

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**FREDERICK BOYLE,**  
Plaintiff,

-against-

**ROBERT W. WERNER, Director, Office of  
Foreign Assets Control of the United States  
Department of the Treasury, et al.,**

Defendants.

**Case No. 05 Civ. 4995 (DCP)**

**ECF CASE**

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**PLAINTIFF'S SUPPLEMENTAL REPLY MEMORANDUM IN FURTHER  
OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS  
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN FURTHER  
SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL JUDGMENT ON THE  
PLEADINGS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT**

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT.....	1
ARGUMENT.....	1
I.    OFAC’s Enforcement Proceedings Violated Reverend Boyle’s Fifth Amendment Privilege Against Self-Incrimination.....	1
II.   Reverend Boyle Has Properly Alleged First Amendment Viewpoint Discrimination.....	3
III.  Reverend Boyle is Entitled to Discovery on His First Amendment Viewpoint Discrimination Claim.....	6
IV.  OFAC’s Penalty Violates Reverend Boyle’s Right to the Free Exercise of Religion Under the Religious Freedom Restoration Act.....	7
CONCLUSION.....	10
CERTIFICATE OF FILING AND SERVICE	

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Boy Scouts of America v. Wyman</i> 335 F.3d 80 (2d Cir. 2003).....	4
<i>Brock v. Tolkow</i> 109 F.R.D. 116 (E.D.N.Y. 1985).....	2
<i>Church of the Am. Knights of the Ku Klux Klan v. Kerik</i> 356 F.3d 197 (2d Cir. 2004).....	4, 5
<i>Employment Div., Dep't of Human Resources of Or. v. Smith</i> 494 U.S. 872 (1990).....	9
<i>Farrakhan v. Reagan</i> 669 F. Supp. 506 (D.D.C. 1987).....	9, 10
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> 546 U.S. 418 (2006).....	9, 10
<i>Jenkins v. Comm'r of Internal Revenue</i> 483 F.3d 90 (2d Cir. 2007).....	8
<i>Marchetti v. United States</i> 390 U.S. 39 (1968).....	3
<i>McGuire v. Reilly</i> 386 F.3d 45 (1st Cir. 2004).....	4
<i>National Audubon Soc'y v. Hoffman</i> 132 F.3d 7 (2d Cir. 1997).....	6
<i>Peck v. Baldwinsville Cent. Sch. Dist.</i> 426 F.3d 617 (2d Cir. 2005).....	6
<i>R.A.V. v. City of St. Paul, Minn.</i> 505 U.S. 377 (1992).....	3, 4, 5
<i>Ridley v. Mass. Bay Transp. Auth.</i> 390 F.3d 65 (1st Cir. 2004).....	5

<i>Saratoga Dev. Corp. v. United States</i> 21 F.3d 445 (D.C. Cir. 1994).....	6, 7
<i>S.E.C. v. Graystone Nash, Inc.</i> 25 F.3d 187 (3d Cir. 1994).....	3
<i>Sherbert v. Verner</i> 374 U.S. 398 (1963).....	8
<i>United States v. Amer</i> 110 F.3d 873 (2d Cir. 1997).....	8, 9
<i>United States v. Antoine</i> 318 F.3d 919 (9th Cir. 2003).....	10
<i>United States v. Approx. 1,170 Carats of Rough Diamonds Seized at JFK Int'l Airport</i> No. CV 2005-5816 (ARR) (MDG), 2007 WL 2071863 (E.D.N.Y. 2007).....	2
<i>United States v. Certain Real Property and Premises Known as 1344 Ridge Road, Laurel Hollow, Syosset, N.Y.</i> 751 F. Supp. 1060 (E.D.N.Y. 1989).....	2
<i>United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.</i> 55 F.3d 78 (2d Cir. 1995).....	3
<i>United States v. Hardman</i> 297 F.3d 1116 (10th Cir. 2002).....	10
<i>United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y.</i> 760 F. Supp. 1015 (E.D.N.Y. 1991).....	2
<i>United States v. Parcels of Land</i> 903 F.2d 36 (1st Cir. 1990).....	2
<i>United States v. Talco Contractors, Inc.</i> 153 F.R.D. 501 (W.D.N.Y. 1994).....	3
<i>United States v. U.S. Currency</i> 626 F.2d 11 (6th Cir. 1980).....	2
<i>Wehling v. Columbia Broadcast System</i> 608 F.2d 1084 (5th Cir. 1979).....	1
<i>Westchester Day Sch. v. Village of Mamaroneck</i> ---F.3d ---, 2007 WL 3011061 (2d Cir. 2007).....	7, 8

