No. 16-814

In The
Supreme Court of the United States

MONIFA J. STERLING,
Lance Corporal (E-3), U.S. Marine Corps,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Armed Forces

BRIEF *AMICUS CURIAE* OF CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, CHRISTIAN LEGAL SOCIETY, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE LUTHERAN CHURCH – MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE – CONEL, AND QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in addition to its other errors in defining a "substantial burden" on religious exercise under the Religious Freedom Restoration Act (RFRA), the court of appeals effectively imposed an erroneous requirement that military personnel exhaust administrative remedies before raising a RFRA defense to a military order.

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious, professional, and civil liberties organizations that are committed to, among other things, the protection of religious freedom in the military and in other settings. The specific interests of various *amici* are set forth in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals decision in this case prevents petitioner, LCpl Monifa Sterling, and many others like her from invoking the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (2012) ("RFRA"), to protect their exercise of religion in the military. *Amici* agree with petitioner that the decision of the Court of Appeals for the Armed Forces ("CAAF") adopts an "exceedingly narrow" – and fundamentally flawed – "understanding of what constitutes a 'substantial burden'" on religious exercise that triggers RFRA's protections. Pet. for Cert. 12. We focus on one particular flaw in the CAAF's understanding: the idea that petitioner failed to show a "substantial burden" on her

[1] Neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici curiae*, their members, or their counsel) contributed money that was intended to fund its preparation or submission. Ten-day notice of intent to file this brief was provided to all parties. All parties have consented to the filing of this brief, including petitioner's blanket consent that is on file with the Clerk.

religious activity in part because she failed to pursue a possible administrative accommodation of her religious exercise. *See* Pet. App. 27-28. The CAAF's analysis, in effect, creates an improper requirement of exhaustion of administrative remedies for service members raising RFRA defenses in the military justice system.

Petitioner was court-martialed for, among other things, refusing to obey her superior's orders to take down three printed signs that displayed a paraphrase of a Bible verse, "No weapon formed against me shall prosper." Pet. 5-6 (citing *Isaiah* 54:17 (King James)). In defense, petitioner asserted that the orders impermissibly burdened her religious exercise under RFRA. This defense may fail when the merits are considered. But in rejecting the defense at the threshold, the CAAF ruled in a way wholly inconsistent with other lower court decisions and with the text, structure, and purpose of RFRA. Whether or not petitioner's defense is ultimately valid, she "was entitled to have the [court] analyze her conviction under the legal construct set forth in RFRA." Pet. App. 31 (Ohlson, J., dissenting).

RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion" unless it demonstrates that application of the burden is the least restrictive means of serving a compelling governmental interest. 42 U.S.C. § 2000bb-1. Evaluating whether there was a "substantial burden" on petitioner's exercise of religion, the court made several errors detailed in the petition for certiorari. We agree with petitioner that the CAAF erred in holding that

she could not show a substantial burden unless she had a religious tenet requiring her to post religious signs at work. "RFRA protects optional religious exercise as well as religiously-compelled practices." Pet. 11. We also agree that this error calls out for this Court's review under the standards for granting certiorari: it deepens a clean and well-established split in the courts of appeals over whether a "substantial burden" exists only when the religious adherent faces such a "dilemma" between complying with the government's order and complying with a specific demand of her faith. Pet. 13-22. The narrow conception of burden wrongly rejects claims at the threshold and "neuters" RFRA's requirement – equally applicable in the military – that substantial restrictions on religious activity must be justified by compelling governmental interests. Pet. 13.

We focus here on another ground the CAAF gave for barring petitioner's defense at the threshold. The court objected that she failed to request an accommodation of her religious exercise through the military's processes, under which she would have had to obey the orders in the interim. Pet. App. 27-28. In the court's view, petitioner's failure to invoke this process was a reason why she could not show a substantial burden on her religious exercise:

> [B]y potentially delaying an accommodation for only a short period of time, the accommodation process interposes a de minimis ministerial act, reducing any substantial burden otherwise threatened by an order or regulation of general applicability, while permitting

> the military mission to continue in the interim. This consideration is crucial in the military context, as the very lifeblood of the military is the chain of command.

Pet. App. 28.

