No. 16-814

In the Supreme Court of the United States

MONIFA J. STERLING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

BRIEF OF *AMICI CURIAE* 36 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the existence of a forced choice between what religion and government command is necessary to establish a "substantial burden" under the Religious Freedom Restoration Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici are thirty-six Members of Congress who share two distinct interests in this case.

First, Congress has a strong interest in ensuring that every statute is interpreted and enforced in a manner consistent with its text and purpose. *Amici* Members of Congress file this brief because the U.S. Court of Appeals for the Armed Forces announced and applied an interpretation of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, that accords with neither the text nor the purpose of the statute.

Second, *amici* Members of Congress have an interest in the nationwide, uniform application of the law. The court of appeals' decision represents the thirteenth federal court of appeals to address the question whether a "substantial burden" under RFRA, and also the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, can exist solely when the government forces a religious adherent to choose between the dictates of religion and the commands of

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1. Pursuant to this Court's Rule 37, *amici curiae* Members of Congress state that no counsel for any party authored this brief in whole or in part, and no person or entity other than counsel for *amici curiae* Members of Congress made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified of the filing of this brief more than 10 days prior to the filing of this brief. The parties have provided written consent to the filing of this brief.

the government. Eight courts of appeals (the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh) have held that RFRA's "substantial burden" provision is not so severely limited. And now five courts of appeals (the Third, Fourth, Ninth, District of Columbia, and Armed Forces) have held that RFRA's protections of religious liberties are triggered only when the religious adherent is put to just such a forced choice. This circuit split is deep. And with every federal court of appeals except the Federal Circuit included in the circuit split, it is likely to remain indefinitely, unless the Court resolves it. *Amici* Members of Congress submit that for an American right as fundamental as the exercise of religious liberties, indefinite uncertainty and discord among the courts of appeals are intolerable. The Court should grant the petition for review.

Amici Members of Congress are:

United States Senators

Roy Blunt (R-MO)
James Lankford (R-OK)
Ted Cruz (R-TX)
Roger Wicker (R-MS)
James M. Inhofe (R-OK)

Members of the House of Representatives

Robert Aderholt (R-AL)
Randy Hultgren (R-IL)

Brian Babin (R-TX)

Dave Brat (R-VA)

Michael K. Conaway (R-TX)

Kevin Cramer (R-ND)

Jeff Duncan (R-SC)

Bill Flores (R-TX)

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Trent Franks (R-AZ)

Bob Gibbs (R-OH)

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Glenn Grothman (R-WI)

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Barry Loudermilk (R-GA)

Steven Palazzo (R-MS)

Steve Pearce (R-NM)

Robert Pittenger (R-TX)

John Ratcliffe (R-TX)

Peter J. Roskam (R-IL)

Keith Rothfus (R-PA)

David Rouzer (R-NC)

Steve Russell (R-OK)

Ann Wagner (R-MO)

Tim Walberg (R-MI)

SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces (CAAF) has joined a minority of the courts of appeals in interpreting and applying RFRA contrary to the plain text and articulated purposes of the statute. Despite statutory text making clear that RFRA is implicated by any sincerely motivated religious practice that is substantially burdened by government action, the CAAF narrowly construed RFRA to protect only conduct *required* by a person's faith. *E.g.* Pet.App.21 ("having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of religion"). Consequently, contrary to congressional intent that RFRA "provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014), the CAAF has interpreted RFRA to protect only a narrow category of religious conduct against only a narrow category of infringements. In so doing, the CAAF's decision expands governmental authority to prohibit religiously motivated speech.

Moreover, the CAAF's decision will have the effect of substantially diminishing RFRA's protections for members of our Armed Forces, again contrary to the purpose of the statute. Due to the nature of military service, service members live in a structure where superior officers and officials appropriately exercise substantial authority over

their day-to-day actions. But such authority does not diminish or nullify RFRA's threshold protection of religious practices. However, under the CAAF's interpretation of RFRA—where a direct prohibition on a particular exercise of religion will not constitute a substantial burden on that exercise—religious-exercise and religious-speech rights could be in significant jeopardy because RFRA will no longer offer the protections of religious liberty that Congress enacted for all Americans, including those serving in the military.

