IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Monifa J. STERLING, Lance Corporal (E-3) U.S. Marine Corps, Appellant.	BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, MEMBERS OF CONGRESS, AND THE COMMITTEE TO PROTECT RELIGIOUS LIBERTY IN THE MILITARY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT Crim. App. Dkt. No. 201400150 USCA Dkt. No. 15-0510/MC

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

Amici, The American Center for Law and Justice, and Members of Congress, Senator James Lankford, Representatives John Fleming, Robert Aderholt, Brian Babin, Diane Black, Marsha Blackburn, Charles W. Boustany, Jr., Jim Bridenstine, Bradley Byrne, Doug Collins, Kevin Cramer, Jeff Duncan, Bill Flores, Randy Forbes, Jeff Fortenberry, Trent Franks, Louie Gohmert, Bob Goodlatte, Gregg Harper, Vicky Hartzler, Jeb Hensarling, Jody Hice, Tim Huelskamp, Bill Johnson, Sam Johnson, Walter Jones, Jim Jordan, Mike Kelly, Trent Kelly, Steve King, Doug Lamborn, Mia Love, Tom McClintock, Jeff Miller, Dan Newhouse, Steven Palazzo, Robert Pittenger, Keith Rothfus, Steve Russell, Steve Scalise, Chris Smith, Tim Walberg, and Joe Wilson, and the

Committee to Protect Religious Liberty in the Military[1] pursuant to Rules 26(a)(3) of this Court, respectfully submit this brief as *amici curiae* in support of granting Appellant Monifa J. Sterling's Petition for Grant of Review.

ARGUMENT

I. THE NMCCA ERRED AS A MATTER OF LAW IN HOLDING RFRA INAPPLICABLE TO STERLING'S RELIGIOUS LIBERTY CLAIM.

Despite giving lip service to the broad protective scope of RFRA, the NMCCA adopted an unduly cramped definition of "religious exercise" and ruled RFRA inapplicable to this case. Slip. Op. at 11. The NMCCA's reasoning conflicts with the terms of the statute and decisions of the Supreme Court of the United States.

Congress enacted RFRA, 42 U.S.C. §2000bb et seq., and its sister statute, RLUIPA, 42 U.S.C. §2000cc-1 "in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).[2] RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if

[1] The Committee to Protect Religious Liberty in the Military is comprised of over 142,000 American citizens.

[2] RFRA was enacted in response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) which departed from an earlier line of cases protecting religiously motivated conduct. The *Smith* Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause. RFRA's purpose was to restore the protection for religiously motivated conduct afforded under the pre-*Smith* line of cases.

the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§2000bb-1(a), (b). RFRA further specifies that "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* §2000bb-2(1).

Congress's intent that RFRA apply to the military is indisputable. Recognizing that military regulations and policies are traditionally accorded heightened deference, Congress nevertheless warned that "seemingly reasonable regulations based upon speculation, exaggerated fears of [sic] thoughtless policies cannot stand." H.R. Rep. No. 103-88, at 8 (1993). Military officials must accordingly show that any policy or regulation that burdens a service member's religious freedom is the least restrictive means of protecting a compelling governmental interest. *Id.*[3]

[3] The Department of Defense expressly incorporated RFRA into its own regulations effective January 22, 2014. It amended DoD Instruction 1300.17, which addresses "Accommodation of Religious Practices Within the Military Services," as follows:

> In accordance with section 2000bb-1 of Title 42, United States Code . . . requests for religious accommodation from a military policy, practice, or

A federal district court recently affirmed RFRA's applicability to the U.S. military in *Singh v. McHugh*, 2015 U.S. Dist. LEXIS 76526 (June 12, 2015). The court held that the Army violated RFRA when it denied enrollment in the Reserve Officers' Training Corps to an observant Sikh whose religion required him to wear a turban, uncut hair, and a beard. The Army had urged the court to abstain from upholding the plaintiff's religious liberty rights out of deference to military leaders.

