No. 16-814

In The
Supreme Court of the United States

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

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE MILITARY RELIGIOUS FREEDOM FOUNDATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY OPPOSING CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

U.S. CONSTITUTION

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Military Religious Freedom Foundation [MRFF] is an IRS 501(c)(3), not-for-profit corporation, located in Albuquerque, NM. It is dedicated to ensuring that all members of the United States Armed Forces receive the Constitutional guarantee of religious freedom to which they and all Americans are entitled by virtue of the First Amendment.[1]

To date, approximately 50,000 active duty, veteran, and civilian personnel of the United States Armed Forces have come to the MRFF for redress and assistance in resolving or alerting the public to their civil rights grievances. MRFF recognizes that military life requires individual adherence to shared patriotic principles. MRFF also recognizes the need for military personnel to at times temporarily relinquish some Constitutionally granted personal freedoms for the sake of military discipline and objectives.

MRFF has a significant interest in the effect that granting Petitioner her belated claims for religious accommodation will have on military discipline and good order. Petitioner, an active-duty Marine while on duty, posted signs she belatedly claimed were

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[1] No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the Amicus Curiae made a monetary contribution to the preparation and submission of this Brief or to counsel. Counsel for the Parties have consented to Amicus Curiae filing this Brief and such have been filed with the Court. Counsel for the government timely received MRFF's notice of intent to file an amicus brief under Rule 37(2)(a). Counsel for Petitioner, Mr. Clement, waived the time requirement for such notice under Rule 37, and consented to the filing of this Brief.

Biblically related, at her common work area which was open to other personnel at a large military base (Camp Lejeune, NC), which is U.S. Government property. Granting her the relief she requests, raises a substantial issue under the Establishment Clause of the First Amendment.

MRFF is also concerned that granting Petitioner the relief she seeks, will be tantamount to ignoring a Department of Defense Instruction [DoDI] and Secretary of the Navy Instruction [SECNAVINST] that seek an appropriate balance between the Free Exercise and Establishment Clauses of the First Amendment, the Religious Freedom Restoration Act [RFRA], 42 U.S.C. § 2000bb et seq., and accommodating military requests under the Free Exercise Clause. Petitioner failed to comply with the applicable regulations on seeking prior command approval for any religious accommodations so that her Command could ensure compliance with relevant DoD and Navy policy – policies that Petitioner did not challenge below.

THE FACTUAL BACKGROUND

The MRFF offers the following supplemental, factual material:

1. "[T]he claimed exercise of religion at issue in this case involved posting the printed words, '[n]o weapon formed against me shall prosper' at a shared workplace in the context of [Petitioner's] contentious relationship with her superiors."[2]

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[2] United States v. Sterling, 75 M.J. 407, 410 (CAAF 2016).

2 The "signs" at issue,[3] are not Biblical quotations – the language paraphrases (without attribution) language in Isaiah 54:17.[4]

3. ". . . [Petitioner] did not inform the person who ordered her to remove the signs that they had any religious significance to [her], the words in context could easily be seen as combative in tone, and the record reflects that their religious connotation was neither revealed nor raised until mid-trial."[5]

4. "Nor, despite the existence of procedures for seeking a religious accommodation, did [Petitioner] seek one."[6]

5. Petitioner was convicted:

   ". . . contrary to her pleas, of one specification of failing to go to her appointed place of duty, one specification of disrespect toward a superior commissioned officer, and four specifications of disobeying the lawful order of a noncommissioned officer (NCO) . . . ."[7] She was acquitted of an unrelated offense.

6. The only conviction before this Court is Petitioner's conviction for refusing to obey a

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[3] All of the parties at Petitioner's court-martial referred to the posted language as "signs."

[4] See, Pet. at n.2, 5.

[5] 75 M.J. at 410.

[6] Id.

[7] Id., see, 10 U.S.C. §§ 886, 889, and 891.

direct order of her NCO supervisor to remove the "signs." Petitioner was not charged with any offense relating to the posting of the signs.

7. In addition to testifying at trial about her "Trinity" concept [Pet. at 5], Petitioner later testified as follows:

> "Q: What was your intention of 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."[8]

8. ". . . [Petitioner] did not present any testimony that the signs were important to her exercise of religion, or that removing the signs would either prevent her 'from engaging in conduct [her] religion requires,' . . . or cause her to 'abandon[] one of the precepts of her religion." [citations omitted][9]

9. ". . . the trial evidence does not even begin to establish how the orders to take down the signs interfered with any precept of her religion let alone forced her to chose between a practice or principle important to her faith and disciplinary action."[10]

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[8] CAAF, Joint Appendix [JA], 114. Emphasis added.