Finally, the CAAF engrafted notice and exhaustion prerequisites to RFRA claims that Congress did not include in the statute. These extra-statutory hurdles for religious adherents are inconsistent with the text and purpose of RFRA, and it is for Congress, not a court of appeals, to establish the necessary requirements for invoking RFRA.

The dissenting judge below succinctly stated the reasons this case warrants the Court's review: "In sum, the majority opinion imposes a legal regime that conflicts with the provisions of RFRA, contradicts the intent of Congress, and impermissibly chills the religious rights of our nation's service members." Pet.App.33 (Ohlson, J., dissenting). The Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE CAAF'S DECISION IS IRRECONCILABLE WITH THE TEXT OF RFRA AND SUBSTANTIALLY UNDERMINES THE STATUTE'S PURPOSE OF PROVIDING VERY BROAD PROTECTION FOR RELIGIOUS LIBERTY.

A. Consistent with Its Purpose, RFRA's Text Guarantees Broad Protection for Religious Liberty.

As this Court has recognized, RFRA and its sister statute RLUIPA were enacted "in order to provide very broad protection for religious liberty." *Hobby Lobby*, 134 S.Ct. 2751, 2760. RFRA was passed in the wake of the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment. *Id.* at 878-82. *Smith* retreated from the method of analysis adopted in prior free-exercise cases such as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). In those cases, the Court had used a balancing test that asked whether a challenged government action that substantially burdened the exercise of religion was necessary to advance a compelling state interest. *Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015).

Congress enacted RFRA in direct response to *Smith*, and with the unmistakable purpose of providing expansive and significant protections for the exercise of religious liberties. *See, e.g.*, *Holt*, 135 S.Ct. at 859 ("Following our decision in [*Employment Division v.*] *Smith*, Congress enacted RFRA in order to provide greater protection for religious liberty than is available under the First Amendment.") (citation omitted); *Hobby Lobby*, 134 S.Ct. at 2760 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). The congressional design to confirm the Nation's commitment to substantial protection of religious liberties is evident throughout RFRA's text. For example, Congress expressly found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Congress also determined that "governments should not substantially burden religious exercise without compelling justification," *id.* § 2000bb(a)(3), and made clear that "sensible balances" must be maintained "between religious liberty and competing prior governmental interests," *id.* § 2000bb(a)(5). To accomplish this goal, RFRA's stated purpose was to "guarantee" the "application [of the compelling-interest test] in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1).

RFRA's operative provisions ensure the application of the compelling-interest test in all cases

where free exercise of religion is substantially burdened. RFRA states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA goes on to provide that, if the government substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government can demonstrate "that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b)(1), (2).

Additionally, the term "exercise of religion" is expansively defined to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A) (RLUIPA's definition of religious exercise); *id.* § 2000bb-2(4) (RFRA provision stating that "'exercise of religion' means religious exercise, as defined [by RLUIPA]"). *See also Hobby Lobby*, 134 S.Ct. at 2762 n.5 (confirming that "the 'exercise of religion' under RFRA must be given the same broad meaning that applies under RLUIPA"). Thus, a "religious exercise" under RFRA "involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons." *Hobby Lobby*, 134 S.Ct. at 2770 (punctuation and citation omitted).

Congress also made clear that RFRA's protections broadly apply to all federal entities, including the branches of the U.S. Armed Forces and the Department of Defense. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include any "department" or "agency" of the United States). Underscoring RFRA's application to the Armed Forces, the Act's legislative history confirms RFRA applies to the free exercise claims of military personnel. *E.g.*, S. REP. NO. 103-11, at 12 (1993) (in a subsection entitled "Application of the Act to the Military," explaining that "[u]nder the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test"). Finally, Congress made RFRA applicable "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *Id.* § 2000bb-3(a).

In sum, and as aptly described by this Court, RFRA offers protections "far beyond what this Court has held is constitutionally required." *Hobby Lobby*, 134 S.Ct. at 2767. Indeed, the breadth of RFRA's religious-liberty protection, and the scope of its application to federal law, led one commentator to observe that RFRA is "a sweeping 'super-statute'" providing "a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulson, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253, 254 (1995).

