IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY 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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Argument

Certified Issues I and II.

GIVEN (1) APPELLANT'S PETITION ASKED THIS COURT TO CORRECT THE NAVY-MARINE CORPS COURT'S INTERPRETATION OF THE RELIGIOUS FREEDOM RESTORATION ACT, (2) THIS COURT'S WIDE DISCRETION TO RESOLVE A CASE ON ANY GROUNDS AND PAST PRECEDENT DOING JUST THAT, AND (3) DUELING WAIVERS ON A FIRST IMPRESSION ISSUE GROUNDED IN "BAD FACTS"—THIS COURT SHOULD FIND APPELLANT FAILED TO RAISE A DEFENSE UNDER THE ACT AT TRIAL, AND FAILED AT TRIAL TO DEMONSTRATE ANY SUBSTANTIAL BURDEN.

A. Waiver is a prudential doctrine, and courts may resolve cases on any permissible grounds. Even given dueling waivers, this Court should, as in *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010), use this case to clarify to litigants how *not* to raise a Religious Freedom Restoration Act defense to military charges.

Both trial and appellate waiver doctrines are prudential doctrines, that is, a court may discretionarily apply, or not apply them.[1] And even where a trial judge unsatisfactorily applies the law, appellate courts may, as argued in the United States' Answer, resolve cases on any ground supportable by the record. *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957) (per curiam).

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[1] *See, e.g., Singleton v. Wulff,* 428 U.S. 106, 119-20 (1976) (declining to apply waiver, despite lower court not ruling on and parties not arguing an issue); *United States ex rel. Keshner v. Nursing Pers. Home Care,* 794 F.3d 232, 234 (2nd Cir. 2015) (waiver is prudential, but new arguments may be entertained "where the argument presents a question of law and there is no need for additional factfinding.") (internal quotations and citations omitted).

Courts should moreover be wary of resolving difficult and novel constitutional or statutory questions when other ways of disposing of the case are available and answering those questions will "have no effect on the outcome of the case." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (citation omitted).

When confronting the issue of "dueling waivers"—where both parties appear to insufficiently raise issues at trial or on appeal—courts possess no less discretion to carefully choose, or reject, which waiver to ignore. *See United States v. McGehee*, 672 F.3d 860, 873-74 n.5 (10th Cir. 2012) ("waiver of waiver" principle is discretionary, not mandatory). The Tenth Circuit recently confronted the issue of "dueling waivers" in *United States v. Rodebaugh*, 798 F.3d 1281 (10th Cir. 2015). There, the United States failed in its appellate brief on the merits to argue that the appellant had waived or forfeited "an objection to the district court's failure to make specific findings." *Id.* at 1313. But the Tenth Circuit declined to apply "waiver of waiver," noting that during oral argument on appeal, the United States had made a similar argument, albeit not raising forfeiture or waiver. *Id.* at 1314.

In cases of "dueling waivers," several considerations apply. First, this Court may provide systemic certainty to trial practice by issuing an opinion that circumscribes the minimum requirements for enunciating a defense under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4

("RFRA" or "the Act"). *Cf. Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783 (1992) ("adherence to precedent promotes stability, predictability, and respect for judicial authority.") (internal citations omitted). Second, appellate courts may avoid applying waiver when the application of waiver would "reinforce error already prevalent in the system." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (noting application of waiver inappropriate, despite United States not arguing ultimate basis of Court's holding at either Supreme Court or at Court of Appeals). Third, in the military system, although issues certified by a Judge Advocate General are not required to be answered, the fact that a Judge Advocate General requests this Court answer a legal question weighs against application of the prudential doctrine of waiver.

In *Bradley*, an opinion that brought certainty to military trial practice on the issue of the effect of guilty plea waivers, this Court specified the issue of whether the defendant, at trial, waived the issue of defense counsel disqualification; the issue had been raised by neither side. 68 M.J. at 280. The *Bradley* court held that the guilty plea waiver doctrine operated to waive any objection, on appeal, to the disqualification issue, despite the issue having been litigated at the trial level. *Id.* at 280. The *Bradley* holding has proven tremendously important to military practice by reinvigorating the concept of guilty plea waiver, has become a staple in advice to trial litigants as to the waiver effects of guilty pleas, and has been cited

numerous times in appellate pleadings and lower court opinions for just that proposition. But the disqualification issue, on which the *Bradley* court ruled, was one "the Government did not assert at trial, and does not contend on appeal that the issue was waived." *Id.* at 284-85 (Effron, C.J., concurring).

