No. _____

In the
Supreme Court of the United States

MONIFA J. STERLING,
Lance Corporal (E-3), U.S. Marine Corps,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To shift the burden to the government to justify an infringement on religious conscience, the Religious Freedom Restoration Act requires an adherent to establish a "substantial burden" on religious exercise. A minority of federal courts of appeals, including the court below, have held that adherents categorically cannot establish a substantial burden unless they show that the federal government put them on the horns of a dilemma—forcing them to choose between what their religion and the government demand. The majority of federal courts of appeals, however, have correctly held that such a dilemma is not necessary to establish a substantial burden; rather, a substantial burden can also be established by a direct restraint on religious exercise and by restrictions on conduct that is religiously-motivated but not religiously-compelled. In this case, the Court of Appeals for the Armed Forces joined the minority side of the split, limiting the civil liberties of the nearly two million men and women who defend religious freedom in uniform.

The question presented is: whether the existence of a forced choice between what religion and government command is necessary to establish a "substantial burden" under the Religious Freedom Restoration Act.

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The "substantial burden" standard is the touchstone of federal statutory protections for religious liberty. A religious claimant cannot prevail on a claim under the Religious Freedom Restoration Act (RFRA)—or under the Religious Land Use and Institutionalized Persons Act (RLUIPA)—without first demonstrating a "substantial burden" on religious exercise. In a series of unemployment-compensation decisions, this Court held that a substantial burden on religion exists when a state conditions receipt of a government benefit on behavior prohibited by religious faith. In other words, this Court has recognized that a substantial burden on religious exercise exists when the government requires a believer to choose between fidelity to faith (such as refraining from work on the Sabbath) and receiving benefits (such as unemployment benefits conditioned on a willing to work certain days).

A majority of courts of appeals have correctly recognized that this "dilemma" scenario does not constitute the *only* means by which an adherent can demonstrate a substantial burden on her religious exercise. Instead, these circuits have recognized that the government can impose a substantial burden far more directly by simply forbidding religious practice, especially when it comes to inmates and others over whom the government has direct control. These circuits sensibly recognized that a complete prohibition on religious exercise is the most obvious form of substantial burden and also recognized that

the religious practice burdened need not be religiously-compelled.

Several other courts of appeals, however, have held that a substantial burden exists *only* when the government places a believer between the proverbial rock and a hard place. Absent such a dilemma, an adherent categorically cannot establish a substantial burden. In this case, the Court of Appeals for the Armed Forces (CAAF) joined that minority when it held that a Marine's exercise of religion was not substantially burdened when her superior ordered her to remove from her personal workspace three small slips of paper containing Biblical quotations. Petitioner, Lance Corporal (LCpl) Monifa Sterling, had posted the Biblical quotations to give her spiritual strength in the face of difficulties she was experiencing at work. LCpl Sterling's superior demanded that she remove the signs, but LCpl Sterling declined, leading LCpl Sterling's superior to forcibly remove them. LCpl Sterling then replaced the signs, leading to charges of insubordination and ultimately a court-martial. On appeal, the CAAF recognized that LCpl Sterling's posting of the Biblical quotations constituted religious exercise under RFRA, but ultimately held, quite remarkably, that a direct order to take down the signs did not "constitut[e] a substantial burden" on that acknowledged religious exercise.

The CAAF's analysis suffers two related flaws. First, the CAAF appears to have discounted LCpl Sterling's religious exercise because the posting of the Biblical quotations, while religiously-motivated, was not religiously-compelled. But both RFRA and

this Court's cases have made clear that a religious exercise is protected whether or not it is compelled or central to the adherent's faith. Second, the CAAF followed a minority of courts in differentiating between burdens that arise from direct restraints on religious practice and those that arise from dilemmas and, remarkably, afforded *less* protection against the former. That analysis gets matters exactly backward. A direct government prohibition on religious exercise is the quintessential substantial burden. The contrary reasoning is not only doctrinally flawed, but it leaves the individuals most in need of protection—those, like service members, subject to direct government commands—with the least protection from government interference with religious exercise.

In numerous other circuits, the removal of LCpl Sterling's Biblical quotations would have constituted a substantial burden on her religious exercise. The burden would then shift to the government to satisfy strict scrutiny. Perhaps the government could demonstrate that the distinct realities of military life required this imposition. But the realities of military life, which allow the government to issue direct orders rather than rely on incentives, should not deprive service members of their free exercise rights at the threshold and relieve the government from even having to try to show that its conduct was the least restrictive means of furthering a compelling governmental interest. The decision below subjects the Nation's million-plus service members who defend our most fundamental liberties to a minority rule limiting their ability to freely engage in religious exercise. It deepens an entrenched split, is

profoundly wrong, and presents an ideal opportunity to address a significant and frequently recurring issue. The Court should grant certiorari.

OPINIONS BELOW

The opinion of the CAAF is reported at 75 M.J. 407 and reproduced at pages 1-47 of the appendix. The opinion of the U.S. Navy-Marine Corps Court of Criminal Appeals is unreported but available at 2015 WL 832587 and reproduced at pages 48-73 of the appendix.

JURISDICTION

The CAAF entered judgment on August 10, 2016. On October 12, 2016, the Chief Justice extended the time in which to file a petition for certiorari to December 23, 2016. This Court has jurisdiction under 28 U.S.C. §1259.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 *et seq.*, are provided in the appendix.

STATEMENT OF THE CASE

A. Background

In May 2013, LCpl Sterling of the United States Marine Corps was assigned to Section 6 (S-6) of the 8th Communications Battalion. Her direct supervisor was Staff Sergeant (SSgt) Alexander. LCpl Sterling's duties required her to sit at a desk and use a computer to assist Marines experiencing problems with their Common Access Cards. Pet.App.4.

LCpl Sterling self-identifies as a Christian and as a "religious person." CAAF.JA.42, 90.[1] While working in the S-6, LCpl Sterling taped three small pieces of paper around her workspace, each containing the same printed quotation drawn from the Bible: "No weapon formed against me shall prosper." CAAF.JA.43.[2] LCpl Sterling regards the Bible "as a religious text," and she intentionally drew the quotation from "scripture." CAAF.JA.90.

In each instance, LCpl Sterling printed the quotation on one line of 8-½ x 11-inch paper, with the paper cut away so that only the printed text remained. CAAF.JA.44. Two of the quotations were printed in 28-point font, and the third was printed in 12 or 14-point font. *Id.* at 43-44. LCpl Sterling taped the smallest quotation above her computer screen, and she taped the other two on the side of her computer tower and along the top shelf of her incoming mailbox.

LCpl Sterling deliberately taped the three quotations in this manner so that they were visible only to her and so that she "did a trinity," *i.e.*, the belief of the Christian faith that there is one Lord in three divine persons. *Id.* at 42. Her motivation for posting the Biblical quotations and invoking the trinity was that she was "a religious person." She testified that she sought to "have [the] protection of three around me" in response to difficulties that she

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[1] "CAAF.JA" refers to the joint appendix filed in the CAAF.

[2] The quotation comes from *Isaiah* 54:17. *See, e.g.*, King James Bible ("No weapon that is formed against thee shall prosper."); American King James Version ("No weapon that is formed against you shall prosper.").

was experiencing at work. *Id.* at 45. The religious quotations were "a mental reminder" to her and were not intended to "send a message to anyone" else. *Id.*

Around May 20, 2013, SSgt Alexander saw the quotations and ordered LCpl Sterling to remove them. SSgt Alexander stated: "I don't like those. I don't like their tone." *Id.* at 47. LCpl Sterling testified that she informed SSgt Alexander that the quotations were not "meant to antagonize her" and that "it's religion." But SSgt Alexander was unmoved. LCpl Sterling also testified that SSgt Alexander's exact order was to "take that S-H-I-T off your desk or remove it or take it down." *Id.*

At the end of the day, when SSgt Alexander noticed that LCpl Sterling had not removed the quotations, she removed them herself and threw them in the trash. The next day, upon discovering that LCpl Sterling had reposted the quotations, SSgt Alexander again ordered LCpl Sterling to remove them. When LCpl Sterling declined, SSgt Alexander again removed the quotations herself. *Id.* at 21.

B. LCpl Sterling's Court-Martial and the NMCCA Decisions

The government convened a special court-martial to try LCpl Sterling for charges resulting in part from her refusal to remove the Biblical quotations from her workspace. Pet.App.8. As relevant here, the government presented specifications alleging that LCpl Sterling willfully disobeyed SSgt Alexander's orders to remove the Biblical quotations. *Id.* LCpl Sterling moved to dismiss the specification on the grounds that SSgt Alexander's orders were unlawful because they

violated her right to free exercise of religion. CAAF.JA.100. In support of the motion, LCpl Sterling invoked Department of Defense Instruction 1300.17, which explicitly incorporates RFRA. *See* CAAF.JA.89, 216-30.

The military judge denied the motion to dismiss from the bench, issuing no written decision. CAAF.JA.116. The military judge acknowledged that the quotations were "biblical in nature" and contained "religious language." *Id.* But, without reference to any authority, the military judge concluded that the orders to remove the signs containing the quotations "did not interfere with [LCpl Sterling's] private rights or personal affairs in any way." *Id.* The military judge instructed the court-martial that, as a matter of law, SSgt Alexander's orders to remove the quotations were lawful. *Id.* The court-martial convicted LCpl Sterling of failure to obey SSgt Alexander's orders to remove the Biblical quotations. *Id.* at 119. LCpl Sterling was sentenced to a bad-conduct discharge and a reduction in pay grade, *id.* at 120, and the Convening Authority approved the sentence in substantial part.[3]

On appeal, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) rejected LCpl Sterling's contention that the order to remove the Biblical quotations violated RFRA. It stated that LCpl Sterling's display of the Biblical quotations did not constitute a "religious exercise" for purposes of RFRA

[3] The court-martial also convicted LCpl Sterling of several other charges not at issue in this petition, while acquitting her of another charge. CAAF.JA.119.

because it was not "part of a system of religious belief" and that LCpl Sterling's actions, therefore, did "not trigger the RFRA." Pet.App.60. Accordingly, the NMCCA did not address whether the government had substantially burdened LCpl Sterling's religious exercise, or whether the government did so in the least restrictive manner in furtherance of a compelling governmental interest, as RFRA requires. *See* 42 U.S.C. §2000bb-1.

C. The CAAF Decision

The CAAF granted LCpl Sterling's petition for review but ultimately upheld LCpl Sterling's conviction and sentence. At the outset, the CAAF rejected the government's contention that LCpl Sterling had waived a RFRA defense by purportedly failing to raise that defense during her court-martial. Pet.App.14. It then rejected the NMCCA's holding that LCpl Sterling's display of Biblical quotations did not qualify as "religious exercise" under RFRA. In the CAAF's view, "the NMCCA erred in defining 'religious exercise' for purposes of RFRA." Pet.App.15. The court noted RFRA's "broad definition" of that term and observed that LCpl Sterling had testified that the slips of paper were "Bible scripture of a religious nature," "invoked the Trinity," and "fortified her against those who were picking on her," all of which demonstrated that her posting of the quotations was "religious exercise." Pet.App.16.

The CAAF then addressed whether SSgt Alexander's "taking down the signs" containing the Biblical quotations "constitutes a substantial burden" on LCpl Sterling's religious exercise. Pet.App.24.

Viewing that as the "legal question to be decided" in this case, the court held that removal of the Biblical quotations did not substantially burden LCpl Sterling's religious exercise within the meaning of 42 U.S.C. §2000bb-1. The CAAF expressed its view, "contrary to the dissent's understanding," that the substantial burden analysis requires the court to focus on "the subjective importance of the conduct to the person's religion." Pet.App.21. With considerable understatement, the court acknowledged that "there is not precise conformity within the federal circuits on the exact parameters of what constitutes a 'substantial burden.'" Pet.App.20. Canvassing the circuits, the court then concluded that a substantial burden on religious exercise exists only when the government "force[s] the claimant to act contrary to her beliefs," even if the government practice nonetheless "offends religious sensibilities." Pet.App.23. Applying that exceedingly narrow understanding of "substantial burden,'" the CAAF determined that removal of LCpl Sterling's Biblical quotations did not substantially burden her religious exercise because she "did not testify that she believed it is any tenet or practice of her faith to display signs at work," and the government did not "pressure[] her to either change or abandon her beliefs or force[] her to act contrary to her religious beliefs." Pet.App.24.

The court supported its holding with what it deemed "two additional salient facts." Pet.App.25. First, it faulted LCpl Sterling for not telling her superior that the Biblical quotations "had a religious connotation, let alone that they were important to her religion." *Id.* The court held that such notice was "[r]equir[ed]" before finding a substantial

burden. *Id.* Second, it faulted LCpl Sterling for not "request[ing] an accommodation" before engaging in her religious exercise. Pet.App.27. At the same time, the court conceded that "RFRA does not itself contain an exhaustion requirement," and "at least one federal appellate court has held that an individual need not request an exemption to invoke RFRA, even if a system for doing so is in place." *Id.* (citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012)).

Judge Ohlson dissented. He criticized the majority's "unduly narrow" approach to the substantial-burden requirement as "inconsistent with both the plain language and clear purpose of RFRA." Pet.App.47 (Ohlson, J., dissenting). Noting that that the majority's holding accentuated "a distinct split among the federal circuit courts of appeals" and that the "Supreme Court has yet to address this point," Pet.App.38, Judge Ohlson pithily captured the core issue in this case: A "compelled violation of one's religion may be *sufficient* for finding a substantial burden, but this does not also mean that it is *necessary* for such a finding." Pet.App.47. Judge Ohlson also faulted the majority's novel notice and exhaustion obligations. Pet.App.44.

Judge Ohlson warned that the majority's decision not only "imposes a legal regime that conflicts with the provisions of RFRA" but also "impermissibly chills the religious rights of our nation's servicemembers." Pet.App.33. He cautioned that the majority's decision would subject "other servicemembers in the future … to conviction at court-martial for merely engaging in religious

exercise that is entitled to protection." Pet.App.30. In his view, RFRA "provides the men and women of our nation's armed forces with the presumptive right to fully, openly, and spontaneously engage in religious exercise." *Id.*

REASONS FOR GRANTING THE PETITION

As both the majority and dissent recognized, this case implicates a clean and well-developed circuit split over a question of exceptional importance. The CAAF joined the Third, Fourth, Ninth, and D.C. Circuits in holding that, for RFRA purposes, a substantial burden on religious exercise exists *only* when government subjects a believer to a dilemma pressuring the adherent to violate religious precepts; a complete prohibition on optional religious exercise is deemed insufficient to impose a substantial burden. The majority of circuits, however, have correctly rejected that cramped conception of the standard and sensibly recognized that direct prohibitions on religious exercises are quintessential substantial burdens and that RFRA protects optional religious exercise as well as religiously-compelled practices. Had LCpl Sterling raised her RFRA defense in civilian court in the circuits following the sensible majority approach, the removal of the Biblical quotations—the posting of which, the CAAF agreed, constituted religious exercise by LCpl Sterling—would plainly constitute a substantial burden. Our Nation's service members should not be subject to a flawed minority rule that is less protective of their religious liberty, not because the military context may justify substantial burdens, but

because the minority rule fails to recognize substantial burdens at the threshold.

The CAAF's exceedingly narrow understanding of what constitutes a "substantial burden" is doubly flawed. Initially, both RFRA and this Court's precedents forbid any distinction between practices that are religiously-compelled and those that are merely religiously-motivated. RFRA protects all religious exercise, and any sensible interpretation of the Religion Clauses must forswear a judicial inquiry into the "subjective importance" of a religious practice or any distinction between whether the practice is commended or compelled by the adherent's religion. Equally important, this Court's pre-RFRA cases *extended* protection to situations where the government interference with religious exercise took the more subtle form of forcing the adherent to choose between fidelity to religious practice and forgoing a government benefit. Nothing in those cases remotely suggests that a direct government order to work on the Sabbath or cease a religious practice would be subject to less protection. But a minority of courts have adopted just such a miserly and counterintuitive approach to recognizing substantial burdens.

