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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROGER HOLLY,
Plaintiff,
v.
SALLY JEWELL,
Defendant.

Case No. 16-cv-00011-DMR

**ORDER GRANTING PARTIAL
MOTION TO DISMISS**

Re: Dkt. No. 19

Plaintiff Roger Holly is an African American man and a licensed minister in the Baptist Church who worked for the National Park Service until his termination on March 10, 2014. Plaintiff’s First Amended Complaint (“FAC”) [Docket No. 16] alleges four claims for relief: 1) religious and race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, (“Title VII”); 2) retaliation on the basis of religion and race in violation of Title VII; 3) violation of his First Amendment rights to free speech, free exercise of religion, and freedom of association; and 4) violation of the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000(bb) *et seq.* Plaintiff brings this action against Defendant Sally Jewell in her official capacity as the Secretary of the United States Department of the Interior.

Defendant now moves pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss Plaintiff’s First Amendment and RFRA claims. Defs.’ Partial Motion to Dismiss (“MTD”) [Docket No. 19]. Defendant argues that both claims are “preempted” by Title VII, which provides the sole remedy for discrimination in federal employment.¹ *Id.* Having considered the parties’

¹ Defendant describes this as a “preemption” issue. MTD at 7. This term has been used by some courts in similar circumstances. *See, e.g., Tagore v. United States*, No. CIV. A. H–09–0027, 2009 WL 2605310, at *10 (S.D. Tex. Aug. 21, 2009), *aff’d in part, rev’d in part* by 735 F.3d 324 (5th Cir. 2013); *Francis v. Ridge*, No. Civ. 2003/0039, 2005 WL 3747434, *3 (D.V.I. Dec. 27, 2005); *Dorsey v. Roche*, No. C 00–21070 JW, Docket No. 53 at ECF 13 (N.D. Cal. Oct. 1, 2002). Other courts use the term “subsumed.” *See, e.g., Francis v. Mineta*, 505 F.3d 266, 270 (3d Cir. 2007).

1 briefs and oral argument, the court grants Defendant’s motion.

2 **I. FACTUAL BACKGROUND**

3 The following facts are set forth in Plaintiff’s FAC. The court focuses on Plaintiff’s
4 allegations relating to his claims for religious discrimination and violation of his First Amendment
5 rights. It does not discuss allegations relating to race discrimination or retaliation, as those claims
6 are not at issue in the present motion.

7 Plaintiff, an African American man, is a Baptist Christian and a gospel minister. He
8 worked at the San Francisco Maritime National Historic Park as a maintenance worker from May
9 2012 until his termination in March 2014. In late November 2013, Plaintiff met with management
10 officials. Among other things, Plaintiff complained that he had been told that he could not
11 “display” a Bible that he read on his breaks, although other employees were not questioned about
12 the reading materials that they kept for their break times. On November 23, 2013, while on a
13 break and out of uniform, Plaintiff performed a baptism in the seashore adjoining the park. On his
14 next work day, Plaintiff’s supervisor interrogated Plaintiff about the baptism, and questioned him
15 extensively about his religion. On January 28, 2014, Plaintiff’s employer issued a Notice of
16 Proposed Termination, followed by a termination decision on March 10, 2014. The final agency
17 decision noted that Plaintiff was terminated for performing a baptism at Aquatic Park.

18 **II. LEGAL STANDARDS**

19 **A. Rule 12(b)(1)**

20 A motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court’s subject
21 matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). A court will dismiss a party’s claim for lack of
22 subject matter jurisdiction “only when the claim is so insubstantial, implausible, foreclosed by
23 prior decisions of th[e Supreme] Court, or otherwise completely devoid of merit as not to involve
24 a federal controversy.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (citation
25

26 This court joins yet other courts in describing the issue as whether Title VII provides the exclusive
27 remedy for discrimination in federal employment. *See, e.g., Harrell v. Donahue*, 638 F.3d 975,
28 984 (8th Cir. 2011); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995); *Ethnic Emps. of
Library of Cong. v. Boorstin*, 751 F.2d 1405, 1407 (D.C. Cir. 1985); *White v. Gen. Servs. Admin.*,
652 F.2d 913, 916 (9th Cir. 1981).

1 and quotation marks omitted). When reviewing a 12(b)(1) motion, the court sculpts its approach
2 according to whether the motion is “facial or factual.” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
3 2000). A facial challenge asserts that “the allegations contained in a complaint are insufficient on
4 their face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
5 (9th Cir. 2004). By contrast, a factual attack disputes “the truth of the allegations that, by
6 themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at
7 1039.

8 Here, Defendant facially attacks Plaintiff’s First Amendment and RFRA claims pursuant to
9 Rule 12(b)(1), arguing that they should be dismissed because they are “preempted” by Title VII.

