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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF ARIZONA

11 United States of America,  
12  
13 Plaintiff,  
14 vs.  
15 Amber Ortega,  
16 Defendants.

Mag. No. 4:20-mj-08904 (LAB)  
MOTION IN LIMINE  
(Government's Motion to Preclude Any  
Defense Under the Religious Freedom  
Reformation Act)

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18 The United States of America, by and through its undersigned attorneys, hereby  
19 requests the Court preclude the defendant from presenting any defense under the Religious  
20 Freedom Restoration Act (RFRA) because the defendant cannot establish a prima facie  
21 case, and the government has chosen the least restrictive means to fulfill its compelling  
22 interests. In addition, the defendants are not entitled to an evidentiary hearing.  
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24 **I. Factual Summary**

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26 The Organ Pipe Cactus National Monument ("the park") is a U.S. national  
27 monument spanning 517 square miles in Southern Arizona. The park extends from the  
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1 U.S./Mexico border north towards Why, AZ, and is bordered on the northwest by the  
2 Cabeza Prieta National Wildlife Refuge, and to the east by the Tohono O’Odham Indian  
3 Reservation. West Border Road runs east/west along the southern edge of the park along  
4 the U.S. side of the border. (Exhibit A). From October 9, 2019, through September 9,  
5 2020, West Border Road was subject to heavy construction traffic and activity related to  
6 border infrastructure. This traffic included large construction vehicles and equipment.  
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9 On October 9, 2019, the park’s Superintendent issued a temporary closure order  
10 pursuant to § 36 CFR 1.5(a)(1) for a small portion of the park which included West Border  
11 Road. (Exhibit B). Specifically, the following areas were closed:

- 12 • West Border Road (Roosevelt Reservation) from Monument Hill west to  
13 Quitobaquito Springs; and,
- 14 • All crossover roads that connect South Puerto Blanco Drive to the West  
15 Border Road.  
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18 *Id.* The closure was in response to public safety concerns associated with border  
19 infrastructure construction activity. *Id.*

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21 On September 9, 2020, National Park Service (NPS) officers working within the  
22 boundaries of the park were advised that construction crew members reported two  
23 individuals were sitting on or in heavy construction equipment in an area of West Border  
24 Road which was subject to the closure order. U.S. Border Patrol Agents and U.S. Park  
25 Rangers responded to the area and observed Nellie David sitting on the bucket of a front-  
26 end loader that was parked on West Border Road. The Park Rangers observed the  
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1 defendant standing approximately 30 yards away near the United States/Mexico border.  
2 Park Rangers approached the defendant and made several attempts to communicate to her  
3 that the area was closed and she needed to leave. Park Rangers also explained to Ortega  
4 that if she refused to leave the area they would have to arrest her. Ortega refused leave the  
5 area and was arrested<sup>1</sup> for violations of 36 C.F.R. § 2.32(a)(2) (Interfering with Agency  
6 Functions); and, 36 C.F.R. § 1.5 (Violation of Closures and Public Use Limits).  
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9 **II. Legal Summary**

10 **a. Statutory Background of RFRA**

11 In 1990, the United States Supreme Court upheld the state of Oregon’s refusal to  
12 give unemployment benefits to two Native Americans fired from their jobs after testing  
13 positive for using peyote, an illegal substance, in a religious ceremony. *Employment*  
14 *Division v. Smith*, 494 U.S. 872 (1990). In response, Congress passed the Religious  
15 Freedom Restoration Act (RFRA) of 1993, codified as 42 U.S.C. § 2000bb, to reinstate the  
16 “*Sherbert Test*,” which mandated strict scrutiny be used when determining if the Free  
17 Exercise Clause of the First Amendment has been violated. *See Holt v. Hobbs*, 135 S. Ct.  
18 853, 860 (2015).  
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22 **b. *Prima Facie* Case**

23 To establish a prima facie RFRA claim, a defendant must present evidence that (1)  
24 the defendant’s activities were an “exercise of religion,” and (2) the government action  
25 “substantially burdened” the defendant’s exercise of religion. 42 U.S.C. § 2000bb-1(a);  
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28 <sup>1</sup> Nellie was also arrested and her case has been adjudicated.

1 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068-69 (9th Cir. 2008).

