IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, *Appellee*, *- versus -* **MONIFA J. STERLING,** Lance Corporal (E-3), U.S. Marine Corps, *Appellant.*	USCA Dkt. No. 15-0510/MC N-MC CCA Dkt. No. 201400150 Date: 2 February 2016

AMICUS CURIAE BRIEF OF

THE MILITARY RELIGIOUS FREEDOM FOUNDATION

In Support of Neither Party

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

ISSUES ADDRESSED BY *AMICUS CURIAE*

I. IS APPELLANT PROCEDURALLY BARRED FROM OBTAINING THE RELIEF SHE NOW SEEKS?

II. RFRA's HISTORY AND CONGRESSIONAL INTENT.

III. EVEN IF THE RFRA ISSUE WAS LEGALLY PRESERVED, IT DOES NOT PROVIDE APPELLANT ANY BASIS FOR JUDICIAL RELIEF WHERE THE PUBLIC DISPLAY OF THREE "SIGNS" IN HER COMMON, PUBLIC WORK AREA, ON A MILITARY INSTALLATION PROPERTY OF THE U.S. GOVERNMENT, WAS NOT A *BONA FIDE* FREE EXERCISE OF RELIGION IN THE *MILITARY* CONTEXT.

STATEMENT OF THE CASE

The Military Religious Freedom Foundation [MRFF] accepts Appellant's *Statement of the Case,* excepting her characterization of the "signs" at issue as being "Biblical quotations."[1]

STATEMENT OF FACTS

MRFF accepts the Government's *Statement of Facts.*

SUMMARY OF ARGUMENT

> *It is also urged that the requisite criminal intent was lacking since petitioners were motivated by religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under a claim of religious sanction.*[2]
>
> *[I]f a driver is stopped for speeding, the fact that she is a believer or that she is late for church does not relieve her of the obligation to abide by speed limits.*[3]

This is a case about *conduct*, not speech. It is a case about *misconduct*, not the "Free Exercise" of religion. It is a case where Appellant now claims that her misconduct (as applicable here) is cloaked within the penumbra of the First

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[1] Appellant first described the signs as being "of a religious nature...." [JA-078]. She then equivocated and testified, "There is (*sic*) a bible scripture; they're from - - of a religious nature." [JA-079]. *See* Government Brief [Govt.Br.] at 19, n.5, noting that the actual wording on the signs are from the lyrics of a song.

[2] *Cleveland v. United States,* 329 U.S. 14, 20 (1946).

[3] Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the* Religious Freedom Restoration Act *Is Bad Public Policy,* 9 Harv. L & Pol'y Rev. 129, 131 (2015).

Amendment's "Free Exercise" clause and RFRA.[4] What Appellant and her *amici* overlook is that she was ***not*** prosecuted for posting the signs – she was court-martialed for *inter alia,* violating her supervisor's orders to *remove* the signs. Appellant exercised her claimed "right" (without obtaining an approved accommodation) and, like any other servicemember subject to the UCMJ, who violated a punitive article, was subject to punishment under the UCMJ.

Appellant's real problem – and why this Court should deny relief – is more basic. She did not preserve the arguments that she now makes before this Court, *i.e.,* that her conduct was a protected "exercise of religion" and therefore, should have been accommodated by the USMC. That argument overlooks the fatal flaw – Appellant failed to comply with DoDI 1300.17 (2009 ed.) and SECNAVINST 1730.8B (2012), by *first* requesting religious accommodations from her command before gambling that her conduct would thereby be accommodated. By not making such a request, Appellant's command lacked the opportunity to even consider any form or type of possible accommodation, much less grant such if the command deemed it warranted.

Finally, even if her arguments are somehow deemed "preserved," Appellant errs by ignoring the legislative history of the RFRA which expressly recognized the unique nature of military discipline and that RFRA was not intended to change the

[4] 42 U.S.C. § 2000bb *et seq.*

"significant deference" the judiciary must give to military authorities. This case did not arise in a *civilian* setting with *civilian* parties – it involved active-duty Marines, *on-duty*, on base, in a common work area frequented by other military members whereby Appellant first posted *"religious"* signs, and then defied the order of her USMC supervisor to remove the signs. It is the *military context* of Appellant's misconduct – violating her supervisor's orders – that she is ignoring.

The orders by Appellant's NCO did not "substantially burden" Appellant's religious practices, much less her beliefs.[5] Therefore, neither the First Amendment nor RFRA support her arguments. Appellant nowhere discusses *how* violating an NCO's orders constitutes the "Free Exercise" of religion. Violating a specific provision of the UCMJ is not and cannot be "accommodated" under the circumstances herein.[6] This Court should respectfully deny relief.

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[5] RFRA, 42 U.S.C. § 2000bb-1(a), establishes the "substantial burden" standard, assuming that it applies in this case.

[6] Had Appellant been prosecuted for simply *posting* the signs, the issue may have been a closer call. Appellant (and her *amici*) fail to notice and appreciate this distinction - something that her Brief demonstrates:

> ... LCpl Sterling was not court-martialed for posting quotations from *Leaves of Grass;* she was court-martialed for posting Biblical quotations. Appellant's Br.20.

