No. 16-814

IN THE

Supreme Court of the United States

MONIFA J. STERLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF LTC KAMAL S. KALSI, D.O., U.S.A.R., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF LTC KAMAL S. KALSI, D.O., U.S.A.R., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Army Lieutenant Colonel Kamal S. Kalsi, D.O., submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF *AMICUS CURIAE*

Lieutenant Colonel Kamal S. Kalsi is an officer in the United States Army, an emergency room physician, and the first Sikh member of the armed forces to be permitted to serve on active duty with a turban, beard, and unshorn hair in more than twenty years. He was awarded the Bronze Star, the fourth-highest combat award in the armed forces, for his service in Afghanistan in 2011, and he has been an advocate for the rights of Sikh Americans both in and out of uniform.

Lieutenant Colonel Kalsi volunteered for the armed forces as a medical student in 2001 and served in the U.S. Army Reserves for nearly eight years while wearing a turban, beard, and unshorn

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or his counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of Lieutenant Colonel Kalsi's intent to file this brief at least ten days before the due date. On January 13, 2017, Petitioner filed a blanket consent letter to the filing of *amicus curiae* briefs with the Clerk's Office. The United States has provided its written consent to the filing of this brief, and a copy has been filed with the Clerk's Office.

hair—all articles of the Sikh faith—without incident. When he volunteered for active duty in 2009, however, he was required to either violate these expressions of his faith or obtain a religious accommodation. Lieutenant Colonel Kalsi ultimately obtained an accommodation, but only after an exhaustive process which included, among other efforts, fifty Congressional signatures on a letter to the Secretary of Defense, 15,000 petitioner signatures on a similar letter, $500,000 in lobbying costs, and the assistance of a law firm and a civil rights organization.

Amicus has a particular interest in this case because although he was fortunate to avoid the need for judicial intervention to obtain an accommodation, he is uniquely aware of the challenges service members face when their exercise of religion is erroneously deemed inconsistent with the military's need to maintain good order. Furthermore, as a Sikh, Lieutenant Colonel Kalsi understands military service to fulfill his religious obligation to engage in service to mankind and believes his faith makes him a better soldier.

The Religious Freedom Restoration Act (RFRA) is the final shield for those forced to choose between serving their country and observing their faith. If the opinion below were to stand, the religious freedoms of service members, especially those of minority religious groups like Sikhs, could be greatly restricted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed RFRA, 42 U.S.C. §§ 2000bb *et seq.*, expressly to provide expansive protection for

religious liberty. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1. All a claimant must do to establish a prima facie case before a court shifts the burden of proof to the government is establish the existence of a substantial burden on her sincerely held religious beliefs. This is a low bar.

Furthermore, in passing RFRA, Congress clearly intended for the judiciary to perform an active and essential function in safeguarding religious freedom while simultaneously refraining from passing judgment on the objective validity or importance of a religious adherent's beliefs. The language and context of RFRA make clear that this balancing act is necessary to protect free exercise without placing courts in the uncomfortable and inappropriate position of determining which religious practices are sufficiently "important" or "central" to an adherent's beliefs to warrant such protection.

In its opinion below, however, the Court of Appeals for the Armed Forces (CAAF) joined a minority of federal circuit courts and interpreted RFRA to place courts in just such a position. In assessing whether the orders to remove the religiously motivated signage at Petitioner's work station "substantially burdened" her exercise of religion, it ruled that Petitioner had failed to establish that "the signs were important to her exercise of religion, or that

removing the signs would either prevent her from engaging in conduct [her] religion requires or cause her to abandon one of the precepts of her religion." Pet. App. 24 (citations and quotations omitted).

In other words, the CAAF framed the RFRA "substantial burden" analysis in terms of whether a claimant can prove that a religious practice is sufficiently important to her beliefs such that an order to refrain from that practice creates an impossible choice. Such a rule is contrary to congressional intent, violates fundamental principles regarding the proper role of the judiciary, and risks creating a host of problems for those, like Petitioner or *Amicus*, whose religious beliefs may be unfamiliar or insignificant in the eyes of others. Rather, as the petition for certiorari notes, the proper test for "substantial burden" appreciates that such a burden can exist even in the absence of an impossible choice. The majority of the Courts of Appeals recognize such situations, and instead focus on the sincerity of the adherent's beliefs.

