UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOBIN DANA JACOBROWN, Plaintiff, v. LAWRENCE G. ROMO, UNITED STATES OF AMERICA, Defendants.	No. 09-cv-1420 (RMU)

OPPOSITION TO MOTION TO DISMISS

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) on the ground that plaintiff lacks standing, and under Fed. R. Civ. P. 12(b)(6) on the ground that the complaint fails to state a claim upon which relief can be granted. The motion should be denied for the reasons stated below.

Introduction

Plaintiff Toby Jacobrown is a 22-year-old United States citizen and birthright Quaker who has not registered for the military draft because "registration is incompatible with his sincere religious beliefs." Complaint ¶ 1.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., ("RFRA") provides that:

> Government shall not substantially burden a person's exercise of religion . . . [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. Put another way, RFRA exempts plaintiff from the obligation to

register unless registration would not "substantially burden [his] exercise of religion," or unless the government can establish that registration furthers a "compelling governmental interest" and that requiring plaintiff to register is "the least restrictive means of furthering that compelling governmental interest." The government's motion to dismiss, which deals at length with peripheral issues, largely loses sight of the straightforward facts and law that govern this case.

ARGUMENT

I. Plaintiff Has Standing To Pursue This Lawsuit.

Defendants argue that plaintiff lacks standing for two reasons. First, they claim, he can show no injury "because the Selective Service's procedures already provide [him] with a mechanism to assert his conscientious objector status." Motion to Dismiss at 9. Second, they assert, the complaint "fails to allege a concrete injury." *Id*. Neither argument has merit.

A. Plaintiff cannot register for the draft without violating his sincere religious beliefs.

Plaintiff has alleged that "under these [*i.e.,* existing] circumstances, registration is incompatible with his sincere religious beliefs." Complaint ¶ 1. He has alleged that he could register "if the Selective Service System would allow him to *register*, or otherwise *officially* assert, his claim to conscientious objector status in connection with his registration for the draft." *Id*. ¶ 15 (emphasis added). He has alleged that he cannot in good conscience register because "the Selective Service System will not *register* or maintain any *official* record of such a claim." *Id*. ¶ 1 (emphasis added). These factual allegations, self-evidently made on first-hand knowledge, must be accepted as true at this stage of the case. *Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009).

However, defendants appear to have decided that plaintiff's religious scruples are satisfied because he can scribble whatever words he wishes in the margin of his registration form, a microfiche copy of which will be maintained in the System's records. *See* Motion to Dismiss at 9-10. But it is for plaintiff, not defendants, to say what plaintiff's religious beliefs are, and whether they are satisfied by existing Selective Service practices. Plainly they are not satisfied or plaintiff would have registered. When Mr. Jacobrown alleged that he could comply with the registration requirement "if the Selective Service System would allow him to *register*, or otherwise *officially* assert, his claim to conscientious objector status," Complaint ¶ 15 (emphasis added), he meant what he said: that he could comply if his C.O. claim would be *registered*, *i.e.,* recorded in the same way that his date of birth and Social Security number are registered, or in some other way "*officially* assert[ed]"—not just scribbled in the margin of a registration form.

Likewise, when plaintiff alleged that he cannot register because "the Selective Service System will not . . . maintain any *official* record of such a claim," Complaint ¶ 1 (emphasis added), he meant what he said: a microfiche copy of a scribble in the margin of a registration form, buried somewhere in the archives far from the Selective Service System's official registration database, is not an official record of an official claim.

Perhaps the allegations of the complaint could be read as defendants read them. But as a matter of law, this Court "must give the plaintiff [not the defendants] the benefit of all reasonable inferences derived from the facts alleged." *Tooley v. Napolitano*, 556 F.3d at 839. Defendants' attempt to make this case go away by telling the Court that they know better than the plaintiff does what his religious beliefs are, and what he can or cannot do without violating them, is factually presumptuous and legally unavailing.

B. Plaintiff has alleged sufficiently concrete injury to support standing to pursue injunctive and declaratory relief.

Defendants next argue that plaintiff "lack[s] standing because of his failure to allege a concrete injury in fact as required under the Constitution." Motion to Dismiss at 11. Mr. Jacobrown has alleged more than enough injury to support his standing to maintain this lawsuit for injunctive and declaratory relief.

