IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201400150
Monifa J. STERLING, Lance Corporal (E-3) U.S. Marine Corps Appellant	)	USCA Dkt. No. 15-0150/MC

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

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military

Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(2), (3), UCMJ, 10 U.S.C. § 867(a)(2),(3) (2012).

Statutory Background

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4, provides that the Federal Government "shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person ... is in furtherance of a compelling governmental interest; and ... is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)(b). RFRA applies to "all Federal law, and the implementation of that law," *Id.* § 2000bb-3(a), and protects "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) (Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") definition, imported into RFRA via 42 U.S.C. § 2000bb-2(4)).

Statement of the Case

A panel of members with enlisted representation sitting as a special court-martial convicted Appellant, contrary to her pleas, of failure to go to her appointed place of duty, disrespect toward a superior commissioned officer, and four specifications of disobeying a noncommissioned officer.

Articles 86, 89, 91, UCMJ, 10 U.S.C. §§ 886, 889, 891 (2012). The Members sentenced Appellant to reduction to pay grade E-1 and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

At trial, Appellant moved to litigate the lawfulness of two orders to remove three signs, generally arguing the signs were religious.[1] Months later on direct review before the Navy-Marine Corps Court of Appeals, Appellant first made an argument demanding relief under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq. (Appellant's Br. 25, Aug. 8, 2014.) Following briefing and oral argument, the lower court affirmed the findings and sentence in an unpublished opinion. *United States v. Sterling*, No. 201400150, 2015 CCA LEXIS 65 (N-M. Ct. Crim. App. Feb. 26, 2015). This Court granted review and specified two issues, and the Judge Advocate General of the Navy certified two additional issues.

[1] Appellant did not enunciate at trial the argument some amici now make: that the order was unlawful under language appearing in various policies or other statutes. This court should treat these arguments as waived at trial and not preserved for appellate review.

Statement of Facts

In 2013, Appellant was a college-educated, thirty-something Marine Corps Lance Corporal. (J.A. 187-88.) She faced court-martial after repeated refusals to obey direct orders.

A. Appellant worked at a shared desk in an office shared with other Headquarters Group sections. Appellant provided services to Battalion Marines. For six months, she did not place large signs across her shared workspace and sought no accommodation to do so. She did not complain that a lack of such signs violated her religious beliefs.

Appellant, along with two other Marines, worked for Staff Sergeant Alexander at the S-6 section of the 8th Communications Battalion, part of the II Marine Expeditionary Force (MEF) Headquarters Group ("MHG"). (J.A. 041-42, 067-68.) Appellant testified that her job involved assisting Battalion Marines with Common Access Card (CAC) issues. (J.A. 111, 144.) Appellant's clients sat at Appellant's shared desk while they sought her assistance. (J.A. 111, 144.)

The S-6 section shared office space with other Battalion sections such as the Information Management Office and the Comptroller. (J.A. 042-43.) But the S-6 section comprised only three desks in the office: one for Staff Sergeant Alexander; one for a corporal; and one for the two junior Marines. (*Id.*) Appellant and another Marine shared the same desk. (*Id.*)

Other Marines' desks from other work sections were located all around Appellant's workspace. (J.A. 042.)

Nothing in the Record supports that Appellant, after her arrival at the S-6 section in December 2012, put up any conspicuous signs in her shared government workspace, that she requested any religious accommodation, that she told anyone about her religious beliefs, or that she mentioned any dissatisfaction with a lack of signs in the office.[2]

At sentencing, it emerged that in March 2013, Appellant was formally counseled by her commanding officer, but that Appellant had refused to acknowledge the counseling. (J.A. 179.) Additionally, she refused to acknowledge numerous subsequent counselings by her command. (J.A. 180-86.)

B. Two months after refusing to acknowledge a formal counseling from her command, Appellant put up three large signs in a large font. She placed them in three places across her shared workspace. She refused to take them down, but did not explain why.

Staff Sergeant Alexander's merits testimony on January 27, 2014, demonstrated the following. In May 2013, Staff Sergeant Alexander was preparing for "a 96"——a four-day holiday weekend. (J.A. 043.) Consistent with her routine, she walked around her section's office area and checked to make sure it was clean.

[2] At sentencing, Appellant's Service Record Book revealed that when Appellant enlisted, she professed no religious preference and attested that there was no religious practice that would prevent her fulfilling her military duties. (J.A. 187-88.) After she enlisted, Appellant never updated her electronic service record to indicate any religious preference. (J.A. 177.)

(J.A. 043.) As she inspected her subordinates' spaces, she noticed something new: three signs on 8 1/2" by 11" paper had been placed in different locations across the shared workspace. (J.A. 043, 045, 078, 113.) The signs were either taped up, or folded into tents and placed on top of items around the workspace. (J.A. 045-46.) Nothing in the Record indicates that similar signs had ever been placed on Appellant's desk, her colleagues' desks, or any desks in the Battalion spaces.

One sign was mounted on top of Appellant's computer monitor. (J.A. 045-46, 111-13.) A second sign was mounted on the top shelf of her cubicle's inbox. (*Id.*) And a third sign was mounted on top of her computer tower. (J.A. 045, 112-13.) Staff Sergeant Alexander testified that they were large enough to be legible both to passers-by, and to those seated at the desk whenever Appellant was tasked with assisting them. (J.A. 046.) Appellant later testified they were "maybe 28-point font." (J.A. 111-12.)

When Staff Sergeant Alexander saw the signs, she did nothing immediately, but after the long weekend, she informed Appellant "that they *needed to be removed due to the fact that it wasn't just her desk*; it was being shared by the other junior Marine." (J.A. 043.)

Appellant did not remove the signs. (J.A. 043.)

At the end of the day, Staff Sergeant Alexander again checked the office spaces for cleanliness, and found the signs still there. (J.A. 043.) Staff Sergeant Alexander removed the signs herself, and discarded them. (J.A. 043.)

The next day, as Staff Sergeant Alexander "r[a]n in and out of the office" during the day, she noticed that "the signs were back up again" mounted and displayed in multiple locations across the shared workspace. (J.A. 043.) Staff Sergeant Alexander ordered Appellant a second time to remove the signs. (J.A. 043.)

Appellant did not remove the signs. (J.A. 043.)

Later, finding the signs still there, Staff Sergeant Alexander again removed the signs herself. (J.A. 044.)

Appellant cross-examined Staff Sergeant Alexander about the signs, but asked no questions: (a) about what the signs said; (b) about whether Staff Sergeant Alexander knew or believed the signs were religious; or, (c) about any conversation between Appellant and Staff Sergeant Alexander after the orders were issued. (J.A. 045-47.)

Indeed, neither party indicated any concern about the content of the signs during Staff Sergeant Alexander's January 27, 2014, testimony. Instead the Government proved that the signs were visible, obtrusive, and the orders were disobeyed; the Defense asked only whether complaints had been received

about the signs and whether the signs were large. (J.A. 045-47.)

Appellant later implied that Staff Sergeant Alexander was racist, and claimed she swore at her when issuing the order; Staff Sergeant Alexander was recalled and testified when issuing the orders, she had been seated, used no foul language, was not aggressive, and neither swore nor used any racial language. (J.A. 116, 140, 154-55.)

C. Appellant subsequently refused to obey other orders. When ordered to wear the proper uniform, she insisted a "sports medicine" chit excused her duty to obey. When ordered to distribute passes to families of Marines returning from Afghanistan, she claimed she would be sleeping and attending church.

In August 2013, Staff Sergeant Robert Morris, USMC, noticed Appellant was "out of uniform," and ordered her to wear "her service uniforms as directed by the Commandant of the Marine Corps." (J.A. 049.) Appellant refused to obey this order. (J.A. 050.) She insisted that a medical chit from base "sports medicine" excused her from obeying. (J.A. 050.)

This was untrue. (J.A. 050.) Staff Sergeant Morris again ordered Appellant to return home and put on her service uniform. (J.A. 050.) A second time, Appellant refused. (J.A. 050.) Staff Sergeant Morris escorted Appellant to the most senior enlisted Battalion member, First Sergeant Frank Robinson, USMC,

who ordered Appellant a third time to wear the correct uniform of the day. (J.A. 034, 050.)

Appellant refused to obey this order as well, stating that "that was an order she couldn't follow," leading to her conviction of two specifications of Article 91, disobeying the order of a staff noncommissioned officer. (J.A. 034, 174.)

A month later, First Sergeant Robinson ordered Appellant to distribute vehicle passes to civilian family members of Marines deployed to Afghanistan. (J.A. 034-35, 040.) The passes enabled family members to access the base and greet Sailors and Marines returning from deployment. (JA. 038, 056.) Appellant told First Sergeant Robinson "that she wasn't going to do it." (J.A. 035.)

Major Mary Flatley, USMC, a Marine with twenty-nine years' military service, asked the First Sergeant to bring Appellant to her so that she could "you know, talk some sense into her, reason with her, to make sure that she goes to her appointed place of duty on Sunday." (J.A. 054-55.) Major Flatley met with Appellant. (J.A. 035.) Major Flatley was unsuccessful in persuading Appellant to obey the order to work on Sunday. (J.A. 035, 056, 072.) Appellant stated: "I'm not going to be there. I'm going to . . . take my meds and I'm going to be sleeping that day." (J.A. 036, 056-57.)

Major Flatley called First Sergeant LaRochelle into the office. (J.A. 057.) She directed both first sergeants to begin writing a charge sheet on Appellant. (J.A. 057.) Appellant informed Major Flatley she was recording the conversation. (J.A. 057.) Major Flatley told Appellant that she would give Appellant a "second chance" and re-issued the order: "Your appointed place of duty is at the gate, all right? At pass and ID, to handout passes to the Marines' families that were coming from Afghanistan. Do you understand that?" (J.A. 035-36, 057.)

Appellant again refused, this time on religious grounds. She answered: "Yes, ma'am, I do... [but n]o, ma'am, I'm not [going to be there]. I am going to take my meds and sleep and go to church." (J.A. 036, 056, 072). Major Flatley persisted, explaining there was no conflict because the gate duty would not begin until 1600 on Sunday, "after church." (J.A. 059, 072.)