Without doubt, the question presented is a recurring issue of national importance. "Substantial burden" is not just any term in the United States Code on which the circuits have diverged. It is the threshold requirement for the Nation's statutory protections for religious conscience. It may be that the government can demand that service members incur substantial burdens on their religious exercise

that the government could not require of the rest of us. But that analysis should take place under RFRA's narrow tailoring framework, where the unique compelling interests and need for order can be properly analyzed. The problem with the decision below is that it deprives our Nation's service members of their rights to religious liberty at the threshold. The military context means that the government need not resort to the indirect coercion of denying unemployment benefits. A soldier can be simply ordered to work on a Sabbath, to shave a beard, or to remove a Bible verse or a religious article of clothing. An application that rejects such claims at the threshold as not even imposing a substantial burden effectively neuters Congress' deliberate judgment that RFRA applies to and protects those serving in our armed forces.

I. The Courts Of Appeals Are Intractably Split Over What Constitutes A Substantial Burden On Religious Exercise.

Both the majority and dissent agreed that the federal courts of appeals are divided over the "substantial burden" standard. The dissent emphasized the "distinct split among the federal circuit courts of appeals that have analyzed" the substantial-burden question. Pet.App.38. And with considerable understatement, the majority observed that "there is not precise conformity within the federal circuits on the exact parameters of what constitutes a 'substantial burden.'" Pet.App.20. Both are correct: the CAAF's decision deepens a split among the federal courts of appeals regarding what an adherent must demonstrate in order to establish a

substantial burden on religious exercise. That divide, which the decision below directly implicates, calls out for this Court's review.

A. The Minority View: A Substantial Burden Exists Only When the Government Forces Adherents to Engage in Conduct That Their Religion Forbids or Refrain from Conduct That Their Religion Requires.

Before the decision below, four courts of appeals held that a "substantial burden" under RFRA or RLUIPA exists only when the government puts an adherent on the horns of a dilemma: an adherent must face a choice between remaining faithful and forgoing a government benefit (or, conversely, between violating faith and avoiding a penalty). Among these courts, the chief proponent of this "dilemma" theory is the Ninth Circuit. A divided en banc panel of that court has squarely held that "a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit … or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) (emphasis added). Government action that only disturbs an adherent's "subjective, emotional religious experience"—*i.e.*, that "diminish[es]" an adherent's "spiritual fulfillment"—is insufficient. *Id.* at 1070. Thus, if a particular action is religiously significant, but not religiously compelled, a government burden on that activity is not substantial. Lest it be unclear, the majority

drove home the point: "Any burden imposed on the exercise of religion short of that described [above] is not a 'substantial burden.'" *Id.*

The Ninth Circuit has repeatedly reaffirmed *Navajo Nation*'s narrow interpretation of "substantial burden." For instance, applying *Navajo Nation*, a Ninth Circuit panel recently held that religious adherents could not show a substantial burden because they did not "face … a dilemma" and could not point to government conduct "forc[ing them] to choose between obedience to their religion and criminal sanction." *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016). Elsewhere, the Ninth Circuit has held that no substantial burden exists absent a "forced choice," *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012), or unless government action "coerces [believers] into a Catch-22 situation." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008).

The Third Circuit, like the Ninth Circuit, requires that government action, in order to constitute a substantial burden, either place a believer between a theological rock and a hard place or pressure the believer to "modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007).

Similarly, the Fourth Circuit also does not find the existence of a substantial burden unless government "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006). The perils of rigid adherence to that narrow

standard are illustrated by a recent district court decision from within the Fourth Circuit. Applying the *Lovelace* rule, a district court held that a correctional department's placement of an inmate's faith on a banned-religions list did not impose a substantial burden because the direct ban did not "pressur[e the claimant] into modifying his behavior or violating his beliefs." *Coward v. Jabe*, No. 1:10-cv-147, 2014 WL 932514, at *7 n.2 (E.D. Va. Mar. 10, 2014). While the Fourth Circuit vacated the decision on other grounds, *see* 647 F. App'x 181 (4th Cir. 2016), the fact that the Fourth Circuit's rule could even countenance a distinction between banning a religion entirely and pressuring an adherent to waver from a particular compelled tenet of that religion, with only the latter imposing a substantial burden, is an obvious sign that something is amiss.

Finally, as the majority and dissent below noted, the D.C. Circuit has also held that a substantial burden "requires a compelled violation of beliefs." Pet.App.38 (Ohlson, J., dissenting) (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008)); *see also* Pet.App.20 (majority acknowledging that under *Kaemmerling*, "a substantial burden exists where a government action places substantial pressure on an adherent to modify her behavior and to violate her beliefs" (brackets and quotation marks omitted)). Indeed, without disagreement by the majority, the dissent correctly observed that the "distinct split among the federal circuit[s]" regarding the substantial-burden standard is "demonstrated by *Kaemmerling*." Pet.App.38 (Ohlson, J., dissenting).

The CAAF's decision deepened this "distinct split." *Id.* Like the foregoing courts of appeals, the CAAF adopted the minority position that government action imposes a substantial burden on religious exercise only when it "force[s] the claimant to act contrary to her beliefs." Pet.App.23. Direct prohibitions "upon a religious conduct" or "restraints placed on behavior that is religiously motivated" but not religiously-compelled impose no substantial burden, the majority held, as they "do[] not necessarily equate" to "a pressure to violate one's religious beliefs." Pet.App.21. Application of this test, the majority continued, requires an inquiry into "the subjective importance of the conduct to the person's religion." *Id.* According to the CAAF, because LCpl Sterling did not provide evidence that her religion compelled her to post the Biblical quotations in a trinity, the direct order to cease that religiously-inspired action did not constitute a substantial burden on her religious exercise. Pet.App.23-24.

B. The Majority View: A Substantial Benefit Exists Whenever the Government Directly Restrains Religious Exercise, Even When That Religious Exercise Is Not Compelled Such That The Adherent Faces a Dilemma.

By contrast, seven courts of appeals have held that while government action putting adherents to a choice between the demands of God and Caesar is one kind of substantial burden, it is not the only one. *See* Pet.App.47 (Ohlson, J., dissenting) (insisting that

"a compelled violation of one's religion may be *sufficient* for finding a substantial burden," but "this does not also mean that it is *necessary* for such a finding"). Rather, direct prohibitions on religious exercise can impose substantial burdens, even if they do not force adherents to choose between what the government and the adherent's religion compel.

For example, the Tenth Circuit has squarely rejected the notion that such an "illusory choice" is some kind of *sine qua non* for a substantial burden. Although that court has recognized that substantial burdens *may* result from situations "where the only realistically possible course of action trenches on an adherent's sincerely held religious belief," the court has also recognized that substantial burdens *need not* result from such situations. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). The Tenth Circuit thus held that religion may be substantially burdened when government "prevents participation in conduct motivated by a sincerely held religious belief" whether or not that conduct is compelled. *Id.*; *accord Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013) (en banc), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Similarly, the First Circuit has recognized that substantial burdens may result from a variety of factual circumstances beyond a dilemma. That court has declined to "adopt any abstract test" for assessing the existence of a substantial burden, choosing instead to "recognize different types of burdens" by employing a "functional approach." *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d

78, 95 (1st Cir. 2013). Likewise, the Second Circuit has "decline[d] to adopt a definition of substantial burden" that would require claimants to show that they have been "compelled to do something their religion forbids." *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.).

In a lengthy opinion, the Fifth Circuit has held that "at a minimum, the government's *ban* of conduct sincerely motivated by religious belief" can impose a substantial burden. *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009). That court sensibly reasoned that if a dilemma may impose a substantial burden, then "a complete ban," if anything, just "presents a much stronger case." *Id.*; *accord A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) (substantial burdens may arise "[w]hen conduct is subject to an outright ban").[4]

Following the same approach, the Sixth Circuit has held that government action may impose a substantial burden when it "effectively bars" a "religious practice," whether or not the practice is compelled. *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014). Like the Fifth Circuit, the Sixth Circuit observed that the "greater restriction (barring access to [a] practice) includes the lesser one" of coercing a violation of one's religious beliefs. *Id.*

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[4] *Merced* and *Betenbaugh* interpreted and applied the Texas Religious Freedom Restoration Act, which was passed in the wake of *City of Boerne v. Flores*, 521 U.S. 507 (1997). Both the Texas Supreme Court and the Fifth Circuit have looked to the federal RFRA when addressing the Texas RFRA. *Merced*, 577 F.3d at 588; *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009).

The Seventh Circuit recently joined these circuits. In 2003, the Seventh Circuit adopted a stringent substantial-burden test that required an adherent to show that a government action bore "direct, primary, and fundamental responsibility for rendering religious exercise … effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). After twelve years of adhering to this exceedingly narrow test, the Seventh Circuit last year acknowledged that its former approach "did not survive" this Court's decisions in *Hobby Lobby* and in *Holt*. *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015). Quoting *Holt*, the Seventh Circuit emphasized that RFRA protects "*any* exercise of religion." *Id.* (emphasis added).

The Eighth Circuit follows suit and does not require the plaintiff to demonstrate a dilemma between the demands of religion and government as a prerequisite to finding a substantial burden. *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749-50 (8th Cir. 2014) (record indicating that correctional department flatly prohibited tobacco use by Native Americans for religious ceremonies "amply shows" a substantial burden).

Finally, in line with these circuits, the Eleventh Circuit has held that "[a]n absolute denial of the opportunity" to partake in a religious practice may "satisf[y] the substantial burden threshold."

Wilkinson v. Sec'y, Fla. Dep't of Corr., 622 F. App'x 805, 815 (11th Cir. 2015).[5]

The divide between the courts of appeals on the substantial-burden question is not only crystalline; it is outcome-determinative here. The CAAF framed the "legal question to be decided" as whether SSgt Alexander's "taking down the signs constitutes a substantial burden." Pet.App.24. The CAAF had already concluded that LCpl Sterling's posting the Biblical quotations was an exercise of religion, and it assumed that this religious exercise was based on a sincerely held religious belief. Pet.App.16, 19. In the majority of circuits, the removal of the Biblical quotations would constitute a rather obvious substantial burden, because the government "prevent[ed] participation in conduct motivated by a sincerely held religious belief," *Abdulhaseeb*, 600 F.3d at 1315, namely, LCpl Sterling's posting of the quotations. But because the CAAF, like a minority of the circuits, required LCpl Sterling to show that removal of the quotations "pressured her to either change or abandon her beliefs or forced her to act contrary to her religious beliefs," Pet.App.24 (citing *Kaemmerling*, 553 F.3d at 678-79), it found no

[5] Underscoring the clarity of the split, the decisions by courts of appeals adopting the minority rule have featured spirited, scholarly dissents supporting the majority rule. *See, e.g.*, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 16 n.3 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasizing that "it is black-letter law" that substantial burdens may result from direct prohibitions on religious practice); *Navajo Nation*, 535 F.3d at 1086 (W. Fletcher, J., dissenting) (criticizing majority for adopting "extremely restrictive" test).

substantial burden and brought an end to LCpl Sterling's RFRA claim.

The extent of an adherent's religious freedom should not turn on his or her geographic location within the United States. And it certainly should not turn on an adherent's membership in the United States military. Yet the courts of appeals are intractably divided on the substantial-burden question, and the CAAF's holding will now apply in all military cases—even if the relevant regional court of appeals would have afforded a service member a more generous construction of "substantial burden" in civilian court. This deep and intolerable split plainly warrants the Court's review.

II. The CAAF's Decision Is Incorrect.

The CAAF rightly determined that LCpl Sterling's display of Biblical quotation in the form of the trinity qualified as religious exercise. Pet.App.16. It also assumed (correctly) that this conduct was "based on a sincerely held religious belief." *Id.* at 19. But the CAAF proceeded to hold that the removal of the signs did not substantially burden LCpl Sterling's exercise of her sincere religious beliefs. *Id.* at 23-24. The CAAF's justifications for that remarkable conclusion do not withstand scrutiny.

First, the majority suggested that LCpl Sterling experienced no substantial burden because the conduct at issue was merely religiously *motivated* rather than religiously *compelled*. To apply this test, the CAAF inquired into "the subjective importance of the conduct to the person's religion," and faulted LCpl Sterling for failing to substantiate "that the

signs were important to her exercise of religion" or that their display was a "tenet" or "precept" of her faith. Pet.App.21, 24-25. Not only is this view plainly wrong, but—as the dissent explained—it flatly contradicts the text of RFRA and volumes of Supreme Court precedent precluding inquiry into such religious questions by secular courts. Second, and relatedly, the CAAF excused the government's conduct because it amounted to a direct prohibition rather than a dilemma. But as the dissent and a majority of courts of appeals have recognized, nothing in this Court's precedents condones the view that "a governmentally urged violation of one's religious beliefs is the exclusive means for effecting a substantial burden." *Id.* at 46. Nothing in logic or precedent supports the view that government incentivization to abandon a religious practice is worse than a direct prohibition.

A. The CAAF Impermissibly Scrutinized the "Subjective Importance" of the Prohibited Conduct to LCpl Sterling's Faith.

In the decision below, the majority concluded that no substantial burden arose because LCpl Sterling's conduct was merely religiously *motivated* rather than religiously *compelled*. The CAAF focused on "the subjective importance of the conduct to the person's religion," and it held that adherents must show that a desired practice "is important to her religious exercise" and implicates a "tenet" or precept" of her faith. Pet.App.21. This entire line of inquiry, which was central to the CAAF's rejection of

LCpl Sterling's RFRA claim, took the CAAF to a place no secular court is equipped or authorized to go.

First, there is no warrant for the Court's distinction between actions or beliefs that are religiously-motivated and actions or beliefs that are religiously-compelled. RFRA not only protects them both but forbids any effort by secular courts to make the distinction. Nothing in RFRA suggests that sincerely-held religious beliefs can be disregarded if they concern matters that are not compelled by an adherent's religion or do not amount to a precept of the faith. A government prohibition on religiously-motivated conduct, like saying the rosary or attending daily Mass—no less than a prohibition on religiously-compelled conduct, like Good Friday fasting or attending Sunday Mass—would plainly impose a substantial burden on religious exercise.

Second, and even more fundamentally, the CAAF's inquiry into "subjective importance" and the "tenets" or "precepts" of an adherent's faith took the CAAF into forbidden territory. Federal courts have no tools to discern the "subjective importance" of a practice or whether a practice is religiously-compelled, as opposed to just religiously-motivated. Are Christians "compelled" to read the Bible, or is reading the Bible merely "motivated" by faith? Is an action taken in conformance with the Ten Commandments religiously compelled—they are "commands," after all—or religiously motivated? The answers to such questions are far from clear. Indeed, the whole notion of having clear prohibitions, precepts, and tenets, is itself a religious judgment on which different religions have different perspectives.

What is clear is that secular courts have no business even attempting to answer such questions or draw such distinctions. Indeed, it is "the very process of inquiry" into "religious creeds" that "impinge[s] on rights guaranteed by the Religion Clauses," to say nothing of RFRA. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

For these reasons, both this Court and RFRA squarely foreclose any inquiry into the "centrality" of a particular practice to an adherent's faith. *See Hobby Lobby*, 134 S. Ct. at 2762, 2770; 42 U.S.C. §2000bb-2(4); *id.* at §2000cc-5(7)(A). While the CAAF majority dutifully denied the dissent's complaint that it was engaged in a centrality analysis, Pet.App.21-22, its actual inquiries were, if anything, more problematic. At least a centrality inquiry purports to be objective, whereas the CAAF openly embraced an inquiry into "the subjective importance of the conduct to the person's religion." Pet.App.21. Likewise, any effort to determine whether conduct was a "tenet," "precept," or "practice of religious faith," takes courts into impermissible territory. The Article III Courts are not the Sanhedrin.

