DOES SERVING YOUR MILITARY MEAN YOU CAN'T SERVE YOUR GOD? COMPARING AN INTEREST IN OBEDIENCE FROM SERVICE MEMBERS TO THEIR RELIGIOUS FREEDOM

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I. INTRODUCTION OF *UNITED STATES V. STERLING*

In August 2016 the United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings of the lower court case of *United States v. Sterling*. Lance corporal Monifa Sterling worked in a shared space utilizing computers to assist Marines who were having trouble with their Common Access Cards.[2]

In this shared workspace Lance Corporal Sterling put up three signs, which stated "no weapon formed against me shall prosper." Among other charges[3], in May of 2013, Lance Cpl. Sterling received a special court-martial for ignoring two orders from her Staff Sergeant to remove the signs from her shared workspace, even going as far as to replace the signs when the Staff Sergeant removed them.[4] Lance Cpl. Sterling appealed the court-martial claiming there was an error in finding the order to remove the religious quotes was lawful because "the order violated [her] right to freely exercise her religion and the order did not have a valid military purpose."[5]

On appeal, Lance Cpl. Sterling argued that she had the right to display these altered Bible quotations in her workspace under the Religious Freedom Restoration Act (RFRA).[6] The

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[2] United States v. Sterling, 2015 CCA LEXIS 65, 2 (Crim. Ct. App. 2015); *see* Definition of *Common Access Card*, DEPARTMENT OF DEFENSE, http://www.cac.mil/common-access-card/ (stating "[t]he CAC . . . is the standard identification for active duty uniformed service personnel.") (Last visited Nov. 5, 2016).

[3] *Id.* at 1 (facing a court-martial for failing to go to her appointed place of duty, disrespect to a superior commissioned officer, and four specifications of disobeying the lawful order of a noncommissioned officer, which included improper uniform).

[4] *Id.* at 3 (stating the appellant posted three signs with the biblical quote "No weapon formed against me shall prosper," which she claimed were intended to represent the Christian trinity).

[5] *Id.* at 2.

[6] LAHORE, WASHINGTON: MARINE DOES NOT HAVE A RIGHT TO DISPLAY RELIGIOUS SIGNS ON GOVERNMENT PROPERTY, SAYS

government did not make any specific arguments in response to Lance Cpl. Sterling's claims on appeal. Instead the government seemed to rely on the court-martial that all the charges were willful disobedience, as well as reliance on the presumption that military orders "are lawful and are disobeyed at the subordinate's peril."[7] The Staff Sergeant ordered removal of the signs because she did not like their "tone," which the Court used to buttress an argument that the signs seemed combative, and being placed in a shared workspace would be contrary to good order.[8] The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the orders to remove the signs were lawful and that RFRA could not be triggered by these circumstances.[9] The holding discussed that only beliefs firmly rooted in religion are protected under the Free Exercise clause.[10] Further the Court held that the military has an interest in discipline and good order of service members.[11]

Lance Cpl. Sterling appealed again and the case went to the United States Court of Appeals for the Armed Forces, the military's highest court, which yet again affirmed the lower court's decision "that RFRA did not protect Sterling's religious expression."[12] The majority held that the order to remove the signs did not substantially burden Sterling in the practice of her religion and that the military had an interest in enforcing this order because obedience and unity in military members is integral to the organization's success.[13] Simply, the Court decided that Lance Cpl. Sterling did not identify a sincerely held belief that required her to post the signs, and without a religious exercise the

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AMERICAN UNITED, US Official News, Feb. 2, 2016, *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=48c08e87-a026-4915-87b6-87c26cdea331&pdworkfolderid=0fee7850-907d-4ca9-8df1-8f92437cccb4&ecomp=wpdtk&earg=0fee7850-907d-4ca9-8df1-8f92437cccb4&prid=02e28b3a-e3ae-4a54-896b-a38490470d60.

[7] *Sterling*, 2015 CCA LEXIS at 15.

[8] *Id.* at 18.

[9] *Id.*

[10] Definition of *Free Exercise* Clause, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/free_exercise_clause (noting the Free Exercise Clause refers to the restriction on Congress to not make a law prohibiting the free exercise of religion, found in the First Amendment) (last visited Feb. 17, 2017).

[11] *Sterling*, *supra* at note 1.

[12] Kelly J. Shackelford, *The Supreme Court Must Restore Religious Liberty to Military Members*, NATIONAL REVIEW, (August 24, 2016) http://www.nationalreview.com/article/439295/religious-liberty-threatened-supreme-court-must-revisit-monifa-sterling-case, (last visited Nov. 5, 2016).

[13] United States v. Sterling, 75 M.J. 407 (A.F. Ct. Crim. App., 2016).

RFRA analysis could not be triggered.[14] The Court also notes that Lance Cpl. Sterling did not request an accommodation for her supposed religious practice, seemingly making an argument that the military has these regulations in place to be able to notify superiors of acts of religious importance.[15]

The dissent in *Sterling* disagreed with the majority's RFRA analysis because it created a requirement that the religious conduct be "important" to the practitioner, that the individual notify the government of the practice, that Lance Cpl. Sterling did not avail herself to the Navy's accommodation framework, and that "substantial burden" requires the burden be based on a affirmative violation to be substantial.[16] While recognizing the military's interest in good order and discipline as a legitimate one,[17] Judge Ohlson writes that Sterling did demonstrate that her conduct was a part of her religious belief at trial, and for that reason she should have received an appropriate RFRA analysis.[18]

II. WHERE *STERLING* FALLS SHORT

Even with the military having a legitimate interest in morale and discipline of their units, the majority's discussion in *Sterling* failed to truly address Lance Cpl. Sterling's religious belief and show why it was not substantial in and of itself. The Court should have analyzed Sterling's practice as to whether or not it was a religious belief that if she were denied the practice it would substantially burden her. This would have been the proper analysis because she raised a RFRA claim and, according to Congress, "religious liberty laws apply with full force to the military."[19]

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[14] *Id.* at 415.
[15] *Id.* at 419.
[16] *Id.* at 425-27.
[17] *Id.* at 420-21.
[18] *Id.* at 421.
[19] Noah Feldman, *Religious Liberty is Different for the Military*, JOURNAL-TIMES, Aug. 16, 2016, *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=df024ec9-8d47-4566-940e-0729f5017302&pdworkfolderid=b09fa9db-2c2c-4d89-b3c4-4805261cb028&ecomp=wpdtk&earg=b09fa9db-2c2c-4d89-b3c4-4805261cb028&prid=ed39c03d-e97e-4f25-958f-f8bf964287b9.

Instead of truly showing why it was not substantial enough to meet a RFRA claim, the majority focused on the military's interest and stated that Lance Cpl. Sterling's practice was not substantial because she did not give notice of her practice. The Court concluded the opinion by stating that without there being a prima facie case for a RFRA claim there is no need to evaluate whether the order was "the least restrictive means of furthering a compelling government interest."[20]

While there is merit to a defense of government action that is against someone's rights where the government interest is compelling, that does not mean the Court can simply ignore the rest of the analysis when these claims come to court. It must still be decided whether Lance Cpl. Sterling did have a religious right in posting the Biblical quotes. Then it must be decided whether or not the government has the ability to circumvent that right because their interest outweighs Lance Cpl. Sterling's in this case. Instead, the Court seems to put the cart before the horse and leaves us with an opinion that seemingly goes in circles in the majority. The explanation of why Lance Cpl. Sterling does not have a prima facie case cannot be that the government has an interest in burdening her religious exercise.