Appellant's waiver responses thus should be rejected for three reasons:

First, Appellant made no attempt at trial to signal that she was moving to dismiss pursuant to a statutory "defense" under the Religious Freedom Restoration Act, nor does the Department of Defense Instruction suggest that such a defense exists. Indeed, Appellant's argument at trial was that Staff Sergeant Alexander's orders were unlawful because the Department of Defense "allowed" her to practice religion. (J.A. 075, 089.) Tellingly, the Department of Defense Instruction Appellant submitted, without comment, in support of her argument at trial *never once* directs the military services to implement—much less ever mentions—a criminal "defense" under RFRA at courts-martial. (J.A. 253.) Indeed, despite Appellant's incorrect claim that the newer version of the Instruction is significantly different, the explicit "Purpose" and focus of every iteration of the Instruction is to specify how servicemembers should seek religious accommodations, and delegates the power to the Service Secretaries to define those processes at the service level. (J.A. 251, 253-57.).

In fact, the *sole* mention in the latest version of the Instruction of the Act, which itself is merely one of several listed references, is to cite the Act as the source for the Instruction's explanation of when "requests for religious accommodation" may be denied—and Appellant made no such request. (J.A. 253.) In her Petition and Supplement, Appellant similarly limited her demand for relief concerning the Act, merely asking this Court to reverse the lower court's application of the Act—but asking for no relief and alleging no error as to the Military Judge's application, or lack of application, of the Act. (Appellant's Supplement at 6-7, 10-21.)

The Military Judge can hardly be faulted for not knowing that Appellant, many months later, would wish that at trial she had moved for a defense available under the Act. Indeed, one of the cases Appellant cites in her Reply supports the proposition that Appellant's actions at trial should be held to be a waiver of a RFRA defense. *See Rweyemamu v. Cote*, 520 F.3d 198, 204 (2nd Cir. 2008) (finding RFRA waived because "the defendants never once mentioned RFRA in their motion to dismiss before the district court, nor did they ever argue that Title VII substantially burdens their religion.").

Second, as to her decision to not ask this Court to find error in the Military Judge's rulings and findings on the Motion at trial that her behavior was "allowed," Appellant has no substantive response except to claim that a grant of

review means that this Court has pre-emptively rejected that argument. But it is not the United States' job to locate error in the Military Judge's findings and petition this Court to set them aside, and Appellant did not press that argument at this Court until her Reply. Instead, Appellant chose to ask this Court to set aside the lower court's RFRA holdings because the lower court too narrowly interpreted the Act. Appellant did not ask this Court to set aside the Military Judge's ruling on her trial Motion—even assuming he knew Appellant would later claim she was asking for application of the Act, which he did not.

Finally, all parties, and the lower Court, engaged on the issue of whether Appellant demonstrated a "substantial burden" under the Act, and whether she had sought accommodation. The lower Court's ruling centered on a holding that the Religious Freedom Restoration Act did not apply to Appellant's "[p]ersonal beliefs, grounded *solely* upon subjective ideas about religious practices." *United States v. Sterling*, No. 201400150, 2015 CCA LEXIS 65, *15 (N-M. Ct. Crim. App. Feb. 26, 2015) ("Such action does not trigger the RFRA."). The lower court ordered oral argument on whether the order to remove the signs was lawful.

As in the Tenth Circuit case of *Rodebaugh*, and contrary to Appellant's claim otherwise, (Appellant's Reply at 2, 17-18), during oral argument below the United States explicitly argued that the Act provided no relief because (1) Appellant failed to demonstrate a "substantial burden" under the Act, and (2) the

Record contained no indication that Staff Sergeant Alexander knew the quotes were religious. Oral Argument at 31:32, 33:15, 33:30, 35:20, *United States v. Sterling*, 2015 CCA LEXIS 65.[2]

Appellant correctly adds that neither side's briefs at the Navy-Marine Corps Court fully engaged on the RFRA matter—a matter neither litigated at trial by Appellant nor preserved. But Appellant is incorrect that the United States failed to point out both her failure to demonstrate a substantial burden, and failure to notify her command that the signs were religious. The United States made that argument repeatedly during oral argument, as in *Rodebaugh*. Oral Argument at 31:32, 33:15, 33:30, 35:20, *United States v. Sterling*, 2015 CCA LEXIS 65*; Rodebaugh*, 798 F.3d at 1314. And the lower Court itself focused on Appellant's failure to request accommodation or inform her command the signs were religious. *Sterling*, 2015 CCA LEXIS 65, at *15.