10 **B. Rule 12(b)(6)**

11 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
12 sufficiency of the claims alleged in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199–200
13 (9th Cir. 2003). When reviewing a motion to dismiss for failure to state a claim, the court must
14 “accept as true all of the factual allegations contained in the complaint,” *Erickson v. Pardus*, 551
15 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss the case “only where there is
16 no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal
17 theory.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)
18 (citation and quotation marks omitted).

19 **III. ANALYSIS**

20 Defendant argues that Plaintiff’s First Amendment and RFRA claims assert religious
21 discrimination in a federal workplace, and therefore should be dismissed because Title VII
22 provides the exclusive remedy for discrimination in federal employment. Defendant also argues
23 that since she has been sued in her official capacity, she cannot be held vicariously liable for
24 monetary damages resulting from constitutional violations allegedly committed by Plaintiff’s
25 supervisors.

26 **A. Whether Defendant Properly Brings This Motion Under Rule 12(b)(1)**

27 As an initial matter, Plaintiff asserts that Defendant’s motion should be denied because she
28 improperly brings it under Rule 12(b)(1) instead of Rule 12(b)(6). According to Plaintiff,

1 Defendant’s argument raises an issue of statutory standing (as opposed to Article III standing),
2 which cannot be addressed through Rule 12(b)(1). Pl.’s Opposition (“Opp.”) [Docket No. 20] at 2
3 (citing *Maya v. Centex Corp.*, 658 F.3d 1060, 1067–68 (9th Cir. 2011)). Defendant responds that
4 Plaintiff confuses the issues of standing and preemption. Reply [Docket No. 21] at 6.

5 Although this dispute is styled as a motion to dismiss for lack of subject matter jurisdiction
6 pursuant to Rule 12(b)(1), the more appropriate analysis is under Rule 12(b)(6), which asks
7 whether Plaintiff has failed to state a claim upon which relief can be granted. This case
8 unequivocally raises federal questions which confer subject matter jurisdiction pursuant to 28
9 U.S.C. § 1331. In this motion, Defendant essentially argues that Plaintiff cannot state a claim for
10 relief under RFRA or the First Amendment because Title VII prevents him from doing so. *See*,
11 *e.g.*, *Francis v. Mineta*, 505 F.3d 266, 268 (3d Cir. 2007) (disagreeing with district court’s
12 dismissal of RFRA claim under Rule 12(b)(1) due to lack of subject matter jurisdiction, but
13 affirming result pursuant to Rule 12(b)(6)).

14 **B. Title VII and Federal Employment**

15 **1. General Principles**

16 Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on
17 race, color, religion, sex or national origin. 42 U.S.C. § 2000e *et seq.* As originally enacted, Title
18 VII did not provide a remedy for federal employees alleging job-related discrimination. Congress
19 filled this loophole through passage of section 2000e–16 as part of the 1972 amendments to Title
20 VII. *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 825 (1976).

21 In *Brown*, the Supreme Court took up the question of whether the 1972 amendment
22 “provides the exclusive judicial remedy for claims of discrimination in federal employment.” 425
23 U.S. at 820–21. After review of the legislative history, *Brown* held that “the congressional intent
24 in 1972 was to [create] an exclusive, pre-emptive administrative and judicial scheme for the
25 redress of federal employment discrimination.” *Id.* at 829. The court then examined Title VII’s
26 statutory scheme as a whole, and found that “the structure of the 1972 amendment itself fully
27 confirms the conclusion that Congress intended it to be exclusive and pre-emptive.” *Id.*

28 *Brown* discussed other contexts in which the Supreme Court has held that “a precisely

1 drawn, detailed statute pre-empts more general remedies,” including situations where the
2 preempted statutory or tort remedies were found to undermine exhaustion requirements or
3 narrowly tailored compensation schemes. *Id.* at 834–35. *Brown* concluded that “the Civil Rights
4 Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in
5 federal employment.” *Id.* at 835; *see also White v. Gen. Servs. Admin.*, 652 F.2d 913, 916–17 (9th
6 Cir. 1981) (“[A]llowing additional individual remedies would interfere with th[e] carefully
7 devised scheme [of Title VII] by permitting circumvention of administrative remedies.”); *Labtis v.*
8 *Paulson*, No. C 07–3333 RS, 2008 WL 2705004, at *3 (N.D. Cal. July 9, 2008) (applying *Brown*
9 and *White*; dismissing federal employee’s tort and contract claims to the extent they challenged
10 race, color, religion, sex, or national original discrimination).

