UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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CHRISTOPHER D. MOORE-BACKMAN,	**: Index No. 4:09-cv-00397-TUC-BPV**
Plaintiff/Petitioner,	**:**
-against-	**: Judge Raner C. Collins**
UNITED STATES OF AMERICA	**: Magistrate Bernardo P. Velasco**
Defendant/Respondent.	**:**

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PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Christopher D. Moore-Backman submits this memorandum of law in opposition to the motion to dismiss of defendant United States of America.

The allegations of the complaint establish that Christopher Moore-Backman would be entitled to relief under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq*. in his claim for a tax refund. Accordingly, the United States' motion to dismiss should be denied.

Summary of Argument

On this motion to dismiss, the Court should treat all the well-pleaded allegations in the complaint as true and should construe them in a light most favorable to Christopher Moore-Backman, the non-moving party. The complaint should not be dismissed unless it appears beyond doubt that Christopher Moore-Backman can prove no set of facts in support of his claim which would entitle him to relief.

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*("RFRA") provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), unless it "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In its motion to dismiss, the United States makes no effort to address the standards for determining whether an accommodation

of Christopher Moore-Backman's exercise of his religious beliefs is required under RFRA. The Supreme Court has directed, however, that the government must "demonstrate that the compelling interest test is satisfied through the application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006). Accordingly, the United States' motion should be denied.

In addition, an examination of Christopher Moore-Backman's complaint demonstrates that he has adequately alleged all the elements of a RFRA claim. Christopher Moore-Backman's request for accommodation is in accord with his sincere religious beliefs and the long-standing "Peace Testimony" and conscientious objection to supporting war in all forms that are well-known aspects of his faith, the Religious Society of Friends (Quakers). As a result of the United States' refusal to accommodate Christopher Moore-Backman's sincere religious beliefs he has been denied a portion of the refund owing him from his 2007 taxes and charged penalties and interest on his 2001 and 2004 taxes which constitutes a substantial burden under the Ninth Circuit's decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1069-70 (2008)(*en banc*), *cert. denied,* ___ *U.S.* ___, *129 S.Ct. 2763, 174 L.Ed.2d 207 (2009).*

Although the burden rests on the United States to allege and prove both a compelling interest *and* that it employs the least restrictive means to achieve that compelling interest, Christopher Moore-Backman's complaint alleges sufficient facts from which the court can find that accommodating his sincere religious beliefs would not cause any undue burden to the government. The government has long been able to accommodate conscientious objection to military service and to the payment of taxes or fees to support warfare. The government already provides tax

accommodations to persons whose religious beliefs preclude them from voluntarily complying with tax obligations; for example, by exempting the Amish from the payment of Social Security taxes. And the government is able to segregate tax payments for specific uses without suffering undue burden; for example, in its administration of the campaign finance check-off law.

The Second and Third Circuit decisions relied upon by the United States do not govern this Court's discernment and are distinguishable. Among other things, none of them involved a RFRA claim for a tax refund, and they all applied a RFRA standard that is not consistent with the standard adopted by the Ninth Circuit and the Supreme Court.

The United States' arguments that the Court lacks subject matter jurisdiction over Christopher Moore-Backman's claim should be rejected because (1) the United States plainly has waived its sovereign immunity for suits for a tax refund or an accommodation under RFRA, (2) Christopher Moore-Backman's request for relief is not barred by either the Anti-Injunction Act, 26 U.S.C. § 7421, or the Declaratory Judgment Act, 28 U.S.C. § 2201, and (3) RFRA explicitly authorizes the courts to award "appropriate relief against a government."

FACTS

1. Christopher Moore-Backman's Claim.

Christopher Moore-Backman's complaint alleges, among other things, that he was entitled to a federal income tax refund for the 2007 tax year in the amount of $3,255.00. The IRS applied $1,509.69 of those funds to taxes allegedly owed for the 2001 tax year ($1,026.04) and for the 2004 tax year ($483.65). (*Complaint at* ¶¶ *11 & 12.*) Christopher Moore-Backman had filed his tax returns for 2001 and 2004, but had been compelled to withhold the amounts owing on those

returns because the United States government violates his religious beliefs and conscience (1) by forcing him to finance the conduct of war and the production of the weaponry of war, and (2) by failing to provide a means for applying his tax payments to non-military purposes. (*Complaint at ¶¶ 6-10.*) The refusal of the government to accommodate his religious beliefs and conscience violates Christopher Moore-Backman's legal rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.* and breaches the United States' obligations to respect the universal human right to freedom of thought, conscience and religion. Accordingly, the offset of those taxes against Christopher Moore-Backman's 2007 refund was in violation of his legal rights, and he is therefore entitled to a judgment directing the United States of America to refund the remaining unpaid $1,509.69. (*Complaint at ¶¶ 39-46.*)

