IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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TABLE OF CONTENTS

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

United States District Court

United States Court of Appeals for the Armed Forces

Statutes

Other Authorities

Issues Presented

I.

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

II.

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

III.

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

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice. 10 U.S.C.

§866(b)(1). This Court, therefore, has jurisdiction under Article 67, UCMJ. *Id.* §867.

Statement of the Case

A Special Court-Martial, consisting of officer and enlisted members, found Lance Corporal (LCpl) Sterling, contrary to her pleas, guilty 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 in violation of Articles 86, 89 and 91, UCMJ, respectively. *See id.* §§866, 886, 889, 891.

On February 1, 2014, the members sentenced LCpl Sterling to a bad-conduct discharge and reduction to pay grade E-1. (R. at 428.) On April 2, 2014, the Convening Authority approved the sentence, and, except for the punitive discharge, ordered it executed. Special Court-Martial Order No. M14-07, 2 Apr 2014. On February 26, 2015, the NMCCA affirmed the findings and the sentence as approved by the Convening Authority. *See United States v. Sterling*, No. 201400150, 2015 WL 832587 (N-M. Ct. Crim. App. Feb. 26, 2015). LCpl Sterling petitioned this Court for review on April 24, 2015.

Statement of Facts

LCpl Sterling's Posting of the Biblical Quotations, and SSgt Alexander's Orders to Remove Them

In May 2013, the relevant period in question, LCpl Sterling was assigned to the Communications (S-6) section of the 8th Communications Battalion, under the supervision of Staff Sergeant (SSgt) Alexander, her Staff Non-Commissioned Officer in Charge (SNCOIC). (R. at 180.) During that assignment, LCpl Sterling's duties included sitting at a desk and utilizing a computer to assist Marines experiencing issues with their Common Access Cards. *Sterling*, slip op. at 2.

LCpl Sterling self-identifies as a Christian and as a "religious person." (R. at 270, 307, 310.) While working in 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." (R. at 308.)[1] LCpl Sterling regards the Bible "as a religious text" and acknowledged that the quotation was drawn from "scripture." (R. at 270.) In each instance, LCpl Sterling printed the quotation on one line of 8-1/2 x 11-inch paper, with the paper cut away so that only the printed text remained. (R. at 308-09.) Two of

[1] 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."). During trial, the parties and court referred to the printed quotations as "signs."

the quotations were printed in 28-point font, and the third was printed in a smaller font. (R. at 308-09.)

LCpl Sterling taped the quotation in the smaller font above her computer screen. She taped the other two on the side of her computer tower and along the top shelf of her incoming mailbox. (R. at 308-09.) LCpl Sterling made and posted three copies of the quotation around her workspace to reflect the "trinity," *i.e.*, the Christian belief of three persons in one God. (R. at 307, 310.) She testified that she "did a trinity" to "have [the] protection of three around me" in response to what she considered to be harassment by fellow Marines. (R. at 307, 310.) The quotations were "of a religious nature" and "purely personal" to her; they were "only for [her]" and not intended to "send a message to anyone but" herself. (R. at 270, 310.) As such, LCpl Sterling taped the quotations so that they were primarily visible only to her, and not others. (R. at 310.)

On or about May 20, 2013, SSgt Alexander observed the quotations and ordered LCpl Sterling to remove them. (R. at 181.) At the end of the day, SSgt Alexander noticed that LCpl Sterling had not removed the quotations, and she removed them herself and threw them in the trash. (R. at 181.) The next day, upon discovering that LCpl Sterling had reposted the quotations, SSgt Alexander again ordered LCpl Sterling to remove

them. (R. at 181.) When LCpl Sterling did not, SSgt Alexander again removed the quotations herself. (R. at 181-82.)

