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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR TEXAS, ARIZONA, ARKANSAS, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Arizona, Arkansas, Kansas, Louisiana, Michigan, Missouri, Nevada, Ohio, Oklahoma, South Carolina, Tennessee, Utah, and West Virginia.[1] Petitioner Lance Corporal (LCpl) Sterling, a Christian, was ordered not to post copies of a paraphrased Bible verse on her desk at work. Although members of the armed forces are subject to rules of military discipline, they also live as members of a broader community, including as citizens of the amici States. Their ability to practice their faiths affects their lives

[1] Counsel of record for the parties received timely notice of intent to file this amicus brief. *See* Sup. Ct. R. 37.2(a). Leave to file this brief is not required. *See* Sup. Ct. R. 37.4.

and their interactions with other members of their communities within the amici States, and the amici States have an interest in defending the dignity of religious exercise. That interest is reflected in the States' own constitutional provisions and "state RFRAs,"[2] the implementation of which provides a useful perspective on the federal Religious Freedom Restoration Act (RFRA).

SUMMARY OF ARGUMENT

The court below erred in refusing to apply the strict scrutiny dictated by RFRA, as it held that LCpl Sterling's religious exercise was insufficiently "importan[t]" to her faith. Pet. App. 21. That holding adopts the view of a minority of circuits that RFRA scrutiny is triggered only if the government forces individuals "to engage in conduct that their religion forbids or ... prevents them from engaging in conduct their religion requires." Pet. App. 21 (quoting *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)).

This cramped reading of RFRA contravenes the statute's express protection for a broad swath of faith-based activities, whether or not those activities are

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[2] Twenty-one States statutorily protect religious liberty from government intrusion under general laws often called state RFRAs. *See infra* Appendix (citations). Other States have constitutional protections that go beyond rights recognized under the First Amendment's Free Exercise Clause. *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

compelled by, or central to, the tenets of a faith. Furthermore, the question presented raises just the narrow and basic issue whether RFRA's strict scrutiny even applies to a complete prohibition on petitioner's conduct. If left to stand, the ruling of the court below threatens the statutorily guaranteed religious liberties of all service members. The Court should grant the petition and reject the lower court's misinterpretation of RFRA.

ARGUMENT

I. RFRA's Applicability Does Not Require Assessing the Importance of a Given Religious Exercise.

The court of appeals' narrow reading of RFRA does not properly account for its text and design, federal cases interpreting it, or state cases interpreting analogous state RFRAs.

RFRA imposes strict scrutiny over all actions of the federal government that "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). The term "exercise of religion" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* §§ 2000bb-2(4), 2000cc-5(7). Congress further commanded that this definition "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." *Id.* § 2000cc-3(g).[3]

[3] Even under the First Amendment, a practice may be protected religious exercise so long as it is "rooted in religion"

Although the term "substantially burden" is not defined, legislative context instructs that "conduct does not have to be compelled by religion" to be substantially burdened. Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 151 (1995). For instance, one situation raised during the legislative debate over RFRA was an architectural board telling religious adherents that they could not arrange a chapel altar as they saw fit. *Id.* at 151-52. Although the adherents were not religiously compelled to have their altar in any particular place, such an exercise of government authority was one of the "bad examples" that RFRA was crafted to prevent. *Id.* at 152. These and other examples raised during RFRA's debate confirm that "religious exercise is substantially burdened if religious institutions or religiously motivated conduct is burdened, penalized, or discouraged"; the religious exercise need not be a religion's central tenet or compelled by religion. *Id.*

Most federal circuits have adopted this view in defining the substantial-burden standard.[4] State RFRAs

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and not "purely secular." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989).

[4] *See, e.g.*, *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013); *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749-50 (8th Cir. 2014); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *Wilkinson v. Sec'y, Fla. Dep't of Corr.*, 622 F. App'x 805, 815 (11th Cir. 2015); *see also* Pet. 17-22.

also reflect this accepted approach. For example, Texas's RFRA statute provides: "it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). The Oklahoma Religious Freedom Act requires strict scrutiny for all government actions that "inhibit or curtail religiously motivated practice." Okla. Stat. tit. 51, § 252(7). Similarly, the Tennessee RFRA statute defines a strict-scrutiny-triggering "substantial burden" on a person's free exercise of religion as government action that "inhibit[s] or curtail[s] religiously motivated practice." Tenn. Code § 4-1-407(a)(7), (b).