1. Plaintiff faces a threat of prosecution.

It is true that the D.C. Circuit requires a strong showing of threatened prosecution before allowing pre-enforcement litigation. *See, e.g., Navegar, Inc. v. United States,* 103 F.3d 994, 1001 (D.C. Cir. 1997); *Seegars v. Gonzales*, 396 F.3d 1248, 1255 (D.C. Cir. 2005).[1] But plaintiff has alleged that by not registering he renders himself "subject to criminal prosecution under 50 U.S.C. App. § 462," Complaint, ¶ 23, and "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 133 (D.D.C. 2004) (Urbina, J.) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (alterations by the Court). It would be premature to assume that

[1] This Circuit doctrine has been repeatedly criticized as inconsistent with Supreme Court precedent. *See, e.g., Seegars*, 396 F.3d at 1256-58 (Sentelle, J. dissenting); *Ord v. District of Columbia*, 587 F.3d 1136, 1146 (D.C. Cir. 2009) (Brown, J., dissenting) ("litigants should not be required to jump through such hoops to get past the courthouse door. . . . [T]he en banc court can and should rehear this appeal *sua sponte* and overrule *Navegar*."). The relevant Supreme Court decisions, such as *Babbitt v. United Farm Workers*, 442 U.S. 289 (1979), and *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1998), involve statutorily regulated "conduct arguably affected with a constitutional interest." *Babbitt*, 442 U.S. at 298. While this case involves conduct arguably protected by a statute, that statute protects conduct very closely connected with the constitutional interest in free exercise of religion. Thus, the *Babbitt* and *American Booksellers* standard ought to apply here as well.

there are not facts to support this claim.[2]

2. Plaintiff faces a lifetime ban on public sector employment.

Government employment is a large and ever-growing sector of the U.S. workforce, and the statutory ban on the employment of non-registrants extends to the employees of many state governments as well.[3] Nevertheless, defendants are correct that plaintiff cannot at this time show it is *likely* that he will seek employment as a civil servant or government contractor.

3. Plaintiff faces a lifetime ban on federal educational loans and grants.

By contrast, the complaint shows it *is* likely that plaintiff will suffer the concrete harm of being denied federal financial assistance for education when he returns to school. As defendants concede, "Jacobrown *does* allege that he would have obtained federal aid in the past but for his non-registration." Motion to Dismiss at 13 n.3 (emphasis in original). And the complaint alleges that "defendants' policies and practices . . . *will* substantially burden plaintiff's exercise of religion by depriving him of federal financial assistance for his college education that he *would* receive in coming semesters if he were registered." Complaint ¶ 34 (emphasis added). Defendants carp that plaintiff "does not allege that he intends to apply for federal student aid," Motion to Dismiss at 13, but the sentence just quoted necessarily implies that allegation, for one cannot receive federal financial assistance if one does not apply for it.

The bottom-line question regarding standing to seek injunctive relief is whether a

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[2] The evidence will show that Mr. Jacobrown has received at least three individually addressed communications from the Selective Service System—not including the letters appended to the Motion to Dismiss—specifically warning him that failure to register "is a federal crime punishable by a fine and imprisonment."

[3] *See* http://www.sss.gov/fsstateleg.htm.

plaintiff is "*likely* to suffer future injury" because of a challenged law or practice. *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 131 (D.D.C. 2004) (Urbina, J.) (quoting *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp*., 28 F.3d 1268, 1273 (D.C. Cir. 1994) (in turn citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108-09 (1983))) (emphasis added). It is *likely* that Mr. Jacobrown will suffer a future loss of federal financial aid for higher education because of his non-registration, and that is sufficient to support his standing to seek injunctive relief here.

4. Plaintiff confronts a forced choice between obeying the law and obeying his religious beliefs.

Defendants' motion ignores an additional ground for standing: plaintiff's allegations that "defendants' policies and practices . . . [are] forcing him to choose between (a) violating his sincere religious beliefs by registering for the draft and (b) exposing himself to the serious criminal and civil penalties and sanctions listed in paragraphs 23-26," Complaint ¶ 30, and that "[t]hese circumstances have imposed, are imposing, and will continue to impose upon plaintiff significant psychological and emotional stress." Complaint ¶ 55.