B. The CAAF's Decision Misconstrues the Text of RFRA, Thwarting Its Purpose of Broadly Protecting Religious Liberty.

This case involves the application of RFRA's religious-liberty protection to a free-exercise claim made by a member of the Armed Forces. Lance Corporal Monifa Sterling is a U.S. Marine who professes the Christian faith and identifies herself as a religious person. CAAF.JA.36, 43, 45. Sterling posted in her work station, which consisted of a desk and computer, three small pieces of paper with a Scripture verse from Isaiah 54:17. The verse stated "No weapon formed against me shall prosper." *Id.* at 42.

Sterling's superior officer noticed the pieces of paper and ordered her to remove them. *Id.* at 45. Sterling did not remove them. Later the same day, Sterling's superior officer removed the pieces of paper and threw them in the trash. The next day, Sterling reposted the verses, and her superior officer again ordered Sterling to remove them. *Id.* at 21. Sterling refused, and her superior officer again removed the quotations. *Id.* at 21-22.

A special court-martial was convened to try Sterling on several charges. Pet.App.8. Sterling was convicted, CAAF.JA.116-17, and the United States Navy–Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence, Pet.App.2. The CAAF granted Sterling's

petition for review, but ultimately upheld her conviction and sentence. Pet.App.29.

Three aspects of the CAAF's decision are particularly significant because they reflect profound misunderstandings of RFRA that result in substantially and improperly diminishing the intended scope and effect of its text. First, the CAAF held that in evaluating whether a substantial burden has been imposed on a religious practice, courts must focus on "the subjective importance of the conduct to the person's religion." Pet.App.21. But RFRA's text requires the opposite, and secular courts are both unauthorized and incapable of conducting such an inquiry.

Second, the CAAF's decision adopts the interpretation applied by a minority of federal courts of appeals that have too-narrowly construed RFRA. Under this theory of RFRA, the CAAF held that the statute (1) only protects conduct *required* by a person's faith and (2) applies to government decisions forcing a person to choose between religious dictates and government commands but does not apply to government decisions prohibiting a religious exercise. This construction of RFRA runs afoul of its text and ignores its purpose, dramatically limiting RFRA's protection of religious liberty.

Third, the CAAF held that Sterling failed to establish a prima facie case that a substantial burden had been imposed on her religious exercise

because she did not provide notice of the nature of the Biblical quotations in her workspace, and she failed to request an accommodation from the military. But RFRA includes neither a "notice" nor an "exhaustion" requirement. These additional hurdles imposed by the CAAF further diminish the statute's broad protection of religious liberty.

The CAAF's decision is particularly troubling given its jurisdiction over citizens serving in the Armed Forces. The consequence of the CAAF's adoption of both novel and minority interpretations of RFRA is to substantially limit its scope and protections to the unique disadvantage of Americans serving in the military. Given its central role in defending our Nation, it is to be expected that the military will have sound, compelling justifications for regulating certain religious practices. Thus, in Sterling's case, as for any other service member, the military's justification for burdening her religious practice may well be sufficient under RFRA's compelling-interest test. But the military should not be largely relieved of any requirement to establish such justifications by narrowly circumscribing the religious liberty rights of service members at the threshold. Doing so improperly deprives our military of a fundamental statutory protection designed by Congress to protect the religious freedoms of *all* Americans.

1. The CAAF's "subjective importance" inquiry has no place in a RFRA analysis.

The CAAF held that the "substantial burden" analysis under RFRA requires courts to focus on "the subjective importance of the conduct to the person's religion." Pet.App.21. In so doing, the CAAF concluded that adherents must show that a desired practice is "important to her exercise of religion" and involves a "tenet" or "precept" of her faith. Pet.App.24. This conclusion is untethered from the text of RFRA and requires courts to conduct inquiries into the relative significance of particular religious practices that secular judges are neither authorized nor equipped to undertake.

