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 STATES OF OKLAHOMA, NEVADA, ARIZONA, ARKANSAS, GEORGIA, NEBRASKA, SOUTH CAROLINA, TEXAS, UTAH AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY 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

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ARGUMENT

The States of Oklahoma, Nevada, Arizona, Arkansas, Georgia, Nebraska, South Carolina, Texas, Utah, and West Virginia (collectively, "the *amici* States"), by and through their Attorneys General and pursuant to Rules 26(a)(3) of this Court, submit this brief as *amici curiae* in support of neither party urging this Court to correct the U.S. Navy-Marine Corps Court of Criminal Appeals' misinterpretation and misapplication of the Religious Freedom Restoration Act ("RFRA").

It appears all parties agree that the court below erred by refusing to afford Appellant the protections of RFRA because it incorrectly believed that Appellant's religiously-motivated practices do not amount to "religious exercise." This narrow reading of RFRA contravenes the People's intent to provide firm protections for a broad scope of faith-based activities, threatening the statutorily-guaranteed religious liberties of all Marines, including those who are citizens of the *amici* States. Although the *amici* States take no position on whether the Government's actions meet the strict scrutiny of RFRA in this case, the States urge this Court to hold that Appellant's actions constitute "religious exercise" for the purposes of RFRA and the Government's actions in response must therefore be evaluated under RFRA's demanding standards.

I. RFRA Is Intended To Apply To All Religiously-Motivated Conduct.

A. The Federal and State RFRAs provide broader protections than the First Amendment.

The U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), touched off a national conversation about the scope of protections afforded to the religiously-motivated actions of people of faith. In *Smith*, the Court held that the First Amendment does not protect religious practices from being interfered with by a neutral, generally applicable law even when the law lacks a compelling governmental interest. *Id.*

After a nationwide bi-partisan consensus formed agreeing that this rule provided far too little safeguards for religious liberties, Congress passed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, with no dissenting votes in the House and only three votes against in the Senate.[1] RFRA explicitly disavowed *Smith* and sought to provide greater protections for religious freedom than those guaranteed by the Free Exercise Clause by prohibiting the government from "substantially burden[ing] a person's exercise of religion" unless it can demonstrate that the burden is in "furtherance of a compelling governmental interest" and "is the least

[1] H.R.1308 Action Overview, https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions.

restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-2000bb-1.

Although the Supreme Court held that RFRA was unconstitutional as applied to the States, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), the national consensus in favor of broad religious liberty protections had not faded. Thus, in response to *City of Boerne*, many states enacted their own RFRAs to provide greater protection for religious freedom than the First Amendment. Since *Smith*, 21 states have passed a state-level RFRA equivalent and 11 other states provide robust religious liberty protections through court decisions.[2]

Because state and federal RFRAs "were all enacted in response to *Smith* and were animated in their common history, language and purpose by the same spirit of religious freedom," courts consider the decisions of one in interpreting the other. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258-59 (5th Cir. 2010) (quoting *Barr v. City of Sinton*, 295 S.W.3d 287, 299 (Tex. 2009)). Thus, in determining what constitutes "religious exercise" protected by RFRA, it is useful to consider not only the text and case law interpreting RFRA,

[2] *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (Oct. 15, 2015); Eugene Volokh, *What is the Religious Freedom Restoration Act?*, http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/ (Dec. 2, 2013).

but also state RFRA laws that were enacted contemporaneously with the federal RFRA.

With this background in mind, it is beyond argument that RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-2761 & n.3 (2014). Accordingly, the court below was wrong to premise its RFRA analysis on the idea that RFRA merely "codified" the Free Exercise Clause and to rely exclusively on pre-RFRA First Amendment cases, which only provide guidance on the floor of protections granted by RFRA, but do not set RFRA's limits. J.A.005; *see also see also Holt*, 135 S. Ct. at 862 (warning against "improperly import[ing] a strand of reasoning from cases involving [] First Amendment rights" into RFRA cases). This Court should correct that misinterpretation of the purpose and effect of RFRA.