According to LCpl Sterling, SSgt Alexander said that she wanted the quotations removed because she did not "like their tone." (R. at 312, 340.) LCpl Sterling added that SSgt Alexander's exact order was to "take that S-H-I-T off your desk or remove it or take it down." (R. at 312.) For her part, the only reason SSgt Alexander gave for why the quotations "needed to be removed" was that LCpl Sterling shared her desk with another junior Marine. (R. at 181.) LCpl Sterling testified, however, that she did not share a desk with anyone else in May 2013; she only started sharing a desk afterward, when she was transferring out of S-6 and another Marine was transferring in. (R. at 306, 311.)[2] In any event, neither SSgt Alexander nor any other witness testified that any Marine (including the Marine who purportedly shared LCpl Sterling's desk) was ever distracted, annoyed, or agitated by—or even saw—the quotations. Indeed, the only witnesses who testified on the subject—all of whom visited LCpl Sterling in her workspace in May 2013—stated that they were never distracted, annoyed, or agitated by

[2] SSgt Alexander never identified the Marine who purportedly shared LCpl Sterling's desk, and the Government did not call that Marine as a witness.

anything on or around LCpl Sterling's desk during that time. (R. at 217, 233, 256.)[3]

The Military Judge's Verbal Ruling

At trial, LCpl Sterling moved to dismiss the specifications alleging that she willfully disobeyed SSgt Alexander's orders to remove the Bible quotations. (R. at 266.) LCpl Sterling argued that SSgt Alexander's orders were unlawful because they violated her right to free exercise of religion and lacked a valid military purpose. (R. at 280, 288.) Among other things, LCpl Sterling invoked Department of Defense Instruction (DODI) 1300.17, Accommodation of Religious Practices within the Military Services. (R. at 271; Appellate Exhibit (AE) XXXVI.)[4]

The military judge denied the motion to dismiss from the bench, issuing no written decision. (R. at 362.) The judge acknowledged that the quotations "were biblical in nature" and contained "religious language." (R. at 362.) But he concluded that the order was lawful because, in his view, LCpl Sterling's workspace "was shared by at least one other person," and "other service members" who "came to [LCpl Sterling's] workspace for

[3] The military judge prohibited LCpl Sterling from testifying whether she had received any comments about the quotations from others. (R. at 310.) He also prohibited LCpl Sterling from asking SSgt Alexander whether she had received any comments about them. (R. at 184.)

[4] In January 2014, the DOD revised DODI 1300.17 to expressly incorporate the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb *et seq.*

assistance ... could have seen the signs." (R. at 362.) Without reference to any authority, the military judge concluded that the orders "did not interfere with [LCpl Sterling's] private rights or personal affairs in any way." (R. at 362.) The military judge instructed the court-martial members that, as a matter of law, SSgt Alexander's orders to remove the quotations were lawful. (R. at 368.) The members convicted LCpl Sterling of disobeying SSgt Alexander's orders. (R. at 1-2.)[5]

The NMCCA's Decision

LCpl Sterling appealed to the NMCCA, again arguing that SSgt Alexander's orders to remove the Biblical quotations were unlawful because they violated her right to free exercise of religion and lacked a valid military purpose. Among other things, she raised RFRA and DODI 1300.17 as potential defenses to the charges of which she was convicted.

The NMCCA affirmed LCpl Sterling's convictions and sentence, holding, in relevant part, that SSgt Alexander's orders were lawful. *Sterling*, slip op. at 7-11. Turning first to whether the orders violated LCpl Sterling's religious

[5] The members also convicted LCpl of several other charges not at issue in this petition (failing to go to her appointed place of duty, disrespect toward a superior commissioned officer, and two specifications of disobeying the lawful order of a noncommissioned officer) while acquitting her of one charge (making a false official statement). (R. at 1-2.)

freedom, the court stated that "to invoke the protection of the RFRA," LCpl Sterling "must first demonstrate that the act of placing the signs on her workstation is tantamount to a 'religious exercise.'" *Id.* at 8 (quoting 42 U.S.C. §2000cc-5(7)(A)). The court acknowledged the "deference courts [must] pay to questions regarding the importance of religious exercises to belief systems." *Id.* But it nevertheless concluded that "the definition of a 'religious exercise' requires the practice be 'part of a system of religious belief.'" *Id.* (quoting 42 U.S.C. §2000cc-5(7)(A)). In the court's view, "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." *Id.* (quotation marks omitted). Thus, the court rejected LCpl Sterling's "invitation to define 'religious exercise' as any action subjectively believed by the appellant to be 'religious in nature.'" *Id.* at 8-9.

