IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
	)	BRIEF OF ALLIANCE DEFENDING
Appellee	)	FREEDOM AND CHAPLAIN ALLIANCE
	)	FOR RELIGIOUS LIBERTY AS
	)	*AMICI CURIAE* IN SUPPORT OF
v.	)	APPELLANT
	)	
Monifa J. STERLING,	)	Crim.App. Dkt. No. 201400150
Lance Corporal (E-3)	)	
U.S. Marine Corps,	)	USCA Dkt. No. 15-0510/MC
	)	
Appellant	)	

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

INTEREST OF *AMICI CURIAE*

Alliance Defending Freedom (ADF) and the Chaplain Alliance for Religious Liberty, pursuant to Rule 26(a)(3) of this Court, respectfully submit this brief as *amici curiae* in support of Appellant Monifa J. Sterling.

ADF is a nonprofit public interest organization that specializes in constitutional law and advocates for the right of people — including service members — to freely live out their faith. Since its founding in 1994, ADF has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, numerous cases before federal courts of appeals, and hundreds of cases before

federal and state courts across the country, as well as in tribunals throughout the world. ADF has won four cases before the United States Supreme Court over the last five years alone. *See e.g. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (striking down federal burdens on ADF's client's religious freedom under the Religious Freedom Restoration Act); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

The Chaplain Alliance for Religious Liberty is an association of over 30 endorsing agencies representing over 2,700 chaplains across all branches of the military. The Chaplain Alliance works to ensure the religious freedom of chaplains and all service members.

INTRODUCTION

This case is about Monifa Sterling, but it is also about every American who puts on the uniform in service to

this country. The question is whether service members will be allowed to exercise their faith in the military, or whether they will be denied the same constitutional freedoms they have volunteered to defend and are willing to die for. If the lower court's ruling is left unchanged, religious freedom will be subject to the whims of military supervisors and a chilling effect will sweep across the military, contrary to clear Congressional intent and Constitutional directive. The opinion by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) should be reversed as it relates to both issues specified for review by this Court.

ARGUMENT

I. THE ORDERS TO REMOVE THE BIBLICAL QUOTATIONS WERE UNLAWFUL BECAUSE THEY HAD NO VALID MILITARY PURPOSE AND THEY CONFLICTED WITH APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS.

A. The orders had no valid military purpose.

Lawful orders cannot "interfere with private rights or personal affairs" without "a valid military purpose." *United States v. New*, 55 M.J. 95, 106 (C.A.A.F. 2001) (quoting United States Manual for Courts-Martial, Paragraph 14c(2)(a)(iii) (1995 ed.) ("MCM"). An order has a valid military purpose only where it relates to "military duty."

Id. (quoting MCM); *see also United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002). And military duty includes "all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order [and discipline] in the service." *United States v. New*, 55 M.J. at 106 (quoting MCM); *see also United States v. Washington*, 57 M.J. at 398; *United States v. Spencer*, 29 M.J. 740, 743 (A.F.C.M.R. 1989) (quoting *United States v. Wilson*, 12 C.M.A. 165 (1961)) (finding orders that are too broadly restrictive of a private right to be arbitrary and illegal); *United States v. Kochan*, 27 M.J. 574, 575 (N-M. C.M.R. 1988)(same).

Here, the orders clearly lacked a valid military purpose for broadly restricting Appellant's private rights and personal affairs. The orders were not related to mission accomplishment or the maintenance of good order and discipline. The record is devoid of any evidence whatsoever of prejudice to good order and discipline; in fact, every witness whose testimony touched on the issue stated they never saw anything distracting, agitating, or controversial on or near Appellant's desk. And Appellant's

supervisor merely testified she "did not like [the Bible quotations'] tone." Joint Appendix ("JA") at 045. Law and logic dictate that such an arbitrary and capricious purpose for overly restrictive orders falls far short of the mark.

B. The orders conflicted with Appellant's statutory and constitutional rights.

Orders "must not conflict with the statutory or constitutional rights of the person receiving the order." MCM, Paragraph 14c(2)(a)(v) (2012 ed.). The First Amendment to the United States Constitution has always protected religious exercise. Statutory protection arrived with RFRA, 42 U.S.C. §2000bb (1993) et seq., and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc-1 (2000), both enacted by Congress "to provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2759; *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). The Department of Defense (DoD) incorporated RFRA into its own regulations in January 2014 by amending Department of Defense Instruction (DoDI) 1300.17, "Accommodation of Religious Practices Within the Military Services." RFRA (including its relation to Free Exercise jurisprudence) and DoDI 1300.17 will be addressed more fully below, but it is sufficient to

note that Congress' intent that RFRA apply to the military is beyond dispute.[1]

In the present case, the orders were clearly unlawful, as they had no valid military purpose and conflicted with Appellant's constitutional and statutory rights. By ordering her to take down the Biblical quotations without consideration for RFRA and DoDI 1300.17, Appellant's leadership completely disregarded her religious freedom. There is no need for this Court to proceed any further; it can and should reverse the ruling by the lower court on this basis alone.

