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	CONSOLIDATED RESPONSE AND REPLY BRIEF OF APPELLANT 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:

HIRAM S. SASSER, III
CAAF Bar No. 36566
MICHAEL D. BERRY
CAAF Bar No. 34828
First Liberty Institute
2001 W. Plano Pkwy, Ste 1600
Plano, TX 75075
(972)941-4445
mberry@libertyinstitute.org

JOHN J. STEPHENS
Major, USMC
CAAF Bar No. 36142
Appellate Defense Division
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg 58, Ste 100
Washington Navy Yard, DC 20374
(202) 685-8587
john.j.stephens@navy.mil

PAUL D. CLEMENT
(*pro hac vice*)
GEORGE W. HICKS, JR.
(*pro hac vice*)
MICHAEL H. MCGINLEY
(*pro hac vice*)
Bancroft PLLC
500 New Jersey Avenue NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

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Introduction

The Government does not dispute that the Religious Freedom Restoration Act (RFRA) applies to military discipline or that "the lower court was incorrect" in its RFRA holding. *See* Appellee's Br. 33. It nonetheless attempts to salvage a concededly erroneous holding through an assortment of forfeited forfeiture arguments and other claims that are without merit.

Eager to head off a clarifying ruling that RFRA was both applicable and violated here, the Government contends that Lance Corporal (LCpl) Sterling has forfeited her RFRA claim altogether by failing expressly to invoke RFRA during her trial and by not objecting to the purported absence of findings by the Military Judge on this issue. The Government did not make these arguments below but did make them in urging this Court not to grant review, and the Court not only implicitly rejected them in granting review but also specified additional questions on the merits of the RFRA claim. The Court was right to do so. Both of the Government's forfeiture arguments are themselves plainly forfeited; the Government had every opportunity to raise them below, but elected not to do so. And they are clearly wrong in any event. LCpl Sterling sufficiently invoked RFRA at trial, the lower court addressed her RFRA claim in the decision now under review, and LCpl Sterling has, for obvious reasons, focused on errors in that decision. The Government's implicit suggestion that this Court made a mistake in

granting review, and the Government's implicit invitation to render the exhaustive briefing of LCpl Sterling and her array of *amici* for naught, should be rejected.

The Government's desire to avoid the merits of this case is understandable: The RFRA violation here is clear. There can be no doubt that LCpl Sterling was exercising her sincerely held religious beliefs when she placed a Biblical quotation around her workspace in the form of a trinity. The Government effectively conceded as much below, but now, for the first time in this case, the Government disputes that LCpl Sterling is a Christian and that the quotation she placed around her desk was drawn from the Bible. But this belated second-guessing of LCpl Sterling's uncontroverted testimony—which established that she *is* a Christian and that she placed the signs around her desk for sincerely-held *religious* reasons—is both forfeited and manifestly meritless.

The Government also belatedly claims that Staff Sergeant (SSgt) Alexander's orders and this prosecution did not substantially burden LCpl Sterling's exercise of religion. But in the lower court, not only did the Government *not dispute* substantial burden—despite every opportunity to do so—it took substantial burden as a *given*, arguing only that SSgt Alexander's conduct satisfied strict scrutiny. The Government had it right the first time. The substantial consequences visited upon LCpl Sterling based on her refusal to cease her religious exercise plainly satisfy the substantial burden test.

The Government also belatedly raises what amounts to an exhaustion requirement and hints that LCpl Sterling's religious display could have been accommodated if only she had formally requested an accommodation. That argument is triply problematic. First, the argument is forfeited. Second, it is wrong; there is no exhaustion requirement under RFRA, which affirmatively requires the Government to respect religion and does not require the adherent to seek relief from a prior restraint. Third, this belated argument devastates the one argument that the Government actually presented below, namely that the overwhelming imperatives of the military context allowed its refusal to accommodate LCpl Sterling to satisfy strict scrutiny. If, as the Government now hints, it could have accommodated LCpl Sterling if only she had asked, then it is impossible for the Government to insist that its failure to accommodate her was necessary to further a compelling government interest. In short, the Government has placed all its eggs in the exhaustion basket, even though that argument is both forfeited and wrong.

Even apart from their incompatibility with the exhaustion argument, the Government's strict scrutiny arguments are meritless. The Government claims a compelling interest in good order and discipline, but the Supreme Court has warned time and again that such generalized claims are insufficient to justify specific burdens on a RFRA claimant's rights. The Government does not take

issue with that proposition, but instead claims that it qualifies for a purported exception to that rule because its interest in uniform application of order and discipline cannot admit of any exceptions under RFRA. But this argument is fatally incompatible with the very accommodation process that the Government repeatedly touts, which envisions numerous exceptions if only the adherent would ask. The Government also half-heartedly contends that accommodating RFRA rights would raise Establishment Clause concerns, but the Supreme Court has rejected that argument time and again.

The Government also does not come close to satisfying its exceptionally demanding burden that prohibiting LCpl Sterling's Biblical quotations and court-martialing her for posting them was the least restrictive means of protecting any compelling government interest. The Government had a stable of other, less restrictive alternatives to the path it chose. Yet, it does not even try to address those less restrictive measures; instead, it falls back once again on its accommodation-process argument, which is both forfeited and incorrect. Congress did not demand exhaustion, and the Government cannot impose that requirement through the back door by suggesting that the possibility of an accommodation is a less restrictive alternative.