Some even characterize Sterling's religious claims as "bogus" because "she did not inform anyone that [the signs] were religious until her court-martial."[21] This seems like a mischaracterization that would solidify the majority's notice requirement. Perhaps the argument to notify of religious practices being the cause of disobeying orders deserves more of a stringent consideration in regards to the military where there is a direct order, but in general, there is nothing unusual in only bringing up defenses at trial. The majority in *Sterling* even recognizes "that RFRA does not itself contain an exhaustion requirement and that at [it has previously been] held that an individual need not request an exemption to invoke RFRA, even if a system for doing so is in place."[22] Since the Court even states that she does not need to

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[20] *Sterling*, 75 M.J. at 420.

[21] Targeted News Service, *Federal Court Correct to Dismiss Former Marine's Bogus Religious Freedom Claims*, TARGETTED NEWS SERVICE, Aug. 10, 2016, *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=1aba1766-1a97-4469-87f0-ba5bb199c1a8&pdworkfolderid=1eb8ba20-7867-4a82-948a-8ac2eb3c53d0&ecomp=wpdtk&earg=1eb8ba20-7867-4a82-948a-8ac2eb3c53d0&prid=ed39c03d-e97e-4f25-958f-f8bf964287b9.

[22] *Sterling*, 75 M.J. at 419.

seek an exemption to be able to invoke a RFRA claim this argument of notice being require to ensure her claim is not bogus is incorrect. To require everyone to explain all of their religious beliefs and how they practice them would be absurd. The biased description of Lance Cpl. Sterling's RFRA claim seems to be colored by those who look at the entirety of her court-marital charges.[23] While those are circumstances of disobeying orders without any possible excuse and the court-martial has been deemed an appropriate punishment for those acts, that does not mean that her claim to a religious right should be ignored.

Further, it seems the Court states that Sterling's disobedience is contrary to good order, but the Court does not give further explanation about why the biblical quotes would be contrary to good order.[24] Lance Cpl. Sterling's disobedience of her Staff Sergeant's orders is a separate issue addressed in the other charges of her court martial.[25] The fact that she has multiple infractions which led to her court martial might justify why the military court threw the book at her, but it does not show why this religious claim should be completely shot down without particular explanation regarding the religious claim. Lance Cpl. Sterling's religious claim goes beyond the individual and can affect other military personnel who have an interest in posting religious quotes in their workspace. It is clear that the opinion requires more of an analysis and legal backing for the opinion to truly carry any weight. The proper analysis for religious claims is under the Religious Freedom Restoration Act.

III. HISTORY OF THE RELIGIOUS FREEDOM RESTORATION ACT

To better understand and analyze this case it is necessary to parse the Religious Freedom Restoration Act. The plain language of RFRA is that the government "shall not substantially burden a person's exercise of religion even if the burden results from a general rule of applicability."[26] The statute has the exception of allowing a substantial burden where the government has a compelling interest and they use the least restrictive means to further that interest.[27] This is important for Lance Cpl.

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[23] *See* Targeted News Service, *supra* note 20 (describing Lance Cpl. Sterling's failure to report for duty and failure to wear the proper uniform).

[24] *Sterling*, 2015 CCA LEXIS at 15.

[25] *Id.* at 1.

[26] § 42 U.S.C.S. 2000bb-1 (2016).

[27] *Id.*

Sterling's claim. It is important to note that in her case the Court describes the government interest in wording that is more along a "legitimate" standard, describing the order as valid and lawful.[28] The Court can get away with this because it says Lance Cpl. Sterling's religious exercise is not even enough to trigger a RFRA claim, so a true analysis gets left behind. This glaring omission will be discussed further later in this note.

The statutory language for RFRA flows from legal history of the United States. The beginnings of the legal cases regarding the right to exercise religious conduct as part of one's belief rely on the Free Exercise Clause in the First Amendment, which states "Congress shall make no law . . . prohibiting the free exercise of religion" and comes to shape RFRA.[29] While the text is absolute, there are limits on its application. The Supreme Court "has interpreted this clause so that the freedom to believe is absolute, but the ability to act on those beliefs is not."[30] This has lead to different debates, which can be seen through the case history, on how to interpret reasonable limits and who can be subject to to these limits. These sometimes contentious debates have ultimately lead to RFRA and how it stands today.

The case history for RFRA begins with *Sherbert v. Verner*. In *Sherbert*, strict scrutiny was applied where an individual, who was a devout Seventh-Day Adventist, was fired because job requirements substantially burdened her religious practices by requiring her to work on Saturdays, which violated her fundamental right from the Free Exercise Clause of the First Amendment.[31] The test from *Shebert*, which required a compelling state interest that was achieved by the least restrictive means to justify any restriction of free exercise of religion,[32] was criticized as

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[28] *Sterling*, 75 M.J. at 421.

[29] U.S. Const. amend. I.

[30] Claire Mullally, *Free-Exercise Clause Overview*, FIRST AMENDEMENT CENTER (Sept. 16, 2011), http://www.firstamendmentcenter.org/free-exercise-clause (last visited Nov. 6, 2016) (giving an example of reasonable limits on freedom to exercise religion by stating that a court would not allow human sacrifice even if the religion required it).

[31] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Definition of *Strict Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/strict_scrutiny, (last visited Nov. 6, 2016) (explaining that strict scrutiny is applied when a suspect class's fundamental right is abridged and that to pass the compelling government interest must be be narrowly tailored to achieve that interest. Suspect classes have been found to include religious identification).

[32] Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 825 (1994).

too broad and was later eliminated.[33] The Court dismantled this strict scrutiny application for laws that infringed on religious practice in *Employment Division of Oregon v. Smith*, by holding that laws that are generally applicable and facially neutral would be upheld, regardless of whether or not it infringed on a religious practice.[34] In response, RFRA was signed into law on November 16, 1993 to codify the compelling interest being narrowly tailored standard where there is substantial burden on a religious practice, which revived the test from *Sherbert* as a statutory right rather than constitutional.[35]

RFRA's legislative history began in 1990 when its chief sponsor, Representative Solarz, introduced it. Solarz described *Smith* as "retreating from the previous protection accorded religious freedom in our country."[36] He felt obligated to introduce RFRA because *Smith* could have an "unavoidable consequence of democracy", which would negatively impact not only minority religions, but mainstream ones as well.[37] Language in the bill indicated it would restore the compelling interest test from *Sherbert* and *Yoder*.[38]

It is noticeable that there was negative sentiment regarding *Smith* and that it was considered a departure from the appropriate treatment of religious claims. There were different debates around RFRA, but no discussion kept the statute from applying to the military.[39] RFRA was passed by a large margin of 97-3.[40] This vote is evidence of a strong sentiment to protect religious practice, and not continue with the trend that was appearing in *Smith*. When properly utilized, RFRA appropriately balances religious freedom with interests in health, safety, public welfare and other compelling interests.

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[33] Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 591 (1996).

[34] Employment Division of Oregon v. Smith, 494 U.S. 872 (1990) (holding two Native Americans who used peyote could justifiably be fired from their job as this was considered "misconduct" by the rehabilitation center for whom they worked, even though the use of the peyote was part of their religious service).

[35] Robin-Vergeer, *supra* note 32.

[36] Whitbeck, *supra* note 31, at 847.

[37] *Id.*

[38] *Id.* at 855.

[39] *Id.* (discussing the opposition from pro-life groups because this bill could expand abortion rights. There was also a call for an amendment that kept RFRA from being applicable to prisoners in federal, state, or local prisons).

[40] *Id.* at 863.