This majority approach to assessing claimants' threshold burden has three virtues. First, it removes courts from the highly problematic business of determining what is and is not "important" for an adherent's religious beliefs. Second, it refocuses courts on an analysis which lies within their proper role: judging the claimant's credibility and the context of the asserted claim to determine the sincerity of the claimant's religious beliefs under the circumstances. Third, and critically, the majority approach discussed in the petition better protects minority religious groups whose beliefs and practices may be

less familiar to courts undertaking the substantial burden analysis.

The CAAF's application of the substantial burden requirement potentially forces service members like *Amicus*—who do not want the government to needlessly suppress their religious beliefs while in uniform—to choose between their country and their religion. Accordingly, this Court should grant certiorari to resolve the circuit conflict and bring the CAAF's interpretation of RFRA's "substantial burden" requirement in line with the majority of the Courts of Appeals and with congressional intent.

ARGUMENT

A. Congress Passed RFRA to Provide Expansive Protection for the Exercise of Religion

1. RFRA's plain language, which does not explicitly define "substantial burden," nevertheless clearly evinces congressional preference in favor of broad and comprehensive protection for religious conduct of *any* sort. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA applies to the military. *See* Pet. App. 2 ("[RFRA] which, by its own terms, applies to every 'branch, department agency, instrumentality, and official (or other person acting under color of law) of

the United States,' 42 U.S.C. § 2000bb-2(1), also applies in the military context.").

Although RFRA originally defined "exercise of religion" by reference to First Amendment jurisprudence, Congress explicitly severed this connection in 2000 with the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, and defined the phrase as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000bb-2 (referencing § 2000cc-5(7)(A)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014) (The "amendment of RFRA through RLUIPA . . . deleted the prior reference to the First Amendment" in the definition of "exercise of religion"). Further, RLUIPA provides that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

Congress did not define "substantial burden." That phrase is key to implementing RFRA's protections because it sets the threshold at which governmental interference with a sincerely held religious belief becomes impermissible. Black's Law Dictionary defines the word "substantial" as including "[c]onsiderable in amount" and "burden" as "[s]omething that hinders or oppresses." *Black's Law Dictionary* 236, 1656 (10th ed. 2014). Thus, by its plain language, RFRA protects against considerable hindrances to or oppression of any religious conduct, whether or not such conduct is compelled by (necessary for) or central (important) to "a system of religious belief"—and this is meant to be construed

as broadly as possible. This sweeping language reflects congressional intent that RFRA provide broad protection.

2. The development of Free Exercise jurisprudence, and the moment and manner in which Congress chose to intercede, reinforces the case that RFRA is meant to apply broadly and protect broadly.

Before the passage of RFRA, the Free Exercise Clause was the primary source of protection for religious conduct.[2] The Court had established the test for assessing the constitutionality of government action curtailing religious conduct in several cases, notably *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These decisions required courts to conduct "a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest." *Hobby Lobby*, 134 S. Ct. at 2760.

This Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), marked a turning point in Free Exercise jurisprudence and—in the view of many—gutted Constitutional protection for religiously motivated conduct. *Smith* held that a neutral law of general applicability need only satisfy ra-

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[2] This Court has long distinguished between religious belief, which may not be prescribed or proscribed by the government, and religious conduct, which can be limited within the constraints of the First Amendment. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (The Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.")

tional basis scrutiny even where the law proscribes religiously motivated conduct or requires conduct that violates religious beliefs. *See id*. at 879, 890; *see also Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). Under the *Smith* regime, therefore, unless the government targets some or all religions or certain religious practices, it is free to regulate all religious conduct without the need to establish its compelling interest in doing so. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532-33.

