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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 United States of America,)
15 Plaintiff,) No. 20-mj-08904-N/A-LAB
16 vs.)
17) **MOTION TO RECONSIDER ORDER**
18) **REJECTING RFRA DEFENSE**
19 AMBER ORTEGA,)
20 Defendant.)
21 _____)

22 Defendant Amber Ortega, through counsel undersigned, hereby moves this Court to
23 reconsider its November 18, 2021 Order (Doc. 46) that testimony regarding RFRA will not
24 be admitted and considered on the question of guilt or innocence.

25 Local Rule of Criminal Procedure 12.1, addressing motions in criminal cases,
26 incorporates the provisions of Rule 7.2 of the Local Rules of Civil Procedure, which
27 addresses motions for reconsideration in subsection (g). This rule requires the movant to
28 “point out with specificity the matters that the movant believes were overlooked or

1 misapprehended by the Court, or any new matters being brought to the Court’s attention for
2 the first time and the reasons they were not presented earlier.” The rule also contemplates
3 the filing within fourteen days of the filing of the Order that is the subject of the motion,
4 although that date may be excused on a showing of good cause. Here, the Order was entered
5 20 days ago, but good cause exists for this very brief delay because defendant was in the
6 process of obtaining new counsel (a process made more difficult and time-consuming by the
7 ongoing COVID-19 pandemic), because the issues are complex and benefit from careful
8 research, and because the fourteen days since the issuance of the order included the
9 Thanksgiving holiday. Because the Court has already agreed to delay its verdict at the
10 government’s request until December 15, the filing of this motion now will not cause
11 prejudice.
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15 The application of the Religious Freedom Restoration Act (RFRA) is complex, and often
16 fact-specific. There is a significant body of law interpreting each of its requirements. This
17 Court was provided with very little briefing on the subject, and did not identify and correctly
18 apply the governing law. Resolving that now, before a verdict or judgment, will conserve
19 resources and be preferable to addressing it in a motion for new trial or appeal to the District
20 Court.
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23 The Order contains three significant errors. First, it applies the RFRA analysis to the
24 wrong government action. Second, it badly misapprehends the nature and scope of the
25 exercise of religion being asserted. Third, it misunderstands RFRA’s “substantial burden”
26 requirement.
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1 **A. Government Action**

2 This Court’s Order concludes that “the defense was unable to prove that on 9/9/20 the
3 closure order and the ranger’s lawful order that Ms. Ortega leave the construction zone
4 imposed a substantial burden on her ability to engage in her religious activities.” Doc. 46 at
5 9. That is the wrong question. This is not a civil lawsuit seeking to void a closure order. Ms.
6 Ortega did not initiate these proceedings; the government did. And it is that action—the
7 criminal prosecution and any concomitant punishment, not the closure order—that imposes
8 the relevant substantial burden on her exercise of religion.
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11 It is far beyond the scope of this misdemeanor prosecution to determine whether the
12 government may undertake this construction or close a particular area. This is in stark
13 contrast to a case like *Navajo Nation v. U.S. Forest Service*, 535 U.S. 1068 (9th Cir. 2008),
14 in which plaintiffs asked the court to prohibit the government from proceeding with a
15 particular aspect of its development of government-owned land. There, the question was
16 whether the government could use artificial snow made in small part from recycled
17 wastewater on federal land over the objection of a tribe for whom that action desecrated
18 religiously significant land. The equivalent here would be if Ms. Ortega had sued to enjoin
19 the construction of the wall, because it offended her religious beliefs. She has done no such
20 thing. She asks only that she not be imprisoned, restricted in her liberty, or fined by the
21 government for vocally and physically objecting to that construction—actions very much
22 encompassed in her religion, as explained in more detail below.¹ Whether Ms. Ortega was
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28 ¹ This is not to say that any individual has a right to physically interfere with government actions that offend their religious beliefs. There is a crucial difference between seeking to

1 able to engage in prayer at a particular sacred site with the construction ongoing nearby
2 addresses the effect of the *construction* on her exercise of religion. This Court should instead
3 assess whether criminal prosecution for the particular actions she is accused of taking—
4 entering the area and refusing to leave—substantially burdens her religious exercise. And if
5 those particular actions were a part of her religious exercise, then it obviously does.
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7 The government accomplished its goal—it was able to remove her from the area and
8 continue with the construction to which she was objecting. And, absent this prosecution, Ms.
9 Ortega was able to engage in the relevant exercise of her religion: doing whatever she could
10 to protect her people’s sacred lands, including placing her own body between the equipment
11 she viewed as harmful and the land she viewed as sacred. Prosecuting her now for those
12 religiously motivated actions accomplishes nothing, let alone a compelling government
13 interest that can be accomplished no other way. And it is the validity of the prosecution, not
14 the legality of the construction project, that this Court must decide.
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18 In short, because this is a criminal prosecution of Ms. Ortega, the emphasis must be on
19 the religious nature of the actions taken by Ms. Ortega. This Court’s RFRA analysis did not
20 evaluate her actions; it evaluated the government’s program. That is a manifest error.
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22 **B. Exercise of Religion**

23 RFRA, 42 U.S.C.A. § 2000bb-1, forbids the imposition of a substantial burden on “a
24 person’s exercise of religion.” In ruling that Ms. Ortega had not established a prima facie
25 case, this Court explained that “Ms. Ortega, and other tribal members, had access to the
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28 interfere in a third party’s actions that are, according to one’s religion, wrong, and engaging
in a centuries-old spiritual practice of resisting and bearing witness to actions that directly
and immediately disrupt a person’s own religious life.

