

COURT OF APPEALS FOR THE STATE OF ALASKA

David Phillip, et alia

Appellants/Cross-Appellees,

v.

State of Alaska,

Appellee/Cross-Appellants.

Court of Appeals No. A-11580 et alia


Lead Trial Court Case No. 4BE-12-00580CR

Amicus Curiae Brief of
American Civil Liberties Union of Alaska Foundation

Filed in the Supreme Court of
the State of Alaska this 9th
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AUTHORITY PRINCIPALLY RELIED UPON

Alaska Constitution, Article One, Section Four

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

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JURISDICTIONAL STATEMENT

The District Court in Bethel convicted the listed appellant fishermen of violating a provision of the Alaska Administrative Code, prohibiting use of certain king salmon fishing gear during times of declared emergency on the Kuskokwim River. Jurisdiction over the appeal of their convictions is proper under Alaska Statute 22.07.020(c) and Alaska Appellate Rule 202(b).

INTERESTS OF AMICUS

As the ACLU of Alaska Foundation more fully describes in today's motion for leave to file this brief, it protects civil liberties through advocacy, education, and litigation. It has unique insight into the right of free exercise and experience defending this right and other similar constitutional rights, including before this Court. It has access to a nationwide network of legal advocates and scholars, as well as a local and uniquely Alaskan competence in issues surrounding the Alaska Native community and traditional religions. Defending liberties like the right of free exercise of religion is the core of the ACLU of Alaska's purpose.

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ISSUES PRESENTED FOR REVIEW

1. Did the State of Alaska violate the fishermen's rights under the free exercise of religion clause of the Alaska Constitution by prosecuting them for engaging in religiously-based conduct?
2. Did the District Court err by holding that the State was entitled to ignore such religious interests in closing the salmon harvest on the basis of a superseding interest in managing the king salmon population?

STATEMENT OF THE CASE

The thirteen fishermen were charged with violating emergency orders from the Alaska Department of Fish and Game banning certain king salmon fishing gear and effectively closing the king salmon fishery on the Kuskokwim River during June and July of 2012. The thirteen men are all Yup'ik fishermen, members of an Alaska Native group who have harvested king salmon from those waters for hundreds and thousands of years. They argued to the District Court that their actions were protected by the free exercise clause of the Alaska Constitution and that the State had failed to provide any permitting process or other consideration for those beliefs. Based on a similar reversal of the

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conviction of an Athabaskan moose hunter in *Frank v. State*,¹ the fishermen argued they could not be convicted of the offense. While the District Court found that fishing for king salmon was indeed religious activity protected by the free exercise clause and that the fishermen were sincere in their beliefs,² it held that the State's interest in preventing the "*unfettered* taking of Chinook salmon" outweighed the religious interests of the fishermen.³ This appeal and the State's cross-appeal followed.

STANDARD OF REVIEW

In evaluating a defense to a criminal charge, the Court reviews de novo whether a prima facie case showing of the elements of the defense has been made.⁴ The Court also reviews de novo matters of interpretation of the Alaska Constitution.⁵ In a bench trial, the trial court's findings of fact are reviewed for clear error.⁶

¹ 604 P.2d 1068 (1979).

² Exc. at 110.

³ *Id.* at 111.

⁴ *Marshall v. State*, 238 P.3d 590, 592 (Alaska 2010).

⁵ *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001).

⁶ *Fletcher v. Trademark Const., Inc.*, 80 P.3d 725, 729 (Alaska 2003).

ARGUMENT

The fishermen were charged with a violation of a section of the Alaska Administrative Code, allowing the Alaska Department of Fish and Game to prohibit by emergency order the use of king salmon-specific gill nets on the Kuskokwim river during times of shortfall in the king salmon population.⁷ They raised as a defense the right of free exercise of religion, on the grounds that the harvest of king salmon from the Kuskokwim's waters was deeply engrained in their religious beliefs. As followers of traditional Yup'ik beliefs, they strongly believe that catching king salmon is required to maintain harmony in the universe, to ensure that season continues to follow season, and that future salmon return to the river.