Just two Terms ago, this Court explained that federal civil rights apply "to an exercise of religion regardless of whether it is 'compelled.'" *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). And yet the CAAF majority faulted LCpl Sterling for seeking to undertake conduct only "religiously motivated" and insufficiently "important to her exercise of religion." Pet.App.24. Likewise, in *Holt*, this Court further explained that RFRA's protections are not "limited to beliefs which are shared by all of the members" of a

faith. 135 S. Ct. at 863. Yet here, too, the CAAF faulted LCpl Sterling because the conduct did not derive from "any tenet or practice of her faith." Pet.App.24.

It is little wonder, then, that the dissent concluded that the majority's novel "importance" requirement is incompatible with this Court's "routine recognition" to the contrary as well as with what "the statute explicitly states." *Id.* at 43-44 (Ohlson, J. dissenting). As the dissent correctly reasoned, there is no basis whatsoever for the position that "religious conduct must be 'important' to the servicemember's faith." *Id.*

B. The CAAF Wrongly Found That Religious Exercise Can Be Substantially Burdened Only by the Kind of Dilemmas Implicated in the Court's Prior Cases.

The CAAF's insistence that LCpl Sterling demonstrate that the posting of Bible verses was religiously-compelled flowed from a flawed belief that RFRA's scrutiny of substantial burdens applies only when the government forces an adherent to choose between what his religion compels (or forbids) and what the government forbids (or compels). But that too is an unduly narrow conception of RFRA that has particularly pernicious consequences in the military context.

When the government is operating vis-à-vis ordinary civilians, the government's burdens on religion often take the form of indirect compulsion. The government either conditions a benefit on refraining from some religious practice, as in

Sherbert v. Verner, 374 U.S. 398 (1963), and other unemployment benefit cases, or imposes a fine on those who refuse to take actions their religion forbids, as in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). But in certain settings, such as incarceration and military service, the government does not need to rely on such inducements, but can directly coerce parties through absolute prohibitions and direct commands. Nothing in precedent or common sense supports protecting religious adherents only against government actions that rely on indirect coercion. To the contrary, as the Fifth, Sixth and Tenth Circuit have all recognized, the direct prohibition on religious exercise is an even more obvious burden on religious exercise. *See Merced*, 577 F.3d at 590; *Haight*, 763 F.3d at 565; *Abdulhaseeb*, 600 F.3d at 1315.

This Court's precedents provide no meaningful support for a distinction between (unprotected) prohibitions and (protected) dilemmas. Indeed, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006), this Court upheld a preliminary injunction preventing the United States from banning the importation of a schedule-I substance used in the group's religious ceremonies. The ban on importing hoasca did not merely put O Centro's members to a tough choice. If hoasca was stopped at the border, then the group's religious practice would be stopped in its tracks. The substantial burden on religious exercise was so obvious in the case that the federal government conceded the point.

While the idea that a direct prohibition on religious exercise is a quintessential substantial burden seems obvious, a number of courts have clung to the idea that a dilemma is a *sine qua non*. And it is clear that this minority view comes from a misreading of this Court's precedents and that the CAAF adopted this minority view. Thus, it is equally clear that only this Court's review can dislodge the minority's misconception.

As noted above, the minority view emanates from the Ninth Circuit and its reading of *Sherbet* and *Yoder* as providing not just an example of a substantial burden, but the sole exemplars of such burdens. The Ninth Circuit's *Navajo Nation* decision squarely held that "[a]ny burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA." *Navajo Nation*, 535 F.3d at 1070. Moreover, the government quoted this language in full in its brief and repeatedly pressed this theory. *See* Br. of Appellee at 45-50. In turn, the CAAF cited this same paragraph of *Navajo Nation* and concluded that no substantial arises unless government forces "the claimant to act contrary to her beliefs." Pet.App.23 (citing *Navajo Nation*, 535 F.3d at 1070).

The CAAF thus succumbed to the same error that infected *Navajo Nation* and other decisions holding that only a dilemma, rather than a direct prohibition, can trigger a substantial burden on religious exercise. That error is the belief that the Court's pre-RFRA decisions addressing the Free Exercise Clause, principally *Sherbert* and *Yoder*,

constitute the entire universe—or more to the point, the outer bounds—of substantial-burden cases. But, as the dissent below pointed out, while those decisions indicate that a "compelled violation of one's religion may be *sufficient* for finding a substantial burden," nothing about them suggests that such violations are "*necessary* for such a finding." Pet.App.47. Moreover, subsequent decisions like *O Centro* and *Holt* make clear that substantial burdens are not limited to those that take the precise form of the substantial burdens identified in this Court's pre-RFRA cases.

In short, it is "black-letter law" that substantial burdens may result from direct prohibitions on religious exercise. *Priests for Life*, 808 F.3d at 16 n.3 (Kavanaugh, J., dissenting from the denial of rehearing en banc). That view, adopted by the majority of circuits, is shared by leading treatises. *See, e.g.*, Eugene Volokh, *The First Amendment and Related Statutes* 1060 (5th ed. 2014) ("[P]rohibiting someone from doing something that is mandated by his religious beliefs" "constitutes a substantial burden."). And it has been advanced by the United States in prior litigation. *See, e.g.*, Br. for the United States as Amicus Curiae Supporting Petitioner at 13, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827) (arguing that Gregory Holt's religious exercise was substantially burdened not because he was in a dilemma but because he was prohibited from "grow[ing] a half-inch beard").

C. The Removal of LCpl Sterling's Biblical Quotations Constituted a Substantial Burden on LCpl Sterling's Religious Exercise.

However the CAAF's reasoning is understood, the majority was wrong to impose an unduly narrow limitation on "substantial burden." The circuit split at issue evinces both problems with the majority's reasoning. Requiring that a religious practice be "compelled" re-imposes all the problems with the centrality requirement that this Court and Congress have repudiated. *See, e.g.*, *Holt*, 535 F.3d at 862 (a religious practice need not be "compelled"). And suggesting that a $5 fine (the amount of the penalty in *Yoder*) is more of a burden than a direct order to a service member or an inmate is equally untenable. What is clear from the majority's analysis is that it made an egregious mistake in concluding that no substantial burden existed.

Under the standard employed by a majority of circuits, LCpl Sterling unquestionably experienced a substantial burden on her religious exercise. In the decision below, the majority determined that LCpl Sterling's display of the Biblical quotations was religious exercise within the meaning of RFRA, and the majority assumed that LCpl Sterling's motivations were sincere. Pet.App.16, 19. The majority then deemed "the very legal question to be decided" as whether the "taking down" of the

quotations "constitutes a substantial burden." Pet.App.24.[6]

Under a correct understanding of "substantial burden," there is no doubt that it does. The removal of the Biblical quotations directly "prevent[ed] participation in conduct motivated by a sincerely held religious belief." *Abdulhaseeb*, 600 F.3d at 1315. LCpl Sterling was "complete[ly] ban[ned]" from engaging in "conduct sincerely motivated by religious belief." *Merced*, 577 F.3d at 590. The government action here "effectively bar[red]" a "religious practice." *Haight*, 763 F.3d at 565.

This unremarkable conclusion is also supported by common sense. The conduct at issue was an undisputed exercise of religion by LCpl Sterling to beseech a higher power for spiritual strength and fortitude in the face of challenges. One does not need a theology degree to know that persons of all faiths routinely seek comfort or inspiration from sacred scripture. Christianity is no exception; indeed, the Bible frequently assures believers that they will be shielded from harm and encourages them to beseech God for that assistance. *See, e.g.*, 2 *Samuel* 22:4 (King James) ("I will call on the Lord, who is worthy to be praised: so shall I be saved from mine enemies."); *Psalms* 46:1 (King James) ("God is our refuge and strength, a very present help in trouble."); 2 *Thessalonians* 3:3 (King James) ("But the Lord is

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[6] Indeed, the majority expressly held that LCpl Sterling did not face a dilemma. *See* Pet.App.24 (rejecting contention that substantial burden was "caused by the choice between obeying the orders to remove the signs and potentially facing a court-martial").

faithful, who shall establish you, and keep you from evil."). The Bible even exhorts believers to display its verses for protection. *See, e.g.*, *Deuteronomy* 6:9 (King James) ("And thou shalt write [these words] upon the posts of thy house, and on thy gates."). Whatever justifications the government could provide for its direct order to remove the Bible verses, the notion that the direct order imposed no substantial burden on religious exercise is plainly erroneous.

In supporting its remarkable conclusion that removing the Biblical quotations was not a substantial burden on LCpl Sterling's religious exercise, the panel pointed to what it deemed "two additional salient facts": LCpl Sterling's failure to explain the import of the religious practice and her failure to request an accommodation before engaging in religion. But as the dissent ably explained, the majority's "novel notice requirement" is highly flawed. Pet.App.44. "[N]owhere in RFRA's text, its legislative history, or the relevant case law does there appear any indication that the government must be conscious … that its actions may impermissibly curtail religious exercise in order for a successful RFRA defense to lie." *Id.*

The majority's requirement that LCpl Sterling affirmatively request permission through an administrative process before undertaking religious exercise is equally erroneous. As the majority was forced to concede, *see* Pet.App.27, RFRA does not contain an exhaustion requirement. To the contrary, RFRA explicitly provides that its protections can be asserted as a "defense in a judicial proceeding." 42 U.S.C. §2000bb-1(c). And nothing in RFRA supports

the majority's system of prior restraint. The statute does not state that "persons may exercise religion only upon obtaining permission from the Government." Instead, it states that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a).

The default rule under RFRA, therefore, is that individuals may exercise their religion and that the Government may not infringe that right. The Government cannot condition that protection on a requirement that individuals wishing to exercise their religion obtain an accommodation in advance. Indeed, as the majority was also forced to acknowledge, "at least one federal appellate court has held that an individual need not request an exemption to invoke RFRA." Pet.App.27 (citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). The CAAF's exhaustion requirement thus not only is incorrect, but creates another split among the courts of appeals, underscoring the need for this Court's review.

III. The Question Presented Is Important And Should Be Decided In This Case.

The metes and bounds of what constitutes a "substantial burden" of religious exercise for purposes of RFRA (and, by extension, RLUIPA) is undeniably a recurring question of exceptional national importance. The issue arises in nearly every RFRA and RLUIPA case. It has become the subject of a deep but well-developed and fully

percolated split in the courts of appeals, generating numerous opinions on both sides of the merits. Commentators across the ideological spectrum agree that it presents one of the most important unresolved questions in modern religious-liberty law. *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. Ill. L. Rev. 1771, 1772 (2016) (question "stands at the center of recent clashes between law and religion"); Frederick Mark Gedicks, *'Substantial' Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. (forthcoming Jan. 2017).

For several reasons, this case offers an ideal vehicle for this Court's review. First, while the circuit split is deep and developed, the government often concedes the existence of a substantial burden on the religious claimant in religious-freedom cases. *See, e.g.*, Br. for the Respondents at 43, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827) ("Respondents have not contested Petitioner's assertion that [the] no-beard policy imposes a substantial burden on his religious exercise."); *O Centro*, 546 U.S. at 426 ("the Government conceded that the challenged application of the [law] would substantially burden a sincere exercise of religion"). This important question should be settled definitively by this Court and not based on the vagaries of when and where the government decides to fight or concede. Here, there is no question that the government actively contested the existence of a substantial burden, and the CAAF accepted that argument to dispose of the case. Accordingly, the substantial-burden question that has divided the courts of appeals is not only squarely before this

Court but will be dispositive to the Court's resolution of the case.

Second, the CAAF's decision imposes distinct hardships on service members and is likely the final word from the military courts on the issue. According to the logic of the Court below, if LCpl Sterling faced a choice between removing the Bible verses and retaining her eligibility for a benefit program, that choice would have presented the kind of dilemma that triggers meaningful scrutiny under RFRA (at least if her religion compelled the posting). But the military does not need to rely on such indirect inducements. As this case illustrates, when a superior wants a religious display removed or a religious exercise stopped, he or she issues a direct order and directly compels that result.

If that kind of direct compulsion does not constitute a substantial burden, then as a practical matter RFRA will no longer apply to the military, despite Congress' unmistakable contrary intent. As the dissent below emphasized, "there is no question that the protections afforded by RFRA apply with full effect to our nation's armed forces." Pet.App.34. If anything, "Congress was crystalline in its expectation that RFRA would apply to the military." *Id.* at 35; *see* 42 U.S.C. §2000bb-2(1) (RFRA applies to every "branch, department, agency, instrumentality, and official … of the United States"). To be sure, the distinct realities of military life may well allow the government to justify burdens on religious exercise in certain military contexts where a similar burden could not be imposed on civilians. But the CAAF decision allowed the realities of military life to cut off

the inquiry at the threshold. The government never has to justify the burdens because they take the form of direct orders prohibiting religious exercise.

Worse still, the Court may never have another opportunity to consider the substantial-burden standard within the critically important context of the Nation's military. Service members have no appeal as of right to the CAAF. That Court's jurisdiction is largely discretionary. *See* 10 U.S.C. §867. Further, this Court only has jurisdiction to review cases the CAAF has decided—not cases in which it has declined discretionary review. *See* 28 U.S.C. §1259. That means that the majority's unjustifiable narrowing of the substantial-burden construct will have a permanent impact on service members and may never be revisited by the CAAF or, in turn, this Court. That result is intolerable. Of all Americans, "the men and women of our nation's armed forces," who fight to defend our fundamental liberties and civil-rights laws, should be those most entitled to invoke those protections when in need. Pet.App.30 (Ohlson, J., dissenting).

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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December 23, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Nos. 15-0510, 16-0223

UNITED STATES,

Appellee / Cross-Appellant,

v.

MONIFA J. STERLING, Lance Corporal,
United States Marine Corps,

Appellant / Cross Appellee.

Argued: April 27, 2016
Filed: August 10, 2016

OPINION

Judge RYAN delivered the opinion of the Court.

A special court-martial consisting of officer and enlisted members convicted Appellant, contrary to her pleas, of one specification of failing to go to her appointed place of duty, one specification of disrespect toward a superior commissioned officer, and four specifications of disobeying the lawful order of a noncommissioned officer (NCO), in violation of Articles 86, 89, and 91, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 889, 891 (2012). The members sentenced Appellant to a reduction to pay grade E-1 and a bad-conduct discharge. The

convening authority approved the sentence as adjudged. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. *United States v. Sterling*, No. NMCCA 201400150, 2015 CCA LEXIS 65, at *2, *30, 2015 WL 832587, at *1, *10 (N-M. Ct. Crim. App. Feb. 26, 2015) (unpublished).

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1 (2012) (as amended), which, by its own terms, applies to every "branch, department agency, instrumentality, and official (or other person acting under color of law) of the United States," 42 U.S.C. § 2000bb-2(1), also applies in the military context. Indeed, at least two general orders prescribe the manner in which religious accommodations to rules of general applicability should be processed and facilitated in the military. Dep't of Defense Instr. 1300.17, Accommodation of Religious Practices Within the Military Services (Feb. 10, 2009, Incorporating Change 1, Jan. 22, 2014) [hereinafter DoDI 1300.17]; Dep't of the Navy, Secretary of the Navy Instr. 1730.8B CH-1, Accommodation of Religious Practices (Mar. 28, 2012) [hereinafter SECNAVINST 1730.8B CH-1]. But we note from the outset that this is not the usual case where an individual or group sought an accommodation for an exercise of religion and it was denied. Nor is it a case where the practice at issue was either patently religious, such as the wearing of a hijab, or one where it was not but a government actor somehow knew the practice was religious and prohibited it on that basis. Rather, the claimed exercise of religion at issue in this case involved posting the printed words "[n]o weapon formed against me shall prosper" at a shared

workspace in the context of Appellant's contentious relationship with her superiors.

As the NMCCA concluded, Appellant did not inform the person who ordered her to remove the signs that they had had any religious significance to Appellant, the words in context could easily be seen as combative in tone, and the record reflects that their religious connotation was neither revealed nor raised until mid-trial. *See Sterling*, 2015 CCA LEXIS 65, at *11, *14-15, *19, 2015 WL 832587, at *4, *5, *6. Nor, despite the existence of procedures for seeking a religious accommodation, did Appellant seek one. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5. Nonetheless, the following issues are before this Court:

SPECIFIED ISSUES

> I. Did Appellant establish that her conduct in displaying signs referencing Biblical passages in her shared workplace constituted an exercise of religion within the meaning of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 (2012), as amended? If so, did the actions of her superior noncommissioned officer in ordering her to take the signs down, and in removing them when she did not, constitute a substantial burden on appellant's exercise of religion within the meaning of the Act? If so, were these actions in furtherance of a compelling government interest and the least restrictive means of furthering that interest?