11 In sum, to date, the Supreme Court and Ninth Circuit have held that Title VII provides the
12 sole remedy for federal employees challenging workplace discrimination. The court now
13 examines Plaintiff’s First Amendment and RFRA claims to determine whether they must be
14 dismissed in light of the Title VII “exclusive remedy” rule announced in *Brown*.

15 2. Plaintiff’s First Amendment Claim

16 Plaintiff’s First Amendment claim alleges violation of his right to free exercise of religion,
17 free speech, and freedom of association. FAC at ¶¶ 65–79. Plaintiff asserts that he exercised all
18 of these rights by engaging in private religious conduct when he performed a baptism ceremony
19 while on his lunch break. He contends that this act was the motivating factor in Defendant’s
20 decision to terminate him. Plaintiff further states that his employer severely intruded upon his
21 First Amendment rights by prohibiting him from reading the Bible, discussing the Bible or its
22 teachings, denigrating his religious activities, prohibiting interaction with others regarding religion
23 on non-work time, and prohibiting him from engaging in religious activities on non-work time.
24 *Id.*

25 As discussed above, Title VII provides the sole remedy for discrimination in federal
26 employment. However, the Ninth Circuit has recognized that a plaintiff may bring separate tort or
27 constitutional claims to the extent they fall outside this rubric. Thus, in *White*, the court noted that
28 “Title VII does not preclude separate remedies for unconstitutional action other than

1 discrimination based on race, sex, religion or national origin.” *White*, 652 F.2d at 917 (citing
2 *Carlson v. Green*, 446 U.S. 14 (1980); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388
3 (1971)). Courts therefore must determine whether a plaintiff’s constitutional or tort claims seek
4 remedies for conduct other than discrimination in federal employment.

5 For example, in *Nolan v. Cleland*, 686 F.2d 806, 814–15 (9th Cir. 1982), the Ninth Circuit
6 addressed whether, in addition to her Title VII claim for sex discrimination, a former federal
7 employee could bring a constitutional claim for violation of due process based on allegations that
8 her employer’s deceit, coercion, and duress caused her involuntary resignation, which constituted
9 a taking of a property interest. Although Nolan argued that her due process claim did not
10 challenge workplace discrimination, the Ninth Circuit reasoned that the factual predicate for her
11 constitutional claim was the same for her Title VII claim. As such, the Ninth Circuit applied
12 *Brown* and found that the district court properly struck Nolan’s constitutional claim because Title
13 VII “provides the exclusive judicial remedy for claims of discrimination in federal employment.”
14 *Id.* (citing *Brown*, 425 U.S. at 835). *But see Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir.
15 1987) (remedy for unconstitutional actions other than employment discrimination not barred by
16 Title VII, even if arising from same core of facts).

17 In *Otto v. Heckler*, 781 F.2d 754 (9th Cir.), *amended by* 802 F.2d 337 (9th Cir. 1986), the
18 Ninth Circuit held that “torts which constitute ‘highly personal violation[s] beyond the meaning of
19 ‘discrimination’ [are] separately actionable.” *Id.* at 756–57 (finding that plaintiff could not pursue
20 certain alleged constitutional violations because they were actionable under Title VII; other
21 allegations, although theoretically viable, did not did not amount to a violation of plaintiff’s
22 constitutional right to privacy); *see also Brock v. United States*, 64 F.3d 1421, 1423–24 (9th Cir.
23 1995) (torts relating to harms from sexual assault and rape may be actionable in addition to claims
24 for Title VII sexual harassment, because rape and sexual assault involved highly personal violation
25 beyond the meaning of discrimination.)

26 In *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1415 (D.C. Cir.
27 1985), the court affirmed application of the *Brown* rule to dismiss constitutional claims to the
28 extent that they “simply restated claims of racial, ethnic or other discrimination cognizable under

1 Title VII.” However, the court reversed the dismissal of constitutional claims that “could [not] be
2 asserted in a Title VII lawsuit.” *Id.* These included the allegation that the Library of Congress had
3 punished the plaintiff organization and its members for their constitutionally protected criticisms
4 of library policies, and had forced the organization to disclose its membership list as a condition of
5 official recognition. *Id.* The D.C. Circuit found that these assertions fell outside the scope of Title
6 VII, and that nothing in the history of Title VII suggested that Congress intended to prevent
7 federal employees from suing their employers for constitutional violations against which Title VII
8 provides no protection at all. *Id.*; *see also Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983)
9 (Title VII does not foreclose federal employee’s suit for deprivation of constitutionally protected
10 property interest without due process based on employer’s failure to follow its own affirmative
11 action plans and regulations).