**STATUTES**

42 U.S.C. § 2000bb-1(a).....9

42 U.S.C. § 2000bb-1(b).....9

**RULES**

31 C.F.R. § 575.202.....10

## PRELIMINARY STATEMENT

Plaintiff Frederick Reverend Boyle (“Reverend Boyle”) respectfully submits this reply to the government’s supplemental memorandum. The government argues that the Office of Foreign Assets Control (“OFAC”) did not violate Reverend Boyle’s Fifth Amendment privilege against self-incrimination because a meaningful accommodation of that privilege is required only where a prosecution is underway and not merely threatened. The government also asserts that Reverend Boyle’s claim that OFAC’s enforcement of the Iraqi Sanctions Regulations against him based upon his public opposition to U.S. military involvement in Iraq, and not his alleged travel to that country, fails to state a claim for First Amendment viewpoint discrimination, and should be dismissed at the pleading stage. Finally, the government argues that OFAC’s failure to provide any exemption for religious travel to Iraq, no matter how deeply held an individual’s religious beliefs, cannot constitute a substantial burden under the Religious Freedom Restoration Act (“RFRA”). The government is mistaken on each point. For the reasons set forth below, and for the reasons provided in Reverend Boyle’s prior submissions, the government’s motion for dismissal should be denied and Reverend Boyle’s cross-motion for relief should be granted.

## ARGUMENT

### **I. OFAC’s Enforcement Proceedings Violated Reverend Boyle’s Fifth Amendment Privilege Against Self-Incrimination.**

Contrary to the government’s suggestion (Defs.’ Supp. Mem. at 16), Reverend Boyle is constitutionally entitled to meaningful accommodation of his Fifth Amendment protection against compulsory self-incrimination where he “reasonably apprehends a risk of self-incrimination...though no criminal charges are pending against him...and even if the risk of prosecution is remote.” *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 n.5

(5th Cir. 1979) (internal citations omitted). *See also, e.g., United States v. U.S. Currency*, 626 F.2d 11, 14 (6th Cir. 1980) (recognizing that the Fifth Amendment privilege exists where “the information...harbor[ed] the potential of exposing the speaker to a criminal...charge,” and directing the district court to consider accommodations); *Brock v. Tolkow*, 109 F.R.D. 116, 119 n.2 (E.D.N.Y. 1985) (“The fact that an indictment has not yet been returned...does not make consideration of the stay motion any less appropriate.”).

As previously explained (Pl.’s Supp. Mem. at 3-13; Pl.’s Opp. to Mot. to Dismiss at 11-14), it is the “*threat* of parallel criminal actions” alongside a civil forfeiture, or other non-criminal action that “places claimants...in a difficult and untenable position” and necessitates accommodation of the Fifth Amendment right. *United States v. Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y.*, 760 F. Supp. 1015, 1034 (E.D.N.Y. 1991) (emphasis added). *See, e.g., id.* (allowing claimants to file affidavits under seal prior to a criminal indictment and later staying civil proceedings when criminal charges were filed); *United States v. Parcels of Land*, 903 F.2d 36, 44-46 (1st Cir. 1990) (finding that the lower court properly sought to accommodate the claimant’s Fifth Amendment right by entering a protective order, even though the claimant had not yet been indicted) (emphasis added); *see also United States v. Approx. 1,170 Carats of Rough Diamonds Seized at JFK Int’l Airport*, No. CV 2005-5816 (ARR) (MDG), 2007 WL 2071863, at \*2 (E.D.N.Y. 2007) (recognizing that the Fifth Amendment dilemma is created because “civil forfeiture actions are closely intertwined with *potential* criminal proceedings”) (emphasis added); *United States v. Certain Real Property and Premises Known as 1344 Ridge Road, Laurel Hollow, Syosset, N.Y.*, 751 F. Supp. 1060, 1063 (E.D.N.Y. 1989) (granting a stay in a civil forfeiture proceeding as to an unindicted party). Indeed, here the government itself made certain that Reverend Boyle was “confronted by

substantial and ‘real’ and not merely trifling or imaginary hazards of incrimination.” *United States v. Talco Contractors, Inc.*, 153 F.R.D. 501, 504 (W.D.N.Y. 1994) (quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968)). Specifically, OFAC told Reverend Boyle that he was potentially subject to criminal prosecution based upon the same alleged conduct underlying the administrative fine levied against him and yet refused to provide Reverend Boyle any assurance that he would not be indicted for that conduct or, alternatively, to ameliorate the threat by staying its civil enforcement proceeding until the statute of limitations for criminal prosecution had run. (A.R. 77; Pl.’s Supp. Mem. at 7; Pl.’s Opp. to Mot. to Dismiss at 13). See *United States v. Certain Real Property and Premises Known as: 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 83 (2d Cir. 1995) (recognizing that a court should pay special attention to accommodating an individual’s Fifth Amendment privilege where “the government is a party in a civil case and also controls the decision as to whether criminal proceedings *will* be initiated”) (emphasis added) (citing *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 193-194 (3d Cir. 1994)). OFAC’s failure to provide any meaningful accommodation of Reverend Boyle’s privilege against self-incrimination violated the Fifth Amendment.