Finally, even if RFRA does not apply to LCpl Sterling's religious exercise and somehow permits the Government to punish her for her religious actions, there

was no valid military purpose to support SSgt Alexander's orders to remove the Biblical quotations. The lower court improperly based its decision on unfounded speculation that unnamed other service members *might* be "distracted" by the Biblical quotations. But that it is not enough to support orders that directly infringed LCpl Sterling's core individual rights. As throughout the rest of its brief, the Government barely mentions the decision under review, offering only a smattering of irrelevant claims that were never raised below and do not affect the analysis.

Argument

I

LANCE CORPORAL STERLING PRESERVED HER RFRA CHALLENGE.

The Government offers a mishmash of forfeiture arguments to distract from the straightforward RFRA violation in this case. The Court has heard most of these arguments before, in the Government's opposition to LCpl Sterling's petition for review. Those arguments—themselves all forfeited by the Government, which raised none of them before the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and instead argued the merits—rightly did not deter the Court from granting review; indeed, the Court directed further briefing on all the RFRA questions in the case. Now that the parties and an array of *amici* have done just that, the Government's principal response is to double down on its belated

forfeiture claim. This transparent (albeit understandable) effort to avoid the merits issues on which this Court granted review and that numerous parties have addressed—and the Government's implicit contention that the Court erred in granting review—should be rejected.

A. The Government's Claim That Lance Corporal Sterling Has Forfeited Her RFRA Claim by Purportedly Failing to Assert It at Trial Fails.

The Government first contends that LCpl Sterling "forfeited any RFRA issue on appeal by not making a RFRA claim at trial." *See* Appellees' Br. 32; *see also id.* at 1, 24, 28-33. That is the exact same objection the Government lodged at the petition stage, although not in the courts below. *See, e.g.*, Appellee's Answer to Supp. to Pet. for Grant of Review 11 ("Appellant never argued her RFRA claim to the Military Judge, nor did she reference her burden under RFRA."); *id.* at 20 ("Appellant never explicitly raised RFRA at trial."). That assertion did not pose an obstacle to this Court's granting review, and it similarly poses no obstacle to this Court's deciding the merits of this case.

To begin with, the Government has forfeited its argument that LCpl Sterling waived her RFRA claim because it never pressed that argument below. "[I]t is well-established that the government can 'waive waiver' implicitly by failing to assert it." *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (quotation marks omitted); *see also Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2009); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1445 (7th Cir. 1996); *United States v. Quiroz*, 22 F.3d

489, 490-91 (2d Cir. 1994) (principle is applicable when "the government … neglected to argue on appeal that a defendant has failed to preserve a given argument in the district court").

That is precisely what the Government did here. In her opening brief to the NMCCA, LCpl Sterling explicitly argued that her rights under RFRA had been violated. *See* Sterling NMCCA Br. 25-29. In its response brief, the Government never contended that LCpl Sterling's purported failure to invoke RFRA before the Military Judge defeated that claim. Instead, it argued the merits, contending that the Government "can substantially burden the free exercise of religion when it (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." NMCCA Answer on Behalf of Appellee 24. The Government then claimed that it satisfied this test, because SSgt Alexander's orders were "made in the least restrictive means in order to further a compelling governmental interest." *Id.* at 27. By "elect[ing] to address the issue on the merits" in the NMCCA, *Tokatly*, 371 F.3d at 618, and successfully attempting to procure a favorable ruling on the merits from that court, the Government thus forfeited its argument that LCpl Sterling forfeited her RFRA claim by failing expressly to invoke RFRA at trial.

Not surprisingly, the NMCCA did not remotely suggest that LCpl Sterling had forfeited her RFRA claim. Rather, in the decision now under review, it

proceeded to analyze and decide LCpl Sterling's RFRA claim on the merits. (*See* J.A.004-007.) This further undercuts any suggestion that this Court should decline to address LCpl Sterling's RFRA claim. *Cf. United States v. Wells*, 519 U.S. 482, 488 (1997) ("[W]e may address a question … if it was 'pressed in or passed on' by the Court of Appeals." (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992) (brackets omitted)).

Even putting aside that the Government forfeited its forfeiture argument, the argument is unavailing in all events. LCpl Sterling invoked her RFRA rights at trial. She submitted DoD Instruction (DoDI) 1300.17 as an exhibit to her motion challenging the lawfulness of SSgt Alexander's orders. (*See* J.A.236-244.) As the Government concedes, *see* Appellee's Br. 21 n.7, that document cites RFRA and expressly incorporates RFRA's statutory language. In fact, DoDI 1300.17 only began citing RFRA on January 22, 2014, and LCpl Sterling brought her motion almost immediately thereafter, on February 1, 2014. *See id.*; *see also* J.A.080-081. Testimony on the motion went toward the religious nature of the quotations and LCpl Sterling's own religious beliefs, and LCpl Sterling's argument on the motion stressed that the orders were "unlawful [on] the ground of [her] religion." (J.A.089.)