Further, Appellant's medications permitted her to fulfill the gate duty so long as she was sitting down. (J.A. 060; R. 211.) Major Flatley told Appellant she could both take the medication, and also carry out her duty at the gate, sitting down. (J.A. 072.) But Appellant turned to a lance corporal standing nearby and asked if she needed to obey Major Flatley's orders. (J.A. 036.) Receiving no encouragement, Appellant nonetheless refused to take the passes from Major Flatley. (J.A. 036.)

Appellant never showed up at the duty hut to distribute passes. (J.A. 051-53.) First Sergeant Robinson testified that "it was, to me, the most disrespectful thing I had witnessed from a Marine of junior rank to a more senior... commissioned officer." (J.A. 037.) Appellant was charged and Members convicted Appellant of Article 86, failure to go to an appointed place of duty, and Article 89, disrespect toward a superior commissioned officer. (J.A. 174.)

D. Appellant elected to proceed pro se, but accepted assistance from Detailed Defense Counsel throughout trial. Appellant told an acquaintance she would file "continuance after continuance" if her command "wants to keep messing with me."

At trial, Appellant acknowledged that while she could complain to an appellate court about the competence of appointed counsel, she could not make that objection if she represented herself. (J.A. 019.) Appellant's colloquy regarding pro se representation comprises ten pages. (J.A. 019-028.) The Military Judge granted the request. (J.A. 028.) Appellant later reasserted she wanted to proceed pro se. (J.A. 029-030.) Despite this, Appellant accepted help, including questioning and argument, from Defense Counsel throughout trial.

Appellant filed two motions to continue trial. (J.A. 215-16.) In response the United States submitted evidence that when her motion to proceed pro se was granted, Appellant informed a duty Marine that she "won" her case, and that "if MHG wants to

keep messing with me, then I'll do a continuance after continuance." (J.A. 220.)

E. Seven days after Staff Sergeant Alexander's merits testimony—nine months after refusing the order to remove the unattributed signs—Appellant first claimed the order was unlawful because the signs were religious.

Seven days after Staff Sergeant Alexander testified, and before the Government's case on the merits resumed, Appellant for the first time moved to litigate the lawfulness of all the orders given to her by "all the individuals listed in the specifications," including Staff Sergeant Alexander's orders to remove the signs, which she claimed were religious. (J.A. 075, 078.) Appellant filed no pretrial motions regarding the order to remove the three signs. (J.A. 031.) The Military Judge noted this issue was normally litigated pretrial. (J.A. 075.)

During the Motion session, Appellant neither claimed she requested religious accommodation, nor mentioned the Religious Freedom Restoration Act. Appellant submitted without comment Department of Defense Instruction (DoDI) 1300.17 (Jan. 22, 2014). (J.A. 080, 236-50.) She later argued: "The DoD says that I'm allowed to practice my religion as long as it's within good order, discipline; I'm not bothering anybody, I'm not untidy... I obviously don't understand why I'm being picked on." (J.A. 089.)

In the Article 39(a) session in support of her mid-trial motion, Appellant testified that the three signs were on 8 1/2" by 11" pieces of paper. (J.A. 078.) Appellant testified that the signs "are a bible scripture; they're from——of a religious nature." (J.A. 079.) When asked if she was Christian, Appellant replied: "Nondenominational, but yes." (J.A. 079.)[3]

Appellant presented no other evidence in support of the Motion. (J.A. 080.) The Military Judge delayed ruling on the otion. (J.A. 102.) Appellant never requested that the Military Judge consider additional evidence, including her own or others' testimony on the merits, in support of her Motion on the lawfulness of Staff Sergeant Alexander's orders.

Ruling verbally later at the close of trial, Military Judge found Staff Sergeant Alexander's orders lawful:

> each order was reasonably necessary to safeguard and protect the morale, discipline, and usefulness of members of a command, and were [sic] directly related to the maintenance of good order and discipline of a service... [Further,] the workspace in which the accused placed the signs was shared by at least one other person. That [sic] other servicemembers came to accused's workspace for assistance at which time they could have seen the signs. The court also finds that the signs, although the verbiage... [was] biblical in nature... could easily be seen as contrary to good order and discipline.

(J.A. 159.)

[3] Various Amici argue that Appellant is a "Protestant." While very possibly true, the United States is unaware of anything in the Record that demonstrated this. (J.A. 177, 187-88.)

F. On the merits, Appellant declined to answer questions directly, offered her thought processes, and prevaricated about whether she received orders, whether she responded to Staff Sergeant Alexander, whether she also had to remove non-religious items, whether she sat at a shared workspace, and whether she replaced the signs.

After litigating the lawfulness of all the orders she was charged with disobeying, trial on the merits resumed.

After the Government rested, Appellant took the stand during her case-in-chief. She explained that her reason for placing the three signs was "purely personal... it's a mental reminder to me when I come to work, okay. You don't know why these people are picking on you." (J.A. 114.)

She explained that all three signs were identical, and each read: "No weapon formed against me shall prosper." (J.A. 112.) She explained: "I did a trinity, because I'm a religious person." (J.A. 111.) And again later, she stated: "Because I'm a religious person, trinity. I have my protection of three around me." (J.A. 114).

Appellant never explained if the "weapon" she was defending against was her command, whose formal counseling the Record indicates she refused to acknowledge two months earlier. (J.A. 179.) Nor did she explain whether the "weapon" was her professed belief that her command was "highlighting her" or had unfairly singled her out and forced her to "remove... pictures

of my nephews when everybody else in the office has theirs." (J.A. 089-90, 114, 140-42, 166-68, 172; R. 351, 379-80.)

Appellant never explained if the placement of the three signs in her office, at a shared workspace and at a shared desk ——or if the signs' placement on top of the computer tower, on the computer monitor, and on the inbox——were linked to her religion. Nor did she explain if printing in a large font size, or making "signs," or whether the specific quotation choice——or whether the alteration of the original Biblical quote from "thee" to the signs' "me," were linked to her religion. She never explained where in the Bible the quote came from.[4]

Indeed, at trial Appellant merely testified (1) that she erected three signs to invoke the trinity——and (2) that the quote was religious. (J.A. 111-12, 114.) She never argued the orders substantially burdened her religious exercise.

Appellant disputed Staff Sergeant Alexander's testimony that her desk were shared. (J.A. 311.)

At first, Appellant did not dispute that she was ordered to remove the signs. (J.A. 110.) But when Defense Counsel asked Appellant about Staff Sergeant Alexander's order, Appellant then

[4] Appellant and Amici's claim that the source is undisputed to the contrary, no reference to the Christian Book of Isaiah is to be found in the Record of Trial.

claimed "I don't even remember that she asked me to take them down." (J.A. 115-16.)

Shortly later, Appellant conceded again: "[Staff Sergeant Alexander] said well I want it off," and still later claimed that Staff Sergeant Alexander ordered her to: "Take that S-H-I-T off your desk or remove it or take it down now." (J.A. 116.) But a beat later, Appellant characterized it as "She *asked* me to remove them." (J.A. 117 (emphasis added).) Staff Sergeant Alexander, recalled to the stand, denied ever swearing at Appellant. (J.A. 154-55.)

During a stream-of-consciousness characterization of the incident, Appellant admitted that Staff Sergeant Alexander confronted her about the signs and said "I don't like your tone," and "I want it off." (J.A. 116.) Appellant stated she felt like a "deer caught in the headlights confused" about the order to remove them, and claimed that she asked Staff Sergeant Alexander "what tone." (J.A. 116.) Appellant claimed she felt confused about this order as she had never meant to antagonize the Staff Sergeant, did not expect Staff Sergeant Alexander to "com[e] behind the desk," and because "it's religion." (J.A. 116.)

Appellant then claimed that she asked Staff Sergeant Alexander "why" she had to remove the signs. (J.A. 116.) She

explained that "I was asked to remove other things so I did not understand why now I had to remove my religion." (J.A. 116.)

But only pages later, Appellant changed this characterization, now claiming the Staff Sergeant was asking the questions. Trial Counsel: "And Staff Sergeant Alexander ordered you to take those signs down?" (J.A. 144.) Appellant: "No. I just remember *her asking questions* about it and stating her distaste for them, sir." (J.A. 144 (emphasis added).) Trial Counsel: "Didn't you say on direct that she had told you to take those signs down and that you asked her why she was asking you to take the signs down?" (J.A. 144.) Appellant: "No." (J.A. 144.)

Trial Counsel persisted: "So you *didn't* say on direct that you asked her why she wanted you to take the signs down?" (J.A. 145 (emphasis added.) Appellant: "I don't remember her ordering me to take them down. I remember her *asking me* why I had them there; that I remember." (J.A. 145 (emphasis added).)

When asked whether she "put more signs up the next day at work," Appellant denied putting up a second set of signs, or maybe changed the subject: "No. I actually have post its; if I remember correctly." (J.A. 145.)

G. Appellant never argued the Religious Freedom Restoration Act at trial.

Appellant never argued to the Military Judge that RFRA provided a defense to the criminal charges facing her, nor did she reference her burden under RFRA. (J.A. 031-32.) The Instruction Appellant submitted cited RFRA as a reference and quoted language from RFRA. (J.A. 236, 238.) The first explicit claim that RFRA protected her disobedience was before the Navy-Marine Corps Court of Criminal Appeals——fifteen months after refusing to remove the signs. (Appellant's Br. 25, Aug. 8, 2014.)

The Military Judge made no Findings of Fact or Conclusions of Law under RFRA about: whether Appellant's testimony demonstrated an "exercise of religion"; whether that exercise of religion was sincere; or, whether that exercise of religion had been "substantially burdened." (*See* J.A. 159.) The Judge also made no findings as to the accommodation process outlined in the Department of Defense Instruction and Secretary of Navy Instruction.

The first person the Record indicates Appellant clearly informed that the signs were Biblical quotations or an invocation of the trinity is the Military Judge. (J.A. 041-045, 089, 097, 100-02, 110-17, 144-45, 154-55.)