II. The ORDERS TO REMOVE THE BIBLICAL QUOTATIONS VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT.

A. RFRA applies to the military and provides a presumption in favor of religious accommodation.

RFRA was expressly applied to the military through the 2014 revision of DoDI 1300.17.[2] This year, a federal

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[1] While recognizing the deference traditionally afforded the military, Congress observed that "seemingly reasonable regulations based upon speculation, exaggerated fears of [sic] thoughtless policies cannot stand." H.R. Rep. No. 103-88, at 8 (1993).

[2] The Instruction mirrors RFRA and now reads as follows, in pertinent part:

> In accordance with [RFRA], requests for religious accommodation from a military policy, practice, or duty that substantially burdens a Service member's exercise of

district court applied the statute to the military in holding that the Army violated RFRA by denying enrollment in the Reserve Officers' Training Corps to a Sikh whose religion required him to request an exemption from the Army's grooming standards. Significantly, the court rejected the Army's request for overly broad deference and highlighted RFRA's presumption in favor of religious accommodation. "Congress has already placed a thumb on the scale in favor of protecting religious exercise, and it has assigned the [c]ourt a significant role to play." *Singh v. McHugh*, WL 3648682, at 16 (D.D.C. June 12, 2015).

RFRA was passed in 1993 with overwhelming bipartisan support[3] in response to *Employment Div. v. Smith*, 494 U.S. 872 (1990). Deviating from case law protecting religiously motivated conduct, the Court in *Smith* held that neutral, generally applicable laws that incidentally burden the

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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, Paragraph 4(e).

[3] The bill passed in the House unanimously and in the Senate by a vote of 97-3. *See* H.R. 1308 (103rd): Religious Freedom Restoration Act of 1993, https://www.govtrack.us/congress/votes/103-1993/s331(last visited December 9, 2015).

exercise of religion may not run afoul of the Free Exercise Clause. RFRA was enacted to restore the protection for religiously motivated conduct afforded under pre-*Smith* jurisprudence. Seven years later, Congress went one step further by passing RLUIPA to expand the definition of "religious exercise" beyond First Amendment case law to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5(7)(A)(2000).

In a momentous decision last year, the Supreme Court acknowledged Congress' mandate that RFRA "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." *Hobby Lobby*, 134 S. Ct. at 2761-62 (quoting 42 U.S.C. §2000cc-3(g)). This year, the Court again reiterated that RFRA goes beyond even the robust protection of religious liberty under the First Amendment. *See Holt*, 135 S. Ct. at 853, 859-60 ("Following our decision in *Smith*, Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.").

Despite such broad protection, some courts engage in judicial overreach by continuing to restrictively define

religious exercise or by substituting their own judgment for that of the religious adherent. Repeatedly, the Supreme Court has warned against this pitfall, where courts wrongfully assume the role of ultimate arbiter of whether a religious practice is protected. *See Thomas v. Review Board of Indiana Employment Sec. Div.*, 450 U.S. 707, 714-15 (1981) (warning for this assessment "not to turn upon a judicial perception of the particular belief or practice in question. . . Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). *See also Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Courts have recognized a broad range of activity as religious exercise under the expansive protection of RFRA. *See Western Presbyterian Church v. Bd. Of Zoning Adjustment of the District of Columbia*, 862 F. Supp. 538, 545-46 (D.D.C. 1994) (church program to feed the needy); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (wearing a crucifix around the neck); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (using eagle feathers in worship). RLUIPA added to

RFRA's already capacious protection to include even more conduct under the umbrella of religious exercise, even within the tightly controlled prison context. *See Holt v. Hobbs*, 135 S. Ct. at 862 (growing a beard); *Knows His Gun v. Montana*, 866 F. Supp.2d 1235, 1239 (D. Mont. 2012) (sweat lodge); *Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) (kosher meals).

In its opinion, the NMCCA cited the appropriate definition of "religious exercise" in RFRA (as amended by RLUIPA). JA at 005. But the court then injected its own narrow view by declaring that religious exercise must be "part of a system of religious belief", supporting its interpretation by relying upon pre-RFRA Free Exercise jurisprudence. Id. This approach stands in direct opposition to the text of RFRA and its interpretation by the Supreme Court. And it exemplifies the precise danger the Court warned against.

