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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

BRUNSWICK DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. STEPHEN MICHAEL KELLY MARK PETER COLVILLE CLARE THERESE GRADY MARTHA HENNESSY ELIZABETH MCALISTER PATRICK M. O'NEILL CARMEN TROTTA Defendants.	)	NO. 2:18-CR- 22 **BRIEF OF AND BY PROFESSORS OF RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY ON DEFENDANTS' MOTION TO DISMISS UNDER THE RELIGIOUS LIBERTY RESTORATION ACT**

Introduction:

Amici Law Professors, all experts in constitutional law and specifically the law of religious liberty, seek to provide the court with the proper framework within which to consider Defendants' motion to dismiss grounded in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 (hereinafter "RFRA"). This case raises important questions regarding the application of RFRA as a defense in a criminal prosecution; thus, it is imperative that the Court structure its ruling on the RFRA motion to dismiss in a way that will provide clear guidance to the parties here and to other parties and courts in the future. As experts in the law of religious liberty in general, and in RFRA in particular, we are concerned that the government's brief misstates well-settled law on the basic elements of the RFRA case. We offer this *amicus* brief to help guide the court's reasoning on the application of RFRA in this case.

Congress enacted RFRA in 1993 in response to the Supreme Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id*. at 879 (internal quotation marks omitted). With RFRA, Congress sought "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," that had been altered by the Court in *Smith*. 42 U.S.C. § 2000bb(b)(1). By reinstating as a statutory matter the pre-*Smith* free exercise standard, Congress recognized that laws of general applicability may, in some cases, impose a substantial burden on the religious exercise of some persons. Congress required that in circumstances where religious

exercise is substantially burdened by state action, the government must justify such burden as furthering a compelling interest through narrowly tailored means. The Supreme Court affirmed this interpretation of the reach of RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'") (quoting 42 U.S.C. § 2000bb–1(a)).[1] RFRA aims to provide substantial protection to the free exercise of religion while recognizing that this right is not absolute, insofar as it must yield where necessary for the government to implement a compelling public interest, or where the rights of third parties, for instance other citizens, are burdened by the overly solicitous accommodation of an individual's religious belief. Further, the First Amendment's Establishment Clause imposes a limit on the extent to which the government may accommodate the religious beliefs of citizens, as the government must ensure that an "accommodation [is] measured so that it does not override other significant interests" and does not "differentiate among bona fide faiths." *Cutter v. Wilkinson*, 544 U.S. 709, 722-

[1] In this respect the government's initial position, taken at oral argument on the motion hearing held on August 2, 2018, that RFRA does not apply as a defense to enforcement of laws of general applicability, is absolutely wrong. "This is a statute of general applicability, and we cited the Smith case and I believe Professor Quigley talked about that as well. The Supreme Court has never held, never held, that an individual's religious beliefs can effectively excuse him from compliance with laws that prohibit certain criminal conduct. The statutes here, as required in the Smith case, they are valid and neutral laws of general applicability, and one cannot argue, therefore, that their religious practices proscribe a compliance with the four statutes which are charged in this case … I did not see any or I have not found a criminal case which has specifically addressed instances where RFRA was raised as a defense as it was in this matter." Argument of U.S Attorney Karl Irving Knoche, transcript of Motions Hearing before the Honorable R. Stan Baker, August 2, 2018, at p. 66.

23 (2005).

Through a process of strict judicial review, RFRA creates the possibility of discrete religious exemptions to those whose religious activities are constrained by neutral laws of general applicability.[2] To receive an exemption under RFRA, a claimant need not demonstrate that the challenged law or policy singles out any particular group for special harm—such a law would be presumptively unconstitutional under the Free Exercise and Establishment Clauses of the First Amendment, making a RFRA exemption unnecessary. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Nor need a defendant show that he believes the challenged law cannot exist *at all*. RFRA is not a means of challenging the application of a law or policy generally, but of challenging a particular application to the extent that it conflicts with a particular person's specific religious practices.