12 As currently pleaded, Plaintiff’s First Amendment claim is for religious discrimination in
13 employment, including his termination for performing a baptism. Plaintiff’s constitutional claim is
14 dismissed with prejudice to the extent that it challenges conduct protected by Title VII. However,
15 the court grants leave to amend to the extent that Plaintiff can state a First Amendment violation
16 that is distinct from his Title VII claim.

17 3. Plaintiff’s RFRA Claim

18 Defendant argues that Plaintiff’s RFRA claim must also be dismissed, because it
19 challenges conduct for which Title VII provides the sole remedy pursuant to *Brown*. Plaintiff
20 responds that *Brown* does not answer the question, because the *Brown* decision preceded the
21 enactment of RFRA. Plaintiff argues that the Supreme Court’s recent decision in *Burwell v.*
22 *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) suggests that Title VII is no longer the sole
23 remedy for religious discrimination against federal employees, because RFRA provides an
24 additional avenue of relief.

25 Congress enacted RFRA in 1993. Under *Brown*, Title VII unequivocally provided the
26 exclusive remedy for claims of religious discrimination in federal employment prior to RFRA’s
27 passage. The question then becomes whether RFRA created an additional remedy for religious
28 discrimination in federal employment. The answer begins with an examination of the

1 congressional intent expressed through RFRA.

2 The Religious Freedom Restoration Act provides that the Government cannot impose a
3 law that substantially burdens a person's free exercise of religion unless the Government
4 demonstrates that the law “(1) is in furtherance of a compelling governmental interest; and (2) is
5 the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §
6 2000bb–1(b)(1)–(2). The statute “applies to all Federal law, and the implementation of that law,
7 whether statutory or otherwise, and whether adopted before or after [the passage of RFRA].” 42
8 U.S.C. § 2000bb–3(a).

9 Legislators introduced RFRA in direct response to the Supreme Court’s decision in
10 *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* involved two Native American
11 employees who were fired and denied unemployment benefits after they admitted to ingesting
12 peyote as part of a religious ceremony. The state argued that it had a compelling interest in
13 proscribing use of certain drugs pursuant to its controlled substance laws. The employees argued
14 that the prohibition on use of sacramental peyote violated the free exercise clause of the First
15 Amendment. Prior to *Smith*, the Court traditionally had held that any law that substantially
16 burdened the free exercise of religion was constitutionally permissible only if the Government
17 could establish a compelling interest. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972);
18 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In *Smith*, however, the Court concluded that a
19 generally applicable law may survive constitutional scrutiny without demonstration of a
20 compelling interest, even if the law substantially burdened the free exercise of religion. 494 U.S.
21 at 884–85.

22 Congress promptly responded by overturning *Smith* through the passage of RFRA. This
23 purpose is recognized in RFRA itself: “The Congress finds that in *Employment Division v. Smith*,
24 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government
25 justify burdens on religious exercise imposed by laws neutral toward religion; and the compelling
26 interest test as set forth in prior Federal court rulings is a workable test for striking sensible
27 balances between religious liberty and competing prior governmental interests.” 42 U.S.C. §
28 2000bb(a)(4)–(5). *See also* 42 U.S.C. § 2000bb(b) (“The purposes of this chapter are (1) to

1 restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and
 2 *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free
 3 exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons
 4 whose religious exercise is substantially burdened by government.”); *see also* S. REP. No. 103–
 5 111, at 2, 8–9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893, 1897–98 (explaining the
 6 purpose of RFRA); H.R. REP. No. 103–88, at 1–5 (1993) (same).

7 Thus, the unambiguous intent of RFRA was to return to the pre-*Smith* status quo of
 8 requiring the Government to show a compelling interest for any law that substantially burdened
 9 the free exercise of religion. *Francis*, 505 F.3d at 270; *In re Young*, 141 F.3d 854, 857 (8th Cir.
 10 1998).

11 Despite the seemingly broad language of RFRA, the legislative history reveals that
 12 Congress was careful to circumscribe its reach. Accordingly, in a section captioned “Other Areas
 13 of Law are Unaffected,” the Senate Report states: “[a]lthough the purpose of this act is only to
 14 overturn the Supreme Court’s decision in *Smith*, concerns have been raised that the act could have
 15 unintended consequences and unsettle other areas of law.” S. REP. No. 103–111, at 12 (1993),
 16 *reprinted in* 1993 U.S.C.C.A.N. 1879, 1902. The Report then discusses a number of areas that are
 17 not affected by RFRA, including Title VII. It explains: “[n]othing in this act shall be construed as
 18 affecting religious accommodation under title VII of the Civil Rights Act of 1964.” *Id.* at 13,
 19 *reprinted in* 1993 U.S.C.C.A.N. at 1903. The House Report on RFRA contains nearly identical
 20 language. *See* H.R. REP. No. 103–88, at 7 (1993) (“Nothing in this bill shall be construed as
 21 affecting Title VII of the Civil Rights Act of 1964.”).