The fishermen met the basic criteria of the *Frank* test, a similar case holding that an Athabaskan hunter was protected from prosecution for hunting moose out of season because of his need to harvest moose for a funeral service. The District Court in the present case found that the fishermen's actions were religious in nature and grounded in sincere religious belief. The District Court, however, found that the state's compelling interest overrode the constitutional rights of the fishermen,

⁷ Alaska Admin. Code, tit. 5, sec. 01.270(n).

because the “unfettered taking of Chinook salmon” would threaten the State’s interest in preserving the king salmon stock.

The District Court erred in so holding, because it wrongly assumed that the only way to accommodate religious belief was to permit “unfettered” taking of salmon by all subsistence users. The District Court failed to explore whether some other means, such as offering limited religious exemptions or permits to religiously-sincere Yup’ik fishermen, would have endangered the king salmon stock.

The ACLU of Alaska understands, based on the State’s Amended Points on Appeal, that it has abandoned its claims that the District Court erred by not applying the federal standard under *Employment Division v. Smith*.⁸

I. The *Frank* Test Governs Free Exercise Cases Under the Alaska Constitution

In 1975, a group of 25 to 30 Athabaskan hunters set out to hunt a moose to get meat for the funeral potlatch of a young man who had recently died. Carlos Frank assisted in the taking of the moose, which was served at a feast for roughly 200-250 members of the village. Frank was charged by Troopers with the offense of killing a moose out of season. At trial, Mr. Frank raised the defense that his conduct was

⁸ 494 U.S. 872 (1990).

protected by the Free Exercise Clause of the Alaska Constitution. He was convicted at trial, and his conviction was reversed by the Alaska Supreme Court.

In doing so, the Alaska Supreme Court set forth a test for enforcement of the Alaska Free Exercise Clause that has stood for 34 years. Finding that the Free Exercise Clause of the Alaska Constitution constitutes a defense to a criminal act requires a finding that “there is a religion involved, [that] the conduct in question is religiously based, and [that] the claimant is sincere.”⁹ The State can rebut such a showing by demonstrating that a compelling state interest would “suffer if an exemption is granted to accommodate the religious practice at issue.”¹⁰

Although the federal courts now follow a different rule in federal free exercise cases,¹¹ the Alaska Supreme Court has frequently stated that the *Frank* rule continues to apply in free exercise cases brought under the Alaska Constitution.¹² In light of the State’s apparent

⁹ *Frank*, 604 P.2d at 1071.

¹⁰ *Id.* at 1073.

¹¹ *Smith*, 494 U.S. at 888 (holding that, regardless of the sincerity of the individual’s religious belief, the conviction of a Native American for peyote use would stand).

¹² *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 280-81 (Alaska 1994) (rejecting the federal *Smith* rule in favor of continued application of the *Frank* standard in state free exercise cases); *see also Huffman v. State*, 204 P.3d 339, 344 (Alaska 2009); *Larson v. Cooper*,

abandonment of the argument that the Court of Appeals should overrule the Alaska Supreme Court's decision in *Frank*, the Court should apply the *Frank* standard in reviewing the District Court's ruling.

II. The Fishermen Properly Showed that the Alaska Constitution Protects Their Religiously-Motivated Actions

In Free Exercise cases, the first step in the process requires examining 1) whether a religion is involved, 2) whether the individual is sincere in his belief, and 3) whether the activity in question is "religiously based."¹³ The District Court found that the fishermen properly met each of these three elements. The State has cross-appealed the District Court's decision only as to whether the king salmon fishing is "religiously-based" conduct.

A. Traditional Yup'ik Beliefs Constitute a Religion

The District Court properly found that traditional Yup'ik religious beliefs constitute a religion. The State did not appeal this finding. 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

90 P.3d 125, 131 (Alaska 2004); *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 940 (Alaska 2004).

¹³ *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001).

relate to ultimate questions and whether there are rituals or other activities associated with it.”¹⁴ Such “ultimate questions” include “deep and imponderable” matters, such as the nature of life and death, and the nature of right and wrong.¹⁵

Yup’ik cosmology expresses an organized and interrelated web of complex beliefs about the nature of human life and animal life and the nature of 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.”¹⁶ 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 Eskimo peoples at the foundation of social life Once the initial differentiation between human and nonhuman persons

¹⁴ *Huffman*, 204 P.3d at 345.

