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

REPLY BRIEF FOR PETITIONER

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The Court of Appeals for the Armed Forces ("CAAF") framed the "very legal question to be decided" in this case as whether a government order to "tak[e] down signs" containing Biblical quotations, backed with sanctions up to and including court-martial, "constitutes a substantial burden" on the religious exercise of the Marine who posted them. Pet.App.24. The answer to that question should be self-evident: of course it does, no less than if the government ordered an individual to remove a cross, take down a mezuzah, or destroy a sacred text. Perhaps the government can establish that such directives are the least restrictive means of furthering a compelling governmental interest in the military context. But the notion that they do not substantially burden an adherent's exercise of religion blinks reality and would neuter the Religious Freedom Restoration Act ("RFRA"). The decision below reached this misguided outcome by finding that the posting of the Bible verse was of insufficient subjective importance to LCpl Sterling to count as a substantial burden on her religious exercise. That holding is plainly incompatible with RFRA. It also implicates a deep split in the circuits and puts our Nation's service members on the short end of the split when it comes to protecting religious liberty. As a diverse array of *amici* attest, the decision demands this Court's review and reversal.

The government in its opposition dodges the "very legal question" in this case. Rather than defend the indefensible proposition that the forced removal of Biblical quotations does not substantially

burden religious exercise—the clear holding of the decision below—the government instead repeatedly attempts to recast the decision as one about evidentiary sufficiency in the particular context of LCpl Sterling and these signs. Opp.4,6,13. But the CAAF did not grant discretionary review and divide over a case-specific dispute about sincerity, exhaustion, or any other factbound matter. Instead, the CAAF granted review, expressly declined to rest its decision on the sincerity of LCpl Sterling's religious beliefs, and divided over the proper legal standard for a religious adherent seeking to establish a substantial burden. The majority indisputably and impermissibly inquired into the importance of the religious practice at issue and aligned itself with a minority of circuits that demand a religious adherent to show a government-compelled dilemma. The dissent had no difficulty identifying that holding, the deepening of the circuit split, or the decision's baleful consequences for the religious liberty of those in uniform. The government can talk all its wants about agreeing with *amici* about the importance of religious exercise in the military, but the undeniable reality is that service members nationwide and worldwide are now governed by a binding precedent that adopts a minority position that will make it particularly difficult for those within the command structure of the armed forces to show a substantial burden. That result is intolerable and can only be remedied by this Court's review.

I. The CAAF's Decision Is Incorrect.

The government goes to great lengths to try to convert this critically important case about RFRA's

substantial-burden analysis into a factbound evidentiary dispute. *E.g.*, Opp.13-14. It faults LCpl Sterling, who represented herself in the court-martial proceedings, for offering only "a few lines of … testimony" about what her faith means to her and making an "extremely limited evidentiary showing." *Id.* The government likewise emphasizes the majority's doubts about the sincerity of LCpl Sterling's religious beliefs. *E.g.*, Opp.6,24-25. But the government cannot wish away the holding that now binds every member of the military. The CAAF did not reject LCpl Sterling's RFRA claim based on evidentiary insufficiency or the sincerity of her religious beliefs. Indeed, no decision at any level of these proceedings rested on such grounds. Nor did the CAAF's decision rest on any other factbound holding. Rather, the majority based its decision on LCpl Sterling's failure to satisfy a demanding test for showing a substantial burden on religious exercise that is flatly inconsistent with RFRA.

There is simply no denying that the CAAF held that RFRA's substantial burden test requires an inquiry into the "subjective importance of the conduct to the person's religion." Pet.App.21; *see also* Pet.App.43 (Ohlson, J., dissenting) (criticizing majority for "creat[ing] a requirement that the religious conduct must be 'important' to the servicemember's faith in order to merit protection under RFRA"). Indeed, just a page after emphasizing that the CAAF foreswore any inquiry into centrality, Opp.15, the government is forced to concede that the CAAF "held that petitioner's claim failed because she did not 'provide evidence indicating an honest belief that "the practice was important to her free exercise

of religion."'" Opp.16 (quoting Pet.App.25). But both RFRA and this Court's precedents no more allow an inquiry into importance than they allow an inquiry into centrality. *See* Pet.24-26 (collecting cases). Both inquiries equally take secular courts to places they may not go. And the CAAF's holding was not about either sincerity or case-specific evidentiary sufficiency. To be sure, LCpl Sterling was faulted for providing insufficient evidence of the subjective importance of the burdened practice to her religious exercise. But RFRA imposes no evidentiary burden whatsoever to show subjective importance. To the contrary, a statute that expressly forecloses an inquiry into the centrality of the religious practice at issue does not permit, let alone require, an essentially equivalent inquiry into the "subjective importance of the conduct to the person's religion." Pet.App.21. But every service member in the Nation must now shoulder that burden. That is reason enough for this Court's review.

