**IN THE DISTRICT COURT FOR THE STATE OF ALASKA**
**FOURTH JUDICIAL DISTRICT AT BETHEL**

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| STATE OF ALASKA | | ) |
| | | ) |
| Plaintiff. | | ) |
| | | ) |
| vs. | | ) |
| | | ) |
| BRIAN IVAN, | 4BE-12-627 CR | ) |
| FELIX FLYNN, | 4BE-12-559 CR | ) |
| PETER HINZ, | 4BE-12-575 CR | ) |
| HOWARD NICHOLAI, | 4BE-12-617 CR | ) |
| MICHAEL FRYE, | 4BE-12-567 CR | ) |
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| DANA KOPANUK, | 4BE-12-675 CR | ) |
| TOM CARL, | 4BE-12-604 CR | ) |
| MICHAEL ANDREW, | 4BE-12-602 CR | ) |
| | | ) |
| Defendants. | | ) |
| | | ) |

# *AMICUS CURIAE* MEMORANDUM IN SUPPORT OF THE DEFENDANTS' FREE EXERCISE OF RELIGION CLAIMS

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The American Civil Liberties Union of Alaska ("ACLU of Alaska") submits this conditionally filed memorandum in support of the defendants' claims regarding the defense that their conduct was protected by the Free Exercise clauses of the Alaska Constitution and the United States Constitution. A motion for leave to file the conditionally filed memorandum is simultaneously submitted.

## I. Overview of Case

Based on accounts of the charges, the *amicus* understands that the defendants are some 21 men, all charged with various fishing and fishing gear related offenses, typically cited under 5 AAC 01.270(n). During the summer of 2012, the Commissioner of the Department of Fish and Game completely closed the subsistence salmon fisheries in the lower Kuskokwim River for extended periods, in response to a shortfall in the return of king salmon. The defendants are alleged to have violated these bans on subsistence salmon fishing in June and early July 2012.

The defendants have advanced the claim that their conduct was protected by the Free Exercise Clause of the United States Constitution, the Free Exercise Clause of the Alaska Constitution, and the Religious Freedom Restoration Act (RFRA). U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 4; 42 USC 2000bb *et seq*. For reasons described below, the *amicus* will discuss the defense of religious practice only in light of the Alaska Constitution.

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## II. The Legal Framework on the Free Exercise of Religion

The United States Supreme Court held in *Sherbert v. Verner* that "any incidental burden on the free exercise of appellant's religion" must be justified by a compelling state interest. 374 U.S. 398, 403 (1963). For 27 years, the *Sherbert* test was the basis for evaluating whether facially-neutral laws that incidentally burdened religious practice tended to violate the First Amendment. In 1990, the U.S. Supreme Court reversed itself and announced that was abandoning the *Sherbert* test and holding that religious objection did not exempt a person from compliance with a religiously neutral law that incidentally burdens religion. *Employment Div v. Smith*, 494 U.S. 872, 888 (1990).

Congress was upset that the "Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and passed the Religious Freedom Restoration Act, which statutorily restored the *Sherbert* test. 42 USC 2000bb. The Supreme Court struck down the application of RFRA to state governments as outside the scope of Congressional power. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). The Congress responded by passing a more limited law affecting state governments only, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which is not before this Court. 42 USC 2000cc-1 *et seq*.

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However, the Alaska Supreme Court adopted its own version of the *Sherbert* test under the Alaska Constitution and has not renounced it, even after the U.S. Supreme Court's opinion in *Smith*.

> A valid, neutral, generally applicable law cannot violate the free exercise clause of the federal constitution. The regulation at issue here falls into that category and so is not invalid under the First Amendment. *We apply the Alaska free exercise clause differently.*

*Huffman v. State*, 204 P.3d 339, 344 (Alaska 2009) (emphasis added). The Alaska free exercise clause still requires that the state demonstrate a compelling interest to justify even incidental burdens imposed on religious practice by facially neutral laws. Since the Alaska free exercise clause is at least as protective of individual religious liberty under RFRA or the First Amendment, this memorandum will address the Alaska Free Exercise Clause exclusively.

The test which applies regarding alleged violations of the Free Exercise Clause of the Alaska Constitution is that which was first expressed in *Frank v. State*, 604 P.2d 1068 (Alaska 1979). In *Frank*, an Athabaskan man was charged with shooting a moose out of season. *Id.* at 1069. He raised as a defense the claim that his conduct was religiously compelled, because he shot the moose so that he could bring moose meat for a funeral potlatch. *Id.* The Alaska Supreme Court found in his favor, finding that the conduct was "deeply rooted in" religious practice, the defendant's religious belief was "sincere," and the state had failed to

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show that granting exemptions to those sincerely seeking religious exemptions would negatively affect a compelling state interest. *Id.* at 1072-74.

The *Frank* test was restated later as having two components. First, the claimant must show "a religion [is] involved, the conduct must be religiously based, and the claimant must be sincere." *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001). If the claimant meets this burden, the Court must then consider whether the religious practice poses a threat to public peace or safety, or whether "competing governmental interests that are of the highest order and [are] not otherwise served." 34 P.3d at 958.