Such mental and emotional harm is sufficiently concrete to support standing, as courts have recognized in other contexts. *See, e.g., Harris v. Forklift Systems, Inc*., 510 U.S. 17, 22 (1993) ("Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.") (citation omitted). Likewise, claims for intentional or negligent infliction of emotional distress could never be litigated in a federal court if emotional harm were not sufficiently concrete to support

Article III standing. Absent recognition that such harm is concrete, many archetypical RFRA claims, for example a challenge to a government ban on the consumption of sacramental wine, *see, e.g., Sample v. Lappin*, 479 F. Supp. 2d 120 (D.D.C. 2007), would have to be dismissed for lack of standing, for the harm from such a ban is obviously not nutritional but emotional. Plaintiff therefore has standing on this ground as well.

5. Plaintiff also has standing to obtain declaratory relief.

Defendants' motion also ignores the fact that plaintiff seeks declaratory as well as injunctive relief. *See* Complaint at 13-14, ¶¶ A, B, C and D. As Chief Judge Lamberth has recognized, "[W]here plaintiff is only seeking declaratory relief, he need not establish a likelihood of future injury; the established past injury is sufficient." *Johnson v. Williams*, No. 06-cv-1453, 2009 WL 302180 at *1 (D.D.C. Feb. 6, 2009). Defendants admit that plaintiff has alleged past injury in the form of lost financial aid, *see* Motion to Dismiss at 13 n.3. They correctly observe that plaintiff cannot recover damages from the United States for that loss, *see id*., but he can obtain a declaratory judgment, whether or not damages are available. *Johnson v. Williams, supra.*

Defendants' motion to dismiss under Rule 12(b)(1) therefore fails.

II. The Complaint States A Claim Upon Which Relief Can Be Granted.

Defendants argue that the complaint should be dismissed under Rule 12(b)(6) for two reasons. First, they say, it fails adequately to allege that the registration requirement imposes a substantial burden on plaintiff's exercise of religion. Motion to Dismiss at 15. Second, they assert, any such burden "would be justified by the government's compelling interests and the lack of a practicable alternative." *Id*. Again, neither argument has merit.

A. The complaint adequately alleges that the registration requirement substantially burdens plaintiff's exercise of religion.

1. Plaintiff has alleged sufficient facts about his religious beliefs.

Defendants complain that plaintiff has provided "insufficient facts from which to divine a plausible claim," Motion to Dismiss at 17, but what defendants apparently mean is that they don't find plaintiff's claim logical by their own lights, *see id*. (reasoning that plaintiff can't very well have a "plausible" claim because "[t]here is no military draft underway," and in the event of a draft he could "present and have adjudicated his claim to conscientious objector status" before being inducted.) Most young men—indeed, most conscientious objectors—may feel no substantial religious burden on those facts, but Mr. Jacobrown does, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment [or RFRA] protection." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 714 (1981).

Assume a law that prohibits wearing a head covering (*cf. Goldman v. Weinberger*, 475 U.S. 503 (1986))—what more can an observant Jew or Muslim need to say beyond, "my religious beliefs tell me I should wear a head-covering"? Assume a law that requires all men over the age of 60 to ingest 81 mg. of Aspirin daily—what more can a Christian Scientist need to say beyond, "my religious beliefs tell me I should not ingest drugs"? Assume a law that prohibits the consumption of *hoasca* tea—what more can the members of a burdened faith need to say beyond, "drinking this tea is part of our faith"? *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 425 (2006). Some beliefs are familiar; some are unfamiliar—that does not make the unfamiliar beliefs "implausible" under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as defendants seem to suggest, *see* Motion to Dismiss at 17.

In this case the law requires men reaching the age of 18 to register for the draft—what more can Mr. Jacobrown need to say beyond, "my religious beliefs tell me that I cannot register"? This is what he has said. *See* Complaint ¶¶ 1, 14. The fact that defendants find this belief illogical or difficult to accept is irrelevant. The statement, "my religious beliefs tell me that I cannot register," is a statement of *fact* made on personal knowledge; it must be accepted as true on defendants' motion to dismiss. *Tooley v. Napolitano*, *supra*.[4] (Whether the registration requirement imposes a substantial burden on plaintiff's exercise of religion is a different question, discussed *infra* p. 12.)