2. Christopher Moore-Backman's Religious Beliefs:
Conscientious Objection to Participation in Warfare in All Forms.

Christopher Moore-Backman is a member of the Religious Society of Friends (Quakers). (*Complaint at ¶ 4.*) He is a member of San Francisco Friends Meeting, which is part of Pacific Yearly Meeting of the Religious Society of Friends. (*Complaint at ¶ 25.*) His practice of nonviolence is in accordance with the Quaker peace testimony that is a long-held Friends' belief and a vital part of Christopher's faith. (*Complaint at ¶ 4.*)

Pacific Yearly Meeting's book of guidance in self-discipline, Faith and Practice (1995), describes the "Peace Testimony" that has long been a central part of Friends' beliefs. (*Complaint at ¶ 25.*) It provides (at page 29; http://www.pacificyearlymeeting.org/fp/pymfp2001pg029.html):

"Based upon love and concern for the wellbeing of all, Friends work

> for reconciliation and active nonviolent resolutions of conflict. Friends have traditionally supported conscientious objectors to military service, while holding in love, but disagreeing with, those who feel that they must enter the armed forces. Friends oppose all war as inconsistent with God's will."

Faith and Practice goes on to identify Friends' responsibilities in balancing the practice of faithfulness to God and conscience with the dictates of government. It states (at page 37; http://www.pacificyearlymeeting.org/fp/pymfp2001pg037.html):

> "We value our part in shaping the laws of our country. Our task is to see that laws serve God's purposes and build a just social order. Our first allegiance should be to God, and if this conflicts with any compulsion of the state, we serve our country best by remaining true to our higher loyalty."

These "testimonies" have long been an integral part of the Religious Society of Friends. Quakers are well known for their unyielding religious conviction that attention to the Inner Light, present in every person, empowers all of us to resolve disputes without resort to the machinery of war. This conviction results in Friends' uncompromising stand against warfare in all forms. (*Complaint at ¶ 13.*)

For example, the earliest Quakers, in 1661, declared to King Charles II their unequivocal refusal to participate in war making:

> "We do utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever.

> And this is our testimony to the whole world... The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil and again to move unto it; we do certainly know, and do testify to the world, that the spirit of Christ, which leads us into all Truth, will never more move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, nor for Kingdoms of this world."

(Declaration "Against All Plotters and Fighters in the World" addressed to Charles II by George Fox, Richard Hubberthorne and 10 other Friends, January 21, 1661.) (*Complaint at ¶ 14.*) From this date on, the peace testimony has been an integral and distinctive feature of Quaker beliefs and practices, distinguishing the Society of Friends from many other religious groups and calling Quakers to personal witness and testimony to support the end of warfare and the promotion of nonviolent alternatives. (*Complaint at ¶ 15.*)

Conscientious objection to military service is the oldest and most familiar expression of the Quaker peace testimony. By the middle of the eighteenth century, the absolute refusal of Quakers to fight or to provide military requisition was so familiar that at least five colonies -- New York, Virginia, Massachusetts, North Carolina and Rhode Island -- allowed Quakers to be exempted from the military service obligatory for other able-bodied males. (Pennsylvania, more heavily Quaker, did not even adopt a military conscription act until 1775.) Conscientious objection by Quakers in the United States has continued to be an important expression of the peace testimony in all the major wars, from the Revolutionary War through the conflict in Vietnam, during which the United States abandoned the mandatory military draft. (*Complaint at ¶ 16.*)