The NMCCA acknowledged that LCpl Sterling had "taped a biblical quotation in three places around her workstation, organized in a fashion to represent the trinity," and it acknowledged that LCpl Sterling had "invoke[d] religion" to explain the posting. *Id.* at 9. The court nonetheless held that there was "no evidence that posting [the] signs at her workstation was an 'exercise' of that religion in the sense that

such action was 'part of a system of religious belief.'" *Id.* In the court's view, LCpl Sterling had simply posted "what she believed to be personal reminders that those she considered adversaries could not harm her." *Id.* Such conduct, the court believed, "does not trigger the RFRA." *Id.* Accordingly, the court did not address whether the orders to remove the quotations advanced a compelling governmental interest or were the least restrictive means of advancing that interest.

The NMCCA next held that the orders had a valid military purpose. The court acknowledged the "meager findings of fact" by the military judge on this question. *Id.* at 10. It nevertheless concluded that the orders were valid because the other Marine purportedly sharing LCpl Sterling's desk and other Marines coming to the desk "would be exposed to biblical quotations in the military workplace." *Id.* The court added that the specific Biblical quotation in question—"no weapon formed against me shall prosper"—"could be interpreted as combative" and thus "could certainly undercut good order and discipline." *Id.* at 11. In a footnote, the court conceded the "possible implication that [the] orders may have on [LCpl Sterling's] Free Exercise ... rights" but continued to uphold their lawfulness. *Id.* at 10 n.19.

I.

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

The Religious Freedom Restoration Act of 1993 (RFRA) was enacted in the wake of the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* rejected the test developed and applied in earlier cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). That test assessed whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). By contrast, *Smith* held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Id.* at 2761 (quotation marks omitted).

Congress responded to *Smith* by enacting RFRA, which provides that "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). Under RFRA, government may substantially burden a person's "exercise of religion" only if it demonstrates that "application of the burden to the person" is (1) "in furtherance of a compelling governmental interest," and (2) "the least restrictive means of furthering that compelling governmental interest." *Id.* §2000bb-1(b).

RFRA originally defined "exercise of religion" as "the exercise of religion under the First Amendment." *See Hobby Lobby*, 134 S. Ct. at 2761-62. In the Religious Land Use and Institutional Persons Act of 2000 (RLUIPA), however, Congress amended RFRA's definition of "exercise of religion" to incorporate RLUIPA's definition of that term. RLUIPA, and thus RFRA, defines "exercise of religion" as "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). Congress specifically mandated that this concept "be construed in favor of a broad protection of religious exercise." *Id.* §2000cc-3(g).

Consistent with Congress' instruction, the Supreme Court recently held in *Hobby Lobby* that RFRA "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. Indeed, the Court repeatedly emphasized this aspect of RFRA. *See, e.g.*, *id.* at 2761 (RFRA "ensure[s] broad protection

for religious liberty"); *id.* at 2762 n.5 (RFRA has "same broad meaning" of "exercise of religion" as RLUIPA); *id.* at 2767 ("RFRA was designed to provide very broad protection for religious liberty."). The Court further held that RFRA provides "even broader protection for religious liberty than was available" under pre-*Smith* decisions like *Sherbert* and *Yoder*. *Id.* at 2761 n.3. That is so, the Court explained, because RLUIPA's amendment of RFRA's definition of "exercise of religion" "deleted the prior reference to the First Amendment," *id.* at 2772, in "an obvious effort to effect a complete separation from First Amendment case law," *id.* at 2761-62.