2. The Selective Service System does not already accommodate plaintiff's religious beliefs.

Defendants argue that Mr. Jacobrown can reconcile his beliefs with the registration requirement by "mak[ing] some religiously-motivated statement with respect to his conscientious objector status in connection with his participation in the registration system." Motion to Dismiss at 18. We have already explained why that is not true; *see supra* pp. 2-3.

3. The burden on plaintiff's exercise of religion is not based on how the government treats the information gathered from him.

Defendants next speculate whether "what Jacobrown seeks is for the government to treat the information gathered from him in a particular way (such as by storing it in a specific file for conscientious objectors or processing it in some special fashion)." Motion to Dismiss at 19. They note that if plaintiff's religious objection is based on the absence of

[4] Should the Court conclude that a more elaborate statement of plaintiff's religious beliefs is required, then plaintiff respectfully seeks leave to file an amended complaint, leave for which should be "freely give[n]." Fed. R. Civ. P. 15(a)(2).

such special treatment, that is not a substantial burden under the teaching of *Kaemmerling v. Lappin*, 553 F.2d 669 (D.C. Cir. 2008).

Defendants' speculation is beside the point, because this is not the basis of plaintiff's religious objection. Apparently defendants have been confused by plaintiff's efforts to suggest the sorts of accommodations that the Selective Service *could* make, which would enable him to register. And he did request that the Court consider ordering such accommodation as an alternative form of relief. But, to be clear, plaintiff's claim is that, under current circumstances, his religious beliefs do not allow him to register, and that the registration requirement therefore imposes a substantial burden on his free exercise of religion. The relief to which he is entitled under RFRA (absent a voluntary or court-ordered accommodation) is an exemption from registration.

Plaintiff's case is therefore nothing like *Kaemmerling v. Lappin,* where Mr. Kaemmerling made it "abundantly clear that he [did] not challenge the collection of any particular DNA carrier—such as blood, saliva, skin, or hair," but objected only to what the government did with such material *after* it was in the government's possession. 553 F.2d at 678. On those facts, the court of appeals concluded that "Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id*. at 679. Here, by contrast, Mr. Jacobrown does object to what the government insists that *he do*—fill in, sign, and submit a registration form. Signing one's name to a legal document (or taking the equivalent action online) is a significant personal action.[5] That personal action is precisely "the subject of the burden to which he objects."

[5] Presumably an intentional false statement on a draft registration form, whether submitted on paper or via the Internet, could be prosecuted under 18 U.S.C. § 1001.

4. The burden on plaintiff's exercise of religion is not based on how the Selective Service operates its internal procedures.

Making a point that seems identical to the previous one, defendants argue, based on *Bowen v. Roy*, 476 U.S. 693 (1986), that it cannot be a burden on plaintiff's exercise of religion for the Selective Service System to maintain its own records in whatever manner it sees fit. *See* Motion to Dismiss at 20-21. In *Bowen*, quite parallel to *Kaemmerling*, the plaintiff objected to state agencies' use of a Social Security number for his daughter, "not because it places any restriction on what *he* may believe or what *he* may do, but because he believes the use of the number may harm his daughter's spirit." *Bowen*, 476 U.S. at 699 (emphasis added). Because his objection had nothing to do with his own (or his daughter's) personal action or refusal to act, the Court concluded that he "may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id*. at 700.

This case has no more connection to *Bowen* than it does to *Kaemmerling*. To repeat, it is not the Selective Service System's internal recordkeeping practices that impose a substantial burden on Mr. Jacobrown's exercise of religion. It is the requirement that *he sign and submit* a registration form, when he knows that such a submission cannot include an official claim to conscientious objector status and that no official record of such a claim will be maintained. Complaint ¶¶ 1, 15; *and see supra* pp. 2-3. Mr. Jacobrown's *knowledge* of the government's recordkeeping practices, and the fact that his refusal to register is based in part on that knowledge, does not make his case like *Bowen* or

Kaemmerling. To analogize, if Mr. Jacobrown refused to push a red button because he knew that pushing the button would begin a chain of internal government processes that would result in launching a missile aimed at a populated city, no one would doubt that compelling him to push the button would impose a substantial burden on his exercise of religion—and that burden would be based on his objection to compelled personal conduct, not objection to internal government practices. The same is true here.