[9] 75 M.J. at 418.

[10] Id. at 419.

SUMMARY OF ARGUMENT

> [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.[11]

This is a case about military misconduct by an active duty Marine who refused to obey the direct order of her Marine NCO supervisor. It is not about the "Free Exercise" of religion. It is a case where Petitioner claims that her misconduct (as applicable here) was protected by the penumbra of the First Amendment's "Free Exercise" clause and RFRA.[12]

What Petitioner 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. Petitioner exercised her claimed "right" (without obtaining an approved accommodation) and, like any other servicemember subject to the UCMJ who violates lawful orders from a superior, was subject to punishment under the UCMJ.

Petitioner argues that her conduct was a protected "exercise of religion" and therefore, it should have been accommodated by the USMC. That argument overlooks the fatal flaw – Petitioner failed to comply with DoDI 1300.17 (2009 ed.) and SECNAVINST 1730.8B (2012), by first requesting religious accommodations from her command. By not making such a request, Petitioner's

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[11] 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).

[12] 42 U.S.C. § 2000bb et seq.

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, Petitioner 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 "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 Petitioner first posted her signs, and then defied the order of her USMC supervisor to remove the signs. It was the military context of Petitioner's misconduct – violating her supervisor's orders – that provided the basis for this case.

The orders by Petitioner's NCO to remove the signs did not "substantially burden" Petitioner's religious practices, much less her beliefs.[13] Therefore, neither the First Amendment nor RFRA support her arguments. Petitioner nowhere discusses how violating an NCO's orders constitutes the "Free Exercise" of religion. Violating a specific, criminal provision of the UCMJ is not and cannot be "accommodated" under the circumstances herein.[14]

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

[14] Had Petitioner been prosecuted for simply posting the signs, the issue may have been a closer call. But, she was not prosecuted for "posting" anything – Biblical or not.

ARGUMENT

I. CONGRESS, THE MILITARY, AND RFRA: SOME RELEVANT BACKGROUND.

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. Levy,[15] Goldman v. Weinberger,[16] and to the extent feasible, RFRA.

RFRA as amended,[17] 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; Petitioner did not. Nor does Petitioner address her failure to seek any religious accommodations in her Certiorari Petition.

DoDI 1300.17 (2014), provides:

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[15] 417 U.S. 733 (1974).

[16] 475 U.S. 503 (1986). Discussed infra.

[17] 42 U.S.C. § 2000cc et seq.

> 4. POLICY. It is DoD policy that:
>
> a. The DoD places a high value on the rights of 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," something that Petitioner 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[18] ... discipline, or mission accomplishment." Paragraph 5(c), sets for the requirement of first seeking an accommodation and how such requests are to be handled. Petitioner at no time made any such request. As the Navy-Marine Corps Court of Criminal Appeals [NM CCA] found:

> [Petitioner] "never told her SSgt[19] that the signs had a religious connotation and never requested any religious accommodation to

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[18] Petitioner's misconduct – as evidenced by her convictions – was the antithesis of "unit cohesion."

[19] Staff Sergeant.

> enable her to display the signs." United States v. Sterling, 2015 WL 832587, *5.

Petitioner seeks 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 is whether or not RFRA permits an active-duty Marine subject to the Uniform Code of Military Justice [UCMJ],[20] 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 of Article 92(2), UCMJ, 10 U.S.C. § 892(2)?

Congress, exercising its delegated power under the "Make Rules" Clause, Article I, § 8, cl.14, U.S. Const., enacted the UCMJ in 1950. Thus, there is an apparent constitutional tension between the UCMJ and RFRA – but one easily resolved.

Petitioner'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.

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[20] 10 U.S.C. § 801 et seq.

Petitioner has not addressed how, by allowing her to post signs of a religious nature, that changes anything with respect to the Establishment Clause, as specified in RFRA § 2000bb-4.[21] 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?"[22]

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 or endorse religion....[23]

Petitioner's situation is hardly an aberration. For example, in Tucker v. California Dept. of Educ.,[24] a State employee (a computer analyst) who had no public interactions, challenged an order essentially forbidding

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[21] "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...."

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

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

[24] 97 F.3d 1204 (9th Cir. 1996).

all religious "speech" in and around the workplace.[25] 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....[26]

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 Petitioner, 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 delineate the accommodations. That process complies with both the First Amendment and RFRA and will avoid needless litigation.