Friends have also long been concerned by the inconsistency of helping to finance a war effort, while refusing to participate in warfare. For at least two hundred years, this concern has led numerous Friends to decline to support the machinery of warfare. (*Complaint at* ¶ *17.*) For example, in 1755, while the Pennsylvania Assembly was debating raising funds "for the king's use" in the French and Indian War, a delegation of 20 Quakers addressed the Assembly in opposition to the raising of money for the war. When the bill became law, Friends published "An Epistle of Tender Love and Caution to Friends in Pennsylvania" to explain why their faith would not permit them to pay war taxes:

> "And being painfully apprehensive that the large sum granted by the late Act of Assembly for the King's use is principally intended for purposes inconsistent with our peaceable testimony, we therefore think that as we cannot be concerned in wars and fightings, so neither ought we to contribute thereto by paying the tax directed by the said Act, though suffering be the consequence of our refusal, which we hope to be enabled to bear with patience."

(*Complaint at* ¶ *18.*)

And in 1776, during the Revolutionary War, Philadelphia Yearly Meeting approved a minute "that a tax levied for the purchasing of drums, colours, and other warlike purposes, cannot be paid consistent with our Christian testimony." Similar positions were expressed in opposition (i) to taxes imposed to retire the debt from the Revolutionary War, (ii) to import duties used to finance the War of 1812, and (iii), to a lesser extent, during the Civil War. (*Complaint at* ¶ *19.*)

When Congress instituted the first federal universal military service draft during the

Civil War, it provided exemption for "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations. . . ." Congress specifically accommodated conscientious objections to the payment of "war taxes" by providing, in the Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6, 9, that the commutation fee to be paid for exemption from military service was to be applied solely to humanitarian purposes. (*Complaint at ¶ 20.*)

Similarly, the constitutions and statutes of many of the colonies and original 13 states provided exemptions from militia service, which was the sole mechanism for gathering armed forces for the nation. Those statutes also accommodated objections to paying "war taxes" by providing that militia service commutation fees were to be applied to nonmilitary uses. For example, the New York legislature provided in statues in the early 19th Century that the commutation or exemption tax paid by Quakers was to be used for the "support of common schools". (Act of April 8, 1808, NY Legis., 31st Sess., Ch. 154, Art. XIV; in Laws of the State of New York (Websters & Skinner 1809), Vol. V, at 333; Act of March 29, 1809, NY Legis., 32nd Sess., Ch. 165; in Public Laws of the State of New York (S. Southwick 1809), at 197-199.) In 1814, the New York legislature directed "That all commutation money hereafter to be received from people called Quakers, under or by virtue of the act to organize the militia of this state, instead of being paid to the treasurer of this state, for the benefit of common schools, shall be paid to the several county treasurers, for the use of the poor in the said counties." (Act of April 15, 1814, NY Legis., 37th Sess., Ch. 200, Art. XXIII; in Laws of the State of New York (H.C. Southwick 1814), at 253.). (*Complaint at ¶ 21.*)

In more recent times, many Quakers, including Petitioner Christopher Moore-

Backman, and Friends' organizations refused to pay the federal telephone tax originally imposed to help finance the Vietnam War, but continued thereafter. (*Complaint at ¶ 22.*)

The peace testimony has led Quakers to seek nonviolent methods of resolving disputes and to provide training, counseling and assistance in peace making and reconciliation efforts. It was work of this sort that was the primary basis for the award of the Nobel Peace Prize to the Religious Society of Friends in 1947. (*Complaint at ¶ 23.*)

Christopher Moore-Backman has actively practiced this nonviolent faith and witness in accordance with the long-standing beliefs of the Religious Society of Friends and the guidance from Pacific Yearly Meeting. He believes that, in the tradition of Mohandas Gandhi and Martin Luther King, Jr., practitioners of nonviolence must be actively and openly nonviolent if they are to offer a true and viable alternative to militaristic use of lethal force in response to human conflict. He holds, with many Christians, that the teachings of Jesus point us to the active, nonviolent engagement and voluntary self-suffering that characterized Gandhi's and King's teachings and conduct. (*Complaint at ¶¶ 24, 27.*)