Under these circumstances, that LCpl Sterling did not explicitly invoke RFRA or label her argument as a "RFRA defense" before the Military Judge does

not somehow result in forfeiture of her arguments or render meaningless either the lower court's RFRA decision or this Court's decision to grant review. *Cf. Johnson v. City of Shelby*, 135 S. Ct. 346, 346 (2014) (per curiam) (summarily reversing decision that dismissed complaint "for imperfect statement of the legal theory supporting the claim asserted"). The Government and the Military Judge were clearly aware that LCpl Sterling raised a religious-freedom objection to SSgt Alexander's orders, which under DoDI 1300.17 is premised on RFRA. Indeed, in one of the Government's leading cases, the defendant "had not specifically asserted a claim under RFRA" before the district court, and yet the court of appeals proceeded to address that claim. *United States v. Lafley*, 656 F.3d 936, 938-39 (9th Cir. 2011). The Government's belated argument to the contrary provides no reason for this Court not to do the same, especially when the lower court reached the merits.

B. The Government's Claim That Lance Corporal Sterling Has Forfeited Her RFRA Claim by Purportedly Failing to Object to the Military Judge's Lack of Findings Fails.

The Government next oddly attempts to twist its confession of error into a forfeiture problem for LCpl Sterling. Admitting that the NMCCA impermissibly "narrowed RFRA's definition of 'exercise of religion,'" Appellee's Br. 33, the Government maintains that "the real issue lies … in the Military Judge's lack of findings as to sincerity and substantial burden," *id.* at 34; *see also id.* at 39. But,

the Government contends, LCpl Sterling "lodges no objection" to this lack of findings, *see id.* at 35, and "[i]nstead of objecting to the Military Judge's lack of findings as to sincerity or substantial burden," *id.* at 36, she has "focus[ed] virtually exclusively on the lower Court's opinion," *id.* at 37. Therefore, in the Government's view, she has "waive[d] any objection as to that complete lack of findings." *Id.* at 34.

This Court has already heard this argument, too, and implicitly—and correctly—rejected it. At the petition stage, the Government argued against review because "the Military Judge made none of the factual findings that seem to be required for a prima facie RFRA defense," including sincerity and substantial burden. *See* Appellee's Answer 20-21. The Court nevertheless granted review, and for good reason. As with its argument regarding LCpl Sterling's purported failure to assert RFRA at trial, the Government never made this argument to the lower court, despite every opportunity to do so in response to LCpl Sterling's RFRA arguments. The Government has thus once again forfeited its forfeiture objection. And, once again, the NMCCA addressed LCpl Sterling's RFRA claim on the merits, without any mention of the Military Judge's purported failure to make findings on the issue.

The Government's argument is in all events without merit. Of course LCpl Sterling has "focus[ed] virtually exclusively on the lower Court's opinion."

Appellee's Br. 37. That is the decision under review by this Court, following LCpl Sterling's petition seeking review of that decision and this Court's order granting review of that decision and specifying additional questions on the merits. LCpl Sterling obviously *does* object to the Military Judge's ruling, which was affirmed by the decision she now challenges. But like any appellant in any appeal, she has focused on the errors in the decision under review, along with the additional merits questions specified by this Court. And now that the Government has conceded that the lower court's decision *was* erroneous, the very last thing this Court should do is reward the Government's abandonment of its victory below by *affirming* the NMCCA's ruling, which everyone agrees was incorrect. The notion that LCpl Sterling has somehow lost her ability to vindicate her rights because the Government has abandoned any defense of the decision under review is utter nonsense.

II

THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA) PROVIDES VERY BROAD PROTECTION FOR RELIGIOUS LIBERTY. LANCE CORPORAL STERLING'S POSTING OF BIBLICAL QUOTATIONS AT HER WORKSPACE WAS A CORE EXERCISE OF HER SINCERELY HELD RELIGIOUS BELIEFS. STAFF SERGEANT ALEXANDER'S ORDERS TO REMOVE THE SIGNS SUBSTANTIALLY BURDENED LANCE CORPORAL STERLING'S RELIGIOUS EXERCISE. AND THE ORDERS WERE NEITHER BASED ON A COMPELLING INTEREST NOR NARROWLY TAILORED.

The Government does not dispute that RFRA's "very broad protection for religious liberty" applies in the military context. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Nor does it dispute that the NMCCA misapplied RFRA's definition of an "exercise of religion." Appellee's Br. 33. Instead, the Government spuriously and belatedly questions the sincerity of LCpl Sterling's Christian beliefs, incredibly suggests that her placement of a Biblical quotation in a "trinity" surrounding her workspace was not a religious exercise, and disingenuously maintains that LCpl Sterling was required to obtain prior permission to exercise her religion. The Government made none of these arguments in the lower court, however, and as a result, they are all forfeited. Worse still, the Government's belated exhaustion objection and related suggestion that it might have accommodated LCpl Sterling if she had only asked fatally undermines the only arguments the Government actually preserved. Having argued below that it had a compelling interest in disallowing LCpl Sterling's sincere exercise of religion, the Government belatedly suggests that the only problem is that she did not ask for an accommodation. Not only is that wrong; it makes clear that the Government's denial cannot satisfy strict scrutiny.