B. Religious exercise is protected by RFRA even if not a part of a formal or recognized "system of religion."

Even under the narrower protections of the First Amendment, courts have consistently held that the protections of the "exercise of religion" extend to all religious beliefs and practices, even those that are subjective, personal, or peculiar. The "guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981). A person of faith "may not be put to the proof of their religious doctrines or beliefs" by a court; rather the court's "task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, ***in his own scheme of things***, religious." *United States v. Seeger*, 380 U.S. 163, 184 (1965) (emphasis added).[3]

In contrast to this broad purview, the court below appears to have taken the view that "religious exercise" for the purpose of RFRA includes only those practices that a court can objectively locate in a systematic set of rituals or beliefs, rejecting as irrelevant the adherent's subjective and personal reasons for the practice. J.A.005. But not only does this view impermissibly narrow the scope of RFRA detailed above, the inquiry it requires forces courts into the forbidden territory wherein they must impermissibly "question . . . the validity of

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[3] *See also Doswell v. Smith*, 139 F.3d 888, *3 (4th Cir. 1998) (religious exercise may be protected even if belief is a "new or exotic one outside the mainstream of traditional, clearly established, religious beliefs held and practiced in the society"); *Africa v. Com. of Pa.*, 662 F.2d 1025, 1031-32 (3d. Cir. 1981) (courts "must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs"); *Blount v. Johnson*, 2007 WL 1577521, *5 (W.D. Va. May 30, 2007) ("The fact that an individual's understanding of the origins or reasons for a particular religious practice may be mistaken, incomplete, or at odds with the understanding of other followers and even experts of his stated religion is beside the point when determining whether his personal belief is religious and sincere.") (citation omitted).

particular litigants' interpretations of [their] creeds" or "say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). "It is not the court's place to question where a plaintiff 'draws lines' in his religious practice." *A.A. ex rel. Betenbaugh v. Needville Ind. Sch. Dist.*, 701 F. Supp. 2d 863, 876 (S.D. Tex. 2009).

The court below nonetheless questioned Appellant's interpretation of her own faith because it incorrectly believed that the definition of "religious exercise" in RFRA "requires the practice be 'part of a system of religious belief.'" J.A.005. But quoting that definition in full reveals just the opposite: "religious exercise" is defined to include "***any*** exercise of religion, ***whether or not*** compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7) (emphasis added). Thus, the federal RFRA, in alignment with the First Amendment case law, protects even those religious practices that don't have formal blessing in organized religion. State RFRAs similarly define religious exercise without regard to whether or not the practice is compulsory or central to a larger system of religious belief. *See* statutes cited *infra* n.5; *Barr*, 295 S.W.3d at 300.[4]

[4] The court below also relied upon *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), but that case merely set forth the

In short, absent evidence that a person's beliefs are "purely secular," motivated by "strictly political or philosophical concerns," or are "obviously shams and absurdities ... devoid of religious sincerity," the Court should accept the person's assertions regarding her religious beliefs and practices. *Betenbaugh*, 701 F. Supp. 2d at 876 (citing *Yoder*, 406 U.S. at 215). Thus, this Court should correct the holding of the court below by clarifying that the protections of RFRA extend to those practices that result from an adherent's subjective or personal beliefs, even if those practices cannot be found in any systematic or formalized religious structure.

C. Any act engaged in for religious reasons or with religious motivations is an exercise of religion.

"Exercise of religion" includes any practice that is at least in part motivated by religion or engaged in for religious reasons. Even under the First Amendment, a practice is protected as religious exercise so long as it is "rooted in religion" and not "purely secular." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989). Under the federal RFRA, "the 'exercise of

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requirement that claimed religious exercise must not be "purely secular." An allegation that a professed belief is not really religious raises a complex and difficult question of fact. *See, e.g.*, *Africa*, 662 F.2d at 1031-36. But the court below was not a factfinder nor did it perform the requisite careful weighing, instead dismissing the claim because it could not locate Appellant's actions within a recognized "system of religious belief." J.A.005. In contrast, the trial court accepted the claimed religious nature of Appellant's actions, as it should absent strong evidence to the contrary. J.A.006, 114.

religion' involves . . . physical acts that are engaged in for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2770.