Despite this history and the large margin of the vote for RFRA, there is still criticism of RFRA for being too broad a statute because it applies to all federal and state laws that substantially burden religious conduct. In particular, there is a complaint that there the "bare standard of review [is] yoked to no particular substantive policy arena within which Congress is constitutionally empowered to act" because it applies to all state laws even though it is not within Congress's enumerated power to have this much control in regulation of state laws.[41] The concerns of RFRA being too broad, since it applies to state action as well as federal, may be justified – but that will not be extensively discussed here. These concerns of federalism do not bear on the applicability of RFRA in the current case, as it is a military case and federal law governs. Clearly, it is within Congressional authority to pass laws that affect the federal government. RFRA applies to the military; therefore, the application of a narrow definition of substantial burden in RFRA claims by military personnel would curtail the freedom of these people and be inconsistent with RFRA's purpose.

Again, there is a viable argument against applying RFRA on the state level. This is especially true considering that the statutory language says, "substantially burdened by the government." When considering Congress passed RFRA, it seems reasonable to limit it to the federal government. These concerns of federalism and state sovereignty lead to the decision in *City of Boerne v. Flores*, where RFRA was held unconstitutional as applied to the States because it impermissibly interfered with the judiciary's sole power to interpret the Constitution.[42] This decision did not speak to the constitutionality of RFRA at the federal level, and it has been used since then on the federal level. There is no standing to limit the use of RFRA for federal cases, including in military court.

While there has been a bit of a contentious debate surrounding RFRA, to say the least, the passing of this statue was done in the wake of the *Smith* decision, which worked to dismantle a precedent that safeguarded religious practices.[43] The stated

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[41] Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REVIEW 357, 364 (1994).

[42] City of Boerne v. Flores, 521 U.S. 507 (1997) (holding Congress' enactment of RFRA was excessive when it kept state zoning authorities from being able to deny building a church in a particular area. The Court explained that Congress does not have the power to create new substantive rights on the state level and that RFRA cannot be considered preventative).

[43] Robin-Vergeer, *supra* note 32, at 603.

purpose of RFRA was to restore the compelling interest test in *Sherbert* and *Wisconsin v. Yoder*[44] and to guarantee its application in all cases where Free Exercise is substantially burdened. RFRA was proposed and enacted to provide a defense to individuals whose religious exercise has been substantially burdened by the government.[45] The statue declares that the right to Free Exercise is secured in the First Amendment.[46] If the individual bringing the claim can prove that his or her freedom of religious exercise has been substantially burdened by the government, namely that there is a prima facie case, then the burden of proof shifts to the government to prove that there is a compelling government interest that is narrowly tailored in burdening this religious belief.[47]

When the bill was passed it defined government as a branch, department, agency, instrumentality, and official (or other person acting under the color of law) of the United States, a State, or subdivision of a State; and exercise of religion defined as the exercise of religion under the First Amendment to the Constitution.[48] Since the military is part of the Department of Defense, which is a department under the order of the Executive branch, it is unmistakably a part of the government.[49] For this reason, it makes sense that RFRA applies to the military.

RFRA not only works to apply to both state and federal claims, but also covers a wide array of religious practices. On the introduction of this bill it was stated, "[l]ots of religious activities are recommended but not obligatory - - and RFRA covers those, notwithstanding the D.C. Circuit's comment."[50] This shows just how extensive RFRA could be, allowing people to protect certain forms of worship that they feel are important to their practice of faith but that may not be a tenet from their religious hierarchy. The D.C. Circuit stated that the inquiry of a regulation on a

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[44] Whitbeck, *supra* note 31 (explaining that the Court applied *Sherbert*'s compelling interest test in *Yoder*, where Amish families were charged with violating Wisconsin law by refusing to send their children to high school and the court protected the Amish beliefs).

[45] 42 U.S.C.S. § 2000bb(b) (1993).

[46] 42 U.S.C.S. § 2000bb(a)(1).

[47] *Id.*

[48] H.R. Res. 1308 § 5, 103th Cong. (1993) (enacted).

[49] DEPARTMENT OF DEFENSE, DOD 101: WHO WE WORK FOR, https://www.defense.gov/About/DoD-101, (stating the DOD works for the President of the United States. Also, Congress approves the budget for the military and acts as a "Board of Directors").

[50] Feldman, *supra* at note 18.

religious practice should focus on "whether the regulation at issue [forces claimants] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires."[51] This understanding of religious practice is narrow. It would only cover what the religion specifically states must or must not happen, and can limit individuals from expressing his or her religious belief in a way that still may be very important to them.

To better understand religious practices and what should be covered it would be helpful to look at other related law. Title VII came about around the same time as RFRA, and prohibits employment discrimination based on race, color, religion, sex, and national origin.[52] Title VII broadly defines religion for the purposes of what law covers. The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[53] Reasonable beliefs and practices are protected as long as the accommodation does not put an undue burden on the employer, not only for traditional, organized religions, but for new or informal religious beliefs as well.[54] Further, it also protects people who do not have religious beliefs or practices from being discriminated against.[55] This gives a different view of religion than the one cited in in the D.C. Circuit Court's opinion.[56]

The debate on legal limitations on the freedom of religion has been a focus of the constitutional dispute and has two approaches: the narrow and the broad.[57] The narrow approach only protects religious activity under legal rights that are already available "to individuals and organizations – primarily freedom of expression and association – and the Free Exercise Clause

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[51] Henderson v. Kennedy, 253 F.2d 12 (D.C. Cir. 2001).

[52] Title VII, Section 2000e-5.

[53] Title VII, Section 2000e(j) defining religion. (Note: Title VII does not explicitly apply to the military as it discusses private employers).

[54] *Questions and Answers: Religious Discrimination in the Workplace*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/policy/docs/qanda_religion.html (last visited Feb. 17, 2017) (explaining what is "religion" under Title VII).

[55] *Id.*

[56] Title VII, Section 2000e(j).

[57] Thomas C. Berg, *On the Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L REV. 1277, 1277 (Summer 2005).

prevents only discrimination against religious activity."[58] By comparison, the broad approach calls for an individualized review of religious claims under the Free Exercise Clause or other applicable provisions, "[r]egardless of how the law treats nonreligious viewpoints or other organizations."[59] Jurisprudence of religious freedom moved from the broad approach in *Sherbert* and *Yoder* to the narrow approach *in Smith*.[60]

The approach in *Smith* caused a "dichotomization of religious beliefs and religious conduct," which lead to a widespread dissatisfaction with *Smith*.[61] The issues with this change were seen in a case where the federal government built a timber-transporting road on federal land that disturbed Native American religious ceremonies and this was allowed since "[t]he Native Americans were not personally coerced . . . into violating their religious beliefs."[62] With this courts were less focused on minority rights, and this was clearly cause for concern as there was movement back toward the broader approach with RFRA, which gives a more "precise" standard.[63]

Some feel it is appropriate to go against the recent trend of religious liberty, which as seen with the language in RFRA when proposed and with the language in Title VII, has been broad.[64] There is a sentiment against growing religious freedom because of the fear the "[r]eligious freedom [will] be used as a sword to create a license to discriminate, to undermine civil rights advances that have already been made."[65] The beginnings of RFRA were supported by civil rights organizations. This can be seen with the ACLU, since it was enacted to protect religious minorities, but that support has dwindled following controversies of some officials using RFRA to allow discrimination against members of the LGBT community.[66] This had lead to a call for a narrowing of RFRA to

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[58] *Id*.

[59] *Id*.

[60] *Id*. at 1283.

[61] Whitbeck, *supra* note 31, at 836.

[62] Berg, *supra* note 56 (citing Lying v. Northwest Cemetery Protective Association, 485 U.S. 439, 449 (1988)).

[63] *Id*. at 1295.

[64] *See* THE U.S. EEOC., *supra* note 53.

