IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA		)
		)
Plaintiff,		)
		)
vs.		)
		)
BRIAN IVAN,	4BE-12-627 CR	)
FELIX FLYNN,	4BE-12-559 CR	)
PETER HINZ,	4BE-12-575 CR	)
HOWARD NICHOLAI,	4BE-12-617 CR	)
MICHAEL FRYE,	4BE-12-567 CR	)
PETER BERLIN,	4BE-12-570 CR	)
YAGO EVAN,	4BE-12-573 CR	)
NOAH OKOVIAK,	4BE-12-571 CR	)
JOHN ALEXIE,	4BE-12-569 CR	)
PATRICK BLACK,	4BE-12-560 CR	)
NATHAN EVAN,	4BE-12-657 CR	)
MAX OLICK,	4BE-12-589 CR	)
JOHN OWENS,	4BE-12-595 CR	)
JAMBS ALBRITE,	4BE-12-582 CR	)
AUGUSTINE PITKA,	4BE-12-650 CR	)
SAMMY JACKSON, I,	4BE-12-590 CR	)
JOSEPH SPEIN,	4BE-12-629 CR	)
EUGENE NICOLAI,	4BE-12-603 CR	)
DANA KOPANUK,	4BE-12-675 CR	)
TOM CARL,	4BE-12-604 CR	)
MICHAEL ANDREW,	4BE-12-602 CR	)
		)
Defendants.		)
		)

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM IN SUPPORT OF THE DEFENDANTS' FREE EXERCISE OF RELIGION CLAIMS

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

The American Civil Liberties Union of Alaska ("ACLU of Alaska") moves this court to accept its conditionally filed memorandum in support of the defendants' defense that their conduct was protected by the Free Exercise clauses of the Alaska Constitution and the United States Constitution. The court has the widely recognized authority[1] to accept an amicus curiae brief under its inherent authority in Criminal Rule 51, to proceed in any manner not contrary to the rules, the constitution, and the common law.

The court may act by analogy with Appellate Rule 212(c)(9) which authorizes the admission of *amicus curiae* briefs in appellate matters. Indeed, the Alaska Supreme Court has recommended that "the most effective and expeditious way to participate" at the trial court level for individuals not named as parties or without adequate interests to justify intervention is by filing an *amicus curiae* brief.[2] While there is no specific rule permitting *amicus* filings at the trial court level, the case law makes clear that motions for leave to file an *amicus* brief or memorandum are routinely granted and looked upon favorably.

The ACLU of Alaska is a civil liberties organization with thousands of members statewide, dedicated to protecting the constitutional rights of all

[1] Numerous published opinions mention with apparent approval the acceptance by trial courts of *amicus* briefs in difficult cases. *See, e.g., Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 351 (Alaska 2011) (noting that the Superior Court considered an *amicus* memorandum from the American Cancer Society); *Smith v. State*, 229 P.3d 221, 230 (Alaska App. 2010) (noting *amicus* brief at Superior Court level from American Psychiatric Association and American Medical Association).

[2] *State v. Weidner*, 684 P.2d 103, 114 (Alaska 1984); *see also Neese v. State*, 218 P.3d 983, 993 (Alaska 2009); *Keane v. Local Boundary Com'n*, 893 P.2d 1239, 1250 (Alaska 1995); *Ryfeul v. Ryfeul*, 650 P.2d 369, 374 n.16 (Alaska 1982) (suggesting that, upon remand " the superior court solicit *amicus* presentations" from interested non-parties).

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Alaskans, including the right of free exercise of religion under the First Amendment of the United States Constitution and Article One, Section 4 of the Alaska Constitution. The ACLU of Alaska has considerable expertise in the area of questions of constitutional rights. As an affiliate of the national American Civil Liberties Union, the ACLU of Alaska has unique access to civil liberties organizations around the country who have dealt with excessive force claims, including those addressing religious freedom. The ACLU of Alaska believes that its memorandum may be helpful to the court in deciding the present matter.