II. Did Appellant's superior noncommissioned officer have a valid military purpose in ordering appellant to remove signs referencing Biblical passages from her shared workplace?

CERTIFIED ISSUES

I. Did Appellant's failure to follow an instruction on the accommodation of religious practices impact her claim for relief under the Religious Freedom Restoration Act?

II. Did Appellant waive or forfeit her religious freedom Restoration Act claim of error by failing to raise it at trial?

We hold that the orders to remove the signs were lawful. Appellant's claimed defense to violating those orders under RFRA was preserved, but Appellant has failed to establish a prima facie RFRA case. Moreover, we hold that her failure to either inform her command that the posting of the signs was religiously motivated or seek an accommodation are both relevant to Appellant's failure to establish that the orders to remove the signs constituted a substantial burden on her exercise of religion. Consequently, while the NMCCA's RFRA analysis was flawed, we affirm the decision on other grounds.

I. Facts

In December 2012, Appellant was assigned to Section-6 (S-6) of the 8th Communications Battalion. Staff Sergeant (SSgt) Alexander was her immediate supervisor. Appellant assisted Marines with their Common Access Cards. Marines sat next to

Appellant's desk while she assisted them. The military judge found that, during this time, Appellant shared her desk with another junior Marine.

Appellant had ongoing difficulties and a contentious relationship with many superiors in her command, including SSgt Alexander. While Appellant characterized the difficulties as "people … picking on [her]," from the command's perspective, the difficulties were that:

> [Appellant] fails to provide a positive contribution to the unit or Corps. [Appellant] cannot be relied upon to perform the simplest of tasks without 24/7 supervision. [Appellant] has not shown the discipline, professional growth, bearing, maturity or leadership required to be a Marine. Ultimately [Appellant] takes up [the] majority of the Chain of Command's time dealing with her issues that result from nothing more than her failure to adapt to military life.

The charges at issue in this case are symptomatic of these deficiencies, and other performance issues, while not the subject of criminal charges, were noted in her service record book. In May 2013, two months after a counseling session for failing to secure a promotion, and on the heels of a confrontation with SSgt Alexander about turning in a completed Marine Corps Institute course, Appellant printed three copies of the words "[n]o weapon formed against me shall prosper," on 8 1/2- x 11-inch paper in 28-point font or smaller. Appellant cut the

signs to size and taped one on the side of her computer tower, one above her computer screen, and one above her desk mailbox. The signs contained no additional information and were large enough for those walking by Appellant's desk and Marines seated at her workspace to read.

SSgt Alexander discovered the signs and ordered Appellant to remove them because "it wasn't just her desk; it was being shared by the other junior Marine." According to Appellant, SSgt Alexander said that she wanted the signs removed because she did not like their tone. Nothing in the record indicates that SSgt Alexander knew that the text was Biblical in origin, and the NMCCA found that Appellant never informed SSgt Alexander that the signs had either a religious genesis or any religious significance to Appellant. *Sterling*, 2015 CCA LEXIS 65, at *11, *14-15, 2015 WL 832587, at *4, *5, *6.

Appellant failed to remove the signs, so SSgt Alexander removed them herself. The next day, SSgt Alexander saw that Appellant had replaced the signs and once more ordered Appellant to remove them. Appellant also failed to follow this order, and SSgt Alexander again removed the signs. In addition to failing to mention the religious nature of or religion practice involved to SSgt Alexander, Appellant also failed to request a religious accommodation to enable her to display the signs. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5.

In August 2013, another of Appellant's superiors, SSgt Morris, noticed that Appellant was not wearing the proper uniform, and he ordered her to wear "her service uniforms as directed by the Commandant of

the Marine Corps." According to SSgt Morris, Appellant refused to obey the order because Appellant said "she had a medical chit out there stating she could not wear the uniform." SSgt Morris spoke with medical personnel at the base, who stated that Appellant could wear the required uniform, and he again ordered Appellant to change into the proper uniform. Appellant refused. SSgt Morris then escorted Appellant to First Sergeant (1stSgt) Robinson, who repeated the order for a third time. Appellant again refused.

On September 12, 2013, 1stSgt Robinson ordered Appellant to report to the Pass and Identification building on Sunday, September 15, 2013, from 4:00 PM until approximately 7:30 PM, to help distribute vehicle passes to families of service members returning from deployment. According to 1stSgt Robinson, Appellant refused on the basis that "she was on medication." On September 13, 2013, 1stSgt Robinson informed Major (Maj) Flatley that he was having issues with Appellant. Maj Flatley met with Appellant to "talk some sense into her, reason with her, [and] to make sure that she goes to her appointed place of duty on Sunday." During their conversation, Maj Flatley attempted to hand the vehicle passes to Appellant. According to Maj Flatley, Appellant refused to take the passes and stated that she would not be there and would be sleeping. As a result, Maj Flatley called 1stSgt LaRochelle and directed her to begin writing a charge sheet on Appellant.

Maj Flatley gave Appellant another chance to comply and again ordered Appellant to distribute

passes on Sunday. Maj Flatley asked whether Appellant understood the order and would comply. According to Maj Flatley, Appellant said that she understood the order but was not going to be there, and instead was "going to take [her] meds and sleep and go to church." Maj Flatley explained to Appellant that distributing the passes did not conflict with church because the passes did not need to be distributed until 4:00 PM on Sunday. On September 15, 2013, Appellant did not report to her appointed place of duty.

A special court-martial for charges resulting from the above incidents commenced in January 2014. At trial, the military judge cautioned Appellant about the dangers of appearing pro se. Nonetheless, Appellant elected to represent herself, with limited assistance from defense counsel. As relevant to the issues before this Court, during the middle of trial and days after SSgt Alexander's initial direct trial testimony about Appellant's failure to obey her orders to remove the signs, Appellant moved to dismiss those orders violations.

Appellant argued for the first time that the orders to remove the signs were "unlawful under the grounds of [her] religion" and that the Department of Defense (DoD) permitted her to practice her religion "as long as it's within good order [and] discipline." Appellant indicated that she was a nondenominational Christian and that the quotations were "a [B]ible scripture" and "of a religious nature." Without argument or comment, Appellant also submitted DoDI 1300.17 (Jan. 22, 2014), which referenced RFRA and incorporated

RFRA's language.[1] Appellant testified that because she was a religious person, she posted the signs in the form of the Christian Trinity to have the "protection of three" and to serve as a "mental note."

Appellant also testified that the signs were "just purely personal" and served as "a mental reminder to [her] when [she came] to work .... [because she did not] know why these people [were] picking on [her]." Appellant stated that she believed her situation with her command was unfair because she was being picked on, including by SSgt Alexander. The Government reasserted that the signs were ordered to be taken down because they were distracting.

The military judge held that SSgt Alexander's orders were lawful because they were "related to a specific military duty," SSgt Alexander was authorized to give them, and each order required Appellant to do something immediately or at a future time. Furthermore, the military judge held that the orders were reasonably necessary to safeguard military interests and good order and discipline because other servicemembers could have seen the signs in the shared workspace and the signs' language, "although ... [B]iblical in nature ... could easily be seen as contrary to good order and discipline." Finally, the military judge ruled that the orders to remove the signs "did not interfere with [Appellant's] private rights or personal affairs."

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[1] Prior to and during trial, the Department of Defense updated DoDI 1300.17 (Jan. 22, 2014), providing greater reference to RFRA. Appellant submitted the new instruction. *See also* DoDI 1300.17 (Feb. 10, 2009) (in place at the time of conduct at issue).

II. NMCCA Decision

On appeal, the NMCCA, held, inter alia, that SSgt Alexander's orders served a valid military purpose and were lawful. *Sterling*, 2015 CCA LEXIS 65, at *19, 2015 WL 832587, at *6. The NMCCA held that the orders maintained good order and discipline because (1) the signs could have fostered religious divisions in the military workplace[2] and (2) the signs expressed Appellant's antagonism toward her command. While the court noted that the military judge's factual findings were meager and "fail[ed] to illuminate why the military judge believed the signs['] verbiage 'could easily be seen as contrary to good order and discipline,'" the NMCCA nonetheless observed that the record adequately supported the military judge's conclusion that SSgt Alexander's orders were lawful. *Sterling*, 2015 CCA LEXIS 65, at *16-17, 2015 WL 832587, at *5.

Recognizing Appellant's bellicose relationship with her command, the NMCCA found that Appellant was "locked in an antagonistic relationship with her superiors," that the signs could be interpreted as combative, and agreed with the military judge that the signs could thus "easily be seen as contrary to good order and discipline."

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[2] We reject this basis for concluding that the orders were lawful. While the military judge found that the signs were "[B]iblical in nature," that Appellant's desk was shared with another Marine, and that the signs were visible to Marines sitting at Appellant's desk, there is nothing in the record to establish that the signs were readily identifiable as religious quotations, and thus, the notion that they would foster religious divisions seems untenable. *Sterling*, 2015 CCA LEXIS 65, at *17, 2015 WL 832587, at *6.

Sterling, 2015 CCA LEXIS 65, at *19, 2015 WL 832587, at *6 (internal quotation marks omitted).

The NMCCA then concluded that Appellant was not entitled to a defense to the orders violations based on RFRA. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5. The NMCCA held that the definition of religious exercise required "the practice be 'part of a system of religious belief.'" *Sterling*, 2015 CCA LEXIS 65, at *14, 2015 WL 832587, at *5. Reasoning from this premise, it went on to conclude that Appellant's posting of signs containing a Biblical quotation in three places around her workstation did not qualify as a religious exercise and that as a result, RFRA did not apply. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5. The court observed, "[w]hile [Appellant's] explanation at trial may invoke religion, there is no evidence that posting signs at her workstation was an 'exercise' of that religion in the sense that such action was 'part of a system of religious belief.'" *Sterling*, 2015 CCA LEXIS 65, at *15-16, 2015 WL 832587, at *5. Moreover, the court noted that Appellant never stated that the signs had a "religious connotation" and never requested any religious accommodation for them. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5. Rather, the court found that the record demonstrated that Appellant had placed the signs as "personal reminders that those she considered adversaries could not harm her." *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5.

III. Discussion

A. The Orders to Remove the Signs Were Lawful

"The legality of an order is a question of law that [this Court] review[s] de novo." *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003). This Court defers to a military judge's factual findings "unless they are clearly erroneous or unsupported by the record." *United States v. Rader*, 65 M.J. 30, 33 (C.A.A.F. 2007). The same deference applies to the NMCCA's factual findings. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000).

A lawful order "must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." *Manual for Courts-Martial, United States* pt. IV, para. 14.c.(2)(a)(iv) (*MCM*). "[T]he dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order." *MCM* pt. IV, para. 14.c.(2)(a)(iv). "An order is presumed to be lawful, and the accused bears the burden of rebutting the presumption." *United States v. Ranney*, 67 M.J. 297, 301-02 (C.A.A.F. 2009) (citation omitted) (internal quotation marks omitted), *overruled by United States v. Phillips*, 74 M.J. 20, 22-23 (C.A.A.F. 2015). "To be lawful, an order must (1) have a valid military purpose, and (2) be clear, specific, and narrowly drawn." *Moore*, 58 M.J. at 468 (citation omitted). "The order must not conflict with the statutory or

constitutional rights of the person receiving the order." *MCM* pt. IV, para. 14.c.(2)(a)(v).

Appellant argues that there was no valid military purpose in ordering her to remove the signs from her shared work space. We disagree. The military judge's and NMCCA's findings that Marines sharing or coming to the workspace would be exposed to the signs are not clearly erroneous. *Sterling*, 2015 CCA LEXIS 65, at *17, 2015 WL 832587, at *6. SSgt Alexander was Appellant's immediate supervisor and testified that she wanted the signs removed because she wished to keep the shared workspace clean.

Importantly, the NMCCA's findings that Appellant had a "contentious" relationship with her command, "even prior" to this incident, and that, in that context, posting the words "[n]o weapon formed against me shall prosper" might be "interpreted as combative" are also not clearly erroneous. 2015 CCA LEXIS 65, at *19, 2015 WL 832587, at *6 (internal quotation marks omitted). Appellant herself conceded that SSgt Alexander did not like the signs' tone, and the NMCCA found that Appellant did not tell SSgt Alexander that the signs had a religious connotation. *Sterling*, 2015 CCA LEXIS 65, at *15, 2015 WL 832587, at *5. Given these circumstances and the complete absence of evidence that SSgt Alexander either knew the signs were Biblical or ordered them removed for that reason, Appellant has failed to rebut the presumption that the orders were lawful and necessary to further the mission of Appellant's unit by maintaining good order and discipline. Without question, a junior Marine with a contentious relationship with her superiors posting combative

signs in a workspace could undermine good order and discipline.

Appellant fails to rebut the presumption of the lawfulness of the orders, and because she fails to establish a prima facie RFRA case, she also lacks a defense for failing to follow the orders.

B. RFRA[3]

RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), "'exercise of religion'" is broadly defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (4) (cross-referencing "exercise of religion" as defined in RLUIPA, 42 U.S.C. § 2000cc-5(7)(A)). As we noted above, RFRA applies to the military. *See supra* p. 3.

"Our review of the requirements of [RFRA], although largely factual in nature, presents mixed questions of fact and law." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). This Court reviews legal questions, including the application of RFRA, de novo. *See United States v. McElhaney*, 54 M.J. 120, 125 (C.A.A.F. 2000). Factual findings are

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[3] Given Appellant's assertion at trial that the orders violated her religion, the submission of an order that cited RFRA, and the raising of the issue before the NMCCA, we reject the Government's argument that Appellant waived or forfeited her right to assert her RFRA claim on appeal to this Court. *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006).

reviewed for clear error. *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008).

Appellant argues that the NMCCA erred in its rationale for declining to afford her a RFRA defense to the orders violations and that the order to remove the signs substantially burdened her sincerely held religious beliefs. In sum, we agree that the NMCCA erred in defining "religious exercise" for purposes of RFRA. But while the posting of signs was claimed to be religiously motivated at least in part and thus falls within RFRA's expansive definition of "religious exercise," Appellant has nonetheless failed to identify the sincerely held religious belief that made placing the signs important to her exercise of religion or how the removal of the signs substantially burdened her exercise of religion in some other way. We decline Appellant's invitation to conclude that any interference at all with a religiously motivated action constitutes a substantial burden, particularly where the claimant did not bother to either inform the government that the action was religious or seek an available accommodation.

1. Religious Exercise Under RFRA

A RFRA inquiry is triggered by a "religious exercise." The NMCCA's holding that RFRA's definition of "'religious exercise' requires the practice be 'part of a system of religious belief'" was too narrow.[4] *Sterling*, 2015 CCA LEXIS 65, at *14, 2015

[4] It is entirely possible, given the remainder of its conclusions, that the NMCCA intended to hold that posting the signs was not based on a sincerely held religious belief. But that is not what it said.

WL 832587, at *5 (quoting 42 U.S.C. § 2000cc-5(7)(A)). RFRA defines "'religious exercise'" as "any exercise of religion, *whether or not compelled by, or central to, a system of religious belief*." 42 U.S.C. § 2000bb-2(4) (emphasis added) (cross-referencing 42 U.S.C. § 2000cc-5(7)(A)). A "'religious exercise'" under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

On the one hand, there was no indication on the signs that the quote was Biblical, and there was no testimony that Appellant informed SSgt Alexander or anyone else that she posted the signs for religious purposes until trial. On the other hand, Appellant stated she was a "[n]ondenominational" Christian and that the signs "are a [B]ible scripture" of "a religious nature." Appellant also testified that the signs invoked the Trinity and fortified her against those who were picking on her. Appellant stated that she was motivated to post the signs in order to gain the "protection" of the "[T]rinity," because she is "a religious person." Given RFRA's broad definition of religious exercise, Appellant's posting of signs could qualify.