Relatedly, the Supreme Court has also held that "the federal courts have no business addressing ... whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 2778. This prohibition, which further underscores the Court's broad construction of "exercise of religion," predates RFRA's enactment. *See, e.g.*, *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim."); *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."); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714

(1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969); *United States v. Ballard*, 322 U.S. 78, 87 (1944). The courts' "narrow function" is to determine whether the asserted belief reflects "'an honest conviction'" by the person asserting it. *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716); *see also id.* at 2774 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere.'").

Congress has made clear that RFRA applies to military actions. The House Judiciary Committee's report on RFRA states that "[p]ursuant to the Religious Freedom Restoration Act, the courts must review the claims of ... military personnel under the compelling governmental interest test." H.R. Rep. No. 103-88, at 8 (1993). Similarly, the Senate Judiciary Committee's report states "[u]nder the unitary standard set forth in the Act, courts will review the free exercise claims of military personnel under the compelling governmental interest test." S. Rep. No. 103-111, at 12 (1993). Accordingly, RFRA applies to military free exercise claims. *See, e.g.*, *Rigdon v. Perry*, 962 F. Supp. 150, 161 (D.D.C. 1997).

The NMCCA's cramped interpretation of the term "exercise of religion"—and refusal even to apply RFRA on that basis—cannot be

squared with the foregoing principles. Contrary to controlling precedent, the NMCCA gave a narrow construction to "exercise of religion" by holding that it "requires the practice be 'part of a system of religious belief,'" and "[p]ersonal 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." *Sterling*, slip op. at 8. Thus, the NMCCA concluded, "exercise of religion" categorically does not extend, and RFRA categorically does not apply, to an "action subjectively believed by [a person] to be 'religious in nature.'" *Id.* at 8-9.

In so holding, the NMCCA did not even acknowledge governing authority holding that RFRA "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. And its constricted view of "exercise of religion" in RFRA cannot be reconciled with the "very broad protection" of religious liberty that RFRA provides. Indeed, the "limitations" placed on the term "exercise of religion" by the NMCCA, *Sterling*, slip op. at 8, are at odds with the plain text of RFRA and RLUIPA, which protect "*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); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"

(quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))). Nothing in the statutory text provides that an "exercise of religion" must be "part of" a system of religious belief, as the NMCCA held.

In announcing its narrow definition of "exercise of religion," the NMCCA relied on a single pre-RFRA, pre-*Smith* decision, *Yoder*. That reasoning is flawed for several reasons. First, as explained, *Hobby Lobby* made clear that RFRA provides "even broader protection for religious liberty than was available" under pre-*Smith* decisions like *Yoder*. Thus it is incorrect to rely on *Yoder* to place limits on RFRA's scope, as the NMCCA did.

Second, even on its face, *Yoder* does not support the NMCCA's conclusions. *Yoder* simply noted that conduct rooted in "philosophical and personal" rather than "religious" beliefs is not entitled to First Amendment protection. 406 U.S. at 216. As the Supreme Court has explained, this means that beliefs must be "'rooted in religion'" to receive the protection of the Free Exercise Clause; "purely secular views do not suffice." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) (quoting *Thomas*, 450 U.S. at 713). But the NMCCA's holding goes beyond leaving "purely secular views" unprotected; it categorically excludes from First Amendment (and RFRA) protection *any* conduct a person sincerely believes is "religious in nature."