5. The complaint adequately states a claim that requiring plaintiff to register for the draft imposes a substantial burden on his exercise of religion.

Our Circuit helpfully has articulated the elements of a substantial burden under RFRA: "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling*, 553 F.2d at 678 (quoting *Thomas v. Review Board*, 450 U.S. at 718).

The facts of this case fit that definition like a glove. The government has put very substantial pressure on Mr. Jacobrown to modify his behavior and to violate his beliefs by registering for the draft.

His belief is that it would be wrong—contrary to his religion—to register for the draft under existing circumstances. He therefore has not registered.

The pressure to modify his behavior and to violate his beliefs consists of informing him that if he does not register, he can be prosecuted and convicted of a felony, and fined and sent to prison for a period of years; that he will be forever barred from most federal jobs; and that he will be forever barred from receiving federal financial aid for education. *See* Complaint ¶¶ 23-26.

Defendants' efforts to divert attention from this straightforward analysis should be rejected.

B. Requiring Mr. Jacobrown to register for the draft is not the least restrictive means of serving the government's compelling interest in protecting the nation's security.

Under RFRA, once a person has shown that the government is imposing a substantial burden on his or her sincere exercise of religion, the burden shifts to the government to

> demonstrate[] 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). For purposes of RFRA, the term "demonstrates" means "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). *See also O Centro Espirita,* 564 U.S. at 428 (discussing the government's burden).

Plaintiff does not deny that "[f]ew interests can be more compelling than a nation's need to ensure its own security." Motion to Dismiss at 21 (quoting *Wayte v. United States*, 470 U.S. 598, 611 (1985)). Defendants also cite presidential statements about the importance of continued Selective Service registration "as a stand-by mechanism in the case of a national emergency." *Id*. at 23.

But defendants sensibly do not claim that registration is *itself* a compelling interest. Their claim is more limited: that "universal registration with no exemptions is the only *means* of vindicating the government's compelling interest in having a ready pool of potential inductees that can be quickly called to service in times of emergency; no other system would be *administratively feasible*." *Id*. (emphasis added).

RFRA places the burden squarely on the government to "demonstrate," with "evidence" and "persuasion," that its claim is true—that "universal registration with no

exemptions," and with no accommodation for the religious needs of Mr. Jacobrown, is the *only feasible way* to serve the need for a stand-by mobilization system. Defendants have not carried that burden. To the contrary, their position is both untrue as a factual matter and unsupportable as a matter of sound reasoning.

It is remarkable that defendants chose to use the phrase "no exemptions." Chief Justice Roberts, writing for a unanimous Supreme Court, responded to exactly the same argument made by the Drug Enforcement Administration:

> 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 "rule[s] 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).

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 436 (2006).

The Supreme Court went on to rule that the Drug Enforcement Administration *did* have to make an exception to its "war on drugs" to allow the members of the plaintiff sect to engage in religious use of a certain Schedule I controlled substance, finding that such an exception would not actually make the sky fall, despite the government's arguments to the contrary. Nor has the sky fallen in the 52 months since that decision, despite the government's prediction. The same would be true here. The government's arguments on pp. 23-26 of the motion to dismiss are reminiscent of the government's arguments in *O Centro Espirita,* and are equally unpersuasive.

1. Defendants' assertion that "universal registration with no exceptions" is the only feasible means of serving the compelling interest in having a stand-by mechanism for a military draft is belied by the fact that registration is not, in fact, universal.

The largest and most obvious—but not the only—flaw in defendants' proof is the fact that women are entirely exempt from registration. They are exempt despite the fact that approximately 200,000 women serve on active duty in the U.S. military, comprising about 15% of the total active force, and that more than 92% of military specialties are open to women.[6] It is true that this massive exemption from so-called "universal registration," with its obvious negative impact on the nation's ability to expand the armed forces rapidly in an emergency, is the result of congressional legislation—but that does not change the fact that it exists. Congress had reasons for enacting this exemption, but as Chief Justice Roberts pointed out, "Congress had a reason for enacting RFRA, too." *O Centro Espirita,* 546 U.S. at 439.[7] Exempting plaintiff from registration, as mandated by Congress through RFRA, is orders of magnitude less harmful to potential military readiness than exempting millions of women, which Congress is willing to tolerate.