The first time Appellant claimed the quotation derived from the Christian Bible's Book of Isaiah 54:17, was on May 19, 2015. According to Appellant's Supplement, Isaiah's original quote was: "No weapon that is formed against *thee* shall prosper." (Appellant's Supplement at 3 n.1, May 19, 2015 (emphasis added).)[5]

Nowhere in the Record, during trial on the merits or during litigation concerning the signs, does anything support that Appellant told anyone that complying with the order to remove the signs created a conflict between her military duty to follow orders and the tenets of her religion. (J.A. 041-045, 089, 097, 100-02, 110-17, 144-45, 154-55.) Nor did Appellant testify at trial that this was the case.

The Judge also made no Conclusions of Law about whether the Government had a compelling interest in issuing the order to Appellant to remove the signs. (J.A. 159.) Finally, the

[5] If it is appropriate to judicially notice that Appellant's signs are *not* an exact quote of Isaiah 54:17 via footnote, it is equally appropriate to judicially notice that Appellant's signs *are* an exact quote from Fred Hammond's song "No Weapon Formed Against Me Shall Prosper." The refrain to the song repeats, over and over: "No weapon formed against me shall prosper, it won't work." (https://www.youtube.com/watch?v=9KlhlHTE12Q) But the United States believes neither the actual quote from the Book of Isaiah, nor Fred Hammond's popular song, are properly in the province of appellate court factfinding. This Court is not a factfinding court.

Military Judge made no Conclusions of Law as to the whether the Government employed the "least restrictive means." (J.A. 159.)

H. A Secretary of the Navy Instruction directs all Marines and Sailors to submit religion-based requests for excusal from military duties, in writing, to the unit commander.

When Appellant placed the signs in her shared workspace, military procedures governed how servicemembers must request exceptions to military duties based on religion. "Accommodation of Religious Practices Within the Military Services." Department of Defense Instruction (DoDI) 1300.17 (Feb. 10, 2009). The Instruction states that "The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions." *Id.* (*See* J.A. 251-259 (incorporating 2014 changes).)

Per the 1988 version of the Department of Defense Instruction, guided by the "basic principle of... free exercise of religion," the Secretary of the Navy promulgated Secretary of the Navy Instruction (SECNAVINST) 1730.8B (Oct. 2, 2008), "Accommodation of Religious Practices."[6] (J.A. 260-68.) Appellant did not cite to this Instruction at trial.

[6] The 2009 and 2014 versions of the DoDI near-identically delegate to service secretaries the ability to "issue appropriate implementing documents," (J.A. 246, 248), and to "prescribe[] rules" for any "individual making the request for accommodation *of a religious practice* [to] military commanders...". (J.A. 240, 242, 255, 257.)

The Navy Instruction instructs Sailors and Marines on Departmental procedures for requesting accommodations for religious practices. *Id.* The Commandant of the Marine Corps is instructed to advise all Marines, both at enlistment and again at re-enlistment, of this policy. (J.A. 267.) It prescribes procedures for accommodation requests, including a procedure for appealing denials. (J.A. 266.)

In the section of the Navy Instruction entitled "Responsibilities," it directs: "Members seeking religious accommodation must submit their request in writing through their chain of command to their commanding officer..." SECNAVINST 1730.8B(5)(a), 11(a).[7] Among the detailed "Responsibilities" provided in the Navy Instruction, commanders are required to respond under strict timelines to these accommodation requests, are given detailed factors to consider, and must report both approvals and denials of every accommodation request to officials higher in the chain of command. (J.A. 267.)

[7] While Appellant's trial was ongoing and prior to the Article 39(a), UCMJ, session to litigate Appellant's Motion, the Department of Defense updated the Instruction to explicitly reference the Religious Freedom Restoration Act (RFRA). (J.A. 251-59.) The new Instruction, which Appellant submitted to the Military Judge, added language from and cited to RFRA, but otherwise (1) kept the burden on servicemembers to submit requests for accommodation, and (2) continued to delegate to the service secretaries the ability to promulgate rules and procedures for how accommodation requests should be made within their respective services. (J.A. 240, 242, 255, 257.)

I. Nothing in the Record supports that Appellant submitted any accommodation requests. But Appellant insisted her command was "picking on her" on the basis of race, religion, appearance, and other factors.

Appellant at trial claimed she could not attend gate duty because her command knew she was going to be sleeping, taking medication, and attending church instead. (J.A. 060, 072, 127, 132, 136, 201.) Nothing in the Record supports that she submitted a written request excusing her from standing gate duty.

So too, Appellant repeatedly claimed that officials in her command were "picking on her" and "highlighting" her and "singling her out." (J.A. 089-90, 114, 141-42, 166-68, 172; R. 351, 379-80.) She claimed that Staff Sergeant Alexander "singled [her] out unfairly" as well as "another Haitian" in boot camp. (J.A. 140.)

As proof, during the February 1 court session and testifying during the Defense case-in-chief, Appellant claimed that she previously "put out... a request mast concerning" Staff Sergeant Alexander because of "the religious thing" at Headquarters Group.[8] (J.A. 140.) Appellant submitted extrinsic

[8] As with religious accommodations, request mast submissions must be submitted in writing, and to the commanding officer. In the Marine Corps, request mast is governed by NAVMC DIR 1700.23F (Mar. 22, 2007) ("Request Mast Procedures"). The section entitled "Procedural Issues" closely resembles procedures in the Navy Religious Accommodations Instruction, and mandates that:

no proof of this, did not explain the result of the request mast, and made no argument at trial that the result of the request mast suggested that using the religious accommodation process would have been futile.

Appellant also claimed that Staff Sergeant Alexander "had a problem with my hair." (J.A. 140.) Appellant testified she believed Staff Sergeant Alexander's impression of her was impacted by "a mixture of a female-to-female thing, a cultural/racial thing; that was at boot camp." (J.A. 139.) Appellant agreed that maybe "she personally, I feel, doesn't like me." (J.A. 139.)

As for the rest of the command, who she claimed ignored her desire to go to church and inability to stand duty, Appellant claimed that they "honor[ed] their other Marines' chits but not mine" and stated "I don't understand what makes me different. There has to be something different about me, there has to be. It has to be the tone of my voice or my perfume or something. There has to be." (J.A. 170.)

"Request Mast applications will be submitted in writing utilizing NAVMC form 11296 (Rev) via the chain of command to the commander with whom the Request Mast is desired." *Id.*, Encl(1) at 3-1.

Appellant submitted no proof of any religious accommodation being requested or denied while she worked for Staff Sergeant Alexander, or at any other time.

Summary of Argument

Appellant's RFRA claim fails for six reasons. First, Appellant objects only to the lower court's definition of "exercise of religion," waiving review of whether the Military Judge erroneously analyzed her burden under RFRA. Second, Appellant at trial waived and forfeited appellate relief under the RFRA, as she neither argued a RFRA claim of relief nor explained how RFRA applied to her vague assertion that the placement of the three signs was religious.

Third, though the Military Judge made no findings as to sincerity, it would have been clear error for a reasonable factfinder to have concluded that Appellant's placement of three signs——with these particular unattributed words paraphrasing a biblical quote, across a shared desk and in a shared office workspace——was a sincere exercise of religion, in light of her prevarication, her numerous unsupported claims of racial, religious, and personal bias, and the entire Record.

Fourth, precedent supports that the thin evidence Appellant introduced at trial of what "three signs" meant to her fails to match the "exercise of religion" Appellant now claims was burdened. Appellant introduced no evidence at trial that her

religion: (a) was linked to the signs' placement in a shared workspace or on a shared desk; (b) was linked to her selection of these particular words; (c) was linked to the choice of large signs, and a large font; (d) was linked to ignoring and failing to explain why she should not remove the signs; (e) was linked to a refusal to follow the Navy's accommodation scheme; (f) was linked to replacing the signs without explanation; or (g) was linked to her declining to describe this religious exercise until she arrived at trial.

Fifth, precedent supports that Appellant's failure to use the Department of the Navy's religious accommodation procedures makes any burden insubstantial. Appellant was not coerced to remove the signs, but given the command's sensitivity to her desire to attend church, she easily might sought and likely received accommodation. She failed her RFRA burden to demonstrate that the accommodation process would have been futile. And because the testimony and claimed burden do not match, analysis of alternate means of exercise is permissible.

Sixth, the orders furthered a compelling government interest to maintain an orderly and clean shared Battalion office. The Government's argument, theory, and evidence at trial never departed from this. And even presuming anyone in the command should have recognized the arguably belligerent signs were paraphrased biblical passages, the Government then

has a compelling interest to remove signs to avoid Establishment Clause and ethical violations.

Finally, the order was lawful. Appellant, a junior Marine, received a direct order to remove three signs that cluttered a shared workspace. The order was unrelated to the content of the signs. Appellant made no claim that the unattributed signs were an exercise of Free Speech, and any such argument would fail. Speech in a shared government workspace, as here, can be attributable to the Government.

Argument

A person claiming a RFRA violation "must first establish a prima facie case by showing that the government action at issue 'works a substantial burden on his ability to freely practice his religion.'" *United States v. Lafley*, 656 F.3d 936, 939 (9th Cir. 2011) (citation omitted). This requires that the claimant "(1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his sincerely held religious beliefs is substantially burdened." *United States v. Zimmerman*, 514 F.3d 851, 852 (9th Cir. 2007).[9]

[9] Significantly for the purposes of this brief and cases cited, the tests in both RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1-2), mirror each other and share definitions. *See Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1095

Any request for religious accommodation must be sincerely based on a religious belief and not some other motivation. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n. 28 (2014)).

If the claimant satisfies these requirements, "the challenged government action may nonetheless be upheld if the government 'demonstrates' that the action 'is in furtherance of a compelling governmental interest' and is implemented by 'the least restrictive means.'" *Lafley*, 656 F.3d at 939 (quoting 42 U.S.C. § 2000bb–1(b)).

Under Article 59(a), UCMJ, the "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2012); *United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011).

"Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (citation omitted).

(9th Cir. 2008) (noting "Because RFRA and RLUIPA cases share the same analytic framework and terminology and are, in the words of the Court in [*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)], governed by the 'same standard,' RLUIPA cases are necessarily applicable to RFRA cases.").

Certified Issue II.

