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.	BRIEF OF MEMBERS OF CONGRESS, THE AMERICAN CENTER FOR LAW AND JUSTICE,AND THE COMMITTEE TO PROTECT RELIGIOUS LIBERTY IN THE MILITARY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT Crim. App. Dkt. No. 201400150 USCA Dkt. No. 15-0510/MC

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

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

Amici, Members of Congress, Senator James Lankford, Representatives John Fleming, Robert Aderholt, Charles W. Boustany, Jr., Jim Bridenstine, Mo Brooks, Doug Collins, Kevin Cramer, Jeff Duncan, John Duncan, Bill Flores, Randy Forbes, Jeff Fortenberry, Trent Franks, Louie Gohmert, Bob Goodlatte, Gregg Harper, Vicky Hartzler, Tim Huelskamp, Bill Johnson, Walter Jones, Mike Kelly, Trent Kelly, Steve King, Doug Lamborn, Tom McClintock, Jeff Miller, Pete Olson, Steven Palazzo, Robert Pittenger, Joe Pitts, Keith Rothfus, David Rouzer, Steve Russell, Adrian Smith, and Tim Walberg, the American Center for Law and Justice, and the Committee to Protect Religious Liberty in the Military[1] pursuant to Rules 26(a)(3) of this Court, respectfully submit this brief as *amici curiae* in support of Appellant Monifa J. Sterling.

SUMMARY OF RELEVANT FACTS

Lance Corporal Monifa Sterling (Sterling) professes the Christian faith and identifies herself as a religious person. J.A. 079, 111, 114. In May 2013, Sterling posted in her work station, which consisted of a desk and computer, three small pieces of paper with a Scripture verse from Isaiah 54:17. The

[1] The Committee to Protect Religious Liberty in the Military consists of over 175,000 Americans who are concerned that the religious liberty rights of the nation's service members are increasingly under attack.

verse stated "No weapon formed against me shall prosper." Two of the quotations were printed in 28 point font and the third was printed in smaller font. J.A. 112-113. Sterling chose to post the verses in three places at her work station to remind herself of the Christian doctrine of the Trinity. The verses were intended for Sterling's benefit alone and not as a message to anyone else. J.A. 113-114. On or about May 20, 2013, Sterling's superior officer noticed the verses, and ordered her to remove them, calling them "sh**." J.A. 116. Sterling did not remove them. Later the same day, Sterling's superior officer removed the verses and threw them in the trash. Sterling's superior officer reportedly "did not like their tone." J.A. 116.

The next day, Sterling reposted the verses, and her superior officer again ordered Sterling to remove them. *Id.* Sterling refused, and her superior officer again removed the quotations. J.A. 043-044.

A special court-martial convicted Sterling on several charges,[2] including charges of disrespect towards a superior officer and disobeying a lawful order. The NMCCA affirmed, rejecting Sterling's claims that her religious liberty rights

[2] Sterling was also convicted on charges unrelated to the Bible verse incident.

were violated under the Religious Freedom Restoration Act (RFRA).

ARGUMENT

I. LANCE CORPORAL STERLING'S TREATMENT FLOUTS CONGRESS'S INTENT THAT ARMED FORCES SERVICE MEMBERS' RELIGIOUS FREEDOMS BE PROTECTED AS FULLY AS POSSIBLE WITHOUT JEOPARDIZING MILITARY DISCIPLINE AND READINESS.

Congress enacted RFRA, 42 U.S.C. § 2000bb et seq., and its sister statute, RLUIPA, 42 U.S.C. § 2000cc et seq. "in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).[3] RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "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." 42 U.S.C. §§ 2000bb-1(a), (b). RFRA further specifies that "the term 'government' includes a branch,

[3] RFRA was enacted in response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) which departed from an earlier line of cases protecting religiously motivated conduct. The *Smith* Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause. RFRA's purpose was to restore the protection for religiously motivated conduct afforded under the pre-*Smith* line of cases.

department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1).

Congress's intent that RFRA apply to the military is indisputable. Recognizing that military regulations and policies are traditionally accorded heightened deference, Congress nevertheless warned that "[s]eemingly reasonable regulations based upon speculation, exaggerated fears of [sic] thoughtless policies cannot stand." H.R. Rep. No. 103-88, at 8 (1993). Military officials must accordingly show that any policy or regulation that burdens a service member's religious freedom is "the least restrictive means of protecting a compelling governmental interest." *Id.*

Notwithstanding RFRA's clear applicability to the Armed Services, numerous reported instances of hostility to religious faith in the military arose in the past few years. For example, in one incident, an Air Force Academy cadet was required to remove a Bible verse from his personal whiteboard outside his living quarters.[4] Upon learning of the Air Force Academy's action, Congressman Doug Lamborn of Colorado wrote a letter to the Air Force Academy, a portion of which is germane here:

[4] Religious Accommodations in the Armed Services: Hearings Before the Subcommittee on Military Personnel, 113th Cong. (2014) (statement of Travis S. Weber, Director, Center for Religious Liberty, Family Research Council).