Under the court's analysis, the burden on a person's religious exercise may be deemed "insubstantial" when there is a "ministerial act" that might possibly have resulted in the eventual accommodation of the religious exercise. In effect, this analysis creates a requirement of exhaustion of administrative remedies. Under the court's logic, when the administrative process might lead to an accommodation, the burden on religious exercise is measured by the cost of going through that process, not by the ultimate burden the religious adherent faces from the government restriction in question. Extending this logic to its end, even a severe restriction on religious exercise can be immunized from scrutiny under RFRA simply because an administrative process might have led to an accommodation – even when the individual was required to forego engaging in the religious activity for the duration of that process. In the context of a court-martial, therefore, a service member like petitioner may be barred from challenging the restriction of her religious exercise because she did not earlier pursue an administrative accommodation. Notwithstanding the court's denial (*see* Pet. App. 28), this is an exhaustion requirement.[2]

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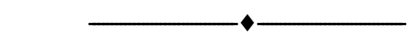
[2] To support its conclusion, the CAAF cited *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d

Even apart from its other errors, the CAAF's decision merits review because of this effective exhaustion requirement, for three reasons. First, the imposition of an exhaustion requirement is in conflict with decisions in two other federal courts holding that RFRA contains no such requirement. Second, the CAAF decided an important issue of federal law in a way that restricts RFRA's protections in the military justice system and could have implications in other contexts. Third, the CAAF's interpretation of RFRA is wrong as a matter of the statute's text, structure, and purposes.



ARGUMENT

I. THE CAAF DECISION CONFLICTS WITH CIVIL COURTS' HOLDINGS THAT RFRA CONTAINS NO EXHAUSTION REQUIREMENT.

The CAAF recognized that the text of RFRA "does not itself contain an exhaustion requirement." Pet.

1151, 1178 (10th Cir. 2015); and *Priests for Life v. U.S. Dep't of Health and Human Serv.*, 772 F.3d 229, 249-52 (D.C. Cir. 2014), both of which were vacated and remanded in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). But those cases are irrelevant. There the government had actually given an accommodation, and the question was whether it removed the burden on religious exercise. Whatever the conclusion in such circumstances, it does not apply here, where there is merely a process that might or might not provide an accommodation while the service member must forego the religious activity in the interim. Nothing in the *Zubik* cases justifies concluding that the only burden in such a case is the cost of invoking an uncertain accommodation process.

App. 27. It also noted that the Ninth Circuit has "held that an individual need not request an exemption to invoke RFRA, even if a system for doing so is in place." *Id*. (citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012)).[3] The court nonetheless went on to impose what is, in reality, an exhaustion requirement.

In *Oklevueha*, the plaintiff church sued to bar the government's enforcement of the Controlled Substance Act of 1970, 21 U.S.C. §§ 801 *et seq*. (2012) ("CSA"). The church encouraged its members to consume "marijuana as a sacrament" in religious ceremonies and as a means to "enhance spiritual awareness." *Oklevueha*, 676 F.3d at 833. After federal law enforcement officers seized a package of the church's marijuana, the members feared that the government would bring CSA prosecutions that would eliminate the church's ability "to cultivate, consume, possess, and distribute marijuana for religious purposes." *Id.* at 834.

The church, citing RFRA, sued to block the enforcement of the CSA's ban. The government responded that the church must first apply for an accommodation under the Drug Enforcement

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[3] Although the Ninth Circuit in *Oklevueha* in 2012 correctly ruled that RFRA contained no exhaustion requirement, the religious claimants subsequently lost on the merits because, as petitioner explains, the Ninth Circuit later adhered to a rigid definition of "substantial burden" that imposed the "dilemma" requirement the petition describes. *See* Pet. 15 (discussing *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016)).

Administration's (DEA's) process, 21 C.F.R. § 1307.03, to "allow the DEA to apply its expertise to Plaintiffs' claim, possibly moot the case if the claim is granted, and help build a record for judicial review." *Oklevueha*, 676 F.3d at 838. The court, however, refused to require the plaintiff to pursue the accommodations process. To do so, the court reasoned, would be "to read an exhaustion requirement into RFRA where the statute contains no such condition . . . and the Supreme Court has not imposed one." *Id*.

