No. 24-291

In the

Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, 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 YOUNG AMERICA'S FOUNDATION, ADVANCING AMERICAN FREEDOM, FAITH & FREEDOM COALITION, AND FAMILY POLICY ALLIANCE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Young America's Foundation (YAF) is a national nonprofit organization whose mission is to educate and inspire young Americans with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF fulfills its mission in part through student-led chapters on college campuses and individual membership. YAF members commonly face anti-conservative bias from administrators and student governments. This case is important to YAF because it presents this Court the opportunity to strengthen the fundamental freedom of religion. If the government is permitted to prevent religious expression on public property free of strict scrutiny, conservative students could be forced to abandon their faiths on campus.

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law. AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their

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[1] Rule 37 Statement: Undersigned counsel certifies that all parties have received timely notice of and consented to the filing of this brief. Undersigned counsel certifies that no counsel for a party authored the brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no other person, other than the amici, their members, or their counsel, made such a monetary contribution.

responsibilities to the nation." Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983). AAF believes that the government has a fundamental responsibility to protect the rights of Americans, including their right to freely exercise their religious beliefs.

Faith & Freedom Coalition was founded in 2009 as a nonpartisan, non-profit, tax-exempt, social welfare organization as defined by I.R.C. section 501(c)(4). Its mission is to educate, equip, and mobilize people of faith and like-minded individuals to be effective citizens and to enact public policy that strengthens families, protects individuals, and promotes religious liberty domestically and internationally. Today, it has grown to over 2.5 million members nationwide. Faith & Freedom Coalition is a leader at the state and federal level in advocating for the rights of individuals to freely exercise their religion as well as for the equal treatment of all religious adherents. Faith & Freedom Coalition is concerned that these rights are being steadily eroded and that people of faith are being systematically excluded from the public square.

Family Policy Alliance joining in this brief is an organization that educates and advocates at the state and federal level for policies and legislation supporting religious freedom and strong families. As an organization focused on state policies that ensure and shore up religious liberty, we support a religious group's right to practice on traditionally sacred land,

according to the Constitution and a state's Religious Freedom Restoration Act (RFRA).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act (RFRA) provides the most rigorous protection to religious liberty, preventing the government from substantially burdening religious exercise without satisfying strict scrutiny. This case presents the question of how, under RFRA, courts should define substantial burden.

The freedom to believe whatever we want, and to practice those beliefs, is a core part of what makes America special. Congress codified this value in enacting RFRA, stating, "[T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution…" 42 U.S.C. § 2000bb-(a)(1). However, this Court has not always protected religious practice to the highest degree. Congress recognized this problem when it reflected on *Employment Div. v. Smith*, 494 U.S. 872 (1990), stating that "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." § 2000bb-(a)(4). Religious practitioners would hope that RFRA had solved the problem.

However, in contravention to Congress' laudable intentions, the Ninth Circuit recently discovered an exception to RFRA's protections against

government intrusions on religious practice: government land. In *Apache Stronghold v. United States of America*, No. 21-15295 (Ninth Cir. March 1, 2024) (referred to throughout this brief as "*Apache Stronghold*" or "the Ninth Circuit's decision"), the Ninth Circuit, narrowly interpretating a single pre-*Smith* case to hold that Petitioners were ineligible for religious protection because their religious practice must occur on publicly owned property. The Framers and Congress would likely be surprised to find that protection against government did not apply on public land.

The Ninth Circuit's decision violates RFRA's statement of purpose, as well as its operative text. RFRA "guarantee[s] its application in all cases where free exercise of religion is substantially burdened" § 2000bb-(b)(1). Yet the Ninth Circuit's decision obliterates any such guarantee. RFRA "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by government." Yet the Ninth Circuit's decision disenfranchises an entire religion from judicial recourse. § 2000bb-(b)(2) The text applies to "all" religious practice, § 2000bb-3(a), on "real property."

This Court has never defined substantial burden under RFRA and should grant certiorari to take this opportunity to define that term to include a complete prohibition by the government of a religious practitioner's free exercise, regardless of the geographic location of that exercise.