The Record belies that argument, *viz.,* she was *not* prosecuted for "posting" anything - Biblical or not. She was court-martialed, *inter alia,* for violating the direct orders of her NCO Supervisor to *remove* the signs.

ARGUMENT

I. APPELLANT IS PROCEDURALLY BARRED FROM OBTAINING THE RELIEF SHE NOW SEEKS.

The MRFF accepts the Government's arguments on this issue [Gov't Br.18 *et seq*.] and will not repeat them. We however, *supplement* them as follows.

A. Appellant Failed to Preserve Her Claimed *Religious Freedom Restoration Act* [RFRA] / "Free Exercise" Issues by Not Seeking Accommodations in Advance.

Preliminarily, Appellant failed to demonstrate that her posting of the signs constituted a "religious exercise" as defined in 42 U.S.C. § 2000cc-5(7)(A) ["any exercise of *religion*...."] Her own trial testimony refutes her appellate claims:

> Q: What was your intention in putting these signs up?
>
> A: ***It's just purely personal***. Like I just -- it's a mental reminder to me when I come to work, okay. You don't know why these people are picking on you.[7]

MRFF submits that if the signs were "purely personal," then there was no basis (religious or otherwise) for Appellant to post them in 28 Point Font[8]

Congress and both the DoD and Navy have sought to accommodate, consistent with military necessities and good order and discipline, the principles of *Parker v.*

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[7] JA-114; emphasis added. Appellant *now* claims on appeal that "her Biblical quotations amounted to a form of prayer...." Appellant's Br. 10.

[8] That is WordPerfect X4, 28 point, Times New Roman, font.

Levy,[9] *Goldman v. Weinberger*,[10] and to the extent feasible, RFRA.

RFRA as amended,[11] contains a Congressional recognition that "accommodation" provisions may indeed satisfy both the Free Exercise Clause and RFRA in § 2000cc-3(e):

> **(e) Governmental discretion in alleviating burdens on religious exercise**
>
> A government may avoid the preemptive force of any provision of this chapter ... by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

The DoD and Navy complied with this; Appellant did not.

DoDI 1300.17 (2014), provides:

> 4. **POLICY.** It is DoD policy that:
>
> a. The DoD places a high value on the rights of members of the members of the Military Services to observe the tenets of their respective religions *or to observe no religion at all*.
>
> * * *
>
> c. DoD has a compelling government interest in mission accomplishment, unit cohesion, good order, discipline, health, safety, on both the individual and unit levels. ... [emphasis added].

Subparagraph "f" of ¶ 4, specifically addresses "Requests for accommodation,"

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[9] 417 U.S. 733 (1974).

[10] 475 U.S. 503 (1986). Discussed *infra.*

[11] 42 U.S.C. § 2000cc *et seq*.

something that Appellant never made in this case.

Likewise, SECNAVINST 1730.8B (2012), paragraph 5, sets out Navy policy, *viz.,* to accommodate "when these doctrines or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion[12] ... discipline, or mission accomplishment." Paragraph 5(c), sets for the requirement of first seeking an accommodation and how such requests are to be handled. Appellant at no time made any such request. As the NMCCA found:

> [Appellant] "never told her SSgt that the signs had a religious connotation and never requested any religious accommodation to enable her to display the signs." *Sterling,* 2015 WL 832587, *5.

As such, Appellant failed to preserve her alleged RFRA issue below and it is not now properly before this Court.

B. By Failing to Preserve Her Free Exercise Issue Under RFRA, Appellant has Forfeited Her Right to Appellate Relief.

Appellant cannot now, after-the-fact, argue that her command acted illegally or that the orders to remove her "signs" were illegal or invalid, when she never preserved the issue before her command – which *could have* granted accommodations had they been given the opportunity to do so, under First Amendment and RFRA

[12] As the Record demonstrates, Appellant's misconduct – as evidenced by her convictions - was the antithesis of "unit cohesion."

principles. She thus *forfeited* this claim,[13] and therefore, there is no legal basis to now grant her any relief. Indeed, RCM 801(g), expressly provides:

> ***Failure by a party to raise defenses or objections*** or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, ***but the military judge for good cause shown*** may grant relief from the waiver. [Emphasis added]

As noted, Appellant made no specific "Free Exercise" objection nor asserted RFRA as a defense at trial. Furthermore, the military judge has long-since lost subject-matter jurisdiction and the rule on its face, does not provide for appellate relief.

That rule is consistent with RCM 905(a), which provides:

> Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. ***The military judge for good cause shown may grant relief*** from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, ***must be raised before the court-martial is adjourned*** for that case and, unless otherwise provided in this Manual, ***failure to do so shall constitute waiver.***[Emphasis added][14]

Appellant nowhere addresses, much less argues why RCM 801(g), and RCM 905(e) do not bar her from raising these issues on appeal. *See, e.g., United States v. Vazquez,*

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[13] *See, e.g., Wood v. Milyard,* 132 S.Ct. 1826 (2012)[failing to preserve an issue at trial forfeits it]; and *United States v. Gudmundson,* 57 M.J. 493 (CAAF 2002)["failure to preserve" concept].