2 To do this she must first articulate the scope of her beliefs, and then show that her  
3 beliefs are religious in nature, that they are sincerely held, and that the exercise of her  
4 sincerely held beliefs is substantially burdened by a government action. *United States v.*  
5 *Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007). The sincerity and full scope of a claimant's  
6 asserted beliefs should be scrutinized. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct.  
7 2751, 2779 (2014); *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996);  
8 *Zimmerman*, 514 F.3d at 854; *Guam v. Guerrero*, 290 F.3d 1210, 1222-23 (9th Cir. 2002).  
9 However, the reasonableness or validity of a claimant's beliefs may not be subject to  
10 scrutiny. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779; see also *Bauer*, 84 F.3d at  
11 1559. "Exercise of religion" is defined as "any exercise of religion, whether or not  
12 compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4)  
13 (incorporating by reference 42 U.S.C. § 2000cc-5(7)(A)).

14 To establish that a government action constitutes a substantial burden on a  
15 claimant's sincerely held religious belief, a claimant must show either (1) that he or she  
16 was forced to choose between following his or her sincerely held religious beliefs or  
17 receiving a government benefit, or (2) that he or she was coerced to act contrary to his or  
18 her sincerely held religious beliefs by the threat of criminal or civil sanctions. *Snoqualmie*  
19 *Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1214 (9th Cir. 2008) (quoting *Navajo Nation*, 535  
20 F.3d at 1070).

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1                   **c. Strict Scrutiny**

2                   Only once a defendant has established both elements of a prima facie claim does the  
3                   burden shift to the government to demonstrate that the “substantial burden” posed by the  
4                   government action is (1) in furtherance of a compelling governmental interest and (2) the  
5                   least restrictive means of furthering that compelling governmental interest. *Navajo Nation*,  
6                   535 F.3d at 1068 (citing 42 U.S.C. § 2000bb–1(b)). To demonstrate that the government’s  
7                   action is in furtherance of a compelling interest, the government must demonstrate that the  
8                   “application of the challenged law [to] the particular claimant whose sincere exercise of  
9                   religion is being substantially burdened” furthers a compelling interest. *Gonzales v. O*  
10                  *Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006). Put another way,  
11                  the government’s action is in furtherance of a compelling interest if demanding “unbending  
12                  compliance” advances its stated interest to a “meaningful degree.” *United States v.*  
13                  *Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016).

14                  In determining whether an interest is compelling as to a particular claimant, courts  
15                  look to whether analogous exceptions to the challenged statute already exist and to the  
16                  particularity with which the interest is alleged. *See Hobby Lobby Stores, Inc.*, 134 S. Ct.  
17                  at 2779; *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 432. If the  
18                  government identifies a compelling interest with particularity, then it must still demonstrate  
19                  that no less restrictive means of furthering its interest exists. 42 U.S.C. § 2000bb-1(b)(2).  
20                  Stated another way, the government must demonstrate that it cannot accommodate the  
21                  claimant’s belief more without furthering its interest less. *Christie*, 825 F.3d at 1056. To  
22                  do this, the government must demonstrate that its preferred means are reasonable and that  
23                  24                  25                  26                  27                  28

1 any other proffered options are either not less restrictive or not plausible. *Id.* at 1061.

2 **III. Discussion**

3 **a. The defendant cannot establish a *prima facie* case.**

4  
5 **i. The defendant can not show that she was “exercising” her religion**  
6 **at the time she was arrested.**

7 As an initial matter, the defendant must show that her stated beliefs are religious in  
8 nature and sincerely held. *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007).

9 At trial, the defendant will have to provide testimony as to her personal and sincerely held  
10 religious beliefs. Assuming the defendant can establish that she has sincerely held religious  
11 beliefs, next she will have to show that the conduct for which she was arrested was an  
12 exercise of her religion. In this case, the defendant was arrested for violating the October  
13 2019 closure order. It is unclear at this point how violating a closure order would have  
14 been an exercise of defendant’s religion. Nor is it clear that she was exercising her religious  
15 beliefs when she was arrested for violating the closure order. Defendant would have to  
16 show that her “presence” in the closed area was the exercise of her sincerely held religious  
17 beliefs.  
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21 **ii. The government’s actions did not “substantially burden” the**  
22 **defendant’s exercise of her religion.**

23 Finally, the defendant has to show that the government action did “substantially  
24 burden” the defendant’s exercise of her religion. The defendant’s argument is meritless  
25 because, first, the government’s choice of how to use its own land cannot legally create a  
26 substantial burden on the free exercise of an individual’s sincerely held religious beliefs.  
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28 Second, even if the government’s regulations regarding access to and use of its own land

1 could create a substantial burden, the defendant would have to show that her stated beliefs  
2 are in conflict with the regulations she is charged with violating.