> Religious freedom and religious tolerance go hand in hand. Censoring Bible verses or any religious text for that matter, from personal or even common areas at the Air Force Academy suggests an apparent anti-religion bias rather than a rational approach that supports tolerance of all faiths. We are asking future officers to perhaps give even their very lives to protect and defend the Constitution and yet denying them rights from that same Constitution.
>
> . . . .
>
> The brave men and women serving to protect the Constitutional rights of all Americans should not have their own Constitutional rights stifled as they carry out that task. I urge you to reconsider your decision to censor this Cadet's religious beliefs, and to set the record straight on where the Air Force stands with regard to the religious liberty of all Cadets.[5]

Other similarly egregious instances of hostility to religious faith include:

- The Ohio Air National Guard removed an article that mentioned the words, "faith" and "Jesus Christ" from a Wing newsletter while Moody Air Force officials allowed an article about atheism to remain.[6]

- A devotional message by an Air Force chaplain was removed from the base website, although it was later reinstated after

[5] Letter from Doug Lamborn, Congressman, Colo. Fifth Cong. Dist., to Lieutenant General Michelle Johnson, Air Force Academy Superintendent (Mar. 13, 2014), *available at* http://lamborn.house.gov/news/documentsingle.aspx?DocumentID=751.

[6] Religious Accommodations in the Armed Services: Hearings Before the Subcommittee on Military Personnel, 113th Cong. (2014) (statement of Chaplain (COL) Ronald A. Crews, USA (Ret.); Executive Director, Chaplain Alliance for Religious Liberty).

public outcry and intervention by some on the Subcommittee on Military Personnel.[7]

- An Army equal-opportunity officer gave a Power Point training presentation that listed "Evangelical Christians," "Catholics," and "UltraOrthodox [Jews]" as "Religious Extremist[s]" alongside the KKK and Al Qaeda.[8]

In the face of these and similar incidents, Congress deemed it necessary to enact additional statutory clarity and protections for religious freedom in the military. Beginning with the 2013 National Defense Authorization Act, Congress added § 533 providing legal protections for service members, and barring the defense department from forcing them to perform services which violate their moral or religious beliefs. Passed with overwhelming bipartisan support, the 2013 Act provides:

> The Armed Forces shall accommodate the beliefs of a member of the armed forces reflecting the conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such beliefs as the basis of any adverse personnel action,

[7] Religious Accommodations in the Armed Services: Hearings Before the Subcommittee on Military Personnel, 113th Cong. (2014) (statement of Chaplain (COL) Ronald A. Crews, USA (Ret.); Executive Director, Chaplain Alliance for Religious Liberty).

[8] Religious Accommodations in the Armed Services: Hearings Before the Subcommittee on Military Personnel, 113th Cong. (2014) (statement of Chaplain (COL) Ronald A. Crews, USA (Ret.); Executive Director, Chaplain Alliance for Religious Liberty).

> discrimination, or denial of promotion, schooling, training, or assignment.[9]

Congress further directed the Secretary of Defense to develop regulations to enforce these protections.[10]

The Secretary of Defense failed to fully develop and implement the required regulations.[11] In response to that failure, and in response to continuing incidents of disciplinary action against service members exercising their religious faith,

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[9] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 533(a)-(b), 126 Stat. 1632, 1727 (2013).

[10] *Id.* § 533(c).

[11] The Department of Defense revised its policy to incorporate the 2013 NDAA shortly after Congress passed the 2014 NDAA.

The Department of Defense amended DoD Instruction 1300.17, which addresses "Accommodation of Religious Practices Within the Military Services," as follows:

> In accordance with section 2000bb-1 of Title 42, United States Code . . . requests 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;
> (b) Is the least restrictive means of furthering that compelling governmental interest.

DoDI 1300.17. DoDI 1300.17 further provides that "[r]equests for religious accommodation from a military policy, practice, or duty that does not substantially burden a Service member's exercise of religion" are evaluated by "balancing the needs of the requesting Service member . . . against the needs of mission accomplishment." DoDI 1300.17. Requests for accommodation that fall under this balancing test may be denied "[o]nly if it is determined that the needs of mission accomplishment outweigh the needs of the Service member." *Id.*

Congress added § 532 to the 2014 National Defense Authorization Act (2014 NDAA), again with strong bipartisan support. Section 532 amends the 2013 NDAA to require the Armed Forces to accommodate "individual expressions of belief" reflecting "sincerely held" conscience, moral principles, or religious beliefs of military personnel unless doing so "could have an adverse impact on military readiness, unit cohesion, and good order and discipline."[12]

The 2014 NDAA further required the Secretary of Defense to implement regulations within 90 days following enactment.[13] The 2014 NDAA also required an investigation into compliance with the new protections afforded to the beliefs of military personnel. Section 533 states that within eighteen months after

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[12] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 532(a), 127 Stat. 672, 759 (2013).

> Unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Armed Forces shall accommodate individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such expressions of belief as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

Id.

[13] National Defense Authorization Act for Fiscal Year 2014 § 532(b).

the Secretary of Defense issues the new regulations, the Inspector General of the Department of Defense must submit to the congressional defense committees a report on "adverse personnel actions, discrimination, or denials of promotion, schooling, training, or assignment for members of the Armed Forces based on conscience, moral principles, or religious beliefs."[14]

The 2014 NDAA also requires a report on the number of times a military department was contacted about possible belief-based incidents,[15] and requires that the Inspector General "consult with the Armed Forces Chaplains Board, as appropriate."[16]

Finally, in the House Report to the 2016 National Defense Authorization Act, the House Armed Services Committee urged the Department of Defense to ensure that

> review and determination of religious accommodation requests are made quickly, efficiently, and in the least restrictive manner to the service member requesting the accommodation. Unless there is a demonstrated, unavoidable, and immediate impact on compelling government interests in military readiness, unit cohesion, and good order and discipline, the free exercise of a service member seeking an accommodation must not be substantially burdened as a condition of seeking an accommodation or while an accommodation request is pending. Once granted, an accommodation should presumptively remain in place unless continuing

[14] *Id.* § 533(a)(1).

[15] *Id.* § 533(a)(2).

[16] *Id.* § 533(b).

> to accommodate the specific service member will have a demonstrated and unavoidable impact on compelling government interests in military readiness, unit cohesion, and good order and discipline.[17]

As the federal district court recently pointed out in *Singh v. McHugh*, 2015 U.S. Dist. LEXIS 76526 (June 12, 2015), "Congress has already placed a thumb on the scale in favor of protecting religious exercise, and it has assigned the Court a significant role to play." *Id.* at *51 (holding that Army violated RFRA when it denied enrollment in the Reserve Officers' Training Corps to an observant Sikh whose religion required him to wear a turban, uncut hair, and a beard).

Lance Corporal Sterling's treatment by her superior officer, and the NMCCA's dismissal of Sterling's RFRA claim fly in the face of Congress's will that religious liberties be accommodated in the Armed Services.

II. THE NMCCA WRONGLY HELD THAT STERLING WAS NOT EXERCISING HER RELIGION.

Despite giving lip service to the broad protective scope of RFRA, the NMCCA adopted an unduly cramped definition of "religious exercise" and ruled RFRA inapplicable to this case. Slip. Op. at 11. The NMCCA's reasoning conflicts with the terms of the statute and decisions of the Supreme Court of the United States.

[17] H.R. Rep. No. 114-102, at 134 (2015).

RFRA's capacious protection for religious liberty is demonstrated in significant part by its expansion of RFRA's definition of "religious exercise." When enacting RLUIPA, Congress amended the RFRA definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). As the Supreme Court recently explained:

> Before RLUIPA, RFRA's definition made reference to the First Amendment. See § 2000bb-2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc-3(g).

Burwell, 134 S. Ct. at 2761-62. Rejecting the dissent's argument that "religious exercise" was more broadly defined in RLUIPA than in RFRA, the *Burwell* Court concluded that a proper reading of the statutes required "exercise of religion" to be broadly interpreted under both RFRA and RLUIPA. *Id.* at 2762 n.5.

A. The NMCCA's Definition of "Religious Exercise" is Incompatible with *Burwell*, as well as the Supreme Court's Pre-*Smith* Free Exercise Jurisprudence.

In defining protected "religious exercise" as only those practices that are "part of a system of religious belief," Slip. Op at 11, the NMCCA ignored the *Burwell* Court's instruction that the definition should be interpreted more broadly than it was under previous Free Exercise Clause jurisprudence, 134 S. Ct. at 2761. Even if the Court's pre-*Smith* Free Exercise decisions provided the appropriate standard, however, those cases leave no doubt that Sterling's conduct qualifies as religious exercise.

As long as the conduct in question was religiously motivated, government actions that burdened the conduct would be subject to strict scrutiny. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981); *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963). Both *Sherbert* and *Thomas* focused on the religiously motivated conduct and upon the government coercion to give up that conduct. 374 U.S. at 404; 450 U.S. at 709.