[14] While the Rule uses the word "waiver," as *Milyard, supra,* notes, in this case it was a forfeiture. Under either definition, the issue is not properly before this Court.

72 M.J. 13, 24 (CAAF 2013)(Stucky, J., concurring in result).

C. The *Canon of Constitutional Avoidance* Applies.

Neither party has addressed the *Canon of Constitutional Avoidance* that is lurking in this litigation. This Canon – according to the Supreme Court – applies to statutory interpretation.[15] Specifically:

> It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. [citations omitted] The canon is thus a means of giving effect to congressional intent, not subverting it.[16]

Appellant and her *amici* seek to have this Court interpret RFRA in a manner that somehow excuses her from its accommodation-seeking provision, as implemented by DoDI 1300.17 (2009 ed.) And SECNAVINST 1730.8B, and *then* provide her (and presumably other servicemembers similarly situated in the future) with a *per se*, "Free Exercise" defense. MRFF does not contest that RFRA applies to the military as a general proposition. But, the issue here – assuming that it was preserved – is whether or not the RFRA permits an active-duty Marine subject to the Code, to assert a *constitutional* defense via the Free Exercise Clause in a court-martial as a defense to a Specification accusing her of violating an order of her NCO supervisor, in violation

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[15] *Clark v. Martinez,* 543 U.S. 371, 381 (2005).

[16] *Id.* The applicable Congressional intent is discussed *infra.*

of Article 92(2), UCMJ.

Congress, exercising its delegated power under the "Make Rules" Clause, Article I, § 8, cl.14, U.S. Const., enacted the UCMJ in 1950.[17] Thus, there is an initial constitutional tension between the UCMJ and RFRA.

That tension is compounded by the Commander-in-Chief Clause [Article II, § 2, cl.1, U.S. Const.] which *mandates* that the President "shall be Commander in Chief...." Thus, by virtue of Constitutional delegation, Appellant was obligated to follow the orders of her chain-of-command. Add to this, the requirements of the "Take Care" Clause [Article II, § 3] and the problem gets worse, *viz.,* should the Commander-in-Chief (or his subordinate chain-of-command) enforce the provisions of Article 92, UCMJ, or RFRA, consistent with "good order and discipline?"

The "Take Care" Clause imposes an obligation on the Executive to ensure that he and his subordinates comply with and execute Congressional enactments.[18] But, the Supreme Court has also held that the Executive "has exclusive authority and absolute discretion to decide whether to prosecute a case."[19] While rare, this is not the first time that this Court has experienced a constitutional conundrum between

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[17] 10 U.S.C. § 801 *et seq.*

[18] *Medellin v. Texas,* 552 U.S. 491, 532 (2008).

[19] *United States v. Nixon,* 418 U.S. 683, 693 (1974); *accord, United States v. Armstrong,* 517 U.S. 456, 464 (1996); and *Smith v. United States,* 375 F.2d 243 (5th Cir. 1967).

Congress and the Executive.[20]

In *New,* this Court invoked the "Political Question" doctrine and declined (avoided) to rule on the constitutionality of the President's use of the Armed Forces in a United Nations "peace keeping" mission. Here, this Court can (and should) *avoid* the Appellant's constitutional issues under the *Canon of Constitutional Avoidance* on the basis that she did not comply with the statutory and regulatory requirements of first seeking an accommodation under RFRA. Specifically, Appellant's argument that RFRA is controlling is not only wrong under RFRA, but ignores the fact that her claimed remedy raises a substantial First Amendment, *Establishment Clause* violation by purporting to allow the posting of signs of a religious nature in a common military work-area, that serviced many other Marines in a government building on a large USMC Base.

Appellant has ***not*** addressed:

1. Her non-compliance with RFRA § 2000bb-1(C), *Judicial Relief*;[21]

2. How, by allowing her to post signs of a religious nature changes anything with respect to the Establishment Clause, as specified in

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[20] *See, e.g., United States v. New,* 55 M.J. 95, 108-9 (CAAF), *cert. denied,* 534 U.S. 955 (2001). *See also, United States ex rel. New v. Rumsfeld,* 448 F.3d 403 (DC Cir. 2006), *cert. denied,* 550 U.S. 903 (2007).

[21] "A person whose religious exercise has been burdened in violation of this section may assert that violation as a ... defense in a judicial proceeding."

RFRA § 2000bb-4.[22]

Appellant's failure to pursue, and thus preserve her RFRA issue at trial, should resolve this matter while avoiding the Constitutional issues – both her Free Exercise claims and the corresponding Establishment Clause entanglements. That is the dilemma facing this Court ***if*** it finds that Appellant has "preserved" her claims. In this regard:

> [C]onsider if a relatively low ranking military member in a customer service-oriented field answered every phone call with, "Jesus saves, how may I help you?"[23]

That is the issue here and this is why it is wrong.