State RFRAs and their case law provide similarly broad definitions for the exercise of religion. For example, the Oklahoma Religious Freedom Act subjects to strict scrutiny all government actions that "inhibit or curtail religiously motivated practice." Okla. Stat. tit. 51, § 252(7); *see also* Tenn. Code § 4-1-407(7). Similarly, Arizona's Free Exercise of Religion Act is triggered when any "action or refusal to act is motivated by a religious belief." *State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009).[5]

In sum, any act or practice is within the purview of RFRA's protections as an "exercise of religion" if it is at least in part motivated by religious belief or engaged in for religious reasons, so long as those purported religious motivations or reasons are not a complete sham or attempt at deception.

II. Appellant's Conduct Constitutes "Religious Exercise" For The Purposes Of RFRA.

With these principles in mind, it is clear that Appellant's actions are covered by RFRA. LCpl Sterling's placement of the

[5] Most State RFRAs similarly define "exercise of religion" by reference to motivation. *See* Fla. Stat. § 761.01 ("'Exercise of religion' means an act ... that is substantially motivated by a religious belief, whether or not ... compulsory or central to a larger system of religious belief."); Ill. Rev. Stat. Ch. 775, §35/5 (same); *see also* Idaho Code § 73-401; Kan. Stat. §60-5301; La. Rev. Stat. §13:5234; Mo. Rev. Stat. §1.302; N.M. Stat. § 28-22-2; Tex. Civ. Prac. & Remedies Code § 110.001.

Biblical quotes around her desk was religiously motivated and done for religious reasons, even if just in part. The quotes are "biblical in nature." J.A.006. They are significant to LCpl Sterling because, through her faith, she believes in the absolute truth of the Bible, and that religious text gave her assurance that "no weapon formed against [her] shall prosper." Isaiah 54:17; J.A. 040, 042-45. Her attempt to draw comfort from the words of an 8th-century Canaanite makes little sense outside of its religious reason and motivation.

Thus, even if Appellant's "personal reminders" of the religious truth that she holds dear is not part of a readily locatable practice among her professed system of religion, J.A.005, that practice is still an exercise of religion protected by RFRA because, as detailed above, RFRA protects even those religious actions not formally embraced by any particular organized denomination. Moreover, there is no evidence that Christians do *not* typically have the words of the Bible posted around spaces that they frequent (likely a common practice) and the Bible itself encourages people to write God's words "on the doorposts of your house and on your gates." Deuteronomy 6:9.

Although the court below speculated that her SSgt was unaware of the signs' religious nature or that religion has been invoked only as a post-hac justification, J.A.005, their forcible removal was purportedly justified precisely because

everyone recognizes them to be religious and thereby "divisive," J.A.006, *see also* J.A.045, 068-69, 114. Moreover, the Supreme Court has recently held that, unless imposed by the text of the statute, knowledge that a practice is religious is not a requirement for a claim of religious discrimination, nor is the person of faith required to inform her superior that a given practice is religious. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032-34 (2015). RFRA, like Title VII, contains no knowledge requirement, and thus is triggered by Appellant's religious exercise even if her superior did not know or was not informed it was religious.

CONCLUSION

It appears that all parties agree that the court below got it wrong when it held that Appellant's actions are not an "exercise of religion." In its answer to the petition for certiorari, for example, the government does not defend the conclusion of the court below regarding whether Appellant's actions are religious exercise. Although the *amici* States take no position on the ultimate resolution of all the issues in this case, they respectfully urge this Court to correct the misapplication of RFRA performed by the court below and hold, for the reasons stated above, that Appellant's conduct constitutes "religious exercise" for the purposes of RFRA.

Date: December 28, 2015

Respectfully submitted,

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to counsel for Appellee, Brian K. Keller and Colonel Mark Jamison, and to counsel for Appellant, Paul D. Clement, George W. Hicks, Hiram S. Sasser, and Michael D. Berry on December 28, 2015.

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Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 26(d) because it does not exceed half of the page limit permitted for appellants (30 pages).

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