A. Lance Corporal Sterling's Placement of a Biblical Quotation in a Trinity Around Her Workspace Was a Core Exercise of Her Sincerely Held Religious Beliefs.

Rather than defend the lower court's erroneous decision, the Government instead takes the remarkable step of questioning the sincerity of LCpl Sterling's religious beliefs. *See* Appellee's Br. 42-45. In fact, the Government even goes so far as to suggest that the quotation she placed around her desk is not actually drawn from the Bible. *See id.* at 15, 18-19 & n.5. The Government has never before advanced these astonishing arguments, and for good reasons: They are conclusively foreclosed by the record and, in all events, have no legal merit.

LCpl Sterling's uncontroverted testimony at trial established that she is a Christian and that she was exercising her religion when she arranged a Biblical quotation in a "trinity" around her workspace. The Government professes ignorance about LCpl Sterling's religious affiliation, Appellee's Br. 13 n.3, and claims that she "never explained if the placement of the three signs in her office … were linked to her religion." *Id.* at 15. But that is simply false. LCpl Sterling testified at trial that she identifies as a Christian and as a "religious person." (J.A.079, 111, 114.) She also testified that she considers the Bible "a religious text," (J.A.079), that she consciously drew the quotation at issue from "scripture," (*id.*), and that she deliberately chose to tape three quotations around her workspace in order to represent the concept of the "trinity," to "have [the] protection of three

around [her]," and as "a mental reminder" of God's promise of protection. (J.A.111, 114.) And based on LCpl Sterling's testimony, the Military Judge found that the quotation was "biblical in nature." (J.A.159.) The lower court likewise agreed. (*See* J.A.006 (NMCCA referring to "biblical quotations").) There simply can be no serious doubt that LCpl Sterling sincerely holds her religious beliefs or that the quotation on her slips of paper was based in the Bible.[1]

Until now, the Government has never questioned LCpl Sterling's sincerity, much less with the "evidence" it now touts. When LCpl Sterling testified about her religious beliefs at trial, the Government did not offer any contrary testimony. And when the Government was before the NMCCA, it did not question LCpl Sterling's religious sincerity. On the contrary, it acknowledged that LCpl Sterling "stated that she was a religious person and the three signs represented the trinity." NMCCA Appellee's Brief 25. The Government cannot now turn around and claim that LCpl Sterling's religious belief was, in fact, not sincere. The Government had every opportunity to raise this argument in the lower court, but it failed to do so.

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[1] Perhaps the strangest of the Government's sincerity arguments is its suggestion that LCpl Sterling might have drawn the quotation from a song by a musician named Fred Hammond. *See* Appellee's Br. 19 n.5. Setting aside the fact that LCpl Sterling's explicit testimony establishes that she drew the quote from "scripture," it is rather obvious that Fred Hammond—a *gospel singer*—drew the lyrics of his song from the Bible as well. *See The Real Fred Hammond*, http://www.realfredhammond.com/ (describing Mr. Hammond as "the 'Babyface' of gospel"). Thus, even on its own bizarre terms, the Government's argument confirms that LCpl Sterling's placement of the quotation around her desk was an exercise of religion.

Accordingly, the Government has forfeited it. *See, e.g.*, *Shea v. Kerry*, 796 F.3d 42, 56 (D.C. Cir. 2015) (finding the Government's argument forfeited because, "[a]lthough we may affirm a judgment on any ground that the record supports and that the opposing party had a fair opportunity to address, an argument never made below is waived on appeal" (citations and quotation marks omitted)).

In all events, the Government's argument fails on the merits. LCpl Sterling's sincere exercise of religion stands in stark contrast to the claims that courts have rejected in previous RFRA cases. In the canonical RFRA sincerity case, *United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010), the Tenth Circuit held that a gang of drug dealers could not avoid prosecution by claiming membership in "the Church of Cognizance, which teaches that marijuana is a deity and sacrament." *Id.* at 718-19; *see also Hobby Lobby*, 134 S. Ct. at 2774 n.28 (citing *Quaintance*). The Government's effort to place LCpl Sterling's conventional exercise of her Christian faith in the same category of the sham religions in *Quaintance* and other cases involving illegal drugs and gun possession, *see* Appellee's Br. 42-43 & n.15, is disheartening and unavailing. The differences could hardly be more obvious. Placing a "trinity" of small slips of paper with a Biblical quotation around one's workstation is a far cry from inventing a religion as part of an effort to traffic illegal drugs. Nothing in the record supports the Government's assertion that LCpl Sterling placed the Biblical quotations around

her desk for the "secular purpose of 'sticking it' to her superiors." *Id.* at 44. And the Government's repeated, disingenuous invocation of unrelated disciplinary events cannot possibly undermine the direct evidence at trial that LCpl Sterling was exercising her sincerely held Christian beliefs when she placed the Biblical quotations around her workspace.