> APPELLANT WAIVED APPELLATE RELIEF UNDER THE RELIGIOUS FREEDOM RESTORATION ACT. SHE MADE NO ARGUMENT UNDER RFRA AND DID NOT ATTEMPT TO DEMONSTRATE HER BURDEN. EVEN UNDER PLAIN ERROR, NO PREJUDICE RESULTED AS A FULL RFRA ANALYSIS WOULD REACH THE SAME RESULT.[10]

Multiple reasons exist for disposing of this case and resolving this case on grounds of waiver and forfeiture.

A. Appellant elected to proceed *pro se*, accepting the risks. She cannot complain she was unaware how to properly raise RFRA at trial.

An accused proceeding *pro se* must "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Mix*, 35 M.J. 283, 286 (C.M.A.

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[10] Appellant also waives objection that Members, rather than the Judge, should have decided the issue. Prevailing law treats RFRA as a motion *in limine*. *See, e.g., United States v. Christie*, No. 10-00384(01) LEK, 2013 U.S. Dist. LEXIS 181090, *6, *13 (D. Haw., Dec. 30, 2013) (RFRA motion in criminal case should be decided pre-trial, as "[n]either the elements of the Defendant's prima facie case under RFRA nor the Government's showing of a compelling interest and least restrictive means will require the presentation of facts surrounding Defendant's guilt or innocence."); *United States v. Epstein*, No. 14-287, 2015 U.S. Dist. LEXIS 166654, *19-20 (D.N.J. Dec. 11, 2015) (rejecting defense request for RFRA defense to jury, as "presenting evidence of religious beliefs ... would run the risk of confusing and misleading the jury as to which law Defendants must adhere, and... would carry a significant potential for jury nullification."). RFRA claims should be ruled on by the military judge, not the members. *Cf. United States v. Mack*, 65 M.J. 108, 112 (C.A.A.F. 2007) (order lawfulness decided by judge).

1992); R.C.M. 506(d). The Military Judge questioned Appellant at length, later revisiting the discussion, and Appellant repeated a desire to proceed *pro se.* (J.A. 019-30.) Appellant has not argued that the Judge improperly advised her, thus waives that argument. *See, e.g., United States v. Anekwu,* 695 F.3d 967, 985 (9th Cir. 2012); *cf. United States v. Riggins,* No. 15-0334, 2016 CAAF LEXIS 13, at *19 n.8 (C.A.A.F. Jan. 7, 2016). Likewise, she makes no argument, thus waives, any argument that advice she accepted from her appointed Defense Counsel was deficient.

B. Appellant waived appellate relief under RFRA by never articulating a RFRA argument or referring to any prong of her RFRA burden at trial.

"Any defense . . . capable of determination without the trial of the general issue of guilt may be raised before trial." R.C.M. 905(b). "A motion shall state the grounds upon which it is made." R.C.M. 905(a). "Other motions... [or] defenses... must be raised before the court-martial is adjourned ... and ...failure to do so shall constitute waiver." R.C.M. 905(e). *See Kensington Rock Island Lt. Partnership v. American Eagle Historic Partners,* 921 F.2d 122, 124-25 (7th Cir. 1990) (arguments raised in district court in "perfunctory and underdeveloped ... manner are waived on appeal").

In a RFRA context, courts have held that "where a party fails to assert a substantial burden on religious exercise

before a district court...the party may not raise that issue... for the first time on appeal." *See, e.g., Rweyemamu v. Cote,* 520 F.3d 198, 204 (2d Cir. 2008) (internal quotation and citation omitted).

Appellant never mentioned RFRA, made no argument on any of the prongs of RFRA, did not claim the Secretary's accommodation procedures were a substantial burden, but instead argued the Instruction allowed her to "practice my religion." (J.A. 089.) Appellant attached a Department of Defense Instruction that internally cited to RFRA—but made no argument as to what words in the eight pages of the document she believed provided her grounds for relief.

Instead, Appellant argued she was "being picked on," did not intend to "bother[] anyone," and "I'm allowed to practice my religion." (J.A. 089.) She submitted no evidence that she requested religious accommodation or that any accommodation was denied. (J.A. 078-080, 089.) She never referred to the substantive prongs of RFRA, never attempted to demonstrate how erecting three signs across a shared workplace with these particular words was a sincere exercise of religion, nor did she argue that the order substantially burdened any such exercise. Simply put, nothing suggests Appellant thought she was raising a RFRA defense either when she was ordered to remove the signs, or at trial.

C. Appellant forfeited any argument that RFRA shielded her from conviction for disobeying direct orders to clean her workspace.

A majority of cases agree that the proper place to resolve RFRA defenses is as a motion *in limine*. *See supra* at 28 n.10. The United States agrees that a trial judge should decide motions to dismiss under RFRA, consistent with holdings of this Court that judges properly decide the lawfulness of orders, and with R.C.M. 905. R.C.M. 905(b) ("Any defense . . . capable of determination without the trial of the general issue of guilt may be raised before trial."). Regardless, whether the Judge or the Members should have decided the issue, no prejudice occurred.

In *United States v. Martines,* No. 13-10305, 582 Fed. Appx. 768 (9th Cir. July 10, 2014), the Ninth Circuit found no plain error where an appellant claimed the district court should have submitted to the jury a RFRA defense to the crime of possession of marijuana with intent to distribute. The appellant never objected to the trial judge's instructions. *Id.* at 768.

The *Martines* court held: "Martines' vague and generic testimony about the principles of his faith——together with the fact that Martines did not tell his probation officer in 2006 that he was a Rastafarian... could support a rational jury determination that Martines' Rastafarian beliefs were not in fact sincerely held..." *Id.* at 769.

So too here, even if not waived, Appellant forfeited any RFRA issue on appeal by not making a RFRA claim at trial. First, no plain error occurred: as demonstrated, further below, Appellant can point to nothing in the Record that demonstrates either that displaying these three signs, in the manner she did, was in fact a sincere exercise of religion, or that the order to remove them substantially burdened any "exercise of religion" supported by her trial testimony. Appellant's claim that these issues are "beyond dispute" is simply mistaken.

Second, no prejudice occurred from either the Military Judge not conducting a full RFRA analysis himself, or instructing the Members on a RFRA defense. As demonstrated below, it would have been clear error for a judge to have found Appellant's professed exercise of religion to be sincere, or to have found that Appellant's professed exercise of religion matched was what Staff Sergeant Alexander's order substantially burdened. *Cf. United States v. Davis*, 73 M.J. 268 (C.A.A.F. 2014) (no prejudice, despite failure to instruct on a defense, because a rational panel would not have believed the appellant's version of events).

Moreover, during sentencing, the evidence adduced was consistent with a lack of sincerity and a secular purpose for these three signs. Appellant's service record indicates she entered the military disavowing any religious preference, and

disavows any religious convictions that would affect military duties. And Appellant, just two months prior to her crimes, had already declined to acknowledge her commanding officer's counseling on her failings as a United States Marine.

Specified Issue I, Certified Issue I.

> APPELLANT WAIVES OBJECTION NOW THAT THE MILITARY JUDGE MADE INADEQUATE FACTUAL FINDINGS. FURTHER, APPELLANT FAILED TO MEET HER BURDEN AT TRIAL: THE RECORD DEMONSTRATES THAT REPEATED PLACEMENT OF SIGNS IN A SHARED WORKSPACE WAS A SECULAR REFUSAL TO OBEY ORDERS, NOT A SINCERE EXERCISE OF RELIGION. FURTHER, APPELLANT FAILED TO DEMONSTRATE A "SINCERE EXERCISE" COEXTENSIVE WITH HER ACTIONS. NO SUBSTANTIAL BURDEN EXISTS BECAUSE APPELLANT FAILED TO REQUEST ACCOMMODATION UNDER THE NAVAL INSTRUCTION, AND BECAUSE SHE WAS NOT FORCED TO CHOOSE BETWEEN OBEYING ORDERS AND HER RELIGION. FINALLY, THE ORDER TO REMOVE SIGNS MEETS STRICT SCRUTINY.

A. Appellant's only objection is that the lower court restrictively defined "exercise of religion." The United States agrees, but this warrants no relief.

The United States agrees with Appellant and Amici that the lower court narrowed RFRA's definition of "exercise of religion." To the extent the lower court defined "exercise of religion" to exclude from RFRA protection "personal beliefs, grounded *solely* upon subjective ideas about religious practices" or "any action subjectively believed by the appellant to be 'religious in nature,'" the lower court was incorrect. *See United States v. Sterling*, No. 201400150, 2015 CCA LEXIS 65, *14 (N-M. Ct. Crim. App. Feb. 26, 2015).

Congress' definition dictates that that so long as the "religious practice" is in fact sincere, that is sufficient under RFRA. *See Thomas v. Review Board of the Ind Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation"); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2779 (2015) ("[O]ur 'narrow function... in this context' therefore 'is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas*, 450 U.S. at 716).).

But if this Court disagrees that Appellant waived or forfeited appellate review of her RFRA claim, then the real issue lies not in the lower court's definition of "exercise of religion" but in the Military Judge's lack of findings as to sincerity and substantial burden. As noted, Appellant does not object and hence waives any objection as to that complete lack of findings.[11]

[11] Appellant, in fact, solely focuses on the lower court's "speculation" and "conjecture." Appellant's appeal is confined solely to her objection to the Navy-Marine Court's legal definition of "exercise of religion," and has no objection whatsoever to the trial court's ultimate conclusions. (*See, e.g.*, Appellant's Br. 6-7, 10-13, 33.)

B. Appellant fails now to object to the Military Judge's lack of findings on sincerity or "exercise of religion" as legally deficient, hence concedes and waives appellate review of these RFRA prongs.

Appellant's entire argument here centers on the lower court's "cramped" reasoning——not the Military Judge's findings as to her burden, that is, the first two prongs of RFRA. Appellant lodges no objection to the Military Judge's failure to make any factual findings as to sincerity, or to fail to analyze a "substantial burden" in light of any enunciated "exercise of religion."

