IN THE DISTRICT COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BRIAN IVAN, 4BE-12-627	)
FELIX FLYNN, 4BE-12-559	)
PETER HINZ, 4BE-12-575	)
HOWARD NICHOLAI, 4BE-12-617	)
MICHAEL FRYE, 4BE-12-567	)
PETER BERLIN, 4BE-12-570	)
YAGO EVAN, 4BE-12-573	)
NOAH OKOVIAK, 4BE-12-571	)
JOHN ALEXIE, 4BE-12-569	)
PATRICK BLACK, 4BE-12-560	)
NATHAN EVAN, 4BE-12-657	)
MAX OLICK, 4BE-12-589	)
JOHN OWENS, 4BE-12-595	)
JAMES ALBRITE, 4BE-12-582	)
AUGUSTINE PITKA, 4BE-12-650	)
SAMMY JACKSON, I, 4BE-12-590	)
JOSEPH SPEIN, 4BE-12-629	)
EUGENE NICOLAI, 4BE-12- 603	)
DANA KOPANUK, 4BE-12-675	)
TOM CARL, 4BE-12-604	)
MICHAEL ANDREW, 4BE-12-602	)
	)
Defendants.	)

STATE'S CONSOLIDATED MOTION TO EXCLUDE DEFENSE, FOR PRETRIAL RULING ON FREE EXERCISE ISSUE, AND REQUEST FOR EVIDENTIARY HEARING

The state moves the Court, under Criminal Rules 12(b) and 42(e), for an evidentiary hearing and pretrial ruling on the defendants' contention that their right to free religious exercise prohibits the state from prosecuting them for fishing violations. The Court should not allow the defendants to litigate this issue before the Court as fact-finder at trial. This motion is supported by the attached memorandum.

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DATED March 12, 2013 at Bethel, Alaska.

MICHAEL C. GERAGHTY
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By: _____
Chris Carpeneti
Assistant District Attorney
Alaska Bar No. 0802001

I hereby certify that a true copy of the foregoing was served on NTP
via ☐ *mail* ☒ *fax* ☐ *e-mail* ☐ *court box* ☐ *hand del.*
By: _____ *Date:* 3.12.13

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STATE'S MEMORANDUM IN SUPPORT OF A CONSOLIDATED MOTION TO EXCLUDE DEFENSE, FOR PRETRIAL RULING ON FREE EXERCISE ISSUE, AND REQUEST FOR EVIDENTIARY HEARING

The state moves the Court, under Criminal Rules 12(b) and 42(e), for an evidentiary hearing and pretrial ruling on the defendants' contention that their right to free religious exercise prohibits the state from prosecuting them for fishing violations. Rule 12(b) allows the Court to consider before trial any matter "capable of determination without the trial of the general issue." The defendants' free exercise

theory has no bearing on their guilt or innocence of the charges, but rather concerns whether the charges are constitutionally precluded. The Court should resolve it before trial rather than considering it at trial in its role of fact-finder.

The Court should rule on the free exercise theory before trial, separately from the defendants' guilt or innocence, for several reasons. Both the defendants and the state wish to present evidence on free exercise that applies in common across all twenty-two cases, and a joint pretrial evidentiary hearing would be a straightforward way to accomplish this. A pretrial resolution would also serve the interests of judicial economy by potentially obviating the need for many trials if the Court accepts the free exercise theory in some or all of the cases. A pretrial resolution would give each defendant a better opportunity to prepare and present alternative defenses at trial if the Court rejects the free exercise theory. And importantly, a pretrial resolution of the issue would put the parties on equal footing as far as the right to appeal an adverse ruling on this significant public policy matter and obtain clear guidance for future cases.

Background

The twenty-two defendants are each charged with fishing on the Kuskokwim River in violation of closure orders intended to protect diminished king salmon runs in the summer of 2012. The cases have not been formally consolidated, but the cases involve common issues and the defendants are all represented by the same counsel. Trial was scheduled for November 13, 2012 in some of the cases.

One week before their November trial date, the eleven defendants scheduled for trial jointly sought a continuance and filed a "notice of additional defense." They indicated their intent to call Dr. Chase Hensel as an expert at trial and to claim that because of their traditional Yup'ik beliefs, they were entitled to violate the closure orders under the Alaska Constitution's free exercise clause. All twenty-two defendants filed a subsequent joint notice on November 24, adding Robert Nick, Jr. as an expert and further citing the First Amendment to the U.S. Constitution as well as the Religious Freedom Restoration Act of 1993 (RFRA).

