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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Natalie Renee Hoffman, Oona Meagan Holcomb, Madeline Abbe Huse, Zaachila I. Orozco-McCormick,

Defendants.

Case No. 4:19-CR-00693-RM

[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 the appeal from the judgment of conviction by the magistrate judge, specifically the magistrate judge's ruling on the 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 defense 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 magistrate judge dismissed the defendants' RFRA defense without providing even a cursory substantive analysis of elements of the claim. We offer this *amicus* brief to help guide the Court's review of the magistrate judge's dismissal of the defendants' RFRA defense in this case. This Court reviews the magistrate judge's denial of RFRA relief de novo. See *United States v. Vasquez-Ramos*, 531 F.3d 987, 990 (9th Cir. 2008).

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 to allow 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 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 of accomplishing 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) enforcement of the law in this case advances a compelling governmental interest; and (ii) that interest is being accomplished through the least restrictive means. 42 U. S. C. §§ 2000bb–1(a), (b).

The Supreme Court recognized the application of RFRA to criminal prosecutions

[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?abstract_id=3262826.

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.").

In assessing the merits of a RFRA claim, whether raised affirmatively to enjoin enforcement of a federal law or policy, or as a defense to an enforcement proceeding

initiated by the government, as is the case herein, the court must substantively analyze each of the elements of the RFRA case. The magistrate judge in this case, however, failed to provide any substantive analysis of RFRA in its judgment of conviction, preferring instead to describe the claim as "a modified Antigone defense." Doc. 166, at 2. While the reference to Greek tragedy is interesting, particularly to us as academics, it substitutes for actual legal analysis of the federal statutory defense raised by the defendants. Antigone sets up a tension between the King's law – a formal edict that prohibited the burial of Antigone's brother Polynices – and the unwritten law of the Gods that mandated a proper burial so as to fulfill a duty to honor and mourn the dead. Mid-way through Sophocles' play Antigone challenges the King: "I did [not] think your orders were so strong that you, a mortal man, could overrule the gods' unwritten and unfailing laws."[2]

Yet the defense raised in this case, unlike in Sophocles' play Antigone, does not stage a tragic conflict between written positive law and unwritten, abstract morality. The law appealed to by the defendants is not outside of or above the laws of the state. Instead, the defendants ask the court to interpret a written, legislatively created right to religious liberty. The magistrate judge's failure to offer a careful analysis of their RFRA defense reflects a mistake of law, passing under cover of a clever parry to Greek tragedy, that should be corrected on appeal.

What follows is intended to provide an outline for the court of how that legal analysis should proceed in the appeal from the magistrate judge's judgment.

I. The RFRA Prima Facie Case

[2] Sophocles, *Antigone* in *The Complete Greek Tragedies*, D. Grene and R. Lattimore, eds. and trans. (E. Wyckoff, 1954).

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 asserted by the Defendants herein, can be the kind of faith-based duty that RFRA was designed to protect.

The magistrate judge rejected the defendants' RFRA defense, in part, because he regarded their beliefs as political rather than religious in nature. See Doc. 68, at 5 ("Defendants' proclaimed moral, ethical, and spiritual belief to assist humans in need of basic necessities appears to be a simple recitation 'for the purpose of draping religious garb over [political or philosophical] activity[.]'")(citation omitted). 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 question of whether, objectively, the claimant's beliefs are "religious," and whether, subjectively, the claimant himself understood the beliefs to be religious.

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.

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. 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, or (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 establishing a substantial 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 magistrate judge held, without any substantive reasoning, that "there has been no showing that the exercise of [defendants' religious belief] has been substantially burdened by the narrowly limited access in the Cabeza Prieta National Wildlife Refuge." Doc. 68, at 5. Yet, 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, *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"). The Government's position in this case, adopted by the magistrate judge, effectively immunizes public land use or policy related to the issuance of permits from a duty to accommodate individual religious liberty rights, and 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 . . . individuals and organizations do not give up their religious-liberty protections by … interacting with federal, state, or local governments." Attorney General Jeff Sessions, "Federal Law Protections for Religious Liberty," p. 1-2.

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. 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.

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 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. 109 F.3d 1375, 1378–79 (9th Cir. 1997).[3]

It is possible that the magistrate judge found that the defendants' religious beliefs were 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. 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 supported by the Supreme Court's reading of RFRA.

The Government's position in this case has been that a RFRA claimant's religious beliefs are not substantially burdened if the government can conjure acceptable religious

[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.").

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.

Another way to understand this parsimonious reading of RFRA is that it reads 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 such a novel approach to proving a substantial burden on religious exercise. Such a narrow reading of RFRA 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 asserted only a generalized interest in enforcing the law, reciting broad aims for the legislation. See Tr. 3:151. "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). To the extent that the government argued at trial that the broad interest in protecting Proghorn sheep would be undermined by a permit exemption for these defendants because doing so would create enough waste to threaten the Sonoran Pronghorn population, the facts adduced at trial showed otherwise. Tr. 3:139-41; 3:148-152.

The government has also argued that allowing an exemption in this case would result in a floodgate of exemptions, thus damaging the fragile ecosystem at CPNWR. 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. Yet, established case law 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.

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.

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 court must find that the Government has proven 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.

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 by the court in this stage of 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.

The Government supplements 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.").

III. Conclusion

The magistrate judge failed to provide even a cursory discussion of the elements of the defendants' RFRA motion in this case. This Court should correct this error and offer a careful analysis of the meaning and merits of the RFRA defense in the instant prosecution.

Respectfully submitted,

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Dated: April 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, I 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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