ARGUMENT

I. DISABUSING THE NINTH CIRCUIT OF THE "INTERNAL GOVERNMENT AFFAIRS" LIMITATION WOULD NOT OPEN THE FLOODGATES TO SUBVERSIVE CLAIMS UNDER RFRA.

This Court need not search for atextual limits to what constitutes a substantial burden as Congress has already delineated limits to RFRA claims. To state a cognizable claim under RFRA, the claim must be "sincerely" "religious"; the claimant must be seeking to "exercise" his religion (i.e., he cannot simply say "this bothers my conscience."); and the "burden" on his religious exercise must be "substantial." If the claimant meets each of these burdens, he still may lose at the balancing stage. RFRA does not enable claimants to overthrow legitimate government schemes. Rather, RFRA enables claimants to hold the government accountable to a core, traditional American freedom via strict scrutiny.

Under the law of many circuits, Petitioners' case would already constitute a cognizable claim. Far from expanding the number of lawsuits across the board, the Court's guidance here would simply bring the Ninth Circuit into step with at least six other circuits. Pet. for Cert. pp.29-32. In other words, these claims are already being brought. Even the Ninth

Circuit agreed that complete prevention constituted a protectible interest until *Navaho Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (which it now overrules), so even the Ninth Circuit was willing to balance these claims outside of this anathematic context. A holding by the Court that substantial burdens can exist on public property would not only be correct, but also would not meaningfully change the number of cases being brought.

II. CONGRESS CREATED RFRA TO GIVE COURTS THE ABILITY AND DUTY TO BALANCE GOVERNMENT INTERESTS AGAINST A BROAD RANGE OF RELIGIOUS EXERCISES.

A. RFRA's broad purpose and the evil it sought to remedy

In the 1960-70s, the Court developed First Amendment standards to protect against government restrictions on "religious exercise." In cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court weighed the restriction on the practitioner against the government's interest behind enacting the restriction. Sometimes the practitioner prevailed, and sometimes the government did.

In 1990, the Court sent shockwaves through the country when it decided *Smith*, 494 U.S. 872. There, this Court interpreted the First Amendment's "prohibit" narrowly to hold that no cognizable First

Amendment claim exists where a government action of "neutral and general applicability" burdened religious exercise only "incidentally." Basically the government could do whatever it wanted so long as it was not targeting or discriminating against religion.

Congress desired to give religious practice higher degrees of protection, and so they quickly enacted the Religious Freedom Restoration Act. Thus, Congress did so to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." RFRA is explicitly designed "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

This Court has recognized RFRA's broad protections, holding that RFRA goes "beyond what this Court has held is constitutionally required." *Hobby Lobby*, 573 U.S. at 695. *Hobby Lobby*, like this case, concerned whether the claimant "can even be heard under RFRA." Id. at 705. Now, as then, the answer is yes because RFRA's scope is broader than this Court's interpretation of the First Amendment.

Unfortunately, in *Apache Stronghold* the Ninth Circuit, rather than balance the religious interest at issue in keeping with these broad protections, used this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), to bar the claim. The Ninth Circuit erroneously extended *Lyng* by finding that: RFRA subsumed without referencing a pre-*Smith* case that on its own terms bears no relevance to the term "substantial burden";

and a complete and eternal physical bar to religious practice, as opposed to a less intrusive disturbance, is not a prohibition. The Ninth Circuit, on this erroneous reasoning, found that claimants have no protectable interest and wrongly created a novel and narrow definition of substantial burden.

B. RFRA's enshrining of the compelling interest test

In *Hobby Lobby*, 573 U.S. at 695 n.3, this Court held that RFRA did two things: it restored the compelling interest test, and it broadened the class of claims entitled to religious liberty exemptions. This Court has recognized the positive duty of courts to conduct this balancing test. In responding to the dissent in *Hobby Lobby*, this Court stated that "Congress, in enacting RFRA, took the position that the compelling interest test…is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* at 735-36 (quoting 2000bb(a)(5) (internal quotes omitted)). Thus, the dissent's concerns that courts should avoid such disputes reflected *Smith*-type thinking that could not defeat "the wisdom of Congress's judgment" through a duly enacted law. *Id.* at 735-36. In other words, balancing is good, and courts should not evade their duties RFRA claimants.