The Government also appears to question whether LCpl Sterling's placing the signs in the form a trinity is an "exercise of religion." *See* Appellee's Br. 40-42. On both the facts and the law, this claim is mystifying. LCpl Sterling testified—without rebuttal by the Government—that she is a Christian and that she "did a trinity" with the signs in order to "have [the] protection of three around [her]" in response to difficulties she experienced at work. (J.A.111, 114.) *Even if* the quotation on the signs was not a Biblical quotation, her actions would thus plainly constitute an "exercise of religion." But as both courts below acknowledged, and the Government has never before disputed, the signs *did* contain "[B]iblical quotations," (J.A.006), removing any doubt that LCpl Sterling's "placement of the signs" was "a sincere exercise of religion." Appellee's Br. 43. The Government's argument essentially reduces to an attack on the importance or centrality of LCpl Sterling's actions to her religious beliefs. But that is no different from the lower court's cramped reading of RFRA that the Government now says it abandons. Regardless, RFRA squarely forecloses this line of attack when it

defines "religious exercise" 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); 42 U.S.C. §2000bb-2(4). This aspect of the Government's argument should thus be rejected for the same reasons that the lower court's analysis was legally invalid. *See* Appellant's Br. 18-26.

B. The Government Substantially Burdened Lance Corporal Sterling's Exercise of Religion.

Having abandoned the lower court's cramped reading of RFRA and having failed in its effort to impugn the sincerity of LCpl Sterling's religious beliefs, the Government's next tack is to argue that LCpl Sterling suffered no substantial burden on her exercise of religion. This argument likewise fails.

As a threshold matter, the Government has forfeited this argument, too. Before the lower court, not only did the Government *not* dispute substantial burden—despite every opportunity to do so—it took substantial burden as a *given*. Specifically, the Government argued below that "[t]he federal government *can* substantially burden the free exercise of religion when it (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." Appellee's NMCCA Br. 24 (emphasis added). The Government's newly minted argument before this Court that there was no substantial burden at all is "an argument never made below" that "is waived on appeal." *Shea*, 796 F.3d at 56.

Forfeiture is particularly clear with respect to the Government's principal contention that SSgt Alexander's actions did not constitute a substantial burden on LCpl Sterling's exercise of religion because LCpl Sterling did not formally request an accommodation to place the Biblical quotations at her workstation. *See* Appellee's Br. 12, 20-21, 46-51. Indeed, this argument is triply flawed: it is forfeited, wrong, and undermines the strict-scrutiny arguments the Government actually preserved. First, as to forfeiture, this quasi-exhaustion requirement never surfaced below. The Government's brief in the NMCCA did not so much as mention *any* of the accommodation procedures it now invokes, even though it plainly had "a fair opportunity" to raise and address them. *Shea*, 796 F.3d at 56. The Government cannot belatedly invoke them now for the first time.

Second, this argument is deeply flawed. The substantial burden on LCpl Sterling's religious exercise did not disappear merely because the Department of the Navy offers an administrative avenue by which service members may request religious accommodations. On the Government's view, no service member may raise a RFRA defense unless she first requests an administrative accommodation. *See* Appellee's Br. 46-47. Relying on a pre-RFRA case, the Government argues that "[t]he 'considered professional judgment of the [Navy] is that' accommodations should be requested, in writing, by unit commanding officers." Appellee's Br. 47 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986)).

But RFRA imposes no 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 the courts do not blindly defer to the "professional judgment" of the military when doing so would nullify the plain terms of a congressional statute. *See Singh v. McHugh*, 109 F. Supp. 3d 72, 91-92 (D.D.C. 2015) (holding that RFRA required an exception to military grooming rules for a Sikh ROTC candidate). That is especially so when the statute in question is RFRA, which "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. §2000bb-3(a); *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) ("RFRA is unusual in that it amends the entire United States Code."). As between RFRA's statutory protections and the proposition that a service member cannot raise a RFRA defense without first requesting an administrative accommodation, RFRA wins out.

Indeed, nothing in RFRA supports the Government's proposed 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 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. Presented with a similar argument, the Ninth Circuit held that claimants seeking RFRA protection for the use of controlled substances need not first "request an exception to the [Controlled Substances Act]" from the Government, even though a regulatory system for seeking such exceptions is in place. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). The court expressly "decline[d] … to read an exhaustion requirement into RFRA where the statute contains no such condition … and the Supreme Court has not imposed one." *Id.* (citations omitted). For the same reasons, the Department of the Navy's system for accommodating religious beliefs cannot displace RFRA's statutory protections.[2]

[2] The Government has no real response to *Oklevehua*. It dismisses the case as concerning only "prudential ripeness," Appellee's Br. 48-49, but ignores that the Government urged that the case was prudentially unripe *precisely because* the RFRA claimants did not first "request an exception" that would have permitted the conduct in question. The Ninth Circuit squarely rejected the proposition that a RFRA claimant must "request an exception" or otherwise "exhaust [an] administrative remedy" before invoking RFRA, because RFRA "contains no such condition." 676 F.3d at 838 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)). If the failure to exhaust an administrative remedy does not render a case unripe, it is hard to see why it would nonetheless eliminate a substantial burden on a RFRA claimant's exercise of religion, and the Government does not even attempt to make the connection. Instead, puzzlingly, the Government moves on and purports to rebut LCpl Sterling's "appeal to *EEOC v. Abercrombie & Fitch Stores, Inc.*" Appellee's Br. 49. But that case is nowhere to be found in LCpl Sterling's opening brief, much less with respect to substantial burden.