> Defendants urge the court to stay its hand "on the grounds that the military will do a better job responding to social change on its own." They point to the fact that military commanders have been central to important policy changes that the services have implemented in recent years, including the repeal of the ban on openly gay service members, and voluntary changes to the policies on direct ground combat assignments for women. "These examples," they maintain, "counsel against bold judicial intervention, and most importantly demonstrate that successful change requires military commanders to be central to the decision-making process."

> duty that substantially burdens a Service member's exercise of religion may be denied only when the military policy, practice, or duty:
> (a) Furthers a compelling governmental interest;
> (b) Is the least restrictive means of furthering that compelling governmental interest.

DoDI 1300.17.DoDI 1300.17 further provides that "[r]equests for religious accommodation from a military policy, practice, or duty that does not substantially burden a Service member's exercise of religion" are evaluated by balancing the needs of the requesting Service member . . . against the needs of mission accomplishment. DoDI 1300.17 at A004. Requests for accommodation that fall under this balancing test may be denied "[o]nly if it is determined that the needs of mission accomplishment outweigh the needs of the Service member."

*Id. at *50-51 (citations omitted).*

The court rejected the Army's argument, stating, "even if it involves an important matter of public policy and evolving social norms, Congress has already placed a thumb on the scale in favor of protecting religious exercise, and it has assigned the Court a significant role to play." *Id.* at *51.

Congress's intent that RFRA provide capacious protection for religious liberty is demonstrated by its expansion of RFRA's definition of "religious exercise." When enacting RLUIPA, Congress amended the RFRA definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc-5(7)(A). As the Supreme Court recently explained:

> Before RLUIPA, RFRA's definition made reference to the First Amendment. See §2000bb-2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc-5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." §2000cc-3(g).

Burwell, 134 S. Ct. at 2761-62. Rejecting the dissent's argument that "religious exercise" was more broadly defined in RLUIPA than in RFRA, the *Burwell* Court concluded that a proper reading

of the statutes required "exercise of religion" to be broadly interpreted under both RFRA and RLUIPA. *Id.* at 2762 n.5.

A. The NMCCA's Definition of "Religious Exercise" Is Incompatible With *Burwell*, as well as the Supreme Court's Pre-*Smith* Free Exercise Jurisprudence.

In defining protected "religious exercise" as only those practices that are "part of a system of religious belief," Slip. Op at 11, the NMCCA ignored the *Burwell* Court's instruction that the definition should be interpreted more broadly than it was under previous Free Exercise Clause jurisprudence, 134 S. Ct. at 2761. Even if the Court's pre-*Smith* Free Exercise decisions provided the appropriate standard, however, those cases leave no doubt that Sterling's conduct qualifies as religious exercise.

As long as the conduct in question was religiously motivated, government actions that burdened the conduct would be subject to strict scrutiny. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963); *Thomas v. Review Board*, 450 U.S. 707, 715 (1981). Both *Sherbert* and *Thomas* focused on the religiously motivated conduct and upon the government coercion to give up that conduct. 374 U.S. at 404; 450 U.S. at 709.

The decision in *Thomas* (an unemployment benefits case) is particularly apt here. There, a Jehovah's Witness resigned his job in a steel foundry when the only available work involved producing tank turrets. Thomas's religious beliefs prohibited

him not only from personally fighting in a war, but also from producing tanks that might later be used in war. *Id.* The Court focused on the presence of government coercion to give up the conduct in question. The Court did not undertake to determine whether opposition to tank manufacturing was "part" of the Jehovah's Witness faith. Rather, warning against judicial second-guessing of Thomas' theological beliefs, the Court held that the reviewing court's "narrow function" is to look for government coercion that "put[s] substantial pressure on an adherent to modify" a sincere religious exercise, regardless of the precise religious lines drawn by the believer. *Id.* at 716-18; *see also id.* at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one").