However, this does not answer the altogether different questions whether (1) the conduct was based on a sincerely held religious belief, as opposed to being a post-hoc justification for posting signs that were combative in nature and violating orders to

remove them, or (2) the orders to remove the signs substantially burdened Appellant's religious beliefs.

2. Prima Facie RFRA Case

To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the defendant sincerely holds. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). If a claimant establishes a prima facie case, the burden shifts to the government to show that its actions were "the least restrictive means of furthering a compelling governmental interest." *United States v. Quaintance*, 608 F.3d 717, 719-20 (10th Cir. 2010). Because Appellant fails to establish a prima facie case, the burden does not shift to the Government in this case.

a. Sincerely Held Religious Belief

While religious conduct triggers a RFRA inquiry, RFRA only protects actions that are "sincerely based on a religious belief." *See Holt*, 135 S. Ct. at 862. Determining sincerity is a factual inquiry within the trial court's authority and competence, *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013), and "the [claimant's] 'sincerity' in espousing that practice is largely a matter of individual credibility," *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013). Courts are highly deferential to claimants in evaluating sincerity, *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), but may still conduct meaningful reviews of sincerity. *See Hobby Lobby Stores*, 134 S. Ct. at 2774 n.28;

Quaintance, 608 F.3d at 721-23; *United States v. Manneh*, 645 F. Supp. 2d 98, 112-13 (E.D.N.Y. 2008) (noting that courts are "seasoned appraisers of the 'motivations' of parties" and can observe the claimant's "demeanor during direct and cross-examination") (citation omitted) (internal quotation marks omitted); *Zimmerman*, 514 F.3d at 854 ("The district court should hear directly from [the claimant], as his credibility and demeanor will bear heavily on whether his beliefs are sincerely held."). "Neither the government nor the court has to accept the defendants' mere say-so." *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) ("[A]n adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief … or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of a religious doctrine.") (internal citations omitted); *cf. United States v. Messinger*, 413 F.2d 927, 928-30 (2d Cir. 1969) (referencing a Justice Department recommendation that a defendant-draftee's "long delay in asserting his conscientious objector claim" was evidence of religious insincerity where his claim came two years after his Selective Service registration). To be certain, in evaluating sincerity a court may not question "whether the petitioner ... correctly perceived the commands of [his or her] faith." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). Nor does a court "differentiate among bona fide faiths." *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

In this case, the record does not clearly address whether Appellant's conduct was based on a "sincerely held religious belief" or motivated by animosity toward her chain of command. While Appellant testified that the signs were religious, arranged to mimic the Trinity, and were "personal .... mental reminder[s]," she also only raised religion as an explanation for the signs in the middle of trial, and some of her testimony arguably indicates that the signs were actually a response to contentious relationships at work, including with SSgt Alexander. Moreover, the NMCCA's factual analysis, which is not clearly erroneous, emphasizes this nonreligious basis for the signs. *Cf. supra* pp. 9, 12 note 4.

Yet, whether her conduct was based on a sincerely held religious belief is an intensely fact-based inquiry, *see Korte*, 735 F.3d at 683, and is beyond the purview of this Court. *United States v. Crider*, 22 C.M.A. 108, 110-11, 46 C.M.R. 108, 110-11 (1973). We could simply hold that it was her burden to affirmatively establish the sincerity of her belief by a preponderance of the evidence at trial and that she failed to do so. *See Quaintance*, 608 F.3d at 719-23. However, because we can resolve the case on the basis of Appellant's failure to establish that the orders to remove the signs were a substantial burden, we will instead assume arguendo that her conduct was based on a sincerely held religious belief.

b. Substantial Burden

Early drafts of RFRA prohibited the government from placing a "burden" on religious exercise, but Congress added the word "substantially" before

passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch). RFRA does not define "substantially burden," and the federal appellate courts provide several different formulations. Contrary to Appellant's argument, not every interference with conduct motivated by a sincere religious belief constitutes the substantial burden that RFRA prohibits.

To be sure, all courts agree that a substantial burden exists where a government action places "'substantial pressure on an adherent to modify [her] behavior and to violate [her] beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas*, 450 U.S. at 718); *cf. Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).[5] But no court interpreting

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[5] However, aside from this point of agreement, there is not precise conformity within the federal circuits on the exact parameters of what constitutes a "substantial burden." *See, e.g.*, *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 332 (5th Cir. 2009) ("A burden is *substantial* if 'it truly pressures the adherent to significantly modify his religious behavior and *significantly violate* his religious beliefs.'") (citation omitted) (second emphasis added); *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) ("For the purposes of RLUIPA, a substantial burden exists where … the government puts *substantial pressure* on an adherent to substantially modify his behavior and to violate his beliefs.") (emphasis added); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("The combined import of these articulations leads us to the conclusion that a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to *significant pressure which directly coerces* the religious adherent to conform his or her behavior accordingly.") (emphasis added); *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003) (framing inquiry as whether the belief interfered with

RFRA has deemed that any interference with or limitation upon a religious conduct is a substantial interference with the exercise of religion. Instead, and contrary to the dissent's understanding, courts have focused on the subjective importance of the conduct to the person's religion, as well as on "whether the regulation at issue 'force[d claimants] to engage in conduct that their religion forbids or … prevents them from engaging in conduct their religion requires.'" *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001)). In other words, having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of religion. We agree with the D.C. Circuit that:

> One can conceive of many activities that are not central or even important to a religion, but nevertheless might be religiously motivated…. To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement.

Henderson, 253 F.3d at 17.

Of course, to determine whether a prima facie case has been established, courts do not question

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by the government was "considered central or important to [petitioner's] practice of Islam."). The order to remove signs in the instant case does not constitute a substantial burden under any of these formulations.

"whether the petitioner … correctly perceived the commands of [his or her] faith." *Thomas*, 450 U.S. at 716. But while we will not assess the importance of a religious practice to a practitioner's exercise of religion or impose any type of centrality test, a claimant must at least demonstrate "an honest belief that the practice is important to [her] free exercise of religion" in order to show that a government action substantially burdens her religious exercise. *Sossamon*, 560 F.3d at 332; *see also Ford*, 352 at 593-94. A substantial burden is not measured only by the secular costs that government action imposes; the claimant must also establish that she believes there are religious costs as well, and this should be clear from the record. *See* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 Harv. J.L. & Gender 35, 80 (2015); *cf. Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).

This requirement is not novel; language in central Supreme Court opinions on the question of substantial burden affirms that the adherent's subjective belief in the importance of a practice to her religion is relevant to the substantial burden inquiry. *See, e.g.*, *Holt*, 135 S. Ct. at 862 ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.… Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.") (internal citation omitted); *Hobby Lobby*, 134 S. Ct. at 2764-65, 2778 (noting that the claimants have a sincere religious belief that life begins at conception and "that providing the coverage demanded by the HHS regulations is connected to

the destruction of an embryo in a way" that goes "'against [their] moral conviction to be involved in the termination of human life'") (internal citations omitted); *Yoder*, 406 U.S. at 218 (holding that secondary schooling substantially interferes with the Amish religion because it "contravenes the basic religious tenets and practices of the Amish faith, both as to the parent and the child").

In contrast, courts have found that a government practice that offends religious sensibilities but does not force the claimant to act contrary to her beliefs does not constitute a substantial burden. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). "A burden is not substantial if 'it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.'" *Sossamon*, 560 F.3d at 332. Moreover, "[a]n inconsequential or *de minimis* burden on religious practice does not [constitute a substantial burden], nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling*, 553 F.3d at 678; *see also Midrash Sephardi, Inc.*, 366 F.3d at 1227; *Abdullah*, 600 F.3d at 1321 (recognizing that not every "presentation of a meal an inmate considers impermissible constitutes a substantial burden on an inmate's religious exercise"); *Ford*, 352 F.3d at 593-94 (focusing on appellant's subjective belief that the exercise at issue was "critical to his observance as a practicing Muslim" in evaluating substantial burden).

Appellant has failed to establish that the orders to remove the signs substantially burdened her

religious beliefs. While Appellant seeks to cast the substantial burden as caused by the choice between obeying the orders to remove the signs and potentially facing a court-martial, this logic is flawed, as it presumes that taking down the signs constitutes a substantial burden—a burden imposing both secular and religious costs. This is the very legal question to be decided. We reject the argument that every interference with a religiously motivated act constitutes a substantial burden on the exercise of religion. *See Kaemmerling*, 553 F.3d at 679 (finding "as true the factual allegations that [the claimant's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened").

In this case, Appellant did not present any testimony that the signs were important to her exercise of religion, or that removing the signs would either prevent her "'from engaging in conduct [her] religion requires,'" *Mahoney*, 642 F.3d at 1121 (citation omitted), or cause her to "abandon[] one of the precepts of her religion," *Sherbert*, 374 U.S. at 404. While Appellant testified that posting the signs was religiously motivated in part, she did not testify that she believed it is any tenet or practice of her faith to display signs at work. *See Wilson v. James*, 139 F. Supp. 3d 410, 424-25 (D.D.C. 2015). Nor does Appellant's testimony indicate how complying with the order to remove the signs pressured her to either change or abandon her beliefs or forced her to act contrary to her religious beliefs. *See Kaemmerling*, 553 F.3d at 678-79; *cf. Hankins*, 441 F.3d at 104 (detailing the consequences of failing to assert or establish at trial that an action substantially burdens

a religious exercise). Although Appellant did not have to provide evidence that posting signs in her shared workspace was central to her belief system, she did have to provide evidence indicating an honest belief that "the practice [was] important to [her] free exercise of religion." *See Sossamon*, 560 F.3d at 332. Contrary to Appellant's assertions before this Court, the trial evidence does not even begin to establish how the orders to take down the signs interfered with any precept of her religion let alone forced her to choose between a practice or principle important to her faith and disciplinary action.

"[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *See Cutter*, 544 U.S.at 720. In evaluating whether taking down the signs constituted a substantial burden on her exercise of religion, we will not ignore two additional salient facts. First, Appellant never told the person who ordered her to take down the signs—which were not, like the wearing of a hijab, obviously religious to most, *see E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 n.3 (2015)—that they even had a religious connotation, let alone that they were important to her religion. Requiring that minimal step before concluding that an order imposes a substantial burden is certainly not onerous or unreasonable in the military context where orders are presumed to be lawful, adherence to orders is integral to the military performing its mission, and the military force is made up of diverse individuals with diverse backgrounds—with no guarantee those charged with command have any special expertise in religion. Permitting, as the dissent proposes, military

members to disobey orders now and explain why later (much later, as in mid-trial in the instant case) makes no sense. It is certain that "the military is, by necessity, a specialized society," *Parker v. Levy*, 417 U.S. 733, 743 (1974), and "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). As we recently concluded:

> "'[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history [and] are founded on unique military exigencies as powerful now as in the past.'" *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1968) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). Unlike his civilian counterparts, "'it is [the servicemember's] primary business … to fight or be ready to fight wars should the occasion arise.'" [*Levy*, 417 U.S. at 744 (citation omitted)]. In order to achieve this objective, "[n]o question can be left open as to the right to command [by a superior], or the duty [to obey by a subordinate]." *In re Grimley*, 137 U.S. 147, 153 (1890); *accord* [*Goldman*, 475 U.S. at 507] (1986) (noting that "the military must foster instinctive obedience").

United States v. Caldwell, 75 M.J. 276, 281-82 (C.A.A.F. 2016) (alterations in original).

Second, and relatedly, we will not overlook the reality that DoD and Naval regulations permitted Appellant to request an accommodation for any rule or regulation that she believed substantially burdened her religion, but required that she adhere to and follow orders while awaiting a determination on the matter. *See* DoDI 1300.17 para. 4(g); SECNAVINST 1730.8B CH-1 para. 5(a). Appellant is charged with knowledge of both general orders, and not only did she fail to inform her superiors about the religious significance of the signs from her perspective, she did not request an accommodation.

We recognize that RFRA does not itself contain an exhaustion requirement and that at least one federal appellate court has held that an individual need not request an exemption to invoke RFRA, even if a system for doing so is in place. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). But we agree with those courts that have held that an option to request an accommodation "may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes." *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1178 (10th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam); *Priests for Life v. U.S. Dep't of Health and Human Serv.*, 772 F.3d 229, 249-52 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik*, 136 S. Ct. 1557.

Appellant could have requested an exemption from her chain of command to post the signs, and she

could have appealed a denial of the request to the Commandant of the Marine Corps. *See* SECNAVINST 1730.8B CH-1 paras. 5.c, 5.d. The relevant instruction requires commanders to balance requests against considerations such as military readiness and unit cohesion, and commanders must reply to requests within one week. *Id.* at paras. 5, 5.c. If military necessity precludes honoring a request, commanders are required to "seek reasonable alternatives." *Id.* at para. 11.d.

While Appellant's failure to seek an exemption does not prevent her from invoking RFRA, the accommodation process is important for two reasons. First, the established and expeditious option to request an accommodation illustrates the importance that the military places both on respecting the religious beliefs of its members and avoiding substantial burdens on religion where possible. Second, by potentially delaying an accommodation for only a short period of time, the accommodation process interposes a de minimis ministerial act, reducing any substantial burden otherwise threatened by an order or regulation of general applicability, while permitting the military mission to continue in the interim. This consideration is crucial in the military context, as the very lifeblood of the military is the chain of command. *United States v. Priest*, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972) ("The armed forces depend on a command structure that at times must commit men [and women] to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."); *see also Caldwell*, 75 M.J. at 282.

Because Appellant has not established a prima facie case, this Court need not evaluate whether the orders at issue in this case were the least restrictive means of furthering a compelling government interest.

IV. Judgment

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judge OHLSON, dissenting.

In my view, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (2012), provides the men and women of our nation's armed forces with the presumptive right to fully, openly, and spontaneously engage in religious exercise. This right extends to sincere religious conduct that is not specifically required by, or deemed by judges to be important to, the tenets of a servicemember's faith. Further, servicemembers who are court-martialed for sincere religious conduct may invoke the protections afforded by RFRA even if they did not obtain the permission of the Government before engaging in that conduct, and even if they did not contemporaneously inform their chain-of-command that their actions were religious in nature.

I conclude that the majority's disposition of the instant case is not consistent with these rights under RFRA. Moreover, I conclude that the majority's analysis of the underlying legal issue raises the prospect that other servicemembers in the future may be subjected to conviction at court-martial for merely engaging in religious exercise that is entitled to protection under the statute. Therefore, I must respectfully dissent.

I. Overview

To be clear at the outset, RFRA does not give members of the military carte blanche to do whatever they please, whenever they please, simply because they cloak their actions in the garb of religion. To the contrary, the preservation of good order and discipline in the military often serves as a legitimate and powerful governmental interest, and in

appropriate instances, the interests of the individual must yield to the interests of the whole. However, the mere talismanic invocation of "good order and discipline" must not be allowed to curtail the religious liberty of our nation's servicemembers when the government's actions are neither warranted nor statutorily authorized.

In the instant case, Lance Corporal (LCpl) Sterling testified at trial that she posted in her workspace three strips of paper that contained a paraphrase of a biblical passage.[1] She made clear that she did so because the signs were religious in nature, were evocative of the Trinity, and were intended to provide her with encouragement and comfort in a time of personal difficulty. In response to her conduct, LCpl Sterling's noncommissioned officer (NCO) ordered her to take down the signs, and when the junior Marine declined to do so, the NCO removed the signs herself. LCpl Sterling was then court-martialed for, inter alia, disobeying the NCO's order.

Under these circumstances, LCpl Sterling was entitled to have the United States Navy-Marine Corps Court of Criminal Appeals (CCA) analyze her conviction under the legal construct set forth in RFRA by Congress.[2] However, as both the

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[1] The printed phrase was: "No weapon formed against me shall prosper." This is a paraphrase of the biblical passage stating, "No weapon that is formed against thee shall prosper." *Isaiah* 54:17 (King James).