## III. Salmon Fishing is a Long-Standing Practice with Deep Roots in Yup'ik Religious Beliefs and Understandings About the Universe

Throughout the Pacific Northwest, the cultures and religions of many Native American and Alaska Native tribes are organized around the salmon harvest. The Ninth Circuit recognized that the "diets, social customs, and *religious practices* [of tribes living west of the Cascades] centered on the capture of fish." *United States v. State of Wash.*, 520 F.2d 676, 682 (9th Cir. 1975) (emphasis added). For members of such tribes, including the Yup'ik, salmon fishing is more than a mere way of getting food, interchangeable with going to the supermarket.

Instead, a Yup'ik fisherman on the Kuskokwim today fishes as part of a seamless, continuous tradition dating back hundreds and thousands of years. These traditions reflect more than just an effort to get as many fish in as little time as

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possible: instead, the traditions rely on the fisherman making the right acts with the right mindset to maintain the balance in the Yup'ik cosmology. Fishermen who adhere to these traditions ensure that the salmon will continue to return to the river in the future.

**A. Traditional Yup'ik Beliefs Meet the Basic Definition of a Religion**

Yup'ik traditional beliefs constitute a religion, within the meaning the Free Exercise Clause. Courts considering this question have traditionally looked at "how broad and fundamental an individual's set of expressed beliefs are by considering factors such as whether the premises of the religion relate to ultimate questions and whether there are rituals or other activities associated with it." *Huffman*, 204 P.3d at 345. Yup'ik traditional beliefs have deep origins in the community and have been widely studied by academics. These traditional beliefs express a particular understanding of the universe and how individuals relate to the universe, as well as the animals in the universe.

"Eskimo cosmology . . . was originally founded on the assumption of an undifferentiated universe, wherein human attention to the rules was an act of participation necessary both to create difference and maintain connections."[1] The Yup'ik traditional beliefs regarding animals and how humans should interact with them reflected a sophisticated balance of the personhood of the human hunter and his prey. "The differentiation of persons into humans and nonhumans was for

[1] Ann Fienup-Riordan, *Boundaries and Passages: Rule and Ritual in Yup'ik Eskimo Oral Tradition*, at 48 (1994 University of Oklahoma Press).

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Eskimo peoples at the foundation of social life. . . . Once the initial differentiation between human and nonhuman persons had been established, their relationship in perpetuity depended on their carefully regulated interaction."[2]

Yup'ik beliefs about animals and humans directly addressed these "ultimate questions" that define a religion. "Yup'ik cosmology . . . presents human and nonhuman persons as engaged in a constant cycle between birth and rebirth. . . ."[3] The supreme being in Yup'ik belief is the *Ellam Yua*, the spirit of the air, who monitored the system of cultural taboos around taking food animals and punished the breaking of those taboos with bad weather and starvation.[4] In Yup'ik cosmology, every person and animal had a *yuk*, meaning roughly, a soul; also referred to as *yua*, or its own soul.[5] A system of traditional beliefs relating to life and death, souls, the afterlife or reincarnation, fits the basic definition of what constitutes a religion for Free Exercise clause purposes.

**B. The Practice of Salmon Fishing is Deeply Rooted in Yup'ik Religious Beliefs**

Yup'ik beliefs regarding the practice of salmon fishing are "deeply rooted" in their religion and their understanding of the universe. For Free Exercise clause purposes, the term "deeply rooted" does not mean essential or required. *Frank*, 604 P.2d at 1072 ("[A]bsolute necessity is a standard stricter than that which the

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[2] Fineup-Riordan, at 48-49.

[3] *Id.* at 49.

[4] Susan Hansen, *Yupik Eskimo Cultural History and Lore from the Lower Yukon River: Oral Traditions and Their Associations with the Land*, at 88 (1985).

[5] *Id.* at 51.

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law imposes."). In a related federal standard, conduct "motivated by sincere religious belief" need not be central to one's religion to gain protection under the free exercise clause, nor would courts be equipped to make such a determination. 494 U.S. at 887 ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). As long as conduct is "religiously based," the second provision of the *Frank* test is met. *Sands*, 34 P.3d at 959.

While mainstream Western beliefs may focus on particular religious ceremonies, holidays, or special acts as defining what "religion" is, many court decisions have recognized as "deeply rooted in religion" or "religiously based" acts that go far outside the mainstream. Of course, as the nearest analogue, *Frank* recognized that the taking of moose had a religious angle, although the moose hunt in *Frank* was a single instance and oriented around a particular ritual.

That the moose taking in *Frank* was oriented around a particular ritual does not show that the salmon fishing here is not rooted in religion. The Alaska Supreme Court in *Sands* also declared that the "shunning" practice of Jehovah's witnesses was deeply rooted in religion. 34 P.3d at 959; *see also Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 876 (9th Cir. 1987) (finding that "shunning" was a religious practice"). The practice of "shunning" is a form of social ostracism that requires members of a religious community to refuse to greet, speak to, or otherwise acknowledge the existence of

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a former member of the community. *Paul*, 819 F.2d at 876-77. Like taking salmon, the practice of shunning might occur on a daily basis and is not focused around any particular religious ceremony; instead, shunning constitutes a religious practice because it is an outward expression of the community's values, rooted in their religious beliefs.