## **II. Reverend Boyle Has Properly Alleged First Amendment Viewpoint Discrimination.**

The Supreme Court made clear in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992), that the government may not regulate even those things explicitly recognized to be “nonspeech” based upon hostility or favoritism toward the underlying message expressed. Even expressions that are “not within the area of the area of constitutionally protected speech” cannot “be made the vehicles for [impermissible] content discrimination.” *Id.* at 383-84. The government (Defs.’ Supp. Mem. at 7 n.3) seeks to evade *R.A.V.*’s holding by arguing that the statute in that case was declared facially invalid. But the Supreme Court did not limit its ruling

to facial challenges alone. To the contrary, *R.A.V.*'s reasoning applies equally to as-applied challenges: the point is that the First Amendment restricts the government from regulating "nonspeech" based upon the underlying message expressed. *See R.A.V.*, 505 U.S. at 389-90. Indeed, it is well-settled that viewpoint discrimination may arise because of the manner in which a law is applied – that is, when, as here alleged, "the government enforces the law against persons of one viewpoint who violate the statute while not enforcing the law against similarly situated persons of the opposing viewpoint who also violate the statute." *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004). Otherwise, the government could discriminate freely based upon viewpoint as long as a statute or regulation was neutral on its face. The First Amendment does not tolerate such absurdities.

The central question in an as-applied viewpoint discrimination claim, therefore, is whether "the defendants in fact applied [the law] in a viewpoint discriminatory manner." Pl.'s Supp. Mem. at 19; *Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 (2d Cir. 2003). That is exactly what Reverend Boyle has alleged: that OFAC applied the Iraqi Sanctions Regulations against him based upon his public opposition to U.S. military involvement in Iraq, not his alleged travel to that country.<sup>1</sup> The government (Defs.' Supp. Mem. at 6-7) seeks to rely on *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210-11 (2d Cir. 2004), to suggest that the Iraqi Sanctions Regulations cannot discriminate based upon viewpoint because they burden foreign travel, not protected speech. But the government misreads *Church of the American Knights*. In that case, the Second Circuit found only that the plaintiffs there did not establish a viewpoint discrimination claim because they failed to "suggest[], much less show[],

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<sup>1</sup> The government (Defs.' Supp. Mem. at 4) also says that Reverend Boyle traveled to Iraq in early 2003 to serve as a "human shield." But OFAC imposed a fine against Reverend Boyle only for his alleged travel to Iraq. (A.R. 1-2).

that any other group was granted a permit” under circumstances similar to those under which the plaintiffs were denied a permit. *Church of the Am. Knights*, 356 F.3d at 211 (explaining that because plaintiffs did not allege that the law was in fact applied in a biased manner, they “therefore failed to establish a case of *either* viewpoint discrimination or selective enforcement”) (emphasis added). In other words, the court determined that the plaintiffs had failed to sustain their claim of viewpoint discrimination on summary judgment (and after an evidentiary hearing before the district court), *not* that a claim of viewpoint discrimination in the context of “nonprotected speech” must be dismissed as a matter of law at the pleading stage. Here, Reverend Boyle has properly alleged that the Iraqi Sanctions Regulations were applied against him in a viewpoint discriminatory manner, making dismissal inappropriate. Comp. ¶¶ 47-48, 63.

Indeed, defendants acknowledge (Defs.’ Reply Mem. at 6) that the government violates the First Amendment when it acts “in ways that favor some viewpoints or ideas at the expense of others.” As *R.A.V.* makes clear, even if the Iraqi Sanctions Regulations directly affect only unprotected travel, OFAC cannot use the Regulations as “vehicles” for discrimination by enforcing them in a viewpoint discriminatory manner. *R.A.V.*, 505 U.S. at 383-84. To be sure, “[i]n practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004). But that is precisely what discovery is for: to provide a plaintiff with the opportunity to sustain his claim by adducing evidence that the government has impermissibly enforced a law in a viewpoint discriminatory manner, even though that law may not discriminate on its face. *See* Pl.’s Supp. Mem. at 20-21. Reverend Boyle has properly alleged a claim of First Amendment viewpoint discrimination, and that is all that is required at this threshold stage. Accordingly, the government’s motion to dismiss this claim should be denied.