[2] The majority devotes significant attention to the numerous leadership challenges presented by Appellant. However, RFRA does not predicate its applicability on the obedience,

Government and the majority concede, the CCA applied a fundamentally flawed definition of what constitutes religious conduct under RFRA. The CCA's decision thus deprived LCpl Sterling of a properly conducted review of her case under Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866 (2012), which states that a CCA may affirm "only such findings of guilt … as it finds correct in law and fact." The majority's decision to affirm this case on other grounds only serves to compound this problem.

I readily concede that even if the CCA had applied the correct legal standard in this case, LCpl Sterling may not have prevailed on the merits. It is not enough for a servicemember to engage in activity with religious underpinnings; the servicemember's actions must be a "sincere" expression of religious belief. Therefore, if a servicemember seeks to use less-than-genuine religious beliefs as a pretext for inappropriate conduct, or even if a servicemember is sincerely religious but has mixed motives for acting upon those beliefs—such as invoking a biblical passage in order to engage in a passive-aggressive display of contempt for military leadership—the servicemember's conduct will not pass muster under RFRA. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014) ("[P]retextual assertion[s] of … religious belief[s] … fail [under RFRA]."); *see also United States v. Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010) (rejecting RFRA defense due to an ulterior, secular motive). Indeed, there is evidence in the record to suggest that the

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punctuality, demeanor, or performance of the person engaging in religious exercise.

latter scenario may be precisely what we are confronted with in the instant case. Importantly, however, as the majority also recognizes, the CCA failed to examine this fundamental question, and this Court does not have the statutory fact-finding authority to do so on its own.

Unfortunately, instead of remanding this case so that it can be properly adjudicated by the court below, the majority instead has chosen to impose a stringent, judicially made legal standard in this and future religious liberty cases that is not supported by the provisions of RFRA. Contrary to the majority's holding, the plain language of the statute does not empower judges to curtail various manifestations of sincere religious belief simply by arbitrarily deciding that a certain act was not "important" to the believer's exercise of religion. Neither does the statute empower judges to require a believer to ask of the government, "Mother, may I?" before engaging in sincere religious conduct. And further, nowhere in the statute are servicemembers required to inform the government of the religious nature of their conduct at the time they engage in it. In sum, the majority opinion imposes a legal regime that conflicts with the provisions of RFRA, contradicts the intent of Congress, and impermissibly chills the religious rights of our nation's servicemembers.

II. The Law

As stated in the statute itself, RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion[,] even if the burden results from a rule of general applicability," unless the government can "demonstrate[] that application

of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). As amended by its sister statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "*any* [sincere] exercise of religion, *whether or not compelled by, or central to, a system of religious belief*." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also* 42 U.S.C. § 2000bb-2(4) (importing RLUIPA definition to RFRA); *Hobby Lobby*, 134 S. Ct. at 2774 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere' ...."). This plain language provides a very broad aperture through which to view the type of religious conduct that is protected from governmental infringement. Indeed, RFRA guarantees Americans a degree of religious liberty that extends significantly beyond the rights afforded by the First Amendment. *See Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015) (noting that "Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment"); *see generally* 42 U.S.C. § 2000bb-(b).

As the majority acknowledges, there is no question that the protections afforded by RFRA apply with full effect to our nation's armed forces. RFRA explicitly states that it applies to the "government," which is then statutorily defined as including "a branch, department, agency, instrumentality, and official ... of the United States." 42 U.S.C. § 2000bb-2(1). This certainly includes the military. *See, e.g.*, *Singh v. Carter*, Civil Action No. 16-399 (BAH), 2016 U.S. Dist. LEXIS 26990, at *24-25, 2016 WL 837924,

at *6 (D.D.C. Mar. 3, 2016); *Singh v. McHugh*, 109 F. Supp. 3d 72 (D.D.C. 2015); *Rigdon v. Perry*, 962 F. Supp. 150, 160 (D.D.C. 1997). Even if this fact were not sufficiently obvious on the statute's face, RFRA's legislative history would dispel any remaining doubt. Congress was crystalline in its expectation that RFRA would apply to the military. S. Rep. No. 103-111, at 12 (1993) ("Under the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test."); H.R. Rep. No. 103-88 (1993) ("Pursuant to [RFRA], the courts must review the claims of … military personnel under the compelling governmental interest test."). It therefore is without question that the military falls squarely within RFRA's embrace.[3]

III. How RFRA Generally Applies to the Military Justice System

RFRA's practical application in the military justice system is straightforward. When a convening authority refers charges against an accused based on activity that constitutes religious exercise, the

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[3] This is further evidenced by Department of Defense, Instruction 1300.17, which addresses the "[a]ccommodation of [r]eligious [p]ractices [w]ithin the [m]ilitary" and explicitly incorporates RFRA. Dep't of Defense (DoD), Instr. 1300.17, Accommodation of Religious Practices Within the Military Services, para. 4.e.(1) (Feb. 10, 2009, Incorporating Change 1, Jan. 22, 2014) ("[R]equests for religious accommodation from a military policy, practice, or duty that substantially burdens a Service member's exercise of religion may be denied only when the military policy, practice, or duty: (a) Furthers a compelling governmental interest; [and] (b) Is the least restrictive means of furthering that compelling governmental interest.").

accused may invoke RFRA to prevent prosecution and/or conviction.[4] *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a … defense in a judicial proceeding and obtain appropriate relief against a government."); *see also United States v. Christie*, Nos. 14-10233, 14-10234, 2016 U.S. App. LEXIS 10748, at *12, 2016 WL 3255072, at *4 (9th Cir. June 14, 2016) (stating that "RFRA gives each person a statutory right not to have his sincere religious exercise substantially burdened by the government"). In this context, a servicemember seeking the protections afforded by RFRA must initially demonstrate that he or she was engaging in, or seeking to engage in, religious exercise. 42 U.S.C. § 2000bb-1(a). Religious exercise "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Hobby Lobby*, 134 S. Ct. at 2769-70 (citation omitted). A servicemember does not need to prove that his or her conduct was either central to, or compelled by, his or her faith. *Id.* at 2770. Rather, a servicemember need only prove that his or her conduct was *sincerely inspired by* religion. *Id.* at 2774; *see also Jolly v.*

[4] The assertion by the Government that a servicemember must utter the mantra "Religious Freedom Restoration Act" at trial in order to be afforded the protections of that statute is utterly unfounded. Not only is "RFRA … the law regardless of whether parties mention it," *see Muslim v. Frame*, 897 F. Supp. 215, 216 (E.D. Pa. 1995), but LCpl Sterling unmistakably argued that the order was unlawful because of her religious beliefs. She even went as far as to submit the DoD Instruction that incorporates RFRA's framework.

Coughlin, 76 F.3d 468, 476 (2d Cir. 1996) ("[S]crutiny [under RFRA] extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. An inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom ...") (internal citation omitted); *United States v. Manneh*, 645 F. Supp. 2d 98, 111 (E.D.N.Y. 2008) (noting that the "[s]incerity analysis 'provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud'") (citation omitted).

A servicemember must next prove that his or her religious exercise was "substantially burden[ed]" by the government. 42 U.S.C. § 2000bb-1(a); *see also Hobby Lobby*, 134 S. Ct. at 2777-79. Although the statute does not define the term, "[i]t is well established that 'when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted). Here, we are faced with such a scenario. "Substantial" is traditionally defined as "[c]onsiderable in amount," *Black's Law Dictionary* 1656 (10th ed. 2014), and "burden" as "[s]omething that hinders or oppresses," *id.* at 236. It therefore is clear that a substantial burden exists where the government has *considerably* hindered or oppressed *any* sincere religious conduct. *See, e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004) (using the dictionary definition of "substantial burden"). *Contra*

Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (using First Amendment precedent to conclude that a substantial burden requires a compelled violation of beliefs).[5]

Finally, if a servicemember has successfully made this threshold showing—i.e., demonstrated both that he or she engaged in sincere religious conduct and that the government substantially burdened that religious exercise—the burden shifts from the servicemember to the government, which then must justify its actions. 42 U.S.C. § 2000bb-1(b); *see also Hobby Lobby*, 134 S. Ct. at 2779. To do so, the government must prove not only that it was seeking to achieve a compelling governmental interest when it burdened the servicemember's religious exercise, but that there existed no other, less burdensome means to protect that interest. 42 U.S.C. § 2000bb-1(b). This standard is "exceptionally demanding," *Hobby Lobby*, 134 S. Ct. at 2780, and requires a reviewing court to "look[] beyond [the government's] broadly formulated interests … and

[5] As demonstrated by *Kaemmerling*, there is a distinct split among the federal circuit courts of appeals that have analyzed this prong of RFRA. The Supreme Court has yet to address this point, likely because the government typically concedes the existence of a substantial burden—even in cases where the challenged action does not compel an affirmative violation of a person's religious beliefs. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). *But see Priests For Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 244 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (explicitly declining to answer this question).

scrutinize[] the asserted harm … to particular religious claimants," *O Centro*, 126 S. Ct. at 1220.

Of course, this review entails special considerations in the military context. It goes without saying that the military's unique nature and mission give rise to the crucial interest of maintaining good order and discipline, an objective that is without analog in the civilian world. *See, e.g.*, *Brown v. Glines*, 444 U.S. 348, 354 (1980) (noting that the military has a "substantial Government interest" in maintaining "a respect for duty … discipline" (internal quotation marks omitted) (citation omitted)); *see also United States v. Caldwell*, 75 M.J. 276, 281-82 (C.A.A.F. 2016) (emphasizing the same). To be clear then, the military's need to maintain good order and discipline may in certain circumstances trump an individual servicemember's presumptive right to engage in religious exercise.

But while the military's asserted interest in good order and discipline surely deserves great deference, it does not demand reflexive devotion. Rather, in each case an individualized determination must be made about whether the military's interest was compelling, and whether in realizing that interest, the military could have employed means that were less burdensome on the servicemember's religious liberties. And in so doing, attention must be paid to the fact that by enacting RFRA, "Congress … placed a thumb on the scale in favor of protecting religious exercise." *McHugh*, 109 F. Supp. 3d at 92.[6] The plain

[6] When analyzing RFRA cases, the language of the statute controls—even in the military. I acknowledge the majority's

language of the statute mandates this approach, and it is not our role to question the lawfully enacted policies of Congress.

IV. How RFRA Applies in This Specific Case

At trial, LCpl Sterling adequately demonstrated that the actions for which she was being court-martialed constituted "religious" conduct.[7] LCpl Sterling testified that both the substance and placement of her signs were inspired by her Christian faith. The slips of paper that LCpl Sterling placed on her workspace were organized in the form of the "trinity," an unmistakable Christian motif, and

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concern about potentially establishing a "disobey first, explain later" approach to religious liberty in the armed forces. However, under the provisions of RFRA as enacted by Congress, servicemembers who engage in religious exercise pursuant to their statutory rights are not, in fact, disobeying a lawful order. Therefore, in such instances the "disobey first, explain later" concept is inapt; the statutory scheme provided by Congress is more akin to "exercise first, defend later if necessary." Indeed, consistent with the statute's provisions as crafted by Congress, servicemembers are not constrained from asserting a RFRA defense at any point in the disciplinary process. The question of whether this is the best approach in the military is a legislative determination, not a judicial one. And finally, it is important to note that those servicemembers who do disobey a lawful order and then improperly seek the protection of RFRA at a later date can be treated by the military in the same manner as any other servicemember who disobeys a lawful order for nonreligious reasons—to include being convicted at court-martial.

[7] This is not to say that LCpl Sterling proved she was engaging in "religious exercise." As explained above, in order for a RFRA claimant to prevail on this prong, he or she must demonstrate that the conduct was religiously inspired *and* that it was sincere. A mere showing that the servicemember engaged in conduct that had religious overtones is not sufficient.

on them was printed a biblically inspired quotation: "No sword formed against me shall prosper." This, LCpl Sterling suggested at trial, was done because she is "a religious person" and therefore viewed the printouts as providing her with the "protection of three." Thus, there is no doubt that LCpl Sterling's conduct required further analysis under the provisions of RFRA. However, the CCA concluded otherwise.

In its decision, the CCA held: "[W]e believe the definition of a 'religious exercise' requires the practice [to] be 'part of a system of religious belief.'" *United States v. Sterling*, No. NMCCA 201400150, 2015 CCA LEXIS 65, at *14, 2015 WL 832587, at *5 (N-M. Ct. Crim. App. Feb. 26, 2015). The CCA then went on to "reject … [A]ppellant's invitation to define 'religious exercise' as any action subjectively believed by the appellant to be 'religious in nature.'" *Id.* The CCA was wholly mistaken.

It has long been recognized that courts are particularly ill equipped to govern what does or does not constitute "religion." *See Thomas*, 450 U.S. at 715 (noting that "the judicial process is singularly ill equipped to resolve … [intrafaith] differences [among followers of a particular creed]"); *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) ("Judges are ill-equipped to examine the breadth and content of an avowed religion ….'). Instead, as the Supreme Court recognized in the First Amendment context, the exclusive role of a reviewing court "is to decide whether the beliefs professed … are sincerely held and whether they are, in [a servicemember's] own scheme of things, religious." *United States v.*

Seeger, 380 U.S. 163, 185 (1965); *see also Manneh*, 645 F. Supp. 2d at 112 ("[W]hile courts may be poorly equipped to determine what is religious, they are seasoned appraisers of the 'motivations' of parties and have a duty [under RFRA] to determine whether what is professed to be religion is being asserted in good faith."). It is therefore the case that "[i]mpulses prompted by dictates of conscience as well as those engendered by divine commands are … safeguarded against secular intervention, so long as the [servicemember] conceives of the beliefs as religious in nature." *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984); *accord Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs [of a] believer … [even if] his [or her] beliefs are not articulated with … clarity [or] precision …."); *see also Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) ("[T]he judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken.").

As a result, the CCA's flawed understanding of RFRA prevented it from addressing whether LCpl Sterling's conduct was sincerely founded on her religious beliefs and, as a corollary, whether LCpl Sterling was engaged in "religious exercise"—the very first prong of RFRA. Such a determination must be built solidly on facts and, by statute, this fact-finding function lies solely in the unique province of the courts of criminal appeals; it does not lie within the purview of this Court. Thus, the proper disposition of this case is as clear as it is narrow. This Court should remand this case to the CCA so that it can properly consider the factual basis for

LCpl Sterling's RFRA claim with a correct understanding of the law.[8] To this end, it is the CCA's prerogative to determine whether this is possible on the record or whether it is necessary to order a *DuBay*[9] hearing. Either way, the CCA should correctly consider the issues presented in this case. LCpl Sterling deserves no less, and we should seek to address nothing more.[10]

V. The Majority's Substantial Burden Analysis Cannot Be Reconciled with RFRA

I disagree with four aspects of the majority's substantial burden analysis. First, the majority creates a requirement that the religious conduct must be "important" to the servicemember's faith in order to merit protection under RFRA. This directly contradicts the routine recognition that "[i]t is not within the judicial ken to question the centrality of

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[8] To be clear, this conclusion in no way purports to suggest that LCpl Sterling should have or would have prevailed on the merits if the majority had ordered a remand. My position is based squarely on the fact that the CCA's obvious legal error deprived LCpl Sterling of an appropriate legal and factual review of her case.

[9] *See generally United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[10] Any consideration of Appellant's claim, even after a proper RFRA analysis, would be incomplete without answering a question of fact that has not yet been considered, let alone addressed, by either the military judge or the CCA: Was LCpl Sterling's conduct sincere? This question lies beyond the proper scope of our authority, and because the answer is essential to the proper resolution of this case, we have but one option: Remand. *Cf. United States v. Edwards*, 46 M.J. 41, 46 (C.A.A.F. 1997) (remanding case for further proceedings where relevant facts were not developed to resolve legal issue).

particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989); *see also Sample v. Lappin*, 424 F. Supp. 2d 187, 193 (D.D.C. 2006) (noting the same in its RFRA analysis). In fact, the statute explicitly states that religious exercise *does not* have to be compelled by or central to a system of religious belief. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Thus, the apparent assertion that religious conduct must be "important" to the servicemember's faith in order to merit protection under RFRA is mistaken.