The decision in *Thomas* (an unemployment benefits case) is particularly apt here. There, a Jehovah's Witness resigned his job in a steel foundry when the only available work involved producing tank turrets. Thomas's religious beliefs prohibited him not only from personally fighting in a war, but also from producing tanks that might later be used in war. 450 U.S. at 709. The Court focused on the presence of government coercion

to give up the conduct in question. The Court did not undertake to determine whether opposition to tank manufacturing was "part" of the Jehovah's Witness faith. Rather, warning against judicial second-guessing of Thomas' theological beliefs, the Court held that the reviewing court's "narrow function" is to look for government coercion that "put[s] substantial pressure on an adherent to modify" a sincere religious exercise, regardless of the precise religious lines drawn by the believer. *Id.* at 716-18; *see also id.* at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.").

The NMCCA's definition sets up military tribunals as theological experts parsing through "religious belief systems" to ascertain whether a given practice can be deemed a "part" of such religious system. Article II courts, no less than Article III courts, lack competence to engage in such an inquiry. The Supreme Court has repeatedly admonished the judiciary not "to dissect religious beliefs." *Thomas,* 450 U.S. at 715. Whether a religious practice is protected must not "turn upon a judicial perception of the particular belief or practice in question." *Id.* at 714; *see also City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) ("[I]t '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.'" (quoting *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990))); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (same).

Even if courts were competent to assess the validity of a person's beliefs, the NMCCA simply assumed, with no inquiry at all, that Sterling's posting of Scripture verses in her work space was an outlier practice, disconnected from any religious belief system. Slip op. at 11.

In fact, the Judeo-Christian tradition includes many exhortations to meditate upon Holy Writ. *See, e.g.,* Joshua 1:8 (Basic English Bible) ("Let this book of the law be ever on your lips and in your thoughts day and night, so that you may keep with care everything in it; then a blessing will be on all your way, and you will do well"); Psalm 1:2 (New American Standard Version 1995) ("But his delight is in the law of the LORD, And in His law he meditates day and night."); Psalms 119:15-16 (New American Standard Version 1995) ("I will meditate on your precepts and regard your ways. I shall delight in your statutes; I shall not forget Your word.").

Posting scripture verses where they can be easily viewed facilitates meditation for the believer. The NMCCA's uninformed conclusion that the practice of posting scripture verses to facilitate meditation is not "part" of a religious belief system

demonstrates why courts should not assess the validity of religious practices.

RFRA's definition of religious exercise encompasses all religiously motivated conduct. Sterling's decision to post Scripture verses in three places to reflect the Trinitarian nature of the Christian deity and to remind her of a Scriptural promise is quintessentially religiously motivated conduct.

B. *Wisconsin v. Yoder* does not Support the NMCCA's Constrictive Definition of Religious Exercise.

The NMCCA based its narrow definition of "religious exercise" on a misapplication of the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Slip op. at 11. *Yoder* does not support the NMCCA's conclusion that religious exercise includes only practices that are verifiably "part" of a religious belief system. In *Yoder*, the Court was concerned only with whether the Amish opposition to state compulsory school attendance law was religiously motivated.

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

406 U.S. at 215-16. The Court concluded that "the record in this case abundantly supports the claim that the traditional way

of life of the Amish is not merely a matter of personal preference, but *one of deep religious conviction*." *Id.* at 216 (emphasis added). The Court added further that the entire Amish population shared this deep religious conviction, and the conviction was "intimately related to daily living." *Id.*

The Court's description of the Amish beliefs cannot, however, be converted into a mandate that only beliefs verifiably part of a religious belief system qualify for protection. The NMCCA's attempt to construe it that way is flatly refuted by *Thomas*, 450 U.S. at 716-18, and *Burwell*, 134 S. Ct. at 2762. *Thomas* forbids the courts from "dissect[ing a litigant's] religious beliefs" for the purpose of assessing their "validity" as part of a religious belief system. *Thomas*, 450 U.S. at 715; *Flores*, 521 U.S. at 513. *Burwell* highlights Congress's intent that § 2000cc-5(7)(A) must be construed broadly, without reference to pre-*Smith* free exercise jurisprudence. 134 S. Ct. at 2762. In short, *Yoder* is irrelevant to the proper interpretation of § 2000cc-5(7)(A).

Section 2000cc-5(7)(A) clearly encompasses Sterling's conduct in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the NMCCA.

Respectfully Submitted,

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to counsel for Appellee, Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and to counsel for Appellant, Paul D. Clement, George W. Hicks, Hiram S. Sasser, Michael D. Berry, on December 23, 2015.

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Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 26(d) because it does not exceed 7,000 words, half of the type-volume limitation permitted for appellants (14,000 words).

2. This brief complies with the typeface and style requirements of Rule 37 because this brief has been prepared in a mono-spaced typeface using Microsoft Word 2013 with Courier New, 12-point, 10 characters per inch.

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