Here the CAAF reached the opposite result, adopting the very reasoning the Ninth Circuit rejected. The CAAF ruled against petitioner in part because she had not availed herself of the Marine Corps' accommodation process before raising a RFRA claim. Just as the government in *Oklevueha* argued – unsuccessfully – that pursuit of administrative remedies would have allowed the DEA "to apply its expertise," the CAAF here concluded that had petitioner pursued the accommodation process, her superiors could have applied their expertise by "balanc[ing] requests against considerations such as military readiness and unit cohesion." Pet. App. 28. Similarly, the CAAF, in contrast to the Ninth Circuit, relied on the fact that the administrative process might provide an accommodation after "only a short period of time" and thereby moot the case. *Id*.

The CAAF tried to distinguish *Oklevueha* by saying that petitioner did not have to pursue administrative remedies as a matter of exhaustion, but that the availability of that process meant she could not

show her religious exercise had been substantially burdened. Pet. App. 28. But that is mere semantics. The Ninth Circuit refuses to dismiss RFRA claims for failure to pursue administrative remedies first; the CAAF dismissed a RFRA defense in a court-martial for failure to pursue such remedies first. This creates a clear conflict and contradicts the clear provision that RFRA can be raised as either "a claim or [a] defense in a judicial proceeding." 42 U.S.C. § 2000bb-1(c).

Moreover, the CAAF's determination that petitioner should have pursued an administrative accommodation cannot simply be subsumed under the "substantial burden" analysis. It is one thing for a court to say, prospectively, that an administrative process may itself pose only an insubstantial burden and may head off a more serious burden imposed by the restrictive order itself. But here, by contrast, the CAAF made retroactive use of petitioner's failure to pursue that process: the court used her failure as a reason to bar her RFRA defense in a court-martial proceeding in which she unquestionably faced a significant legal burden, namely a bad-conduct discharge and a reduction in pay grade. Pet. 7. That reasoning does not inquire into "burden." It effectively imposes a sanction for failing to request an accommodation: it is an exhaustion requirement.

The CAAF's conclusion also conflicts with another civil court decision, which rejects exhaustion in the military context. In *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016), an Army Ranger sued the government seeking to enjoin an order to "undergo several

days of specialized testing" aimed at ensuring that his Sikh articles of faith, "a cloth head covering and unshorn hair and beard," would not interfere with the combat effectiveness of his gear. *Id*. at 218. Singh claimed that the order violated RFRA because it substantially burdened the exercise of his religion. *Id*. at 219. The government countered that the Army's interests in maintaining "discipline and obedience" require a judicial policy of non-interference. *Id.* at 224. According to the Army, Singh should have disobeyed the order and brought up his objections in a court-martial or other "administrative proceeding." *Id.* at 224-25.

The court rejected the government's argument, reasoning that it would "require [the plaintiff] to exhaust administrative remedies in a court-martial proceeding before bringing his constitutional and RFRA claims before this Court." *Id.* at 226. It noted that RFRA contained no exhaustion requirement, and no exception for the actions of the military. *Id.* at 229 (citing *Oklevueha*, 676 F.3d at 838).[4]

Singh's inconsistency with the CAAF decision here is manifest. The CAAF, relying on the military's interest in maintaining the chain of command, effectively made the accommodation process mandatory

[4] In this case's subsequent history, the court held that Singh could not show that he was likely to suffer "irreparable harm," because he received a long-term (one-year) accommodation from the military, and therefore denied his motion for a preliminary injunction. *Singh v. Carter*, No. 16-399 (BAH), 2016 WL 2626844, at *5-*6 (D.D.C. May 6, 2016). This conclusion does not change the court's prior ruling regarding exhaustion requirements.

before a service member can challenge a burden on her religion under RFRA. But *Singh* held that the military's interests should not change the analysis: RFRA still applies fully to the military, and it does not contain an exhaustion requirement. The court added that claims "founded solely upon a constitutional right" are not well-suited to adjudication in administrative proceedings. 168 F. Supp. 3d at 229, 224-25.