But the problems with the majority decision do not end there. The CAAF's subjective importance test comes perilously close to limiting RFRA to practices that are compelled by the adherent's faith, *see* Pet.App.46-47 (Ohlson, J., dissenting), which would contradict RFRA's clear text, *see* 42 U.S.C. §2000cc-5(7)(A) ("'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). The best the government can do in defending this aspect of the decision is to suggest that the CAAF did not find a showing of compulsion necessary, but simply held that "it would have been *sufficient*" for LCpl Sterling to show interference with religiously compelled

conduct, and that ultimately her claim failed because she did not demonstrate the "importance" of posting Biblical quotations to her faith. Opp.15-16. But that response only underscores the conflict between the decision below and the statute Congress passed. RFRA renders the question whether a practice is central to or compelled by faith categorically irrelevant. That is what "whether or not" means. Thus, a decision that renders compulsion sufficient, but not necessary, is at least half wrong. And when the only other way for the adherent to satisfy its burden is to show that the practice, while not compelled, is subjectively important (one might just as well say central), then the decision is entirely inconsistent with the statute. Put differently, the very fact that the government concedes that one way to satisfy the CAAF's subjective importance test is to show something RFRA deems irrelevant—namely, compulsion—demonstrates that the test is fundamentally at odds with RFRA.

II. The Question Presented Implicates A Well-Developed Circuit Split.

The government's insistence that the circuits are not divided over the circumstances that give rise to substantial burdens is at odds with *both* the majority and the dissent below. Whether one favors the understatement of the majority—"not precise conformity," Pet.App.20 n.5—or the dissent's "a distinct split among the federal circuit courts," Pet.App.38 n.5, the existence of a sharp divide is undeniable.

While picking away at the margins, the government makes no real effort to deny or defend

the forced-choice/compulsion standard employed by the minority of circuits. Nor could it, as the minority decisions speak for themselves with unusual directness. The government, for instance, does not acknowledge—much less defend—the Ninth Circuit's holding that "a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit ... or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) (emphasis added). This was no mere rhetorical flourish on the part of the divided en banc court, which left no room for doubt that "only" means "only": "Any burden imposed on the exercise of religion short of that described [above] is not a 'substantial burden.'" *Id.* The government's failure to defend *Navajo Nation* before this Court is telling since the decision was a centerpiece of its argument to the CAAF. *See* p.9, *infra.*

Confronted with such unmistakable holdings, the government simply changes the subject to facts and statements of peripheral importance. For instance, the government highlights *Navajo Nation*'s statement that the government action there was "offensive to the [p]laintiff's religious sensibilities." Opp.22 (alteration in original). True enough, but that observation had little to do with the court's holding or its explication of the legal standard for determining what constitutes a substantial burden.

The government suggests that the divide of authority could be ameliorated by looking to RFRA's

legislative history and "pre-*Smith* decisions." Opp.11, 22 n.4. But that explains rather than minimizes the split. Before *Smith*, this Court identified substantial burdens only in the unemployment compensation context (*e.g.*, *Sherbert*) and in *Yoder*. Those cases involved dilemmas, and some lower courts have mistakenly identified such dilemmas as a *sine qua non* for substantial burdens. Other courts have recognized that the pre-*Smith* decisions provide helpful exemplars of substantial burdens without exhausting the possible forms that substantial burdens can take. And, of course, all of this confusion stems from the absence of any statutory definition of substantial burden, a fact that has not gone unnoticed by lower courts. *E.g.*, *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (noting no "express definition of the term 'substantial burden'"); *see also Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013) ("The Supreme Court has never provided a working definition of 'substantial burden.'"). A quarter-century of doctrinal development has led the circuits down very different avenues in their understanding of what constitutes a substantial burden under RFRA.

Unable or unwilling to defend the minority stance among the circuits, the government's principal contention is that this case does not implicate the identified circuit split. Opp.18-20. But that argument is premised on the same *post hoc* recharacterization of the majority's decision that the government employs in defending the merits—that the CAAF did not actually "limit RFRA to conduct that is religiously compelled or to burdens that take

the form of dilemmas rather than direct prohibitions." Opp.18. That simply ignores that the CAAF demanded that LCpl Sterling demonstrate the subjective importance of posting the Biblical quotations to her religion. Pet.App.21-25. And when she failed to convince the court that the postings were important or compelled, as opposed to just a comforting aspect of her religious practice, the CAAF found no substantial burden because there was no compulsion of action her religion forbade and no forced choice between the dictates of her religion and commanding officer. Pet.App.22-24. In short, contrary to the government's suggestion, Opp.16-18, LCpl Sterling's claim of a substantial burden failed because she failed to convince the CAAF she faced a real dilemma, as opposed to showing—as other circuits allow—that the government "prevent[ed] participation in conduct motivated by a sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).[1]

The dissent, for one, had no problem recognizing that the "majority takes the position … that a claimed burden must be based on an affirmative violation of one's religion in order to qualify as 'substantial.'" Pet.App.46. And it further recognized that the majority had effectively declared a dilemma necessary, rather than simply sufficient, to establish

[1] Notwithstanding the government's contention, the circuits have consistently distinguished direct prohibitions from dilemmas. *See, e.g.*, *Abdulhaseeb*, 600 F.3d at 1315. Regardless, if the distinction truly is "illusory," Opp.17, that only underscores the need for granting review and repudiating the notion that a forced choice or compelled exercise is necessary for a substantial burden.

a substantial burden. Pet.App.47. Indeed, that is precisely the result that the government sought. Before the CAAF, the government repeatedly pressed *Navajo Nation*'s cramped theory that "[a]ny burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder*"—classic dilemma cases—"is not a 'substantial burden.'" Appellee's C.A.Br. 46; *see also id.* at 25, 33. The CAAF then cited *Navajo Nation* prominently in concluding that no substantial burden exists unless the government "force[s] the claimant to act contrary to her beliefs." Pet.App.23.