II. RFRA AND CONGRESSIONAL INTENT.

> Not all burdens on religion are unconstitutional.[27]

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

[26] 97 F.3d at 1214.

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

A. Military Free Exercise Jurisprudence.

Proper analysis of Petitioner'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."[28] 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."[29] Petitioner'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 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.[30]

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[28] 417 U.S. at 743.

[29] Id. at 749 [emphasis added].

[30] Id. at 758.

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

Parker quoted with approval from United States v. Gray,[31] 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.[32]

After Parker, this 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 accomplish its mission the military must foster instinctive obedience, unity,

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[31] 42 C.M.R. 255 (CMA 1970).

[32] Id. at 258.

> commitment, and esprit de corps.[33]

This 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.[34]

The decision 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.[35] Here, Petitioner 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.

Petitioner's arguments fail to consider the specific legislative history surrounding the enactment of RFRA in 1993, which rejected 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.,[36] extensively relied upon by Petitioner, provide little (if any) guidance in the military context of this

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[33] 475 U.S. at 507.

[34] Id.

[35] Id. at 509-10.

[36] 134 S.Ct. 2751 (2014).

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.[37]

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][38]

Amicus respectfully submit that the legislative history of RFRA is quite clear viz., the Parker and Goldman deference principles noted above, control the

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[37] House Report at 8.

[38] Senate Report at 11-12.

issues herein.

One commentator 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.[39]

Congress reacted to Goldman by enacting 10 U.S.C. § 774.[40] In 1990, this Court decided Employment Division v. Smith,[41] 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.[42]

Here, the 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...."[43] no longer valid as Petitioner appears to suggest? Both the UCMJ and RFRA are valid exercises of 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. It simply is not a Free Exercise burden to require Petitioner to have requested

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[39] Sussman at 97.

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

[41] 494 U.S. 872 (1990).

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

[43] Fitzkee at 66.

appropriate accommodations in advance of posting her signs.[44] Indeed, the Court's decision in Hobby Lobby, relied upon by Petitioner and her amici, was premised upon an available accommodation.[45]

What remains is this: whatever Petitioner 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. . . ."[46] Petitioner 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].[47]

It was Petitioner's criminal conduct that led to her court-martial and conviction, not her religious beliefs. Or, "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[48] 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 this Court in Lee stated:

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

[45] 134 S.Ct. at 2759.

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

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

[48] Lee, 455 U.S. at 258.

> 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.[49]

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."[50]

Good order and discipline has been the cornerstone of all effective militaries for centuries, and the Marine Corps certainly embodies that concept.[51] 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.[52]

The rationale for this is fundamental: "In no uncertain

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[49] Id. at 261.

[50] Fitzkee, at 59.

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

[52] Bolden, 476 U.S. at 699.

terms . . . a superior orders and the subordinate follows. . . . [C]ompliance could mean the difference between life and death."[53]

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].[54]

Here, Petitioner was not prosecuted because of her religious opinions, but rather for her misconduct in violating the orders of her superior NCO.

> 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.[55]

In the context of "good order and discipline" within our military, this is even more essential. In the context of the Petitioner, she is attempting to now become a law unto herself.

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[53] Sussman, at 110.

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

[55] Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

Finally, the Court's attention is invited to United States v. Apel,[56] 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)].[57]

Petitioner 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.[58]

III. RFRA DOES NOT PROVIDE PETITIONER ANY BASIS FOR JUDICIAL RELIEF.

A. Context.

Petitioner'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

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[56] 135 S.Ct. 1114 (2014).

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

[58] See also, United States v. Webster, 65 M.J. 936 (Army Ct.Crim.App. [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.

protection of society."[59] Here, the context is a purely military setting - a Lance Corporal with "a contentious relationship between the [Petitioner] and her command[[60]], prior to the charged misconduct."[61]

> According to the NM CCA opinion below:
>
> "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].[62]

But, there are additional, contextual factors here. As noted, Petitioner 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 Petitioner refused to follow direct orders, chaos (to include death) could

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

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

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

[62] Id. at *4.

result and the mission would fail. This is the situation that Petitioner overlooks. While Petitioner 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 non-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

Petitioner'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 misconduct at issue. This 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.[63]

Perhaps the most analogous non-military case is Morse v. Frederick.[64] 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

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[63] 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 Petitioner here, Holt had specifically requested a religious accommodation.