Third, *Yoder* does not support the NMCCA's belief that "courts need some reference point to assess whether the practice is indeed religious," which in turn requires determining whether a practice is "part of a system of religious belief." *Sterling*, slip op. at 8. The Supreme Court has firmly rejected these propositions in holding that courts are not to inquire about "the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Rigdon*, 962 F. Supp. at 161 ("[I]t is not for this Court to determine whether encouraging parishioners to contact Congress on the Partial Birth Abortion Ban Act is an 'important component' of the Catholic or Jewish faiths."); *see* pp. 12-13, *supra*. The only potentially permissible inquiry is whether the asserted claim is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *United States v. Lee*, 455 U.S. 252, 257 n.6 (1982) (quoting *Thomas*, 450 U.S. at 715) (quotation marks omitted). But even that limited question predates RFRA, and thus may well be impermissible. *See Hobby Lobby*, 134 S. Ct. at 2778 (courts "have no business addressing ... whether the religious belief asserted in a RFRA case is reasonable").

There can be little doubt that the NMCCA's improperly narrow construction of "exercise of religion" was materially prejudicial to LCpl Sterling's substantial rights, for under a correct interpretation of that term, her conduct plainly

constituted an "exercise of religion" subject to RFRA.[6] According to uncontradicted testimony, LCpl Sterling is a Christian. She posted three small slips of paper containing the same Bible quotation—"no weapon formed against me shall prosper"—around her workspace. (R. at 307, 310.) LCpl Sterling "did a trinity" of the quotation to, in her words, "have [the] protection of three around me". (R. at 308, 310.) There is nothing "purely secular" about this conduct. *Frazee*, 489 U.S. at 833. To the contrary, the reliance that LCpl Sterling—a Christian—placed on an inspirational quotation drawn from the Bible—a Christian text—posted in the form of a Trinity—a Christian belief—is plainly "rooted in religion." *Thomas*, 450 U.S. at 713. By any reasonable measure, LCpl Sterling's posting of the Biblical quotations is as much an "exercise of religion" as, for example, refusing to manufacture tank turrets, *see Thomas*, 450 U.S. at 714-15, or refusing to provide health insurance covering abortifacients, *see Hobby Lobby*, 134 S. Ct. at 2779, both of which have been held to be exercises of religion. As such, the NMCCA erred in failing even to apply RFRA to LCpl Sterling's obvious "exercise of religion."

[6] LCpl Sterling preserved this issue at trial (R. at 280), and she provided to the military judge a copy of DODI 1300.17, which specifically references RFRA and provides the same definition of "exercise of religion" as RFRA (R. at 271; Appellate Exhibit XXXVI.).

II.

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

Even under the NMCCA's improperly narrow interpretation, LCpl Sterling's conduct constituted an "exercise of religion" that triggers application of RFRA. The NMCCA held that in order to be an "exercise of religion," the conduct in question must be "part of a system of religious belief." *Sterling*, slip op. at 8. LCpl Sterling's conduct amply satisfies this test.

As an initial matter, it bears emphasizing that the relevant facts are undisputed. The government has never contested that LCpl Sterling is a practicing Christian.[7] The NMCCA acknowledged that what LCpl Sterling sought to tape on her workspace was a "Biblical quotation." *Sterling*, slip op. at 9-10; *see also* R. at 362 (military judge recognizing the "religious quotes" containing "religious language"). The NMCCA further recognized that LCpl Sterling had placed the quotation around her workspace "in a fashion to represent the trinity." *Sterling*, slip op. at 9. And it is undisputed that LCpl

[7] Trial testimony also established that LCpl Sterling is a regular churchgoer. *See, e.g.*, R. at 275.

Sterling did so to "have [the] protection of three around me" in response to perceived harassment by others. (R. at 307, 310.)