Similarly, the day-to-day keeping of a bear by a Native American was found to be a religious practice worthy of protection by the federal Free Exercise clause. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 213 (3d Cir. 2004). A federal court also found that an abortion protest was within the scope of the federal Free Exercise clause because the protest was "deeply rooted" in the individual's religious belief. *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009). Because courts are not in the business of declaring religious orthodoxy, "the claim of the [individual] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965).

"[T]he people of the Yukon-Kuskokwim Delta . . . still have strong feelings associated with subsistence foods. And deeply embedded in these ties with the land and the subsistence cycle are elements of the old religious and spiritual beliefs."[6] At the heart of the Yup'ik religious understanding of hunting and fishing is the notion that both animals and humans engaged in a "collaborative reciprocity by which the animals *gave themselves* to the hunter in response to the hunter's

[6] Susan Hansen, *Yupik Eskimo Cultural History and Lore from the Lower Yukon River: Oral Traditions and Their Associations with the Land*, at 64 (1985).

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respectful treatment of them as nonhuman persons."[7] Thus, the successful Yup'ik fisherman is not a person of great skill, but a person who obeys the traditional laws regarding the treatment of the salmon and who shows the salmon proper respect.[8] Treating an animal's body thoughtlessly, or carelessly wasting or trampling on food will cause the offended animal's *yua* to discourage other animals from allowing themselves to be caught.[9]

A Yup'ik fisherman who is a sincere believer in his religious role as a steward of nature, believes that he must fulfill his prescribed role to maintain this "collaborative reciprocity" between hunter and game. Completely barring him from the salmon fishery thwarts the practice of a real religious belief. Under Yup'ik religious belief, this cycle of interplay between humans and animals helped perpetuate the seasons; without the maintaining that balance, a new year will not follow the old one.[10] The state of Alaska, by intervening to bar salmon fishing, fundamentally disrupts the order of the Yup'ik world, both in its day-to-day practicalities and its overall spiritual harmony between humans and animals.

### C. The Sincerity of Belief Is Essentially an Individual Credibility Question, Which the Court Should Judge on an Individual Basis

Courts may factually inquire whether the individual in question sincerely holds the claimed religious belief. *Frank*, 604 P.2d at 1075 n.14. This sincerity test

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[7] Fineup-Riordan, at 50.

[8] *Id.* at 58.

[9] *Id.* at 89.

[10] Nancy Lee Williamson Sanders, *The Relationship of Spirituality and Health Among the Yup'ik of Southwestern Alaska: an Exploratory Study*, at 40.

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is *not* an opportunity to examine whether the belief is common or orthodox within the individual's claimed religion. *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (rejecting as improper prison's claims that prisoner seeking kosher meals qualified as a Jew under ecclesiastical law and instead looking to the prisoner's frequent definition of himself as a Jew).

Instead, this test is essentially a question of the claimant's truthfulness in his claimed religious purpose. The sincerity requirement, if contested by the parties, typically requires "direct and cross-examination to facilitate a credibility evaluation." *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984). "Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief" or that his professed belief was "a moving target" can tend to show a belief is not sincerely held. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 57 (1st Cir. 2002). Beyond providing these rough outlines of the legal claims, the *amicus* cannot assist the Court further in determining whether any single fisherman's claim is sincere; the Court must judge that sincerity on a case-by-case basis.

## IV. Creating a Religious Exemption Application Permit for Salmon-Taking Would Not Harm the State Interest in Managing the Salmon Population

The *amicus* does not argue that the Free Exercise clause is a license to take as many fish as one wishes, nor that all Yup'ik people are entitled to take unlimited numbers of salmon. Neither did the Alaska Supreme Court find that all

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Athabaskan people could take all the moose they wanted. The Alaska Supreme Court in *Frank* instead held that the state had failed to show that the state's interest in maintaining the moose population would be thwarted if individual religious exemptions were granted. 604 P.2d at 1074. The *amicus*'s argument suggests nothing more than the Alaska Supreme Court required in *Frank*: a system of religious exemption applications that could be evaluated by the Department of Fish and Game. In the absence of even rudimentary consideration for the free exercise rights of Alaskans, the state should not be entitled to prosecute people for practices deeply rooted in their religion and culture for time out of mind.

The state has produced no evidence regarding how many people might apply for a religious exemption from salmon fishing exclusions, if the Department of Fish and Game ("Fish and Game") offered one. "The burden of demonstrating a compelling state interest which justifies curtailing a religiously based practice lies with the state." *Frank*, 604 P.2d at 1074. The state cannot assume that every single person who catches salmon in a subsistence capacity on the Kuskokwim River would automatically apply for and be granted such an exemption. Indeed, the *Frank* court specifically rejected the state's foundationless claims that allowing religious exemptions to the game laws would create anarchy on the affected lands. *Frank*, 604 P.2d at 1074 (rejecting state's anticipation of "general lawlessness").

Indeed, Fish and Game would not be obliged to grant every such application. Since a compelling interest could override the Free Exercise right,

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Fish and Game could respond in numerous ways where the number of exemption applications sought exceed the available stock of fish or game. The state could set up a scheme where Fish and Game could run a lottery of applications to allow a smaller subset of applicants to harvest fish or game, allow each applicant a particular bag limit, or even, where the fishery was totally depleted, deny all the applications. How the state manages any such exemption scheme is not for this Court to decide however. Having made no effort to address the religious needs of the Yup'ik community by creating an exemption application, the state should not be entitled to prosecute the fishermen in the present case, any more than it was entitled to prosecute the moose hunter in *Frank*.