> When one puts on his ... military uniform or steps over the threshold of the Capitol Building as a federal employee, he transforms into an agent of the government. In this alter ego they are not performing in their individual capacity, but as governmental actors that are subject to the Establishment Clause. [footnote omitted].[24]

Furthermore:

> ... in common areas (such as in common office space or on the common grounds of a military installation), truly religious displays are prohibited because they reasonably appear to advance

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[22] "Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion...."

[23] Sussman, *Prayer For Relief: Considering the Limits of Religious Practices in the Military,* 20 Roger Williams Univ. L.Rev. 75, 115 (2015)[hereinafter "Sussman"].

[24] *Id.* at 111.

or endorse religion....[25]

Appellant's situation is hardly an aberration. For example, in *Tucker v. California Dept. of Educ.,*[26] a State employee (a computer analyst) who had *no* public interactions, challenged an order essentially forbidding all religious "speech" in and around the workplace.[27] More specifically, the order banned the posting of *religious* materials. While ultimately holding that portion of the order overbroad, the court concluded:

> There are ... important distinctions between restricting employees' speech at the workplace and prohibiting employees from using the state's walls, tables or other space to post messages or place materials. The government has a greater interest in controlling what materials are posted on its property....[28]

This Court can, and respectfully should, avoid both the Free Exercise and Establishment issues the same way that the DoD and Navy did – insist that servicemembers such as Appellant, comply with RFRA's express provision for requesting religious accommodations in advance, so that the government can appropriately and constitutionally evaluate them. If found to be reasonable, it can then

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[25] Fitzkee, *Religious Speech in the Military: Freedoms and Limitations,* XLI Parameters 59, 68 (Autumn 2011)[hereinafter "Fitzkee"].

[26] 97 F.3d 1204 (9th Cir. 1996).

[27] Notably, such *was* allowed in the employees' individual cubicles, which were not open to the public.

[28] 97 F.3d at 1214.

delineate the accommodations. That process complies with both the First Amendment and RFRA and will avoid needless litigation at the *appellate* level, without an adequate record from the court-martial proceedings.

II. RFRA's HISTORY AND CONGRESSIONAL INTENT.

Not all burdens on religion are unconstitutional.[29]

A. Free Exercise Jurisprudence Before RFRA.

Proper analysis of Appellant's claims requires some historical background. In *Parker v. Levy, supra,* the Court reiterated three important (and relevant) principles. *First,* "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."[30] Appellant does not challenge this premise. *Second,* "[The UCMJ] and the various versions of the Articles of War which have preceded it, regulate aspects of the ***conduct*** of members of the military which in the civilian sphere are left unregulated."[31] Appellant's arguments about her conduct, *viz.,* posting "religious" signs in her military, common-area, workplace and then ignoring orders to remove them, fly in the face of this *Parker* principle.

Third,

> While the members of the military are not excluded from the protection granted by the First Amendment, the different

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[29] *United States v. Lee,* 455 U.S. 252, 257 (1982).

[30] 417 U.S. at 743.

[31] *Id.* at 749 [emphasis added].

> character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[32]

Appellant's arguments overlook – if not reject – this premise.

Parker quoted with approval from *United States v. Gray,*[33] *viz.*:

> Servicemen, like civilians, are entitled to the constitutional right of free speech. The right of free speech, however, is not absolute in either the civilian or military community [citations omitted]. . . . [S]imilar speech by a subordinate towards a superior in the military can directly undermine the power of command; such speech, therefore, exceeds the limits of free speech that is allowable in the armed forces.[34]

After *Parker,* the Supreme Court's next significant First Amendment decision *vis-a-vis* the military, was *Goldman v. Weinberger, supra,* the "yarmulka" case. There the Court reiterated the principles enumerated in *Parker*:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and *esprit de*

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[32] *Id.* at 758.

[33] 42 C.M.R. 255 (CMA 1970).

[34] *Id.* at 258.

corps.[35]

The Court went on to state:

> In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.[36]

The Court concluded by noting that the "First Amendment [did] not require the military to accommodate" then Captain Goldman's desire to wear his yarmulka while on-duty and in uniform.[37] Here, Appellant rejects that premise, claiming that the First Amendment's "Free Exercise" Clause and RFRA *require* accommodation of her "religious" signs in her common-area, military workspace.

B. RFRA and its Application to the UCMJ.

Appellant's arguments fail to accurately consider the specific *legislative history* surrounding the enactment of RFRA in 1993, which rejects her premise that RFRA legislatively overruled or significantly curtailed the *Parker* and *Goldman* holdings. Furthermore, purely civilian cases such as *Burwell v. Hobby Lobby Stores, Inc.,*[38] extensively relied upon by Appellant, provide little (if any) guidance in the *military*

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[35] 475 U.S. at 507.

[36] *Id.*

[37] *Id.* at 509-10.

[38] 134 S.Ct. 2751 (2014).

context of this case.