Even on its own terms, the Government is wrong to suggest that the Department of the Navy requires service members to request an accommodation before invoking their RFRA rights. Consistent with RFRA and applicable case law, relevant DoD regulations *permit*, but do not *require*, servicemembers to seek religious accommodations. Nothing in the latest version of DoDI 1300.17 (effective January 22, 2014), which incorporates RFRA, requires servicemembers to seek an accommodation if they wish to exercise their religion, nor does it inform them that they forfeit a RFRA claim by failing to do so. The Government touts SECNAVINST 1730.8B(11)(a) as a "longstanding military directive," Appellee's Br. 50, under which servicemembers must "submit religious accommodation requests to the commanding officer," *id.* at 47; *see also id.* at 21. Critically, however, SECNAVINST 1730.8B (1) does not mention RFRA, and (2) predates the latest version of DoDI 1300.17, which *does* expressly incorporate RFRA and—consistent with RFRA—*eliminates* any suggestion that a servicemember must first request an accommodation in order to exercise his or her religion.[3]

[3] The Government grudgingly acknowledges the changes made by DoDI 1300.17 only in a footnote. *See* Appellee's Br. 21 n.7. Even then, it vaguely asserts that the new instruction "kept the burden on servicemembers to submit requests for accommodation." *Id.* But nothing in the latest version of DoDI 1300.17 requires service members to request an accommodation in order to exercise their religion or invoke their RFRA rights. To the extent the Government's vague statement asserts otherwise, it is, as explained, flatly inconsistent with RFRA.

It is difficult, moreover, to understand how the Government's prior restraint regime would work in circumstances like these. The necessary accommodation in this case was not easily foreseeable the way some others, like a Sikh soldier's request to keep a religious dagger or a Jewish sailor's request to wear a yarmulke, would be clear in advance. There was no reason to believe that LCpl Sterling's small slips of paper containing a religious message would cause any impermissible disruption. Thus, it would have been unreasonable to expect LCpl Sterling to anticipate SSgt Alexander's reaction and preemptively apply for a religious accommodation. Similarly, it would have been unreasonable to expect LCpl Sterling to quickly run off and request an accommodation as soon as SSgt Alexander ordered her to remove the quotation.

For these reasons, the Government's cases are far off-point. Nowhere in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), did the Supreme Court suggest that a system for requesting religious accommodations would nullify an inmate's statutory right to invoke RLUIPA as a defense. Nor are cases like *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), which involved a "regulatory permit process" that applies to *all* parties—not just those who wish to exercise their religion—any help to the Government. Appellee's Br. 47. Those cases concern generally applicable requirements that apply regardless of whether one is exercising religion. This is not a case where anyone who wished to tape three small pieces of paper around her

desk needed advance approval from her commanding officer. LCpl Sterling's inability to preemptively anticipate SSgt Alexander's actions and obtain an accommodation is nothing like a Native American's failure to go through the normal permitting process for obtaining eagle feathers, *see Friday*, 525 F.3d at 948, or a church's failure to request a routine zoning variance, *see Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957 (9th Cir. 2011).[4]

Finally, the Government fails to acknowledge that its exhaustion/ accommodation argument—in addition to being forfeited and wrong—fatally undermines the strict scrutiny arguments it actually preserved. By hinting that LCpl Sterling's request might have been granted if only she had clearly asked for a religious accommodation, *see* Appellee's Br. 25, the Government makes clear that its insistence that it has a compelling interest in eliminating religious displays from

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[4] The Government also claims that *O Centro*, a "case Appellant cites," does not aid LCpl Sterling on the substantial burden factor. Appellee's Br. 50. But in her opening brief, LCpl Sterling never cited *O Centro* with respect to the substantial-burden factor, so the Government's "rebuttal" is mystifying. The Government's remaining cases—a district court decision and an unpublished Ninth Circuit *per curiam* memorandum order, *see id.* at 47 n.16—are far off-base. In the former, the court found no substantial burden on numerous grounds, including that the defendant had conditionally approved the claimant's request, and that the claimant had not asserted that the subject property had any religious significance. *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1357-58 (N.D. Ga. 2012). In the latter, the court simply held that the claimants had offered only "conclusory statements" in declarations, rather than evidence demonstrating religious importance. *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. United States Dep't of the Interior*, 603 F. App'x 651, 652 (9th Cir. 2015). Those circumstances are not present here.

the workplace is unsustainable. The accommodation process promises that exceptions to general rules are possible in the military context, just as in most contexts to which RFRA applies. Thus, while a requirement that an adherent apply for an accommodation or else forfeit a claim to a substantial burden is incompatible with RFRA, the Government's belated emphasis on the accommodation process is inconsistent with many of the strict-scrutiny arguments it made below and continues to make in this Court.

Apart from its unavailing "accommodation" theory, the Government has little else to say about the substantial burden on LCpl Sterling's exercise of religion, and understandably so. The burden on LCpl Sterling's exercise of religion was clear and substantial. When ordered to remove her Biblical quotations, LCpl Sterling was presented with an untenable choice: Either she could follow SSgt Alexander's orders and cease her exercise of religion or face disciplinary action including court-martial. When she chose not to compromise her exercise of religion, she received a severe punishment. It is difficult to imagine a more straightforward substantial burden under RFRA.