[65] Sunnivie Brydum, *Why the Supreme Court Can't Save Us from 'Religious Liberty'*, ADVOCATE, (last updated June 8, 2016), http://www.advocate.com/politics/2016/6/08/why-supreme-court-cant-save-us-religious-liberty (arguing religious exemptions have been abused as a tactic for undermining civil rights advances, e.g. backlash on same-sex marriage).

[66] *Id*. (referencing a law in Indiana that gave Hoosiers a "right to discriminate" and a bill from Mississippi formerly titled the "Protecting Freedom of Conscience

apply for the real need of protecting religious minorities, which would ideally stop this misuse.[67]

Unfortunately, there have been many people who use their religious beliefs to reinforce their discriminatory behavior. This was the claim in *Wilson v. James*, where a member of the National Guard sent an email from his military account objecting to a same-sex marriage ceremony at West Point's chapel on the basis of his religious beliefs as a Mormon.[68] The court did not accept his claim of a religious protection under the conclusion that the First Amendment does not protect military personnel who criticize their personnel because there are discipline and order concerns.[69] This is the kind of hiding behind religion when speaking and acting in a discriminatory way that people are concerned about, and why some are calling for limits in religious freedom.

In fact, this could be argued as evidence for why large religious groups should not have protection as it used for discrimination and RFRA should focus on the religious minorities that need protection, as it seems some people are arguing.[70] But RFRA was made to protect not only well established religious groups and practices, but also minority and newer groups with their own reasonable practices. There should not be a discernment between different religions and the treatment of claims those followers bring. To put limits on religious claims because of the size of their religion would be counter to the spirit of RFRA.

The idea of limiting religions that are a majority would have hindered some important decisions that have allowed more inclusiveness in the military. This may threaten claims Sikh and Muslim soldiers have brought to be able to wear a beard while serving in the military, even though it is not "uniform".[71] In fact, going with a narrow approach would only protect legal rights already in place for individuals and organizations, which would

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From Government Discrimination Act", which prohibited same-sex marriage, same-sex sexual relations, and being transgender).

[67] *Id.*

[68] Wilson v. James, 139 F. Supp.3d 410, 418 (2015) (stating "[o]ur base chapels are a place of worship and this [is] a mockery to God and our military core values" in his email).

[69] *Id.*

[70] *See*, Brydum *supra* note 64.

[71] *See* Targeted News Service, *Army Ends Forced Shaves for Sikh Soldier*, TARGETED NEWS SERVICE (Dec. 14, 2015) (showing a temporary religious accommodation for a solider to follow his Sikh faith by wearing a turban and maintaining a beard during his military service because these practices do not "prevent excellence in military service.").

still threaten minority groups, possibly even more so if minority religions are not well based.[72] The biggest issue with the broad approach is the requirement to have an individualized review, which lends to judicial inefficiency, but the narrow approach has a bigger risk of people missing out on parts of their religious practices because they cannot get a reasonable accommodation or are discriminated against in their workplace.

To ensure that there is not too much of a limit on RFRA such that viable claims are disregarded, the system in place should be appropriately used. There are other interests to consider when people are using their religious beliefs to discriminate, and employers and governments could use sufficiently compelling interests to prevent this sort of discriminatory behavior that sometimes arises under the veil of religious sanction:

> The most obvious case for limiting religiously motived conduct is when it would harm the health or safety of other – or more broadly and perhaps tenuously, when it would disturb "public peace and order." . . . [B]oth *Sherbert* and *Yoder* defined the question as whether the religious practice "posed some substantial threat to public safety, peace, or order."[73]

Another limit that can be used is the rights and freedoms of others, since religious conduct cannot interfere with these interests.[74] To continue to use the broad approach would be to apply the appropriate level of scrutiny and deny claims only when there is a sufficient interest to do so. Making religious claims a distinctive concern of the law allows the courts to analyze all these different interests and better come to a decision that is in the best interest of society and the different parties.

The history and intent of RFRA show that it definitively applies to *Sterling*. The military clearly fits in with the section 5 definition of government in the House Bill.[75] Lance Cpl. Sterling made a prima facie case by testifying at trial that the signs were religious,[76] that she had three copies to represent the Trinity, and

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[72] *See*, Berg *supra* note 56.
[73] *Id.* at 1298-99.
[74] *Id.* at 1301.
[75] 1993 H.R. 1308, § 5 (March 11, 1993).
[76] Definition of *prima facie*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/prima_facie, (last visited Nov. 6, 2016) (defining

that they were there to give her "encouragement . . . in a time of personal difficulty."[77] The fact that she did not debate the religious nature of the signs until she was at trial does not bar her from making the defense at her court-martial hearing, nor does it affect her ability to appeal the decision. Since Lance Cpl. Sterling made a prima facie case for a right to religious exercise the burden shifts to the government to prove their interest and tailoring, as stated in the statute. This case is a prime example of what RFRA should be used for – to safeguard the religious rights of any individual subject to general statutes of the government through a proper analysis of interest of the government.

IV. UNDERSTANDING THE MILITARY SCHEME

A better understanding of the military scheme is necessary to understand *Sterling* since this case hinges on the circumstance of it occurring in the military. If Lance Cpl. Sterling's claim had been any other organization it would have been impossible for this order to be upheld. As stated earlier, Congress has stated that religious liberty laws "apply with full force to the military."[78] The Court in *Sterling* did affirm that RFRA applies to the armed forces. While the Court did not say outright that there are certain circumstances in the military that give the law a different meaning and application for uniformed personnel and civilians, the Court had to deal with the "distinctive command structure of the military."[79] In fact, without looking at the distinctive command structure of the military this opinion would make no sense and be unhelpful. In fact, it would act as a counter to the standards set forth in freedom of religion cases.

A good starting place is to first look at exactly what the process of a court-martial is. A court-martial is a court for trying military service members accused of offenses against military law.[80] Lance Cpl. Sterling received a special court-martial.[81] A special court-martial consists of a minimum of three members and

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prima facie as sufficient to establish a fact or raise a presumption unless disproved or rebutted).

[77] *Sterling*, 75 M.J. at 37 (J. Ohlson, dissent) (giving weight to her using this quotes as a religious practice because the quotes were intended to give her strength through her beliefs).

[78] Feldman, *supra* note 18.

[79] *Id.*

[80] Definition of *Court-martial*, DICTIONARY.COM, http://www.dictionary.com/browse/court-martial (last visited Feb. 18, 2017).

[81] *Sterling*, 2015 CCA LEXIS, at 1.

a military judge, although the accused may request to be tried by the military judge alone.[82] It is an intermediate court that is often characterized as a misdemeanor court, which may try all persons subject to the Uniform Code of Military Justice.[83] A special court-martial may enforce punishments authorized under the Rules for Court-Martial 1003, subject to exceptions, and the accused must be proven guilty beyond a reasonable doubt.[84]

Military law is extremely important as there is an interest to the entire nation that service members in the armed forces are held to standards that make them act as a cohesive unit and ensure that they obey orders. This is especially true when those orders directly affect the United State's national security. There is a strong legal precedent that shows how important national security is and severe measures can be taken to ensure it.[85] The armed forces have their own laws governing them that are distinct from laws on civilians because there is more of an expectation from service members once they take an oath.

The Uniform Code of Military Justice is federal law that serves as the foundation for military law. Every member of the armed forces is subject to to this law, as well as other statutory provisions and regulations authorized by the Commander in Chief.[86] Congress has plenary and exclusive control over the formation, organization and government of the military and the laws are in force in times of peace, as well as in times of war.[87] The Code of Military Justice states that a member of the United States Military may be held criminally liable for failure to obey lawful orders.[88] While military members are required to obey lawful orders, they do not have to follow unlawful orders. In any

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[82] *Courts-Martial Explained*, MILITARY.COM, http://www.military.com/benefits/military-legal-matters/courts-martial-explained.html

[83] *Id.*

[84] *Id.*

[85] Korematsu v. United States, 323 U.S. 214 (1944) (holding that compulsory exclusion of citizens during a time of war is justified to reduce the risk of espionage and ensure national security).