Nothing in RFRA's text suggests that only religious practices of high "importance" or that involve a "tenet" or "precept" of faith qualify for a substantial burden analysis. The opposite is true. Congress provided that the term "exercise of religion" is expansively defined to "include[] *any* exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphases added). The CAAF's contrary conclusion works directly against congressional intent to provide broad protection for religious practices. Further, secular courts are neither authorized nor capable of conducting the inquiries contemplated by the CAAF. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716

(1981) ("Courts are not arbiters of scriptural interpretation."). As the dissenting judge correctly noted, the inquiry suggested by the CAAF majority into the relative significance of particular religious practices "directly contradicts the routine recognition that '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" Pet.App.43-44 (Ohlson, J., dissenting) (quoting *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989)).

2. RFRA's protection is not limited to conduct required by a person's faith or to forced dilemmas.

The CAAF also concluded that a substantial burden on religious exercise exists only when the government "force[s] the claimant to act contrary to her beliefs," even if the government practice nonetheless "offends religious sensibilities." Pet.App.23. Based on this incorrect understanding of "substantial burden" under RFRA, the CAAF held that the removal of Sterling's Biblical quotations did not substantially burden her religious exercise because it did not "pressure[] her to either change or abandon her beliefs or force[] her to act contrary to her religious beliefs." Pet.App.24.; *see also* Pet.App.21 ("having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of

religion"). The CAAF's decision adheres to the interpretation adopted by a minority of federal courts of appeals that have narrowly construed RFRA to protect only conduct *required* by a person's faith. *See infra* Part II.

Again, the CAAF's understanding of the "substantial burden" analysis departs from applicable statutory language, which defines the term "exercise of religion" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). For interrelated reasons, this text precludes the CAAF's interpretation that RFRA protects only against forced choices to act in a manner violating the tenets of one's faith.

To begin with, because § 2000cc-5(7)(A) makes clear that a "religious exercise" is expansively defined to include practices that are not "compelled by" or "central" to a religion, it plainly encompasses practices that are *not required* by the adherent's faith. Further, by focusing on each individual adherent, the statute protects the subjective (as long as they are sincerely held) beliefs and practices of "a person," rather than merely protecting those practices absolutely compelled by a religious doctrine. For the phrase "a person's exercise" to have its natural meaning, there must be some room for the person to conduct that exercise according to his or her own beliefs and in a manner that may vary among different "persons" protected by the statute.

In this regard, the Court has recognized that RFRA's text requires "a more focused inquiry" into the application of the law or rule "'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S.Ct. at 2779 (quotation omitted). In *Holt*, the Court further explained that religious practices need not be undertaken by all adherents to a religious faith in order to be protected: A Muslim claimant's "belief [that he must grow a beard] is by no means idiosyncratic. But even if it were, the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt*, 135 S.Ct. at 862-63 (quoting *Thomas*, 450 U.S. at 715-16) (internal citation omitted).[2]

Likewise, a majority of courts of appeals have recognized that the "substantial burden" inquiry focuses on the individual "person," and that the religious exercises protected by statute go beyond those exercises compelled by religious doctrine. *See*

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2. The Court also noted that RLUIPA's "substantial burden" provision "mirrors RFRA." 135 S.Ct. at 860. "RLUIPA thus allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'" *Id.* (quoting *Gonzales v. O Centro Espírita Beneficente Uniõ do Vegetal*, 546 U.S. 418, 436 (2006)). Because the statutory provisions, and the standards by which they are interpreted, are identical, the circuit split regarding the "substantial burden" issue includes both the RFRA and RLUIPA cases. Thus, the courts of appeals' analysis of the question "What constitutes a substantial burden on the exercise of religion?" involves cases under both statutes.

infra Part II; *see also* Pet.17-22. For example, the Tenth Circuit has held that an adherent need not "prove that the exercise at issue is somehow 'central' or 'fundamental' to or 'compelled' by his faith" to satisfy the definition of religious exercise in 42 U.S.C. § 2000cc-5(7)(A). *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014). The court further concluded that "[e]ven if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, even if some may find it illogical, that doesn't take it outside the law's protection." *Yellowbear*, 741 F.3d at 55; *see also Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013) ("A burden does not need to be disabling to be substantial. We do not agree with those courts that have suggested that nothing short of coercion to change or abandon one's religious beliefs can meet the substantial burden test."); *Haight v. Thompson*, 763 F.3d 554, 560 (6th Cir. 2014) (explaining that "[s]o long as the practice is traceable to a sincerely held religious belief, it does not matter whether [it] is central to [the adherent's] faith") (citation omitted).