Under RFRA, the federal government may not "substantially burden" a person's religious exercise, even where the burden results from a religiously neutral, generally applicable law that might be constitutionally valid under *Smith*, unless the imposition of such a burden is the least restrictive means to serve a compelling governmental interest. The person claiming a RFRA defense must show i) that he or she holds a belief that is religious in nature; ii) that that belief is sincerely held; iii) that his or her exercise of religious belief was substantially burdened by a federal law or policy. Once the person

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[2] James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, forthcoming 2019 Wisconsin Law Review, p. 23, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262826.

claiming a RFRA defense has made out this showing, the burden shifts to the government to show that i) it has a compelling interest; and ii) that interest is being accomplished through the least restrictive means. 42 U. S. C. §§2000bb–1(a), (b). In this case the government has conceded that defendants' actions were motivated by their religious beliefs and that those beliefs are sincerely held. Docket No. 227, p. 10. However, the government's discussion of the standard to be applied in determining these two elements of the RFRA claimants' *prima facie* case misstates the law. For this reason we feel it appropriate for *amici* to clarify for the court the proper analysis to be applied in assessing the defendants' *prima facie* showing that their beliefs are religious in nature and that they are sincerely held.

The government does not concede the other elements of the RFRA case, specifically arguing that the defendant's religious beliefs were not substantially burdened, that the government has a compelling interest in enforcing the law against the defendants, and that the instant prosecution is narrowly tailored to accomplish that compelling interest.

The defendants' assertion of a faith-based exemption from prosecution in this case falls squarely within the intended meaning of RFRA. The Supreme Court recognized the application of RFRA to criminal prosecutions in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), finding an exemption to enforcement of the Controlled Substances Act, 84 Stat. 1242, as amended, 21 U.S.C. § 801 et seq. (2000 ed. and Supp. I): "A person whose religious practices are burdened in violation of RFRA 'may assert that violation as a claim or defense in a judicial proceeding and obtain

appropriate relief.' § 2000bb–1(c)." *Id.* at 424.

The RFRA Prima Facie Case

a. Do The Defendants Hold Beliefs That Are *Religious* In Nature

With respect to the showing required by the party claiming a RFRA exemption, the claimant must first demonstrate with "the evidence of persuasion" (42 U.S.C. § 2000bb-2(3)) that he or she holds a belief that is *religious* in nature. This showing requires courts to consider the mixed question of whether, objectively, the claimant's beliefs are "religious," and whether, subjectively, the claimant himself understood the beliefs to be religious in nature. RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S.Ct. 2751, 2762 (2014). RFRA provides protection to a wide diversity of religious practices, including those that differ significantly from the Abrahamic traditions. Thus, a RFRA claimant need not show that they believe in a singular deity, that their faith includes a house of worship, or that they are a member of a recognizable congregation. "This [] inquiry reflects our society's abiding acceptance and tolerance of the unorthodox belief. Indeed, the blessings of our democracy are ensconced in the first amendment's unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). "Our nation recognizes and protects the expression of a great range of religious beliefs."

Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1064 (9th Cir. 2008).

In considering whether a system of values or beliefs counts as objectively religious for the purposes of RFRA and similar federal statutes, courts have looked to several key indicia of "religiosity" that implicate "'deep and imponderable matters' … includ[ing] existential matters, such as humankind's sense of being; teleological matters, such as humankind's purpose in life; and cosmological matters, such as humankind's place in the universe." *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016), *aff'd* (8th Cir. Sept. 7, 2016).

The government implies at several points in its opposition to the defendants' religious liberty-based motion to dismiss that their beliefs are political in nature, and therefore not religious within the meaning of RFRA. When addressing the question of whether a belief or ideology is religious in nature, courts have found that an action or position does not lose its religious character merely because it coincides with a particular political belief. *Rigdon v. Perry*, 962 F.Supp. 150, 164 (D.D.C. 1997) (a priest's "desire to urge his Catholic parishioners to contact Congress on legislation that would limit what he and many other Catholics believe to be an immoral practice—partial birth abortion—is no less religious in character than telling parishioners that it is their Catholic duty to protect every potential human life by not having abortions and by encouraging others to follow suit."). In *McGowan v. State of Maryland*, 366 U.S. 420 (1961), the Supreme Court provided examples of beliefs that may be grounded in both religious and secular values, such as condemnation of murder, theft or fraud. In the Establishment Clause context, a legal prohibition on murder, for instance, does not lose its secular character

simply because many religious traditions contain similar prohibitions.