First, the House *Committee on the Judiciary* issued House Report 103-88 (May 11, 1993)["House Report"], on RFRA, which stated:

> The Committee recognizes that the religious liberty claims in the context of . . . the military present far different problems ... than they do in civilian settings. . . . [M]aintaining discipline in our armed forces, [has] been recognized as [a] governmental interest[] of the highest order.[39]

The Senate's *Committee on the Judiciary*, issued a more detailed analysis in Senate Report 103-11 (July 27, 1993)["Senate Report"] in a section captioned as "Application of the Act to the Military:"

> The courts have always recognized the compelling nature of the military's interests in these objectives [maintaining good order, discipline, and security] in the regulation of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. ***The committee intends and expects that such deference will continue under this bill.*** [emphasis added][40]

Amicus respectfully submit that, as applicable herein, the legislative history of RFRA is quite clear that the *Parker* and *Goldman* principles noted above, control the issues herein.

Following the Court's decision in *Goldman,* military commentators jumped into

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[39] House Report at 8.

[40] Senate Report at 11-12.

the debate over its impact on military law.[41] One other commentator more recently noted:

> [T]he military ... is a coercive institution. One's life is restricted to a much larger extent, and one's personal behavior is subject to a much higher scrutiny.[42]

Congress reacted to *Goldman* by enacting 10 U.S.C. § 774.[43] In 1990, the Court decided *Employment Division v. Smith,*[44] the so-called "Peyote" case. It held that a State's denial of unemployment benefits to Native Americans fired for using the drug as part of a religious sacrament of their Native American Church, did *not* violate the Free Exercise Clause. Congress reacted by passing RFRA.[45]

Here, at issue is, to what extent does RFRA impact *military* First Amendment jurisprudence? Or, is the premise that "[m]ilitary members accept diminished constitutional rights–as part of the 'service before self' ethos...."[46] no longer valid as Appellant and her *amici* suggest? Both the UCMJ and RFRA are valid exercises of

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[41] *See, e.g.,* Folk, *Religion and the Military: Recent Developments,* Army Lawyer (December, 1985) at 6; Vinet, Goldman v. Weinberger: *Judicial Deference to Military Judgment in Matters of Religious Accommodation of Servicemembers,* 36 Naval L.Rev. 257 (1986); and Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 Mil.L.Rev. 125 (1988).

[42] Sussman at 97.

[43] Pub.L. 100-180, 101 Stat. 1086 (1987).

[44] 494 U.S. 872 (1990).

[45] Pub.L. 103-41, 107 Stat. 1488 (1993).

[46] Fitzkee at 66.

Congressional *constitutional* powers. But, in the military context, that does not mean that RFRA prevails ***if*** there are conflicts among the UCMJ, RFRA, and First Amendment. How to resolve those conflicts is the underlying issue here – unless the Court accepts the argument that because Appellant did not legitimately preserve her Free Exercise claims, the *Canon of Constitutional Avoidance* precludes granting her relief. It simply is not a Free Exercise burden to require Appellant to have requested appropriate accommodations in advance of posting her signs.[47] Indeed, the Court's decision in *Hobby Lobby,* relied upon by Appellant and her *amici,* was premised upon an available accommodation.[48]

What remains is this: whatever Appellant thought about her supervisor's direct orders to *remove* the signs, the orders had "no tendency to coerce individuals into acting contrary to their religious beliefs. . . ."[49] Appellant again misses the point:

> Our cases have long recognized a distinction between the freedom of individual *belief,* which is absolute, and the freedom of individual *conduct, which is not absolute.* [emphasis added].[50]

As noted above, it was Appellant's criminal *conduct* that led to her court-martial and conviction, *not* her religious beliefs. Or, as the Court also held, "To maintain an

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[47] *See, e.g., Wheaton College v. Burwell,* 134 S.Ct. 2806, 2807 (2014)(Mem.)

[48] 134 S.Ct. at 2759.

[49] *Lying v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450 (1988).

[50] *Bolden v. Roy,* 476 U.S. 693, 699 (1986).

organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[51] While extreme, the Free Exercise Clause would not legally sanction human sacrifices as part of a religious ritual as a defense to a homicide charge. And, as the Court stated:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all of the burdens incident to exercising every aspect of the right to practice religious beliefs.[52]

C. Good Order and Discipline.

> "[T]here are characteristics of the military—including its rank structure and the need for good order and discipline essential to accomplishing the military's crucial mission—that justify constraints on the religious speech of all military members beyond what would be constitutionally tolerable in the civilian context."[53]

Good order and discipline has been the cornerstone of all effective militaries for centuries, and the USMC certainly embodies that concept.[54] As such,

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.[55]

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[51] *Lee,* 455 U.S. at 258.

[52] *Id.* at 261.

[53] Fitzkee, at 59.

[54] For a historical analysis of this concept, *see,* Cooper, *Gustavus Adolphus and Military Justice,* 92 Mil.L.Rev. 129 (1981).

[55] *Bolden,* 476 U.S. at 699.