Christopher Moore-Backman has sought to live fully in the life of this commitment and sacrifice by meeting conflict with nonviolence and love. For example, he served a 10-month term as a human rights accompanier of civilians living in a war zone in Colombia, in a program organized by the Fellowship of Reconciliation (www.forusa.org/). He accompanied and bore witness to a Colombian civilian community that had made a public declaration of neutrality in the on-going civil war. Christopher Moore-Backman also undertook training as a facilitator with the Alternatives to Violence Project ("AVP") (www.avpusa.org/) and has applied his training by facilitating AVP workshops in both prison and non-prison settings. He assisted the Nonviolent Peaceforce

(www.nonviolentpeaceforce.org/) in its efforts to lay the groundwork for its international peace team endeavors and, as this work provided no compensation, undertook fund-raising to provide for his own subsistence. (*Complaint at* ¶¶ *28-31.*)

Christopher Moore-Backman has published articles and led numerous workshops on the teachings of Gandhi and their application to our society. Through these efforts, he has sought to bring Gandhi's teachings to the work of contemporary Quakers and other faith communities. Gandhi taught that "Noncooperation with evil is a sacred duty," and he made his life a shining example of that truth. Christopher Moore-Backman follows this wisdom and example by committing his life to the power and efficacy of nonviolence. Coerced participation in our nation's use of lethal force is a violation of his religious practice and sacred duty to obey his conscience. His refusal to pay for war flows from this understanding and faith. (*Complaint at* ¶¶ *32-33.*)

3. The Burden on Christopher Moore-Backman's Exercise of His Religious Conscience.

Christopher Moore-Backman's faith and practice stands in stark contrast to the militaristic conduct of our nation.

The United States government has engaged in continuous war making and preparations for war at least since World War II, including in the following countries: Korea, Vietnam, Laos, Cambodia, Haiti (twice or more), Grenada, Panama, Somalia, Iraq (twice), Sudan, Serbia (Kosovo), Afghanistan. The United States government has also utilized substantial federal income tax receipts to provide financial assistance to war making by other nations, and armaments and military instruction, including at least all of the following: Greece, Israel, Iran, El Salvador, Honduras, Guatemala, Nicaragua, Colombia, Philippines. These actions have caused enormous levels of death and injury, environmental destruction and property damage. (*Complaint at* ¶¶ *36-37.*)

A substantial portion of federal income taxes collected from individuals like Christopher Moore-Backman has been, and continues to be, spent on these preparations for warfare and on waging war. According to the Stockholm International Peace Research Institute, "The USA's military spending accounted for 45 per cent of the world total in 2007, followed by the UK, China, France and Japan, with 4–5 per cent each. Since 2001 US military expenditure has increased by 59 per cent in real terms, principally because of massive spending on military operations in Afghanistan and Iraq, but also because of increases in the 'base' defence budget. By 2007, US spending was higher than at any time since World War II." (SIPRI Yearbook 2008, http://yearbook2008.sipri.org/05.) (*Complaint at ¶¶ 34-35.*)

The taxpayers of the United States directly finance this military spending. Citizens like Christopher Moore-Backman through their federal income taxes are compelled continuously to pay for war and to support the government's faith in and practice of militarism, or the use of lethal force, to resolve disputes. True religious freedom requires respect for, and tolerance and accommodation of, each person's faith and conscience. The current tax policy of the United States government directly trespasses upon this basic human right of freedom of religion and conscience by forcing citizens like Christopher Moore-Backman to breach their religious principles of nonviolent conflict resolution in favor of the government imposed faith in the efficacy of militarism and lethal force. (*Complaint at ¶ 38.*)

4. The Ability of the United States to Accommodate Christopher Moore-Backman's Exercise of His Religious Conscience.

Moreover, the United States and the Internal Revenue Service readily could accommodate Christopher Moore-Backman's practice of his faith without incurring any substantial

burden. Uniformity in tax collection and utilization policies is not required by any compelling governmental interest. The United States Tax Code includes numerous examples of special exemptions and deductions. For example, the government provides exemptions to Amish applicants from the payment of Social Security taxes in recognition of their religious beliefs. (*Exemption Act of 1988*, 26 U.S.C. § 3127.) And the government is able without substantial burden to segregate certain taxes for specific uses, as with the $3 campaign finance check-off, 26 U.S.C. § 6096. Because the federal government is readily able to administer a program to accommodate Christopher Moore-Backman's practice of religion, such as by segregating his tax payments for use solely for nonmilitary purposes, the refusal to accommodate his religious beliefs is not the least restrictive means of furthering any compelling governmental interest. (*Complaint at* ¶¶ *43-44.*)

ARGUMENT

I.