The NMCCA's definition sets up military tribunals as theological experts parsing through "religious belief systems" to ascertain whether a given practice can be deemed a "part" of such religious system. Article II courts, no less than Article III courts, lack competence to engage in such an inquiry. The Supreme Court has repeatedly admonished the judiciary not "to dissect religious beliefs." *Thomas,* 450 U.S. at 715. Whether a religious practice is protected must not "turn upon a judicial perception of the particular belief or practice in question." *Id.* at 714. *See also City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) ("It is not within the judicial ken to 'question the

centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'"); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (same).

Even if courts were competent to assess the validity of a person's beliefs, the NMCCA simply assumed, with no inquiry at all, that Sterling's posting of Scripture verses in her work space was an outlier practice, disconnected from any religious belief system. Slip op. at 11.

In fact, the Judeo-Christian tradition includes many exhortations to meditate upon Holy Writ. *See, e.g.,* Joshua 1:8 ("Let this book of the law be ever on your lips and in your thoughts day and night, so that you may keep with care everything in it; then a blessing will be on all your way, and you will do well") (Basic English Bible); Psalm 1:2 ("But his delight is in the law of the LORD, And in His law he meditates day and night." (New American Standard Version 1995); Psalms 119:15-16 ("I will meditate on your precepts and regard your ways. I shall delight in your statutes; I shall not forget Your word." (New International Version).

Posting scripture verses where they can be easily viewed facilitates meditation for the believer. The NMCCA's uninformed conclusion that the practice of posting scripture verses to facilitate meditation is not "part" of a religious belief system

demonstrates why courts should not assess the validity of religious practices.

RFRA's definition of religious exercise encompasses all religiously motivated conduct. Sterling's decision to post Scripture verses in three places to reflect the Trinitarian nature of the Christian deity and to remind her of a Scriptural promise is quintessentially religiously motivated conduct.

B. *Wisconsin v. Yoder* Does Not Support the NMCCA's Constrictive Definition of Religious Exercise.

The NMCCA based its narrow definition of "religious exercise" on a misapplication of the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Slip op. at 11. *Yoder* does not support the NMCCA's conclusion that religious exercise includes only practices that are verifiably "part" of a religious belief system. In *Yoder*, the Court was concerned only with whether the Amish opposition to state compulsory school attendance law was religiously motivated.

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

406 U.S. at 215-16. The Court concluded that "the record in this case abundantly supports the claim that the traditional way of

life of the Amish is not merely a matter of personal preference, but *one of deep religious conviction*." *Id.* at 216 (emphasis added). The Court added further that the entire Amish population shared this deep religious conviction, and the conviction was "intimately related to daily living." *Id.*

The Court's description of the Amish beliefs cannot, however, be converted into a mandate that only beliefs verifiably part of a religious belief system qualify for protection. The NMCCA's attempt to construe it that way is flatly refuted by *Thomas*, 450 U.S. at 716-18, and *Burwell*, 134 S. Ct. at 2762. *Thomas* forbids the courts from "dissect[ing a litigant's] religious beliefs" for the purpose of assessing their "validity" as "part of religious belief system." *Thomas*, 450 U.S. at 715; *Flores*, 521 U.S. at 513. *Burwell* highlights Congress's intent that §2000cc-5(7)(A) must be construed broadly, without reference to pre-*Smith* free Exercise jurisprudence. 134 S. Ct. at 2762. In short, *Yoder* is irrelevant to the proper interpretation of §2000cc-5(7)(A).

Section 2000cc-5(7)(A) clearly protects all religiously-motivated conduct and, therefore, encompasses Sterling's conduct in this case. The NMCCA erred in refusing to apply RFRA.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully Submitted,

/s/ Jay Alan Sekulow

JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

ROBERT W. ASH
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Attorneys for Amici Curiae

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to counsel for Appellee, Brian K. Keller and Colonel Mark Jamison, and to counsel for Appellant, Paul D. Clement, George W. Hicks, Hiram S. Sasser, Michael D. Berry, and Tierny M. Carlos on July 10, 2015.

/s/ Laura Hernandez

LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 26(d) because it does not exceed half of the page limit permitted for appellants (25 pages).

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

/s/ Laura Hernandez

LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]