In enacting RFRA, Congress adopted a test, not specific cases or fact patterns. RFRA's text, § 2000bb-(a)(5), clearly states that "prior Federal court rulings" inform the compelling interest test. Nothing in the

text indicates that any caselaw should define, much less limit, "substantial burden."

This Court has previously clarified Congress' motive in enacting RFRA. Where *Smith* had "largely repudiated" the balancing test, *Hobby Lobby*, 573 U.S. at 693, RFRA was meant to restore that test regardless of whether the law at issue was neutrally and generally applicable. This Court has reasoned that "there is no reason to believe…that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Id.* at 706 n.18. And when Congress enacted RLUIPA, it passed on "the same general test but on a more limited category of governmental actions," *Id.* at 695, further clarifying that RFRA's focus is the compelling interest test.

C. RFRA's expansive language

RFRA is a law about effect. In *Hobby Lobby*, this Court focused on the effect of the HHS mandate on the claimants ("If [heavy fines] do not amount to a substantial burden, it is hard to see what would.") *Id.* at 691. Where religious exercise is negatively and substantially affected, RFRA applies. It matters not what tool the government uses to cause the effect. The claimant need not show discrimination, only that the government is doing something that negatively effects his religious practice. *City of Boerne v Flores*, 521 US 507, 517 (1997); § 2000bb-(b)(1). RFRA ensures that where the government seeks to do something that has the effect of burdening religious practice, even

incidentally, the government must pass strict scrutiny. § 2000bb-1(b).

As Chief Judge Judge Murguia noted in dissent, Congress further expanded RFRA's language by amending the statute's definition of free exercise to repeal the direct link between RFRA and the First Amendment. App.1a p.205. The only cases specifically mentioned in RFRA are *Sherbert* and *Yoder*, and they are mentioned in reference to the compelling interest test, not in relation to "substantial burden." § 2000bb-(b)(1). That Congress moved even further away from specific pre-*Smith*, First Amendment cases shows that the pre-*Smith* term RFRA enshrined was the compelling interest test, not specific holdings from specific cases. Had "Congress want[ed] to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so. *Hobby Lobby*, 573 U.S. 682, 714. Here, Congress broadened religious liberty in every way, by linking two specific cases for a specific, enumerated purpose and broadening all other language.

1. "All"

RFRA applies to "all Federal law, and the implementation of that law, whether statutory or otherwise." § 2000bb-3(a). Because RFRA does not define "all," the Court looks to the dictionary definition. *Hobby Lobby*, 573 U.S. at 707. All means "the whole amount, quantity, or extent of," "as much as possible," "every member or individual component of," or "the whole number or sum of." *all*, Merriam-Webster.com, https://www.merriam-

webster.com/dictionary/all (last visited Oct. 10, 12:15p.m.). Clearly, without compelling context to find otherwise, the Court must find that RFRA's "all" encompasses the broadest range of governmental actions possible.

The Ninth Circuit creatively decided that all means "all except internal government affairs that are not coercive, penalizing, or discriminatory." But "nothing in RFRA suggests a congressional intent to depart from the dictionary definition of" "all." *Hobby Lobby*, 573 U.S. at 708 (finding that "person" included corporations in keeping with the dictionary definition.) There is "no reason to think that the Congress that enacted such sweeping protection" meant to permit a complete prohibition on religious exercise to evade scrutiny. *Id.* at 706. Because Congress did not limit the term "all," and because "no conceivable definition of the term" on its own contains carveouts, *Id.* at 708, the Ninth Circuit's finding was erroneous, and that court should have proceeded to the compelling interest test.