22 Plaintiff is conspicuously silent on this legislative history. When pressed during oral
 23 argument, Plaintiff responded that the Senate Report states that RFRA should not be construed to
 24 affect “religious accommodation” under Title VII, but said nothing about “religious
 25 discrimination” claims, such as the one championed by Plaintiff. This over-reads the
 26 congressional statements. To begin with, the court notes that the House Report broadly states that
 27 “[n]othing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964,”
 28 without parsing between religious accommodation and religious discrimination claims. H.R. REP.

1 No. 103–88, at 7 (1993).

2 Moreover, the Supreme Court’s recent decision in *Equal Employment Opportunity*
 3 *Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), illustrates the close link
 4 between religious discrimination and religious accommodation under Title VII. Title VII prohibits
 5 employment discrimination on the basis of a protected trait. It is “an unlawful employment
 6 practice for an employer . . . to discriminate against any individual with respect to his
 7 compensation, terms, conditions, or privileges of employment, because of such individual’s race,
 8 color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a)(1). This is often referred to as
 9 Title VII’s “disparate treatment” provision. Title VII defines “religion” to “includ[e] all aspects of
 10 religious observance and practice, as well as belief, unless an employer demonstrates that he is
 11 unable to reasonably accommodate [the] religious observance or practice without undue hardship
 12 on the conduct of the employer's business.” 42 U.S.C. § 2000e(j). Under this definition of
 13 “religion,” an individual’s “religious practice,” just like his religious belief, is a protected trait
 14 “that cannot be accorded disparate treatment and must be accommodated” unless the employer
 15 demonstrates undue hardship. *Abercrombie*, 135 S. Ct. at 2034. In the absence of such a
 16 demonstration, a plaintiff may prove religious discrimination by “show[ing] that his need for an
 17 accommodation was a motivating factor in the employer's decision.” *Id.* at 2032. In this way,
 18 unlike Title VII claims regarding other protected classifications such as race or gender, claims for
 19 religious discrimination are often bound up with the failure to provide a religious accommodation.
 20 In short, there is no logical reason to believe that Congress, through the RFRA, intended to leave
 21 Title VII as the sole remedy for religious accommodation in federal employment, but somehow
 22 treated religious discrimination differently.

23 Although the Ninth Circuit has yet to address the issue, the Third Circuit and Eighth
 24 Circuit have both concluded that RFRA was enacted for the limited purpose of overturning *Smith*,
 25 and that Title VII remains the exclusive remedy for religious discrimination in federal
 26 employment. In *Francis*, 505 F.3d 266, the plaintiff filed a RFRA lawsuit alleging that the
 27 Transportation Security Administration (“TSA”) violated his right to free exercise of his religion
 28 by firing him for not cutting his dreadlocks, which were an expression of his sincerely-held

1 religious beliefs. The Third Circuit reviewed the legislative history and found that Congress did
2 not intend RFRA to create an “end run” around Title VII’s legislative scheme. *Id.* at 271. The
3 Third Circuit concluded:

4 It is not surprising that nothing in RFRA alters the exclusive nature of Title VII
5 with regard to employees’ claims of religion-based employment discrimination.
6 Nothing in pre-*Smith* case law permitted an employee alleging employment
7 discrimination based on religion to bypass Title VII’s exclusive and comprehensive
8 scheme. Accordingly, since RFRA was only enacted to overturn *Smith* and restore
pre-*Smith* case law, the Senate Report merely clarifies that Congress did not intend
RFRA to subsume other statutory schemes It is equally clear that Title VII
provides the exclusive remedy for job-related claims of federal religious
discrimination, despite Francis’s attempt to rely upon the provisions of RFRA.

9 505 F.3d at 270, 272.

10 Similarly, in *Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011), the plaintiff postal worker
11 was a member of the Seventh Day Adventist Church. The plaintiff requested that he not be
12 scheduled to work from sundown on Fridays to sundown on Saturdays as a religious
13 accommodation. After numerous denied requests, the plaintiff stopped working on Saturdays
14 regardless of whether he was scheduled to do so. He was eventually terminated. The plaintiff
15 claimed that the postal service violated Title VII by failing to accommodate his religion, and that
16 his termination amounted to religious discrimination. In addition, the plaintiff pleaded a violation
17 of RFRA for infringement of his religious practice without a compelling interest. The Eighth
18 Circuit reviewed RFRA’s statutory language as well as its legislative history. It concluded that
19 “RFRA was not intended to broaden the remedies for federal employment discrimination beyond
20 those that already existed under Title VII. As a result, Harrell’s claims under RFRA are barred
21 because Title VII provides the exclusive remedy for his claims of religious discrimination.” 638
22 F.3d at 982–84.