LEGAL STANDARDS GOVERNING A MOTION TO DISMISS.

"On a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party. . . . Under Rule 12(b)(6), a complaint 'should not be dismissed unless it appears beyond doubt that [the] plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Wyler Summit Partnership v Turner Broadcasting System, Inc*, 135 F.3d 658, 661 (9th Cir. 1998) (*citing Parks School of Business, Inc v Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) and *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 535-36 (9th Cir. 1995)).

II.

CHRISTOPHER MOORE-BACKMAN'S COMPLAINT STATES A VALID CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

A. The Religious Freedom Restoration Act of 1993.

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*, ("RFRA") provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . . ." 42 U.S.C. § 2000bb-1(a). RFRA provides an exception to this general rule: the federal government may substantially burden a person's exercise of religion "only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive

means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).[1]

Congress enacted RFRA in response to a decision of the Supreme Court, *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which had substantially narrowed, if not eliminated, the Free Exercise Clause of the First Amendment's protection of the practice of religion. In *Smith*, the Supreme Court discarded the prior standard that subjected burdens on religious practice to "strict scrutiny", which had been developed in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The *Smith* Court held, instead, that the Free Exercise Clause simply was not implicated by a "valid and neutral law of general applicability" regardless of the burden the law might impose on the free exercise of religion. 494 U.S. at 879. In RFRA, Congress sought to

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[1] The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*, provides:

> § 2000bb-1. Free exercise of religion protected
>
> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

reaffirm the government's duty NOT to burden a person's exercise of religion except if necessary to further "a compelling governmental interest" and, even then, only if the government uses the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

B. This Case Raises Issues of First Impression in the Ninth Circuit.

The application of RFRA to the issues raised in this case and to the conduct of the Internal Revenue Service has not been addressed by the Supreme Court and is an issue of first impression in this Circuit. Neither the Ninth Circuit Court of Appeals nor any of the District Courts in the Circuit have addressed either the issues raised in this action or analogous questions. Accordingly, this Court is not bound by decisions from other circuits in considering plaintiff's claim and defendant's motion to dismiss. *See, e.g., U.S. Mortgage, Inc. v. Jensen*, 494 F.3d 833, 842-843 (9th Cir, 2007).

Nonetheless, substantial guidance may be discerned in the decision of the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006), and of the Ninth Circuit in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008)(*en banc*), *cert. denied, ___ U.S. ___, 129 S.Ct. 2763, 174 L.Ed.2d 207 (2009)*.

C. The Decision of the Supreme Court in
Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal.

In a case involving the ceremonial use of a Schedule I illegal hallucinogen in a religious ritual by a small Christian sect, the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006), examined

the scope of RFRA and the manner in which its standards should be applied in determining whether an accommodation was required. The Court substantially clarified the burden the government must satisfy in order to be entitled to an exception from accommodating a person's practice of his faith.

First, the Supreme Court reiterated that the government bears the substantial burden of establishing that an accommodation would be unworkable in each case. It noted:

> RFRA requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened.

Id. at 430-431 (internal quotation marks omitted).

Second, the Supreme Court held that the government could not rely on a claimed need for uniformity in the application of a criminal statute to excuse it from proving that providing an accommodation would be unduly burdensome in the specific case under consideration. By its terms, RFRA contains no exemptions for **any** governmental body or function. In *O Centro*, however, the government argued that "it has a compelling interest in the *uniform* application of the Controlled Substances Act", *id.* at 423 (emphasis in original), which precluded any inquiry into whether accommodating the requested religious exception for ceremonial use of a Schedule I hallucinogen "would seriously compromise its ability to administer the program." *Id.* at 435. The Court emphatically rejected the government's "categorical approach":

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach.. . . [W]e must searchingly examine the interests that the State seeks to promote

> . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.

Id. at 430-431 (internal quotation marks omitted).

Third, the Supreme Court looked to the existence of other statutory or regulatory exemptions as relevant to determining whether a request for accommodation would be unduly burdensome to the government:

> The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.