Permitting an *amicus* brief is almost always consonant with judicial efficiency. Avoiding modest briefing at the cost of ignoring important legal discussion that might result in a remand from the Alaska Supreme Court would serve no one's interest in efficient and prompt resolution of the matter. If the *amicus*'s arguments are valid, the court will have avoided years of litigation by considering them. If the *amicus*'s arguments are invalid, the court can disregard them, at comparatively little cost in terms of time and energy.[3]

For these reasons, the ACLU of Alaska Foundation respectfully requests the court to accept the conditionally filed *amicus curiae* memorandum.

[3] *Keane v. Local Boundary Com'n*, 893 P.2d 1239, 1250 (Alaska 1995) (noting that *amicus* status is a preferred status for a non-party, relative to intervenor, by lessening the burden on the court and parties of its participation); *see also Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (holding that courts should "err on the side of granting leave" to submit *amicus* briefs, since ill-considered briefs will be ignored, and good briefs will be helpful).

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Dated this 11th of February, 2013,

Respectfully Submitted,

THOMAS STENSON
AK Bar No. 0808054
ACLU of Alaska Foundation
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
Telephone: (907) 258-0044
Facsimile: (907) 258-0228
tstenson@akclu.org

Attorney for Amicus Curiae ACLU of Alaska Foundation

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA		)
		)
Plaintiff,		)
		)
vs.		)
		)
BRIAN IVAN,	4BE-12-627 CR	)
FELIX FLYNN,	4BE-12-559 CR	)
PETER HINZ,	4BE-12-575 CR	)
HOWARD NICHOLAI,	4BE-12-617 CR	)
MICHAEL FRYE,	4BE-12-567 CR	)
PETER BERLIN,	4BE-12-570 CR	)
YAGO EVAN,	4BE-12-573 CR	)
NOAH OKOVIAK,	4BE-12-571 CR	)
JOHN ALEXIE,	4BE-12-569 CR	)
PATRICK BLACK,	4BE-12-560 CR	)
NATHAN EVAN,	4BE-12-657 CR	)
MAX OLICK,	4BE-12-589 CR	)
JOHN OWENS,	4BE-12-595 CR	)
JAMBS ALBRITE,	4BE-12-582 CR	)
AUGUSTINE PITKA,	4BE-12-650 CR	)
SAMMY JACKSON, I,	4BE-12-590 CR	)
JOSEPH SPEIN,	4BE-12-629 CR	)
EUGENE NICOLAI,	4BE-12-603 CR	)
DANA KOPANUK,	4BE-12-675 CR	)
TOM CARL,	4BE-12-604 CR	)
MICHAEL ANDREW,	4BE-12-602 CR	)
		)
Defendants.		)
		)

[Proposed] ORDER PERMITTING FILING OF *AMICUS CURIAE* ACLU OF ALASKA'S MEMORANDUM OF LAW

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Having reviewed the tentatively filed memorandum of law of *amicus curiae* ACLU of Alaska and the motion seeking leave from this Court to permit the filing of the memorandum, the Court hereby orders that the memorandum shall be accepted and considered. The motion to permit the filing of the memorandum is granted.

SO ORDERED this ____ day of _____, 2013 at Bethel, Alaska.

_____

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA		)
		)
Plaintiff,		)
		)
vs.		)
		)
BRIAN IVAN,	4BE-12-627 CR	)
FELIX FLYNN,	4BE-12-559 CR	)
PETER HINZ,	4BE-12-575 CR	)
HOWARD NICHOLAI,	4BE-12-617 CR	)
MICHAEL FRYE,	4BE-12-567 CR	)
PETER BERLIN,	4BE-12-570 CR	)
YAGO EVAN,	4BE-12-573 CR	)
NOAH OKOVIAK,	4BE-12-571 CR	)
JOHN ALEXIE,	4BE-12-569 CR	)
PATRICK BLACK,	4BE-12-560 CR	)
NATHAN EVAN,	4BE-12-657 CR	)
MAX OLICK,	4BE-12-589 CR	)
JOHN OWENS,	4BE-12-595 CR	)
JAMBS ALBRITE,	4BE-12-582 CR	)
AUGUSTINE PITKA,	4BE-12-650 CR	)
SAMMY JACKSON, I,	4BE-12-590 CR	)
JOSEPH SPEIN,	4BE-12-629 CR	)
EUGENE NICOLAI,	4BE-12-603 CR	)
DANA KOPANUK,	4BE-12-675 CR	)
TOM CARL,	4BE-12-604 CR	)
MICHAEL ANDREW,	4BE-12-602 CR	)
		)
Defendants.		)
		)