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S.Ct. 2751 (2014) the Supreme Court essentially applied this interpretation of the meaning of "religious" as it appears in RFRA by finding that the claimants' opposition to contraceptive coverage was religious in nature even though it also mirrored political beliefs about abortion and the Affordable Care Act held by some persons for secular reasons. At no time did the Court find, or even suggest, that the beliefs of the RFRA claimants lost their religious character because other parties held similar views on contraception, or on government regulation of health care, for non-religious reasons. Thus, the question for the court herein in determining whether the RFRA claimant's beliefs are religious in nature is not whether others might hold the same values for secular reasons, but whether a value was held or an action was taken by *this* claimant for reasons that are religious to them in their own scheme of things. Similarly, the religiosity of the beliefs of the defendants herein should not be questioned merely because they happen to overlap with other parties' secular political objections to the use of nuclear weapons. Rather, the court must determine the mixed question of whether, objectively, the claimant's beliefs are "religious," and whether, subjectively, the claimant himself understood the beliefs to be religious. The fact that others may hold similar beliefs for secular reasons is of no moment to this inquiry.

There remains a subjective factual component to the question of whether a particular RFRA claimant's belief system should be treated as religious. This subjective inquiry goes to whether the RFRA claimant considered their beliefs to be religious in

nature. "[T]he task of courts is to examine whether a plaintiff's beliefs are, "in his own scheme of things, religious." *Watts v. Fla. Intern. U.*, 495 F.3d 1289, 1298 (11th Cir. 2007) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965). "The question is not whether the plaintiff's beliefs are religious in the objective, reasonable person's view, but whether they are religious in the subjective, personal view of the plaintiff." *Id.*

In this case the factual question of whether the defendant's beliefs were religious in nature is not disputed by the government; however, it is appropriate for the court to make a finding on this question.

b. Are The Defendants' Religious Beliefs *Sincerely Held*?

Second, the RFRA claimant must show that his or her religious beliefs are *sincerely held*. *Hobby Lobby*, 134 S.Ct. at 2774 n. 28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'...."). This element is a question of fact, proven by the credibility of the party asserting a religion-based defense. *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (sincerity is "a question of fact"); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2nd Cir. 1984) (the sincerity analysis "demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross- examination"); *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) ("[S]incerity of religious beliefs 'is a factual matter.'") (citation omitted). *See generally* Kara Loewentheil and Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in *Religious Exemptions* 247 (Kevin Vallier & Michael Weber eds., 2018).

To be sure, the court may give significant weight to the RFRA claimant's assertion of sincerity: "It is well established that we defer to a plaintiff's statement of its own

belief, so long as the plaintiff actually holds that belief." *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1143 (11th Cir. 2016), *vacated on other grounds*, 2016 WL 11504187 (11th Cir. October 3, 2016). But this deference does not render this element of the RFRA *prima facie* case a mere matter of pleading. The court must undertake a meaningful assessment of the factual basis for the claim to sincerity, including examination of the claimant's demeanor.

Regretfully, the government frames the RFRA inquiry in this case in a way that mocks the sincerity of the defendants' asserted religious beliefs: "RFRA … 'could easily become the first refuge of scoundrels if defendants could justify illegal conduct simply by crying 'religion.'" Docket No. 227, p. 1 (quoting *United States v. Meyers*, 906 F. Supp. 1494, 1498 (D. Wyo. 1995)). This is surprising, given the Attorney General's strong guidance to all employees of the Justice Department that "Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity."[3]

c. Are The Defendants Sincerely Held Religious Beliefs *Substantially Burdened* By The Instant Prosecution?

Next, the party seeking a RFRA-based exemption must show that the *exercise* of a

[3] Attorney General Jeff Sessions, *Memorandum For All Executive Departments And Agencies*, "Federal Law Protections for Religious Liberty," October 6, 2017, available at: https://www.justice.gov/opa/press-release/file/1001891/download.

sincerely held religious belief was *substantially burdened* by government action. As the Eleventh Circuit has held, both aspects of this element are questions of law for the court to decide: "We agree with our seven sister circuits that the question of substantial burden also presents 'a question of law for courts to decide.'" *Eternal World Television, Inc. v. Secretary of the U.S. Dep't of Health and Human Servs.*, 818 F.3d 1122, 1144 (11th Cir. 2016) (citing *Priests for Life* I, 772 F.3d 229, 247 (D.C. Cir. 2014)); *see also Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (stating that judicial inquiry into the substantiality of the burden "prevent[s] RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant"); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *Priests For Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014), *vacated on other grounds and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (noting that eight circuits have held that "the question of substantial burden also presents "a question of law for courts to decide.").