Id. at 435.

Finally, the Supreme Court rejected the suggestion that only Congress, and not the federal courts, should engage in crafting exceptions to federal laws of general application. *Id.* at 434 ("RFRA, however, plainly contemplates that *courts* would recognize exceptions – that is how the law works. *See 42 U.S.C. § 2000bb-1(c).").* It soundly rejected the contention that generalized fears about theoretical administrative burdens could justify refusing to consider a specific request for accommodation:

> Here the Government's argument for uniformity ... rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I

> make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5).

Id. at 435-436.

D. The Decision of the Ninth Circuit in Navajo Nation v. United States Forest Service.

In *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008)(*en banc*), *cert. denied, ___ U.S. ___, 129 S.Ct. 2763, 174 L.Ed.2d 207 (2009)*, the Ninth Circuit, *en banc*, elucidated the first part of the RFRA test: what constitutes a "substantial burden" on a person's exercise of religion. In that case, the plaintiffs complained that a sacred site would be desecrated by the Forest Service's plan to use recycled wastewater containing small amounts of human waste in artificial snow to be sprayed on a publicly owned mountain. Looking to the Supreme Court's earlier decisions in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Ninth Circuit determined that a "substantial burden" on a person's exercise of his faith exists "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). *Navajo Nation*, 535 F.3d at 1069-70.

In their decision, the Court also acknowledged that the second part of the RFRA test - whether the government is to be excused from providing an accommodation - imposes on the government a more demanding burden than the constitutional standard under *Sherbert* and *Yoder*. The Ninth Circuit stated:

> The Plaintiffs note that, whereas the government must establish only a compelling interest to withstand a *Free Exercise Clause* challenge, the government must establish both a compelling interest *and* the least restrictive means to withstand a RFRA challenge. That is true enough, but it puts the cart before the horse. The additional statutory requirement of a least restrictive means is triggered only by a finding that a substantial burden exists. . . .

Navajo Nation, 535 F.3d at 1075-76 (internal quotation marks omitted); *see also City of Boerne v. Flores*, 521 U.S. 507, 535 (1997)("[T]he Act imposes in every case a least restrictive means requirement -- a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. . . .").

E. Application of the RFRA Standards In This Case.

In its motion to dismiss, the United States makes no effort to address the standards for determining whether an accommodation of Christopher Moore-Backman's exercise of his religious beliefs is required under RFRA. The Supreme Court has directed, however, that the government must "demonstrate that the compelling interest test is satisfied through the application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-431. The failure of the government even

to address its burdens of establishing the existence of a compelling governmental interest and the absence of less restrictive alternatives should warrant denial of its motion to dismiss.

Nonetheless, it is clear the Christopher Moore-Backman's complaint adequately alleges all the elements of a RFRA claim for which he would be entitled to relief.

Although the United States does not contest the issue, the complaint alleges facts sufficient to establish Christopher Moore-Backman's request for accommodation is in accord with his sincere religious beliefs. The "Peace Testimony" and conscientious objection to supporting war in all forms are well-known and long-standing aspects of the Religious Society of Friends, and Christopher Moore-Backman has actively followed those principles in his life. *See* Complaint at ¶¶ 13-33.

Similarly, although the United States does not contest the issue, the complaint alleges facts sufficient to establish the *Navajo Nation* requirement that the refusal to accommodate Christopher Moore-Backman's sincere religious beliefs causes him to suffer a substantial burden. He has been denied a portion of the refund owing him from his 2007 taxes and charged penalties and interest on his 2001 and 2004 taxes. *See* Complaint at ¶¶ 11-12. Thus he has suffered actual civil penalties for acting in accordance with his religious beliefs. *Navajo Nation*, 535 F.3d at 1069-70.

Having adequately alleged , the burden shifts to the United States to allege and prove both a compelling interest *and* that it employs the least restrictive means to achieve that compelling interest. The United States has done neither in its motion to dismiss.

