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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. 1. Natalie Renee Hoffman (Counts 1-3) 2. Oona Meagan Holcomb, (Counts 2-3) 3. Madeline Abbe Huse, (Counts 2-3) 4. Zaachila I. Orozco-McCormick (Counts 2-3) Defendants.	No. 17-00339MJ-TUC-BGM **[PROPOSED] BRIEF OF AND BY PROFESSORS OF RELIGIOUS LIBERTY AS *AMICI 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 and/or immigration law, 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 herein 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)). 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, 722-23 (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.[1] To receive an exemption under RFRA, a claimant need not demonstrate that the challenged law or policy singles out any particular group

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

for special harm—such a law would be 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 or she 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 enforcement of the law 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; and (iii) that his or her exercise of religious belief was substantially burdened by a federal law or policy. Once the person 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).

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. Many courts in the Ninth Circuit have recognized the jurisdiction of federal courts to entertain RFRA-based motions to dismiss in criminal cases, including their adjudication before trial after an evidentiary hearing. *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016) ("if the government strikes first—for example, by indicting a person for engaging in activities that form a part of his religious exercise but are prohibited by law—the person may raise RFRA as a shield in the hopes of beating back the government's charge."); *see also United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996); *Guam v. Guerrero,* 290 F.3d 1210, 1222 (9th Cir. 2002); *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1129 (D. Ariz. 2006); *United States v. Lepp*, 2008 WL 3843283 (N.D. Cal. 2008); *United States v. Christie*, 2013 WL 2181105 *3 (D. Haw. 2013). The Attorney General specifically condoned the use of RFRA as a defense in federal criminal prosecutions in a new section of the *United States Attorneys' Manual (USAM) Respect for Religious Liberty, available at* https://www.justice.gov/jm/1-15000-respect-religious-liberty-0 ("RFRA applies to all actions by federal administrative agencies, including … enforcement actions.").

I. 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 show with "the evidence of persuasion," 42 U.S.C. § 2000bb-2(3),

that they hold 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 themself understood the beliefs to be religious. 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 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). Religious beliefs "often prescribe a particular manner of acting, or way of life, that is 'moral' or 'ethical' … [and] may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest." *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996). Religiously motivated witness, such as that undertaken by the Defendants herein, can be the kind of faith-based duty that RFRA was designed to protect.

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. *See* Doc. 105 at 8–9. 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.*, 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 contraception and the Affordable Care Act held by some persons for secular reasons. 573 U.S. ___, 134 S.Ct. 2751. 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 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 beliefs about the rights of migrants. 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: were they considered by the claimant to be religious in nature? The central factual question is "whether they are, *in his own scheme of things*, religious." *United States v. Seeger,* 380

U.S. 163, 185 (1965) (emphasis added), with the aim of "differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Isbell v. Ryan*, 2011 WL 6050337 (D. Ariz. December 6, 2011) (citing *Patrick v. LeFevre*, 745 F.2d 153, 157).

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) (stating that 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.'"); *see generally* Kara Loewentheil and Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, in RELIGIOUS EXEMPTIONS 247 (Kevin Vallier & Michael Weber eds., 2018).

Rather than merely reducing this element to a matter of pleading and accepting the RFRA claimants' assertion of sincerity, the court must undertake a meaningful assessment of the factual basis for the claim to sincerity, including examination of the claimants' demeanor. The Government argues that the Court cannot resolve at the motion to dismiss stage the questions of whether defendants' beliefs are religious in

nature and whether those beliefs are sincerely held. Doc. 105 at 9. Yet because the Court will be sitting as factfinder in this case, the factual questions that underlie both of these elements of the RFRA *prima facie* case can be resolved at an evidentiary hearing prior to trial.[2] As noted earlier, it is not uncommon for courts to address a RFRA-based motion to dismiss in a criminal case at the pre-trial stage, after an evidentiary hearing.

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 sincerely held religious belief was *substantially burdened* by government action. This element is a question of law for the court to decide. *See 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"); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144–45 (11th Cir. 2016); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir.

[2] Other courts have ruled that it is appropriate to resolve RFRA-based claims at the motion stage. *See e.g.*, *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996) ("The court may conduct a preliminary hearing in which the defendants will have the obligation of showing that they are in fact Rastafarians and that the use of marijuana is a part of the religious practice of Rastafarians."); *S. Fork Band Council of W. Shoshone of NV v. U.S. Dep't of the Int.*, 2009 WL 73257 *3 (D. Nev. Jan. 7, 2009) ("[B]ecause as a part of its preliminary injunction analysis the court will have to consider the likelihood of Plaintiffs' success on the merits of the RFRA claim, an evidentiary hearing is appropriate.").

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."). 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 his or her 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 or her] religious beliefs.'" *Eternal World Television*, 818 F.3d at 1144 (citations omitted).

