No. 08-846

IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* RELIGIOUS LIBERTY LAW SCHOLARS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE* [1]

Religious liberty law scholars Thomas C. Berg, Alan E. Brownstein, Kristen A. Carpenter, Perry Dane, Carl H. Esbeck, Richard W. Garnett, José Roberto Juárez, Jr., Kenneth L. Karst, Michael J. Perry, and Steven D. Smith submit this brief as *amici curiae* in support of the petition for a writ of certiorari in this case. *Amici* have studied and written extensively about the exercise of religion under the law in the United States, with particular attention to religious liberty under the religion clauses of the First Amendment and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 *et seq.* Specifically,

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1. Counsel of record for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to filing, and the parties' written consent to the submission of this brief has been filed with the Clerk of Court. 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.

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REASON FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S INTERPRETATION OF "SUBSTANTIAL BURDEN" EXACERBATES THE FAILURE OF THE FEDERAL CIRCUIT COURTS TO REALIZE CONGRESS'S INTENT IN ADOPTING RFRA AND RLUIPA.

I. Congress Enacted RFRA and RLUIPA to Ensure That Courts Broadly Require the Government to Justify Burdens on Religious Exercise.

In its watershed decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Constitution does not require the government to offer a compelling interest for the burden placed on a religious practice by a generally applicable criminal law. Two individuals who had been fired from their jobs for ingesting peyote for sacramental purposes were denied unemployment benefits by the State of Oregon on the ground that the consumption of peyote was prohibited under generally applicable criminal law. This Court refused to require the State to show a compelling governmental interest for applying the general criminal prohibition to those who used peyote for religious purposes, and upheld both the state law and the denial of benefits. *Id.* at 883-90. At the same time, the Court made it clear that legislative accommodations of religion, including exemptions from generally applicable laws, are consistent with our traditions and with the First Amendment. *Id.* at 890.

Finding that this Court had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," Congress responded to *Smith* by enacting RFRA. 42 U.S.C. § 2000bb(a)(4). It "restore[d] the compelling interest test," *id.* § 2000bb(b)(2), because "governments should not substantially burden religious exercise without compelling justification," *id.* § 2000bb(a)(3). *See also* S. Rep. No. 103-111, at 2, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900 (1993) (*hereinafter S. Rep.*) ("[RFRA] responds to the Supreme Court's decision in [*Smith*] by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling government interest.").

Thus, RFRA's purpose was to implement Congress's desire that courts would require the government to justify "substantial burdens" on religious exercise. Although Congress left to the courts the task of balancing religious liberties against the government's "compelling" justification, it made clear in the statute that RFRA was to "guarantee . . . application [of the test] in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Indeed, when this Court invalidated the statute as applied to the states, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress responded by enacting RLUIPA to reimpose the restrictions of RFRA on state and local prisons and state and municipal land-use regulations. *See Cutter v. Wilkinson*, 544 U.S. 709, 717

(2005) (noting that in enacting RLUIPA "Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard"). The legislative history of RFRA reflects that Congress had been particularly concerned about government interference with religious exercise in prisons and in the land use context. *See S. Rep.* at 8-10.

In sum, because "all Americans are free to follow their faiths free from governmental interference," *S. Rep.* at 8 (1993), Congress created in RFRA (and later RLUIPA[2]) a broadly applicable "claim and defense" so that courts, unlike in *Smith*, would at a minimum require the government to justify any substantial interference. 42 U.S.C. § 2000bb(b)(3). What constitutes such substantial interference, however, is understandably a difficult threshold question. And as a result, despite Congress's clear desire that courts broadly require the government at least to explain an intrusion on religious exercise, the federal appellate courts have failed to do so consistently, as described below. The Ninth Circuit has now exacerbated that circuit split by adopting the narrowest interpretation of "substantial burden"—one that may very well exempt from scrutiny under RFRA and RLUIPA the types of government action expressly contemplated by Congress

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2. That Congress intended RFRA and RLUIPA to be similarly interpreted is further evidenced by its harmonization of the definitions of "religious exercise" in the two statutes. *See* Pub. L. 106-274, § 7(a)(3), 114 Stat. 803, 807 (2000) (amending the definition in RFRA, 42 U.S.C. § 2000bb-2(4), to track that in RLUIPA, 42 U.S.C. § 2000cc-5, so as to cover the exercise of religion "whether or not compelled by, or central to, a system of religious belief").

in enacting the statutes. This Court should seize this opportunity to resolve the confusion surrounding the statutes and enforce the "substantial burden" test as Congress intended.

II. The Federal Circuits Have Been Inconsistent and Restrictive in Requiring the Government, Under RFRA and RLUIPA, to Justify Burdens on Religious Exercise.