¹⁵ *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981).

¹⁶ Ann Fienup-Riordan, *Boundaries and Passages: Rule and Ritual in Yup’ik Eskimo Oral Tradition*, at 48 (1994 University of Oklahoma Press).

had been established, their relationship in perpetuity depended on their carefully regulated interaction.”¹⁷

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”¹⁸ The supreme being in Yup’ik belief is the *Ellam Yua*, the spirit of the air, who monitors the system of cultural taboos around taking food animals and punishes the breaking of those taboos with bad weather and starvation.¹⁹ In Yup’ik cosmology, every person and animal had a *yuk*, meaning roughly, a soul; also referred to as *yua*, or its own soul.²⁰ The Yup’ik system of traditional beliefs relating to life and death, and the nature of souls constitutes a religion for Free Exercise clause purposes.

B. The District Court Found the Fishermen to Be Sincere

The District Court found as a fact, after a lengthy trial and extensive testimony, that each defendant was sincere in his belief that the act of fishing was deeply rooted in his traditional beliefs. In

¹⁷ *Id.* at 48-49.

¹⁸ *Id.* at 49.

¹⁹ Susan Hansen, *Yupik Eskimo Cultural History and Lore from the Lower Yukon River: Oral Traditions and Their Associations with the Land*, at 88 (1985).

²⁰ *Id.* at 51.

considering a Free Exercise claim, courts should factually inquire whether the individual in question sincerely holds the claimed religious belief.²¹ The sincerity requirement, if contested by the parties, typically requires “direct and cross-examination to facilitate a credibility evaluation.”²² The fact-finding by the District Court on this point has not been cross-appealed by the State. In any event, the District Court’s assessment of individual credibility as to sincerity could only be reviewed for clear error on appeal.

C. The District Court Properly Found that King Salmon Fishing was “Deeply Rooted” in Yup’ik Religious Belief

The District Court found, following uncontroverted expert testimony, that the taking of salmon was a religiously-based act “deeply rooted” in Yup’ik traditional beliefs. Under the *Frank* decision, the third question, as to whether the act in question was “religiously based,” does not require that the action be *compelled*; the Court in *Frank* instead held that the action need only be “deeply rooted” in religious beliefs.²³ The expert witnesses testified at length that the act of fishing or hunting, under traditional Yup’ik beliefs, was not a matter

²¹ *Frank*, 604 P.2d at 1075 n.14.

²² *Patrick v. LeFevre*, 745 F.2d 153,159 (2d Cir. 1984).

²³ *Frank*, 604 P.2d at 1072-73 (holding that, even though other meat could be served at a potlatch, the taking of moose for a potlatch was “deeply rooted” in religious belief).

of personal skill in catching an unwilling prey; instead, catching a fish may depend greatly on the animal *choosing* to be caught, responding to "your relationship with the fish and your personal moral standing as well."²⁴ Fish and game appear and present themselves to fishermen and hunters who treat the animals with respect and do not waste the animals who offer themselves to the fishermen or hunters. The Yup'ik concept of fishing is much more complex than the Western idea of fishing merely to fill one's larder or one's wallet, or for one's own amusement. For the Yup'ik, catching king salmon is part of an elaborate human-animal interaction going back thousands of years.

1. Yup'ik Cosmology Requires a Hunter to Take His Prey to Maintain Balance in the Universe

This unique cosmology requires continued hunting and fishing to maintain the balance in the universe. 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.²⁵ If a hunter fails to fill his role, the order of the

²⁴ Tr. at 28.