Women are not the only exempt category. In general, male U.S. citizens and male aliens residing in the United States who are 18 through 25 years of age are required to register. But within those groups there are seven categories of exemptions, including students enrolled in officer procurement programs at The Citadel, North Georgia College,

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[6] *See* DEPARTMENT OF DEFENSE REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, at 3 (2009), *available at* www.defense.gov/pubs/pdfs/DoD_WHC_on_Women_and_Girls_Report_personal_info_redacted_C82A.pdf.

[7] *See also id.* at 434, pointing out that the congressionally-legislated exemption from the Controlled Substances Act for use of peyote by Native American tribes "fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA."

Norwich University, Virginia Military Institute, Texas A&M University, and Virginia Polytechnic Institute; cadets and midshipmen at the Service Academies or the Coast Guard Academy, men who are incarcerated, men who are hospitalized or institutionalized, men serving in the armed forces, or the Coast Guard, or as officers in the Public Health Service or the National Oceanic and Atmospheric Administration, lawful non-immigrant aliens, and special agricultural workers.[8] The existence of these exemptions conclusively proves the falsity of defendants' assertions that "universal registration with no exemptions is the only means of vindicating the government's compelling interest," Motion to Dismiss at 23, and that "there is no administratively feasible way to accommodate [plaintiff] . . . without interfering with the compelling interest that prompted Congress to establish registration in the first place." *Id*. at 25. It is obviously "administratively feasible" to exempt thousands of students at certain named colleges and universities, and apparently that exemption and the others listed above do not "interfer[e] with the compelling interest that prompted Congress to establish registration in the first place." Given these facts, it cannot possibly be administratively infeasible to exempt Toby Jacobrown, and his exemption could hardly interfere with the government's compelling interest. At a minimum, defendants have not carried *their burden* of demonstrating otherwise—they have not even acknowledged the existence of these substantial exemptions.[9]

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[8] *See* "Who Must Register Chart," available on the Selective Service System's website at http://www.sss.gov/FSwho.htm.

[9] In fact, it appears that in at least one case the Selective Service System accommodated a young man by allowing him to register using a special registration form on which he indicated his intent to seek conscientious objector status. *See* http://www.stopthedraft.com/index.php?articleID=14585&sectionID=60; http://hasbrouck.org/draft/prosecutions.html; http://www.yachana.org/research/writings/draft/ (all reporting the same case). Assuming these reports are accurate, it cannot be infeasible to accommodate Mr. Jacobrown in the same way.

2. Defendants cannot carry their burden by speculating about possible feelings of unfairness on the part of potential registrants.

Defendants' entire discussion of why Mr. Jacobrown cannot be exempted from registration occupies only a single paragraph on pages 24-25 of their motion. They offer only a single reason why, in their view, plaintiff cannot be exempted: because "others could perceive the system as unfair and be less inclined to participate." Motion to Dismiss at 25.

This is sheer speculation supported by zero evidence. Zero evidence that others will even know that Mr. Jacobrown has been exempted, zero evidence that others will feel it is unfair to exempt from registration a conscientious objector who is entitled to exemption from military service, and zero evidence that any person will commit the felony of willfully failing to register based on such a perception of unfairness. This speculation cannot carry defendants' statutory burden to *demonstrate* that exempting Mr. Jacobrown from registration is not possible.