The Ninth Circuit has recognized two ways to understand the notion of substantial burden in the RFRA context: (1) *forcing* a person to choose between the tenets of their religion and a government benefit, and (2) being *coerced* to act contrary to religious belief by threat of civil or criminal sanctions. *Navajo Nation*, 535 F.3d at 1069–70. The second formulation applies most appropriately in this case, where the threat of imprisonment and significant financial penalties will coerce the defendants to act in a way that is contrary to their religious beliefs. This standard was elaborated upon further

by the Ninth Circuit in *Snoqualmie Indian Tribe v. F.E.R.C.*, where the court described the problem of burden as "a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction." 545 F.3d 1207, 1214 (9th Cir. 2008).

The Government makes several arguments to support the position that the defendants' sincerely held religious beliefs have not been substantially burdened by government action. Each of them, unfortunately, mischaracterizes the meaning of "substantial burden" under RFRA.

First, the Government argues that the Defendants' claim that their sincerely held religious beliefs have been substantially burdened by the instant prosecution "is meritless because the government's choice of how to use its own land cannot create a substantial burden." Doc. 105 at 9. The Government relies upon *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), for this proposition, but *Lyng* provides no support for the notion that government policy about land use cannot create a substantial burden on the religious liberty rights of individuals. In *Lyng*, Native American individuals and organizations contested the U.S. Forest Service's plans to permit timber harvesting and road construction in an area of national forest that was traditionally used for religious purposes by members of three Native American tribes. These individuals and organizations sought to enjoin the issuance of the timber permit. The Court denied their claim on the ground, *inter alia*, that the "the affected individuals [would not] be coerced by the Government's action into violating their religious beliefs; nor would … governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. Thus in *Lyng*,

the government's action surely offended the religious beliefs of the affected individuals, but the government took no action that imposed a negative penalty on those individuals.

By contrast, the government action in this case involves the affirmative penalization of religiously-motivated behavior. This is precisely the kind of circumstance anticipated by Congress when it passed RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 U.S.C. §§ 2000cc, et seq.): the enforcement of criminal laws of general application in a way that substantially burdens the religious beliefs of individuals. The Attorney General's guidance on religious liberty echoes this interpretation of RFRA: "individuals and organizations do not give up their religious-liberty protections by … interacting with federal, state, or local governments." Attorney General Jeff Sessions, *Memorandum For All Executive Departments And Agencies*, "Federal Law Protections for Religious Liberty," October 6, 2017, p. 2, *available at* https://www.justice.gov/opa/press-release/file/1001891/download (hereinafter "Federal Law Protections for Religious Liberty"). In *Navajo Nation*, the Ninth Circuit found that RFRA claimants could not make a *prima facie* showing of a substantial burden on their exercise of religion because they were "not fined or penalized … for practicing their religion" on public land. 535 F.3d at 1070. Yet where, as in the instant case, the RFRA claimants have been threatened with fines and criminal penalties, they have satisfied a showing of substantial burden.

Consider scenarios where a federal courthouse required removal of all head coverings, or federal parks were open only on Sundays, a day on which followers of some religious traditions might not be able to visit the parks on account of mandatory

observance of religious ceremony or services? Both of these federal policies about "how to use its own land" could trigger non-trivial requests for accommodations under RFRA.

What is more, the Government's argument that "the government's choice of how to use its own land cannot create a substantial burden" would effectively render RLUIPA a nullity. "RLUIPA prohibits the implementation of any land use regulation that imposes a 'substantial burden' on the religious exercise of a person … except where justified by a 'compelling governmental interest' that the government pursues in the least restrictive way possible." *Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)*, June 13, 2018, pp. 1–2, *available at* https://www.justice.gov/crt/page/file/1071246/download.

As former Attorney General Sessions made clear, "RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration." Attorney General Jeff Sessions, "Federal Law Protections for Religious Liberty," p. 1. The Government's position in this case, essentially immunizing all public land use or policy related to the issuance of permits from any duty to accommodate individual religious liberty rights, also runs contrary to the Attorney General's clear instructions to all U.S. government agencies: "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity." *Id.*

The Government also argues in its brief in opposition to the Defendants' RFRA-based motion to dismiss that the Defendants' religious beliefs are not substantially burdened because nothing in the defendants' stated beliefs prevented them from

obtaining a permit to enter the Cabeza Prieta National Wildlife Refuge (CPNWR). Doc. 105 at 10. But it is not the Defendants' position that they were barred from applying for a permit to enter the CPNWR, rather, they argue, the conditions contained in the permits required them to agree not to engage in religiously motivated conduct. In this sense, the terms of the permit forced them a "to choose between the tenets of their religion and a government benefit." *Navajo Nation,* 535 F.3d at 1070. The instant case presents different facts from those in contexts where faith-based actors sought religious exemptions from the requirements of federal eagle feather permitting schemes such as *United States v. Hugs,* wherein a permitting scheme "permitt[ed] access to eagles and eagle parts for religious purposes," albeit not in as convenient a manner as the defendants would have liked.[3] 109 F.3d 1375, 1378–79 (9th Cir. 1997).

Next, the Government argues that the Defendants' religious exercise is not substantially burdened by this prosecution because there were other legally permitted means by which they could have exercised their faith-based commitment to provide aid to persons at risk of death or serious bodily injury. "There are many methods for providing aid in the CPNWR, some of which do not violate the rules and regulations, and the defendants' preference for one method over another cannot create a substantial burden." Doc. 105 at 12. 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

[3] *Cf. U.S. v. Hardman,* 297 F.3d 1116, 1126–27 (10th Cir. 2002) ("Any scheme that limits [legitimate practitioners of Native American religions] access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief.").