Most state RFRAs define the scope of conduct protected from a substantial burden simply by reference to whether it has a religious motivation, as opposed to an inquiry whether that conduct is a religious "precept" or a "tenet or practice of her faith," Pet. App. 24-25 (CAAF opinion). *See, e.g.*, Fla. Stat. § 761.02; *see also* Idaho Code § 73-401; 775 Ill. Comp. Stat. 35/5; Kan. Stat. § 60-5302; La. Stat. § 13:5234; Mo. Rev. Stat. § 1.302; N.M. Stat. § 28-22-2. Provisions like these would be unnecessary if the States believed substantial burdens could arise only when an individual is coerced to change her religious beliefs or violate a tenet of faith. And because state and federal RFRAs "were all enacted in response to [*Employment Division v. Smith*, 494 U.S. 872 (1990),] and were animated in their common history, language and purpose by the same spirit of religious freedom," it is useful to consider the contemporaneously enacted state RFRAs. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258-

59 (5th Cir. 2010) (quoting *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009)).

II. The Court Below Wrongly Inquired into the Religious Importance of an Exercise of Religion.

The court of appeals stated that it would "assume arguendo" that petitioner's posting of a Bible verse was an exercise of religion within the meaning of RFRA. Pet. App. 19. That correct conclusion leaves only one question to determine RFRA's applicability: whether government activity "substantially burdens" that exercise of religion. 42 U.S.C. § 2000bb-1(a).

In conducting that inquiry, the court of appeals reasoned that the religious exercise at issue was not "substantially burdened"—despite being flatly prohibited—because the religious exercise was, in the court's view, not shown to be "important" enough to petitioner's religion. Pet. App. 24. The court based that conclusion on its view that having the Bible verse at petitioner's desk was not a "precept of her religion," a "tenet or practice of her faith," or a "practice or principle important to her faith." Pet. App. 24, 25.

The court of appeals' test—one turning on the degree of religious significance—effectively imposes a limit on the types of religious exercise covered by RFRA. The statute, however, expressly covers religious exercise regardless of whether it is compelled by, or central to, a particular religion. 42 U.S.C. § 2000bb-2(4) (adopting definition in 42 U.S.C. § 2000cc-5(7) of "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). It is improper to bring that prohibited centrality test into RFRA through the backdoor of its "sub-

stantial burden" test. Once any exercise of religion is implicated—regardless of its religious centrality—a "religious exercise" as defined in RFRA exists and the RFRA threshold test then asks only whether the government has *substantially* burdened that religious exercise. *Id.* § 2000bb-1(a).

RFRA's substantial-burden inquiry, therefore, turns on the degree of penalty imposed by government—not the degree of religious significance of an exercise of religion. The court of appeals erred in departing from this prevalent understanding that the substantiality of a burden is based on the severity of the imposition on protected conduct, not on the perceived importance of the conduct. *See supra* pp. 3-6; *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 230 (1994) ("[I]f an exercise of religion is prohibited, penalized, discriminated against, or made the basis for a loss of entitlements, courts should find a substantial burden.").

A substantial-burden test that depends on adjudicating the importance to a belief system of a certain type of religious exercise would be problematic for a number of reasons. Most importantly, it would require judges to wade into the murky waters of determining the importance of certain conduct to a belief system—which could require theological judgments that this Court has long forbidden: "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." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).[5]

For example, the Bible passage here was significant to petitioner because she believes in the absolute truth of the Bible, which gave her assurance that "no weapon formed against [her] shall prosper." *Isaiah* 54:17. Petitioner testified that her postings were "[B]ible scripture [of] a religious nature," "invoked the Trinity," and "fortified her against those who were picking on her." Pet. App. 16. In other words, petitioner posted a Bible verse in response to stress at work. Petitioner's statutory protection from a government ban on that religious activity should not turn on whether a court finds the activity required by or merely an outgrowth of her faith.