Second, the majority's approach creates a novel notice requirement. But nowhere in RFRA's text, its legislative history, or the relevant case law does there appear any indication that the government must be conscious (or even sensitive to the possibility) that its actions may impermissibly curtail religious exercise in order for a successful RFRA defense to lie. *Cf. Lappin*, 424 F. Supp. 2d at 193 (noting that "[w]hether plaintiff declared his Jewish faith at the time of his incarceration is of no moment [to whether his religious conviction was sincere]"). Indeed, RFRA was in many ways designed to apply where the First Amendment could not—that is, in the face of generalized, *un*intentional religious encumbrance. *See generally* 42 U.S.C. § 2000bb(a)(2) ("[L]aws [that are] 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *Holt*, 135 S. Ct. at 859-60 ("Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.").

Third, the majority mistakenly follows the Government's lead and considers LCpl Sterling's failure to avail herself of the Navy's accommodation framework. In the instant case, however, the Navy's accommodation regime is irrelevant. LCpl Sterling is challenging her NCO's order to remove her religiously inspired signs; she is not challenging the general provisions of the Navy's accommodation framework, nor is she challenging how that framework was applied in her specific case. Under such circumstances, if a servicemember demonstrates that he or she has met the first prong of RFRA, the focus must then be placed squarely on the scope, nature, and effect of the burden placed by the government on the servicemember's religious exercise—not on whether the servicemember *could have* sought "permission" from the government before engaging in the religious exercise.[11]

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[11] The majority is correct that "an option to request an accommodation" can, in some cases, be relevant to a court's analysis under RFRA. *United States v. Sterling*, __ M.J. __, __ (19-20) (C.A.A.F. 2016). For example, the presence and nature of an accommodation mechanism would be appropriately considered in a case involving a challenge to a regulatory framework writ large. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2782; *see also Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1178 (10th Cir. 2015) (addressing whether an accommodation framework itself creates a substantial burden), *vacated and remanded sub nom. Zubik*, 136 S. Ct. 1557. Here, however, we are not faced with such a scenario, and the focus exclusively belongs on the NCO's order. *See, e.g.*, *Singh*, 2016 U.S. Dist. LEXIS 26990, at *27-37, 2016 WL 837924, at *9-11 (holding that a military order to undergo testing was violative of RFRA even though the order was issued to allow the Army to determine whether to grant a religious accommodation to a Sikh officer). Whether LCpl Sterling *could have* sought permission

Fourth, and finally, the majority takes the position that the Supreme Court's historical understanding of the term "substantial burden"—specifically, in the First Amendment context—makes clear that a claimed burden must be based on an affirmative violation of one's religion in order to qualify as "substantial." Thus, in the majority's view, because Appellant neither indicated that her religion requires her to post signs nor claimed that her religion prevents her from removing those signs, Appellant's conduct lies beyond the ambit of RFRA's embrace. But this approach unjustifiably narrows RFRA's substantial burden requirement.

Even if Congress implicitly sought to codify the understanding of "substantial burden" that was woven into the Supreme Court's First Amendment case law, nothing in that precedent indicates that a governmentally urged violation of one's religious beliefs is the exclusive means for effecting a substantial burden. *See, e.g.*, *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.) ("Whether a particular practice is religiously mandated is surely relevant to resolving whether a particular burden is substantial. [But] the Supreme Court … [has never] held that a burdened practice must be mandated in order to sustain a … free exercise claim.… To confine … protection … to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of

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for her conduct is therefore irrelevant to the legality of her NCO's order to remove LCpl Sterling's religiously inspired signs. To hold otherwise would subvert the very purpose of RFRA.

attempting to resolve intra-faith disputes over religious law and doctrine.… We therefore decline to adopt a definition of substantial burden that would require claimants to show that they either have been prevented from doing something their religion says they must, or compelled to do something their religion forbids." (citations omitted)); *see generally Thomas*, 450 U.S. at 715. That is to say, a compelled violation of one's religion may be *sufficient* for finding a substantial burden, but this does not also mean that it is *necessary* for such a finding. Therefore, I cannot adopt the majority's unduly narrow definition of the term and believe it to be inconsistent with both the plain language and clear purpose of RFRA.

VI. Conclusion

The majority opinion ventures beyond that which is necessary to decide the issue before us. In the course of doing so, the Court not only fails to ensure the proper application of RFRA to LCpl Sterling's specific case, it more generally imposes a legal framework that unnecessarily curtails the religious freedom of our nation's servicemembers. For this reason, I must respectfully dissent.

Appendix B

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

NMCCA 201400150

UNITED STATES OF AMERICA

v.

MONIFA J. STERLING,
Lance Corporal (E-3), U.S. Marine Corps

Filed: February 26, 2015

OPINION OF THE COURT

KING, Judge:

A special court-martial consisting of officer and enlisted members convicted the appellant, contrary to her pleas, of failing to go to her appointed place of duty, disrespect towards a superior commissioned officer, and four specifications of disobeying the lawful order of a noncommissioned officer (NCO), in violation of Articles 86, 89, and 91, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 889, and 891.[1] The members sentenced the appellant to be reduced to pay grade E-1 and a bad-conduct discharge. The

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[1] The appellant was acquitted of making a false official statement in violation of Article 107, UCMJ.

convening authority approved the sentence as adjudged.

The appellant now raises six assignments of error: (1) the military judge erred by failing to *sua sponte* instruct the members on the defense of mistake of fact; (2) the evidence that the appellant was disrespectful to a superior commissioned officer was legally and factually insufficient; (3) the military judge erred by finding that an order to remove religious quotes from the appellant's workspace was a lawful order because (a) the order violated the appellant's right to freely exercise her religion and (b) the order did not have a valid military purpose; (4) Specifications 1 and 4 of Charge III represented an unreasonable multiplication of charges; (5) the military judge erred by permitting the Government to introduce impermissible evidence during the presentencing phase of the trial; and (6) the sentence was inappropriately severe. This court heard oral argument on assignment of errors 3 and 5.

After carefully considering the pleadings of the parties, the record of trial, and the oral arguments, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.[2] Arts. 59(a) and 66(c), UCMJ.

BACKGROUND

In May of 2013, the appellant's duties included sitting at a desk and utilizing a computer to assist Marines experiencing issues with their Common

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[2] We have considered assignments of error (2) and (6) and find no error. *United States v. Clifton*, 35 M.J. 79, 81 (C.M.A. 1992).

Access Cards. The appellant printed three copies of the biblical quote "no weapon formed against me shall prosper" on paper in 28 point font or smaller. The appellant 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. The appellant testified that she is a Christian and that she posted the quotation in three places to represent the Christian trinity. 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.

On or about 20 May 2013, Staff Sergeant (SSgt) Alexander ordered the appellant to remove the signs. The appellant refused and the SSgt removed them herself. The next day, the SSgt saw the signs had been replaced and again ordered the appellant to remove them. When the signs had not been removed by the end of the day, SSgt Alexander again removed them herself.

In August of 2013, the appellant was on limited duty for a hip injury and wore a back brace and TENS unit during working hours.[3] The medical documentation (chit) included a handwritten note stating that "[w]earing charlies & TENS unit[4] will be difficult, consider allowing her to not wear charlies."[5] The uniform of the day on Fridays for the appellant's command was the service "C" uniform and when the

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[3] TENS refers to a small machine that transmits pulses to the surface of the skin and along nerve strands.

[4] "Charlies" refers to the Marine service "C" uniform.

[5] Defense Exhibit B.

appellant arrived at work on a Friday in her camouflage utility uniform, SSgt Morris ordered her to change into service "C" uniform. The appellant refused, claiming her medical chit exempted her from the uniform requirement. After speaking with medical, SSgt Morris again ordered the appellant to change into the service "C" uniform. The appellant again refused. SSgt Morris then brought the appellant to First Sergeant (1stSgt) Robinson who repeated the order. Again, the appellant refused.

On 12 September 2013, 1stSgt Robinson ordered the appellant to report to the Pass and Identification building at the front gate on Sunday, 15 September 2013, from 1600 until approximately 1930 to help distribute vehicle passes to family members of returning deployed service members. This was a duty the appellant had performed before. The appellant refused, showing 1stSgt Robinson a separate medical chit that she had been provided to treat a "stress reaction." This chit recommended that the appellant be exempted from standing watch and performing guard duty.[6] Additionally, on 03 September 2013, the appellant was prescribed a medication to help prevent the onset of migraine headaches.[7]

On 13 Sept 2013, the appellant was ordered to report to Major (Maj) Flatley. When she did so, Maj Flatley ordered the appellant to report to Pass and Identification on 15 September 2103 to issue vehicle passes and ordered her to take the passes with her. The appellant told Maj Flatley that she would not

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[6] DE A.

[7] Appellate Exhibit XXXIX.

comply with the order to report and refused to accept the passes. On 15 September 2013, the appellant did not report as ordered.

Additional facts necessary for the resolution of each assignment of error are developed below.

MISTAKE OF FACT INSTRUCTION

The appellant first argues that the military judge erred in failing to *sua sponte* instruct the members on mistake of fact for the allegations that the appellant failed to go to her appointed place of duty as well as the allegations that she twice willfully disobeyed the order of a noncommissioned officer to don her service "C" uniform.

Whether a jury was properly instructed is a question of law we review *de novo*. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). "Mistake of fact" is a special defense and provides:

> If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

Rule for Courts-Martial 916(j)(1), Manual for Courts Martial (2012 ed.)

A military judge has a *sua sponte* duty to give a mistake of fact instruction when the defense is

reasonably raised by the evidence. R.C.M. 920(e)(3). The defense is "reasonably raised" by the evidence when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (citations and internal quotation marks omitted).

The evidence relevant to mistake of fact admitted at trial included Defense Exhibits A and B. DE A was a "light duty" medical chit then in effect recommending the appellant be exempted from watch standing or guard duty. DE B was a "limited duty" medical chit stating that "wearing charlies and TENS unit will be difficult, consider allowing her to not wear charlies." Additionally, the appellant testified that the limitations set forth in the chits were "orders, they're not recommendations" and that she interpreted the handwritten note on DE B as authority to refuse to wear the service "C" uniform because doing so "interferes with comfortable wearing of the devices so I'm to follow it for limited duty."[8] Assuming, *arguendo*, that this quantum of evidence is sufficient to trigger the military judge's *sua sponte* duty to provide a mistake of fact instruction, we will analyze the failure to provide it for prejudice.

The failure to provide a required special instruction is constitutional error. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The test for determining whether constitutional error was harmless is whether it appears "'beyond a reasonable

[8] Record at 268.

doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "Stated differently, the test is: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Failing to go to an appointed pace of duty is a general intent crime. Therefore, any mistake of fact must be both honest and reasonable While the appellant may have offered some evidence at trial that she honestly believed that DE A's recommended limitations exempted her from standing duty, the evidence indicating that this belief was unreasonable was substantial. To begin with, the plain language of DE A makes it clear that the limitations are "recommendations." While we recognize that medically-recommended duty limitations are routinely adopted by commanders, there is no evidence in the record to support a reasonable belief that these recommendations were "orders." Moreover, the appellant conceded that her inability to stand duty would have been caused by her taking a medication as a proactive measure to prevent the onset of migraines. The appellant introduced evidence that the medication could produce side effects including dizziness, drowsiness, "alert issues," and numbness in hands, feet, and tongue, and was therefore prescribed to be taken at night.[9] However, while admitting that she normally took the medication as prescribed, the appellant insisted that she had to take the medication hours earlier on 15

[9] *Id.* at 327-28.

September 2013 because she would be attending church services, which she believed could trigger a migraine. Therefore, because she planned to take the medication by the time her appointed duty would have commenced, she concluded that she could not report to her appointed place of duty.

In a mistake of fact analysis, the appellant's assumption that her choice of activities would necessitate medicating herself early—contrary to the prescription—such that she believed she would have rendered herself unfit to report to her appointed place of duty is unreasonable. Other than the appellant's personal desire, there was no reason she could not have taken the medication as prescribed, thus enabling her to report as ordered. Under these circumstances, we are not persuaded in the least that any member would have found any mistaken belief reasonable.

Mistake of fact involving willful disobedience to a noncommissioned officer "need only have existed in the mind of the accused" even if the mistake was unreasonable. R.C.M. 916(j)(1). When considering whether the appellant honestly believed she was exempt from wearing service "C" uniform, we again turn to the plain language of the chit, which could not be more clear: "May wear TENS unit and brace during working hours under dress uniform." The handwritten modification to the chit does little to support that a belief to the contrary was honestly held: "wearing charlies & TENS unit will be difficult, consider allowing her to not wear charlies." The language the appellant maintains caused her to believe that she was exempt from wearing the service

"C" uniform plainly provides otherwise. Additionally, we note that after the appellant informed SSgt Morris that she was not permitted to wear service "C" uniform, the appellant invited SSgt Morris to speak directly to medical personnel. SSgt Morris immediately did so and was told that the appellant was able to wear service "C" uniform. Accordingly, SSgt Morris again ordered the appellant to don the service "C" uniform, providing the appellant further confirmation that she was not exempt from wearing her service "C" uniform. Indeed, with the exception of the appellant's testimony—itself incredible in light of the facts—there is simply no evidence that would permit a rational member to conclude that the appellant honestly believed she was exempt from obeying the orders. For these reasons, we hold that any erroneous failure to instruct the members on mistake of fact was harmless beyond a reasonable doubt.

LEGALITY OF ORDER TO REMOVE SIGNS

Next, the appellant attacks her convictions for failing to obey the lawful orders to remove the signs. First, the appellant argues that the order violated the appellant's right to exercise her religion as guaranteed under the First Amendment to the Constitution. Second, the appellant asserts that the order lacked a valid military purpose.

At trial, the appellant personally raised a challenge to the legality of the order to remove the signs on grounds that it was "unlawful under the grounds of my religion."[10] She testified that the

[10] *Id.* at 280.

three signs represented the trinity and were a "personal … mental reminder to me when I come to work, okay. You don't know why these people are picking on you."[11] After hearing evidence and argument, the military judge ruled that the orders were lawful in that they were "related to a specific military duty."[12] Specifically, the military judge ruled: "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 members come to [the] accused's workspace for assistance at which time they could have seen the signs."[13] The military judge determined that the signs' quotations, "although … biblical in nature … could easily be seen as contrary to good order and discipline."[14] Finally, without supporting findings of fact or conclusions of law, the military judge ruled that the order to remove the signs "did not interfere with the accused's private rights or personal affairs in anyway [sic]" and denied the appellant's motion to dismiss.[15] This court reviews *de novo* the question of whether the military judge correctly determined that an order was lawful. *United States v. New*, 55 M.J. 95, 106 (C.A.A.F. 2001).

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[11] *Id.* at 310.

[12] *Id.* at 362.

[13] *Id.*

[14] *Id.*

[15] *Id.*

RELIGIOUS FREEDOM RESTORATION ACT

The Free Exercise Clause of the First Amendment to the Constitution indicates the Government cannot "prohibit[] the free exercise" of religion. This prohibition is codified, in part, in the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, which prohibits the Government from placing a substantial burden on religious exercise without a compelling justification. 42 U.S.C. § 2000bb(a)(3). "Religious exercise" is defined to include "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). Accordingly, in order to invoke the protection of the RFRA, the appellant must first demonstrate that the act of placing the signs on her workstation is tantamount to a "religious exercise."