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 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 avowed 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 as 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.

II. The Government's Burden in Opposing the RFRA Motion

If the Defendants carry their burden of demonstrating 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. Does The Prosecution In The Instant Case *Further A Compelling State 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. 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: "prosecution of the defendants for violating the regulations regarding access to and use of the CPNWR furthers both the government's compelling interest in protecting the wilderness character of the CPNWR and securing the border against illegal immigration to a meaningful degree." Doc. 105 at 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. "The *uniform* application of criminal laws argument, as a compelling interest, has also been soundly rejected by the Supreme Court." *United States v. Lepp*, 2008 WL 3843283, *10 (N.D. Cal. Aug. 14, 2008), *aff'd*, 446 Fed. Appx. 44 (9th Cir. 2011) (citing *O Centro*, 546 U.S. at 434–35).

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: the Government's compelling interest in this case, it argues, "includes the cumulative negative effects to the CPNWR and border security of allowing the defendants to continue to violate the regulations at issue in order to further illegal aliens' entry into the United States." Doc. 105 at 14.

Thus, to prevail in carrying its burden of showing that the substantial burden placed on Defendants' sincerely held religious beliefs is justified by a compelling state interest, the Government must marshal a compelling interest in prosecuting *these*

defendants in *this* case.

B. Is The Burden Imposed On Defendants' Religious Beliefs 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]." *Christie*, 825 F.3d at 1061. This "focused inquiry" requires the government to justify why providing an exemption would be unworkable. *O Centro*, 546 U.S. at 431.

The government's brief with respect to this element misstates the kind of proof it must produce in order to demonstrate that its compelling interest is sufficiently narrowly tailored to satisfy RFRA's exacting requirements. Rather than producing persuasive evidence that the prosecution of the Defendants herein is *necessary* to accomplishing its compelling interests as the clear text of the statute requires, the Government argues that "[t]he prosecution in this case is a *reasonable* method for the government to advance its compelling interests." Doc. 105 at 15 (emphasis supplied). 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. The key question to be answered at this stage in the RFRA analysis is whether robust, if not aggressive, criminal prosecution of the Defendants is 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.

Regretfully, the Government supplements its mischaracterization of the "narrowly tailored" test with the reassertion of a slippery slope argument: "permitting an exemption for these four defendants would quickly lead to religious objections from all No More Deaths volunteers regarding these same regulations." Doc. 105 at 15. Just as the slippery slope argument is unavailable to the government when making out a compelling interest, it may not resort to slippery slope arguments in showing that the prosecution is necessary to accomplishing those interests. Every part of the Government's case under RFRA must address the necessity of denying an exemption to *these* Defendants in *this* case, not imagined parties in the future. Consider, for example, the facts in *Hobby Lobby*. At the time that Hobby Lobby filed for an exemption from compliance with the Affordable Care Act under RFRA, it was well known that there were many other employers who would assert such an exemption should Hobby Lobby prevail in the courts. It was completely foreseeable that hundreds, if not thousands, of employers would assert a RFRA-based exemption from compliance with the contraception mandate should the Court rule in favor of Hobby Lobby. Yet, at no time did the possibility, or even inevitability, of future exemptions play a role in the Court's consideration of the specific assertion of a religious liberty right by Hobby Lobby. It could be said that RFRA protects specific assertions of

a right to religious liberty on a retail, not wholesale, basis, and each request for an exemption must be examine on its own terms. "Only those interests of the highest order can outweigh legitimate claims to the free exercise of religion, and such interests must be evaluated not in broad generalities but as applied to the particular adherent." *United States Attorneys' Manual (USAM) Respect for Religious Liberty,* 1-15.300.14. Thus, the Government's argument that "[i]f the government were to grant an exemption in this case, these same volunteers would also seek exemptions," is inapposite. Doc. 105 at 16.

The Government draws to a close its argument on the "narrowly tailored" element by arguing that "[t]he result [of granting an exemption in this case] would be a two-tier class of visitors to the CPNWR – those who are required to obey the regulations, and those who may ignore the regulations to the detriment of other lawful visitors. The resulting chaos, including the confusion caused by law-abiding visitors seeing others openly disobey the regulations, would seriously hamper the government's ability to enforce the regulations to further its interests." Doc. 105 at 16. This conclusion is, quite frankly, rather surprising coming from the representatives of a government that has emphatically declared that the protection of religious liberty is among its highest priorities. The very idea of RFRA is to create specific exemptions to compliance with regulations that apply generally to all others. To characterize the result of granting RFRA-based exemptions as "chaos" indicates a general hostility to the very idea of the government accommodating religious belief in specific cases.

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."); *Christie*, 825 F.3d at 1056 ("We review the district court's compelling-interest and least-restrictive-means conclusions de novo.").

RESPECTFULLY SUBMITTED this November 13, 2018.

SCHARFF PLC

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically transmitted the above document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Spencer G. Scharff