Aside from the complete lack of evidence supporting defendants' speculation, their reasoning is unpersuasive as a matter of common sense. First, only a minuscule fraction of potential registrants would even be aware of plaintiff's exemption—how many 18-year-olds know of the exemption for certain students at certain colleges, even though that information is posted on the Selective Service System's website? Second, if the government is worried about perceptions of unfairness arising out of knowledge about an exemption for one conscientious objector, why is it not a thousand times more worried about perceptions of unfairness arising out of knowledge about exemptions for millions of women, and for thousands of students at selected colleges? Third, as more and more young

men are registered automatically as part of the process of applying for a driver's license,[10] or as a condition of applying for college financial aid, they will become registered regardless of any perceptions of unfairness. Fourth, given the heavy penalties connected with non-registration, even people who may perceive some unfairness are unlikely to act on that feeling. Finally, why would a potential registrant even perceive Mr. Jacobrown's exemption from *registration* as unfair, knowing that in the event of an actual draft, he (and other conscientious objectors) would be exempt from military *service*, with its considerable risks of death and physical or mental injury? In ignoring the perception of unfairness that may arise from knowledge of conscientious objectors' exemption from military *service* but asserting great concern over the perception of unfairness that may arise from knowledge of one conscientious objector's exemption from *registration*, defendants are swallowing a camel and straining at a gnat.

3. Defendants cannot carry their burden by speculating about the possible need to accommodate others.

Defendants also resist providing plaintiff the exemption to which he is entitled under RFRA (or the accommodation that would make an exemption unnecessary) because they foresee the possibility that others might also be entitled to an exemption or accommodation under RFRA. *See* Motion to Dismiss at 26. The government made the same argument in *O Centro Espirita,* invoking the same "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law." 546 U.S. at 435-36. The Court categorically rejected that argument, recognizing that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose

[10] *See* http://www.sss.gov/FSdrivers.htm.

sincere exercise of religion is being substantially burdened." *Id*. at 430-31.[11] Wholly speculative concerns about which or how many other people may seek exemption or accommodation under RFRA cannot *ipso facto* relieve the government from the "Congress[ional] determin[ation] that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Id*. at 436.

4. Defendants cannot carry their burden by speculating about the unpredictability of future circumstances.

Finally, defendants argue that they cannot be required to "recognize [conscientious objector] claims at this point," because an individual's religious beliefs may change with time, as may the legal standards for conscientious objection. Motion to Dismiss at 26. But Plaintiff is not asking the Selective Service System to classify him as a conscientious objector at this time; he understands that actual classifications (*e.g.,* 1-A, 1-O, 4-F), will be made only if and when there is actually a draft. All plaintiff asks is to be allowed formally to "register his *claim* to conscientious objector status," Complaint ¶ 1 (emphasis added), just as earlier generations of registrants were able to do. *See* Complaint ¶ 44 ("Prior to 1980, a Selective Service registrant was able to register his claim to conscientious objector status at the time he registered for the draft, and a record was kept of such a claim.").

Plaintiff is not asking the Selective Service System, or this Court, to make any decision about whether he is entitled to classification as a conscientious objector under the Military Selective Service Act, 50 U.S.C. App. § 456(j). What he seeks is a decision about his rights under the Religious Freedom Restoration Act, and that decision cannot be

[11] In other words, the government "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general." *Westchester Day School v. Mamaroneck*, 504 F.3d 338, 363 (2d Cir. 2007).

postponed until some future date when there may be draft, because the law requires plaintiff to submit his Selective Service registration form *now*.

The possibility that things may change is not an excuse for refusing to apply the law now in effect to the facts as they now exist. If it were, hardly any law could be enforced. Perhaps O Centro Espirita will someday give up its belief in the sacramental consumption of *hoasca* tea; perhaps Congress will someday repeal the Controlled Substances Act's exemption for peyote. Those possibilities were not reasons to deny the plaintiffs in *O Centro Espirita* the exemption to which they were entitled at the time they sought it.[12]

CONCLUSION

For the reasons stated above, defendants' motion to dismiss should be denied.

Respectfully submitted,

/s/ *Arthur B. Spitzer*

Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the Nation's Capital
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
T. 202-457-0800
F. 202-452-1868
artspitzer@aol.com

Of Counsel:
Daniel Mach (D.C. Bar No. 461652)
American Civil Liberties Union Foundation
Program on Freedom of Religion and Belief
915 Fifteenth Street, N.W., Suite 600
Washington, D.C. 20005
T. 202-675-2330
F. 202-546-0738

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[12] If the Selective Service System is truly worried that Mr. Jacobrown may change his religious beliefs between now and his 26th birthday, that contingency can be addressed in the Court's decree, just as some contingencies were addressed in the injunction entered in *O Centro Espirita. See* 546 U.S. at 427.