AMICUS CURIAE MEMORANDUM IN SUPPORT OF THE DEFENDANTS' FREE EXERCISE OF RELIGION CLAIMS

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK
99503-1760
T/907.258.0044
F/907.258.0288

The American Civil Liberties Union of Alaska ("ACLU of Alaska") submits this conditionally filed memorandum in support of the defendants' claims regarding the defense that their conduct was protected by the Free Exercise clauses of the Alaska Constitution and the United States Constitution. A motion for leave to file the conditionally filed memorandum is simultaneously submitted.

I. Overview of Case

Based on accounts of the charges, the *amicus* understands that the defendants are some 21 men, all charged with various fishing and fishing gear related offenses, typically cited under 5 AAC 01.270(n). During the summer of 2012, the Commissioner of the Department of Fish and Game completely closed the subsistence salmon fisheries in the lower Kuskokwim River for extended periods, in response to a shortfall in the return of king salmon. The defendants are alleged to have violated these bans on subsistence salmon fishing in June and early July 2012.

The defendants have advanced the claim that their conduct was protected by the Free Exercise Clause of the United States Constitution, the Free Exercise Clause of the Alaska Constitution, and the Religious Freedom Restoration Act (RFRA). U.S. Const., Amdt. I; Alaska Const., Art. I, Sec. 4; 42 USC 2000bb *et seq*. For reasons described below, the *amicus* will discuss the defense of religious practice only in light of the Alaska Constitution.

/

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

II. The Legal Framework on the Free Exercise of Religion

The United States Supreme Court held in *Sherbert v. Verner* that "any incidental burden on the free exercise of appellant's religion" must be justified by a compelling state interest. 374 U.S. 398, 403 (1963). For 27 years, the *Sherbert* test was the basis for evaluating whether facially-neutral laws that incidentally burdened religious practice tended to violate the First Amendment. In 1990, the U.S. Supreme Court reversed itself and announced that was abandoning the *Sherbert* test and holding that religious objection did not exempt a person from compliance with a religiously neutral law that incidentally burdens religion. *Employment Div v. Smith*, 494 U.S. 872, 888 (1990).

Congress was upset that the "Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and passed the Religious Freedom Restoration Act, which statutorily restored the *Sherbert* test. 42 USC 2000bb. The Supreme Court struck down the application of RFRA to state governments as outside the scope of Congressional power. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). The Congress responded by passing a more limited law affecting state governments only, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which is not before this Court. 42 USC 2000cc-1 *et seq.*

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

However, the Alaska Supreme Court adopted its own version of the *Sherbert* test under the Alaska Constitution and has not renounced it, even after the U.S. Supreme Court's opinion in *Smith*.

> A valid, neutral, generally applicable law cannot violate the free exercise clause of the federal constitution. The regulation at issue here falls into that category and so is not invalid under the First Amendment. *We apply the Alaska free exercise clause differently.*

Huffman v. State, 204 P.3d 339, 344 (Alaska 2009) (emphasis added). The Alaska free exercise clause still requires that the state demonstrate a compelling interest to justify even incidental burdens imposed on religious practice by facially neutral laws. Since the Alaska free exercise clause is at least as protective of individual religious liberty under RFRA or the First Amendment, this memorandum will address the Alaska Free Exercise Clause exclusively.

The test which applies regarding alleged violations of the Free Exercise Clause of the Alaska Constitution is that which was first expressed in *Frank v. State*. 604 P.2d 1068 (Alaska 1979). In *Frank*, an Athabaskan man was charged with shooting a moose out of season. *Id.* at 1069. He raised as a defense the claim that his conduct was religiously compelled, because he shot the moose so that he could bring moose meat for a funeral potlatch. *Id.* The Alaska Supreme Court found in his favor, finding that the conduct was "deeply rooted in" religious practice, the defendant's religious belief was "sincere," and the state had failed to

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

show that granting exemptions to those sincerely seeking religious exemptions would negatively affect a compelling state interest. *Id.* at 1072-74.