The rationale for this is fundamental: "In no uncertain terms . . . a superior orders and the subordinate follows. . . . [C]ompliance could mean the difference between life and death."[56]

Again, this is not a novel concept in our jurisprudence:

> There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops ***on the base under his command*** [emphasis added].[57]

In a similar, but non-military context, the Supreme Court has concluded:

> Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of . . . good order.[58]

Here, Appellant was *not* prosecuted because of her religious opinions, but rather for her misconduct in violating the orders of her superior NCO. *Reynolds* concluded:

> Can a man excuse his practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[59]

In the context of "good order and discipline" within our military, this is even

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[56] Sussman, at 110.

[57] *Greer v. Spock,* 424 U.S. 828, 840 (1976). *Spock* involved political speech issues at Fort Dix, NJ.

[58] *Reynolds v. United States,* 98 U.S. 145, 164 (1878).

[59] *Id.* at 166-67.

more essential. In the context of the Appellant, she is attempting to now become a law unto herself.

Finally, it is important to keep this case in context. Appellant posted her personal signs on government *property,* on her government desk, in her government office, on a USMC Base. The Court's attention is invited to *United States v. Apel,*[60] which involved a "Free Speech" issue at Vandenberg AFB, CA. Of relevance here is the Court's conclusion:

> Federal law makes the commander responsible "for the protection or security of" "property subject to the jurisdiction . . . of the Department of Defense" [citing 50 U.S.C. § 797(a)(2)].[61]

Appellant has not demonstrated how her misconduct in violating a direct order from a supervisor in the specific military context of her charges, *legally* justifies any defense or relief, either under the First Amendment or RFRA.[62]

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[60] 135 S.Ct. 1114 (2014).

[61] *Id.* at 1152. Section 797(a)(4)(D), states "The term 'regulation' includes an order."

[62] *See also, United States v. Webster,* 65 M.J. 936 (ACCA), *rev. denied,* 67 M.J. 9 (CAAF 2008), where a Soldier was convicted of, *inter alia,* violating a superior's order, even after the Army offered a *de facto* accommodation to his religious objections, which he refused. While he raised a RFRA defense, ACCA noted that it was not an absolute defense.

III. EVEN IF THE RFRA ISSUE WAS LEGALLY PRESERVED, IT DOES NOT PROVIDE APPELLANT ANY BASIS FOR JUDICIAL RELIEF WHERE THE PUBLIC DISPLAY OF THREE "SIGNS" IN HER COMMON, PUBLIC WORK AREA, ON A MILITARY INSTALLATION PROPERTY OF THE U.S. GOVERNMENT, WAS NOT A *BONA FIDE* FREE EXERCISE OF RELIGION IN THE *MILITARY* CONTEXT.

A. Context.

Appellant's arguments all suffer from the same fatal flaw - they ignore the *context* of her misconduct. In the domain of the First Amendment's Free Exercise clause, "Conduct remains subject to regulation for the protection of society."[63] Here, the context is a purely military setting - a Lance Corporal with "a contentious relationship between the [Appellant] and her command[[64]], prior to the charged misconduct."[65] Appellant then posted three signs in her common-area, military workplace and U.S. Government property, with an alleged "religious" quotation: "no weapon formed against me shall prosper."[66]

In this context, according to the NMCCA opinion:

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[63] *Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940).

[64] The record reflects that her supervisor was a Staff Sergeant.

[65] *United States v. Sterling,* 2015 WL 832587 at *6 (NM CCA 2015).

[66] Whether this phrase is a "Biblical quotation" as Appellant alleges in her Brief [*see* footnote 6, *supra*], and claims to be a quotation from the Old Testament *Book of Isaiah,* 54:17 [Appellant's Br., at 3, n. 1], it is not an accurate quotation from any version known to *Amicus.* It is an accurate quotation from a *song*, the lyrics of which are set forth in Appendix "A", *infra.*

> "the orders were given because the workspace in which the accused placed the signs was shared by at least one other person[,] [t]hat other service members come to [the] accused's workspace for assistance at which time they could have seen the signs." The military judge determined that the signs' quotations, "although ... biblical in nature ... could easily be seen as contrary to good order and discipline." [internal footnotes omitted].[67]

But, there are additional, contextual factors here. As noted, Appellant *twice* refused a direct order from her NCO supervisor to remove the signs. So, we have a Lance Corporal [E-3], on Base in a USMC common work-area with other Marines, on-duty, in uniform, refusing to comply with direct orders from her Staff Sergeant [E-6] supervisor. That is the antithesis of "good order and discipline." What is a USMC supervisor to think? If they were in a combat situation and Appellant refused to follow direct orders, chaos (to include death) could result and the mission would fail. This is the situation that Appellant overlooks. While Appellant is certainly entitled to her religious beliefs, here it is the context of her conduct that she seeks to excuse by a belated claim of religious accommodation. Specifically, whether or not her supervisor found the signs threatening or defiant, in the applicable circumstances here, there was no First Amendment "privilege."

B. Conduct

> Although the freedom to believe is absolute, the freedom to act in accordance with one's belief, like the

[67] *Id.* at *4.