[86] *Military law: An Overview*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/military (last visited Feb. 18, 2017) (stating "[m]ilitary law consists of the Uniform Code of Military Justice and other statutory provisions for the government of persons in the Armed Forces to which may be added the unwritten common law of the usage and custom of military service as well as regulations and authorized by the President as Commander in Chief of the Armed Forces.").

[87] *Id.*

[88] 10 U.S.C.S. § 892, art. 92.

case, if military personnel disobey orders, they do so at their own peril because they are supposed to presume that the orders from their superiors are lawful.[89] Military responsibility for each member goes beyond following orders, as evidenced by the oath they take.

Upon enlistment, military personnel take an oath to "support and defend the Constitution."[90] Since the Constitution is held in such high regard even to be a part of an oath upon enlistment, military personnel might have a reasonable expectation that they can rely on the Constitution to safeguard certain rights for them, within reason. It seems obvious that the military personnel should expect to sacrifice certain things upon enlistment. Their Code is a separate legal entity, and even though it is subject to the authority of Congress, the legal aspect is carried out in their own military courts. Service members are also obligated by the oaths that they take upon enlistment. They also give up many aspects of their individuality because they are subject to regulation grooming and uniform standards.[91]

Even with an emphasis on uniformity in the military, there is recognition of aspects of individuality. For the purposes of this note, the most important recognition is of religious beliefs and practices. The military has chaplains that conduct religious services and provide religious counseling for their adherents. The military also classifies military personnel by religious beliefs on their identification tags.[92] In 1996, Congress allowed that military personnel can wear religious apparel while wearing their

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[89] Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 108 (citing United States v. Calley, 48 C.M.R. 19 (1973) (holding that "just following orders" does not exonerate a soldier for unlawful behavior); *See* MCM, Part IV, P14(c)(2)(a)(i) (stating that "an order requiring the performance of a military duty [] may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order . . .").

[90] 10 U.S.C.S. § 502.

[91] Rod Powers, *Army Grooming Standards for Men and Women*, THE BALANCE, https://www.thebalance.com/army-grooming-standards-3331780, (last visited November 6, 2016) (accepting many hairstyles as long as they are neat and conservative, such that there is a certain uniformity among military personnel and so the wearing of protective gear is not interfered with).

[92] Lt. Col. David S. Bowerman, *What's on Your Dog Tag?*, U.S. ARMY, Apr. 1, 2014, https://www.army.mil/article/123034 (arguing that religious belief is a big part of one's identification since it goes on one of four lines that sum up a military service member on his or her identification tag. "Spirituality is not just a belief in a higher power, but includes beliefs, ethics and values, even a sense of what is fair.").

uniform.[93] So, while it is clear that the military has a strong interest, and even need, for a certain amount of conformity and for obedience, it is also evident that religious beliefs are recognized as an important right for every individual in this country, whether civilian or military personnel.

The military is different from other employers in its organization and goals, which gives the military different interests to consider when religious accommodations are requested. For example, the military could use their interests in national security, good order, and discipline to keep military personnel from acting in discriminatory and harmful ways.[94] This is important for the military to consider because they require unit cohesion and for their personnel to follow orders, not only for the military to run smoothly, but also for the safety of the service members. These interests are important to be aware of now that RFRA is applied to the military with full force, which means the government must show these compelling interests once a claimant establishes a prima facie case of the military burdening his or her religious freedom.

Prior to *Smith*, military regulations that had an impact on personnel's religious freedom were analyzed under the submissive "rational basis" test.[95] This judicial scrutiny is the lowest standard and defers to the government interest. While Congress was considering RFRA there was a debate over "[w]hether that statute should reverse not merely *Smith*, but also the military [] decisions, and apply the compelling interest standards to those contexts as well."[96] As noted previously, RFRA applies to the military with full force.

Similar to the requirement for military subordinates to follow the orders and policies of their superiors, the military

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[93] *Religious Diversity in the U.S. Military*, MLDC ISSUE PAPER # 22, https://www.secular.org/files/mldc-ripsdemographics_0.pdf, (last visited November 6, 2016) (stating that the accommodation cannot have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline).

[94] *See James*, 139 F. Supp.3d at 410 (showing the court using the military interest in discipline to keep a service member from discriminating against a same-sex marriage through his religious beliefs).

[95] Berg, *supra* note 56, at 1302 (referencing Goldman v. Weinberger, 475 U.S. 534 (1986) (holding that military rules requiring uniformity could prohibit an Orthodox Jewish officer from wearing a yarmulke, even though he only did administrative work during peace time).

[96] *Id.* at 1303.

overall must answer to the separate branches of government.[97] The court holding there was no compelling interest "to justify prohibiting Catholic chaplains from urging their servicemen parishioners to write to Congress in support of anti-abortion legislation, since there was no showing that this would create 'political conflicts' among troops" is evidence of the military's requirement to answer to the separate branches of government.[98] The Supreme Court has specifically reversed previous holdings by protecting military personnel who wear religious apparel, granted that it does not obstruct the performance of a soldier's duties and is kept neat.[99] This shift has protected religious practices of military personnel within reason.[100]

This shows there is precedent for religious claims of military personnel being analyzed under strict scrutiny.[101] Still, there are notable compelling interests of the military as a government organization that safeguard against any abuse or unreasonable claim. For these reasons, it is obvious the court should have analyzed Lance Cpl. Sterling's claim under strict scrutiny. A full and proper RFRA analysis would not only leave a better opinion, but one that would be much less likely to be overturned in the future.

The military struggles with how to handle First Amendment claims, especially when the claims involve religious beliefs and practices of an individual. This problem arises because "[t]he American military is designed around uniformity and mission accomplishment, and these twin goals inevitably run counter to the desires and personal practices of the individuals

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[97] Major Adam E. Frey, *Serving Two Masters: A Scheme for Analyzing Religious Accommodation Requests in the Military*, 74 A.F. L. REV. 47, 51 (2015).

[98] Berg, *supra* note 56, at 1304.

[99] *Id.* at 1310.

[100] *Id.* at 1311 (noting that RFRA's compelling interest test governs, and when applying it courts give deference to military's interests but will not approve "mere speculation [or] exaggerated fears.").

[101] *See* Singh v. McHugh, 109 F. Supp. 3d 72 (D.C.D.C., 2016) (holding temporary religious accommodation of allowing turban and beard for plaintiff enrolling in ROTC would not hinder the compelling government interest); Emma Green, *Coming Soon to the U.S. Army: Turbans, Beards, Hijabs, and Dreadlocks*, THE ATLANTIC, Jan. 4, 2017, https://www.theatlantic.com/politics/archive/2017/01/coming-soon-to-the-us-army-turbans-beards-hijabs-and-cornrows/512204/ (showing how the Army created a new regulation to allow beards, turbans, hijabs, and cornrows without requesting an accommodation in the aftermath of cases such as *Singh*).

who make up the armed forces."[102] While military commanders have a public policy interest in unit cohesion, there is a tension with not accommodating religious practices as it may cause "resentment or resistance" for the individual service member.[103] Further, there can be concerns of the larger American public questioning why an institution dedicated to upholding the Constitution would not give their ranks the benefit of the protections accorded in its clauses.[104]

The first step for a service member to practice his or her religion, as he or she feels obligated, is to request a religious accommodation from his or her commander. This request is to be analyzed through RFRA.[105] In addition, the military must refer to the Department of Defense's Instruction (DoDI) 1300.17 – Accommodation of Religious Practices Within the Military Services.[106] DoDI 1300.17 is framed in the Free Exercise Clause and RFRA.[107] It states the compelling government interest for the Department of Defense is "a military requirement that is essential to accomplishment of the military mission."[108] This article defines exercise of religion as "[a]ny religious practice(s), whether or not compelled by, or central to, a system of religious belief."[109] Further, it calls for Military Departments to accommodate individual expressions of sincerely held beliefs "[i]n accordance with section 533(a)(1) of Public Law 112-239 . . . unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline."[110] This seems to give deference to the religious beliefs and practices of military personnel, but as noted above, the courts usually yield to the interests of the military.[111]

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[102] Frey, *supra* note 96, at 49.