The *Frank* test was restated later as having two components. First, the claimant must show "a religion [is] involved, the conduct must be religiously based, and the claimant must be sincere." *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001). If the claimant meets this burden, the Court must then consider whether the religious practice poses a threat to public peace or safety, or whether "competing governmental interests that are of the highest order and [are] not otherwise served." 34 P.3d at 958.

III. Salmon Fishing is a Long-Standing Practice with Deep Roots in Yup'ik Religious Beliefs and Understandings About the Universe

Throughout the Pacific Northwest, the cultures and religions of many Native American and Alaska Native tribes are organized around the salmon harvest. The Ninth Circuit recognized that the "diets, social customs, and *religious practices* [of tribes living west of the Cascades] centered on the capture of fish." *United States v. State of Wash.*, 520 F.2d 676, 682 (9th Cir. 1975) (emphasis added). For members of such tribes, including the Yup'ik, salmon fishing is more than a mere way of getting food, interchangeable with going to the supermarket.

Instead, a Yup'ik fisherman on the Kuskokwim today fishes as part of a seamless, continuous tradition dating back hundreds and thousands of years. These traditions reflect more than just an effort to get as many fish in as little time as

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

possible; instead, the traditions rely on the fisherman making the right acts with the right mindset to maintain the balance in the Yup'ik cosmology. Fishermen who adhere to these traditions ensure that the salmon will continue to return to the river in the future.

A. Traditional Yup'ik Beliefs Meet the Basic Definition of a Religion

Yup'ik traditional beliefs constitute a religion, within the meaning the Free Exercise Clause. Courts considering this question have traditionally looked at "how broad and fundamental an individual's set of expressed beliefs are by considering factors such as whether the premises of the religion relate to ultimate questions and whether there are rituals or other activities associated with it." *Huffman*, 204 P.3d at 345. Yup'ik traditional beliefs have deep origins in the community and have been widely studied by academics. These traditional beliefs express a particular understanding of the universe and how individuals relate to the universe, as well as the animals in the universe.

"Eskimo cosmology . . . was originally founded on the assumption of an undifferentiated universe, wherein human attention to the rules was an act of participation necessary both to create difference and maintain connections."[1] The Yup'ik traditional beliefs regarding animals and how humans should interact with them reflected a sophisticated balance of the personhood of the human hunter and his prey. "The differentiation of persons into humans and nonhumans was for

[1] Ann Fienup-Riordan, *Boundaries and Passages: Rule and Ritual in Yup'ik Eskimo Oral Tradition*, at 48 (1994 University of Oklahoma Press).

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Eskimo peoples at the foundation of social life. . . . Once the initial differentiation between human and nonhuman persons had been established, their relationship in perpetuity depended on their carefully regulated interaction."[2]

Yup'ik beliefs about animals and humans directly addressed these "ultimate questions" that define a religion. "Yup'ik cosmology . . . presents human and nonhuman persons as engaged in a constant cycle between birth and rebirth. . . ."[3] The supreme being in Yup'ik belief is the *Ellam Yua*, the spirit of the air, who monitored the system of cultural taboos around taking food animals and punished the breaking of those taboos with bad weather and starvation.[4] In Yup'ik cosmology, every person and animal had a *yuk*, meaning roughly, a soul; also referred to as *yua*, or its own soul.[5] A system of traditional beliefs relating to life and death, souls, the afterlife or reincarnation, fits the basic definition of what constitutes a religion for Free Exercise clause purposes.

B. The Practice of Salmon Fishing is Deeply Rooted in Yup'ik Religious Beliefs

Yup'ik beliefs regarding the practice of salmon fishing are "deeply rooted" in their religion and their understanding of the universe. For Free Exercise clause purposes, the term "deeply rooted" does not mean essential or required. *Frank*, 604 P.2d at 1072 ("[A]bsolute necessity is a standard stricter than that which the

---

[2] Fineup-Riordan, at 48-49.