In short, the military justice system effectively requires exhaustion before one can raise a RFRA defense (per *Sterling*), while the civil court system does not require it before one can raise a RFRA claim (per *Oklevueha* and *Singh*). This inconsistency, among other things, creates incentives for service members to use the civil courts if their religious exercise is substantially burdened by a military order. The service member who sues for an injunction in civil court will not be required to pursue administrative options (*Singh*; *Oklevueha*). But the service member who decides to wait and assert a RFRA defense at his court-martial risks losing his ability to assert that defense because he did not first pursue the administrative option.

This state of affairs is arbitrary and unfair. First, the CAAF's effective exhaustion requirement exists in the context where its consequences are most severe: the potential forfeiture of a valid RFRA defense to a potentially severe court-martial sanction. Second, a person's protection under RFRA changes if he raises the statute as a defense rather than a claim, which violates the statute's equal treatment of defenses and claims. *See* 42 U.S.C. § 2000bb-1(c). The current

combination of rulings does not even consistently encourage service members to pursue administrative remedies: it merely encourages them to go immediately to a civil court.

Whatever the ultimate result should be, the Court should fix the arbitrary situation that has developed from these conflicting rulings.

II. THE COURT BELOW DECIDED A VITAL ISSUE OF FEDERAL LAW FOR THE MILITARY CONTEXT, WITH DIRECT IMPLICATIONS FOR NON-MILITARY CONTEXTS AS WELL.

The decision below also demands review because of its importance. First, the CAAF's interpretation of the "burden" prong effectively creates an exhaustion requirement for any RFRA defense arising in the military justice system. Second, this Court's limited jurisdiction to review military court decisions increases the need for review here. Third, the manner in which the CAAF opinion interpreted the burden prong is exportable to other, non-military, contexts.

A. RFRA's Protections Apply Uniformly to the Military, But the Decision Below Effectively Creates an Exhaustion Requirement Only in the Military Justice System.

RFRA applies to every "branch, department, agency, instrumentality, and official . . . of the United

States." 42 U.S.C. § 2000bb-2(1). As departments of the United States, the military branches are each subject to the statute's constraints. Further, Congress envisioned that RFRA would apply uniformly across the government and that claims or defenses arising in the military context would be judged under the same standard as those in other contexts.

Amici agree with petitioner that if the decision below stands, "then as a practical matter RFRA will no longer apply to the military, despite Congress' unmistakable contrary intent." Pet. 35. Because the CAAF is the court of last resort for the military justice system, its decisions are binding on all courts-martial and thus govern any RFRA defense raised in that context. As a result, every RFRA defense raised in the military justice system will likely be subject to the effective exhaustion requirement imposed here.

A court can always say that the military's administrative process might have granted an accommodation. The Department of Defense mandates the process, and each branch of the military has incorporated this mandate and created its own process for providing religious accommodations. *See* U.S. Dep't of Def., Instr. 1300.17, Accommodation of Religious Practices within the Military Services (Jan. 22, 2014).[5] Of course, these processes are not under challenge here: it is laudable that the military has established

[5] *See also* Defense Equal Opportunity Management Initiative, Religious Accommodation in the U.S. Military, https://www.deomi.org/DiversityMgmt/RelAccomMilitary.cfm.

procedures for the protection of the religious exercise of service members. The issue, however, is whether it is legitimate to construe RFRA to require a service member to use these processes before raising RFRA as a defense against a military rule burdening his religious exercise. Nothing in RFRA imposes or authorizes such a requirement (*see infra* part III).

The question whether RFRA will vigorously protect service members' exercise of religion is a vital one. Congress viewed it as vital when it passed RFRA in 1993: it determined that the statute should apply the same standard to religious claims in the military context as in other contexts. The Senate Judiciary Committee Report stated: "Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test." S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, at 12 (1993); H.R. Rep. No. 103-88, *Religious Freedom Restoration Act of 1993*, at 8 (1993) (same). Although this Court had adopted a lowered standard for military personnel's claims under the Free Exercise Clause, *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress determined that the standard for statutory religious freedom claims under RFRA should be the same in the military context as in others.[6]

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[6] *See also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 240 (1994) ("[The bill's supporters] insisted . . . on a unitary standard for evaluating all free exercise claims. . . . [T]he Coalition

As Judge Ohlson said in dissent in the CAAF, "[T]here is no question that the protections afforded by RFRA apply with full effect to our nation's armed forces." Pet. App. 34. Ensuring RFRA's proper application in the military is increasingly important because "as national demographics shift and the military becomes more diverse, commanders should expect a rise in religious practices outside Judeo-Christian traditions." Major Adam E. Frey, *Serving Two Masters: A Scheme for Analyzing Religious Accommodation Requests in The Military*, 74 A.F.L. Rev. 47, 50 (2015). Service members of widely varying faiths will need clear, consistent protection for their religious exercise, one of the very freedoms they are serving to defend.