Congress swiftly and nearly unanimously passed RFRA[3] just three years after *Smith*. This, as well as RFRA's legislative history, is evidence of the breadth of religious conduct that Congress sought to protect. Both the Senate and House reports state that the purpose of the law was to overrule *Smith* and enhance protections for religious conduct by restoring the *Sherbert*/*Yoder* regime. *See* H.R. Rep. No. 103-88, at 1-2, 6 (1993) ("The legislative response to the *Smith* decision is [RFRA]. . . . [which] restores the compelling governmental interest test previously applicable to First Amendment Free Exercise cases by requiring proof of a compelling justification in order to burden religious exercise."); S. Rep. No. 103-111, at 2-3, 8 (1993). The reports also specifically reflect congressional intent that courts draw upon pre-*Smith* decisions for the purpose of conducting the substantial burden and strict scrutiny analyses. H.R. Rep. No. 103-88, at 15; S. Rep. No. 103-111, at 8-9 ("The committee expects that the courts will look

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[3] RFRA passed ninety-seven to three in the Senate, 139 Cong. Rec. 26,416 (1993), and by voice vote in the House, 139 Cong. Rec. 9687 (1993).

to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest.").

In 2000, Congress went a step further, amending the definition of religious exercise to protect religious conduct more broadly and to divorce RFRA from prior Free Exercise holdings on the issue of "exercise of religion." RLUIPA, which amended RFRA, passed unanimously in both the House and Senate. *See* 146 Cong. Rec. 16,621-22 (2000) (House); 146 Cong. Rec. 16,703 (2000) (Senate).

Throughout, Congress has consistently used sweeping language to protect the broadest range of religious conduct. An overly restrictive or narrow reading of the substantial burden requirement undermines Congress's clear purpose in passing and amending RFRA.

3. An interpretation of "substantial burden" that fails to protect religious conduct unless the government action would force an adherent to violate a tenet of her faith runs contrary to clear congressional intent. By necessity, such an approach requires courts to analyze how "central" given conduct is to the claimant's religious beliefs in violation of 42 U.S.C. § 2000cc-5(7)(A). It therefore prevents RFRA from protecting "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id*. Yet as discussed below, several of the Courts of Appeals and the court below have adopted this approach.

In accordance with congressional will, RFRA claimants' initial threshold burden must not be read in a way that hamstrings RFRA's broad statutory protections.

B. The CAAF's Incorrect Application of RFRA's Substantial Burden Requirement Violates Traditional Notions About the Proper Role of Courts, Undermines Congressional Intent, and Deepens the Circuit Split on the Proper Mode of Analysis

1. The CAAF held that Petitioner failed to establish a prima facie RFRA claim by demonstrating that the orders to remove the religiously motivated signage at her work station constituted (1) a substantial burden (2) on her sincerely held religious beliefs. Although the court questioned whether Petitioner adequately proved the latter, the CAAF explicitly grounded its conclusion on its finding that Petitioner failed to establish the existence of a substantial burden. *See* Pet. App. 19. Because it held that Petitioner failed to meet this threshold burden, it did not conduct a strict scrutiny analysis and inquire into whether the government's orders were narrowly tailored to satisfy a compelling governmental interest.

Although it never clearly articulated the test it applied in this case, the CAAF held that Petitioner failed to demonstrate a substantial burden because she did not present sufficient evidence "that the signs were important to her exercise of religion, or that removing the signs would either prevent her from engaging in conduct her religion requires or cause her to abandon one of the precepts of her religion." Pet. App. 24 (citations and quotations omit-

ted). This test, then, as will be applied to the RFRA claims of all service members, apparently acknowledges only two situations in which a substantial burden can exist: (1) when the impeded religious practice is "important" to the claimant's religious beliefs; and (2) when the government imposition creates an impossible choice for a claimant—between violating a "precept" of her faith on the one hand or suffering the consequences of disobeying a government mandate on the other.

These are heavily overlapping categories: common sense dictates that conduct springing from a fundamental religious "precept" is "important" conduct, and vice-versa. In either situation, under the CAAF's test, the court assessing the testimony and evidence advanced by the claimant must ultimately decide whether the religious conduct at issue is "important" in light of the practitioner's sincerely held religious beliefs.