> right to free speech, is not absolute and may be subject to government restriction. [citation omitted][68]

Here, Appellant's putting up three "religious" signs in her military work-space and then refusing direct orders from her NCO supervisor to remove them, is the conduct at issue. As noted "[c]onduct remains subject to regulation for the protection of society."[69] The "society" here was the USMC and Appellant's specific unit - it was not a civilian work-place. As *Parker* and *Goldman* hold, the military, because of its unique status, can regulate the conduct of servicemembers that would be otherwise unconstitutional in most civilian settings other than prisons.[70] Perhaps the most analogous *non-military* case is *Morse v. Frederick.*[71] There, during a school sanctioned event, student Frederick publicly displayed a banner stating, "BONG HiTS 4 JESUS" (sic). When his principal ordered him to take the banner down, he refused. He was then suspended for ten days because the principal felt that the message encouraged illegal drug use contrary to the district's anti-drug abuse policy. Frederick sued for a violation of his First Amendment rights.

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[68] Schauss, *Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services,* Army Lawyer, 17 (February 2013).

[69] *Cantwell,* 310 U.S. at 304.

[70] *But see, Holt v. Hobbs,* 135 S.Ct. 853 (2015), where the Court reversed the decisions of prison officials and lower courts denying prisoner Holt's request for a religious accommodation, *i.e.,* to grow a half-inch beard. Unlike Appellant here, Holt had specifically requested a religious accommodation.

[71] 551 U.S. 393 (2007).

Like *Parker, Goldman* and their progeny, *Morse* also involved a "specialized" segment of society - public school students. While *Morse* did not involve any "free exercise" of religion issue, it is however, instructive. It was Frederick's *conduct* that prompted his suspension, *i.e.,* his refusal to obey the order of his principal. *Morse's* import here is not the message on his banner, rather it was the Court's re-affirmation that certain specialized segments of society, *e.g.,* the military, prisons and public schools, are entitled to "significant deference" by the judiciary.

The *Morse* Court framed the issue:

> The question then becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.[72]

And again, it is the *context* that allows the regulation of *conduct.* Thus, *Morse* held that schools may regulate some student speech that could not be lawfully regulated "outside the school context...."[73] The reason being that, "the military and schools both have unique characteristics that distinguish them from society at large."[74]

C. Symbolic Speech

The protections afforded by the First Amendment,

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[72] 551 U.S. at 403.

[73] *Id.* at 405.

[74] Mason & Brougher, CRS Report for Congress, *Military Personnel and Freedom of Religious Expression: Selected Legal Issues,* 4 (2010); available at: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA521221 [last accessed: 1 FEB 16].

> however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.[75]

While Appellant now hints that her conduct below should be protected in the context of "symbolic speech," she did not make and therefore did not preserve, that argument below.

Symbolic speech is *conduct* conveying a message, that has long been viewed as potentially protected under the First Amendment.[76] *Black* however, stands for the proposition that not all symbolic speech falls within the First Amendment's protections. *Black* involved a criminal prosecution of some KKK members who, contrary to a Virginia statute, conducted a "cross-burning." But, "[t]he fact that cross burning is symbolic expression, however, does not resolve the constitutional question."[77] As the Court concluded, "A ban on cross burning carried out with the intent to intimidate is . . . proscribable under the First Amendment."[78]

However, we must again return to the *context* of Appellant's conduct. Had she posted her religious signs in her barrack's room or inside of her personal car, there would be no legitimate question that such conduct is fully protected by the First

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[75] *Virginia v. Black,* 538 U.S. 343, 358 (2003).

[76] *See, e.g., United States v. O'Brien,* 391 U.S. 367 (1968)["draft card" burning]; and *Texas v. Johnson,* 491 U.S. 397 (1989)["flag burning" case].

[77] *Black,* 538 U.S. at 361.

[78] *Id.* at 363.

Amendment. Indeed, *Amicus* would fully support Appellant in *that context.* But, here we have a scenario where she posted signs, in a common, military work-area, on U.S. Government property, while on duty and in uniform where other military members - to include her supervisor - would be exposed to the "religious" message, threat or not. And in that *context,* under the totality of circumstances, this was *not* protected "symbolic speech."

D. The Judicial Deference Doctrine.

> [W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.[79]

Both the House and Senate Reports pertaining to RFRA's enactment, expressly acknowledged the concept and applicability of judicial deference to core military decision-making. Here, Appellant's NCO supervisor, First Sergeant, Commander, and the Convening Authority *all* used their professional military judgment to conclude that the supervisor's orders to Appellant to remover her signs were lawful *in the context of maintaining good order and discipline*, because they were "disruptive." MRFF urges this Court to keep this within the proper context, *i.e.,* the totality of Appellant's misconduct for which she was convicted – disrespect to a superior

[79] *Goldman,* 475 U.S. at 507. *See also,* Vinet, *supra,* at 263, discussing judicial deference to the military.