## V. Conclusion

In the present case, the traditional Yup'ik belief system meets the basic definition of a religion. Salmon fishing is deeply integrated in the traditional Yup'ik belief system. The Yup'ik belief system requires the fisherman to act in a certain way, to fish in a certain way, and to respect the fish he harvests. The state's denial of all participation in the salmon fishery significantly interfered with a salmon fishing practice "deeply rooted" in a religious belief. The state has not and cannot bear the burden of showing that a religious exemption scheme would thwart its overall management plan. Therefore, if the Court finds that the fishermen's religious claims spring from sincere beliefs, the criminal complaints in these cases must be dismissed.

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Dated this 11th of February, 2013.

Respectfully Submitted.

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

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| | | ) |
| Defendants. | | ) |
| | | ) |

## CERTIFICATE OF SERVICE

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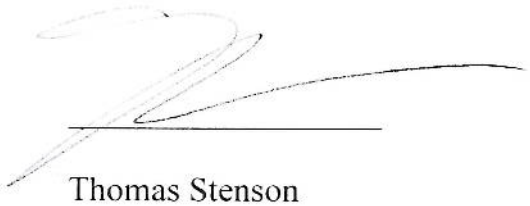
I hereby certify that, on February 11, 2013, I have served by US Mail, upon James Davis, counsel for the defendants, and Chris Carpeneti, District Attorney, a copy of the following documents:

- *Amicus Curiae* ACLU of Alaska Foundation's Motion for Leave to Submit Memorandum in Support of the Defendants' Free Exercise Claims;
- *Amicus Curiae* ACLU of Alaska Foundation's Memorandum in Support of the Defendants' Free Exercise Claims;
- [Proposed] Order Permitting the Filing of the *Amicus Curiae* Memorandum;
- This Certificate of Service.



Thomas Stenson

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IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA )
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FELIX FLYNN )
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PETER HINZ )
MICHAEL FRYE )
PETER BERLIN )
YAGO EVAN ) Case Nos. 4BE-12-559, 617, 575
NOAH OKOVIAK ) 567, 570, 573, 571, 569, 560, 657, 589,
JOHN ALEXIE ) 627, 595, 582, 650, 590, 629, 603, 675,
PATRICK BLACK ) 604, 602 CR
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EUGENE NICHOLAI )
DANA KOPANUK )
TOM CARL )
MICHAEL ANDREW )
)

**DEFENDANTS' BRIEF CONCERNING FIRST AMENDMENT DEFENSE**

The above defendants, by and through the Northern Justice Project, LLC, in accord with this Court's Order of December 6, 2012 hereby file this brief concerning their First Amendment defense.

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## I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

### A. The Yupik People, the Spirit World and King Salmon.

For over 10,000 year, Yupik people have lived in the Kuskokwim area.[1] During this entire time, their lives have been centered on salmon, particularly King Salmon.

The Yupik people believe in a spiritual world where all animals have "yua" or spirits. Yupik people believe that animal spirits offer themselves to worthy people, i.e., a moose will offer itself to a worthy hunter so that the worthy hunter can "catch" the moose and share it with his tribe. The Yupik people consider it offensive to the spirit world to reject an animal's yua. Thus, "catch and release" fishing is considered offensive by Yupik people: the fish spirits are offering themselves to the fishers, but the fishers are rejecting the fish spirits and sending them back into the water, or "releasing" them.

Yupiit believe that animal spirits can be profoundly affected and offended by how Yupiit seek, desire and treat them. For example, a Yupik fisher never tosses the salmon he catches into a boat. Such rough handling will offend the fish's sprit. So, too, a Yupik fisher never wastes any part of a fish. Wasting of any animal will offend

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1 This data is taken from defense counsel's conversations with Yupik Elders as well as from various books, *See e.g.*, Langdon, Steve J., The Native People of Alaska, Greatland Graphics (2008); Ann Fienup-Riordan, Eskimo Essays: Yupik Lives and How We See Them, Rutgers University Press, (1990); Berlo, Janet, Native North American Art. New York: Oxford University Press. (1998). Defendants expect that their experts will testify in accord with this data.

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the animal's sprit and this will mean less of that animal species will present itself to the Yupik people.

How Yupik people seek and desire certain animals directly affect the future availability or scarcity of that animal. For example, if Yupik hunters always hunt muskrat near a village, the muskrat yua will be pleased that they are desired, and there will be more muskrat near that village in the years to come. But, if Yupik hunters stop hunting muskrat near that village, the muskrat yua will be offended that it is no longer desired by the people; it will stop coming to the village. Soon, there will be a scarcity of muskrat near that village. The muskrat will only return if and when the Yupik people begin pursuing them again.

So, too is it with the King Salmon: if Yupik people do not fish for King Salmon, the King Salmon sprit will be offended and it will not return to the river. King Salmon play an even more unique role in Yupiit spiritual life, than do other animals. A King Salmon is the first fresh "meat" after a long winter. Tradition dictates that when a village catches its first King Salmon it is shared amongst all villagers: this tradition unites the villages after a long winter and brings the village together for the coming, important summer subsistence season. Not having this King Salmon to share interrupts and undermines the spiritual life of the Yupiit village.