Herein lies the flaw in the CAAF substantial burden test. Requiring courts to pass judgment on the "importance" of religious *conduct* is indistinguishable from requiring them to pass judgment on the personal religious *beliefs* which motivate the practitioner's conduct. That is an extraordinary leap away from the traditional role of courts in free exercise jurisprudence. *See, e.g.*, *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It 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."); *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.) ("Whether a particular

practice is religiously mandated is surely relevant to resolving whether a particular burden is substantial. [But] the Supreme Court . . . [has never] held that a burdened practice must be mandated in order to sustain a . . . free exercise claim . . . . To confine . . . protection . . . to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." (citations and quotations omitted)).

Religious adherents, and not courts, should determine what constitutes an "important" religious practice in light of their religious beliefs. It has been well-established that courts are ill-equipped to determine what is and is not the exercise of religion, in part due to Establishment Clause concerns. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *see also Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so"); *Ford*, 352 F.3d at 590 (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996)) ("[C]ourts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be. . . . We have no competence to examine whether plaintiff's belief has objective validity.") Courts have no particular expertise in judging which religious practices are important to a practitioner's beliefs, and when they make objective determinations of this nature, there is a risk that the judiciary interprets RFRA in such a way that transforms it into a law "respecting an establishment of religion." U.S. Const. amend. I. More obviously, in a secular republic, it makes little sense

to establish the judiciary as a kind of "high priesthood" for all religions, ruling on what practices are and are not sufficiently "important" to warrant protection.

Yet the CAAF's substantial burden test puts courts in precisely this role. Because it defines "substantial burden" in terms of which religious practices are proven to be important or which are compelled or proscribed by the claimant's beliefs, this test requires courts to decide those issues. Courts, therefore, are forced to conduct an objective analysis of the burdened religious practice in light of the claimant's subjective beliefs.

2. Furthermore, the CAAF's substantial burden test is contrary to congressional intent in passing RFRA and amending it in RLUIPA. As explained above, Congress clearly evinced its intent that RFRA provide expansive protection for the free exercise of religion. This Court has acknowledged as much on several occasions. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) ("Congress enacted RLUIPA and its sister statute, [RFRA], 'in order to provide very broad protection for religious liberty.'") (quoting *Hobby Lobby*, 134 S. Ct. at 2760).

The CAAF test for substantial burden, however, narrows the religious conduct RFRA protects. By requiring courts to decide what religious conduct qualifies as important, the CAAF test carves "unimportant" religious exercise away from RFRA's protections. Moreover, this approach runs contrary to the explicit language of the statute, which provides that RFRA protects "*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) (emphasis added).

By limiting RFRA protection to conduct that is important to or compelled by an adherent's beliefs, as determined by a court, CAAF's test therefore violates the plain language of RFRA and congressional intent in passing the statute.

3. As detailed in the petition, this Court should grant certiorari to address the circuit conflict that exists regarding the application of the substantial burden requirement. The majority approach recognizes that government action can substantially burden a service member's sincerely held religious beliefs even if such action does not force an "impossible choice" and without requiring courts to engage in the deeply problematic analysis of whether the burdened religious conduct is "important."

As the petition notes, seven Courts of Appeals follow an approach that eliminates the need for courts to assess the importance of the claimant's religious practices. This majority approach recognizes that "while government action putting adherents to a choice between the demands of God and Caesar is one kind of substantial burden, it is not the only one." Pet. 17. The majority recognizes the possibility that a substantial burden may exist when there is a direct prohibition on religious exercise even absent the kind of "impossible choice" required by the CAAF's test. Indeed, as the Fifth Circuit noted, if a dilemma or difficult choice between practicing one's faith and complying with government mandates can be a substantial burden, then a complete ban—

whether on religiously motivated signage or the wearing of a turban and beard for a Sikh—must also be capable of qualifying as a substantial burden. *See Merced*, 577 F.3d at 590-91. This, then, accords with congressional intent and ensures that RFRA protects *any* kind of religious practice, so long as the claimant can establish the sincerity of her religious beliefs underpinning the burdened conduct.