23 District courts uniformly have held that where a federal employee asserts a RFRA claim
24 that addresses the same basic injury as a parallel claim asserted under Title VII, the RFRA claim is
25 barred because Title VII provides the exclusive remedy. *See, e.g., Tagore v. United States*, No.
26 CIV. A. H–09–0027, 2009 WL 2605310, at *7–9 (S.D. Tex. Aug. 21, 2009), *aff’d in part, rev’d in*
27 *part by* 735 F.3d 324 (5th Cir. 2013) (“Because plaintiff relies on the same facts to establish both
28 that the defendants violated RFRA by substantially burdening the exercise of her sincerely held

1 religious belief, and that the defendants discriminated against her on the basis of her religious
 2 belief in violation of Title VII, the court concludes that the plaintiff’s RFRA claim is ‘not
 3 sufficiently distinct’ from her Title VII claim to avoid preemption.”); *Francis v. Ridge*, No. Civ.
 4 2003/0039, 2005 WL 3747434, *3 (D. V.I. Dec. 27, 2005) (holding that “Title VII preempts
 5 Plaintiff’s RFRA claim”); *Dorsey v. Roche*, No. C 00–21070 JW, Docket No. 53 at 13 (N.D. Cal.
 6 Oct. 1, 2002) (same)²; *Molotsky v. Henderson*, No. Civ. A. 98–5519, 1999 WL 165683, *1 (E.D.
 7 Pa. Mar. 9, 1999) (“RFRA’s text and legislative history do not suggest Congressional intent to
 8 affect the exclusivity of Title VII remedies to allow federal employees to bring an employment
 9 discrimination claim under that Act.”). Plaintiff has not cited a single case permitting a RFRA
 10 claim for religious discrimination in federal employment, and the court is not aware of any.

11 Plaintiff’s chief argument is that the Supreme Court recently characterized RFRA’s
 12 purpose as far broader than re-establishing the pre-*Smith* interpretation of the First Amendment.
 13 *Burwell*, 134 S. Ct. 2751. In *Burwell*, the Supreme Court held that federal regulations
 14 implementing the Affordable Care Act violated RFRA and were therefore unenforceable. The
 15 regulations required closely-held corporations to provide health insurance coverage for methods of
 16 contraception that contravened the religious beliefs of the companies’ owners. *Burwell* noted that
 17 in amending RFRA through the Religious Land Use and Institutionalized Persons Act of 2000
 18 (“RLUIPA”), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*,³ Congress deleted reference to the First

19
 20 ² At oral argument, Plaintiff expended considerable energy discussing an earlier decision in
 21 *Dorsey* that granted Defendant United States Air Force’s motion to dismiss. Plaintiff asserts that
 22 the *Dorsey* Rule 12 decision demonstrates that the federal government did not argue that the
 23 RFRA claim should be dismissed because Title VII provided the sole remedy for Dorsey’s
 24 religious discrimination claims. Plaintiff further argues that the United States Attorney’s Office
 25 (“USAO”) represented the Defendant in *Dorsey* as well as Defendant in this case, and that this
 26 court should attach legal significance to the fact that the USAO changed its legal position for
 27 purposes of the defense in the instant case. This is a stretch on many levels. First, the court does
 28 not know what the particular Assistant United States Attorney argued in the *Dorsey* Rule 12
 motion, and refuses to speculate. Second, it is crystal clear that at summary judgment, the defense
 in *Dorsey* argued, as it does here, that Title VII prevented plaintiff’s RFRA claim from
 proceeding. *Dorsey*, No. C 00–21070 JW, Docket No. 53 at ECF 13 (N.D. Cal. Oct. 1, 2002).
 Finally, the court is not aware of any legal doctrine that prohibits the USAO from taking a
 different legal position in this case than it did in *Dorsey* (which it did not).

³ As explained in *Burwell*, 134 S. Ct. at 2761–62, as enacted in 1993, RFRA applied to both the
 Federal Government and the States, but the constitutional authority invoked for regulating federal
 and state agencies differed. In its application to federal agencies, RFRA is based on the

1 Amendment, and went further, providing that the exercise of religion “shall be construed in favor
2 of a broad protection of religious exercise, to the maximum extent permitted by the terms of this
3 chapter and the Constitution.” § 2000cc–3(g). *Burwell* found that it was “not possible to read
4 these provisions as restricting the concept of the ‘exercise of religion’ to those practices
5 specifically addressed in our pre-*Smith* decisions.” 134 S. Ct. at 2772.