commissioned officer [her Commander]; failure to go to her appointed place of duty; and *four* specifications of disobeying an NCO. It is not an exaggeration to conclude that Appellant's misconduct was virtually a *per se* violation of "good order and discipline," and certainly did nothing positive for morale, unit cohesion and *esprit de corps* in her Company. This is so:

> Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.[80]

Or, as the Court further noted, "Loyalty, morale, and discipline are essential attributes of all military service.[81]

> In the military context ... the Supreme Court has recognized that military decisions are entitled to a higher level of deference so that the military may maintain order and discipline within its ranks.[82]

RFRA's legislative history clearly shows that Congress, while tinkering with the proper scope of judicial review in the *civilian* context, clearly intended that in the *military* context, *Parker* and *Goldman's* "deference will continue under this bill."[83] Appellant's failure to address this *caveat* to her RFRA arguments cannot be

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[80] *Brown v. Giles,* 444 U.S. 348, 357 (1980).

[81] *Id.* at 357, n. 14.

[82] Mason & Brougher, *supra,* at 4.

[83] Senate Report, *supra,* at 11-12.

overlooked by this Court. Furthermore, as one post-RFRA academic article notes, "it is well established that the government has greater latitude in restricting military members speech than would be permissible in the civilian sector."[84] More specifically as pertinent herein, those authors conclude: "Military superiors certainly have the authority to issue a content-neutral prohibition on all on-duty speech that does not pertain to official business."[85]

While Appellant correctly notes that the legislative history of RFRA does address the military context, she fails to note that both the House and Senate Reports on RFRA maintained the traditional judicial "due deference" standard to the military's decisions in this regard.[86] The "compelling governmental interest" here is both constitutional, *viz.,* avoiding violations of the First Amendment's "Establishment Clause;" and second, the military's *raison d'être*:

> DoD has a compelling government interest in mission accomplishment, unit cohesion, good order, discipline, health, safety, on both the individual and unit levels. . . .[87]

Whether or not Appellant's supervisor could "over-ride" this DoD Instruction is not the issue, as clearly any accommodations required approval by her commander

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[84] Fitzkee & Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses,* 59 A.F. Law Rev. 1, 31 (2007)[citing *Parker v. Levy*].

[85] *Id.* at 34.

[86] *Supplement to Petition for Review,* at 13.

[87] DoDI 1300.17, ¶ 4(c),(2014).

consistent with both the DoDI and SECNAVINST. But again, Appellant never made any requests for accommodation for her command to consider and she cannot ignore the context of her actions - something that her chain-of-command had a *bone fide* interest in for purposes of maintaining good order and discipline. The issue is not the scope of RFRA or its broad protections of religious liberty in the *civilian* community. Rather, it is its *limited* application to an active-duty, on-duty, Marine.

CONCLUSION

Respectfully, the Court should *dismiss* this appeal as improvidently granted. Alternatively, the Court should *affirm* the decision of the NM CCA. [6,910]

DATED: 2nd day of February, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c), 26, & 37(a)

1. This Pleading complies with the type-volume limitations of Rule 24(c) and Rule 26 because it contains **6,910** words [7,000 allowed], as counted by WordPerfect, Version X4's "Word Count" function;

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Sterling,* USCA Dkt. No. 15-0510/MC, was electronically filed with the Court and served upon Petitioner's Counsel and Government Appellate Counsel on **2 February 2016.**

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APPENDIX "A"

“No Weapon” by Fred Hammond©

No weapon formed against me shall prosper, it won't work
No weapon formed against me shall prosper, it won't work
Say no weapon formed against me shall prosper, it won't work
Say no weapon formed against me shall prosper, it won't work

God will do what He said He would do
He will stand by His word
And He will come through
God will do what He said He would do

He will stand by His word
And He will come through
No weapon formed against me shall prosper, it won't work
No weapon formed against me shall prosper, it won't work

God will do what He said He would do
He's not a man that He should lie (Stand by his word)
He will come through
Say God will do what He said He would do

He will stand by His word
He will come through

Oh I won't be afraid of the arrows by day
From the hand of the enemy
I can stand my ground with the Lord on my side
For the snares they have set will not succeed

No weapon formed against me (shall prosper, it won't work) it won't work
No weapon formed against me (shall prosper) shall prosper, it won't work
For I know that he'll do (say he'll do it) what he said he's gonna do (say he'll do it)
He will stand by his word (stand by his word)
He will come through, yeah

God, will do what he said he's gonna do
Stand by his word (stand by his word)
(No) No, (no) no way

No weapon formed against me (shall) shall prosper (prosper no way, no way), it won't work
Telling, no (no weapon) formed against me (shall) shall prosper, it won't work (it won't work)

Don't be afraid
Of the arrows or the snares

Set by your enemies
If you believe it say, ooh, Ooh

There just ain't one,
(There just ain't one)
There just ain't one
(There just ain't one weapon, no)
Although they've said us men will trap you, I want you to know it won't work, oh no no no
(There just ain't one)
And it won't work
(There just ain't one weapon, no)

Source: http://www.metrolyrics.com/no-weapon-lyrics-fred-hammond.html [last accessed, 1 FEB 2016]