### B. The Kuskokwim River, King Salmon By-Catch, King Salmon Use by Non-Yupiit.

King Salmon returns have been declining on the Kuskokwim for decades. In response, the State has gradually been reducing the "openings" during which the

Yupiit people (and all other people) living in the Kuskokwim area can try to catch King Salmon.

In 2012, the State took the final step which could be foreseen 10 years ago: the State prohibited the Yupiit people (and all people) living in the Kuskokwim area from trying to catch any King Salmon.

At no time, during this long decline in King salmon returns, did the State ever seek to limit the catching of King Salmon by non-Yupiit in the Kuskokwim area. For example, there are thousands of non-Yupiit people living in Bethel. After one year of Alaska residency, these non-Yupiit are all allowed by the State to use nets to catch as many King Salmon in the Kuskokwim river as they want to. Despite the fact that these non-Yupiit people have no spiritual or religious connection to King Salmon.

It might have been prudent for the State, as the King Salmon returns started declining on the Kuskokwim river, to limit the number of King salmon that these non-Yupiit Bethel residents were catching for their recreation. This would have prioritized the religious and spiritual practices of the Yupiit people vis à vis King Salmon over the recreational uses of King Salmon by non-Yupik people. But the State never did anything of the sort.

There is a second problem. For years, the Pollock trawl fleet off the coast of Alaska has caught and wasted (by throwing overboard after they die) tens of thousands of King salmon, many of which are headed to the Kuskokwim river. The State of Alaska has never taken one step to end this practice. To the contrary, the State usually

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supports the Pollack trawl fleet's request for high by-catch limits.[2] Indeed, the State helps advertise and sell the Pollack,[3] despite the wanton waste of King salmon associated with the catching of Pollack, even though this just leads to an increase in demand for the Pollack and more wasteful by-catch of King salmon, and more harm to the Yupiit people.

Federal law is supposed to protect the rights of Yupiit people to catch King Salmon.[4] The State *could* sue or take other action against the Pollack fishery or the federal government and demand that the protections set forth in ANILCA are complied with and that the rights of the Yupiit people be protected. Indeed, the State has sued the federal government, many times, for various other issues that the State thinks are

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2 *See* Bristol Bay Times, June 13, 2011, "First Ever King Cap Placed On Gulf of Alaska Pollack Fishery," http://www.thebristolbaytimes.com/article/1124first-ever_king_cap_placed_on_gulf_of_alaska ("In its deliberations, the council considered a range of caps from 15,000 to 30,000 kings that would be allowed to be taken as bycatch in the Pollock trawl fishery. This past April, the council selected a preferred alternative of 22,500 fish, signaling the direction intended by the fishery managers. At the Nome meeting, the NPFMC heard testimony from the Pollock industry calling for the least restrictive cap. The council also heard testimony and received a letter signed by over 500 fishermen and coastal Alaska residents urging fishery managers to adopt the preferred alternative, pointing out that this number was already a compromise and represented middle ground. The 22,500 cap would represent an amount higher than the Pollock fleet's 10-year bycatch average. **Fish and Game Commissioner Cora Campbell made the motion to adopt the 22,500 king bycatch cap.**")(emphasis added).

3 *See, e.g.*, http://www.alaskaseafood.org/health/facts/pages/fish-pollock.html.

4 *Ninilchik Traditional Council v. Fleagle*, 2006 U.S. Dist. LEXIS 67753 (D. Alaska Sept. 20, 2006) ("Congressional policy set out in ANILCA requires utilization of Alaska's public lands in a manner which causes **the least possible adverse impact** on the subsistence use of those lands, and elevates the non-wasteful taking of fish and wildlife above all other consumptive uses of such resources.")(emphasis added).

important to the people of Alaska.[5] The State has never, however, demanded that the Pollack fishery, or the federal government, comply with the protections set forth in ANILCA and stop catching King Salmon so as to not undermine Yupiit subsistence. Even the Alaska Journal of Commerce has noted the utter hypocrisy of the State's position.[6]

**C. The Summer of 2012 and the Yupiit Defendants.**

During the summer of 2012, the State's test fishery showed that there would be too few King Salmon coming up river to sustain the run. The State therefore closed the

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5 "Alaska Sues Over Voting Rights Act," Governing, August 28, 2012, http://www.governing.com/blogs/fedwatch/gov-alaska-sues-feds-over-voting-rights-act.html;

"Alaska Sues U.S. Government so that Cruise Ships Won't Have to Meet Environmental Standards," Skift Travel, July 14, 2012, http://www.governing.com/blogs/fedwatch/gov-alaska-sues-feds-over-voting-rights-act.html;

"Alaska Sues U.S. Over Beluga Whale Listing," lawtimesblog,, June 10, 2010, http://latimesblogs.latimes.com/unleashed/2010/06/alaska-sues-federal-government-over-beluga-whale-populations-endangered-listing.html

"Alaska Sues Over Offshore Drilling Moratorium," Alaska Dispatch, September 9, 2010, http://www.alaskadispatch.com/article/alaska-sues-over-offshore-drilling-moratorium.