[103] *Id.*

[104] *Id.*

[105] Frey, *supra* note 96, at 58.

[106] *Id.* at 61.

[107] *Id.* at 50.

[108] U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES, §(3)(G) (10 FEB. 2009). http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf, (last accessed Feb. 18, 2017) (explaining policy, procedures, and responsibility of commanding officers in granting or denying religious accommodations; modified on January 22, 2014).

[109] *Id.* at §(3)(f).

[110] *Id.* at §(4)(b).

[111] Berg, *supra* note 56, at 1311; *See*, Frey, *supra* at 96, at 63 (stating that, "It is critical for commanders and legal practitioners to realize that the DoDI specifically deals with "requests" for accommodation rather than a presumptive surrender to the individual member's needs. That is, the member cannot produce

Next, the accommodation is either granted or denied. If it is granted, there is obviously no need for any further steps. But, if the religious accommodation is denied and the service member faces a charge for offending military law, he or she can have the claim for religious accommodation reviewed in the court. If the service member shows a substantial burden on his or her religious exercise, then a RFRA analysis applies.[112] *Goldman* shows that courts are not required to grant religious exemptions,[113] and the military can still stand by denials because of a strong interest in a "uniformed, disciplined force."[114]

At the same time, it is important to recognize the competing interests when analyzing these claims, especially when they are presented to a court since the public can see how these cases play out. There must be consideration of whether the denial substantially burdens the service member, and also if the denial might cause resentment or rebellion, which would further harm the goal of unit cohesion.[115] The public may also take issue with denials of what could be perceived as First Amendment liberties since the military is supposed to uphold the Constitution. This fear could also discourage people from joining military forces if they have a strong desire to keep a wide breadth of religious liberty.[116] But, the military has its own concern in ensuring there is a well-functioning unit.

Additionally, the military must use the least restrictive means in obtaining their compelling interest. Ultimately, "[t]he DoDI is written broadly enough that in many situations, commanders and other deciding officials have wide discretion in determining whether an accommodation can be granted."[117] This wide discretion gives the government the ability to grant many accommodations and avoid litigation all together. This would be too broad, but it does leave an idea of when the government should pick their battles with respect to religious accommodations for military personnel. With this background of RFRA and a cursory

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his or her religion as a trump card which automatically negates any command order or policy.").

[112] Frey, *supra* note 96, at 63.

[113] Berg, *supra* note 56, at 1302.

[114] Frey, *supra* note 96, at 90.

[115] *Id.* at 93.

[116] *Id.* at 94 (posing the question "[w]hy not allow religious adherents to maintain their identity while in uniform as long as religious garb and appearances are neat, conservative, and do not interfere with health and safety?").

[117] *Id.* at 112.

look at how the military works, there is enough of an understanding to analyze how *Sterling* should have really been argued and ultimately decided.

V. THE PROPER ANALYSIS FOR *STERLING*

As discussed above, the majority opinion in *Sterling* stated that Lance Cpl. Sterling had not made out a claim because she had not notified her superiors of her religious belief and because this conduct was not a central aspect of her belief as a Christian. While that would be wholly unacceptable in a civilian's case, it was accepted in *Sterling* because "someone refusing to obey a lawful order should have to give a reason," which in this case would be done through the religious exemption.[118] As for the centrality of the practice, it is more plausible in the military context because "serving in the military requires a degree of conformity and obedience absent from any other context."[119]

While the arguments of conformity and obedience do hold water in the military context, it is important to note that the Court never fleshed out these ideas in a comprehensive manner, which leaves the question of whether the Court fully considered these as their reasoning for the ruling. Further, this still does not explain why Lance Cpl. Sterling was essentially barred from a legitimate RFRA claim, when the Court even noted she was not barred for lack of giving notice.[120] Also, obedience and some level of conformity is clearly necessary in the military, but in looking at the full extent of the circumstances it does not seem like this claim of religious practice was so severe that it needed to be quashed, while the workspace was shared it was not public and the Staff Sergeant seemed to take more of a personal issue with the signs by noting that she did not like the "tone."[121]

Additionally, Lance Cpl. Sterling faced a court-martial for other charges.[122] It should be noted that letting the Biblical quotes be recognized as a legitimate religious practice would not let her escape these other charges. It also seems valuable to note that Lance Cpl. Sterling presented her own case, and did not seem to

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[118] Feldman, *supra* note 18, at 2.

[119] *Id.*

[120] *Sterling*, 75 M.J. at 419.

[121] *Id.* at 410 (stating that the words in the context of the office environment could be seen as "combative in tone").

[122] *Sterling*, 2015 CCA LEXIS 65 at 1.

fully understand all of the legal implications and arguments.[123] It also does not mean that the military would automatically lose the case; they could potentially still be found to have a compelling interest. The Court could have and should have given a full RFRA analysis, or at the very least a better explanation of why the military is so different regarding the application of RFRA claims. It would be the only way to truly settle the case.

It has been noted that placing limits on active-duty personnel's religious freedoms cut against recent trends in Supreme Court jurisprudence.[124] This trend is seen in the history that surrounds RFRA, which was brought about in the wake of *Smith* to safeguard religious practices.[125] As discussed above, RFRA requires an application of strict scrutiny when analyzing whether the government or an organization can limit an individual's religious freedom. RFRA has a broad application as it is applied in cases that implicate the Free Exercise Clause. Again, it is important to note that the Court has stated that religious freedom applies to the military with full force.[126]

With RFRA being established as an act, with such a broad application, any limit would be notable. But it also leaves the question of whether not allowing Lance Cpl. Sterling to put modified biblical quotes in a shared workspace is truly a limit on her religious freedom. It would not be a limit on the application of RFRA in two circumstances; namely if posting the biblical quotes would not qualify as a religious practice or if the government had a compelling interest in keeping Lance Cpl. Sterling from posting these biblical quotes in her shared workspace.

Since the definition of religion is so broad it is likely Lance Cpl. Sterling's biblical postings would be regarded as a legitimate religious practice in most circumstances. These postings are obviously religious in nature since the words came from Isaiah 54:17.[127] While Sterling did not allude to any requirement from her religious belief to post the biblical quotes, it was something she reasonably felt she needed in her workspace to remind her of her beliefs and give her strength to get through the day. There is

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[123] Feldman, *supra* note 18, at 1.

[124] *Id.*

[125] *Infra*, Section C (showing the trend moving from the limits in *Smith* toward a broader understanding of religious practices and how to safeguard them).

[126] *Sterling*, 2015 CCA LEXIS 65 at 1.

[127] Isaiah 54:17 (King James) (stating "No weapon that is formed against thee shall prosper; and every tongue that shall rise against thee in judgment thou shalt condemn. This is the heritage of the servants of the Lord, and their righteousness is of me, saith the Lord.").

precedent that shows the Free Exercise Clause embraces "two rights: the right to believe in whatever religion one chooses, and the right to choose how to practice the religion."[128] This leaves room for Sterling to argue the biblical postings were how she felt obligated to practice her religious beliefs. Accommodating this practice would not be difficult for the military.