Nonetheless, Christopher Moore-Backman's complaint alleges sufficient facts from which the court could find that accommodating his sincere religious beliefs would not cause any undue burden to the government. First, the government has long been able to accommodate

conscientious objection to military service and to the payment of taxes or fees to support warfare. *See* Complaint at ¶¶ 16-22. Second, the government already provides tax accommodations to persons whose religious beliefs preclude them from voluntarily complying with tax obligations; for example, by exempting the Amish from the payment of Social Security taxes. *See* Complaint at ¶ 43. Third, the government is able to segregate tax payments for specific uses without suffering undue burden; for example, in its administration of the campaign finance check-off law. *See* Complaint at ¶ 43. Accordingly, the complaint alleges facts sufficient to find that uniformity in tax collection and utilization policies is not required by any compelling governmental interest and that the refusal to accommodate Christopher Moore-Backman's religious beliefs is not the least restrictive means of furthering any compelling governmental interest.

F. The United States' Argument.

The United States does not address its evidentiary obligations under *O Centro* to "demonstrate that the compelling interest test is satisfied through the application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-431. Rather, it relies solely on appellate decisions from the Second and Third Circuits and a decision from the United States District Court for the District of Connecticut for the proposition that "the federal courts have repeatedly rejected claims for refund of federal taxes by taxpayers under the RFRA." Df. Br. At 5, *citing Jenkins v. Commissioner*, 483 F.3d 90 (2d Cir. 2007), *cert. denied*, 552 U.S. 821, 128 S.Ct. 129, 169 L.Ed.2d 29 (2007); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *Adams v. Commissioner*, 170 F.3d 173 (3d Cir. 1999); and *Packard v. United States*, 7 F.Supp.2d 143 (D. Conn. 1998), *aff'd*, 199 U.S.App. LEXIS 11799 (2d Cir. 1999)(summary order). The defendant's argument is misplaced.

First, none of the cases cited by the United States involved a claim for a refund. Rather, those decisions addressed attempts to avoid paying taxes in the first instance or from the imposition of penalties and interest for failing timely to pay taxes owed. *Jenkins*, 483 F.3d at 91 ("We consider here the claim that religious objections to military activities or spending may form the basis for avoiding the payment of federal taxes."); *Browne*, 176 F.3d at 26 ("[T]he Brownes contend that the IRS must allow them to withhold a portion of their taxes and then collect it by levy without charging interest or a penalty."); *Adams*, 170 F.3d at 174 (Plaintiff's claim is based upon "her failure to file returns or pay tax. . . ."); *Packard*, 7 F.Supp.2d at 144 ("[P]laintiff has sued to recover the penalties collected from her. . . ."). No court has ever addressed the issue of accommodation under RFRA in the context of a refund, which was owing to Christopher Moore-Backman for tax year 2007 due to his earned income credit and child credit.

Second, the decisions cited by the United States adopted the "categorical approach" rejected by the Supreme Court in *O Centro*. 546 U.S. at 430-431. *Jenkins*, 483 F.3d at 92; *Browne*, 176 F.3d at 26; *Adams*, 170 F.3d at 179-180; *Packard*, 7 F.Supp.2d at 146-147. [2]

Third, all of these decisions relied on a decision under the *Free Exercise Clause* of the First Amendment, *United States v. Lee*, 455 U.S. 252 (1982), to reject the RFRA claim.[3] *Jenkin*s, 483 F.3d at 92; *Browne*, 176 F.3d at 26; *Adams*, 170 F.3d at 177-179; *Packard*, 7 F.Supp.2d at 147.

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[2] The District Court in *Packard* also mistakenly imposed the burden on plaintiff to disprove the compelling governmental interest and least restrictive means elements under RFRA. 7 F.Supp.2d at 146.

[3] *United States v. Lee* involved a request by an Amish employer for exemption from social security taxes for himself and his employees. The Supreme Court held that "any exemption from payment of the employer's share of social security taxes must come from a *constitutionally required exemption*." 455 U.S. at 256 (emphasis added).

United States v. Lee, however, was a decision examining constitutional accommodation requirements under the First Amendment, not the statutory requirements under RFRA. As such, it did not examine at all the "least restrictive means" test that is included in RFRA, but was not part of the former constitutional analysis under *Sherbert* and *Yoder*. *See Navajo Nation*, 535 F.3d at 1075-76; *City of Boerne v. Flores*, 521 U.S. at 535 ("[T]he Act imposes in every case a least restrictive means requirement -- a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. . . .").[4]

In short, *United States v. Lee* reached a constitutional conclusion that the free exercise of religion protected by the First Amendment did not compel the government to accommodate taxpayers because (1) the First Amendment did not require accommodations to federal statutes of general application, and (2) the Court believed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260. Those considerations no longer hold.