This Court held recently that presenting a supplemental cite, without specific briefing, is insufficient to preserve an issue for consideration. *United States v. Riggins,* No. 15-0334, 2016 CAAF LEXIS 13, at *19 n.8 (C.A.A.F. Jan. 7, 2016). *See also United States v. Berkowitz,* 927 F.2d 1376, 1384 (7th Cir. 1991) ("perfunctory and undeveloped arguments" on appeal are waived, such as where appellant on appeal does not object on appeal to "complete lack of inquiry" by trial judge as to proper analysis); *Krumm v. Holder,* 594 Fed. Appx. 497, 501 (10th Cir. 2014) (citing *Garrett v. Selby,* 425 F.3d 836, 840-41 (10th Cir. 2005)); *Utahns for Better Transp. v. United States Dep't of Transp.,* 305 F.3d 1152, 1175 (10th Cir. 2002) (noting legal issue in a list is inadequate briefing to preserve review); *McCoy v. Mass. Inst. Of Tech,* 950 F.2d 13, 22-23 (1st Cir. 1991)

(litigant must provide analysis of the statutory scheme, and "spell out its arguments squarely and distinctly"); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (appellate courts should not permit "fleeting references to preserve questions on appeal").

Instead of objecting to the Military Judge's lack of findings as to sincerity or substantial burden, Appellant incorrectly: (1) claims there is "no dispute" about the sincerity of her exercise (Appellant's Br. 22); (2) claims the three signs were "plainly an exercise of religion" and a "core exercise of religion" (Appellant's Br. 18, 23); (3) claims the burden on an exercise of religion is "straightforward" (Appellant's Br. 25); and, (4) restricts her analysis to claiming the Military Judge erred in analyzing the validity of the orders given by Staff Sergeant Alexander. (Appellant's Br. 36.)

The first three directly *rely* on findings of fact involving sincerity and exercise of religion. The Military Judge at best found that the quotes in the signs were "biblical in nature," but made no findings about sincerity and no findings about why the signs were placed, why they were placed where they were, in the manner, size, and location they were, or why they contained the words they did. (J.A. 159.)

Appellant avoids the real issue: analysis of whether this Record supports relief under RFRA, and under precedent interpreting criminal defenses under RFRA. Instead, Appellant chooses to focus virtually exclusively on the lower Court's opinion. Not only does Appellant waive objection as to the Judge's analysis of Appellant's burden, but as demonstrated below, under this Record and RFRA precedent, no prejudice exists in any case. Appellant is due no relief.

C. On this Record, a rational factfinder would find Appellant was insincere and the signs were not an exercise of religion by Appellant.[12]

The Supreme Court in 2014 stressed that insincere RFRA assertions must fail. *Hobby Lobby,* 134 S.Ct. 2751, 2774 (2014) ("pretextual assertion of a religious belief... would fail."). Sincerity "is, of course, a question of fact." *United States v. Seeger,* 380 U.S. 163, 185 (1965). Taking the "sincerity" prong of RFRA seriously is consistent with the statute's legislative history. *See Hobby Lobby*, 134 S. Ct. at 2774; S. Rep. No. 103-111 (1993), at 10 (announcing during debate Congress' expectations that courts would continue to weed out such

[12] Some Amici claim that the placement of scripture is *per se* a RFRA exercise of religion, and that Appellant's placement of words similar to scripture quotes was indisputably motivated by religion. Not so. Neither precedent, nor this Record, support these claims. Such a *per se* conclusion would obviate the sincerity and exercise of religion portions of RFRA.

"masquerade[s] designed to obtain [legal] protection."). Checking for sincerity and religiosity is important to exclude sham claims; the religious objection must be both sincere and religious in nature.[13] *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (citing *Seeger*, 380 U.S. at 184-86).

Not only has the Supreme Court stressed how important it is that courts act as gatekeepers of these determinations, but it does not hesitate to engage in analysis to determine, legally, what is "religious" so as to receive legal protection under statutes; nor should this Court hesitate. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 7009 (2012) (determining whether, based on several factors, an individual legally qualified as a "minister within the meaning of the [ministerial] exception".).

And the military judge is the factfinder in the military system entitled to make findings of fact and assessments of credibility on trial motions. *Cf. United States v. Ginn,* 47 M.J. 236, 242-43 (C.A.A.F. 1997). Appellant does not argue otherwise.

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[13] And James Madison in Federalist No. 10 explained this principle of American jurisprudence that survives to this day in courts and statutes: "no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity." So too, here. Before a defense is available, Congress directed the courts to provide a factual check on self-serving claims.

But the Military Judge here made no findings as to the sincerity of Appellant's religious beliefs, or whether distributing the signs across a shared workspace was an "exercise of religion," nor on any of the other prongs of RFRA required for a prima facie defense. (R. 362); *see, e.g., United States v. Zimmerman*, 514 F.3d 851, 852 (9th Cir. 2007) (listing the prongs of a prima facie case of a RFRA defense including scope of belief, that the beliefs are religious, that the beliefs are sincerely held, and that the beliefs have been substantially burdened).

Appellant and amici now claim that it is "undisputed" that the signs were placed as an exercise of religion. But Appellant has submitted no affidavit providing additional facts to support this claim. Even taking the post-trial citations to Isaiah and myriad attempts to bolster her sincerity as true, under *Ginn*, "the facts asserted, even if true, would not entitle appellant to relief." 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001); *see also United States v. Avila*, 53 M.J. 99, 101 n. 1 (C.A.A.F. 2000).

The United States does not concede Appellant's sincerity. A chasm of facts separates Appellant's post-hoc claims of sincerity associated with the display of her signs, and those cases where the United States concedes the sincerity of a deserving litigant. *See, e.g., Holt v. Hobbs*, 135 S. Ct. 853,

862 (2015) (government conceded sincerity of devout Muslim who requested, and was denied, accommodation to grow a beard pursuant to his beliefs); *O Centro*, 546 U.S. at 423 (government conceded religious sect from Amazon Rainforest sincerely believed drinking sacramental tea, brewed from plants from the Rainforest, was a practice of religion).

No relief is due under the first prong of RFRA, then, for two reasons. Despite no findings as to sincerity or as to whether the signs were an *exercise* of religion——rather than merely "biblical in nature" or any lesser legal standard—— despite this, as a nonconstitutional error the result at trial would have been no different even with a sincerity analysis. Art. 59(a); *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). Even if this Court is dissatisfied with the trial judge's application of the law, it may affirm his disposition on "any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (per curiam); *see, e.g., United States v. Allen,* 588 F.2d 1100, 1105 (5th Cir. 1979) (sustaining conviction on alternate grounds from district court, citing to *Jaffke*).

1. Appellant failed to demonstrate her actions were an exercise of religion.

Courts routinely reject RFRA challenges where litigants insufficiently match or link a claimed "practice" to their

"religion."[14] Here, Appellant provided no explanation why placing three large, unattributed signs around her shared office space——rather than in her barracks or some other place——was an "exercise of religion." Appellant's sole testimony at trial in support of the signs being a RFRA "exercise of religion" is that she testified that the signs "did a trinity" for "my protection of three" and for a "mental note" because she was "a religious person" and her command was "picking on her." (J.A. 111, 114; Appellant's Br. 18.) Tellingly, Appellant merely now claims the signs merit protection under RFRA (Appellant's Br. 18) and that Appellant's "is a Christian and that her beliefs are sincere" (Appellant's Br. 22).

This Court should not hesitate to reject Appellant's scant testimony that "three signs" "invoked the trinity," without more, to meet RFRA's definition of an "exercise of religion." Appellant's, and Amici's attempt, post-trial, to link the quote to the Book of Isaiah is an attempt at improper appellate

[14] *See, e.g. Wilson v. James,* No. 13-cv-01351, 2015 U.S. Dist. LEXIS 138984, *22 (D.D.C. Oct. 13, 2015) (no RFRA "exercise of religion" Air Force major used official email to inform senior officers that he believed "homosexual marriage and homosexual activity is a sin", as major never demonstrated any link between the requirements of his religion, and using official email); *Mahoney v. U.S. Marshals Serv.,* 454 F. Supp. 2d 21, 38 (D.D.C. 2006) (rejecting asserted RFRA violation where plaintiffs claimed they wished to engage in speech about their religion, but did not allege that the speech was "part of the exercise of their religion").

factfinding and should be rejected. Congress presumed litigants would enunciate RFRA claims in-court. *See* Fed. R. Crim. P. 12(b)(3)(C) (untimely trial motions waive appeal); Art. 36(a), UCMJ; 10 U.S.C. §836(a) (military rules should be as close as "practicable" to rules in Federal District Court); R.C.M. 905(e) (waiver).

2. Appellant failed to demonstrate any exercise of religion was sincere.

Criminal courts routinely reject litigants' RFRA claims of religious belief on the basis of insincerity.[15] In *United States v. Quaintance,* 608 F.3d 717, 718 (10th Cir. 2010), the Tenth Circuit found that despite a RFRA claim, the drug crimes were motivated by secular motives, not sincere religious convictions. The record demonstrated: (1) the appellants considered themselves a business; (2) the business was integral to the transaction resulting in the appellant's arrest; (3) there was a

[15] *See, e.g., United States v. Duncan,* 356 Fed. Appx. 250 (11th Cir. 2009), *cert. denied* 562 U.S. 907 (2010) (affirming trial judge's refusal to find a prima facie RFRA defense to illegal possession of a firearm despite trial claim gun was part of an African Yoruba Santeria shrine); *United States v. Martines,* No. 13-10305, 582 Fed. Appx. 768 (9th Cir. July 10, 2014) ("substantial reason to doubt the sincerity of his Rastafarian beliefs."); *United States v. Manneh,* 645 F. Supp. 2d 98, 112 (E.D.N.Y. Dec. 31, 2008) (rejecting RFRA claim that prosecution was barred where evidence suggested religious beliefs relating to bushmeat were not bona fide explanation for criminal conduct, no evidence defendant thought she had religious excuse from complying with permit or license or disclosure requirements, thus asserted beliefs not sincerely held).

hasty induction into the claimed religion shortly before the crime; and, (4) other crimes, tied with the crime where a RFRA defense was claimed, "'undermine[]' ...their assertion that they used" the drugs "for religious rather than secular purposes." *Id.* "Without the essential element of sincerity, their RFRA defense must fail." *Id.*

The Record demonstrates Appellant's placement of the signs was not a sincere exercise of religion. Staff Sergeant Alexander expressed no concern with the signs' content. Cross-examination demonstrated nothing to the contrary. Only months after she refused to remove the signs did Appellant argue religion excused her disobedience. And the first time Appellant told anyone that protection of "the trinity" or "biblical scripture" was important to her was at trial. Not until two years later, on appeal, did Appellant first cite the Book of Isaiah as her inspiration. Appellant never testified the location and size of the signs was part of her exercise of religion.