[3] *Id.* at 49.

[4] Susan Hansen, *Yupik Eskimo Cultural History and Lore from the Lower Yukon River: Oral Traditions and Their Associations with the Land*, at 88 (1985).

[5] *Id.* at 51.

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

law imposes."). In a related federal standard, conduct "motivated by sincere religious belief" need not be central to one's religion to gain protection under the free exercise clause, nor would courts be equipped to make such a determination. 494 U.S. at 887 ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). As long as conduct is "religiously based," the second provision of the *Frank* test is met. *Sands*, 34 P.3d at 959.

While mainstream Western beliefs may focus on particular religious ceremonies, holidays, or special acts as defining what "religion" is, many court decisions have recognized as "deeply rooted in religion" or "religiously based" acts that go far outside the mainstream. Of course, as the nearest analogue, *Frank* recognized that the taking of moose had a religious angle, although the moose hunt in *Frank* was a single instance and oriented around a particular ritual.

That the moose taking in *Frank* was oriented around a particular ritual does not show that the salmon fishing here is not rooted in religion. The Alaska Supreme Court in *Sands* also declared that the "shunning" practice of Jehovah's witnesses was deeply rooted in religion. 34 P.3d at 959; *see also Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 876 (9th Cir. 1987) (finding that "shunning" was a religious practice"). The practice of "shunning" is a form of social ostracism that requires members of a religious community to refuse to greet, speak to, or otherwise acknowledge the existence of

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

a former member of the community. *Paul*, 819 F.2d at 876-77. Like taking salmon, the practice of shunning might occur on a daily basis and is not focused around any particular religious ceremony; instead, shunning constitutes a religious practice because it is an outward expression of the community's values, rooted in their religious beliefs.

Similarly, the day-to-day keeping of a bear by a Native American was found to be a religious practice worthy of protection by the federal Free Exercise clause. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 213 (3d Cir. 2004). A federal court also found that an abortion protest was within the scope of the federal Free Exercise clause because the protest was "deeply rooted" in the individual's religious belief. *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009). Because courts are not in the business of declaring religious orthodoxy, "the claim of the [individual] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965).

"[T]he people of the Yukon-Kuskokwim Delta . . . still have strong feelings associated with subsistence foods. And deeply embedded in these ties with the land and the subsistence cycle are elements of the old religious and spiritual beliefs."[6] At the heart of the Yup'ik religious understanding of hunting and fishing is the notion that both animals and humans engaged in a "collaborative reciprocity by which the animals *gave themselves* to the hunter in response to the hunter's

[6] Susan Hansen, *Yupik Eskimo Cultural History and Lore from the Lower Yukon River: Oral Traditions and Their Associations with the Land*, at 64 (1985).

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

respectful treatment of them as nonhuman persons."[7] Thus, the successful Yup'ik fisherman is not a person of great skill, but a person who obeys the traditional laws regarding the treatment of the salmon and who shows the salmon proper respect.[8] Treating an animal's body thoughtlessly, or carelessly wasting or trampling on food will cause the offended animal's *yua* to discourage other animals from allowing themselves to be caught.[9]

A Yup'ik fisherman who is a sincere believer in his religious role as a steward of nature, believes that he must fulfill his prescribed role to maintain this "collaborative reciprocity" between hunter and game. Completely barring him from the salmon fishery thwarts the practice of a real religious belief. Under Yup'ik religious belief, this cycle of interplay between humans and animals helped perpetuate the seasons; without the maintaining that balance, a new year will not follow the old one.[10] The state of Alaska, by intervening to bar salmon fishing, fundamentally disrupts the order of the Yup'ik world, both in its day-to-day practicalities and its overall spiritual harmony between humans and animals.

C. The Sincerity of Belief Is Essentially an Individual Credibility Question, Which the Court Should Judge on an Individual Basis

Courts may factually inquire whether the individual in question sincerely holds the claimed religious belief. *Frank*, 604 P.2d at 1075 n.14. This sincerity test

---

[7] Fineup-Riordan, at 50.