The reason for rendering the substantial burden element a question for judicial determination lies in the concern that to do otherwise would render RFRA claims a mere matter of self-certification. Yet Congress clearly intended RFRA-based exemptions to be authorized through judicial review, not by individual fiat. *See Eternal World Television*, 818 F.3d at 1145 ("The plain language of RFRA simply does not support reducing the role of federal courts to 'rubber stamps' that automatically recognize a substantial burden

whenever a religious adherent asserts there is one … If Congress had intended strict scrutiny to be triggered in all circumstances by a religious adherent's claim that there is a burden, it would have said so."). As Professor Frederick Mark Gedicks has argued persuasively, "[t]he rule of law demands that the determination whether religious costs are substantial should be made by impartial courts." Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 150–51 (2017).

The question of whether, as a matter of law, the RFRA claimant has shown a substantial burden on their religious beliefs, "involves both subjective and objective dimensions. *Hobby Lobby* made clear that there is a subjective aspect to this inquiry: courts must accept a religious adherent's assertion that his religious beliefs require him to take or abstain from taking a specified action … The objective inquiry requires courts to consider whether the government actually 'puts' the religious adherent to the 'choice' of incurring a 'serious' penalty or 'engag[ing] in conduct that seriously violates [his] religious beliefs.'" *Eternal World Television*, 818 F.3d at 1144 (citations omitted).

The Eleventh Circuit has interpreted this to mean that "the government imposes a substantial burden when it places 'pressure that tends to force adherents to forego religious precepts.'" *Eternal World Television*, 818 F.3d at 1144 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.2004)). The government argues in its brief in opposition to the instant RFRA-based motion to dismiss that none of the laws being enforced against the defendants "compel [their] participation in activity prohibited by their religion; the laws do not force or compel them to take any

action, much less participate in nuclear promotion antithetical to their beliefs … The challenged laws do not force Defendants 'to engage in conduct that violates one's religious beliefs.'" Docket No. 227, p. 5 (quoting *Simmons v. Williams*, No. 6:14-CV-111, 2017 WL 3427988, at *14 (S.D. Ga. Aug. 9, 2017)). Yet this framing misstates how the term "substantial burden" has been interpreted by the Supreme Court and the Eleventh Circuit. Indeed, the Department of Justice's own guidance underscores that "[e]xcept in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law." Attorney General Jeff Sessions, *Memorandum For All Executive Departments And Agencies*, "Federal Law Protections for Religious Liberty," October 6, 2017, p. 1, available at: https://www.justice.gov/opa/press-release/file/1001891/download (hereinafter "Federal Law Protections for Religious Liberty").

Taken to its logical conclusion, the government's argument would limit RFRA's protections to religious claimants only to prayer - after all, prayer always remains as a means to exercise religious belief. But as other courts have noted, specific devotional practices such as distributing food to the hungry, water to the thirsty, or public profession of one's faith-based values – even if they conflict with prohibitions contained in generally applicable laws – can be "as much a form of religious worship as is prayer, preaching, or reading the Bible." *Chosen 300 Ministries, Inc. v. City of Philadelphia*, CIV.A. 12-3159, 2012 WL 3235317, at *19 (E.D. Pa. Aug. 9, 2012). See also, *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 546 (D.D.C. 1994) ("the city must refrain, absent extraordinary circumstances, from in any way

regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion. A city cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays.").

Yet the government's reading too narrowly construes the notion of burden as tantamount to a government compulsion to act in ways that violate one's religious beliefs. RFRA's notion of burden also anticipates contexts where faith-based action is criminalized by a law of general application. That was the case in *O Centro* and the defendants argue that it is the case here as well.

Thus, the defendants' claims of substantial burden must be analyzed by the court in accordance with this standard: does compliance with the law in this case force the defendants to forego practices motivated by the sincerely held religious precept that nuclear weapons are immoral?