At trial, Appellant denied, admitted, then denied again being ordered to remove the signs. Appellant claimed she asked "why" she must remove the signs——but later seemed to deny this. Staff Sergeant Alexander testified she had to remove the signs twice, but Appellant did not do so, and instead replaced the signs. While she knew how to "game the system" and liberally

used medical chits to argue that she could refuse orders to stand gate duty, and claimed she submitted a "request mast," which is required to be in writing——she conspicuously prevaricated and defied Staff Sergeant Alexander's orders. Appellant's placement of unattributed multiple large signs referencing "weapons against me," and avoidance of a clear explanation to Staff Sergeant Alexander, demonstrated the signs' self-evident secular purpose of "sticking it" to her superiors. Sincerity is not a word that describes Appellant's excuse-mill.

Appellant's claim that "no one doubts" her sincerity only focuses attention on the remainder of the Record and the lack of any possible prejudice, if a rational factfinder had analyzed the current, broader claims of "exercise" for sincerity. Art. 59(a). Appellant's excuses consistently collided with reality. Her excuse for refusing the order to wear the uniform of the day turned out to be simply untrue. (J.A. 050.) And Appellant explained why she felt excused obeying the order to distribute passes:

> This is——the Department of the Navy already said it. Forget about Lance Corporal Sterling when you're doing stuff. So why is [sic] that you're picking on only me, like why? This was never lawful in the first place. I should have never been in your list of people to consider to hand out these passes... and even if you did make a mistake and you put me on your list, okay, who can we get to hand out these——oh, Lance Corporal Sterling, take her off that list.

(J.A. 089.) Even then, Appellant's excuse that she could not attend gate duty because she would instead attend church, or was excused by a medical chit, was patently untrue. Her superiors explained that to her. Appellant skipped duty nonetheless.

When asked to explain what others called "the most disrespectful conduct they had ever seen," the incident where she refused to accept gate passes from Major Flatly, Appellant characteristically leapt from answering the question to explaining the reasoning underlying the interactions with her superiors: "I did not have the energy or the time or the well-being to entertain her." (R. 328.)

Appellant's claim that the signs were a sincere exercise of religion is compellingly refuted by the Record.

D. Appellant cannot show a substantial burden both because she sought no accommodation, and failed to demonstrate how any burden was substantial or coerced her to abandon her exercise of religion.

Government action substantially burdens religion when it "[p]uts *substantial* pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Review Board*, 450 U.S. 707 (1981), or requires an individual to choose between "either abandoning his religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U. S. 599, 605 (1961). Congress intended courts to play a "gatekeeper" role in determining whether an assigned burden is "substantial"; relying

on a litigant's assertion alone would "read 'substantial burden' out" of RFRA and render "substantial burden" meaningless. *Washington v. Klem*, 497 F.3d 272, 281 (3d Cir. 2007); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

RFRA and RLUIPA apply the same "substantial burden" test as does a Free Exercise analysis. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070–71 (9th Cir. 2008) (en banc) ("Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases."); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (same).

But not all burdens are substantial. A practice that merely offends religious sensibilities but does not force the plaintiff to act contrary to his or her beliefs is not a "substantial burden." *Navajo Nation*, 535 F.3d at 1063, 1070.

1. Naval rules governing religious accommodations since 2008 govern how servicemembers may lawfully request exemption from orders based on religion. Appellant cannot show a substantial burden, having failed to request accommodation.

RFRA and RLUIPA precedent holds that no "substantial burden" exists where claimants or accuseds fail to properly seek

a lawfully prescribed accommodation.[16] Here, pursuant to delegation by the Department of Defense, the Secretary of the Navy prescribed just such a procedure requiring Appellant to submit religious accommodation requests to the commanding officer. The "considered professional judgment of the [Navy] is that" accommodations should be requested, in writing, by unit commanding officers. *See, e.g., Goldman v. Weinberger,* 475 U.S. 503, 508 (1986).

Helpful is the analysis in *United States v. Friday,* 525 F.3d 938 (10th Cir. 2008). A native American appellant "shot a bald eagle for use in the tribe's traditional religious ceremony." *Id.* at 942. It was undisputed that the bird was shot to use its feathers for a religious ceremony, and Friday was prosecuted. *Id.* at 942, 948. The district court noted that a regulatory permit process enabled the legal acquisition of eagle feathers. *Id.* at 944. But the district court noted that

[16] *Church of Scientology of GA, Inc., v. City of San Diego,* CNo. 1:10-CV-00082-AT, 2011 U.S. Dist. LEXIS 116945 (U.S. Dist. N. Ga, Sept. 30. 2011) (summary judgment under RLUIPA where plaintiff did not request regulation variance, thus failed to demonstrate substantial burden); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. United States Dept. of the Interior,* No. 13-56799, 2015 U.S. App. LEXIS 8230, at *5 (9th Cir. May 19, 2015) (no "substantial burden" where declarations submitted were "little more than conclusory statements" insufficient to demonstrate party was "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions").

"few applications had been submitted," and concluded that "it is clear that Defendant would not have been accommodated" and that "the permit system was effectively unavailable to Mr. Friday." *Id.* at 946. The Tenth Circuit reversed, holding that failure to use the process made any burden "insubstantial" under RFRA: "Without any evidence that Mr. Friday's tenets are inconsistent with using the application process, we cannot find a substantial burden under this theory."[17] *Id.* at 948.

This Court should agree with *Friday* and prevailing RFRA precedent, and find any burden insubstantial. Appellant failed to use the prescribed path for requesting excusal from military orders and duties on the basis of religion.

Arguing against this body of caselaw, Appellant points to several cases barely connected to the issue at hand. In *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* 676 F.3d 829, 838 (9th Cir. 2012), the United States there solely argued "prudential ripeness," and the government made no argument about, and the Court did not reach, "substantial burden"; the

[17] Appellant concedes she has no objection to the accommodation policy here. (Appellant Supplement at 9, June 15, 2015.) But where an appellant under RFRA or RLUIPA demonstrates at trial that the accommodation process is futile, then the burden may be "substantial." *See, e.g., McAllen Grace Brethren Church v. Salazar,* 764 F.3d 465, 471 (5th Cir. 2013) (standing to sue under RFRA where requesting an eagle feather permit would have been *futile* given that the Indian tribe was not a federally recognized tribe, and no accommodation could have been given, under 50 C.F.R. § 22.22(a) (2012)).

Ninth Circuit never considered RFRA substantively. *Id.* And Appellant's appeal to *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), fails, given not only that the anti-discrimination statutory scheme is entirely different, but that RFRA's additional word "substantial" has long looked to whether the claimant or defendant may seek to legally accomplish the exercise of religion through an existing process. [18]

More tellingly, the Ninth Circuit rejected a RLUIPA claim "[w]here, as here, a religious institution is required to comply with a facially neutral and generally applicable zoning scheme," but never completed the required accommodation process. *Guatay Christian Fellowship v. County of San Diego,* 670 F.3d 957 (9th Cir. 2011), *cert denied,* No. 11-1451, 2012 U.S. LEXIS 8103 (Oct. 9, 2012) (noting legislative history and statement of Senators Hatch and Kennedy that "Congress did not intend for religious institutions to be exempted [via RLUIPA] from 'applying for variances, special permits or exceptions, hardship approval, or other relief' where they did not encounter discrimination or

[18] Indeed, if the accommodation scheme *were* futile under RFRA precedent, in that case Appellant would be closer to the mark: it might *not* matter if an accommodation was never sought, and the Government did not "know" about the request. That is, then "knowledge" *might not* matter. But again, Appellant makes no claim that the accommodation process here is futile. *See supra,* at 47 n.16. And "substantial"——not "knowledge"——is the correct test.

unfair delay."). Appellant conflates a threshold issue with the substantive prongs of the statute.

So too, the other case Appellant cites is a case where the Government *conceded* the burden was substantial, instead denying that courts could even *grant relief* under RFRA. *See O Centro Espirita,* 546 U.S. at 423. The United States freely agrees that under prevailing "substantial burden" precedent, if an accommodation process is illusory or is refused——then a burden might be substantial such that relief under RFRA may be appropriate. But, Appellant neither objects to the scheme here, nor does anything suggest it is futile; indeed, the Navy Instruction is a longstanding military directive, supported by a scheme of reporting requirements and requiring formal advice to every servicemember about its provisions both when they enlist and re-enlist. *See supra* at 47 n.16; (J.A. 267).

Finally, Appellant makes the same mistake in citing to *Holt v. Hobbs,* 135 S. Ct. 853, 862 (2015), claiming the Court did not tie the availability of accommodations to the least-restrictive means test. This, of course, obscures that Holt properly sought accommodation, and was denied. If Appellant's actions were a sincere exercise of religion followed by a proper but denied accommodation request, then the United States might concede that the burden would become substantial. *See, e.g., Carmichael v. United States,* 298 F.3d 1367 (Fed. Cir. 2002) (submitted written

request to commanding officer under the same Naval Instruction as in Appellant's case); *Goldman*, 475 U.S. at 504 (followed military procedures to request accommodation to wear yarmulke).

As a matter of law, Appellant's burden was "insubstantial." Appellant's cases do not say otherwise.

2. Appellant's testimony, and the exercise of religion she claims on appeal was burdened, are not coextensive. She failed at trial to demonstrate the "exercise of religion" she now claims on appeal.

Although RFRA's inquiry does not ask whether Appellant was "able to engage in other forms of religious exercise," Appellant never testified that her sincere religious belief was that the signs needed to be in her shared workplace. *Holt*, 135 S.Ct. at 862. Thus the burden here was insubstantial, because Appellant's vague testimony supports only that the placement of three signs "invoked the trinity"——not that her religious beliefs led her to "perform this particular ritual at any particular time or that [s]he could not perform this particular ritual" at another time. *See Wilkinson v. The GEO Group*, No. 13-10215, 617 Fed. Appx. 915 (11th Cir. Apr. 7, 2015) (finding no substantial burden where chief of security inadvertently destroyed a Santeria shrine with a nail sticking out of it, not knowing that it was a religious item).