[64] 551 U.S. 393 (2007).

policy. Frederick sued for a violation of his First Amendment rights.

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 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 and controlled 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.[65]

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...."[66] The reason being that, "the military and schools both have unique characteristics that distinguish them from society at large."[67]

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[65] 551 U.S. at 403.

[66] Id. at 405.

[67] Mason & Brougher, CRS Report for Congress, Military (continued...)

C. 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.[68]

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, Petitioner's NCO supervisor, First Sergeant, Commander, and the Convening Authority all used their professional military judgment to conclude that the supervisor's orders to Petitioner to remover her signs were lawful in the context of maintaining good order and discipline, because the signs were "disruptive."

MRFF urges this Court to keep this within the proper context, i.e., the totality of Petitioner's misconduct for which she was convicted – disrespect to a superior 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 Petitioner's misconduct was virtually a per se violation of "good order and discipline," and certainly did nothing positive for

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[67] (...continued)
Personnel and Freedom of Religious Expression: Selected Legal Issues, 4 (2010); available at: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA521221 [last accessed: 8 FEB 17].

[68] Goldman, 475 U.S. at 507.

morale, unit cohesion and esprit de corps in her unit. 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.[69]

Or, as the Court further noted, "Loyalty, morale, and discipline are essential attributes of all military service.[70]

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."[71] Petitioner's failure to address this caveat to her RFRA arguments cannot be overlooked. 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."[72] 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

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

[70] Id. at 357, n. 14.

[71] Senate Report, supra, at 11-12.

[72] 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].

to official business."[73]

While Petitioner 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. 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. . . .[74]

Whether or not Petitioner's supervisor could "over-ride" this DoD Instruction is not the issue, as clearly any accommodations required approval by her commander consistent with both the DoDI and SECNAVINST. But again, Petitioner 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, who refused to follow orders.

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[73] Id. at 34.

[74] DoDI 1300.17, ¶ 4(c),(2014).

IV. CERTIORARI IS NOT WARRANTED.

There are no compelling reasons to disturb the ruling by the CAAF below and thus, no compelling reason to grant certiorari. Contrary to her claim, Petitioner was not deprived of her "religious liberty at the threshold." [Pet. 13]. It was her "threshold" failure to seek a religious accommodation for her signs that placed her in a court-martial for violating a direct order to remove them.

A. There is No Circuit Split.

While it is true as Petitioner suggests, that various Circuit Courts of Appeal have approached the RFRA "substantial burden" issue in differing ways, the cases relied upon by Petitioner and her amici are generally inapposite.[75] All of those cases involved civilians in a civilian context.[76] Thus, because of the specific legislative history of RFRA pertaining to the military, to include the judicial deference principle, none of Petitioner's cases arise in the same or even similar context of this case, viz., an active duty military member in a completely military setting.

Thus, it is irrelevant in the present case which substantial burden formula is used in the civilian

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[75] The sole exception is contained in the amicus brief in Support of Petitioner by Lieutenant Colonel [LTC] Kalsi, where he cites two Army RFRA cases – Singh v. Carter, 185 F.Supp.3d 11 (D.D.C. 2016), and Singh v. McHugh, 185 F.Supp.3d 201 (D.D.C. 2016). But, unlike Petitioner, both Singh cases involved properly requested military religious accommodations that were either denied in full or in part, and neither involved using RFRA as a defense to court-martial charges.

[76] But see, Holt v. Hobbs, supra.

context. Rather, the RFRA issue here is more properly analyzed by using this Court's approach in Holt v. Hobbs, supra, the prisoner-beard case where an accommodation was sought and then denied by prison authorities.

B. This Case Is Not an Appropriate Vehicle to Consider the Scope and Context of RFRA's Application in a Military Environment.

Petitioner did not avail herself of seeking any religious accommodations for her signs – something that Congress, the DoD and the Navy all deemed to be a proper prerequisite in the military context. Nor was the matter appropriately litigated at the trial level. Literally mid-trial, Petitioner for the first time submitted the DoD Instruction without comment or argument. There was no argument or evidence presented (by either side) about the applicability or scope of RFRA vis-a-vis Petitioner's court-martial. Regardless of the potential merits of Petitioner's arguments, the lack of a developed record on the RFRA issues makes this case an inappropriate vehicle for resolving the RFRA issues in a military context.

CONCLUSION

The Court should respectfully deny certiorari for the reasons stated above.

Respectfully submitted,

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February 14, 2017