As the Petitioners explain, the circuit courts have adopted a wide range of views on the threshold question of "substantial burden." Pet. 12-20. On one end of the spectrum, the Fourth and D.C. Circuits take a narrow view of "substantial burden" and thus significantly limit the circumstances under which the government must offer a justification for its interference with religious practice. The Fourth Circuit, for instance, has required that claimants under RFRA have "been compelled to engage in conduct proscribed by their religious beliefs, [or] have . . . been forced to abstain from . . . action which their religion mandates that they take." *Goodall* v. *Stafford County School Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *see also Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), *cert. denied sub nom. Henderson v. Mainella*, 535 U.S. 986 (2002) (same) (citing *Goodall*).

In contrast, the Tenth and Eighth Circuits have taken a much broader approach to "substantial burden." *See Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 2005), *cert. denied*, 515 U.S. 1166 (1995); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1997), *vacated on other grounds sub nom. Christians v. Evangelical Free*

Church, 521 U.S. 1114 (1997) (citing *Werner*). Notably, as the Eighth Circuit has explained, their standard does not look to whether individuals "can continue" to engage in a religious practice, but merely to whether the governmental action in question "meaningfully curtails . . . a religious practice of more than minimal significance in a way that is not merely incidental." *Young*, 82 F.3d at 1418-19.

Between these two views of "substantial burden" lie four other circuits that have adopted various intermediate positions. The Seventh Circuit, for example, has held that "a regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004); *see also Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005); *Washington v. Klem*, 497 F.3d 272, 280 n.7 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005).

Although the question of "substantial burden" is admittedly challenging, the federal appellate courts have failed to realize Congress's intent in enacting RFRA and RLUIPA. Congress acted precisely to counter the reluctance of federal courts to scrutinize government action, not to create a further lack of clarity over whether and when they should do so. As the legislative history indicates, RFRA was to "establish *one standard* for testing claims of Government infringement on religious practices." *S. Rep.* at 8 (emphasis added).

III. The Ninth Circuit's Decision Exacerbates the Failure of the Federal Circuit Courts to Realize Congress's Intent.

The Ninth Circuit has adopted the narrowest interpretation of "substantial burden." It holds that "a 'substantial burden' is imposed *only* when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by threat of criminal or civil sanctions." Pet. App. 20a (emphasis added). This definition resembles the narrow view of the Fourth and D.C. Circuits and is, by the Ninth Circuit's own admission, more limiting than the plain meaning of the phrase contemplates. *Id.* at 29a-30a.

The Ninth Circuit's decision exacerbates the existing failure of the federal appellate courts to realize Congress's intent in enacting RFRA and RLUIPA. It adds another voice to those courts most significantly out of line with Congress's desire to counter the reluctance of federal courts to scrutinize government action. Indeed, as discussed below, the Ninth Circuit's definition of "substantial burden" could exclude from the scope of RFRA and RLUIPA many of the circumstances expressly contemplated by Congress in enacting the statutes, as well as a number of situations in which the government should be required at least to justify its actions.

Importantly, *amici* reflect a range of views on the proper scope of constitutional protection of free exercise and the merits of *Smith*. But the question here is that of Congress's intent and of the relevant statutory text

in enacting RFRA and RLUIPA, and it is clear that the Ninth Circuit's decision so further distorts the landscape that action by this Court is needed. It is time for this Court to step in, as it did recently in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), and ensure that Congress's clear intent is realized.

A. The Ninth Circuit's Definition of "Substantial Burden" Could Exclude Cases Plainly Contemplated by Congress in Enacting RFRA and RLUIPA.

Many of the very situations that Congress intended to include within the statutes' reach may not meet the Ninth Circuit's definition of "substantial burden." These instances of governmental interference with religious practice are not likely to (1) force individuals to choose between following the tenets of their religion and receiving a governmental benefit, or (2) coerce individuals to act contrary to their religious beliefs by threat of criminal or civil sanctions.

1. *Religious Objections to Autopsies.* In some faith traditions, the performance of an autopsy violates the sanctity of the body. For example, "[t]he Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 226 (1993).

In enacting RFRA, Congress noted that, after *Smith*, courts were regularly rejecting religious objections to the performance of autopsies. *See S. Rep.*

at 8 ("Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. . . . Jews have been subjected to autopsies in violation of their families' faith."); *see also, e.g., Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990). It stands to reason that Congress intended for government-mandated autopsies to constitute a "substantial burden" on religious practices under RFRA.