Courts across the country routinely reject claims of "substantial burden" under RFRA and RLUIPA in both criminal and

civil settings based on a mismatch between evidence at trial, and the asserted exercise of religion claimed to have been burdened.[19] None of these authorities contradicts language in

[19] *See United States v. Amer*, 110 F.3d 873 (2d Cir. 1997) (no substantial burden under RFRA, in prosecution for kidnapping and removing children to Egypt, because record failed to reflect appellant could not provide a Muslim education in America); *United States v. Epstein,* 91 F.Supp. 3d 573 (U.S. Dist. N.J. Mar. 19, 2015) (denial of motion to dismiss indictment under RFRA, finding no RFRA substantial burden for kidnapping prosecution where defendants claimed Jewish law authorized "certain forms of force" to secure husband's consent to kidnapping, but court found non-violent alternatives existed to secure husband's consent apart from violating kidnapping laws); *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004) (no substantial burden under RLUIPA where prisoner prevented from attending religious assemblies on occasion due to unavailability of "qualified outside volunteers," required by prison rules to accompany prisoners to the assemblies); *Mahoney v. Doe,* 642 F.3d 1121 (D.C. Cir. 2011) (no substantial burden under RFRA where chalking sidewalk in front of White House, despite District's threat to use Defacement Statute, because chalking was only "one of a multitude of means" of conveying the religious message Mahoney wanted to convey); *Midrash Sephardi v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004) (no substantial burden under RLUIPA on religious exercise of the congregation where synagogue never claimed that "their current location has some religious significance such that their faith requires a synagogue *at this particular site."* (emphasis added)); *Living Water Church of God,* 258 Fed. Appx. 729, 739-41 (6th Cir. 2007) (inability of church to construct "ideal building" is not a substantial burden under RLUIPA); *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2nd Cir. 2007) (where denial of religious institution's application to build is *not absolute,* denial is not a substantial pressure to alter behavior under RLUIPA); *Vinson Church v. Village of Long Grove,* 468 F.3d 975, 997-1000 (7th Cir. 2006) (because church permitted to build smaller facility, conditions on permit limiting size, services, and religious activities conducted, did not impose a substantial burden under RLUIPA); *Mesquite Grove Chapel v. Debonis,* No. 13-16633, 2015 U.S. App. LEXIS 22107 (9th Cir. Dec. 18, 2015) (no substantial burden under RLUIPA where regulation defining

Holt that where the evidence at trial and the claimed exercise burdened under RFRA *match*, that alternate means of practice become irrelevant. But where evidence adduced at trial and the claimed exercise burdened do not match——then alternate means becomes very relevant to whether the burden was substantial.

This is so throughout RFRA and RLUIPA caselaw, just as in *Mahoney v. Doe,* 642 F.3d 1112, 1115, 1120-1121 (D.C. Cir. 2011), a RFRA case where a litigant asserted he sincerely believed that his desire to place chalk art in front of the White House was an expression of his religious views. The appellant was threatened with prosecution under the District's criminal Defacement Statute, and claimed it burdened his ability to draw chalk pictures in front of the White House. *Id.* at 1115. He sued, asking for an injuction to prevent the District from prosecuting or preventing his chalking. *Id.* The *Mahoney* court affirmed the summary judgment against Mahoney, noting that the scope of the claimed belief at trial was not coextensive with the claimed burden——thus the availability of alternate means of expressing his religion without subjecting himself to prosecution *was* relevant. *Id.* The court rejected the appellant's claim that alternate means were irrelevant in such a case, commenting that

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"church" not met by the appellant's proposed use; relocation, or submission of a modified application was also not a substantial burden).

"nothing... indicates RFRA's 'substantial burden' analysis is subject to such manipulation." *Id.*

Any argument to the contrary would ignore widely held RFRA and RLUIPA precedent. Appellant's claim that "substantial burden" differs significantly in the RLUIPA or civil context would suggest the absurd result that while no RLUIPA "substantial burden" exists for a prisoner's occasional inability to attend religious services because of a lack of "qualified outside volunteers," *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004)——under RFRA, the same prisoner in a criminal case would gain a windfall: escaping from prison or forcing his way into a religious service and claiming the same lack of "qualified outside volunteers" would easily shift the heavy burden to the government.

And courts have found no substantial burden where the Internal Revenue Service withdraw tax exempt status from a church engaged in political activities and expenditures. *Branch Ministries v. Rossotti,* 211 F.3d. 137 (D.C. Cir. 2000). Appellant's argument suggests that if the Church was then prosecuted for failure to pay taxes, the "substantial burden" analysis would be different. But nothing supports that Congress intended a different analysis for RFRA, RLUIPA, civil, or criminal cases.

Appellant's vague testimony here was that the three signs were biblical and invoked the trinity. But she never claimed that her religious belief led her to place the signs *at work*, or that a religious belief moved her to lie about having replaced the signs, lie about being ordered to remove them, or avoid asking for an accommodation. But here, the testimony at trial, and the claim on appeal of the exercise that was burdened, do not match. Appellant had many alternate routes to practice the religious exercise she testified to at trial, including: she could have placed them somewhere that Staff Sergeant Alexander and she both agreed would not clutter the office; she could have invoked the trinity at home; she could have invoked the trinity with the "post its" Appellant admitted that she had—and maybe could have used, instead of using 8 1/2" x 11" paper and 28-point font. By testifying so vaguely as to the scope of her beliefs, Appellant failed to prove the signs' removal by Staff Sergeant Alexander was a substantial burden.

E. Staff Sergeant Alexander's order to clean the office was the least restrictive means to accomplish compelling government interests.

This Court may affirm on the ground that ordering removal of these signs was the least restrictive means to achieve compelling government interests, including good order and discipline.

1. The military has a compelling governmental interest in ensuring Staff Sergeant Alexander's order to clean the office was obeyed.

(a) There is a compelling governmental interest in obedience to direct military orders.

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Parker v. Levy*, 417 U.S. 733, 744 (1974).

In other contexts, the Supreme Court has indicated that a "compelling interest" is served where prison officials enact "regulations and procedures" to "maintain good order . . . and discipline." *Cutter v. Wilkinson*, 544 U.S. 709, 716-17, 725 n.13 (2005).

So too, military orders serve a compelling interest in the military. The Religious Freedom Restoration Act "was enacted against a known backdrop of longstanding precedent involving judicial deference to military authorities," *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, at *12 (D.D.C. June

12, 2015). Numerous cases have found good order and discipline to support a compelling government interest under RFRA.[20]

The Supreme Court in *O Centro,* rejected the government's argument that the enforcement of the Controlled Substances Act, without exception, is a compelling interest. 546 U.S. at 430-31. The Court stated that RFRA "contemplate[s] an inquiry more focused than the Government's categorical approach." *Id.* at 430. The Court emphasized that courts must analyze the specific harm that would result from granting an exception from the statute's application to the party in question. *Id.* at 431. But, the Supreme Court acknowledged that the government may "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435.

That is the case here. The Secretary of Defense determined that "DoD has a compelling government interest in mission accomplishment, including... unit cohesion, good order,

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[20] *See Brown v. Glines*, 444 U.S. 348, 348 (1980) ("substantial Government interest . . . in maintaining the respect for duty and discipline so vital to military effectiveness"); *Rigdon v. Perry*, 962 F. Supp. 150, 162 (D.D.C. 1997) ("politically-disinterested military [and] good order and discipline . . . are compelling governmental interests"); *Wilson,* 2015 U.S. Dist. LEXIS 138984, at *26-*27 (letter of reprimand for voicing religious beliefs about same sex marriage via a military email account, to a senior officer outside the chain of command, furthered a compelling governmental interest under RFRA).

discipline, ... on both the individual and unit levels." (J.A. 253.) The Secretary delegated to the Secretary of the Navy—using words nearly identical to the delegation in the 2009 and 1988 Defense Instructions——the responsibility to issue procedures for religious accommodations in the Navy. (J.A. 255, 257.) The Department of the Navy has a policy on religious accommodations. (J.A. 260-268.)

Disobedience to orders without (1) notifying superiors of the religious underpinning of the refusal to comply with direct military orders, or without (2) complying with instructions promulgated specifically to allow religious accommodations to be sought in an orderly and non-disruptive manner, damages mission accomplishment and compromises the military chain of command, which by necessity and to ensure national security relies on instant obedience to orders. *Parker,* 417 U.S. at 744.

(b) Even imputing knowledge of Appellant's current claims to the Government, there is a compelling interest in preventing official endorsement of a religion in shared office spaces.

The three-part test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), for analyzing whether a governmental practice endorses religion or has that effect to a "reasonable observer," considers: (1) whether the governmental action has a secular purpose; (2) whether the principal or primary effect advances or

inhibits religion; and, (3) whether the governmental action must not foster excessive governmental entanglement with religion.

The Court looks, most often in the school prayer context, to whether governmental action amounts to coercion, and whether the government has coerced "anyone to support or participate in religion or its exercise." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (affirming injunction on public delivery of school prayer that had been government-endorsed, thus violative of the Establishment Clause). The Fourth Circuit applied the coercion test to strike down a daily prayer at Virginia Military Institute, noting that VMI's educational method involved "Detailed regulation of conduct and indoctrination of a strict moral code," and finding that including a daily prayer in activities violated the coercion test; it did not matter whether no one would actually be offended. *Mellen v. Bunting,* 327 F.3d 355 (4th Cir. 2003).

If the command here is deemed to have known that the signs were religious, then the Government had a compelling interest in preventing them from remaining visible to daily clients and other workers in the shared office spaces. Moreover, the command had a compelling interest in preventing violations of Joint Ethics Regulation, which forbids official endorsement of non-Federal entities by Department of Defense employees in their official capacities. Department of Defense Directive 5500.07-R,

3-209 ("Joint Ethics Regulation"). A reasonable factfinder would conclude that permitting Appellant to flout direct orders, including the accommodation order, or to put up highly visible and potentially belligerent signs in common areas, would create an unacceptable risk to the good order and discipline of the command. Indeed, this is exactly what the Military Judge did. (J.A. 159.)