6 *See, Alaska Journal of Commerce*, "King Closures Expose Double Standard on Bycatch," July 16, 2012, http://www.alaskajournal.com/Alaska-Journal-of-Commerce/July-Issue-5-2012/Editorial-King-closures-expose-double-standard-on-bycatch/#ixzz2KQxjKzay

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Kuskokwim river to all King Salmon fishing. The State did not consider, in any way, whether allowing any Yupik people to engage in any sort of ceremonial King Salmon fishing might be so *de minimis* as to not impact on the run. Instead, the State simple banned all people from catching any King salmon on the river.

The Yupik and tribal representatives with the State's "salmon working group" recommended that a brief opening be allowed for King salmon fishing. The "salmon working group" voted in favor of this proposal. The State rejected it out-of-hand and prohibited the Yupiit from catching any King salmon.

The Yupik defendants in these cases fished in direct violation of State law. Some of these Yupik fishers fished at the direction of their elders. Some of these Yupik fishers fished at the direction of their tribal councils. All of these Yupik fishers fished in accord with their spiritual/religious beliefs. These Yupik fishers defied the State -- even advertising to the State via press releases -- that they would fish in violation of state law. In order to teach theses Yupik defendants a "lesson" about obedience to the State, the State elected to overcharge all of them with criminal misdemeanors (the State historically only charges fish regulation violators with citations). The State also seized the fishers' nets, and their fish and informed them that they all faced the prospect of jail time. The State informed the fishers that they could obtain the return of their fishing nets only if they accepted a plea bargain from the State and pled guilty. The fishermen, by and large, refused the State's offer.

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**D. The Yupiit Defendants' Notice of Their First Amendment Defense.**

On November 5, 2013, defendants first filed a Notice, in accord with Criminal Rule 16. that they would be calling an expert on Yupik culture and religion (Chase Hensel) at the trials set to commence on April 15. Defendants supplemented this Notice with a second Rule 16 Notice, filed on November 24, stating that they would be calling a second expert on Yupik culture and religion, Robert Nick, at the trials set to commence on April 15.

As set forth in defendants' Notices, defendants' two experts will opine that the First Amendment to the Alaska Constitution protects the defendants' right to catch some King Salmon every year because that activity is religious and spiritual in nature, i.e., it is related to Yupiit's ultimate ideas, metaphysical beliefs and moral and ethical systems, and because that activity relates to fundamental and ultimate questions for the Yupiit people, having to do with deep and imponderable matters, and are comprehensive in nature.

In their Notices, defendants stated that that while the State could interfere with Yupiit's First Amendment rights, because of the scarcity of King salmon, there was a critical prerequisite: the State first had to do everything practical to restrict *all* other uses of King salmon. This means the State first had a duty to act to prohibit the Pollack trawl fleet from catching and wasting tens of thousands of King salmon, many of which are headed to the Kuskokwim river. It also means that the State has a duty to first prohibit all other uses of Kuskokwim King salmon by all other people who are not

catching King salmon as part of their spiritual and religious activity. This means, amongst other things, that all non-Yupik people living in Bethel who regularly use nets to catch King salmon every summer as if they were engaged in genuine subsistence activity, but are really just engaged in recreational fishing, must now be barred from catching any King salmon, until and unless King salmon escapement can first be assured and the religious and spiritual needs of the Yupiit people can first be met.

As the Yupik defendants stated in their Notices, the State has done nothing whatsoever as to either one of the above concerns.

**E. The District Attorney's Response to the Yupiit Defendants' Notices Concerning Their First Amendment Defense.**

In response to defendants' Notices, this Court conducted a hearing on November 30. At this hearing, this Court asked the District Attorney how it wanted to proceed. The District Attorney raised no objections or concerns about defendants' Notices.

Instead, the District Attorney stated that it wanted defense counsel to provide it with contact data for defendants' two experts so that the District Attorney could contact those experts and discover more data underlying their opinions. The District Attorney further stated that, after it spoke with defendants' two experts, it might want to file a brief on defendants' First Amendment defenses.

Defense counsel agreed to the District Attorney's request and immediately provided it with contact data for defendants' two experts.

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This Court ordered the District Attorney to file its brief, if any, on January 4, 2013. This would give the District Attorney plenty of time to meet with and converse with defendants' two experts.

The District Attorney did not file its brief on January 4. Instead, on January 4, the District Attorney filed a motion asking for more time, up to January 14, 2013, to allow it to, apparently, converse more thoroughly with defendants' two experts about their opinions. (With this additional time, the District Attorney would have had over eight weeks, since the day that defendants first filed their Notice of their First Amendment defense, to converse with the District Attorney defendants' two experts about their opinions.)

Finally, on January 14, the District Attorney filed its brief on this issue. After all of this delay, it turns out that District Attorney *failed to even attempt to communicate with either of defendants' experts,* despite the District Attorney's representations to this Court that it needed an eight week delay to do precisely this. No explanation is given by the District Attorney for this abject failure to follow through on its request.

In its brief, the District Attorney suggests that since it was possible that it might have to pay something for Mr. Hensel's time (he owns and operates a professional consulting business), it decided to not even pick up the phone to make any sort of inquiry to Mr. Hensel.

The District Attorney apparently never picked up the phone to speak to Robert Nick. No excuse is proffered for this utter failure to exercise due diligence.