1 sacred Quitobaquito Springs, even during the closure period,” and that “although the water
2 level dropped at times, they had access to the water and levels are returning to normal.” Doc.
3 46 at 8-9. It went on to state “[t]here was no evidence presented that proved that the
4 government interfered with Ms. Ortega’s prayers or ceremony at Quitobaquito Springs on
5 9/9/20, other than the distant sound of heavy machinery.” *Id.* at 9. Thus, the “exercise of
6 religion” this Court considered, and based its ruling on, consisted solely of ability to
7 physically access a particular sacred site. That is far too narrow an understanding of the
8 religious actions at issue here, and limiting consideration to only physical access to a very
9 specific sacred site fails to afford Ms. Ortega the protection Congress intended to afford her
10 when it enacted RFRA. The Court should not contribute to the development of a body of
11 RFRA law biased toward activities easily recognizable to European-descended Americans
12 as prayer. RFRA quite plainly encompasses not only acts of explicit worship, prayer, or
13 ceremony, but actions that form a part of a religion’s teachings. *See, e.g., Fifth Ave.*
14 *Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574–75 (2d Cir. 2002) (church’s
15 “provision of outdoor sleeping space for the homeless effectuates a sincerely held religious
16 belief” under free exercise clause²). And the Supreme Court has directed that religion must
17 be understood in light of “the richness and variety of spiritual life in our country.” *United*
18 *States v. Seeger*, 380 U.S. 163, 185 (1965).

24
25 ² The Ninth Circuit and this district have repeatedly defined the concept of “religion” in
26 RFRA and the related statute RLUIPA according to its jurisprudence in the constitutional
27 Free Exercise context. *United States v. Zimmerman*, 514 F.3d 851, 853–54 (9th Cir. 2007)
28 (importing definition of religion in a Free Exercise case, Callahan, into the context of
RFRA); see also *Isbell v. Ryan*, 2011 WL 6050337, at *5 (D. Ariz. Dec. 6, 2011); *Guillen*
v. Thompson, 2008 WL 5331915, at *3 (D. Ariz. Dec. 19, 2008).

1 First, the Court simply cannot assume that religious practices at a ceremonial site can
2 occur without substantial burden simply because there is physical access. The physical
3 desecration of the surrounding area, the presence of heavy machinery, and the erection of an
4 enormous wall on sacred lands fundamentally disrupt the spiritual experiences Ms. Ortega
5 has in those places, even if she is physically able to access a particular sacred site. Ms.
6 Ortega's religion places great importance on the natural world and the relationship between
7 people and the land on which they exist. Visibly and audibly disrupting that land has a
8 devastating impact on the ability to engage in that sacred communion whether or not Ms.
9 Ortega could physically put her feet at one particular sacred site. Perhaps in some religions,
10 physical access to a sacred site is what is really necessary for the particular exercise of
11 religion. But Ms. Ortega's religion simply does not work that way, and to blindly assume
12 that it does is to discount the nature of the religion itself.³

16 But perhaps more to the point, the Court's analysis ignores entirely the inescapable fact
17 that the act of defending the land is itself an exercise of religion. Ms. Ortega's actions here,
18 as summarized by this Court, included placing her body in front of a construction vehicle
19 and verbally telling Rangers that the land was stolen and was being raped, while insisting
20 she needed to remain there to seek to prevent those things. Doc. 46 at 3. She was singing
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25 ³ The disruption occurring here is of an entirely different nature than that considered in
26 *Navajo Nation*. The physical destruction and division of the land with heavy machinery
27 within, as estimated by the government's witness, approximately one eighth of a mile of a
28 sacred site, which is both visible and audible and does undeniable damage to the land, does
far more than simply "decrease the spiritual fulfillment" of "practicing their religion" in the
area. 535 F.3d. at 1063.