2. "Real property"

RFRA expressly applies to "[t]he use *** of real property" for religious exercise. § 2000bb-2(4); § 2000cc-5(7)(B). By its plain language, all, supra, real property is subject to RFRA.

In *Hobby Lobby*, this Court rejected a narrow definition of "person" that would have excluded for-profit corporations from the statute's protections. 573 U.S. at 683. This Court reasoned that RFRA did not

merely codify pre-*Smith* precedent but was "intended to separate the definition of [exercise of religion] from that in First Amendment case law." *Id.* at 683-84. This Court should now find that the definition of substantial burden is similarly free from an "ossified" pre-*Smith* definition. Even if the Court looks to pre-*Smith* cases for guidance, there is no precedent that holds that a total prohibition on religious exercise is exempt from RFRA's reach, or that government real property is categorically exempt. Thus, RFRA applies here.

If Congress had wanted to exempt government property from RFRA scrutiny, it could have done so. There are many instances of government creating carveouts for its own conduct, including the land-transfer statute at issue in this case. As the Chief Justice noted, that statute exempts itself from the FLPMA. App.1a p.245. Additionally, RFRA specifies that Congress could exempt other provisions of law from RFRA's reach if it wanted to, but Congress has never taken that opportunity. The Ninth Circuit erred by finding that the government's actions regarding Oak Flat are exempted from RFRA scrutiny.

Indeed, such an exemption would be contra to RFRA's purpose. Government acts cannot be beyond RFRA's reach since Americans have always feared government intrusion on religious exercise and sought to protect themselves against it. That is what the Free Exercise Clause is about, and RFRA expands on First Amendment principles. "Courts should construe laws in harmony with the legislative intent and seek to carry our legislative purpose." *Foster v. United States*,

303 U.S. 118, 120 (1938). The Ninth Circuit erred by reading an exemption into law that did not fit within the statute's purpose.

Further, a rule that a claimant has no cognizable RFRA claim where the government is managing its own property would render the real property text surplusage. This Court has been "reluctan[t] to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167,174 (2001) (internal quotes and citations omitted). This is because RFRA only applies to governmental acts. This text becomes surplusage when the Court considers that use of public property that burdens religion more than incidentally already falls under First Amendment review. For example, if the government enacts a rule that applies to religious practice in a discriminatory manner, that is already prohibited by the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). If the government were administering a program on private property but refused to allow religious groups to participate, that is also already prohibited by the First Amendment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). If the "real property" does not mean, as it plainly states, that any prohibition by government on any real property states a cognizable claim under RFRA, it is difficult to understand the function of that language.

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The Court should grant certiorari to clarify that RFRA by its purpose and ordinary meaning protects

"all" "prohibitions" on "religious exercise" on "real property," by government actors, regardless of who controls the property.

III. BASED ON CONGRESS' BROADENED PROTECTIONS FOR RELIGIOUS PRACTICE AND THE SO-FAR LACK OF DEFINITION OF SUBSTANTIAL BURDEN UNDER RFRA, WHAT CONSTITUTES A COGNIZABLE CLAIM UNDER RFRA IS NOT LIMITED TO PRE-RFRA FREE EXERCISE CASES.

Lyng stands for the proposition that the claimants had not brought a cognizable Free Exercise claim where the government's actions disturbed their religious exercise. The Ninth Circuit erroneously transplanted portions of Lyng as if the cases were indistinguishable, and as if RFRA never happened. But RFRA "did not merely restore[the Supreme] Court's pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715. By using *Lyng* to bar a claim under RFRA, the Ninth Circuit essentially moved Petitioners' claim backward in time into *Smith* territory. Even assuming arguendo that *Lyng* applies to bar a Free Exercise claim here, it says nothing about RFRA.

It is understandable why the Ninth Circuit acceded to the temptation to analyze this case in the context of *Lyng*. At a glance these cases are similar. However, *Lyng* did not deal with physical access to sacred sites, and indeed the *Lyng* court stated that

such a claim would present different constitutional questions. App.1a p.5. To the extent factual similarity exists, *Lyng* is still totally unhelpful on the RFRA claim because RFRA did not exist yet. Because *Lyng* did not interpret RFRA or apply a substantial burden analysis, it is unhelpful.