These uncontroverted facts plainly demonstrate that LCpl Sterling's conduct was "part of a system of religious belief." One does not need a seminary degree to know that the Bible is the foundational religious text of Christianity, or that the concept of the Trinity—*i.e.*, three persons in one God—is a fundamental Christian belief.[8] Persons of all faiths, moreover, routinely seek comfort, inspiration, or assistance from the tenets of their faith. Certainly Christianity is no exception; indeed, the Bible frequently assures believers that they will be protected from harm and exhorts believers to beseech God for the same. *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 faithful, who shall establish you, and keep you from evil."). LCpl Sterling posted one such Bible quotation to provide comfort and inspiration to her during

[8] *See, e.g.*, Catechism of the Catholic Church §261 ("The mystery of the Most Holy Trinity is the central mystery of the Christian faith and of Christian life. God alone can make it known to us by revealing himself as Father, Son and Holy Spirit."); BGEA Staff, *Can you explain the Trinity to me?*, Billy Graham Evangelistic Association (June 1, 2004), http://perma.cc/2ng4-8mg5 (explaining that under the "doctrine of the Trinity," there are "three personal distinctions in [God's] complex nature").

a difficult period, and she did so in a way intended to invoke the further protection of the Trinity. If this conduct is not "part of a system of religious belief," it is hard to imagine what is.

The NMCCA's contrary determination strains credulity. The NMCCA believed there was "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,'" in part because LCpl Sterling "never told [SSgt Alexander] that the signs had a religious connotation." *Sterling*, slip op. at 9. Instead, LCpl Sterling "was simply placing what she believed to be personal reminders that those she considered adversaries could not harm her." *Id.* As a threshold matter, SSgt Alexander's knowledge of the reasons for LCpl Sterling's conduct is immaterial to the question whether that conduct is an "exercise of religion" in the first place. Neither RFRA's statutory text nor any case law requires a government official to have personal knowledge of a claimant's religious beliefs in order to trigger RFRA's application. Furthermore, to the extent the quotations were "personal reminders" to LCpl Sterling, the critical point is that the "reminders" were quotations drawn from the central Christian religious text, placed in a formation reflecting a central Christian belief, designed to remind and reassure LCpl Sterling of the divine protection that her

Christian faith not just promises her but encourages her to invoke. Plainly her conduct was "part of a system of religious belief." Accordingly, even under the NMCCA's flawed standard, the court should have applied RFRA.

III.

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

Even if LCpl Sterling's conduct was not an "exercise of religion" requiring application of RFRA, SSgt Alexander's orders to remove the Biblical quotations lacked a valid military purpose and were thus unlawful. An order "may not ... interfere with private rights or personal affairs" without "a valid military purpose." *United States v. New*, 55 M.J. 95, 106 (C.A.A.F. 2001) (quoting paragraph Manual for Courts-Martial, United States ¶14c(2)(a)(iii) (1995 ed.) ("MCM")) (quotation marks omitted). An order has a "valid military purpose" if it "relate[s] 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." *Id.* (quoting MCM); *see also United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002); *United States v. Hughey*, 46 M.J. 152, 154 (C.A.A.F. 1997).

The NMCCA acknowledged the "meager findings of fact" underlying the military judge's determination that SSgt Alexander's orders had a valid military purpose. Indeed, the military judge's only factual findings were that (1) LCpl Sterling's workspace "was shared by at least one other person"; (2) "other service members came to [her] workspace" and "could have seen the signs"; and (3) the specific quotation was "biblical in nature." (R. at 362.) From these spare findings, the NMCCA leaped to the speculative conclusion that other Marines "*would* be"—not could be—"exposed to biblical quotations." *Sterling*, slip op. at 10 (emphasis added). Even more speculatively, the NMCCA stated that "[i]t is not hard to imagine" the "divisive impact to good order and discipline" that "may result" from such exposure. *Id.* The NMCCA's speculation continued: "The risk that such exposure could impact the morale or discipline of the command is not slight." *Id.* And the specific Biblical quotation "could be interpreted as combative." *Id.* at 11.