Both *Hobby Lobby* and *Holt* make clear that religious individuals and organizations cannot be forced to choose between their faith and ruinous government punishment. *See Hobby Lobby*, 134 S. Ct. at 2775-76 ("If the Hahns and Greens and their companies do not yield to this demand [to provide

abortifacients in their employee health care plans], the economic consequences will be severe."); *Holt*, 135 S. Ct. at 861 ("If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise."). Just as the parties in those cases "easily satisfied" their obligation to establish a substantial burden, so too has LCpl Sterling clearly established a substantial burden here. *Holt*, 135 S. Ct. at 862; *Hobby Lobby*, 134 S. Ct. 2779; *see also* Appellant's Br. 26 n.9 (collecting pre-RFRA cases on substantial burden).

The Government hardly even engages either of these controlling precedents. Instead, the Government suggests that LCpl Sterling's exercise of religion was not substantially burdened because she might have been able to exercise her religion in other ways. *See* Appellee's Br. 55. As the Government itself recognizes, *id.* at 51, the Supreme Court rejected this very argument in *Holt*, *see* 135 S. Ct. at 862. Nevertheless, the Government persists in arguing that LCpl Sterling failed to establish that she "could not perform [her] particular ritual at another time," positing a "mismatch between evidence at trial, and the asserted exercise of religion claimed to have been burdened." Appellee's Br. 51-52 (quotation marks omitted); *see also id.* at 55 (claiming that "the testimony at trial, and the claim on appeal of the exercise that was burdened, do not match").

The only mismatch is between the Government's argument and the law. RFRA guarantees adherents freedom from substantial burdens on religious exercise. The Government does not get credit for all the other ways in which it does not substantially burden religious exercise, nor is the existence of alternative avenues for religious exercise relevant to the analysis. A government ban on sacramental wine could not be defended by communicants' ability to continue to receive the host. Nor do RFRA claimants need to prove that they were absolutely *required* to exercise their religion at the precise time or place that the Government decided to burden it. RFRA "applies to an exercise of religion regardless of whether it is 'compelled.'" *Holt*, 135 S. Ct. at 862.

C. The Government Cannot Satisfy Strict Scrutiny.

Because LCpl Sterling's exercise was substantially burdened, the burden shifts to the Government to satisfy strict scrutiny. This is the "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and to satisfy it the Government must show that its burden on religion was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering that compelling government interest." 42 U.S.C. §2000bb-1(b); *see also Hobby Lobby*, 134 S. Ct. at 2779. It has not satisfied either prong here.

The Government argues that it had a compelling interest in generalized "good order and discipline" that allowed it to substantially burden LCpl Sterling's exercise of religion. Appellee's Br. 55; *see also id.* at 56-58. But the Supreme Court has repeatedly held that this sort of abstract interest cannot satisfy RFRA's demanding standard. Instead, RFRA requires the courts to "'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to *particular* religious claimants.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 431) (emphasis added).

Here, the Government does not even attempt to make this particularized showing; it offers nothing at all to suggest that its compelling interest specifically required removal of LCpl Sterling's Biblical quotations. Instead, it contends that it need not make such a showing at all because, in *O Centro*, the Supreme Court "acknowledged that the government may 'demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.'" Appellee's Br. 57. But that argument fails in light of another portion of *O Centro*—not to mention the decision's holding—that the Government studiously ignores. *O Centro* held the "well-established peyote exception" to the Controlled Substances Act "fatally undermines the Government's broader contention that the Controlled Substances Act … admits of no exceptions

under RFRA." 546 U.S. at 434. The same reasoning applies here, for the Government itself repeatedly touts the availability of exceptions under its "policy on religious accommodations." Appellee's Br. 58. If the existence of a single exception "fatally undermines" the proposition that the Controlled Substances Act "admits of no exceptions under RFRA," then *a fortiori* the existence of a policy ostensibly permitting numerous exceptions fatally undermines the Government's argument that RFRA accommodations would "seriously compromise its ability to administer" the "uniform application" of good order and discipline.

The Government also suggests that it was compelled to burden LCpl Sterling's religious exercise under RFRA in order to avoid Establishment Clause concerns. *See* Appellee's Br. 58-59. But the Supreme Court already rejected this argument in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), when it upheld RLUIPA's similar protections against a claim that they violate the Establishment Clause. In doing so, the Court explicitly invoked religious accommodations in the military as an acceptable means of balancing the "play in the joints" between free exercise and the Establishment Clause. *See id.* at 719-22.

In all events, no reasonable observer would have confused LCpl Sterling's personal religious reminders as a government endorsement of religion. Indeed, the only record evidence on the topic confirms that the Biblical quotations did not distract or offend visits to LCpl Sterling's desk. *See* Appellant's Br. 5-6.

Moreover, the Government's exaggerated concerns ignore the well-established rule that the reasonable observer relevant to some Establishment Clause tests is a *reasonably informed* observer. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-55 (2002). Such an observer would presumably notice a military chaplain performing a religious ceremony and understand the rich history that renders a military chaplain consistent with the Establishment Clause. *See, e.g.*, *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985). That such an observer would then turn to the relatively unobtrusive signs on LCpl Sterling's work station and discern a government endorsement of her private religious exercise strains all credulity.