Courts would still inquire as to the sincerity of the claimant's religious beliefs, and the government may still meet its burden by proving the existence of a compelling governmental interest, narrowly tailored, that requires compliance with the government's directive, in this case a military order.[4] But the majority approach prevents courts from passing judgment on the validity of religious practices, a role for which they are ill-suited.

The CAAF's approach, and that taken by a minority of Courts of Appeals, directly conflicts with the majority approach. This Court should grant certiorari to resolve the circuit conflict and bring the CAAF's interpretation in line with the majority view regarding the proper application of the substantial burden analysis.

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[4] It may be possible, as Petitioner notes, that the government can require service members to face substantial burdens on their exercise of religion in ways that the government could not require of civilians. Yet this figures only into the strict scrutiny analysis, and not into RFRA claimants' initial threshold burden.

C. CAAF's Application of the Substantial Burden Analysis Potentially Will Force Service Members Like *Amicus* Who Express Their Religious Beliefs to Choose Between Service to Their Country and Their Religion

Military service is a family tradition for *Amicus* and important to millions of Sikhs around the world. Sikh prophets stood up against forced religious conversions and tyranny by the Moghuls in the 16th and 17th centuries and taught that to be a good Sikh, one must defend the defenseless and protect members of all backgrounds and creeds. Many Sikhs, including *Amicus*, implement these teachings by serving in uniform as police officers and soldiers.

Military service is in *Amicus*'s blood. His great-grandfather served in the Royal British Army; his grandfather and father both served in the air force in India. It followed naturally that *Amicus* volunteered to serve when an Army recruiter visited his medical school. *Amicus* was able to serve in the Army Reserve wearing his turban, beard, and unshorn hair—articles of the Sikh faith—for seven years. When he volunteered for active duty at the end of his training, however, he was told that he would have to cut his hair and remove his turban in order to serve as an officer in the Army. *Amicus* was prepared to die for his country, but he could not—and will not—give the military that which belongs to his faith.

Sikhs have been serving honorably in the United States military since the early 1900s. But in the 1980s a change in Army Regulation (AR) 670-1, *Wear and Appearance of Army Uniforms and Insig-*

nia, led to a presumptive ban of the Sikh articles of faith. As a result of the compassion and hard work of many, *Amicus* became the first Sikh in a generation to be granted a religious accommodation to serve with a turban, beard, and unshorn hair.

The Army permitted *Amicus* to serve while maintaining the articles of his faith only after he sought—and the Army granted him—a religious accommodation in which the Army weighed his request against factors that included unit cohesion, morale, discipline, safety, and health. In order to obtain this accommodation, *Amicus* undertook an onerous task that included, among other things, obtaining fifty congressional signatures on a letter to the Secretary of Defense; 15,000 petitioner signatures on a similar letter; $500,000 in lobbying costs; and the assistance of a civil rights organization as well as a respected law firm.[5]

Amicus was deployed to Helmand Province, Afghanistan in 2011. There, he treated some of the

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[5] The Secretary of the Army has, since the petition was filed in this case, issued an update to AR 670-1. Army Directive 2017-03, "Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation" (Jan. 3, 2017), *available at* http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchForm.aspx?x=ARMY+DIR. This update provides that requests for accommodation for certain religious paraphernalia, including turbans and hair, are to be granted unless the brigade-level commander determines that the request for accommodation is not based on a sincerely held religious belief or identifies certain other reasons to deny the request. *See id.* at 2. This update, however, does not change the presumptive ban on Sikh articles of faith, still requires Sikh soldiers to obtain an accommodation, and in no way affects military courts' application of RFRA.

bloodiest and most devastating injuries in the war and was awarded the Bronze Star Medal, the fourth-highest combat award in the armed forces, for exceptionally meritorious service as an emergency medicine physician. His beard and turban in no way held him back; his patients, often critically injured, cared only for his medical expertise.