We begin our analysis of this assignment of error by recognizing the deference courts pay to questions regarding the importance of religious exercises to belief systems. *See Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." (citation and internal quotation marks omitted)); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (explaining that the fact some Christian denominations do not "compel[]"

their adherents to refuse Sunday work does not diminish the constitutional protection the belief enjoys); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation"); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

However, that is not to say that there are no limitations, for "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas*, 450 U.S. at 713. Additionally, although broad, we believe the definition of a "religious exercise" requires the practice be "part of a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Personal beliefs, grounded *solely* upon subjective ideas about religious practices, "will not suffice" because courts need some reference point to assess whether the practice is indeed religious. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (recognizing for purposes of a First Amendment inquiry that individuals are not free to define religious beliefs solely based upon individual preference). For these reasons, we reject the appellant's invitation to define "religious exercise" as any action subjectively believed by the appellant to be "religious in nature."[16]

Here, the appellant taped a biblical quotation in three places around her workstation, organized in a

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[16] Appellant's Brief of 8 Aug 2014 at 26.

fashion to "represent the trinity." While her explanation at trial may invoke religion, there is no evidence that posting signs at her workstation was an "exercise" of that religion in the sense that such action was "part of a system of religious belief." Indeed, the appellant never told her SSgt that the signs had a religious connotation and never requested any religious accommodation to enable her to display the signs.[17] Instead, the record supports the conclusion that the appellant was simply placing what she believed to be personal reminders that those she considered adversaries could not harm her. Such action does not trigger the RFRA.

VALID MILITARY PURPOSE

The appellant also argues that the military judge erred by finding the orders to remove the signs had a valid military purpose.

Military orders are presumed to be lawful and are disobeyed at the subordinate's peril. Manual for Courts-Martial, United States (2012 ed.), Part IV, ¶ 14c(1)(d)(2)(a)(i). To sustain the presumption of lawfulness, "'the order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with

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[17] Secretary of the Navy Instruction 1730.8B (Ch. 1, 28 Mar 2012) regulates the accommodation of religious practices in the Department of the Navy and requires requests for religious accommodations be submitted in writing to the command. We leave for another day what impact, if any, the failure to first request an accommodation will have on the lawfulness of an order to refrain from engaging in one.

the maintenance of good order in the service.'" *United States v. Moore*, 58 M.J. 466, 467-68 (C.A.A.F. 2003) (quoting MCM, Part IV, ¶ 14c(2)(a)(iii)). To be lawful, an order must (1) have a valid military purpose, and (2) be clear, specific, and narrowly drawn. *Id.* at 468; *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989). The lawfulness of an order is a legal question for the military judge to decide at trial, *New*, 55 M.J. at 105, and this court reviews the trial judge's decision *de novo*, *Moore*, 58 M.J. at 467.

After receiving evidence and hearing argument, the military judge found that 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 members came to the accused's workspace for assistance at which time they could have seen the signs. The court also finds that the signs, although the verbiage … [was] biblical in nature, read something to the effect of no weapon found [sic] against me shall prosper … which could easily be seen as contrary to good order and discipline."[18] Although these meager findings of fact fail to illuminate why the military judge believed the signs verbiage "could easily be seen as contrary to good order and discipline[,]" we are able to glean from the record sufficient information to affirm his ruling.

First, the military judge found that the signs verbiage was biblical in nature, that the desk was shared with another Marine, and the signs were visible to other Marines who came to the appellant's

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[18] Record at 362.

desk for assistance. The implication is clear—the junior Marine sharing the desk and the other Marines coming to the desk for assistance would be exposed to biblical quotations in the military workplace. It is not hard to imagine the divisive impact to good order and discipline that may result when a service member is compelled to work at a government desk festooned with religious quotations, especially if that service member does not share that religion. The risk that such exposure could impact the morale or discipline of the command is not slight. Maintaining discipline and morale in the military work center could very well require that the work center remain relatively free of divisive or contentious issues such as personal beliefs, religion, politics, etc., and a command may act preemptively to prevent this detrimental effect. To the extent that is what the military judge determined to be the case, we concur.[19]

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[19] We are sensitive to the possible implication that such orders may have on the service member's Free Exercise and Free Speech rights under the First Amendment to the Constitution and we have carefully considered the appellant's rights thereunder. While not convinced that displaying religious text at a shared government workstation would be protected even in a civilian federal workplace (*see e.g. Berry v. Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006) (holding that a state may prohibit an employee from posting religious signs in his workspace when clients routinely entered that workspace for purposes of consulting with an agent of the state), it is well-settled that "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[,]" *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). *See also*, *United States v. Brown*, 45 M.J. 389, 396 (C.A.A.F. 1996) ("the

Second, examination of this record indicates the existence of a contentious relationship between the appellant and her command, even prior to the charged misconduct. In fact, the appellant testified that her purpose for placing the signs was to encourage her during those difficult times and that her SSgt ordered her to remove the signs because the SSgt didn't "like their tone."[20] While locked in an antagonistic relationship with her superiors—a relationship surely visible to other Marines in the unit—placing visual reminders at her shared workspace that "no weapon formed against me shall prosper" could certainly undercut good order and discipline. When considered in context, we find that the verbiage in these signs could be interpreted as combative and agree with the military judge that the signs placement in the shared workspace could therefore "easily be seen as contrary to good order and discipline."[21] For this reason as well, the orders to remove the signs were lawful.

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right of free speech in the armed services … must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country."). Moreover, in *Parker v. Levy*, 417 U.S. 733, 759 (1974), the Supreme Court held the military may restrict the service member's right to free speech in peace time because speech may "undermine the effectiveness of response to command." We apply these principles here and remain satisfied that the orders were lawful.

[20] Record at 312.

[21] *Id.* at 362.

UNREASONABLE MULTIPLICATION
OF CHARGES

The appellant next argues that she was prejudiced by being convicted of two specifications for violating an order to change into the uniform of the day on 23 August 2013.[22]

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c) (4). We review five non-exclusive factors from *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001), to determine whether there is an unreasonable multiplication of charges. These factors are weighed together, and "one or more factors may be sufficiently compelling." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). These factors, and their application to these facts, are as follows:

1. Whether the appellant objected at trial. She did not.

2. Whether each charge and specification is aimed at distinctly separate criminal acts. They are.

The record indicates that even though both instances of disobedience occurred on the same day and involved the same order, time and events took

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[22] Specification 1 of Charge III alleges that the appellant, on or about 23 August 2013, disobeyed the order of 1stSgt Robinson to "put on the uniform of the day." Specification 4 of Charge III alleges that the appellant, on or about 23 August 2013, disobeyed the order of SSgt Morris to "change into the uniform of the day."

place between the orders sufficient to constitute separate acts. Specifically, SSgt Morris first ordered the appellant to put on the proper uniform during the morning of 23 August 2103. The appellant responded that "she would not put it on because she had a medical chit out there stating that she could not wear the [proper] uniform."[23] The SSgt then checked the appellant's record book for the medical chit. Unable to find it, he went directly to medical to ascertain the appellant's limitations. After medical informed the SSgt that the appellant could indeed wear the proper uniform, he once again ordered the appellant to do so. Once again the appellant refused. SSgt Morris reported the issue to 1stSgt Robinson who then discussed the issue with Sergeant Major (SgtMaj) Shaw, who had previously permitted the appellant to abstain from wearing service "C" uniform on Friday. After that conversation, 1stSgt Robinson ordered the appellant to don the proper uniform. Again, the appellant refused. We find that refusing the SSgt's order after he clarified the medical limitations was a distinct act separate from the appellant's refusal of the 1stSgt's order after he sought guidance from the SgtMaj.

> 3. Whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality. They do not, for the reasons discussed *supra*.
>
> 4. Whether the number of charges and specifications unreason-ably increase the appellant's punitive exposure. They do not.

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[23] Record at 188.

> Because the appellant was tried at a special court-martial the jurisdictional limits on authorized punishments prevented the appellant's punitive exposure from being unreasonably increased.
>
> 5. Whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. Since the two specifications were aimed at distinctly separate acts, we conclude there is no evidence of prosecutorial abuse.

Applying these factors to this case, we conclude that the charges were not unreasonably multiplied.

SENTENCING EVIDENCE

We next address the appellant's contention that the military judge erred by erroneously admitting presentencing evidence that the appellant "was responsible for the misconduct and poor performance of other Marines."[24]

At presentencing, the Government called three witnesses. In response to trial counsel's question about how the appellant's misconduct affected the unit, the witnesses testified as follows:

1. 1stSgt Robinson:

> [D]ue to the fact of excessive misconduct with lack of repercussions led the perception to other Marines that it was okay—and we saw a slight spike in misconduct in the unit due to that. And even some Marines coming in for nonjudicial punishment would say

[24] Appellant's Brief at 39.

> that, you know, they didn't see anything happen to her and little comments of that nature. So, it greatly impacted the unit negatively with her misconduct, sir.[25]

2. SSgt Alexander:

> [T]he Marines that were around it would see the effect of the situations and would think that they could do what they wanted to—the disrespect toward me as a staff NCO.[26]

3. SgtMaj Shaw:

> [I]t was very noticeable that many of the Marines that she would come in contact with and become friends with, their attitude would change in a negative aspect and their personal discipline would also drop off over a short period of time until they would get some counseling and be brought back into the fold, so to speak.[27]

During his sentencing argument, the trial counsel stated:

> You heard from the [SgtMaj], you heard from the [1stSgt], and you heard from [SSgt Alexander]. You heard how it affected the unit, how they spent man-hours dealing with her misconduct when it could have been spent looking forward and accomplishing the mission. You also heard how it affected other Marines negatively. And how they've had to

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[25] Record at 400.

[26] *Id.* at 402.

[27] *Id.* at 405.

> be counsel[ed], some more man-hours had to be spent on these other Marines that were negatively influenced by [the appellant] and her misconduct.[28]

The appellant now argues that this evidence was inadmissible because the evidence blamed the appellant for the "lack of repercussions" and therefore impermissibly implied that she was "responsible for the misconduct of other Marines."[29]

In the absence of a defense objection, we review a claim of erroneous admission of presentencing evidence for plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *Id.* The appellant has the burden of persuading the court that the three prongs of the plain error test are satisfied. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

Pursuant to R.C.M. 1001(b)(4), trial counsel may present sentencing evidence, "as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of … significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." The phrase "directly relating to or resulting from the offenses" imposes a "higher

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[28] *Id.* at 415.

[29] Appellant's Brief at 39.

standard" than "mere relevance." *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990). The appellant is not responsible for a never-ending chain of causes and effects. *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). Instead, such evidence is admissible on sentence only when it shows "'the specific harm caused by the defendant.'" *Id.* at 478 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

The testimony of SSgt Alexander and SgtMaj Shaw is susceptible to different interpretations. However, under a plain error analysis, we decline to draw the conclusions regarding these witnesses' testimony that the appellant suggests. Instead, SSgt Alexander's testimony that "the Marines that were around it" could reasonably been referring to the appellant's action of refusing to remove the signs and replacing them after SSgt Alexander removed them. Similarly, SgtMaj Shaw's testimony that those in contact with the appellant would suffer a drop in "personal discipline" could reasonably refer to the appellant's combative relationship with the command, during which she was disobeying orders and failing to go to her appointed place of duty. In these contexts, the witnesses' testimony was proper and we therefore decline to find plain error.

However, 1stSgt Robinson essentially testified that the time that elapsed from misconduct to sentencing equated to a "lack of repercussions" which created the "perception to other Marines that it was okay" to commit misconduct or to disrespect a Staff NCO. The time it takes to process a court martial, at least though referral, is solely within the Government's control. Any adverse perceptions that

result from that process are not appropriately attributed to the appellant. In this we agree with our sister court that to conclude otherwise would permit the trial counsel to "argue to the sentencing authority at trial that the accused may be punished more harshly for the inconvenience of the trial. This would be akin to allowing comment upon the right to plead not guilty or remain silent, and we cannot countenance such an unjust outcome." *United States v. Fisher*, 67 M.J. 617 (Army Ct.Crim.App. 2009) (citation omitted). Therefore, we find that allowing this testimony was plain and obvious error.

Having found error, we test for material prejudice. Erroneous admission of evidence during the sentencing portion of a court-martial causes material prejudice to an appellant's substantial rights only if the admission of the evidence substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). To make this determination, we weigh factors on both sides. *United States v. Eslinger*, 70 M.J. 193, 201 (C.A.A.F. 2011). On the one hand, we note that the erroneously admitted testimony was relied upon by the trial counsel during argument.[30] On the other, members are permitted to consider "[a]ny evidence properly introduced on the merits before findings." R.C.M. 1001(f)(2). Here, setting aside the erroneously admitted testimony, the members heard of a contentious relationship between a junior Marine and her superiors. It is not clear why the relationship

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[30] The trial counsel argued for a sentence of reduction to E-1, ninety days confinement, and a bad-conduct discharge. Record at 415.

became contentious, but at a certain point, the appellant decided that her command was "picking on her" and began to refuse to follow orders. Her conspicuous disobedience to her SSgt, repeated refusals to wear the appropriate uniform, and flagrant disrespect of a commissioned officer were all exacerbated by her own presentencing testimony, where the appellant continued to blame her command for her actions and left the members with absolutely no indication of her willingness or potential for further service.[31] That, coupled with SSgt Alexander and SgtMaj Shaw's testimony of the adverse influence the appellant's divisive actions had on other junior members of the command, leads us to conclude that the erroneously admitted evidence did not substantially influence the adjudged sentence.

BCD STRIKER

Although not raised by the parties, we note the trial defense counsel essentially argued for a punitive discharge.[32] It is well-settled that when defense

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[31] During the sentencing hearing, the appellant testified her command was "tired of me going to the IG … and writing letters to Congress, and request mast and, you know … submitting pictures of the barracks[.]" *Id.* at 410.

[32] Trial defense counsel's sentencing argument included the following comments: "As you go through and deliberate upon what punishment would be appropriate, I would just ask you … to make it quick. [LCpl] Sterling, as she has said, is recently married. And she has also said, she is not long for the Marine Corps one way or the other. And so whatever punishment you give her, I would ask that it be a punishment that quickly brings [LCpl] Sterling's association with her command and the Marine Corps to an end. LCpl Sterling is no longer in a position that she can be an asset to her unit … [t]aking that into account, we would ask that whatever

counsel advocates for a punitive discharge, "counsel must make a record that such advocacy is pursuant to the accused's wishes." *United States v. Pineda*, 54 M.J. 298, 301 (C.A.A.F. 2001) (internal quotation marks and citations omitted).

Here, the record is silent in this regard. However, failure to adequately make a record of the appellant's wishes "does not *per se*, require an appellate court to set aside a court-martial sentence." *Id.* Instead, we must assess the impact of the error on the approved sentence to determine whether sufficient prejudice existed, for "where the facts of a given case compel a conclusion that a bad-conduct discharge was reasonably likely, we do not normally order a new sentence hearing." *Id.* (citation omitted).

The appellant's misconduct was not minor. As the Supreme Court has recognized, "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). The members and convening authority were presented with an appellant who brazenly scoffed at this requirement in a manner that adversely impacted the good order and discipline of this unit. Lacking evidence of rehabilitative potential, we find this record amply supports the reasonable likelihood that a bad-conduct discharge would have been awarded and approved notwithstanding this error.

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punishment you assign … quickly allow[s] both the Marine Corps … [and LCpl] Sterling, herself, to move on to a place where both sides can prosper." *Id.* at 418-19.

CONCLUSION

The findings and the sentence as approved by the convening authority are affirmed.

Senior Judge FISCHER and Judge MCDONALD concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Nos. 15-0510, 16-0223

UNITED STATES,

Appellee / Cross-Appellant,

v.

MONIFA J. STERLING,

Appellant / Cross Appellee.

Filed: August 10, 2016

JUDGMENT

This cause came before the Court on appeal from the United States Navy-Marine Corps Court of Criminal Appeals and was argued by counsel on April 27, 2016. On consideration thereof, it is, by the Court, this 10th day of August, 2016,

ORDERED and ADJUDGED:

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court,

/s/William A. DeCicco
Clerk of the Court

Appendix D

Relevant Statutory Provisions Involved

42 U.S.C. § 2000bb

(a) Findings

The Congress finds that-

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are-

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)

and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

(a) In general

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

(b) Exception

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

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

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

42 U.S.C. § 2000bb-2

As used in this chapter-

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

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

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

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb-4

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