RFRA does not involve constitutional analysis. Its standards for refusing to accommodate religious exercise are more demanding than those applied in *United States v. Lee* and the decisions cited in the United States' memorandum. Congress has shown by its subsequent acts, such as expanding the exemption of the Amish from social security taxes in response to *Lee*[5] and the

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[4] As well, in *United States v. Lee*, the Supreme Court did not fully apply the former strict scrutiny constitutional standards, "but in fact applied a watered-down version of the scrutiny employed in *Sherbert* and *Yoder*." *Navajo Nation*, 535 F.3d at 1087 (Dissenting op. of Fletcher, J.)

[5] After the *Lee* decision, Congress expanded the social security tax exemption to include Amish employers, like Mr. Lee, and their employees without any apparent damage to the federal tax system. Technical and Miscellaneous Revenue Act of 1988, Public Law 100-647, Section 8007 (1988), adding Section 3127 of the Internal Revenue Code, 26 U.S.C. § 3127.

presidential campaign finance check-off program,[6] that exceptions to the uniform application of the Internal Revenue Code do not necessarily undermine the tax system. And the Supreme Court has made it clear that Congress' direction to the Federal Courts to adjudicate requests for accommodation on a case-by-case basis under the standards set forth in RFRA should be fully honored for *all* federal statutes.

For all these reasons, the decisions relied upon by the United States from other Circuits do not indicate the proper framework for analyzing Christopher Moore-Backman's claim. This Court should deny the United States' motion to dismiss under Rule 12(b)(6) because the complaint adequately alleges facts which would entitle him to relief under RFRA.

III.

THIS COURT HAS SUBJECT MATTER JURISDICTION TO DECIDE CHRISTOPHER MOORE-BACKMAN'S CLAIM.

The United States also argues that the complaint should be dismissed under Rule 12(b)(1) on the ground that this Court lacks jurisdiction over the matter. The United States appears to contend that it has not waived its sovereign immunity. Df. Br. at 2. It also argues that the complaint requests injunctive and declaratory relief which are barred under the Anti-Injunction Act, 26 U.S.C. § 7421, and the Declaratory Judgment Act, 28 U.S.C. § 2201. Df. Br. at 6-7.

RFRA specifically provides, however, that " A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Indeed, since the Supreme Court determined that RFRA was unconstitutional as applied to the states, *City*

[6] 26 U.S.C. § 6096.

of Boerne v. Flores, 521 U.S. 507 (1997), *all* of the lawsuits asserting RFRA claims have been brought against the United States or one of its divisions, and none of those have been dismissed on the ground that the United States enjoyed sovereign immunity.

Moreover, Christopher Moore-Backman sues for a refund of taxes (*see* Complaint at ¶ 2), and the United States specifically waived its sovereign immunity to such suits in 28 U.S.C. § 1346(a)(1).

Finally, the complaint specifically demands judgment "Refunding to plaintiff the amount of $1,509.69 for overpayment of his 2007 taxes, pending the enactment of appropriate legislation or regulations to provide for the non-military use of such funds." Complaint, Wherefore Clause, ¶ 1. This Court unquestionably has jurisdiction over this claim under 28 U.S.C. § 1346(a)(1).[7] Accordingly, even if the provision in sub-section (c) of RFRA empowering this Court to provide Christopher Moore-Backman "appropriate relief against a government" does not afford the Court authority to issue injunctive or declaratory relief, the complaint adequately alleges a claim for which the Court can provide an effective judgment.

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[7] 28 U.S.C. § 1346(a)(1) provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

CONCLUSION

For the foregoing reasons, plaintiff Christopher Moore-Backman respectfully submits that the Court should deny the motion to dismiss brought by defendant the United States.

Dated: Chico, California
November 27, 2009

Respectfully submitted,

CHRISTOPHER MOORE-BACKMAN

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was served by first class mail, postage prepaid, upon the following this 27th day of November, 2009:

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CHRISTOPHER D. MOORE-BACKMAN