Appellant's Reply also suggests that the grant of review means this Court has already made up its mind on the issues. (Appellant's Reply at 1, 10.) But a grant of review for "good cause shown" has never indicated substantive agreement or rejection by this Court of the issues presented. And the United States' Answer to Appellant's Supplement never urged this Court to reject the Petition on grounds

[2] *Available at* http://www.jag.navy.mil/courts/documents/archive/audio/OAC_01_15_2015.MP3.

of waiver and forfeiture. While the United States noted some of the underlying facts, raising the mess of "dueling waivers" as a basis for opposition in this case would never have made opposing a grant easier. Rather, the United States' Answer to the Supplement focused on the lack of relief due to Appellant under the Act. Finally, the Judge Advocate General directly asks this Court to rule on whether Appellant raised a RFRA defense at trial.

Now that the Petition was granted—on grounds different from those requested by Appellant—the stakes for the military and good order and discipline are high. If Appellant's idiosyncratic demand to read the requirement for a burden to be "substantial" out of the Act is accepted, contrary to prevailing RFRA precedent, the effect on the military will be profound. Waiver and forfeiture should be addressed, particularly given that (1) Appellant asks this to Court adopt a different application of RFRA than that applied in sister Courts of Appeals, (2) the first impression nature of this case in the military, and (3) the implications for military practice if this Court does *not* reject litigants' ability to raise a RFRA defense to court-martial proceedings for the first time on appeal. This issue has been litigated numerous times in the federal Courts of Appeals, and the law is clear that motions, and the grounds for motions, should be raised and litigated at trial—this "second shot at trial" opportunism should not be countenanced, particularly for this Appellant.

In sum, this Court should, as in *Bradley* and per the considerations listed above, *supra* at 2-3, pen an opinion that clearly signals that R.C.M. 905 (1) requires trial litigants to explicitly raise the Religious Freedom Restoration Act at trial, typically as a motion *in limine*, and (2) requires litigants to litigate the basis for that motion before the factfinder in the first instance, including whether the litigant's acts matched the exercise of religion asserted, whether the acts were sincerely performed, and whether a substantial burden existed.

Appellant should not receive a windfall having failed to litigate any of those issues at trial, having failed on appeal to ask this Court to review the adequacy of the Military Judge's findings as to a defense under the Act, and having merely asked this Court to reverse the Navy-Marine Corps' Court's interpretation of the Act. Nor should trial judges be blindsided by reversal of their trial rulings on ground of statutory defenses never litigated before them at trial.

B. Appellant confuses "exhaustion of remedies" with broad agreement that failure to seek available accommodations makes burdens insubstantial under the Act. To hold otherwise would set military justice at odds with the rest of American jurisprudence, and would render "substantial" meaningless, dependent on a litigant's assertion rather than on the analysis of courts and application of precedent.

As noted above, the United States disputed before the Navy-Marine Corps Court whether Appellant satisfied the "substantial" prong of the Act, and argued that Appellant never notified her command the signs were religious. *See supra* at 6. Likewise, the Judge Advocate General certified that issue to this Court.

Though Appellant may find their precedent "deeply flawed," those federal Courts of Appeals that have weighed-in on what "substantial burden" means under RFRA and RLUIPA provide persuasive guidance for this Court's analysis. (*See* Appellee's Answer at 45-55, Jan. 19, 2016); Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1(a)(1-2). Appellant cites not a single case directly engaging or opposing the holdings of that substantial body of RFRA and RLUIPA precedent for this proposition. That is so because, the United States presumes, no such case yet exists.

Indeed, one of the cases Appellant cites not only does not consider the substantiality of the burden in light of a lack of an accommodation request, but confirms that servicemembers should seek accommodation before ignoring the orders of superiors. *Singh v. McHugh*, a109 F. Supp. 3d 72, 74-75, 82-84 (D.D.C. 2015) (citing DoDI 1300.17, the Army's implementing regulation, and the detailed written official denial of plaintiff's written request for religious accommodation "that would enable him to enroll in ROTC with his articles of faith intact . . . Plaintiff contends that the Army's refusal to accommodate his religious exercise violates [RFRA]."). The *Singh* case would be more apposite had Appellant submitted, as required, and been denied, the accommodation request she now concedes would not have been burdensome.