²⁵ Nancy Lee Williamson Sanders, *The Relationship of Spirituality and Health Among the Yup'ik of Southwestern Alaska: an Exploratory Study*, at 40 (2000).

universe will be upended. Refusing to take game when it is available will offend the animal and make it think it is not needed or wanted.²⁶

2. Regularly Taking King Salmon is a Vital Part of Maintaining that Balance

In Kuskokwim River communities, the king salmon sits at the heart of this balance between hunter and prey. Before the District Court, an expert witness testified that an observant fisherman denied the opportunity to fish for king salmon would find that situation “spiritually distressing as well as culturally distressing,” that the longstanding relationship with the salmon would be disrupted by observing such a prohibition.²⁷ A Yup’ik elder called as an expert witness testified that *Ellam Yua* would be angered by a failure to pursue the king salmon while it was present.²⁸ Failing to fish for king salmon would be another way of saying “we don’t really need you” to the salmon.²⁹

Fish and Game forced the fishermen to choose between obeying the emergency orders and upending the balance in the universe on one

²⁶ Tr. at 214 (elder Yup’ik expert witness describes the collapse of the muskrat population after hunters stop pursuing them).

²⁷ Tr. at 67.

²⁸ Tr. at 205-06.

²⁹ Tr. at 88.

hand; and obeying their consciences, maintaining balance in the universe, and violating the law on the other. The Free Exercise clause in Alaska has for years protected the division between giving to Caesar what is Caesar's and to God what is God's. Under traditional Yup'ik beliefs, the king salmon of the Kuskokwim belong to God, not Caesar. Unless the State shows that it was impossible to accommodate the faith of these fishermen and necessary to force them into this Hobson's choice, it may not prosecute them for their religious expression.

3. Fishing for Salmon is "Deeply Rooted" in Yup'ik Religious Belief, Even Absent Any Particular Ritual or Ceremonial Function

This Court need only find that the act of salmon fishing is deeply rooted in Yup'ik beliefs, even without any connection to any ritual or ceremony. While some evidence of religious ceremony associated with king salmon harvest was produced,³⁰ the ultimate resolution of the present case does not require a finding of ritual or ceremony.³¹

Connection to some sort of ritual or ceremony has been a hallmark of

³⁰ Tr. at 85 (discussing first catch celebrations, where the first king salmon catch of the season is celebrated).

³¹ *Swanner*, 874 P.2d at 281 ("[W]e did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices.").

some findings of “deeply rooted” religious practice, but no court has ever claimed that *only* ritual or ceremonial practices are protected.

Several courts have found protected religious conduct in daily activity. For instance, both Alaska and federal cases have found that the practice of “shunning” members of a religious community who have violated the tenets of that community has Free Exercise protection, even though that practice might involve ignoring a person in such pedestrian contexts as at the grocery store or at school.³² 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.³³ While Frank helped kill a moose for a particular potlatch ceremony, that fact does not distinguish *Frank* from the present case.

D. The Fishermen’s Interest in Practicing Their Religion Is Compatible with the State’s Interest in Protecting the Fishery

The District Court agreed that the fishermen met all the criteria for showing that the fishermen had engaged in protected religious activity. It rejected the Free Exercise defense on the grounds that the State’s compelling interest in protecting the fishery overwhelmed the

³² *Sands*, 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).

³³ *Blackhawk v. Pennsylvania*, 381 F.3d 202, 213 (3d Cir. 2004).

fishermen's constitutional rights. The District Court misunderstood or misapplied the *Frank* test, which mandates an inquiry into "whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."³⁴ Instead of examining whether an exemption or accommodation of the legitimate interests of the fishermen might have been made, the District Court simply caricatured the fishermen's religious interests as requiring "unfettered" harvest of king salmon. The District Court also disregarded the evidence showing that the State could have accommodated the fishermen and that the State made allowances for other harvest of the salmon, including commercial harvest of king salmon by commercial fleets, at the expense of the fishermen's rights.

1. The District Court Failed to Consider Whether State Interests Would Suffer from Any Accommodations Other Than "Unfettered" Salmon Harvest

The District Court's opinion demonstrates its error in considering the State's interest in managing the king salmon population and the accommodation of the religious interests of the fishermen. On this point, the State bears the burden of showing that the religious beliefs of

³⁴ *Frank*, 604 P.2d at 1073.

the individuals could not be accommodated.³⁵ The District Court created a false choice where absolute and unfettered subsistence harvest of salmon was the only alternative to the emergency orders shutting down the king salmon harvest.³⁶

The error of the District Court by creating such a stark choice and ignoring less intrusive alternatives is similar to the rejected contentions of the State in *Frank*, when the State advocated that allowing religious accommodations would automatically lead to depletion of the resource. The Supreme Court complained in *Frank* that there was no evidence on the record as to how many potlatches took place in a year and, implicitly, a failure to show the burdens of such accommodations.³⁷ In the present case, the State never presented any evidence as to how many people would likely seek religious exemptions to take salmon.