The NMCCA's string of hypotheses—"not hard to imagine," "may result," "could impact," "not slight" risk, "could be

interpreted"—does not support a determination of a valid military purpose. *See, e.g.*, *United States v. Collier*, 67 M.J. 347, 355 (C.A.A.F. 2009) (holding that appellate court may not affirm trial ruling based on speculation); *United States v. Boylan*, 49 M.J. 375, 378 (C.A.A.F. 1998); *Smith v. Vanderbush*, 47 M.J. 56, 63 (C.A.A.F. 1997). That is especially the case when the record does not contain a single piece of evidence suggesting that any Marine (including the Marine who supposedly shared LCpl Sterling's desk, whom the government never identified, much less called as a witness) was ever distracted or dismayed by the quotations—or even saw them, for that matter. Indeed, every witness who addressed that subject unequivocally testified that they had never seen anything of a distracting or bothersome nature on LCpl Sterling's workspace.[9]

Furthermore, the NMCCA's speculation is internally inconsistent. In rejecting LCpl Sterling's claim that posting the quotations was an exercise of religion, the NMCCA proceeded

[9] Equally unsupported by the record is the NMCCA's belief that LCpl Sterling and SSgt Alexander were "locked in an antagonistic relationship" stemming from events predating the charged misconduct. *Sterling*, slip op. at 11. To the contrary, SSgt Alexander testified that although she served as LCpl Sterling's drill instructor, SSgt Alexander did not remember LCpl Sterling from that time. (R. at 185.) The NMCCA also believed the supposedly "antagonistic relationship" was "surely visible to other Marines," *Sterling*, slip op. at 11, but that is more sheer speculation. Not one "other Marine[]" testified that they observed an "antagonistic relationship" between LCpl Sterling and SSgt Alexander in S-6.

on the premise that the quotations were not outwardly "religious"; thus, for example, the NMCCA faulted LCpl Sterling for failing to tell SSgt Alexander "that the signs had a religious connotation." *Sterling*, slip op. at 9. But in rejecting LCpl Sterling's claim that the orders lacked a valid military purpose, the NMCCA proceeded on the premise that any Marine who saw the quotations would immediately identify them as "religious quotations"—specifically, Christian religious quotations, since the court expressed concerns about service members who do not "share that religion." *Id.* at 10. Both premises—and the determinations based on them—cannot be correct.

In addition to the lack of record evidence and the internal inconsistency, the NMCCA's speculation cannot stand up to reality. The NMCCA suggested that "exposure" to three small slips of paper with a Biblical quotation "could impact the morale or discipline of the command." *Id.* But military members are often more directly exposed to far more religious material every day. For example, federal law mandates that every ship in the Navy conduct nightly evening prayers "compelling" every sailor, regardless of religious affiliation and preference, to listen to a prayer. *See* Beverly J. Lesonik, *Tattoo, Tattoo. Stand by for the Evening Prayer*, U.S. Navy (July 29, 2014, 8:51 PM), http://perma.cc/uqq4-wfzb; 10 U.S.C. §6031(b). Moreover, change of command and military retirement ceremonies routinely

begin and end with a prayer from a chaplain. Accordingly, the notion that walking by a desk with a Biblical quotation "could"—much less would—wreak havoc on good order and discipline is not plausible.

In the end, almost every sentence in the NMCCA's opinion supporting the validity of the orders to remove the quotations relies on conjecture. The NMCCA wrongly constructed a rationale for the military judge's ruling that the military judge himself did not articulate. In so doing, NMCCA engaged in improper speculation, unsupported by the record, to find that orders were necessary to support good order and discipline. That is not the stuff of appellate review or military justice. *See, e.g.*, 10 U.S.C. §866(c) (Court of Criminal Appeals "may act only with respect to the findings ... as approved by the convening authority"). Because the orders lacked a valid military purpose, they were unlawful, and LCpl Sterling's convictions for disobeying those orders cannot stand.

Conclusion

The Court should grant the petition.

Respectfully submitted,

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Appendix: *United States v. Sterling*, No. 201400150, 2015 WL 832587 (N-M. Ct. Crim. App. Feb. 26, 2015).

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on May 19, 2015.

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