### **III. Reverend Boyle Is Entitled to Discovery on His First Amendment Viewpoint Discrimination Claim.**

The government also argues (Defs.' Supp. Mem. at 11-15), that Reverend Boyle is not entitled to discovery on his viewpoint discrimination claim. The government is confused. As Reverend Boyle has explained, this Court must treat the government's motion as a motion for dismissal under Federal Rule of Civil Procedure 12, not a motion for summary judgment under Federal Rule of Civil Procedure 56, since Reverend Boyle has not been provided a reasonable opportunity for discovery. Pl.'s Supp. Mem. at 20-21. Indeed, courts have been particularly careful in as-applied viewpoint discrimination claims not to rule upon motions for summary judgment until after a plaintiff has been allowed a reasonable time to develop the record. Pl.'s Supp. Mem. at 23; *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 624 (2d Cir. 2005) (explaining that a motion to dismiss an as-applied viewpoint discrimination claim could not be treated under Rule 56's summary judgment standard before any discovery had been conducted).

The government also incorrectly asserts that Reverend Boyle cannot conduct discovery because there was an agency proceeding. As the cases cited by the government show (Defs.' Supp. Mem. at 12-13), district courts must allow a reasonable opportunity for discovery even where administrative proceedings were conducted if the record of those proceedings does not allow for adequate review of a claim. *See, e.g., National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) ("absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice"); *see also* Pl.'s Supp. Mem. at 23 n.11. That is plainly the case here: OFAC's administrative proceeding denied Reverend Boyle any opportunity for discovery or to otherwise develop a record for a reviewing court to determine whether OFAC in fact impermissibly sanctioned him based upon his viewpoint, rather than his alleged travel to Iraq. *See, e.g., Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 458

(D.C. Cir. 1994) (discovery allowed where it “provides the only possibility for effective judicial review and...there have been no contemporaneous administrative findings”) (internal quotation marks and citation omitted). Reverend Boyle, therefore, must be afforded the reasonable opportunity for discovery he was denied below so that this Court may properly review his claim of First Amendment viewpoint discrimination.<sup>2</sup>

#### **IV. OFAC’s Penalty Violates Reverend Boyle’s Right to the Free Exercise of Religion Under the Religious Freedom Restoration Act.**

The government (Defs.’ Supp. Mem. at 16-17) argues that Reverend Boyle has failed to allege that his religious beliefs were substantially burdened within the meaning of RFRA, citing the Second Circuit’s decision in *Westchester Day School v. Village of Mamaroneck*, ---F.3d ---, 2007 WL 3011061 (2d Cir. 2007). But *Westchester Day School* supports Reverend Boyle’s RFRA claim. *Westchester Day School* involved the denial of a religious school’s building permit application to expand its already-existing facilities. In the limited circumstance of zoning restrictions, the Second Circuit explained, RFRA imposes a greater showing of substantial burden, requiring a court to examine whether the government action has coerced the institution to change its behavior. *Id.* at \*6-\*7 (“courts [examining] zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land”). The standard under RFRA is different, however, where an individual’s religious beliefs and practices are concerned. As the Second Circuit noted, zoning restrictions present a very different question under RFRA than restrictions which require an individual “to ‘choose between following the precepts of her

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<sup>2</sup> As the government recognizes (Defs.’ Supp. Mem. at 8-11), viewpoint discrimination under the First Amendment and selective enforcement under the Fifth and Fourteenth Amendments are different legal claims, and it is only the latter that even arguably imposes a heightened burden on a plaintiff at the pleading stage.

religion and forfeiting benefits [or being levied a fine], on the one hand, and abandoning one of the precepts of her religion...on the other hand.” *Id.* at \*5 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). That dilemma is precisely the one Reverend Boyle confronted here: he either had to violate a core precept of his religion to avoid financial sanction and possible criminal prosecution, or adhere to his religious beliefs and risk financial and criminal penalties. The Iraq Sanctions Regulations thus imposed a substantial burden on Reverend Boyle’s religious beliefs under RFRA. *See* Pl.’s Supp. Mem. at 13-16; Pl.’s Opp. to Mot. to Dismiss 30-32.<sup>3</sup>