³⁵ *Swanner*, 874 P.2d at 286 (Moore, J. dissenting) (noting that government bore burden of showing compelling interests “which are not otherwise served without limiting Swanner’s conduct”); *Frank*, 604 P.2d at 1074; *Lineker v. State*, A-8957, 2006 WL 2847849, at *3 (Alaska App. Oct. 4, 2006) (unpublished decision) (noting that government must show both its compelling interest and that those interests are not otherwise served by accommodation).

³⁶ *Exc.* at 110.

³⁷ *Frank*, 604 P.2d at 1074.

The fishermen had extensively explored at the evidentiary hearing whether some middle ground where *some* religiously-motivated harvest would be permitted, allowing less than an unfettered harvest.³⁸ The District Court erred by eliminating the State's heavy burden to show that no intermediate step short of unfettered harvest of salmon could have accommodated the religious beliefs of the fishermen.

2. The State Made No Effort to Assess or Accommodate the Religious Needs of the Community

The State could not and did not meet its burden to show that the fishermen could not be accommodated because it made no effort to assess the scope of the religious needs of the community. Under Alaska law, the State has a "duty to accommodate" religious practice; in the present case, the State simply made no allowance at all.³⁹ Since *Frank*, the State has created a religious exemption relating to the fish and game laws in exactly one circumstance: the taking of moose for potlatches that was the subject of the *Frank* case. The State never created a means for people to apply for other exemptions and thus has

³⁸ See, e.g., Tr. at 323 (ADFG official states that ADFG staff had never considered allowing each village a token number of fish).

³⁹ *Seward Chapel v. City of Seward*, 655 P.2d 1293, 1301 (Alaska 1982) (noting that *Frank* created a "duty of accommodation" of religious belief on the government).

no way of showing whether 25, 250, or 25,000 people would have sought such an exemption, had one been offered.⁴⁰

The case is thus not so different on this point from the factual record in *Frank*. No one doubted that barring the State from managing the moose population entirely would have threatened the species. *Frank* rejected the notion that the scope of inquiry was so minimal and demanded that courts hearing such cases consider accommodating religious belief scrupulously. "All the record reveals is that there was but one funeral potlatch in Minto in 1975, and that one moose was needed for it," said the Court in *Frank*. All this record reveals is that there were 25 or so religiously-motivated fishermen cited for fishing in defiance of the order. The State did not show that accommodating these fishermen would have collapsed the fishery, or that accommodating some unknown number of observant Yup'ik in a meaningful way would have collapsed the fishery.

The State failed to consider any number of alternative accommodations for religiously-motivated fishermen, short of

⁴⁰ Cf. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (holding government failed to meet its burden of denying unemployment benefits to religiously observant plaintiff where it failed to produce evidence of numbers of people choosing between religious observance and employment sufficient to create "widespread unemployment") *overruled on other grounds by Smith*, 494 U.S. at 888.

“unfettered” salmon harvest. The State could have restricted king salmon fishing to a few hours for people filing and meeting the criteria for a religious use exemption. The State could have allowed one fisherman from each village to fish for an hour. The State could have created a lottery for allowing limited fishing opportunities. Any number of means to accommodate such a need would have at least shown some consideration of the religious rights of the fishermen of the Kuskokwim. Such thinking was too far “outside the box” for the State.⁴¹ Having failed to consider even the most basic accommodation of those rights, the State cannot show that it was incapable of doing so.

3. The State’s Witnesses Recognized That Religious Accommodations Were Compatible with Preservation of the King Salmon Population

The District Court’s reliance on the notion that unfettered salmon harvest was the only possible accommodation to religious belief was in direct contradiction of the testimony. State witnesses expressly acknowledged that it was feasible to make religious accommodations to allow the harvest of king salmon for a funeral potlatch.⁴² The State received an inquiry from an individual in Akiachak, asking to catch

⁴¹ Tr. at 323.