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4 Any argument the defendant has that the enforcement of the federal crimes against  
5 her violate her rights under the RFRA is foreclosed by clearly established precedent in  
6 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068-73 (9th Cir. 2008). The  
7 right to the free exercise of religion does not provide religious adherents the right to dictate  
8 the government’s use of its own land or resources. *Id.* at 1073 (holding that the movants  
9 “cannot dictate the decisions that the government makes in managing what is, after all, its  
10 land”) (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988))  
11 (emphasis in original). The government may, consistent with RFRA and the Constitution,  
12 regulate and administer its own land in such a way that “decreases the spirituality, the  
13 fervor, or the satisfaction with which a believer practices his religion,” *Navajo Nation*, 535  
14 F.3d at 1063, even if the government’s actions would “virtually destroy” the believer’s  
15 ability to practice his or her religion. *Lyng*, 485 U.S. at 451. To hold otherwise would give  
16 each citizen “an individual veto to prohibit the government action solely because it offends  
17 his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires” and  
18 “would deprive others of the right to use what is, by definition, land that belongs to  
19 everyone.” *Navajo Nation*, 535 F.3d at 1063-64.

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24 Where, as here, there is no showing the government has coerced the defendant to  
25 act contrary to her religious beliefs under the threat of sanctions there is no “substantial  
26 burden” on the exercise of her religion. *Navajo Nation*, 535 F.3d 1058 at 1063 (9th Cir.  
27 2008). Since the closure order relates to the government’s enforcement of its regulations  
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1 governing its own land and a temporary closing of a small portion of the park has not  
2 coerced the defendant to act contrary to her religious beliefs, the defendant cannot establish  
3 any violation of her rights under the RFRA.  
4

5 **b. The United States has chosen the least restrictive means to fulfill its**  
6 **compelling interest.**

7 **i. The government's prosecution of the defendant for the offenses**  
8 **alleged in the Complaint furthers its compelling interests.**

9 The defendant cannot meet the elements of her *prima facie* claim. However,  
10 assuming, *in arguendo*, that she could even meet those elements, the burden would shift to  
11 the government to show that it has chosen the least restrictive means to fulfill its compelling  
12 interest. In this case, the government has a compelling interest in assuring the safety of the  
13 public through enforcement of the temporary closure order in this limited area. During the  
14 time period covered by the October 2019 closure order, West Border Road was subject to  
15 heavy construction traffic and activities including large machinery and vehicles. The  
16 traffic and construction activity created dangerous conditions on West Border Road. The  
17 defendant's presence in violation of the closure order created a danger to herself and others.  
18

19 **ii. The prosecution of the defendant in this matter is a reasonable**  
20 **method to advance the government's compelling interests, and no**  
21 **less restrictive means exist.**  
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23 The prosecution in this case is a reasonable method for the government to advance  
24 its compelling interests in protecting the public from the dangers inherent in an area of  
25 heavy construction activities and traffic. There is no less restrictive means. The closure  
26 order covered only the portion of West Border Road that was subject to the heavy  
27 construction. With the exception of a portion of West Border Road, the entire 517 square  
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1 miles of the Organ Pipe Cactus National Monument was open to the public.

2 **IV. Conclusion**

3 The defendant cannot establish a *prima facie* case that the government's  
4 enforcement of the West Border Road closure order imposed a substantial burden on the  
5 exercise of her religion. Even if the defendant could establish a *prima facie* case, the  
6 government has a compelling interest in promoting public safety and no less restrictive  
7 means were available to ensure compliance with the closure order.  
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9  
10 For these reasons, the government respectfully requests this Court preclude the  
11 defendant from asserting a defense under the Religious Freedom Reformation Act.  
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13 Respectfully submitted this 26th day of August, 2021.

14 GLENN B. McCORMICK  
15 Acting United States Attorney  
16 District of Arizona

17 */s Vincent J. Sottosanti*

18 VINCENT J. SOTTOSANTI  
19 Assistant U.S. Attorney

20 Copy of the foregoing served electronically  
21 or by other means this 26th day of August, 2021, to:

22 All ECF participants  
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