The government argues further that defendants must show that they are completely prevented from engaging in their religiously mandated activity. Docket No. 227, p. 2. Yet nowhere in RFRA's text or in its legislative history can one find support for the proposition that a RFRA claimant must be *completely* prevented from engaging in religiously mandated activity. The burden must be substantial, not complete. And the government's actions must burden "religious exercise" not "religiously mandated activity." The Supreme Court held in *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015)

(interpreting the Religious Land Use and Institutionalized Persons Act (RLUIPA),[4] that federal statutory protection for religious liberty "applies to an exercise of religion regardless of whether it is 'compelled.'" Thus the government's position reflects a significant narrowing of the reach of rights protected under RFRA.

The government marshals one additional argument in favor of its position that the defendants' religious beliefs are not substantially burdened by the instant prosecution: "they had ample alternatives to engage in such activity without violating federal criminal laws … If a defendant 'had acceptable religious alternatives—instead of resorting to violating the criminal laws' then the government's application does not substantially burden defendants' free exercise. Docket No. 227 p. 7 (citations omitted). For several reasons, this construction of the notion of "substantial burden" amounts to a significant narrowing of the protections for religious liberty embodied in federal law, and is not at all supported by the Supreme Court's reading of RFRA.

The government's position is that a RFRA claimant's religious beliefs are not substantially burdened if the government can conjure "acceptable religious alternatives" to violating the law. This reading of the reach of federal statutory protections for religious liberty was presented to the Supreme Court by the government in *Holt v. Hobbs*, and the Supreme Court rejected it: the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise …, not whether the [religious

[4] The Eleventh Circuit applies "the same substantial burden analysis under both RLUIPA and RFRA." *Eternal Word Television*, 818 F.3d at 1166.

liberty] claimant is able to engage in other forms of religious exercise." *Holt v. Hobbs*, 135 S.Ct. at 862.

Ignoring this clear precedent, the government reasserts a reading of RFRA, one already rejected by the Supreme Court, that effectively substitutes the government's assessment of what practices defendant's religion requires for that asserted by the faith-based actors themselves. Nothing in the legislative history of RFRA justifies this reading of the statute, and indeed it amounts to putting the state in the position of assessing the reasonableness of the RFRA claimant's beliefs, something the Supreme Court has repeatedly declared that "the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Hobby Lobby*, 134 S.Ct. at 2778.

Indeed, the government's position in this case conflicts with the Attorney General's guidance to Justice Department lawyers on how to litigate RFRA cases: "Religious adherents will often be required to draw lines in the application of their religious beliefs, and government is not competent to assess the reasonableness of such lines drawn, nor would it be appropriate for government to do so." "Federal Law Protections for Religious Liberty," October 6, 2017, p. 4.

Another way to understand the government's parsimonious reading of RFRA is that it urges the court to read into RFRA a requirement that the party seeking an exemption show that their faith-based conduct is narrowly tailored to further their faith-based beliefs, thus minimizing the likelihood that their religious practices will violate the law. Nothing in the language of RFRA, its legislative history, or the Supreme Court's interpretation thereof supports the novel approach to proving a substantial burden on

religious exercise urged by the government in their brief.

Accordingly, the framing of the notion of "substantial burden on religious exercise" advanced by the government in this case incorrectly elevates compliance with the law as the baseline against which the RFRA claimant's faith-based exemption is to be assessed. Yet this has never been the starting point or baseline of the inquiry into whether the RFRA claimant has articulated a substantial burden on their religious liberty. Rather, RFRA requires that the Court consider whether sincerely held religious beliefs have been substantially burdened by the state's action, and if so an exemption from the law is required *unless* the government can show that enforcement of the law in this particular case is justified by a compelling governmental interest that is accomplished through narrowly tailored means.

The Government's Burden in Opposing the RFRA Motion

If the claimants carry their burden of demonstrating by a preponderance of the evidence that the prosecution herein imposes a substantial burden on their ability to exercise their sincerely-held religious beliefs, they are entitled to a RFRA exemption unless the government can show that the burden is the least restrictive means of advancing a compelling government interest. A compelling interest must be clearly articulated and specific; "broadly formulated interests justifying the general applicability of government mandates" are not considered compelling. *O Centro*, 546 U.S. at 430-31. "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate

that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened. " *Id.* at 420.

a. Does The Prosecution In The Instant Case *Further A Compelling State Interest*?