⁴² Tr. at 319-20.

king salmon for a potlatch.⁴³ The State's witness told the individual that such a request, by analogy with the moose potlatch regulation, must come from a village leader.⁴⁴ The State requested a statement of who would be fishing, when, where, and for how many fish.⁴⁵ Because the State did not hear from a village leader, the request was never granted, but the witness allowed that it was possible to make that accommodation.⁴⁶

The State never explained in argument or in testimony why it would be possible and consistent with its interest to allow king salmon fishing for a memorial service, but not for other religious uses. The testimony presented by the State was impossible to reconcile on this point. The District Court did not explain in its opinion how the State bore its burden to show that this more limited accommodation of religious belief was impossible or unreasonable. Instead, the testimony of the state witness shows that, had a religious exemption been offered, the fishermen could have availed themselves of that option. The District Court clearly erred on this point and should be reversed.

⁴³ *Id.*

⁴⁴ Tr. at 320.

⁴⁵ *Id.*

⁴⁶ Tr. at 321.

4. Despite Claims of Need to Shut Down the King Salmon Fishery, The State Simultaneously Allowed Commercial Catch of Hundreds of Kuskokwim King Salmon

The State presented contradictory evidence regarding the need to close completely the Kuskokwim king salmon fishery. When discussing the assessment of need for a subsistence harvest, the State's biologist painted the State's dilemma in the starkest of lights, stating he had wondered aloud if "this [is] the year we wipe out the [king salmon] run."⁴⁷ From those fears, the State's expert concluded it was reasonable to close completely the king salmon fishery on the Kuskokwim.

At the same time, the State allowed commercial fishing of king salmon in the Quinhagak area, close to the mouth of the Kuskokwim, and in the mouth of the Kuskokwim, even though some of the king salmon caught in the ocean were likely headed up the Kuskokwim.⁴⁸ The State's opening of a commercial fishery, while shutting down the entire Kuskokwim to subsistence fishermen pursuing the same fish bars the State from prosecuting the fishermen for fishing in defiance of the order.

⁴⁷ Tr. at 262.

⁴⁸ Tr. at 301-02, 313-14 (stating that commercial fisheries in districts adjoining the mouth of the Kuskokwim likely caught 67 and 365 king salmon).

The State's expert, when confronted with this apparent conflict said that it was just "the reality of the world" and that practicality demanded that you could not shut down the Bristol Bay fishery, even though the State apparently felt no such compunction about doing so with the Kuskokwim fishery.⁴⁹ The State cannot claim that it could not accommodate the Kuskokwim fishermen while allowing commercial fishermen to catch those same fish. This Court need not determine whether the State could have or should have shut down the commercial fishery, but whether the State can prosecute these sincerely religious fishermen after allowing commercial fisheries to operate.

III. Conclusion

The Western world has brought the giant trawler fleets to Bristol Bay and the Bering Sea and has brought the changing ocean conditions that have altered the salmon fishery. The Yup'ik concepts of interrelatedness, harmony with nature, and prohibition on waste of any resource led to thousands of years of sustainable fisheries on the Kuskokwim. The logic of those traditional values mandate respect for the fish but also the continuing harvest of the fish. To punish the Kuskokwim's best custodians for continuing their sustainable fishing practices would be cruel indeed.

⁴⁹ Tr. at 301-02.

The logic of the *Frank* case and the meaning of the Alaska Free Exercise clause dictate that fishermen who seek king salmon in the sincere pursuit of a religiously-based practice engage in constitutionally protected activity. The State cannot overcome that constitutional protection unless it shows that it could not accommodate the religious beliefs of the fishermen and its own needs. In the present case, the State never offered any exemption to the fishermen nor considered how to accommodate their beliefs. The District Court erred by failing to require the State to show that it could not have accommodated the religious beliefs of the fishermen in some manner short of “unfettered” salmon harvest.

For these reasons, the Court should reverse the District Court’s decision, hold that the State failed to bear its burden in the final step of its *Frank* analysis, and remand with instructions to dismiss. In the alternative, the Court should remand the case to the District Court for reconsideration on the question of whether the State could have offered the fishermen some other accommodation than “unfettered” harvest of king salmon.

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Respectfully Submitted,

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