Similarly, in *Ford v. McGinnis*, the Second Circuit rejected the district court's implication that "in order for a burden to be substantial the burdened practice must be mandated by an adherent's religion." 352 F.3d 582, 593 (2d Cir. 2003). The Second Circuit continued:

> Neither the Supreme Court nor we have ever held that a burdened practice must be mandated in order to sustain [a claimant's] free exercise claim. Nor do we believe that substantial burden can or should be so narrowly defined.
>
> * * *
>
> We therefore decline to adopt a definition of substantial burden that would require claimants to show that they either have been prevented from doing something their religion says they must, or compelled to do something their religion forbids.

Id.[3]

The individually tailored inquiry required by RFRA and recognized by this Court and the majority of the courts of appeals confirms that a substantial burden imposed on *either* religiously motivated conduct *or* religiously mandated conduct is expressly protected under RFRA. The contrary minority view, reflected in the CAAF's decision below, substantially undermines the protections Congress afforded religious liberty under RFRA.

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3. The facts that gave rise to *Ford* occurred prior to the enactment of RLUIPA, and the Second Circuit discussed the substantial burden inquiry in First Amendment free-exercise terms. *Id.* at 592 & n.10. But it notes that under RLUIPA, the "substantial burden" inquiry imposed by Congress "may still apply," *id.*

The CAAF also erred in adopting the minority view that RFRA only applies to governmental decisions forcing religious adherents to choose between the dictates of government and expressions of religion. Pet.App.23; *see also Kaemmerling v. Lappin*, 553 F.3d 669, 679-80 (D.C. Cir. 2008) (rejecting a claimed substantial burden because the government did not "put [the adherent] to a choice…between criminal sanction and personally violating his own religious beliefs"). While these "forced dilemmas" surely run afoul of RFRA, they are not the exclusive manner of imposing substantial burdens on the exercise of religion. Thus, in *Haight v. Thompson*, the Sixth Circuit held that a governmental action that "effectively bar[s]" a religious practice can pose a substantial burden on religious exercise because the "greater restriction (barring access to [a religious] practice) includes the lessor one (substantially burdening the practice)." 763 F.3d at 560; *see also Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749-50 (8th Cir. 2014) (recognizing that a prohibition on the use of tobacco for Native American religious ceremonies "amply shows" a substantial burden on religious exercise). The CAAF is on the wrong side of the circuit split regarding the scope of RFRA's protections.

3. RFRA does not include notice or exhaustion requirements.

Finally, the CAAF's decision, and its construction of RFRA, also turned on what it

described as "two additional salient facts." Pet.App.25. Specifically, the CAAF panel majority supported its conclusion that the removal of the Biblical quotations did not impose a substantial burden on Sterling's exercise of religion because (1) Sterling failed to explain to her superiors the import of her religious practice, and (2) she failed to request an accommodation before engaging in the religious practice. Pet.App.25-27. Departing again from RFRA's text, the CAAF thus invoked a novel notice requirement under RFRA, and suggested that a service member's failure to seek an accommodation could effectively negate a claim that his or her religious practice has been substantially burdened. Left undisturbed, these additional hurdles to a service member's ability to protect their religious liberties under RFRA work directly contrary to the statute's plain language and purpose.

As the dissenting judge correctly observed, "nowhere in RFRA's text, its legislative history, or the relevant case law does there appear any indication that the government must be conscious (or even sensitive to the possibility) that its actions may impermissibly curtail religious exercise in order for a successful RFRA defense to lie." Pet.App.44 (Ohlson, J., dissenting). Indeed, RFRA was designed to apply broadly to laws, rules, and regulations that are *not* intended to burden religious practices. *See* 42 U.S.C. § 2000bb(a)(2) ("[L]aws [that are] 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.");

Holt, 135 S.Ct. at 859-60 ("Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.").[4]

Likewise, nowhere in RFRA did Congress provide an exhaustion requirement that must be met prior to raising a RFRA claim. Again, the dissenting judge correctly understood RFRA's provisions,

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4. The CAAF suggests that the notice requirement it engrafts onto RFRA is uniquely necessary for the Armed Forces because "the military is, by necessity, a specialized society," and "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Pet.App.26 (citations omitted).