Appellant displayed Biblical quotations three times in recognition of the Trinity, clearly motivated by her religious beliefs. Id. at 040. Her conduct is well within the expansive protection of religious exercise intended by Congress through RFRA and RLUIPA. As such, the associated

analysis under RFRA must be performed. The NMCCA erred by not properly conducting this analysis.

B. The orders substantially burdened the religious exercise of Appellant.

Once religiously motivated conduct is raised, the government must account for substantially burdening that religious exercise. 42 U.S.C. §2000bb et seq.; *see also* DoDI 1300.17, Paragraph 4(e). The NMCCA failed to even reach this point in its RFRA analysis because it minimized Appellant's conduct as not flowing from her religious beliefs. A flawed premise yields flawed results; the court's restrictive reading infected its decision on whether Appellant's religious beliefs were substantially burdened. Long ago, the Supreme Court cautioned against this, noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. Because RFRA provides even greater protection of religious exercise than can be found under the First Amendment, the Supreme Court's admonition rings clearer still.

It stands to reason that if a substantial burden potentially runs afoul of RFRA, an absolute prohibition

must. Far beyond any substantial burden, Appellant's religious exercise was not curtailed; it was cut off. Her command provided no options and made no accommodation that could have been narrowly tailored to compelling governmental interests, as RFRA requires. There may be other situations where options are offered or accommodations are rejected, but that is not the case here. It is hard to imagine a more substantial burden of religious exercise than an outright prohibition.

C. The actions taken by Appellant's command do not survive strict scrutiny, because they do not advance a compelling governmental interest in the least restrictive manner.

The NMCCA did not reach this point in RFRA analysis, but the statute makes the process clear: Appellant's command must demonstrate how its refusal to allow Appellant to engage in religious exercise was in furtherance of a compelling governmental interest pursued in the least restrictive manner. *See* 42 U.S.C. §2000bb §§ 2000bb-1(b); *Hobby Lobby,* 134 S. Ct. at 2779; *Holt*, 135 S. Ct. at 863; *Singh,* 2015 WL 3648682 at 12; *Smith*, 494 U.S. at 888 ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other

fields where it is applied), many laws will not meet the test.”).

DoD asserts a compelling interest in “mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline. . .” DoDI 1300.17, Paragraph 4(c).

Good order and discipline within the military are undoubtedly of great importance. But to ratify *any* action taken in pursuit of this governmental interest without any inquiry whatsoever is “a degree of deference that is tantamount to unquestioning acceptance.” *Holt*, 135 S. Ct. at 864. RFRA, as amended by RLUIPA, “does not permit such unquestioning deference.” *Id*. In *Holt*, the Supreme Court acknowledged the deference afforded prison officials in running prisons and evaluating the likely effects of altering prison rules. However, illustrating that deference to a government institution and judicial scrutiny are not mutually exclusive, the Court found the prison’s denial of a religious accommodation did not further its stated interest in rooting out contraband. *Id*. at 864.

As addressed by the Supreme Court, “‘The least-restrictive means standard is exceptionally demanding,’ and it requires the government to ‘sho[w] that it lacks other

means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Id*. at 858 (quoting *Hobby Lobby*, 134 S. Ct. at 2780). "'[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.'" *Id.* at 864 (quoting *Playboy Entertainment Group*, *Inc.,* 529 U.S. 803, 815 (2000)). Here, Appellant's command did not even *consider*, much less pursue, any less restrictive means. Instead, it imposed an outright prohibition on the posting of Appellant's Bible verses. This is clear error and in contravention of RFRA's mandate that the government follow the least restrictive means to avoid imposing a greater burden on religious exercise than is absolutely necessary.

CONCLUSION

Amici curiae urge this Court to reverse the rulings by the NMCCA as related to the issues under review. Absent such reversal, service members will be deprived of the religious freedom their service and sacrifice provide, the same religious freedom protected by the Constitution and by Congress in RFRA and RLUIPA. Congress and the courts have made it clear that religious freedom is truly our first

freedom; it must be defended against any diminution and may only be burdened in the most extreme circumstances.

The same is true in the military. It is a unique institution tasked with a mission that must be accomplished. But service members cannot be forced to check their faith when they put on the uniform. Indeed, in such difficult times as these, their religious freedom is more precious than ever before and must be defended. Those who are willing to give all deserve nothing less.

Date: December 18, 2015

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, Brian K. Keller and Colonel Mark Jamison, and to counsel for Appellant, Paul D. Clement, George W. Hicks, Hiram S. Sasser, Michael D. Berry, and Maj John Stephens on December 18, 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 half of the page limit permitted for appellants.

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

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