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Instead of exercising basic due diligence, the District Attorney tries a different tact; it argues to this Court that since it failed to make any sort of inquiry to Mr. Nick or to Mr. Hensel, the Yupik defendants should now be barred from calling these experts at the trials set for April 15. No authority is given for this extraordinary request because no such authority exists. The District Attorney asked for and was given time and contact data for both of defendants' experts. The District Attorney elected not to contact either expert. This lack of effort should not now inure to the defendants' detriment.

The District Attorney also now claims that defendants' Notices violate Rule 16. This claim has been waived: when the matter was first brought up with this Court on November 30, the District Attorney raised no objection or concern about the adequacy of defendants' Notices.

Furthermore, the District Attorney cites absolutely no authority for its claim that defendants' Notices are inadequate. This is because, again, no such authority exists. Rule 16 requires that a defendant "inform the prosecutor of the names and addresses of any expert witnesses the defendant is likely to call at trial." The defendants in this case have done this. Rule 16 also requires that the defendants "make available for inspection and copying any reports or written statements of these experts." As defense counsel has already stated, the two defense experts are not writing reports. Rule 16 does not, obviously, mandate that an expert write a report. It simple provides that, if a report is written, that report must be shared with the prosecutor. Here, since no expert report was written, there is no report to share with

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the District Attorney. Rule 16 also requires that the defendants "shall also furnish to the prosecutor a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." The defendants' two Notices clearly did this.

Instead of playing fair with defendants, the District Attorney is seeking to bar defendants from calling their two experts. This Court should reject the District Attorney's overtures.

## II. ARGUMENT AND AUTHORITIES AS TO THE FIRST AMENDMENT DEFENSE.

Most non-Native people have a very difficult understanding how and why Native people think that their subsistence activities, like King salmon fishing, is somehow "sacred" or "religious" and this protected by the First Amendment's Free Exercise Clause. The preeminent Indian law scholar in the United States, Felix Cohen, has noted this problem: "Indians have a hard time fitting their religious claims into free exercise terms. One reason for these difficulties is that it is at times impossible to distinguish between Indian religious activities and Indian cultural activities. For instance, some issues such as hunting and fishing rights ... can be viewed either in terms of treaty, cultural, religious, or political rights, or more likely as involving all four issues together." Cohen, Felix, Cohen's Handbook of Federal Indian Law, p 965-7, Section 14.03[2][c], (2012 Edition).

That Yupiit spiritual views are complex, interrelated with other concerns, and somewhat foreign to non-Native people does not, somehow, mean that Yupiit spiritual

practices, like King Salmon fishing, are not protected by the First Amendment. As demonstrated below, the contrary is true: under Alaska's constitution, Yupiit spiritual practices, like King Salmon fishing, *are* protected by the First Amendment. Because the State has not met its burden of showing why it should be allowed to interfere with those spiritual practices, this Court should do as the *Frank* Court did and dismiss the all of the charges against all of the Yupik defendants.

### A. ALASKA'S FREE EXERCISE CLAUSE VIGOROUSLY PROTECTS FREEDOM OF RELIGION THROUGH THE TWO-PART TEST ESTABLISHED IN *FRANK V. STATE*

In *Frank v. State*, the Alaska Supreme Court addressed the importance of the freedom to freely exercise religion, holding "[n]o value has a higher place in our constitutional system of government than that of religious freedom." 604 P.2d 1068, 1070 (Alaska 1979). The court further held that the freedom to act on one's religious beliefs is protected and may only be overcome by compelling state interests. *Id.* The *Frank* decision set forth a two-part test to evaluate claims that state conduct violates an individual's religious rights under Alaska's Free Exercise Clause, and Alaska courts continue to apply this test. *Larson v. Cooper*, 90 P.3d 125, 131 (Alaska 2004); *Huffman v. State*, 204 P.3d 339, 344-45 (Alaska 2009). *Frank's* two-part test and its progeny afford more vigorous protection of religious freedom under the Alaska Free Exercise Clause than its federal counterpart. *Huffman*, 204 P.3d at 344; *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 280-81 (Alaska 1994).

Under the first-part of the *Frank* test, a person invoking his or her religious freedom and challenging facially neutral state conduct must satisfy three requirements:

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(1) a religion is involved; (2) the conduct in question is religiously based; and (3) the claimant is sincere in his or her religious belief. *Larson*, 90 P.3d at 131 (citing *Frank*, 604 P.2d at 1071-73). In evaluating whether a religion is involved, the Alaska Supreme Court looks to federal law, considering how broad and fundamental an individual's set of expressed beliefs are by consideration of factors such as whether the premises of the religion relate to ultimate questions and whether there are rituals or activities associated with it. *Huffman*, 204 P.3d at 344-45. The Alaska Supreme Court has held that determination of whether conduct is religiously based is not limited to actions resulting from religious rituals. *Swanner*, 874 P. 2d 281-82. Rather, a party can meet this requirement by showing the conduct at issue is based on some tenet of the asserted faith. *Id.* (holding landlord's refusal to rent to unmarried couples was sufficiently religiously based because it resulted from religious tenets of the diverse Christian faith).

Importantly, in *Frank*, the court emphasized that a claimant's burden to demonstrate that conduct is religiously based is not onerous. 604 P.2d at 1072-73. To satisfy the requirement that the conduct is religiously-based, "[i]t is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification." *Id.* The court further noted that the determination of religious orthodoxy is not the business of a secular court. *Id.* at 1073.