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The state filed a response on January 14 pointing out fundamental legal flaws in the defendants' First Amendment and RFRA claims. Regarding the Alaska Constitution free exercise claims, the state noted that it is not possible to generalize about the individual defendants' personal beliefs and reasons for fishing. The state also objected that the notices did not explain the substance of the proposed expert testimony.

In reply, the defendants filed a brief elaborating on their free exercise theory. In this brief, they conceded that they "fished in direct violation of State law." Defendants' Brief at 7. They then asserted that "the criminal charges against defendants must be dismissed because the charges violate defendants' rights." Defendants' Brief at 17. But rather than filing a motion to dismiss the charges and requesting an evidentiary hearing at which to present their experts, they expressed their intent to litigate their free exercise theory at trial. Defendants' Brief at 8, 17. The ACLU filed an amicus brief in support of the defendants' free exercise theory.

The cases are scheduled for trial in April 2013.

Argument

I. The defendants' free exercise theory is an as-applied constitutional challenge to the closure orders, not a defense bearing on any element of the charges, and thus should be resolved before trial.

The defendants' free exercise theory is an as-applied constitutional challenge to the river closure orders.[1] In other words, it is an argument that the state may not criminalize the defendants' conduct.[2] Because this defense does not require a determination regarding any element of the charges, it can and should be resolved as a matter of law prior to trial, rather than by the fact-finder at trial.

In *Scudero v. State*, the Court of Appeals examined a similar defense—freedom of speech—when considering a defendant's contention that he was entitled to present

[1] *Cf. State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 366 (Alaska 2009) (rejecting civil suit challenging marijuana law on ripeness grounds, contemplating that an as-applied challenge should be brought in a future case in the context of an actual prosecution under the law).

[2] See 1 Wayne R. LaFave, *Substantive Criminal Law* § 3.1 (2d ed. West 2012) (noting that the state's police power is "constitutionally limited in the sense that certain activity is beyond regulation by the criminal law," such as where "the legislation in question intrudes upon freedom protected by the Bill of Rights").

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that defense to a jury. The court noted that the free speech defense was not "premised on proof of factual circumstances negating a necessary element of the alleged crime," but rather would "apply, as a matter of extrinsic legal policy, even when the elements of a crime have been proved beyond a reasonable doubt."[3] The court thus held that the free speech defense presented "issues for resolution by the court as a matter of law," and that although it likely "included preliminary factual issues whose resolution was necessary," those factual issues were for the court to resolve, not the jury.[4] In its discussion, the court cited Criminal Rule 12(b) ("Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial by motion."), thus recognizing that the free speech defense could appropriately be resolved by the judge before trial.[5]

Like the free speech defense discussed in *Scudero*, the defendants' free exercise arguments are "legal defenses that are not directly tied to an essential element of the crime charged—defenses that apply regardless of whether all necessary elements of an offense have been established."[6] The defendants' position is that even if the state can prove all required elements of the charges against them, their religious freedom nonetheless protects them from criminal liability. Although this defense will involve "preliminary factual issues"—for example, whether the defendants are sincere in their professed religious beliefs—it is nonetheless appropriate for "resolution by the court as a matter of law,"[7] which may, and should, occur before trial. Indeed, as the defendants appear to recognize here, a decision in their favor on this defense would not be an acquittal, it would be an outright dismissal of the charges against them.[8] Defendants' Brief at 17.

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[3] 917 P.2d 683, 686 (Alaska App. 1996).

[4] *Id.* at 685; *see also Dennis v. United States*, 341 U.S. 494, 513 (1951) (rejecting "the theory that a jury must decide a question of the application of the First Amendment" and holding that "[w]hether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case").

[5] *Scudero*, 917 P.2d at 686.

[6] *Id.* at 685.

[7] *Id.*

[8] *Cf. Collins v. State*, 977 P.2d 741, 751 (Alaska App. 1999) (noting that "dismissal on a ground not requiring factual resolution of any of the elements of the offense . . . does not amount to a judgment of acquittal");

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One commentator has noted that such legal defenses, which "frequently relate to matters entirely apart from the issues of culpability litigated at trial," can "be easily, and more efficiently, determined before trial."[9] Such a resolution may be preferable from a defendant's perspective: if prosecuting a defendant violates free exercise, ideally the defendant should not be subjected to a criminal trial at all. Conversely, in a case where the Court is going to reject the free exercise defense, the defendant would benefit from knowing this before trial in order to better prepare alternative defenses.

Accordingly, the defendants' free exercise theory is correctly litigated and resolved before trial.