The government (Defs.’ Supp. Mem. at 17-18) also relies on *Jenkins v. Comm’r of Internal Revenue*, 483 F.3d 90 (2d Cir. 2007), and *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997). Neither case, however, supports the government’s position. In *Jenkins*, the court did not discuss the substantial burden prong of the RFRA test, but rather addressed whether the tax provision there at issue was narrowly tailored to the compelling government interest asserted. *Jenkins*, 483 F.3d at 92. The court found “that RFRA does not afford a right to avoid payment of taxes for religious reasons” because the government could show that allowing any such tax exceptions would “seriously compromise its ability to administer the program.” *Id.* at 92 n.5. Nothing here, however, suggests that allowing an exception to the Iraqi Sanctions Regulations for at least some religious travel would have compromised OFAC’s ability to administer its

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<sup>3</sup> Further, in *Westchester Day School*, the Second Circuit made clear that even if government action has a minimal direct impact on religious exercise (there, the denial of a permit to construct an additional building in a religious school), a substantial burden on religious exercise may nonetheless exist if the laws are enforced “arbitrarily, capriciously, or unlawfully.” *Westchester Day Sch.* 2007 WL 3011061, at \*8. Reverend Boyle’s exercise of his religious beliefs was also therefore substantially burdened within the meaning of RFRA because the Iraqi Sanctions Regulations were enforced against him based upon his opposition to United States military action in Iraq, not his alleged travel to that country, making OFAC’s enforcement arbitrary, capricious, and unlawful.

sanctions program. On the contrary, the existence of other exceptions in the Regulations suggests the possibility of some of accommodation.

In *Amer*, the court briefly considered RFRA in *dicta*, stating that the International Parent Kidnapping Crime Act did not substantially burden the defendant's religious beliefs because the statute did not generally make it difficult for parents to take their children abroad for religious education but did so only "where [it] would violate the custodial rights of the other parent." *Amer*, 110 F.3d at 879 n.1. The statute therefore was narrowly tailored to the government interest of protecting the rights of both custodial parents. OFAC's categorical ban on all religious travel, however, is not so narrowly tailored.

The government's reliance on *Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987), is similarly misplaced. *Farrakhan* was decided in 1987 under the First Amendment's Free Exercise Clause. The Supreme Court subsequently held in *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990), that the First Amendment's Free Exercise Clause "does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Congress enacted RFRA in 1993 in response to the Supreme Court's holding in *Smith*. *Id.* Under RFRA, the federal government cannot, "as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Id.* (citing 42 U.S.C. § 2000bb-1(a)). The only exception provided is when the government demonstrates "that application of the burden *to the person*- (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of achieving that compelling governmental interest." *Id.* (citing 42 U.S.C. § 2000bb-1(b)) (emphasis added). See Pl.'s Supp. Mem. at 15. And the Supreme Court has recognized that

under RFRA’s compelling interest test a court must look “beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro Espirita*, 546 U.S. at 431. This requirement under RFRA that the government satisfy the compelling interest test “through application of the challenged law to... *the particular claimant* whose sincere exercise of religion is being substantially burdened,” *id.* at 430-31 (emphasis added), stands in direct contrast to the Supreme Court’s First Amendment Free Exercise Clause analysis in *Smith* — the analysis on which *Farrakhan* was based. *See Farrakhan*, 669 F. Supp. at 511 (rejecting case-by-case analysis and stating that “courts must consider not only the potential detriment to the governmental interest flowing from an accommodation to the plaintiff, but also the detriment to the governmental interest that would flow from an accommodation to all individuals or groups with similar claims”). As *Farrakhan* was decided under a different test that has since been rejected, it is irrelevant to this Court’s analysis of Reverend Boyle’s claim “[u]nder the more focused inquiry required by RFRA and [its] compelling interest test.” *O Centro Espirita*, 546 U.S. at 432. And, under that inquiry, Reverend Boyle is entitled to relief under RFRA.<sup>4</sup>

## CONCLUSION

For the foregoing reasons, Defendants’ motion for judgment on the pleadings or, in the alternative, for summary judgment, should be denied and Plaintiff’s cross-motion for judgment on the pleadings or, in the alternative, for summary judgment, should be granted.

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<sup>4</sup> The government (Defs.’ Supp. Mem. at 17-18 n.9) also asserts that Reverend Boyle cannot make out a threshold claim that his religious exercise was burdened because he did not apply for a permit prior to his alleged travel to Iraq. But, as previously noted (Pl.’s Supp. Mem. at 17 n.7), Reverend Boyle fell outside any recognized exception to OFAC’s travel ban. *See* 31 C.F.R. § 575.207 (specifying exceptions). RFRA does not require such exercises in futility. *See, e.g., United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002); *United States v. Antoine*, 318 F.3d 919, 922 n.4 (9th Cir. 2003).

Respectfully submitted,

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