[8] *Id.* at 58.

[9] *Id.* at 89.

[10] Nancy Lee Williamson Sanders, *The Relationship of Spirituality and Health Among the Yup'ik of Southwestern Alaska: an Exploratory Study*, at 40.

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

is *not* an opportunity to examine whether the belief is common or orthodox within the individual's claimed religion. *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (rejecting as improper prison's claims that prisoner seeking kosher meals qualified as a Jew under ecclesiastical law and instead looking to the prisoner's frequent definition of himself as a Jew).

Instead, this test is essentially a question of the claimant's truthfulness in his claimed religious purpose. The sincerity requirement, if contested by the parties, typically requires "direct and cross-examination to facilitate a credibility evaluation." *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984). "Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief" or that his professed belief was "a moving target" can tend to show a belief is not sincerely held. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 57 (1st Cir. 2002). Beyond providing these rough outlines of the legal claims, the *amicus* cannot assist the Court further in determining whether any single fisherman's claim is sincere; the Court must judge that sincerity on a case-by-case basis.

IV. Creating a Religious Exemption Application Permit for Salmon-Taking Would Not Harm the State Interest in Managing the Salmon Population

The *amicus* does not argue that the Free Exercise clause is a license to take as many fish as one wishes, nor that all Yup'ik people are entitled to take unlimited numbers of salmon. Neither did the Alaska Supreme Court find that all

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Athabaskan people could take all the moose they wanted. The Alaska Supreme Court in *Frank* instead held that the state had failed to show that the state's interest in maintaining the moose population would be thwarted if individual religious exemptions were granted. 604 P.2d at 1074. The *amicus*'s argument suggests nothing more than the Alaska Supreme Court required in *Frank*: a system of religious exemption applications that could be evaluated by the Department of Fish and Game. In the absence of even rudimentary consideration for the free exercise rights of Alaskans, the state should not be entitled to prosecute people for practices deeply rooted in their religion and culture for time out of mind.

The state has produced no evidence regarding how many people might apply for a religious exemption from salmon fishing exclusions, if the Department of Fish and Game ("Fish and Game") offered one. "The burden of demonstrating a compelling state interest which justifies curtailing a religiously based practice lies with the state." *Frank*, 604 P.2d at 1074. The state cannot assume that every single person who catches salmon in a subsistence capacity on the Kuskokwim River would automatically apply for and be granted such an exemption. Indeed, the *Frank* court specifically rejected the state's foundationless claims that allowing religious exemptions to the game laws would create anarchy on the affected lands. *Frank*, 604 P.2d at 1074 (rejecting state's anticipation of "general lawlessness").

Indeed, Fish and Game would not be obliged to grant every such application. Since a compelling interest could override the Free Exercise right,

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Fish and Game could respond in numerous ways where the number of exemption applications sought exceed the available stock of fish or game. The state could set up a scheme where Fish and Game could run a lottery of applications to allow a smaller subset of applicants to harvest fish or game, allow each applicant a particular bag limit, or even, where the fishery was totally depleted, deny all the applications. How the state manages any such exemption scheme is not for this Court to decide however. Having made no effort to address the religious needs of the Yup'ik community by creating an exemption application, the state should not be entitled to prosecute the fishermen in the present case, any more than it was entitled to prosecute the moose hunter in *Frank.*

V. Conclusion

In the present case, the traditional Yup'ik belief system meets the basic definition of a religion. Salmon fishing is deeply integrated in the traditional Yup'ik belief system. The Yup'ik belief system requires the fisherman to act in a certain way, to fish in a certain way, and to respect the fish he harvests. The state's denial of all participation in the salmon fishery significantly interfered with a salmon fishing practice "deeply rooted" in a religious belief. The state has not and cannot bear the burden of showing that a religious exemption scheme would thwart its overall management plan. Therefore, if the Court finds that the fishermen's religious claims spring from sincere beliefs, the criminal complaints in these cases must be dismissed.