This reasoning is flawed for two reasons. First, although there can be no doubt that the CAAF's observations on the special nature of the military community are correct, they do not explain why religious practices engaged in by members of the military are any less important to our soldiers than to any other citizen at the threshold, as relevant to the "substantial burden" inquiry. Indeed, there is every reason to believe that, for those risking their lives to protect our country, religious practices become even more precious to the adherent. Second, the CAAF misunderstands the portion of the RFRA inquiry in which the military's unique nature and needs are to be evaluated. The substantial burden inquiry focuses solely on the adherent's sincerely motivated religious exercise and the nature of the burden imposed on the adherent by the government. The government's interests, including the military's important need for obedience, commitment, and esprit de corps, are considered in evaluating the government's proffered compelling-interest justifications for the burden imposed on the religious exercise in question.

explaining that "servicemembers…may invoke the protections afforded by RFRA even if they did not obtain the permission of the Government before engaging in [religious] conduct." Pet.App.30 (Ohlson, J., dissenting); *see also id.* at 33 (Ohlson, J., dissenting) (stating that RFRA does not "empower judges to require a believer to ask of the government, 'Mother, may I?' before engaging in sincere religious conduct").[5] The CAAF's importation of non-existent notice and exhaustion requirements into RFRA serve only to frustrate, rather than further, the statute's mandate.

C. The CAAF's Decision Means that, Contrary to Congressional Intent, Members of the Military Will Be Disadvantaged Vis-à-Vis Their Fellow Citizens Under RFRA.

The CAAF's jurisdiction, although narrow, specifically includes review of court-martial cases from the branches of the Armed Forces. *See* 10 U.S.C. § 867(c); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Thus, for members of the military who face punishment for engaging in sincerely-motivated religious practices and who invoke RFRA

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5. The CAAF panel majority concedes that "RFRA itself does not contain an exhaustion requirement," but goes on to effectively impose such a requirement anyway by stating that an option to request an accommodation "may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes." Pet.App.27 (citation omitted).

in their defense, the CAAF will typically provide the final word on their claims.[6] Thus, the CAAF's understanding and interpretation of the scope and substance of RFRA's protections is vitally important to those serving in our military.

The CAAF has adopted a construction of RFRA that departs from the statutory text, embracing novel and minority interpretations that substantially narrow RFRA's protection of religious liberty for those serving in the Armed Forces. *See supra* Part I.A-B. Consequently, our military men and women are uniquely disadvantaged vis-à-vis their fellow citizens in regard to the application of RFRA. While citizens in a majority of jurisdictions across the country can invoke RFRA whenever a substantial burden is imposed on *either* religiously motivated conduct *or* religiously mandated conduct, members of the military will enjoy this protection only for religiously mandated conduct. *See supra* Part I.A-B; *see also infra* Part II. Further, under the CAAF's decision, members of the military are also subject to unique notice and exhaustion requirements under RFRA that do not apply to their fellow citizens.

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6. As noted in Sterling's petition, Pet.36, the CAAF's jurisdiction is largely discretionary, and members of the military therefore have no appeal as of right to the CAAF. 10 U.S.C. § 867. This Court only has jurisdiction to review cases the CAAF has decided, not cases in which it has declined discretionary review. *See* 28 U.S.C. § 1259.

RFRA's text and purpose do not permit these discrepancies. Rather, the intent of Congress, as reflected in RFRA's text, is plainly to apply the same "substantial burden" standard for all citizens.

Further, contrary to the rationale of the CAAF's decision, Congress has otherwise consistently made clear that it is determined to ensure members of the military share the religious liberties enjoyed by their fellow Americans. Specifically, beginning with the 2013 National Defense Authorization Act (2013 NDAA), Congress added section 533 providing legal protections for service members, and barring the Defense Department from forcing them to perform services that violate their moral or religious beliefs. Passed with overwhelming bipartisan support, the 2013 NDAA provides:

> The Armed Forces shall accommodate the beliefs of a member of the armed forces reflecting the conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such beliefs as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 533(a)-(b), 126 Stat. 1632, 1727 (2013). Congress further directed the

Secretary of Defense to enforce these protections. *Id.* § 533(c).