B. Limits on This Court's Review of Military Decisions Make It Important to Review a CAAF Decision that Misinterprets a Broadly-Reaching Federal Law.

Another factor in this case's importance is the restricted nature of this Court's review of military court decisions. As petitioner points out, this Court "may never have another opportunity to consider the substantial-burden standard within the critically important context of the Nation's military." Pet. 36. If (as here) the CAAF commits error in adjudicating a federal claim, the mistake of law becomes the rule for the entire military justice system. But if the CAAF refuses

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[supporting the bill] argued that no group or institution should be completely exempted from the [standard].").

to grant discretionary review of a case that would allow it to revisit the issue, this Court's opportunity to correct the CAAF is significantly limited, since decisions by the CAAF are the only cases in the military justice system that can be reviewed by this Court. *See* 28 U.S.C. § 1259 (2012).[7] If a decision of an intermediate military appellate court is not reviewed by the CAAF, this Court lacks appellate jurisdiction to review it. *Id.*

The CAAF's jurisdiction, in turn, "is largely discretionary." Pet. 36. The large majority of cases on the CAAF's docket are there because the CAAF has chosen to grant review "upon petition of the accused and on good cause shown." Uniform Code of Military Justice, ch. 47, art. 67(a)(3), 10 U.S.C. § 867(a)(3) (2012). In the 2014-15 term, for example, this category constituted 88 percent of the cases added to the docket.[8] And only

[7] The only route to this Court in such cases is collateral review through a new action for habeas corpus, with the limitations and extra time such actions entail. *See* U.S. Court of Appeals for the Armed Forces, Appellate Review of Courts-Martial, http://www.armfor.uscourts.gov/newcaaf/appell_review.htm.

[8] The other two categories of CAAF review are (1) cases in which the intermediate appellate court affirmed a death sentence, where review is mandatory, and (2) cases that "the Judge Advocate General [(JAG)] orders sent to the [CAAF] for review." 10 U.S.C. § 867(a)(1), (2) (2012). Of 72 cases added to the docket in the 2014-15 term, 63 were granted from the petition (discretionary) docket, one was the product of mandatory review, and eight were certified by the JAG. *See* Uniform Code of Military Justice Committee, Annual Report for the period October 1, 2014 to September 30, 2015, at 19-20 (2015), http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf [hereinafter "Annual Report"].

a small fraction of these petitions are granted; in the 2015 term, for example, the figure was about 8 percent. *See* Annual Report, *supra*, note 8, at 19-20 (63 petitions granted out of 788 petitions filed).

Thus, if the military tribunals below the CAAF make a significant legal error, but the CAAF declines (as it typically does) to hear the case, this Court will be unable to engage in appellate review. The Court cannot rely here on the notion that it can easily wait for a later case to present the issue. The jurisdictional hurdles to correcting erroneous decisions of the military justice system make it all the more important for this Court to correct the CAAF's misinterpretations when it can.

C. The Logic of the Decision Below Could Easily Be Applied to Non-Military Contexts.

The importance of this case also stems from the broad implications of its reasoning. If a RFRA claim can be defeated at the threshold because the government agency in question has an administrative process that might have led to an accommodation, the same logic could apply in many contexts.

If petitioner's RFRA defense in his court-martial can be barred, then similarly any religious group that uses a controlled substance for religious reasons could see its RFRA claim barred if it had failed first to seek an accommodation from the DEA. Contrast *Oklevueha*, 676 F.3d at 838 (rejecting such a requirement). Native

American tribes whose members possess eagle feathers, or take other actions affecting endangered species, could have their RFRA defense to a prosecution barred if they did not seek a permit from the Interior Department. *Cf. United States v. Hardman*, 297 F.3d 1116, 1125-35 (10th Cir. 2002) (en banc) (considering RFRA defense against prosecution for eagle-feather possession by Native Americans who were not members of federally recognized tribes); *id.* at 1123 (noting existence of permit process for members of recognized tribes).