Individuals with religious objections to government-mandated autopsies, however, likely would not satisfy the Ninth Circuit's definition of "substantial burden." An autopsy is frequently a matter of "bureaucratic inflexibility," Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. at 226, required without the slightest thought to a decedent's religious sensibilities. *See, e.g., Yang v. Sturner*, 728 F. Supp. 845, 846-847 (D.R.I. 1990) (describing state law providing for autopsies), *withdrawn by Yang*, 750 F. Supp. 558. Accordingly, submission to the state's decision to perform an autopsy is not a contingency upon which a governmental benefit is conditioned. The decedent's family will not receive a benefit for permitting the autopsy. Moreover, the government is not likely to coerce the decedent's family to permit an autopsy by threat of criminal or civil penalty. In all probability, it will simply reject any objection and perform the autopsy.

2. *Customs Seizure of Substances Used in Religious Ceremonies.* As this Court recently emphasized, "the very reason Congress enacted RFRA was to respond to [the] decision [in *Smith*] denying a claimed right to sacramental use of a controlled

substance." *O Centro*, 546 U.S. at 421. And consistent with this understanding of Congress's intent, this Court found against the government under RFRA in a case involving the seizure of *hoasca* tea from members of a Christian Spiritist sect that used the tea in sacramental services.

Under the Ninth Circuit's view of "substantial burden," however, the government could evade RFRA if it seized substances used in sacramental services without any threat of penalty, such as by customs seizure at the border. In those circumstances, the government would not have offered a choice between following the tenets of one's religion and the receipt of a governmental benefit; the customs agent would simply confiscate the goods and not provide any choice whatsoever. Nor would the affected individuals have been coerced by a threat of prosecution or civil penalty to act contrary to their religious practices. If the government simply seized a substance, the owner of the substance would not have been "coerced" to act in any way, much less in a way *contrary* to his or her religious beliefs.

3. *Religious Freedom in Prisons.* In enacting RFRA and RLUIPA, Congress was also highly cognizant of the need to protect the religious freedom of prisoners. RLUIPA, of course, was enacted specifically to reimpose the restrictions of RFRA on state and local prisons. In addition, the legislative history of RFRA refers specifically to several situations involving the religious liberty of prisoners. For example, a principal supporter of RFRA noted that the statute would allow for balancing a prisoner's "religious dietary needs" against the valid concerns of prison officials. 139 Cong. Rec.

26,407 (1993) (statement of Sen. Lieberman). And the Senate Report cites to *Cruz v. Beto*, 405 U.S. 319 (1972), a pre-Smith Supreme Court case in which this Court held that the denial of a Buddhist prisoner's right to use the prison chapel constituted a violation of the Free Exercise Clause. *See S. Rep.* at 9-10 nn. 21 & 22.

Congress's focus on prisoners' religious rights stems from the high likelihood that prison regulations will interfere with religious liberties. *See* 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen. Hatch & Sen. Kennedy) ("Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed."). Over the years, detention officials have flushed copies of the Qu'ran down the toilet, *see Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *rev'd*, 555 U.S. ___, 2008 WL 3910997 (2008), banned religious jewelry, such as crucifixes, *see Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), confiscated religious instruments, *see Brock v. Carroll*, 107 F.3d 241 (4th Cir. 1997), and forcibly imposed grooming standards, such as cutting the beard and sidelocks of a Hasidic Jew, *see Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001).

Again, the Ninth Circuit's new interpretation of "substantial burden" would likely exclude many of these very circumstances that Congress intended to be covered by RFRA and RLUIPA. In most circumstances, prison regulations do not present a religious inmate with the choice between fidelity to his religious convictions and a governmental benefit, nor is a prisoner usually coerced to act *contrary* to his religious beliefs under threat of a civil or criminal penalty. Rather, the inmate

is simply denied the right to practice his faith because the guards have confiscated his religious materials, denied him a special meal,[3] physically prevented him from worshipping in the prison chapel, or otherwise forcibly acted against or upon him.

4. *Restrictions on the Use of Land by Religious Groups.* It is also clear that Congress intended RFRA and RLUIPA to cover governmental interference with the use of land by religious organizations. The legislative history of RFRA specifically discusses the denial of zoning permits to construct churches in "commercial areas." *See S. Rep.* at 8. And as discussed above, RLUIPA was enacted precisely to reinstitute the restrictions of RFRA on state and municipal land-use regulations.

The problem with such denials is that they can effectively block a congregation from building a house of worship at all. As one commentator has explained,

> A right to locate a church in built-up residential neighborhoods is illusory for all but the tiniest congregations. Unless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses. But several adjacent lots never

3. Although the *en banc* majority asserted that the denial of a special meal would constitute a "substantial burden" under its definition, it is clear from the dissenting opinion that reasonable minds—and judges—can disagree on that point. *Compare* Pet. App. 37a-38a n.24 (*en banc* majority), *with id.* at 70a (*en banc* dissent).