Congress also added section 532 to the 2014 National Defense Authorization Act (2014 NDAA), again with strong bipartisan support. Section 532 amends the 2013 NDAA to require the Armed Forces to accommodate "individual expressions of belief" reflecting "sincerely held" conscience, moral principles, or religious beliefs of military personnel unless doing so "could have an adverse impact on military readiness, unit cohesion, and good order and discipline." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 532(a), 127 Stat. 672, 759 (2013).[7]

* * *

Amici recognize that the demands of discipline, order, esprit de corps, and unit cohesion are uniquely important to the effectiveness of our military, and that these demands of the service will in many instances provide the "compelling interest" that justifies the imposition of rules and regulations on service members' religious practices. But the "substantial burden" analysis under RFRA asks a threshold question focused solely on the adherent's religious exercise and the nature of the burden imposed on such religious exercise, not the

7. The 2014 NDAA required the Secretary of Defense to implement regulations within 90 days following enactment. *Id.* § 532(b).

government's justification for its actions. As to this threshold "substantial burden" question, it is clear that Congress intended RFRA to protect equally the religious exercise and speech of all Americans, including those serving in the military. The CAAF's contrary decision defies RFRA's text and substantially undermines its purpose.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT SPLIT ON THE SCOPE OF RFRA IS INTRACTABLE AND THIS IS LIKELY THE ONLY OPPORTUNITY TO REVIEW THE CAAF'S UNIQUELY ERRONEOUS RFRA INTERPRETATION.

The CAAF's decision is but one example—in the intractable 8-5 circuit split—of the confusion surrounding the scope and application of RFRA to free-exercise claims. *See* Pet.13-22. Although the majority of the circuits have correctly understood the broad protection of religious liberty that Congress crafted in RFRA, *see, e.g.*, *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015) (recognizing that RFRA protects "any exercise of religion") (quotation omitted), a significant minority of circuits have not, *see, e.g.*, *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (providing that only a forced dilemma or pressuring a person to "modify his behavior and to violate his beliefs" can pose a substantial burden); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (only "substantial pressure on an adherent to modify his behavior and to violate his beliefs" can pose a substantial burden). Given that every federal court

of appeals except the Federal Circuit has addressed the issue, this circuit split is as well-developed as it is likely to ever be, *see* Pet.13-22, and it is highly unlikely that it will resolve itself. These RFRA issues are thus ripe for the Court's resolution.

Moreover, the right to freely exercise a person's religious liberties is a bedrock American freedom, enshrined in our Constitution and enhanced by statutes such as RFRA. *Amici* Members of Congress submit that for issues as important as the circumstances under which the federal government may substantially burden the free religious exercise of its citizens, indefinite uncertainty will continue to ill-serve both religious adherents (such as Petitioner Sterling) and government actors (such as Sterling's superior officers).

Finally, this case might prove to be the only opportunity the Court has to review the CAAF's unique theory that RFRA contains notice and exhaustion requirements. As the Petition makes clear, the Court has limited opportunities to review cases from the CAAF: The CAAF has a largely discretionary docket—service members have no appeal of right to that court—and this Court only has jurisdiction to review the decisions of the CAAF, not cases in which that court of appeals has declined discretionary review. Pet.36; *see also supra* fn 6. Declining review in this case might indefinitely subject service members to the CAAF's extra-

statutory notice and exhaustion hurdles to religious exercise.

* * *

The CAAF "impose[d] a legal regime that conflicts with the provisions of RFRA, contradicts the intent of Congress, and impermissibly chills the religious rights of our nation's servicemembers." Pet.App.33 (Ohlson, J., dissenting). *Amici* Members of Congress urge the Court to grant the petition for a writ of certiorari and to restore for Americans of every faith the substantial protection of religious exercise embodied in the plain text and articulated purposes of RFRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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