The Court noted that religious exercise is defined to include "any exercise of religion whether or not compelled by, or central to, a system of religious belief."[129] There is even reference to a case that states, "[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[130] But the court argues there are limits on the application of the Free Exercise Clause; they reject "subjective ideas about religious practices."[131] Even though the court has arguments against Sterling's practice as a viable religious practice that can be safeguarded by the Free Exercise Clause, they should still run through the strict scrutiny analysis to solidify the case. Especially considering that one of the cases the court bases its conclusion on also notes that "[c]ourts are not arbiters of scriptural interpretation."[132]

As it stands, there is room for disagreement, which is clearly evidenced by the opinion of the dissent. Reasonable minds can, and apparently do, disagree about whether Sterling's biblical quotes are a reasonable and legitimate religious practice. This leaves an uncertain opinion for future cases regarding religious claims in the military. If the court had successfully analyzed a compelling interest for the military in preventing Sterling's

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[128] Wendy S. Whitbeck, *Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821, 824 (1994) (referencing Connecticut v. Cantwell, 310 U.S. 296 (1940) which held a statute prohibiting religious or charitable solicitation violated the concept of religious liberty when Jehovah's Witness's were prosecuted for their religious practice); *See*, Sterling, 75 M.J. at 52-56 (looking at the Cantwell Court's explanation – that one is not forced by law to have any particular creed or practice, and that it safeguards the free exercise of the chosen form of religion).

[129] *Sterling*, 2015 CCA LEXIS 65, at 15 (citing U.S.C. § 2000cc-5(7)(A)).

[130] Fowler v. Rhode Island, 345 U.S. 67, 70 (1953), (referencing Hernandez v. Commissioner, 490 U.S. 680, 690 (1989); Employment Division v. Smith, 404 U.S. 872, 887 (1990) for the conclusion that it is not the role of the courts to decide the centrality of particular religious practices of a faith).

[131] *See Employment Division*, 494 U.S. at 909 (referencing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). Solidifying the opinion by stating that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." Thomas v. Review Board of Independent Employment Security Division, 450 U.S. 707, 713 (1981)).

[132] *Id.* (looking at *Thomas*, 450 U.S. at 716).

religious practice that was narrowly tailored, it would have left a stronger opinion that would be less likely to be overturned in the future.

The proper analysis for Lance Cpl. Sterling's claim would not have merely focused on whether her posting biblical quotes was a legitimate religious practice or not.[133] It would have gone beyond alluding to the military interest[134] and completed a RFRA analysis. This would involve explaining the compelling government interest and showing how it was applied in the least restrictive means possible. As stated earlier, this would have left a stronger opinion and precedent for others to follow.

To start, Sterling's claim regards her religious practice of posting biblical quotes in her workspace.[135] It is to her detriment that she did not put in a request for this as a religious accommodation at any point in time, nor even reference the quotes as bible passages when being reprimanded by her superior.[136] Further, as discussed above, there are debates about whether this is a viable religious practice.[137] There are strong arguments for this being a religious practice as Sterling explains these were biblical quotes, and she placed three of them in her workspace to signify the Holy Trinity to remind her of her beliefs.[138] Further,

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[133] *Sterling*, 75 M.J. at 416 (noting that the majority admits the record does not address whether Lance Cpl. Sterling's conduct was based on a "sincerely held religious belief" or if the conduct was merely motivated by animosity toward her chain of command).

[134] *Id.* at 414 (referencing *Manual for Courts-Martial, United States* pt. IV, para. 14.c.(2)(a)(iv) (*MCM)* by stating a "[l]awful order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service.").

[135] *Id.* at 416-17 (looking to the majority showing the NMCCA's analysis on one hand which "emphasizes the nonreligious basis for the signs", and showing on the other side that whether her conduct is a sincerely held religious belief is a factual inquiry "beyond the purview of this court").

[136] *Id.* at 410 (showing that Lance Cpl. Sterling was not following a system put in place that works to safeguard religious liberty while still working toward the military interest of unit cohesion, and possibly showing her disregard for her superiors); *Id.* at 38 (noting that even the dissent concedes Lance Cpl. Sterling may not have succeeded on the merits based on the facts of her case).

[137] *Infra*, Section E (showing there are debates about this being a viable religious practice since the majority and dissent cannot come to the same conclusion on this issue; therefore "reasonable minds . . . disagree").

[138] *Sterling*, 75 M.J. at 423 (J. Ohlson, dissenting) (states that a service member need only prove he or she is conducting him or herself in a way that is sincerely inspired by religion (citing Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2774)).

there is an argument in favor of Sterling's practice being protected since Representative Solarz wrote the bill to protect minority and mainstream religions, and discussions showed that it was intended to cover extensive religious practices that were important to the individual.[139] It is a reasonable practice related to Christian beliefs that would place an undue burden on the military if it was accommodated. For arguments sake, and again a stronger opinion, this is a religious practice and a RFRA analysis follows.

In the presumption that Lance Cpl. Sterling's postings of the altered biblical quote was a legitimate religious practice, her next step in the case would be to show that this religious practice, which was from her sincerely held belief, was substantially burdened by the military. While RFRA does not define "substantial burden", and the majority in *Sterling* is not much help in clarifying what it means to substantially burden a claimant's religious belief.[140] The dissent makes a compelling argument in defining "substantial burden".[141] Yet, while the dissent argues Lance Cpl. Sterling should be given a full RFRA analysis Judge Ohlson does not make any specific reference as to how Sterling's religious belief is substantially burdened.[142] Based on the pieces the majority and dissent leave behind, it can be argued that Sterling's religious belief was substantially burdened because she had a legitimate religious belief which inspired her to post the quotes. Then it would show that she was considerably oppressed from expressing that religious belief when she was told that she must take the signs down from her work station. In having a sincerely held religious belief, which the government substantially burdened, Sterling would now have a prima facie case and the analysis would move to the next step.

As stated earlier, once the claimant establishes a prima facie case the burden shifts to the government to prove the order

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[139] *See* Whitbeck, *supra* note 36, at 49 (noting there are lots of religious practices that are not obligatory, but that is not a substantive limit on the application of RFRA).

[140] *Sterling*, 75 M.J. at 416-18 (showing the court explains substantial burden as when the claimant is limited from something important to her exercise of religion or causing her to "abandon the precepts of her religion," without giving examples of how to prove something is "important to the exercise of religion").

[141] *Id.* at 423 (citing Black's Law Dictionary 1656 (10th ed. 2014) Substantial" is traditionally defined as "[c]onsiderable in amount," and "burden" as "[s]omething that hinders or oppresses").

[142] *Id.* at 426-27 (arguing instead what the issue was with the majority's substantial burden analysis in regard to RFRA, and showing that the definition should not be so narrow).

was lawful.[143] This would require the government to go beyond the presumption that military orders are lawful and show that the order to remove the signs passes strict scrutiny.[144] To pass strict scrutiny the order must have a compelling government interest which is narrowly tailored in the least restrictive means to achieve that goal.[145] The military does have a sufficient interest in good order and discipline since it promotes unit cohesion, morale, and usefulness of military members and the command structure.[146] While good order and discipline should not curtail religious liberties of the nation's service members,[147] it could be argued that promoting good order and discipline would further unit cohesion and this would create the conditions for all the military service members to be safe and effectively carry out missions that implicate our national security. The government could support this idea of a different compelling interest in military cases since military adjudication is different.[148]

The government could advance their argument by looking at *Wilson*.[149] In this case the service member had what could be argued as a legitimate religious basis for his viewpoints,[150] but he was not allowed to use military property to promote this viewpoint in a way that discriminated agaisnt another service member. Specifically, his email that the "homosexual wedding was . . . wrong on so many levels. [] Our base chapels are a place of worship and [the wedding is] a mockery to God and our core military values."[151]

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[143] *See* Legal Information Institute, *supra* at 75.