2. Ordering removal of the signs was the least restrictive means to accomplish these goals.

The least-restrictive-means standard is demanding and "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].'" *Holt v. Hobbs*, 135 S. Ct. at 864 (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.* (internal citation and quotation marks omitted). Yet the government need not prove that government officials "considered less restrictive alternatives at a particular point in time." *Id.* at 868 (Sotomayor, J., concurring). Nor must the government "do the impossible" and "refute each and every conceivable alternative regulation scheme." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). The government instead must "support[] its choice of regulation" and "refute the alternative

schemes offered by the challenger." *Id.*; *see Holt*, 135 S. Ct. at 868 (Sotomayor, J., concurring) (citation omitted).

There is a close fit between the government's compelling interests in this case and the means it has used to achieve those ends. The Instruction requiring servicemembers to request accommodation is the least restrictive means to ensure good order and discipline is preserved; indeed, the 2014 revision to the Department of Defense Instruction adds that "Service members submitting requests for accommodation... *will comply* with the... duty from which they are requesting accommodation." (J.A. 254 (emphasis added).) Similarly, the 2008 Navy Instruction notes: "Nothing in this instruction precludes action under the Uniform Code of Military Justice." (J.A. 267.)

As Congress' Uniform Code has always applied to disobedient military behavior, obedience has always remained at the center of the equation. Ordering the signs removed, and punishment, are the least restrictive means to ensure that in the case of a repeat offender; the accommodation instruction is the least restrictive means to protect good order and discipline is ensured until a military commander can review a Marine's request to not follow military orders. This latter part, Appellant apparently concedes.

F. Any remand for factfinding under RFRA creates a high evidentiary burden on the Government to demonstrate how rules are justified in application "to the person"; these hearings may require evidence of other command practices throughout the military.

Both RFRA and RLUIPA do not permit generalized responses by the Government——rather, they require the government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person," that is, "the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt,* 135 S.Ct. 852, 853 (citation omitted).

Once the burden shifts, any testimony required regarding orders, rules, policies, and Instructions, thus, will be specific "to the person" under this strict scrutiny analysis. In *Holt v. Hobbs,* the factfinding remand required testimony as to the scope of the petitioner's belief and practices, as well as testimony by multiple prison officials to justify application of the policy to Holt. 135 S. Ct. 853, 861 (2015).

The Supreme Court looked to surrounding federal and state prisons to determine that application of the policy to Holt failed to meet strict scrutiny. 135 S.Ct. at 866. RFRA and RLUIPA caselaw involving remands for further factfinding largely follows the same microscopic examination of governmental interests "personalized" to appellants, mandating comparison and

justification of more lenient policies in other locations and offices against more strict policies in a given case.[21]

Military officials would, once a RFRA burden shifts, foreseeably be required to justify why one military unit's policy is less permissive than another unit's implementation of policy. This heavy burden should only be held to shift once a litigant properly seeks a religious accommodation though a commanding officer and pursuant to Secretarial policy, or when a deserving litigant faces a futile accommodation policy.

Appellant is not that litigant.

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[21] *See, e.g., Garner v. Kennedy,* 713 F.3d 237, 247 (5th Cir. 2013) (reversing finding of compliance with RLUIPA, finding insufficient "personalized" evidence at factfinding hearing so as to demonstrate why more liberal policies of other prisons could not be followed in instant case); *Knight v. Thompson,* 797 F.3d 934, 938 (11th Cir. 2015) (RLUIPA and RFRA claims, describing how court vacated district court judgment and ordered extensive evidentiary hearing to resolve factual issues surrounding defendant's total ban on native American's wearing of long hair, whether total ban was least restrictive menas of furthering a compelling interest in security, discipline, hygiene, and safety); *United States v. Zimmerman,* 514 F.3d 851, 854 (9th. Cir. 2007) (factfinding ordered on objection to giving DNA pursuant to a prison sentence to determine the "precise scope of Zimmerman's beliefs," whether beliefs would allow for "giving any other sample suitable for DNA analysis," whether the "beliefs are sincerely held, which is a question of fact," and whether his beliefs were "substantially burdened by giving up a DNA sample."); *Ali v. Stephens,* No. 9:09-CV-52, 69 F. Supp. 3d 633 (U.S. Dist. E.D. Texas Sept. 26, 2014) (extensive factfinding hearing covering RLIUPA prongs).

Specified Issue II.

> APPELLANT'S RFRA ARGUMENT SHOULD FAIL, THE MILITARY JUDGE'S FINDINGS WERE NOT CLEARLY ERRONEOUS, AND THE NEED TO PRESERVE GOOD ORDER AND DISCIPLINE, AVOID ESTABLISHMENT CLAUSE VIOLATIONS, AVOID VIOLATIONS OF ETHICAL REGULATIONS, AND MAINTAIN AN ORDERLY PROCESS FOR REQUESTING RELIGIOUS ACCOMMODATIONS, MAKE PROPER THE ORDER TO REMOVE APPELLANT'S BELLIGERENT SIGNS IN A SHARED WORKSPACE.

The legality of an order is a question of law that we review de novo. *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). A superior's order is presumed to be lawful and is disobeyed at the subordinate's peril. Manual for Courts-Martial, United States (2012 ed.), Part IV, para. 14.c.(2)(a)(i); *United States v. Nieves*, 44 M.J. 96, 98 (C.A.A.F. 1996). Not only are orders presumed lawful, but the accused has the burden of demonstrating any unlawfulness.

First, if Appellant's RFRA arguments fail, as they should, then few arguments against lawfulness remain. Appellant waived any argument that Staff Sergeant Alexander's order violated any other regulation or policy. At trial, she only summarily raised the Department of Defense Instruction, and now makes only the RFRA argument, not any argument that the orders otherwise violated the Constitution. But if not waived, Appellant still cannot prevail, as the signs were not "private speech." Appellant now objects merely to findings of the Navy-Marine Corps Court of Appeals' analysis. But that is not what matters:

it is the findings of the Military Judge that are tested for error.

Second, even not applying waiver, the Military Judge's findings were not clearly erroneous and nothing else makes the order unlawful. Appellant does not claim otherwise; instead, Appellant merely argues against the sufficiency of the evidence as to whether other Marines were "distracted," and objects to the lower court's "speculation." (Appellant's Br. 32-36.)

But to sustain the presumption of lawfulness, "the order must relate to military duty, which 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 in the service." MCM Part IV, para. 14.c.(2)(a)(iii)(emphasis added). The order may not "conflict with the statutory or constitutional rights of the person receiving the order" and must be a "specific mandate to do or not to do a specific act." *Id*. at para. 14.c.(2)(a)(iv) and (d). In sum, an order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate. *See United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989).

The Military Judge found that "the workspace... was shared by at least one other person" and that "other service members

came to accused's workspace for assistance at which time they could have seen the signs." (J.A. 159.) Appellant makes no claim that the office space in which she worked was a public space or a forum for private speech; rather, she simply disagrees and insists it was not a shared space. Appellant was a Marine who provided services to other military members from the Battalion.

The Military Judge's Finding, relying on Staff Sergeant Alexander's testimony, and Appellant's demonstrated lack of testimonial credibility, was not clearly erroneous.

Likewise, nothing supports that Appellant's shared Government workspace deserved any of the protections of a public forum, even assuming the command should be imputed to know exactly what Appellant now claims that they meant to her. *See Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 802-805 (1985) (rejecting the argument that a charity drive at a government workplace is a public forum inside a non-public forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (rejecting the argument that a school district's internal mail system was a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-300 (1974) (same with regard to advertising space on city buses).

As the space was not a public forum, the First Amendment does not excuse Appellant's actions, and the Order was proper.

Cf. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S.Ct. 2239 (2015) (finding government-issued specialty plates were "government speech," permitting government direct and final control over messages appearing on specialty license plates). When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009) (finding proper under First Amendment city's refusal to permit a religious monument in a public park, as the city's authority over park made contents of park an expression of the city viewpoints and thus "government speech").

Like the Ten Commandments monument in *Summum*, here the Marine Corps has not "provid[ed] a forum for private speech" with respect to belligerent, religious, or other signs. *Cf. Summum*, 555 U.S., at 470. And like the Texas specialty license plates in *Walker* where the Supreme Court held the license plate designs were government speech and "Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design," here the Government properly ordered Appellant to remove three signs, particularly in light of Appellant's repeated refusal to obey orders and failure to adhere to the requirements of military discipline.

All signs in a shared office space that provides services to military members of all faiths, and no faiths, is "best

viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause." *Pleasant Grove City v. Summum,* 555 U.S. 460, 464 (2009). This is so because the United States Government, and even more so America's military, uses signs to educate and inculcate values in servicemembers; that is, the government uses signs to "speak to" servicemembers. The signs here were, as a matter of law, government speech. Staff Sergeant Alexander properly ordered them removed.

Appellant, in essence, argues that the order to remove three signs that Appellant used to facially, and in ignoring the order tacitly, disobey her direct superior and Staff Sergeant. But arguing that these actions are protected ignores two centuries of military law and Article III precedent supporting it. *See, e.g.* Articles 88, 89, 90, 91, and 92, UCMJ; *Culver v. Secretary of Air Force*, 559 F.2d 622 (D.C. Cir. 1977) (denying First Amendment attack in Article III court on Article 92 court-martial conviction for violating Air Force regulation forbidding taking part in demonstrations in foreign countries).

This is not dissimilar to *United States v. Moore,* 58 M.J. 466 (C.A.A.F. 2003). There, the appellant violated a direct order from a superior noncommissioned officer, "not to converse with civilian workers [in the galley]." The *Moore* appellant, within a half hour from receiving the order, started talking

with civilians in his workplace. The *Moore* Court noted that the appellant believed he had been falsely accused of a crime and was for this reason associating with civilians, but nonetheless "[h]is superiors viewed this conduct as threatening to the civilian employees and potentially compromising the integrity of the investigation." *Id.* at 469.

Staff Sergeant Alexander testified only that she wished to keep her workspace clean, and that large signs had been positioned, in places easily visible to passersby in a shared office space and clients at a shared desk. The Military Judge's findings, in light of the actual words on the signs, Appellant's prevarication, and the other charges against Appellant, were not erroneous.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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