The government has asserted broad interests in protecting the security of military installations that justify the criminal prosecution of the defendants herein, without offering any evidence of why that compelling interest is furthered specifically through the actions taken against these defendants. As the Department of Justice has argued in other cases where it has supported the assertion of a RFRA exemption, "mere generalized concerns . . . are insufficient to prove a compelling governmental interest . . . the government the 'must show a compelling interest . . . in the particular case at hand, not a compelling interest in general.'" Jefferson B. Sessions III, "Statement of Interest of the United States of America," *Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods, Kansas,* Case No. 2:17-cv-02186-DDC (D. Kansas, April 24, 2018), available at: https://www.justice.gov/crt/case-document/statement-interest-roman-catholic-archdiocese-kansas-city-kansas-v-city-mission (citing *O Centro,* 546 U.S. at 432); *see also Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 788 (D. Md. 2008) ("A 'compelling interest' is not a general interest but must be particular to a specific case."), *aff'd*, 368 F. App'x 370 (4th Cir. 2010) (per curiam)."

In this case, the government has not made this showing, rather it merely recites broad aims for the legislation, "§ 1382's general purpose, as reflected in its statutory

history, was to "protect the property of the Government so far as it relates to the national defense." Docket No. 227, p. 13. Of course it may be that the government could produce a particularized showing of a compelling interest at stake in the prosecution of these defendants, but it has not yet done so in its arguments proffered to the Court to this point.

Established case law also instructs that the government may not rely on slippery slope arguments in its effort to make out a compelling interest in enforcing the law against a RFRA claimant. *O Centro*, 546 U.S. at 435-37. However, the government's brief relies on exactly such an argument: "there is a substantial risk that, left unaddressed, it will encourage these Defendants and others to engage in similar conduct at other military installations." Docket No. 227, p. 14.

b. The Burden Imposed On Defendants' Religious Beliefs Is The Least Restrictive Means Of Advancing A Compelling Government Interest.

To demonstrate that the application of the challenged law or policy is narrowly tailored, the government must show that it could not achieve its compelling interest to the same degree while exempting the [party asserting the RFRA claim] from complying in full with the [law]" *U.S. v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016). *See also O Centro*, 546 U.S. at 431. This "focused inquiry" requires the government to justify why providing an exemption would be unworkable. *Id.* at 431-32.

The government's brief with respect to this element merely restates the position that enforcing the law in all cases is of great importance. Its task however is to prove that there are no alternative means of accomplishing the state's compelling interests that would be less burdensome on the defendants religious beliefs. In response to the less

burdensome alternatives proposed by the defendants, the government argues that "Defendants confuse 'least restrictive' with 'most lenient.'" Docket No. 227, p.15 (citing *United States v. Christie*, 825 F.3d 1048, 1062 (9th Cir. 2016)). Yet this position misses the critical inquiry essential to the question of whether the government's actions in this prosecution are "narrowly tailored" to the accomplishment of its compelling interests: is robust, if not aggressive, criminal prosecution of the defendants necessary to achieving the government's interests in this case? Might some other sanction accomplish those aims just as well, while imposing less of a burden on the defendants' exercise of religion? "The government must show 'that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the [plaintiffs].'" *Eternal World Television*, 818 F.3d at 1158 (citation omitted). This is the question the court must resolve in determining whether the government has met its burden of showing that its actions are narrowly tailored to accomplishing a compelling state interest in this case.

Both the compelling interest and least restrictive means analyses are questions of law that can be properly addressed on a motion to dismiss. *See United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008) ("We now conclude, as other circuits have, that both prongs of RFRA's strict scrutiny test are legal questions."); *United States v. Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016) ("We review the district court's compelling-interest and least-restrictive-means conclusions de novo.").

RESPECTFULLY SUBMITTED November 6, 2018.

Katherine Franke (*pro hac vice pending)*

By */s/*_____

Attorneys for Amicus Curiae Professors Katherine Franke, Micah Schwartzman, and Nelson Tebbe

CERTIFICATE OF SERVICE

I certify that on November 6, 2018, I, Elizabeth F. Pavlis electronically transmitted a PDF version of this document to the Clerk of Court using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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