6 There is no question that the majority opinion in *Burwell* interprets RFRA as “providing
7 very broad protection for religious liberty.” *Id.* at 2767. However, it is also clear that *Burwell* did
8 not address the relationship between RFRA and Title VII in federal employment discrimination.
9 The Court expressly noted that its holding was “very specific,” and framed its decision as finding
10 that enforcement of the Affordable Care Act’s contraceptive mandate against the objecting
11 closely-held for-profit corporations was unlawful under RFRA, where the system available to
12 religious nonprofits to object to the contraceptive mandate constituted an alternative that achieved
13 all of the Government’s aims while providing greater respect for religious liberty. *Id.* at 2759–60.

14 Plaintiff contends that *Burwell* found that RFRA applies in the “employment context.”
15 This is word play. *Burwell* did not address religious discrimination claims by employees. It
16 involves “employment” only to the extent that it relates to an employer’s obligations to provide
17 certain kinds of health insurance benefits. *Burwell* in no way grapples with *Brown*’s prior holding
18 that Title VII provides the exclusive remedy for federal discrimination in employment. Plaintiff
19 also cites to passages in *Burwell* that allegedly support that RFRA applies to “employees.” *Opp.*

21 enumerated power that supports the particular agency’s work, but in attempting to regulate the
22 States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth
23 Amendment to enforce the First Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 516–17
24 (1997). In *City of Boerne*, however, the Supreme Court held that Congress had overstepped its
25 Section 5 authority because “[t]he stringent test RFRA demands” “far exceed[ed] any pattern or
26 practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.” *Id.* at
27 532–34.

25 Following *City of Boerne*, Congress passed the RLUIPA. That statute, enacted under Congress’s
26 Commerce and Spending Clause powers, imposed the same general test as RFRA but on a more
27 limited category of governmental actions. *Cutter v. Wilkinson*, 544 U.S. 709, 715–716 (2005).
28 RLUIPA amended RFRA’s definition of the “exercise of religion.” See § 2000bb–2(4) (importing
RLUIPA definition). Before RLUIPA, RFRA’s definition made reference to the First Amendment.
See § 2000bb–2(4) (defining “exercise of religion” as “the exercise of religion under the First
Amendment”).

1 at 3–4. These passages, however, address whether RFRA applies to corporations, such as the
2 three plaintiff companies. 134 S. Ct. at 2767–68. Similarly, Plaintiff points to a passage that
3 addresses a concern by the dissent that businesses have used religious belief as a cloak for
4 discrimination on the basis of race or sexual orientation. Opp. at 4, citing 134 S. Ct. at 2783
5 (addressing dissenting opinion at 134 S. Ct. at 2804–05). However, upon close reading, this
6 exchange cannot fairly be interpreted to mean that *Burwell* effectively has overturned *Brown*. In
7 sum, although the *Burwell* majority opinion clearly stands for the proposition that RFRA provides
8 broad protection for religious freedom, any dictum that can be extracted from *Burwell* about
9 RFRA’s relationship to Title VII amounts to tea leaves at best.

10 Finally, Plaintiff relies on a document entitled “Guidelines on Religious Exercise and
11 Religion in the Federal Workplace,” issued by The White House, Office of the Press Secretary,
12 dated August 14, 1997 (“Guidelines”).⁴ The Guidelines discuss Title VII, the Free Exercise
13 Clause of the First Amendment, and RFRA as distinct obligations applicable to federal
14 employment. Opp. at 4–5. As an initial matter, neither party cites any cases regarding the weight
15 that should be accorded to the Guidelines, nor has the court found any. The Guidelines do not
16 clearly identify their source of authority. As far as the court can determine, the Guidelines were
17 drawn up by a committee involving various coalitions, and were issued by the Clinton
18 Administration Office of the Press Secretary. They are not an Executive Order. They also are not
19 regulations or sub-regulatory guidance by an agency, such as the Equal Employment Opportunity
20 Commission, which is tasked with the authority “to issue, amend, or rescind suitable procedural
21 regulations to carry out the provisions” of Title VII. 42 U.S.C. § 2000e–12(a). In short, the
22 Guidelines do not constitute an agency’s interpretation of a statute typically granted some degree
23 of deference.⁵

24 _____
25 ⁴ Office of the Press Secretary, White House, Guidelines on Religious Exercise and Religious
26 [Expression in the Federal Workplace \(Aug. 14, 1997\),
https://clinton2.nara.gov/WH/New/html/19970819-3275.html](https://clinton2.nara.gov/WH/New/html/19970819-3275.html).