As these two examples demonstrate, the analysis of the CAAF in this case could be imported to bar a RFRA defense in multiple other contexts where an administrative remedy is possible.

III. THE DECISION BELOW IS ERRONEOUS AS A MATTER OF THE TEXT, STRUCTURE, AND PURPOSE OF RFRA.

Finally, the decision below is fundamentally flawed on the merits. In rejecting petitioner's defense at the threshold, and effectively creating an exhaustion requirement, the court construed RFRA in a way that conflicts with the statute's text, structure, and purpose.

A. An Exhaustion Requirement Has No Support in RFRA's Text.

RFRA's text contains no hint of a requirement of exhaustion of administrative remedies. The CAAF

nevertheless effectively construed it to require exhaustion because of the military's unique interests in adherence to the "chain of command." Pet. App. 28. As a result, RFRA now applies differently in the military justice system than it does in civilian courts. RFRA's "unitary standard" (*see supra* p. 13) will only apply to those court-martial defenses that have first been vetted by an administrative process.

This result cannot be squared with the text of RFRA, which contains no words authorizing courts to add such a requirement simply because the military has unique governmental interests. This Court regularly corrects lower courts when they interpolate such atextual requirements into a statute. *See, e.g.*, *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (rejecting judicially imposed "heightened pleading standard" under 42 U.S.C. § 1983); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-61 (1994) (repudiating lower courts' finding of an implied "economic motive" element in racketeering statute). As the dissent in the CAAF noted, "the statute [does not] empower judges to require a believer to ask of the government, 'Mother, may I?' before engaging in sincere religious conduct." Pet. App. 33 (Ohlson, J., dissenting).

B. Exhaustion Requirements Found in Related Statutes Confirm That RFRA Contains No Such Requirement.

The absence of any exhaustion requirement in RFRA is confirmed by the very different texts of several related federal and state laws that require exhaustion. The first is the Prison Litigation Reform Act of 1996 (PLRA). *See* 42 U.S.C. § 1997e(a) (2012) ("no action shall be brought [by a prisoner challenging prison policies] until such administrative remedies as are available are exhausted"). During the debate over RFRA, the Senate considered – but rejected – an amendment that would have exempted prisons from the statute entirely in order to avoid burdens on prison administration. 103 Cong. Rec. S14353-S14368, S14468 (Oct. 27, 1993). Congress, however, passed PLRA three years later, imposing explicit procedural requirements, including exhaustion, on prisoner claims in general, not just in religion cases.

The prison context was the only area where Congress considered imposing procedural requirements such as exhaustion. And Congress adopted an exhaustion requirement – for prisoners only – in PLRA, not in RFRA.

This conclusion is reinforced by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which adopts the same test as RFRA of "substantial burden" and "compelling interest." RLUIPA states that "nothing in [it] shall be construed to amend or repeal the Prison Litigation Reform Act,"

which includes PLRA's exhaustion requirements for prisoners. 42 U.S.C. § 2000cc-2(e). The premise of this addition is that the broad wording of RLUIPA (and RFRA), far from potentially incorporating an exhaustion requirement, might have been read to eliminate an exhaustion requirement otherwise present in the prison context by virtue of PLRA. Congress added a provision to RLUIPA to make clear that the exhaustion requirement survived for prisoners' religious claims; but the addition reinforces that RFRA, which has no corresponding provision, incorporates no exhaustion requirement.

