plaintiff's religious sensibilities but does not force the plaintiff to act contrary to his or her beliefs is not a "substantial burden." *Navajo Nation*, 535 F.3d at 1063, 1070.

Appellant's RFRA claim resembles a similar failed RFRA claim in *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997). There, the appellant raised a RFRA challenge to his prosecution for violation of the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204. The appellant claimed that he removed his children to Egypt to provide them with a Muslim education.

The Second Circuit rejected this RFRA claim, explaining that even if the belief was sincere, no substantial burden

existed: "there is nothing in the record to suggest that the children could not receive proper training in the tenets of Islam in the United States, or that they must go to Egypt to become religiously educated Muslims." *Id.* at 879 n.1. Likewise here, Appellant provides no evidence that adhering to the accommodation scheme required by Departmental regulations, rather than criminally violating the orders of military superiors, posed a substantial burden on her practice of religion.

Appellant never presented facts demonstrating a substantial burden during trial, as she must to claim relief under RFRA. *See La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. United States Dept. of the Interior,* No. 13-56799, 2015 U.S. App. LEXIS 8230, *5 (9th Cir. May 19, 2015) (finding no "substantial burden" where declarations submitted were "little more than conclusory statements" insufficient to demonstrate party was "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions").

Finally, in *Holt v. Hobbs,* 135 S. Ct. 853, 862 (2015), in finding a violation under RFRA's sister-statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, the Supreme Court noted that the "substantial burden" inquiry did not look to "the availability

of alternative means of practicing religion." But here, unlike *Holt*, Appellant was not given "alternative means of practicing religion." Rather, Appellant was able and encouraged by Instruction to request religious accommodation, potentially enabling her to continue to display these exact signs.

This Court need not grant the Petition, because Appellant failed to raise a prima facie case under RFRA: Appellant failed to establish a substantial burden, as she submitted no evidence that she was pressured to change her religious behavior or modify her religious beliefs. To the contrary, she refused to modify her behavior, and set her own desires above that of unit cohesion and military discipline——as she did with each of her criminal charges. This is particularly bewildering, given the wide berth both the Departments of the Navy and Defense have made for accommodations to be routed through and considered by commanding officers, when notified that servicemembers wish to engage in religious practices that may conflict with military duties.

And Appellant cannot seek refuge by claiming the Instruction's accommodation requirement itself is a substantial burden. This case is even stronger for the United States than the "no substantial burden" finding in *Priests for Life v. United States HHS*, 772 F.3d 229 (D.C. Cir. 2014), *reh'g denied*

2015 U.S. App. LEXIS 8326 (D.C. Cir. May 20, 2015). In *Priests for Life*, the D.C. Circuit rejected the plaintiff's claim as "extraordinary" that the religious accommodation built into the Affordable Care Act——requiring religious employers to "opt out" of contraceptive coverage provisions by filling out government forms——itself created a substantial burden. *Id.* at 245-46.

Just as the requirement to fill out a form in *Priests for Life* did not substantially burden those appellants, the binding Departmental Instructions and procedures for requesting accommodations do not burden Appellant. *Id.* at 236. Notably, Appellant makes no claim of "complicity" or repugnance at following the Instruction's accommodations, an issue that produced vigorous dissents in the *Priests for Life* rehearing denial. *See Priests for Life v. United States HHS,* No. 13-5368, 2015 U.S. App. LEXIS 8326, *47 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting).

Even had the lower court proceeded to the second prong, the Record demonstrates that Appellant failed to make a prima facie case of a RFRA violation. Indeed, Appellant knew how to "game the system": she made liberal use of medical chits to refuse multiple orders to stand gate duty. But Appellant curiously chose to disobey the orders of her Staff Sergeant, without providing explanation at that time, and without filing any

formal accommodation requests.

The Petition should be denied.

B. Reviewed *de novo*, Departmental Instructions enact the least restrictive means to enable servicemembers to observe religious practices while in uniform. Even if a prima facie case is present, Appellant merits no relief, thus no good cause exists to examine "exercise of religion."

Because Appellant cannot clear RFRA's first threshold hurdle, this Court need not address whether the order fulfilled a compelling societal and military interest that cannot be advanced by less restrictive means. Needless, the Government satisfies its burden under the second prong.