The Government has also thoroughly failed to demonstrate that ordering LCpl Sterling to remove the Biblical quote and court-martialing her were the least restrictive means of furthering its interests. The Government does not even attempt to refute the less restrictive alternatives offered in LCpl Sterling's opening brief—like requiring LCpl Sterling to move the slips of paper to an even less conspicuous location in her workspace or to add annotations indicating the quotations' Biblical source. *See* Appellant's Br. 30-31. Instead, the Government goes back to the well one more time and invokes its accommodation process. *See* Appellee's Br. 61. As with every other time the Government has relied on the accommodation process, which it never once mentioned before the lower court, this argument is forfeited. But beyond that, its contention that the "Instruction

requiring servicemembers to request accommodation is the least restrictive means to ensure good order and discipline is preserved" is clearly incorrect for several reasons.

First, as noted, RFRA does not permit the Government to *require* service members to obtain advance accommodation in order to exercise their religion. *See* pp. 17-23, *supra*. Congress decided against having an overt exhaustion requirement in RFRA, and the Government cannot introduce such a requirement covertly in the guise of a less-restrictive-alternative argument. Second, an accommodation process purportedly designed to allow *exceptions* to uniformity does not somehow *bolster* uniform "good order and discipline." Indeed, the Government's own argument only underscores that it cannot establish a compelling interest in uniform application of order and discipline that admits of no RFRA exceptions, *see* pp. 27-28, *supra*.

Third, Supreme Court case law makes plain that the existence of an accommodation procedure does not mean that the Government has satisfied the least-restrictive-means test. If the answer provided by the accommodation process would have been no, then the existence of the process is irrelevant. In *Holt*, for example, the plaintiff expressly requested permission to grow a beard for religious reasons, and when the Government declined permission, the Court found an RLUIPA violation. Holt's ability to make such a request was irrelevant. 135 S.

Ct. at 861, 864. If the answer provided by the accommodation process would have been yes, then the failure to ask cannot be fatal or the accommodation process would become an exhaustion process, which RFRA does not permit. Instead, the rational response of a government that would have granted an accommodation, but did not, is to grant an accommodation once RFRA is raised, not doggedly insist that the possibility of granting an earlier accommodation somehow destroys a RFRA claim. In all events, there can be no compelling interest in insisting on imposing a substantial burden on religious exercise when the Government itself would have accommodated that religious exercise.

III

THE LOWER COURT 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 GOOD 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 did not trigger RFRA, the orders to remove the Biblical quotations lacked a valid military purpose and were thus unlawful. In arguing otherwise, the Government again does not even pretend to defend the errors in the lower court's speculative and internally inconsistent decision. *See*

Appellant's Br. 33-36. Instead, oddly, it claims that LCpl Sterling "objects merely to" the NMCCA's decision. Appellee's Br. 64. This is a mystifying argument. This Court certified both issues in LCpl Sterling's petition to review the NMCCA's decision, so of course she is objecting to that court's conclusions on this issue—none of which the Government even attempts to defend.

Unable to defend the NMCCA's decision, the Government seeks to change the subject altogether. It argues that LCpl Sterling was not entitled to post the Biblical quotations because her workspace did not "deserv[e] any of the protections of a public forum." Appellee's Br. 66. But that is beside the point. The slips of paper were an expression of LCpl Sterling's religious beliefs, and SSgt Alexander had no valid purpose for ordering them to be removed from LCpl Sterling's private workspace. And there is no reason at all to treat the signs as *government* speech, akin to a monument in a public park, *see Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or messages printed on government issued license plates, *see Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). Because the orders lacked a valid military purpose, they were unlawful, and LCpl Sterling's convictions for disobeying those orders cannot stand.

Conclusion

The NMCCA's decision should be reversed.

Respectfully submitted,

/S/
HIRAM S. SASSER, III
CAAF Bar No. 36566
/S/
MICHAEL D. BERRY
CAAF Bar No. 34828
First Liberty Institute
2001 W. Plano Pkwy, Ste 1600
Plano, TX 75075
(972) 941-4445
mberry@libertyinstitute.org

JOHN J. STEPHENS
Major, USMC
CAAF Bar No. 36142
Appellate Defense Division
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St, SE
Bldg 58, Ste 100
Washington Navy Yard, DC 20374
(202) 685-8587
john.j.stephens@navy.mil

/S/
PAUL D. CLEMENT
(*pro hac vice*)
/S/
GEORGE W. HICKS, JR.
(*pro hac vice*)
/S/
MICHAEL H. MCGINLEY
(*pro hac vice*)
Bancroft PLLC
500 New Jersey Avenue NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

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, and to counsel for all amici curiae on February 18, 2016.

/S/

MICHAEL D. BERRY
CAAF Bar No. 34828
First Liberty Institute
2001 W. Plano Pkwy, Ste 1600
Plano, TX 75075
Office:(972) 941-4445
Fax: (972) 423-6162
mberry@libertyinstitute.org

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/S/

MICHAEL D. BERRY
CAAF Bar No. 34828
First Liberty Institute
2001 W. Plano Pkwy, Ste 1600
Plano, TX 75075
Office:(972) 941-4445
Fax: (972) 423-6162
mberry@libertyinstitute.org