That position not only implicates a circuit split but threatens a broad swath of religious exercise that RFRA expressly seeks to protect. Many religious exercises—from attending daily Masses for Catholics to wearing the *kara*, or steel bangle, for Sikhs—are not compelled. *See* Kalsi Br.19-20. Indeed, the extent to which religious practices are compelled as opposed to commended is itself an issue on which different religions have very different views. For instance, the Biblical proscription against eating "th[e] flesh" of "the swine," *Deuteronomy* 14:8 (King James), may be viewed as obligatory in Orthodox Judaism but hortatory in Reform Judaism. Many a schism has been precipitated over the question whether a particular practice or belief is compelled or commended, central, or marginal.

For these reasons, RFRA renders all such disputes irrelevant. To show a substantial burden, an adherent does not have to demonstrate that the practice is central, compelled, or subjectively important. And when a religious exercise is

forbidden by a direct order backed by the threat of court-martial, the question whether there is a substantial burden should not be close. The CAAF reached a different conclusion only through reasoning that is categorically forbidden by RFRA and implicates a deep circuit split.

III. There Are No Vehicle Issues Preventing Review Of This Significant Case.

Unable to deny the national importance of the proper test for identifying substantial burdens, the government claims that this case "would not be an appropriate vehicle" for considering it. Opp.23. The government is incorrect.

The government first suggests that the "additional salient fact[]" that LCpl Sterling did not initially seek an accommodation for her religious exercise precludes review because LCpl Sterling's question presented "does not encompass that additional basis for the CAAF's decision." Opp.23-24. But the question presented does not encompass an exhaustion issue for the simple reason that the CAAF's decision did not encompass an exhaustion holding. The CAAF mentioned the accommodation procedure but did not remotely suggest that a failure to invoke that procedure was an alternative basis for rejecting LCpl Sterling's RFRA claim. To the contrary, the CAAF afforded the accommodation procedure all the significance of an "additional salient fact." The CAAF's failure to invoke exhaustion as an alternative holding was understandable in light of the unexplored issues of how that procedure should have worked here and how the military trial court should have addressed

that issue in the context of a self-represented defendant. But in all events, even if the CAAF could have rested its decision on exhaustion grounds, it did not, and as a result every member of the armed forces is stuck with a precedential decision that imposes an incorrect and unduly demanding test for vindicating religious liberty.

In a similar vein, the government contends that the CAAF "strongly suggested that it would have rejected [LCpl Sterling's] RFRA challenge on the alternative ground that she failed to demonstrate that her actions were a sincere exercise of religion." Opp.24. But, once again, the CAAF did not embrace any such alternative holding. To the contrary, it conceded that it was "beyond [its] purview" to determine whether LCpl Sterling's conduct was "based on a sincerely held religious belief." Pet.App.19. Regardless, even if the CAAF could have issued a factbound decision limited to the sincerity of one Marine's religious beliefs, it did not. It instead issued a precedential decision diminishing the rights of every member of the armed forces.

The government last argues that even if LCpl Sterling prevails on her RFRA claim, she "likely" would not receive a different sentence. Opp.25. But as the government acknowledges, LCpl Sterling received a general sentence, so it is impossible to know what her sentence would have been absent her conviction on the two (of six total) specifications regarding the Biblical quotations. *Cf. United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Furthermore, one can request a sentence ending one's "association with" the Marines, Opp.25, without

that sentence being a *bad-conduct* discharge (as LCpl Sterling received), which has adverse consequences for a service member long after separation from the military.

Finally, it bears emphasis that this Court's review is critical because the CAAF's discretionary jurisdiction, combined with the limits on this Court's jurisdiction to review decisions arising in the military courts, *see* 28 U.S.C. §1259; *Matias v. United States*, 923 F.2d 821, 824 (Fed. Cir. 1990), means that the misguided decision below will remain "frozen in place" absent intervention, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 556 (2014). This is not a context where this Court can bide its time and wait for the perfect vehicle. The government suggests that this case is "atypical," Opp.26, but the fact remains that the CAAF has used this case not to address LCpl's Sterling's sincerity, or the adequacy of her exhaustion efforts, but to announce a rule that adversely affects every service member, with no reason to revisit the issue in the future. And given the vagaries of this Court's jurisdiction over cases arising from military courts and the discretionary nature of the CAAF's review, there will be no better vehicle to correct the CAAF's far-reaching and misguided holding.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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