[144] *Sterling*, 75 M.J. at 413 (citing United States v. Ranney, 67 M.J. 297 (C.A.A.F. 2009), which was later overruled by United States v. Phillips, 74 M.J. 20 (C.A.A.F. 2015) and led to the requirement of the order having a valid military purpose that is clear and narrowly drawn, such that it does not conflict with military personnel's statutory and constitutional rights).

[145] *Sherbert*, 374 U.S. at 407-408.

[146] *Sterling,* 75 M.J. at 416.

[147] *Id.* at 420.

[148] *See* Parker v. Levy, 417 U.S. 733 (1974) (discussing how the process of military adjudication differs in a case where a service member urging black men not to enlist during the Vietnam War was conduct that prejudiced the good order and discipline of the Armed Forces).

[149] *James,*139 F. Supp.3d at 410.

[150] *The Family: A Proclamation to the World*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.lds.org/topics/family-proclamation?lang=eng&old=true, (last visisted Sept. 1, 2016) (stating beliefs that family duties are between a man and woman, that marriage between a man and woman is essential to God's plan, and individuals who violate these vows will one day stand accountable before God).

[151] *Wilson*, 139 F. Supp. 3d at 418.

Just as the service member in *Wilson* should was not able to use military property to negatively impact other service members in testament to his religious beliefs, the government could argue that Lance Cpl. Sterling should not be able to do so either. This could be argued based on the facts that Sterling had a number of issues with her commanding officers and other service members she worked with.[152] Based on this background it could be seen why the words "No weapon formed against me shall prosper" would be seen as "combative" and caused Sterling's Staff Sergeant to feel the Sterling was simply acting counter to the good order and discipline that the military requires.[153] Sterling's apparent inability to get along with her unit reasonably caused concern for her commanding officers since they have a goal of promoting unit cohesion.

Once the government shows their compelling interest, the next thing the government would have to prove would be that they "burdened" Sterling in the least restrictive means possible.[154] The government would have a strong argument on this point based on the particular circumstances of this case. The relevant information to consider is that Sterling neither requested an accommodation, nor informed her commanding officers at any point in time that the signs were religious in nature.[155] Additionally, the government can also rely on the concern of Sterling's commanding officers that she did not have a good relationship with the rest of the unit.[156]

Based on these facts the government can argue that this is a very specific case in which they limited a service member's religious practice. The government can argue this was only a limitation on someone who had a negative attitude and was acting counter to the good order and discipline that the military was working to ensure. Also, the government can show that her attitude in conjunction with not properly filing for an accommodation or ever mentioning that the signs were religious in nature are the reasons for not having to allow this accommodation later. The argument would have to be that this is evidence of Sterling's insubordinate behavior, and not that she was required to give notice of the religious practice to show that it was a legitimate one. This is further supplemented by the fact that Sterling posted these signs in a shared workspace on military

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[152] *Sterling*, 75 M.J. at 411-412.
[153] *Id.* at 410.
[154] *Sherbert,* 374 U.S. at 398.
[155] *Sterling*, 75 M.J. at 414.
[156] *Id.* at 411-412.

property.[157] It is a specific case and that shows it is narrowly tailored. Even in creating a standard based off these facts it would still be one of the least restrictive methods of furthering the interest of good order and discipline.

The last thing to consider in a proper RFRA analysis would be balancing the interests. The relevant interests to balance would be Lance Cpl. Sterling's religious freedom, with the government's interest in good order and discipline, and considering health, safety, public welfare.[158] To reiterate, Sterling's interest is in her religious freedom to be able to post these signs in her shared workspace to encourage her during her workday. The government's interest is in good order and discipline in the military to have a well functioning unit. The public interest could go either way depending on the case. The public welfare could benefit from religious tolerance and being more inclusive, or it may suffer from allowing people to discriminate through their religious beliefs and practices.[159] In the present case it seems the public interest would favor the type of religious practice that Sterling is trying to have protected under RFRA, since in most circumstances posting biblical quotes would not be a harmful practice. But the public interest would also be affected by the fact that this case occurs in the military context, as public safety would err on the side of encouraging military service members to follow orders and be a well functioning military.

Looking at all of the aspects of the proper RFRA analysis for Lance Cpl. Sterling's case it seems there is some room for debate, such that reasonable minds may differ. Once all the different facts and circumstances are considered it is clear how the court split over this case. While the majority may have gotten it right in this specific case, a full RFRA analysis would have clarified why it was right and given a better standard for subsequent cases. Sterling's claim should not have succeeded because of her behavior and since she repeatedly disobeyed

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[157] *Id.* at 418.

[158] *Infra*, Section C (stating that a proper RFRA analysis appropriately balances religious freedom with interests in health, safety, public welfare and other compelling interests).

[159] *See Wilson*, 139 F. Supp. 3d; *See also,* Howard M. Friedman, *10 Things You Need to Know to Really Understand RFRA in Arkansas and Indiana*, THE WASHINGTON POST, Apr. 1 2015, https://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/01/10-things-you-need-to-know-to-really-understand-rfra-in-indiana-and-arkansas/?utm_term=.1b8831848b32, (showing amendments in Indiana that allow people to refuse services to the LGBT community without applying for religious accommodations).

orders.[160] Her behavior was clear against good order and discipline and that worked against her in bringing a legitimate claim for religious protection.

Still, the dissent was correct in picking apart the majority's substantial burden analysis in regards to RFRA.[161] If the majority's approach was followed in subsequent cases involving RFRA claims it would create too high a burden for claimants to succeed in bringing a prima facie case, and "curtail[] the religious freedom of our nation's service members."[162] RFRA intended to bring protections to people in their religious freedom, and it would be counter to the framework of that legislation to impose more limits on claimants such that it would be unnecessarily difficult to even establish a prima facie case.

VI. CONCLUSION

It would be inappropriate to allow this blanket statement of the majority, which imposes these additional requirements on a claimant to show how his or her belief was substantially burdened, to be applied in the military context.[163] This would create an environment that would be less tolerant, and would counter the goal of the military in having unit cohesion.[164] It would also push back some progress the military has made to be more inclusive.[165] Accepting and respecting different aspects of people's identities encourages tolerance, which is a better environment for service members to work together. This would not be a threat to the military goals, but would assist in furthering those goals. In any aspect of society, particularly one that relies heavily on collaboration of a large group, it is important to keep in mind the value of inclusion of diverse peoples; with this, the military should implement reasonable standards that make it easier for people to

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[160] *Sterling,* 2015 CCA LEXIS 65 at 1-2.

[161] *Sterling*, 75 M.J. at 426-28.

[162] *Id.* (requiring the practice be "important to the belief", creating a new notice requirement, requiring service members to follow the accommodation framework to be able to bring a claim, and a misunderstanding of substantial burden are different standards that would impair military personnel in protecting their religious freedom).

[163] *Id.*

[164] MLDC Issue Paper *supra* note 92.

[165] *See McHugh*, 109 F. Supp 3d at 72; *see also* Christopher Mele, *Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice*, THE NEW YORK TIMES, Feb. 10, 2017, https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html.

show certain aspects of their individuality, instead of continuing or creating conditions that require service members to file for all sorts of accommodations or bring claims in court.