The least-restrictive-means standard is demanding and "requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Holt v. Hobbs*, 135 S. Ct. at 864 (quoting *Hobby Lobby*, 134 S. Ct. at 2780). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* (internal citation and quotation marks omitted). Yet the government need not prove that government officials "considered less restrictive alternatives at a particular point in time." *Id.* at 868 (Sotomayor, J., concurring). Nor must the government "do the impossible" and "refute each and every conceivable

alternative regulation scheme." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). The government instead must "support[] its choice of regulation" and "refute the alternative schemes offered by the challenger." *Id.*; *see Holt*, 135 S. Ct. at 868 (Sotomayor, J., concurring) (citing *Wilgus*).

There is a close fit between the government's compelling interests in this case and the means it has used to achieve those ends. Both the Senate and House Reports on RFRA reflect that Congress intended the military implementations of the Act—here, the Departmental Instructions—were intended to be "extended ... significant deference." S. Rep. No 103-111, at 12 (1993); H.R. Rep. No. 103-88, at 8 (1993). The United States must balance good order and discipline, and obedience, in the military services, with the requirements Congress has imposed in RFRA. The Instruction requiring servicemembers to request accommodation is the least restrictive means, and when servicemembers elect instead to refuse the orders of superiors, the discretion of military commanders to impose punishment controls.

C. Obedience to orders, including those from Marine Staff Sergeants to Marine Lance Corporals to "clean up their spaces," is a "compelling interest" in the American military, and is a purely legal determination that demonstrates the lack of substantial prejudice.

"[I]t is the primary business of armies and navies to fight

or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Parker v. Levy*, 417 U.S. 733, 744 (1974).

In other contexts, the Supreme Court has indicated that a "compelling interest" is served where prison officials enact "regulations and procedures" to "maintain good order . . . and discipline." *Cutter v. Wilkinson*, 544 U.S. 709, 716-17, 725 n.13 (2005). So too, military orders serve a compelling interest in the military.

Appellant was ordered to clean her spaces, yet defied this order repeatedly without giving explanation, including the explanation required by binding Departmental regulations. The military has a compelling interest in obedience to the orders of superiors, and in requiring Appellant to apply for accommodation before refusing to obey those orders. Appellant has made no argument otherwise. The Petition should be denied.

III.

APPELLANT FAILS TO DEMONSTRATE GOOD CAUSE IN QUESTIONING THE LEGAL SUFFICIENCY OF HER CONVICTION. SHE FAILED TO OBEY MULTIPLE DIRECT ORDERS DIRECTLY RELATED TO HER DUTIES, WHICH INCLUDE THE CLEANLINESS OF HER STAFF SERGEANT'S AND HER WORKSPACES. NOTHING MORE IS NEEDED, NOR NEED SUPERIORS ENUNCIATE AN ADVERSE EFFECT——AT THE TIME OR ON APPEAL——BEFORE MARINES MUST OBEY MILITARY ORDERS.

A. The Charge is legally sufficient. The Members evaluated credibility, believed testimony that the workspace was shared, and believed testimony that the signs caused a cluttered workspace. The Members disbelieved Appellant's post-facto justification of disobeying orders. Appellant points to no precedent that actual harm must occur before military servicemembers must obey military orders.

"An order is presumed to be lawful, and the accused bears the burden of rebutting the presumption." *United States v. Deisher,* 61 M.J. 313, 317 (C.A.A.F. 2005). Lawful orders require a relationship between the order and the subordinate's military duties. *Id.*

Appellant claims that the orders here need not have been followed, because no testimony was introduced that any Marine was actually "distracted or dismayed" "or even saw" the quotations. (Appellant's Supp. 23.) But the precedent Appellant cites offers no support for this proposition. In the military, no *actual* adverse effect or prejudice is required before military subordinates must follow orders. Rather,

subordinates are required by law to follow the orders of superiors——indeed, it is part of the oath every servicemember takes on commissioning and enlistment, and underlies multiple crimes enacted by Congress in the exercise of their Article I, Section 8, Clause 14 constitutional power to make rules for the governance of the land and naval forces. *See* Art. 86, 88, 89, 90, 91, 92, UCMJ, 10 U.S.C. §§ 886, 889, 890, 891, 892.