27 ⁵The courts have established a framework for considering the proper level of deference to be given
28 to an administrative agency interpretation of a statute or a regulation that the agency is charged
with enforcing and implementing. The starting point to determine the appropriate level of
deference, if any, is the language of the delegation of authority from Congress. *Gonzales v.*

1 On their face, the Guidelines are intended for internal use. Section 3 of the Guidelines
2 state: “These Guidelines shall govern the internal management of the civilian executive branch.
3 They are not intended to create any new right, benefit, or trust responsibility, substantive or
4 procedural, enforceable at law or equity by a party against the United States, its agencies, its
5 officers, or any person.” Guidelines at § F(3). By their own terms, the Guidelines do not confer
6 litigable rights, nor do they address the availability of judicial remedies for federal employees for
7 alleged violations of RFRA. In light of the foregoing, the Guidelines are not entitled to deference
8 in determining the question of whether RFRA provides a separate avenue for challenging religious
9 discrimination in federal employment.

10 In conclusion, upon review of RFRA, its legislative history, and cases interpreting RFRA,
11 the court finds that Title VII remains the exclusive remedy for religious discrimination in federal
12 employment. Plaintiff’s RFRA claim is therefore dismissed.

13 **C. Whether Plaintiff May Seek Monetary Damages for His First Amendment**
14 **Claim**

15 Plaintiff brings all of his claims against Jewell in her official capacity as head of the
16 Department of the Interior. Defendant contends that Plaintiff may not seek to recover monetary
17 damages for his First Amendment claim against Jewell because the United States has not waived
18 its sovereign immunity.⁶ MTD at 6–7.

19 “In a suit against the United States, there cannot be a right to money damages without a
20 waiver of sovereign immunity” *United States v. Testan*, 424 U.S. 392, 400 (1976). A suit for
21 damages against federal officers or employees in their official capacity is essentially a suit against
22 the United States and is therefore barred by sovereign immunity absent statutory consent. *Gilbert*
23 *v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Moreover, “[a] waiver of sovereign immunity
24 ‘cannot be implied but must be unequivocally expressed.’” *United States v. Mitchell*, 445 U.S.

25 *Oregon*, 546 U.S. 243, 258 (2006). The Guidelines do not appear to have been created pursuant to
26 any delegation of Congressional authority.

27 ⁶ Plaintiff may seek monetary damages against Jewell under Title VII. *West v. Gibson*, 527 U.S.
28 212, 217 (1999).

1 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The party who sues the
2 United States bears the burden of pointing to such an unequivocal waiver of immunity. *Holloman*
3 *v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citing *Cole v. United States*, 657 F.2d 107, 109 (7th
4 Cir. 1981)).

5 The United States has not waived its sovereign immunity for actions seeking damages for
6 constitutional violations. See *Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir. 1985)
7 (holding plaintiff’s damages claim for violation of his Fourth Amendment rights against the
8 United States was barred by sovereign immunity); *Holloman*, 708 F.2d at 1401–02 (rejecting
9 claimant’s argument that sovereign immunity did not apply to his due process claim for damages
10 when the federal defendants were being sued solely in their official capacity).

11 Plaintiff fails to address Defendant’s argument and responds that he does not seek
12 monetary damages from Jewell in her *individual* capacity.⁷ Opp. at 7 (emphasis added). In his
13 briefing, he states that he is seeking declaratory and injunctive relief, but does not clarify whether
14 he seeks monetary damages for his First Amendment claim. *Id.* However, in his FAC, Plaintiff
15 alleges that as a result of Defendant’s violation of the First Amendment, he “suffered harm in the
16 form of past and future lost wages and benefits and other pecuniary loss, including, but not limited
17 to, costs associated with finding other employment.” FAC at ¶ 78.

18 Plaintiff sues Defendant in her official capacity. FAC at ¶ 2. Plaintiff’s constitutional
19 claim for damages is barred by the doctrine of sovereign immunity.

20 IV. CONCLUSION

21 For the reasons set forth above, Plaintiff’s First Amendment claim is dismissed with
22 prejudice to the extent that it is based on discrimination in his federal employment due to his
23 religious beliefs or activities. **By July 25, 2016**, Plaintiff may amend his complaint if he is able to
24 assert a constitutional claim that is distinct from his Title VII claims. Such a claim may not seek
25 monetary damages.

26 _____
27 ⁷ Plaintiff previously sought damages against Jewell and other dismissed defendants in their
28 individual capacities under a *Bivens* claim, but withdrew this claim for relief in his First Amended
Complaint. See FAC.

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Plaintiff's Religious Freedom and Restoration Act claim is dismissed with prejudice.

The parties shall appear for a further Case Management Conference on August 31, 2016 at 1:30 p.m., and shall file an updated joint case management statement by August 24, 2016.

IT IS SO ORDERED.

Dated: July 11, 2016



Donna M. Ryu
United States Magistrate Judge