The text of RFRA also contrasts with three state religious freedom statutes that contain exhaustion requirements and were passed after RFRA. *See* 71 Pa. Stat. § 2405(b) (2016) (enacted 2002); Tex. Civ. Prac. & Rem. Code § 110.006 (2016) (enacted 1999); Utah Code § 63L-5-302 (2016) (enacted 2008). Each of these state laws requires a potential claimant, before bringing a claim in court, to give the government notice and allow it the opportunity to accommodate the religious exercise. These statutes further reinforce the background assumption that such a law does not require exhaustion of administrative remedies unless it specifically says so. One commentator has noted this difference between these laws and RFRA:

> Because neither the Free Exercise Clause nor the federal RFRA has any exhaustion provision, attorneys [suing under state statutes] may be used to simply filing complaints and dealing with details later. But this

> [assumption that state law parallels the federal RFRA] has led even promising religious liberty claims to get barred.

Christopher C. Lund, *Religious Liberty After* Gonzales: *A Look at State RFRAs*, 55 S.D.L. Rev. 466, 490 (2010).

In sum, the lack of an exhaustion requirement in the federal RFRA is confirmed by contrasting the explicit adoption or preservation of such a requirement in PLRA, RLUIPA, and the three state laws. These provisions confirm that if there is to be a requirement under RFRA that individuals request administrative accommodations for their religious exercise, the proper way is for Congress to legislate, not for courts to impose an atextual requirement.

C. The CAAF's Construction of RFRA Undermines the Act's Structure and Purpose.

The decision of the CAAF also undermines the structure and purpose of RFRA. In stating that petitioner – and effectively many others like her – should pursue administrative remedies or else lose a RFRA claim, the CAAF relied heavily on the interest in "permitting the military mission to continue in the interim" while the administrative request is reviewed. Pet. App. 28. "This consideration," the court said, "is crucial in the military context, as the very lifeblood of the military is the chain of command." *Id.* This rationale disregards RFRA's structure and purpose in several ways.

1. The CAAF conflated two separate components of RFRA by importing arguments for government interests – the military's "chain of command" – into the analysis of whether a "substantial burden" exists. The statute clearly separates the two inquiries. RFRA first states the general rule that "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). That rule must be followed unless "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(b). Analysis under RFRA requires determining first whether a substantial burden exists, and only then whether there are government interests sufficient to satisfy the compelling interest test. To consider government interests in deciding whether a substantial burden exists ignores this basic division. It is also a *non sequitur*: the interests of the military, although important, do not make burdens on the religious exercise of a service member any less substantial.

RFRA's history shows that Congress recognized the distinctively strong interests of the military but determined that those interests should be considered at the "compelling interest" stage of the analysis. As we have already discussed, RFRA adopts a unitary standard for both military and civilian contexts. *See supra* p. 13. Moreover, those who passed the statute expressed confidence that the military's unique interests would be adequately considered under the compelling

interest test. As the House committee report put it: "Pursuant to [RFRA], the courts must review the claims . . . of military personnel under the compelling governmental interest test. . . . However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military . . . officials will be necessarily undermined." H.R. Rep. No 103-88, *supra*, at 8.[9]

Under RLUIPA, 42 U.S.C. § 2000cc *et seq.*, the "sister statute" to RFRA, this Court has held that judges "should respect [prison officials'] expertise" in deciding whether application of a prison regulation "is the least restrictive means of furthering a compelling governmental interest." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015); *see also Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) ("courts [sh]ould apply [RLUIPA's compelling interest] standard with 'due deference to the experience and expertise of prison and jail administrators' ") (quotation omitted). Under RFRA's identical language, the military's interests in order and discipline should likewise be considered at the compelling-interest, not the burden, stage.

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[9] *See also*, *e.g.*, S. Rep. No. 103-111, at 12 (1993) ("The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain [its interests]."); 103 Cong. Rec. S14470 (Oct. 27, 1993) (statement of Sen. Hatch, Senate lead cosponsor) ("I believe the United States military will certainly be able to maintain good order, discipline, and security under this bill.").

2. Moreover, by applying consideration of government interests at the wrong stage, the CAAF inflated those interests. The text of RFRA requires the government to show a compelling interest in the "application of the burden *to the person*." 42 U.S.C. § 2000bb-1(b) (emphasis added); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) ("Court[s] [must] loo[k] beyond broadly formulated interests . . . and scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) ("[Courts must] look to the [government's] marginal interest in enforcing [its] mandate in [each] cas[e]."); *see also Holt*, 135 S. Ct. at 864-65 (acknowledging the compelling nature of a general "interest in the quick and reliable identification of prisoners," while finding that interest less than compelling "as applied in the circumstances present here").