Once a claimant satisfies the first-part of the test, the burden then shifts to the state. *Frank*, 604 P.2d at 1073-74. Under the second-part of the *Frank* test, "courts

must consider whether the conduct poses 'some substantial threat to public safety, peace or order,' or whether 'there are competing governmental interests that are of the highest order and are otherwise not served.'" *Larson*, 90 P.3d at 131 (citing *Frank*, 604 P.2d at 1070). If the state sets forth a compelling interest, the key question is then "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." *Frank*, 604 P.2d at 1073-74. In other words, the State does not shoulder its burden by merely asserting an important state interest or a generalized interest in enforcing its laws -- it must also show that this interest will suffer by giving the challenger a religious accommodation. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal et. al.*, 546 U.S. 418, 438 (2006) (state's general interest in enforcing federal drug laws was inadequate justification to deny a religious sect an accommodation to drink sacramental tea containing regulated-hallucinogen).

The court's application of this two-part test in *Frank* is instructive as to why the State's conduct violates defendants' free exercise rights in this case. In *Frank*, the defendant was an Athabascan who killed a moose out-of-season for a funeral potlatch, and was subsequently convicted for this conduct. The court reversed the defendant's criminal conviction, first concluding that the defendant satisfied the first-part of the test, *i.e.*, he established that the challenged conduct was done pursuant to a sincere religious belief. *Frank*, 604 P.2d at 1071-73. Defendants' free exercise rights were properly invoked because it was "inescapable that the utilization of moose meat at a funeral potlatch is a practice deeply rooted in the Athabascan religion. While moose

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itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs." *Id.* at 1073.

Applying the second-part of the test, the court concluded that defendant's arrest violated his rights under the Alaska Free Exercise Clause. *Id.* at 1073-74. The state asserted that its compelling interest in maintaining a healthy moose population was an adequate interest, but the court held that it was not enough to simply conclude that there was such an important state interest. *Id.* Rather, the critical question was whether the interest in maintaining this moose population would suffer by granting a religious accommodation – and the state failed to show that its asserted interest would suffer if it gave an exemption to defendant. *Id.* Additionally, the court also rejected the state's contention that widespread civil disobedience would result if Athabascans were allowed an exemption to take moose out of season when necessary for a funeral potlatch. *Id.* at 1074.

Finally, the court soundly rejected the state's argument that giving such an accommodation to the Athabascans would amount to the establishment of a religion. *Id.* at 1074. The court explained that the "purpose of such an accommodation is merely to permit the observance of the ancient traditions of the Athabascans. As such, the exemption reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . ." *Id.* at 1075. As discussed below, a religious accommodation is similarly warranted here, thus permitting defendants to observe their ancient traditions and sacred spiritual practices.

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**1. Under this legal framework, the criminal charges against defendants must be dismissed because the charges violate defendants' rights under the Alaska Free Exercise Clause**

At trial, through expert witness testimony, defendants will set forth evidence demonstrating that (1) defendants easily satisfy the first-part of the *Frank* test; and (2) the State cannot satisfy its burden under the second-part of the *Frank* test.

**a. Defendants will show that their religion is involved, that the king salmon fishing is religiously based, and that they are sincere in their religious beliefs**

King salmon fishing is a necessary component of defendants' religious beliefs. The United States Supreme Court has recognized the historic importance of fishing to Native American for religious reasons, noting the practice of religious rites "intended to insure that the continual return of the salmon and the trout . . ." *Washington v. United States*, 443 U.S. 658, 665 (1979).

**b. The State cannot show that denying defendants a religious accommodation is justified by a substantial threat to safety or a compelling state interest**

The Yupiit people want to preserve their critical link to the King salmon yua. This is protected by the First Amendment. On the other-hand, the State has a compelling interest in preserving the King salmon run on the Kuskokwim.

As set forth in *Frank*, the critical question is whether the State can meet its compelling interest -- while at the same time accommodating the spiritual/religious views of the Yupiit people. There are several options available to the State in this regard. First, the State could have closed to Kuskokwim King fishery to all non-Yupiit

Bethel residents first, as a means of protecting the King salmon run. This would insure that more salmon make it to their spawning grounds for future runs.

Second, the State could have take some action to end the practice of the Pollock trawl fleet wasting tens of thousands of King salmon off the Alaska coast, instead of supporting the Pollack trawl fleet's request for high bycatch limits and falsely advertising to the world that Alaska Pollack is "sustainable."[7]

Third, the State could have considered various *de minimis* alternatives. For example, that the State could have considered whether allowing each Yupik village a four hour King Salmon opening per summer, in order to allow the Yupiit people to preserve their critical link to the King salmon yua, would have been feasible given the strength of the King run..

Instead, the State did none of these things. It was and is much easier for the State to simply criminalize Yupiit fishermen, then for the State to take on the trawl fleet, risk offending the non-Native people of Alaska, or sit down with the Yupiit people to figure out how Yupiit spiritual needs can be met at the same time as King salmon escapement goals are met.

## III. CONCLUSION

For the aforementioned reasons, this Court should dismiss all charges against the Yupik defendants.

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7 It is, but only without reference to its deleterious impact on Yupiit life.

NORTHERN JUSTICE PROJECT, LLC

DATE 2/11/13

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I certify that on February 11, 2013
a true and correct copy of the above
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