Furthermore, with hundreds of religions practiced in the Nation, telling what is "important" (Pet. App. 21, 24) for a particular adherent's faith not only would threaten impermissible theological judgments but would be difficult and almost certainly produce inconsistent results across similar cases. A statutory interpretation that in practice protects only religious exercise in conformity with religious mandates that are easi-

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[5] Well before RFRA, the Court stated that people "may not be put to the proof of their religious doctrines or beliefs." *United States v. Ballard*, 322 U.S. 78, 86 (1944). "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see also United States v. Seeger*, 380 U.S. 163, 185 (1965) (the relevant First Amendment inquiry is "whether the beliefs professed . . . are sincerely held and whether they are, in [the claimant's] own scheme of things, religious").

ly ascertained would favor some types of religious belief over others.

Absent evidence that a person's beliefs are, for example, "purely secular," *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), or are "obviously shams and absurdities . . . devoid of religious sincerity," *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974), courts should not embark on an attempt to pronounce the centrality, importance, or significance of a religiously motivated practice in a person's faith. Yet the court of appeals' interpretation of RFRA draws courts into this forbidden territory.[6]

III. The Reasoning Below Misunderstands First Amendment Case Law and Creates Inconsistency in How Individual Rights Are Protected.

The lower court's analysis also improperly drew on pre-RFRA First Amendment case law. That case law may reflect the minimum extent of protection for reli-

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[6] Experience from at least one state court also illustrates the problems with such an approach. The Texas Supreme Court considered the proper interpretation of the substantial-burden test and concluded that the so-called "centrality or compulsion test" is problematic because it "may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion." *City of Sinton*, 295 S.W.3d at 301. The Texas Supreme Court also determined that such a test would be "inconsistent with the statutory directive that religious conduct be determined without regard for whether the actor's motivation is 'a central part or central requirement of the person's sincere religious belief.'" *Id.*

gious exercise under RFRA, but it is not a ceiling. RFRA was designed to have a broader sweep.

A. The court of appeals' holding was based in part on pre-RFRA case law interpreting the First Amendment. Some of those cases suggested that a litigant's activity could not be substantially burdened if she was not required to violate a tenet of her faith—either by being compelled by the government to do something religiously forbidden, or prohibited from doing an act that was religiously required. Pet. App. 23.[7]

But RFRA was enacted to expand the degree of protection beyond the First Amendment baseline. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014) (rejecting the notion that "RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents"); *see also Holt v. Hobbs*, 135 S. Ct.

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[7] For instance, the court below relied on *Sherbert v. Verner*, 374 U.S. 398 (1963), for the proposition that tearing down petitioner's Bible verse postings did not "cause her to 'abandon[] one of the precepts of her religion.'" Pet. App. 24 (quoting *Sherbert*, 374 U.S. at 404); *see also* Pet. App. 23 (distinguishing petitioner's conduct from that in *Yoder*, 406 U.S. at 218). The court similarly relied on *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), for the proposition that "a government practice that offends religious sensibilities but does not force the claimant to act contrary to her beliefs does not constitute a substantial burden." Pet. App. 23. *Navajo Nation*, too, drew from pre-RFRA First Amendment case law that a substantial burden does not arise unless government coerces conduct that is religiously prohibited. 535 F.3d at 1069 (stating that "the cases that RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*— . . . control the 'substantial burden' inquiry").

853, 862 (2015) (warning against "improperly import[ing] a strand of reasoning from cases involving [] First Amendment rights" into RFRA cases).[8] Thus, as a matter of first principles, First Amendment interpretations should not be treated as a limit on RFRA's broader reach.

B. In any event, the court of appeals misunderstood First Amendment precedent in concluding that the substantial-burden inquiry hinges on whether the government has coerced action that violates an adherent's faith. Pet. App. 22-23. To the contrary, this Court cautioned in *Smith* that "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." 494 U.S. at 886–87. A substantial-burden test that asks whether the government requires individuals to violate important or central religious beliefs is as inappropriate under the First Amendment as it is under RFRA.