II. The Court should resolve the free exercise theory separately from the defendants' guilt or innocence to preserve the state's right to appeal.

As explained above, the defendants' free exercise theory is unrelated to their guilt or innocence of the charged offenses and thus appropriate for pretrial resolution. To protect the state's right to seek appellate review—a right that is limited by the prohibition against double jeopardy—the Court should resolve this important issue before trial.

The state may appeal an adverse decision in a criminal case except when prohibited by the constitutional protection against double jeopardy.[10] Jeopardy "attaches" at the commencement of trial on an offense.[11] After that point, if the defendant prevails, the prosecution may be unable to appeal because a reversal and remand for a new trial could be considered to subject the defendant to a second jeopardy

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Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979) (remanding criminal case "with instructions to dismiss the complaint" after resolving free exercise issue in defendant's favor).

[9] *See* 2 Paul H. Robinson, *Criminal Law Defenses* §§ 201(a) & 210(f) (West 2012) (categorizing free exercise among "nonexculpatory defenses" which "arise where an important public policy other than that of convicting culpable offenders, is protected or furthered by foregoing trial or conviction and punishment"); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 3.1(b) (2d ed. West 2012) (noting procedural avenues for raising constitutional objection to prosecution).

[10] *See* AS 22.07.020(d)(2) & AS 22.10.020(e) ("[T]he state's right of appeal in criminal cases is limited by the prohibitions against double jeopardy contained in the United States Constitution and the Alaska Constitution.").

[11] *See* 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, *Criminal Procedure* § 25.1(d) (3d ed. West 2012) (hereinafter, "LaFave Crim. Proc.").

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on the same offense.[12] Accordingly, if these cases proceed to trial without prior resolution of the free exercise question, the state may be unable to appeal if the Court rules in the defendants' favor.

The state reserves the right to argue, regardless of whether this Court grants this motion, that double jeopardy does not apply to these cases or would not prevent the state from appealing an adverse decision on the free exercise question even after the start of trial. But after trial begins and jeopardy arguably attaches, the state's right to appeal an adverse decision is less certain and clear-cut. So unless this Court resolves the free exercise question before trial, this Court cannot guarantee that the state will have the right to appeal, because the state's right to appeal will be determined by the appellate courts, not by this Court. This Court should resolve the free exercise question before trial to ensure that the state has equal appellate rights over this important issue.

Strong public policy reasons favor preserving the state's right to appeal an adverse ruling on the free exercise issue to obtain certainty and guidance for both the government and the public. This important constitutional issue has broad implications extending beyond these individual defendants' cases. A plethora of ad hoc, unreviewable trial court free exercise decisions in cases like these would jeopardize the state's ability to enforce important fish and game regulations and protect threatened salmon stocks. If the state is to be constitutionally precluded from enforcing its fishing regulations against a significant segment of the population, that decision needs to be reviewed and approved by Alaska's highest courts.

Accordingly, to avoid the risk of a double jeopardy bar precluding a prosecution appeal, the Court should resolve the free exercise question before trial. If the Court resolves it in favor of a given defendant—concluding that the charges against him violate his right to free exercise of religion—his trial need not go forward and the state can appeal free from any double jeopardy concern. If the Court holds in favor of the state—concluding that the charges are constitutionally permitted—the parties may find it appropriate to negotiate *Cooksey* pleas such that the defendants can immediately

[12] *See* 7 LaFave Crim. Proc. § 27.3(a).

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appeal on the free exercise question without undergoing trial, given that it appears they are prepared to admit that they committed the offenses.[13] Defendants' Brief at 7 ("The Yupik defendants in these cases fished in direct violation of State law.").

III. The defendants' federal free exercise theory can be resolved in favor of the state immediately without an evidentiary hearing.

As explained in the state's January 14 response to the notice of expert—and as recognized by the ACLU's amicus filing—the defendants' free exercise arguments based on the First Amendment to the U.S. Constitution and RFRA fail as a matter of law and can be resolved immediately without the need to hear any evidence.

In *Employment Division v. Smith*, the U.S. Supreme Court held that the First Amendment is not violated by a neutral law of general applicability—i.e., a law that is not targeted at religiously motivated conduct and that applies equally to conduct without regard to whether it is religiously motivated.[14] Thus, the First Amendment does not prohibit the state from enforcing generally applicable fish and game regulations that are clearly not targeted at religious expression. In response to *Smith*, Congress passed RFRA, which instituted a standard more solicitous of religious exercise. But in *City of Boerne v. Flores*, the U.S. Supreme Court held that RFRA cannot be applied to the states.[15] It thus cannot be applied in this case.