1 and chanting while she did this. *Id.* These are the actions for which she is being prosecuted,
2 and for which she claims RFRA’s protection. Especially in light of the history of interactions
3 among people living on and later arriving on this continent, the act of defending sacred
4 ancestral lands (in addition to spiritual activities that occur on those lands) is very much a
5 part of the religious practice of many O’odham people, including Ms. Ortega. Regardless of
6 whether she has any legal entitlement to actually stop the construction, she absolutely has a
7 legal entitlement to engage in her religious practice of expressing her resistance to the
8 desecration of her sacred ancestral lands and seeking to protect them—even if those efforts
9 must ultimately prove unsuccessful. The fact that those acts were against the law does not
10 change their fundamentally religious nature; indeed, it is that very fact that necessitates a
11 statute like RFRA to begin with. RFRA, in the criminal context, *assumes* that certain actions
12 that are against the law may be exercises of religion, and thus not subject to prosecution,
13 unlawfulness notwithstanding. Even assuming (without conceding) that the government had
14 some right to ultimately remove her from the area, it has *no* right to bring criminal charges
15 against her for doing what her religion calls for. This Court’s failure to acknowledge these
16 aspects of Ms. Ortega’s exercise of religion constitutes a manifest error warranting
17 reconsideration of the November 18, 2021 Order.
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23 **C. Substantial Burden**

24 This Court recognized that *Navajo Nation* provides some discussion of the
25 “substantial burden” analysis, and then declined to rule one way or the other on whether the
26 two methods discussed there were the only possible methods for establishing a substantial
27 burden. Doc. 46 at 8. The Court never says what the “more expansive definition” under
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1 which the claim also fails might be, ruling only that because Ms. Ortega had physical access
2 to one particular sacred site, there was no substantial burden. *Id.* But a proper analysis of
3 this prong involves identifying the governing standard and applying it to the actual full
4 exercise of religion at issue here, as identified above.
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6 Courts in this district have interpreted and applied RFRA’s requirements recently. In
7 *United States v. Hoffman*, 436 F.Supp.3d 1271 (D. Ariz. 2020), the Court explained:
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9 Defendants, do not need to show that their beliefs “required” them to conduct
10 their religiously motivated activities . . . in order to succeed on their RFRA
11 claim. (*Id.*) As amended, RFRA protects “*any* exercise of religion, *whether or*
12 *not compelled by, or central to, a system of religious belief.*” § 2000cc-5(7)(A)
13 (emphasis added). “[A] burden can be ‘substantial’ even if it does not compel
14 or order the claimant to betray a sincerely held belief[.]” Accordingly,
15 Defendants need not establish that their beliefs “required” them to enter the
16 [restricted federal lands]. Rather, Defendants must only show that enforcement
17 of the regulations against them causes them “considerable pressure” to
18 abandon *any* exercise of religion.

19 *Id.* at 1286 (internal citations omitted).

20 As this Court has already recognized, *Navajo Nation* did not purport to set out the
21 only possible methods of proving a substantial burden, and indeed, because that case arose
22 in the context of an affirmative lawsuit seeking to enjoin the government’s own actions on
23 its land, rather than as a defense to a criminal prosecution, the precise contours of its analysis
24 are of little use here. This Court should recognize, as the *Hoffman* Court did, that the
25 “substantial burden” prohibition prevents the government from criminally prosecuting
26 anyone for actions that constitute the exercise of a sincerely held religious belief—which is
27 entirely compatible with the Ninth Circuit’s *Navajo Nation* opinion. Here, there is no
28 question that in protesting the desecration of the land and seeking to protect her ancestral

1 homeland, Ms. Ortega was acting in exercise of her religious beliefs. Prosecuting her for
2 those actions is *per se* a substantial burden. *Cf. Wisconsin v. Yoder*, 406 U.S. 206, 218)
3 (1972) (threat of five-dollar criminal fine constitutes substantial burden); *O Centro Espirita*
4 *Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006) (noting the government conceded
5 that the threat of prosecution would constitute a substantial burden).
6

7 CONCLUSION

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9 In this case, before this Court, Ms. Ortega is not asking the government to cease its
10 construction activities. (In fact, the government has already done so, the orders to undertake
11 the construction having been found unlawful and the president who issued them having been
12 voted out of office; *see Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) (vacated and
13 remanded by *Biden v. Sierra Club*, __ S.Ct. __, 2021 WL 2742775 (July 2, 2021)). She is
14 asking only that she not be punished criminally for her religious activities. That is a small
15 request, and an entirely appropriate one given Congress's insistence that the exercise of
16 religion be strongly protected and the government's long history of ignoring the rights and
17 fundamental humanity of the people who lived on this continent long before the arrival of
18 European colonists. RFRA protect not only the religions white settlers brought with them
19 across the oceans; it protects the religious and spiritual practices of the people who were
20 already here, among them, defending the land. Let us not be the country that runs roughshod
21 over the lives, lands, and spiritual practices of any people who happen to be in our way and
22 then punishes them⁴ for resisting.
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28 ⁴ Ms. Ortega has already suffered significantly as a result of these charges. For these petty offenses, she was transported from near the border to a Core Civic immigration detention

1 Respectfully submitted this 8th day of December, 2021

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3 /s/ Amy P. Knight

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12 CERTIFICATE OF SERVICE

13 I certify that on December 8, 2021, I electronically transmitted a PDF version of
14 this document to the Clerk of Court using the CM/ECF System for filing and for
15 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:
16

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24
25
26

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28 facility in Florence, Arizona, detained for two days without charges during the peak of the
COVID-19 pandemic, and released under conditions of release that have interrupted her
work, health, and emotional wellbeing.