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[8] Contemporaneously, many States enacted their own RFRAs to provide greater protection for religious freedom. Since *Smith*, twenty-one States have passed a state-level RFRA equivalent and courts in eleven other States have interpreted state-constitution provisions to provide religious protections greater than the protections of the First Amendment's Free Exercise Clause. *See infra* Appendix; Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, Volokh Conspiracy (Dec. 2, 2013), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act.

The court of appeals also appeared to draw erroneously on Establishment Clause concepts. The Establishment Clause at a minimum "guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The Establishment Clause, however, guards against government sponsorship of religious activity, which creates the "potential for divisiveness" in a religiously plural society. *Id.* RFRA's substantial-burden threshold test, on the other hand, protects individual liberty and is not designed to avoid religion's potential divisiveness.

C. The court of appeals' substantial-burden test would result in treating the individual right to free exercise of religion differently from other individual rights protected by law. For other individual rights, courts determine whether the right has been violated by analyzing the extent of the burden imposed by the government—not the significance to the individual of exercising the right.

For instance, in the free speech context, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Laws that "target speech based on its communicative content" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* Courts do not examine why an individual wishes to engage in the disputed speech. And a First

Amendment challenge to government-compelled speech does not require showing the degree to which the compelled speech is contrary to the speech (or silence) that an individual wishes to express.

Similarly, the freedom of expressive association "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Insisting that an organization embrace unwelcome members . . . 'directly and immediately affects associational rights.'" *Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 680 (2010) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)). Such laws are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced through "significantly less restrictive [means]." *Roberts*, 468 U.S. at 623. That test does not evaluate individuals' subjective reasons for avoiding the coerced association, or the importance to a group of refusing a particular association. Rather, the burden test simply evaluates the degree of infringement imposed by the government on the protected freedom to associate. *Id.* at 622-23 (noting that "actions that may unconstitutionally infringe upon this freedom can take a number of forms" and that direct penalties are such a scrutiny-triggering burden).

The court of appeals treated petitioner's religiously motivated conduct as based on a sincerely held religious belief, qualifying it as an "exercise of religion" under RFRA. Pet. App. 16, 19. And the court understood that the government here had prohibited that conduct. Pet. App. 4, 6. No more is required to establish a substantial

burden on that exercise of religion. As this Court's decision in *Hobby Lobby* illustrates, it is the severity of the government's penalty—not the centrality or importance of the penalized religious exercise—that must define RFRA's substantial-burden inquiry. *See* 134 S. Ct. at 2775.

* * *

This case is an excellent vehicle to reject the holding that a RFRA substantial burden does not exist unless a religious practice is so subjectively important that its prohibition puts the defendant to a dilemma of faith. Pet. App. 21, 24. As the petition notes, whether this case clears RFRA's substantial-burden threshold is outcome-dispositive under the court of appeals' analysis and is squarely before the Court after the government litigated and won on that issue below. Pet. 34-35. Plus, the Court's review of a complete prohibition on petitioner's conduct does not require any difficult line drawing about what qualifies as a substantial burden.

In addition, the type of conduct for which petitioner was punished is important to the religious experience of a multitude of service members and civilians. To be sure, certain circumstances may call for restriction of religious practice in the workplace if RFRA's strict scrutiny is satisfied. But it is unacceptable under RFRA for the government's flat prohibition on a common form of religious activity to face no scrutiny at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

"State RFRA" Provisions

- Alabama: Ala. Const. art. I, § 3.01
- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: Ark. Code §§ 16-123-401 *et seq.*
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. §§ 761.01 *et seq.*
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. 35/1 *et seq.*
- Indiana: Ind. Code §§ 34-13-9-0.7 *et seq.*
- Kansas: Kan. Stat. §§ 60-5301 *et seq.*
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Stat. §§ 13:5231 *et seq.*
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. §§ 28-22-1 *et seq.*
- Oklahoma: Okla. Stat. tit. 51, §§ 251 *et seq.*
- Pennsylvania: 71 Pa. Cons. Stat. § 2403
- Rhode Island: R.I. Gen. Laws §§ 42-80.1-1 *et seq.*
- South Carolina: S.C. Code §§ 1-32-10 *et seq.*
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code §§ 110.001 *et seq.*
- Virginia: Va. Code §§ 57-1 *et seq.*