> come on the market at the same time, and if they did, any church pursuing this strategy would likely provoke an angry reaction from the neighborhood. It is only in commercial zones that significant tracts of land are bought and sold with any frequency. This makes sense of the common zoning code provisions that permit churches only in residential neighborhoods. To exclude new churches from commercial zones goes far to exclude them from the city, while allowing them to locate as of right in residential neighborhoods goes far to fool uninformed judges into believing that a complaining church has ample opportunity to locate.

Douglas Laycock, *State RFRAs and Land Use Regulations*, 32 U.C. DAVIS L. REV. 755, 760-61 (1999) (footnotes omitted).

Indeed, the area of land use by religious organizations is particularly susceptible to governmental interference. For instance, New York City officials once blocked a church's efforts to replace its own building because the structure had been designated a landmark. *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 732 (1999) (citing *Rector, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 351-52 (2d Cir. 1990)). And a city's zoning policy once limited churches from providing hospitality and food to the homeless. *See Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1237-40 (E.D. Va. 1996).

Under the Ninth Circuit's "substantial burden" standard, however, these burdens on religious practice might not suffice to state a cognizable claim under RFRA or RLUIPA. Neither the denial of a zoning permit nor a government prohibition on certain land uses compels a choice between adherence to religious principles and the receipt of a government benefit. In such situations, the church or religious organization would not be presented with *any* choice. Furthermore, the church or religious organization would not be coerced to act contrary to its religious tenets by a threat of civil or criminal penalties. It is not clear that there would be any threats at all and, to the extent that they would be threatened by penalties, in none of these circumstances would the churches or religious organizations be coerced to act *contrary* to their religious tenets.

B. Under the Ninth Circuit's Definition of "Substantial Burden," the Government Could Escape Scrutiny in a Number of Troubling Cases.

Beyond the cases specifically contemplated by Congress, the Ninth Circuit's view of "substantial burden" could also exclude a number of situations in which the government should be required at a minimum to provide an explanation for its actions.

1. *Compelled Medical Treatment.* Religious beliefs concerning the treatment of the body are often amongst the most important of religious tenets and can frequently come into conflict with standard medical treatments. Courts have encountered situations where children or incapacitated adults have been given blood transfusions

or vaccines despite religious proscription. *See, e.g., John F. Kennedy Mem'l Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971), *overruled by In re Conroy*, 486 A.2d 1209 (N.J. 1985) (upholding hospital's actions where an unconscious Jehovah's Witness was provided a blood transfusion notwithstanding her wearing a card indicating that as a matter of religious principle she did not want to receive blood transfusions).

While there may be a compelling governmental justification for these actions, the Ninth Circuit view of "substantial burden" would never require the government to offer such a justification. Neither the individual subjected to the medical treatment nor the individual's family would be presented with a choice between his or their religious tenets and a governmental benefit. In cases of compelled medical treatment, no choice would be provided. Moreover, the government would not be coercing the individual to act contrary to his religious beliefs on a threat of civil or criminal penalty, as there would be no threatened penalty.

2. *Certain Government Intrusions into Places and Means of Worship.* In some circumstances, by intruding into the places and means of worship, the government can significantly hamper an individual's ability to practice his religion. For example, the Ninth Circuit has previously found it to be a "substantial burden" under RFRA when prison officials tape a Catholic priest's performance of the Sacrament of Penance with a prison inmate. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), *overruled on other grounds by City of Boerne*, 521 U.S. 507. Similarly, if the government were to enter the temples of the Church of Jesus Christ of Latter-day Saints—which are open only to members of the church who comply with particular

teachings, see Immo Luschin, *Latter-day Saint Temple Worship and Activity*, in ENCYCLOPEDIA OF MORMONISM 1449 (Daniel H. Ludlow ed., 1992)—it would likely chill and burden the practice of the Mormon faith.

Again, while there may be a compelling governmental justification for these types of intrusions, the Government would never need to demonstrate any justification under the Ninth Circuit's view of "substantial burden." Such intrusions hardly force an individual to choose between his religious tenets and a governmental benefit, nor does the intrusion coerce the individual to act contrary to his religious beliefs on a threat of civil or criminal penalty. When the government intrudes into places or means of worship, it simply imposes that intrusion upon the worshipers. Tellingly, the *en banc* majority sidestepped the question whether such intrusions would come within its definition of "substantial burden" by refusing to grapple with its previous opinion in *Mockaitis*. *See* Pet. App. 28a-29a n.15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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