Accordingly, the Court should rule immediately, as a matter of law, that neither the First Amendment to the U.S. Constitution nor RFRA prevents the state from prosecuting these defendants for fishing in violation of the closure orders.

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[13] *See Cooksey v. State*, 524 P.2d 1251, 1255–57 (Alaska 1974) (approving conditional plea of no contest incorporating right to litigate dispositive issue on appeal).

[14] 494 U.S. 872, 882-90 (1990).

[15] 521 U.S. 507, 511 (1997).

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IV. An evidentiary hearing is necessary to resolve disputed factual issues relevant to the defendants' Alaska Constitution-based free exercise theory.

Although the defendants' Alaska Constitution-based free exercise arguments also need to be resolved prior to trial, their resolution will involve some disputed facts. The state thus requests a pretrial evidentiary hearing at which the Court can hear evidence from the defendants on their asserted religious reasons for violating the closure orders and from the state on its justification for issuing the closure orders. The Court should then accept post-hearing briefing from the parties advancing their arguments on the legal implications of the evidence that has been presented, and render decisions either accepting or rejecting the free exercise theory in each defendant's case.

Under Alaska's free exercise clause, as interpreted by the Alaska Supreme Court in *Frank v. State*, a person asserting a free exercise defense must first demonstrate that the charges burden his religious freedom by showing that religion is involved, his violation of the law was religiously based, and he is sincere.[16] Once the defendant has met this initial three-part burden, the state must then demonstrate that granting a religious exemption for the defendant would harm a compelling state interest.[17]

After evidence has been presented on these issues, the parties will then be in a position to advance their arguments about the legal implications of that evidence and the proper interpretation and application of free exercise precedent to the situation at hand.[18] Accordingly, the Court should hold a hearing to take evidence related to the test stated in *Frank* and elaborated in other Alaska cases, and accept post-hearing briefing.[19]

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[16] *See Frank v. State*, 604 P.2d 1068, 1071 (Alaska 1979); *Lineker v. State*, 2006 WL 2847849 at *1 & *3 (Alaska App. 2006) (unreported). *Cf. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984) ("Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.").

[17] *See Frank*, 604 P.2d at 1073-74; *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282 (Alaska 1994).

[18] The state wishes to preserve the argument that the test stated in *Frank v. State* and other Alaska cases should be modified to conform to the federal standard outlined in *Employment Division v. Smith*, for the reasons stated in the *Smith* majority opinion. Nonetheless, the state understands that this Court is bound by current Alaska Supreme Court precedent and thus that a hearing on the *Frank* factors would be appropriate here. *See Swanner*, 874 P.2d at 280-81 (stating that *Frank*, not *Smith*, controls in Alaska).

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The state agrees with the defendants that it would be appropriate for the Court to consolidate the defendants' cases for purposes of hearing common evidence on free exercise. However, each individual defendant separately bears the burden of convincing the Court that his particular fishing violation was religiously motivated and that he is sincere. Thus, although the defendants and the state may wish to present common evidence that is relevant to all twenty-two cases, the Court should keep in mind that the defendants' free exercise arguments do not necessarily rise or fall together.

As required by Criminal Rule 42(e)(2), the state estimates that that the proposed consolidated evidentiary hearing on the free exercise issue will take one week. The Court could use the existing April trial date for this purpose.

Conclusion

For the foregoing reasons, the Court should resolve the defendants' free exercise arguments before the start of trial, separately from their guilt or innocence of the charged offenses. The Court should hold a consolidated pretrial evidentiary hearing on disputed factual issues relevant to the *Frank* factors, accept post-hearing briefing, and make factual findings to support its legal decision. The Court should not allow the defendants to litigate their free exercise defense before the Court as fact-finder at trial.

DATED March 12, 2013 at Bethel, Alaska.

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By: _____
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I hereby certify that a true copy of the foregoing was served on MTP *via* ☐ *mail* ☒ *fax* ☐ *e-mail* ☐ *court box* ☐ *hand del.* *By:* ___ *Date:* 3.12.13

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[19] *See, e.g., Huffman v. State*, 204 P.3d 339, 344-45 (Alaska 2009); *Larson v. Cooper*, 90 P.3d 125, 131-33 (Alaska 2004); *Sands v. Living Word Fellowship*, 34 P.3d 955, 958-60 (Alaska 2001); *Swanner*, 874 P.2d at 280-84; *Herning v. Eason*, 739 P.2d 167, 169 (Alaska 1987); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1299-1302 (Alaska 1982).