The challenges *Amicus* faced to serve his country should not be put to others. Several fellow Sikh service members also have sought and ultimately obtained accommodations to maintain their articles of faith while serving in the military, though not without significant effort, adversity, or with temporal limitations.

Although *Amicus* was fortunate for not having to seek judicial intervention, other Sikhs have had to litigate in order to serve in the military while maintaining the articles of their faith. *See, e.g.*, *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016) (granting plaintiff temporary, potentially revocable religious accommodation to maintain Sikh articles of faith in order to enroll in ROTC); *Singh v. Carter*, 185 F. Supp. 3d 11 (D.D.C. 2016) (denying plaintiff's motion for a preliminary injunction directing the Army to grant a permanent religious accommodation to maintain his Sikh articles of faith while serving in the Army). When service members, Sikh or otherwise, rely on RFRA as a last resort, they need courts to properly ascertain whether an order or governmental policy has substantially burdened their beliefs.

The CAAF's approach, narrow though it is, may suit the simple cases where the "importance" of the

at-issue religious conduct is obvious or conceded by the government. The court below has not explained, however, how lower military courts are to determine what is and is not important religious conduct. Will a court examine scripture, or the history of a given religious faith, or a survey of religious leaders? Against what rubric will the claimant's evidence be compared? These and other conceptual flaws further underscore the risks associated with the CAAF's approach to the substantial burden analysis.

The CAAF's approach is far less workable for more difficult cases—Petitioner's among them—particularly because the CAAF failed to identify any standards or criteria for courts to apply when assessing whether an order puts the adherent service member to an impossible choice. Most vulnerable to this flawed test are those who belong to minority religious groups or those who practice their religion in non-orthodox ways: in both cases, courts may not easily discern the importance of an unfamiliar religious practice.

Consider a Sikh service member attempting to establish a prima facie RFRA claim. He might testify as to the nature and sincerity of his religious belief that as a practicing Sikh, he wished to wear the kara—the steel bangle that identifies a Sikh as dedicated to his religious order. He would assert that standing orders regarding the wearing of jewelry constituted a substantial burden on those beliefs.

The court, however, in keeping with the CAAF's holding, would be faced with the challenge of trying to determine whether wearing the bangle is "important" or "central" to the claimant's beliefs. The

court would ask whether the claimant had managed to demonstrate some spiritual harm resulting from the government policy, and would make its decision without any guidance from the CAAF on how to do so: whether it ought to hear from Sikh clergy; whether it could consider evidence that many Sikh men do not wear the bangle; or whether it ought to consider religious laws written in scripture. Nor would the trial court have any baseline to establish when a service member has satisfied his burden—as imposed by the CAAF—to provide sufficient evidence underscoring the "importance" of the claimant's practice.

Under the CAAF's approach, then, it is as though the claimant's faith itself were on trial, but in a vacuum—without any judicially manageable criteria or standards for determining the outcome.

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The United States military has a strong tradition of religious pluralism. Catholics, Protestants, Jews, Muslims, Sikhs, and those who profess no faith at all have served side by side for centuries. If CAAF's decision is allowed to stand, the religious freedoms of service members could be greatly restricted. By limiting RFRA protection in the armed forces to religious conduct which in the view of the courts is "important" or based on a central tenet or precept, *Amicus* and other service members of faith will be forced to choose between their faith and service to their country.

No American should be denied the opportunity and privilege to serve his or her country in uniform, and it would be a rejection of American principles of

religious freedom were they denied such opportunity because of their adherence to their faith. Although it is right and proper that accommodations should be available, RFRA provides a much needed backstop in instances when the accommodation process fails the needs of religious service members. The CAAF's approach permits courts, and not religious Americans, to determine what articles of their faith are "important" enough to warrant protection. This Court should grant certiorari to correct course and clarify that American values, congressional intent, and RFRA itself are best served when courts set a low threshold for claimants' initial showing that a substantial burden has been placed on their religious freedom. Proper application of RFRA is vital to protecting the religious freedom of service members who sacrifice to protect that freedom.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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