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044
F/907.258.0288

Dated this 11th of February, 2013,

Respectfully Submitted,

THOMAS STENSON
AK Bar No. 0808054
ACLU of Alaska Foundation
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
Telephone: (907) 258-0044
Facsimile: (907) 258-0228
tstenson@akclu.org

Attorney for Amicus Curiae ACLU of Alaska Foundation

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

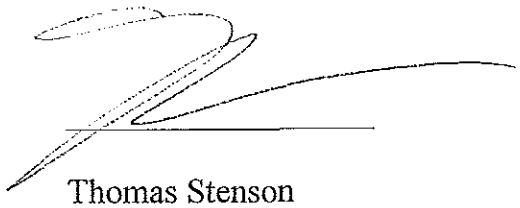
STATE OF ALASKA		)
		)
Plaintiff,		)
		)
vs.		)
		)
BRIAN IVAN,	4BE-12-627 CR	)
FELIX FLYNN,	4BE-12-559 CR	)
PETER HINZ,	4BE-12-575 CR	)
HOWARD NICHOLAI,	4BE-12-617 CR	)
MICHAEL FRYE,	4BE-12-567 CR	)
PETER BERLIN,	4BE-12-570 CR	)
YAGO EVAN,	4BE-12-573 CR	)
NOAH OKOVIAK,	4BE-12-571 CR	)
JOHN ALEXIE,	4BE-12-569 CR	)
PATRICK BLACK,	4BE-12-560 CR	)
NATHAN EVAN,	4BE-12-657 CR	)
MAX OLICK,	4BE-12-589 CR	)
JOHN OWENS,	4BE-12-595 CR	)
JAMBS ALBRITE,	4BE-12-582 CR	)
AUGUSTINE PITKA,	4BE-12-650 CR	)
SAMMY JACKSON, I,	4BE-12-590 CR	)
JOSEPH SPEIN,	4BE-12-629 CR	)
EUGENE NICOLAI,	4BE-12-603 CR	)
DANA KOPANUK,	4BE-12-675 CR	)
TOM CARL,	4BE-12-604 CR	)
MICHAEL ANDREW,	4BE-12-602 CR	)
		)
Defendants.		)
		)

CERTIFICATE OF SERVICE

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044

I hereby certify that, on February 11, 2013, I have served by US Mail, upon James Davis, counsel for the defendants, and Chris Carpeneti, District Attorney, a copy of the following documents:

- *Amicus Curiae* ACLU of Alaska Foundation's Motion for Leave to Submit Memorandum in Support of the Defendants' Free Exercise Claims;
- *Amicus Curiae* ACLU of Alaska Foundation's Memorandum in Support of the Defendants' Free Exercise Claims;
- [Proposed] Order Permitting the Filing of the *Amicus Curiae* Memorandum;
- This Certificate of Service.



Thomas Stenson

ACLU of Alaska Foundation
1057 W Fireweed Lane, Suite 207
Anchorage, AK 99503-1760
T/907.258.0044

AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
(907) 258-0044 (907) 258-0288 (fax)
akclu@akclu.org www.akclu.org

Fax

To:	Bethel Trial Courts	**From:**	Thomas Stenson
Fax:	907-543-4419	**Pages:**	22
Phone:		**Date:**	2/11/2013
Re:	State v. Brian Ivan, 4BE-12-627 CR	**cc:**	

☐ **Urgent** **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

See attached pleadings.

* * * Communication Result Report (Feb. 11. 2013 3:54PM) * * *

1) ACLU Of Alaska Foundation
2)

Date/Time: Feb. 11. 2013 3:49PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
1054	Memory TX	19075434419	P. 23	OK	

Reason for error
E. 1) Hang up or line fail
E. 2) Busy
E. 3) No answer
E. 4) No facsimile connection
E. 5) Exceeded max. E-mail size

AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
(907) 258-0044 (907) 258-0288 (fax)
akclu@akclu.org www.akclu.org

Fax

To:	Bethel Trial Courts	From:	Thomas Stenson
Fax:	907-543-4419	Pages:	22
Phone:		Date:	2/11/2013
Re:	State v. Brian Ivan, 4BE-12-627 CR	cc:	

☐ Urgent For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

See attached pleadings.