None of the three cases cited by Appellant for the claim actually support her novel and somewhat unsettling proposition that actual harm is a prerequisite for obedience to military orders. (Appellant's Pet. Supp. 22-23.) First, *United States v. Collier,* 67 M.J. 347 (C.A.A.F. 2009), merely supports that an evidentiary ruling Mil. R. Evid. 403 with no articulated finding of unfair prejudice cannot be supported by a lower court——which aside from its factual sufficiency review, is otherwise not a factfinding court. *Cf. United States v. Wilcox,* 66 M.J. 442, 451 (C.A.A.F. 2008) ("a rationale supplied by the CCA is not itself evidence").

Second, *United States v. Boylan,* 49 M.J. 375 (C.A.A.F. 1998), merely affirms the unremarkable proposition that the *Care* inquiry in the military has stricter requirements than those in civilian court guilty pleas, and the accused must, in fact, be convinced of her own guilt in order to be convicted. *Id.* at

378. Finally, the concern with speculation in *Smith v. Vanderbrush,* 47 M.J. 56 (C.A.A.F. 1997), appears in the *dissent,* not the majority, and involves the interpretation of rules governing administrative discharge——not legal sufficiency; moreover, the *Vanderbrush* majority apparently did not share the dissent's or Appellant's concern with "speculation."

Appellant's argument suggests that Marines may disobey direct orders to man machine guns during Yom Kippur with impunity unless and until shots are actually fired by the enemy. This position is untenable. The United States knows of no precedent that supports this interpretation of the law in either civilian or military courts. Military discipline runs the gamut from passing "white glove tests" during barracks inspections, to life and death decisions during combat. Obedience to orders must be immediate, and must be exact.

Here, Staff Sergeant Alexander testified that she was responsible for the cleanliness of the shared office space, that Appellant worked for her, and that she directed Appellant to remove the three signs because she wanted the office spaces and desks clean, that "they needed to be removed due to the fact that it wasn't just her desk; it was being shared by the other junior Marine." (R. 181.)

Moreover, the Military Judge's Findings as to the

lawfulness of the order are not as limited as Appellant would have us believe: "The court finds that the orders were given because the workspace ... was shared by at least one other person... That other service members came to accused's workspace *for assistance* at which time they could have seen the signs. The court also finds that the signs, although the verbiage in them ... were biblical in nature, read something to the effect of *no weapon found against me shall prosper*... which could easily be seen as *contrary to good order and discipline*." (R. 362 (emphasis added).)

Appellant would have this case be about the lower court's reading of "exercise of religion," and hence Appellant almost exclusively dwells on that part of the lower court's opinion. But the Military Judge considered Appellant's Motion as-is, and ruled accordingly. The Judge's ruling made Findings to include the scope of Appellant's duties, and acknowledged that Appellant was subject to direct orders from the Staff Sergeant as to the cleanliness of the workspace. Italicized, above, are the words Appellant omitted from her recitation of the Judge's Findings: that Appellant's signs could be seen as "contrary to good order and discipline," and that Appellant's duties——assisting others who came to her workspace——subjected others to seeing this combative language. Nothing, at the time the orders were given,

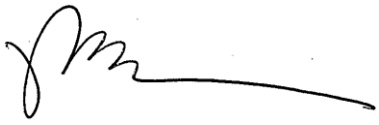
supported that the signs were biblical.

Nothing more is needed. Appellant waited nearly a year after her crimes to claim that her religious beliefs excused her profligate obstreperousness, and Appellant never timely requested accommodation as required by Departmental Instruction procedures, which she had a duty to follow. Marines cannot simply choose to disobey orders without following the prescribed procedures.

This case merits no further review.

Conclusion

The United States respectfully requests that this honorable Court deny the Petition for Grant of Review.



BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682
Bar no. 31714

MARK K. JAMISON

Colonel, United States Marine Corps
Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax -7687
Bar no. 31195

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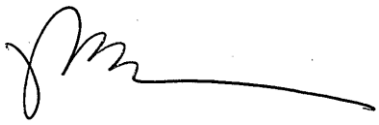
I certify that the foregoing was electronically filed with the Court and a copy electronically served on opposing counsel on June 8, 2015.



BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202)685-7682
Bar no. 31714