The CAAF evaded this individualized analysis by importing a generalized interest in the "chain of command," which influenced its analysis of the burden on religious exercise. By considering the military's interests at the "burden" threshold, and blocking petitioner's claim at that point, the CAAF avoided having to address the proper question under RFRA: whether or not this interest was compelling, and the regulation was the least restrictive means of serving it, as applied to petitioner's case.

3. Finally, one of RFRA's main purposes was to restore protection of the right to the exercise of

religion, which Congress acknowledged as "an unalienable right, secured . . . in the First Amendment." 42 U.S.C. § 2000bb(a)(1). Although the right RFRA grants is statutory, its origins are constitutional. It is inconsistent with the statute's purposes to subject claims or defenses to judicially created exhaustion requirements that chill the exercise of a fundamental liberty.

The decision below surely has the potential to chill service members' religious exercise. Even apart from other errors in the decision, the potential that a service member will forfeit a RFRA defense if he did not first request administrative accommodation will chill religious activity. Although the CAAF describes the accommodation process as an "expeditious option," Pet. App. 28, that will not always be so, or clearly so. For example, in *Singh v. Carter*, *supra*, the Sikh soldier who requested to wear a turban, unshorn hair, and a beard had to undergo several weeks of waiting for the Army's request; had to use personal leave to avoid being on his post in contravention of appearance regulations; and finally faced extensive three-day testing to determine whether his beard and turban would interfere with his actions in combat. *Singh*, 168 F. Supp. 3d at 220-22.

The potential for such burdens could easily persuade service members to cease their religious exercise rather than seek accommodation. Moreover, from the retrospective position of a court-martial, after a service member declined to seek administrative accommodation, there is no way to know what the burden of the administrative process would have been. Courts might bar RFRA defenses retrospectively even in cases in

which a service member plausibly feared a significant burden from the process and therefore did not pursue it.

For these reasons, the CAAF's erroneous conclusion on seeking administrative remedies – quite apart from its other errors – is likely to chill religious activity and undercut the purposes of RFRA.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Chaplain Alliance for Religious Liberty** ("Chaplain Alliance") is an organization comprised of veteran United States military service members, primarily chaplains. As a prerequisite to accepting a chaplain for service in the United States Armed Forces, the United States requires that a chaplain be "endorsed" by a religious organization to then serve as an official representative of his or her faith group. The Chaplain Alliance is an association of endorsing agencies that works to ensure that chaplains can defend and provide for the freedom of religion and conscience that the Constitution guarantees all chaplains and those whom they serve. The Chaplain Alliance has over 30 endorsing agency members; those members endorse over 2,600 military chaplains, about 50% of those currently serving in the armed forces.

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly.

The **American Association of Christian Schools** serves over 800 Christian schools and their students

through a network of thirty-eight state affiliate organizations and two international organizations.

The **Association of Christian Schools International** ("ACSI") is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities.

The Ethics & Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 19.8 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. The Adventist Church operates the largest Protestant educational system in the world, including 650 primary schools, 94 secondary schools, and 13 institutions of higher learning in the United States alone. In the United States, the Church also operates the Adventist hospital system, one of the largest in the country, with 84 hospitals employing 126,000 people, plus more than 300 clinics and other facilities.

The Lutheran Church – Missouri Synod ("LCMS") is a national church body with more than 2,000,000 baptized members, thousands of whom are serving in the armed forces. Pastors of the LCMS have served as military chaplains since the Civil War. Today, the LCMS' Ministry to the Armed Forces supports 67 active duty LCMS chaplains and 71 Reserve and National Guard units.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches,

as well as other church-related and independent religious ministries.

The **National Hispanic Christian Leadership Conference-CONEL** is the National Hispanic Evangelical Association. As the largest Latino Christian organization in America, it leads millions of Hispanic Born Again Christ followers via its 40,118 Evangelical congregations in the United States and 400,000 congregations throughout Latin America. It provides leadership, networking, fellowship, strategic partnerships and public policy advocacy platforms to its seven directives: Life, Family, Great Commission, Stewardship, Education, Youth and Justice.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.