And in the second case Appellant cites, *Rweyemamu v. Cote,* 520 F.3d 198, 204 (2nd Cir. 2008), the Second Circuit found RFRA waived in part because "the defendants never once mentioned RFRA in their motion to dismiss before the district court, nor did they ever argue that Title VII substantially burdens their religion." If anything, *Rweyemamu* supports the United States' argument that Appellant, in failing to argue RFRA before the Military Judge and failing to argue the presence of a "substantial burden" even once during trial, waived her ability to invoke RFRA on appeal.

Further, *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* 676 F.3d 829 (9th Cir. 2012), the case involving prudential ripeness, is inapposite. That case involves plaintiffs seeking an order to allow them to engage in the "consumption, cultivation, possession and distribution of cannabis," and also an injunction *against* prosecution under RFRA. *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* No. 09-00336 SOM/BMK, 2013 U.S. Dist. LEXIS 181624, at *1-*2 (D. Haw. Dec. 31, 2013). The Ninth Circuit merely analyzed in whether the RFRA claim was legally "fit for review." *Oklevueha,* 676 F.3d at 839.

Yet again supporting the United States' arguments as to "futility" and "substantial burden," the *Oklevueha* plaintiff presented evidence that the United States *would refuse* any exemption requests for the religious use of marijuana. *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* No. 09-00336 SOM/BMK,

2012 U.S. Dist. LEXIS 182979, at *14-*15 n.1 (D. Haw. Dec. 31, 2012). The District Court ultimately granted summary judgment in favor of the United States, finding no substantial burden in part because alternative substances, such as peyote, were available. *Id.* at *35-*36.

And this is not a Free Speech case; this is a case about a statute. The United States is unaware of any case where courts have applied First Amendment prior restraints to the "substantial" prong of RFRA. *Cf. Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (discussing prior restraints and the First Amendment). Appellant would like to dispel a broad swath of caselaw by importing prior restraints into a RFRA analysis—but it would also be clearly incorrect, even for a First Amendment claim, because of longstanding caselaw rejecting that argument in the military context. *See, e.g., Brown v. Glines*, 444 U.S. 348, 367 (1980) (detailing cases in accord and rejecting servicemember's claim of prior restraint in First Amendment case where regulations "require members of the service to obtain approval from their commanders before circulating written materials within a military base."); *Heap v. Carter*, 112 F. Supp. 3d 402, 425 (E.D. Va. 2015) (First Amendment case involving Navy and finding no prior restraint, noting: "Dr. Heap has not been forbidden from expressing his Humanist views merely because his application for the chaplaincy was denied. Rather, Dr. Heap simply cannot express his Humanist views as a Navy chaplain. Such an outcome does not operate as a

complete ban on expression sufficient to warrant the label of prior restraint."). So too, Appellant cannot be a Marine and disobey orders without first notifying her command why she seeks an exemption from operation of the military chain of command and military discipline.

Again, religious festivities do not excuse immediate presence at the front lines of battle unless a soldier, sailor, airman, or Marine first has a discussion with superiors—and maybe not even then. This is not a remarkable proposition to anyone familiar with military life. Such an outcome does not operate as a complete ban on expression sufficient to warrant the label of prior restraint; it surely should not be extended to RFRA. And given that Appellant takes no issue with the accommodation process here that might have accommodated her "signs" in some fashion without committing a crime, importing this doctrine into RFRA in the military makes no sense.

Finally, the United States makes no claim that this case was not ripe for consideration under RFRA or that, if adequately raised at trial, analysis of the prongs of RFRA would have been appropriate. Had Appellant supplied evidence that her accommodation requests would be futile, as in *Oklevueha*—it would be a different ball game. (*See* Appellee's Answer at 48 n.17.) Not only did she supply no evidence as to the futility of submitting the required RFRA accommodation request at trial, but Appellant conceded on appeal that the prescribed route for

accommodations was *not* burdensome. (Appellant Supplement Reply at 10, June 15, 2015.)

To read all of these cases and other RFRA and RLUIPA precedent as Appellant suggests would require post-trial hearings in every court-martial to allow the military to show why affirming a conviction on appeal was a compelling government interest, despite that the United States was never informed until after the crimes and after trial that the appellant would invoke a statutory defense under RFRA. As argued in its Answer, RFRA claims may be "ripe" even in the absence of accommodation requests: some litigants may be able to demonstrate that a burden was "substantial" because an accommodation scheme may forbid, or government officials may refuse to provide, an accommodation. *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)).

Those circuits have—"wrong" or not—found that "substantial" actually means something in RFRA litigation, and that when available accommodations are not sought, a RFRA burden is not "substantial." This Court should decline Appellant's demand to read "substantial" out of the Act.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm Appellant's Findings and Sentence.

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