Lyng might well likely come out differently under RFRA. First, *Lyng* hinged on the idea that the Free Exercise Clause is not a means by which individuals can exact things from the government, App.1a. p.225, but such language does not apply where a claimant is asserting a statutory right already given to him by the government. Under RFRA, intended to provide protections beyond those found in the First Amendment, the *Lyng* claimants could plead that reduced access to their spiritual sites constituted a substantial burden, a standard that did not exist at the time *Lyng* was decided[2] and has yet to be squarely defined. This Court would then have balanced the burden against the government's interests. While in *Lyng* this Court held that the claimants' religious exercise was not prohibited, merely disturbed, and that the First Amendment protected against the former but not the latter, in a post-RFRA world the claimants would likely have won on balance because a "disturbance" would constitute a cognizable claim under RFRA.

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[2] As noted in Judge Nelson's concurrence, *Lyng* is not "part of 'any old' soil that was used to define 'substantial burden.'" App.1a p.141.

Fortunately, the Court need not decide whether the disturbance in *Lyng* would constitute a claim under RFRA to decide that the claim at issue here is cognizable.

First, no one disputes that the government action at issue would completely devastate, i.e., prohibit, the claimants' religious exercise. The Ninth Circuit found the government's actions would "literally prevent" the exercise, not temporarily but forever. This states a claim under RFRA's plain language and fits neatly within *Lyng*'s structure.

Second, if prohibit has any meaning, it applies here, where the government has complete control of the means of Petitioners' religious practice. The fact that the Petitioners' entire religion hinges on the use of federal land is unfortunate. But this fact is relevant to whether Petitioners are "prohibited" from free exercise. For the reasons stated above, the term prohibit, like the term real property, cannot be read to mean "prohibited except by the government's land ownership."[3]

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[3] This issue of control is why prison cases are instructive. In prison cases the government has complete control of all the practitioner's resources; here, the government has complete control of Petitioners' religious site. In both cases, the government solely has the power to dictate whether the practitioner is "allowed" to exercise his faith. Also on this line of thinking, the Court could find that the government's actions deny the claimant "an equal share of the rights, benefits, and privileges enjoyed by other citizens," App.1a p.15 (quoting *Lyng*), because all other religious adherents can practice their faith outside of Oak Flat, but Petitioners cannot.

This case is simple under RFRA. In most cases, the claimant has the option to take a penalty, and that penalty entitles them to judicial review via the compelling interest test. See, e.g., *Hobby Lobby*. But even a penalty is not necessary. Consider *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). There, the State of New York placed restrictions on church attendance. Like in this case, the government was restricting religious exercise on real property. This Court, based solely on the Free Exercise harm without mentioning any fine or penalty threatened by the government, found the claimants were entitled to injunctive relief.

Here, the Petitioners have had a longstanding right to worship at Oak Flat, but the government says no more. Somehow this infringement, which is a total deprivation and thus far greater than the restrictions in *Roman Catholic Diocese*, is neither a prohibition nor a penalty, simply because Petitioners lack the option of paying a fine.

In *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014), then-Judge Gorsuch, writing for the Tenth Circuit, found that a claimant had satisfied RLUIPA's substantial burden where he pleaded lack of access to a sweat lodge. Judge Gorsuch noted that the claimant's religion required "some" access and the government refused "any." If the claimant in *Yellowbear*, who lost access to one portion of his religious practice on government property (prison), had pleaded a substantial burden, then certainly the petitioners here, who have pleaded the loss of religious exercise as a whole, has also satisfied RFRA. Then-

Judge Gorsuch seemed to find this case simple, stating that "This isn't a situation where the claimant is left with some degree of choice in the matter and we have to inquire into the degree of the government's coercive influence on that choice."

Here, the Ninth Circuit essentially found that because the claimants do not have the opportunity to resist, they also lack judicial recourse. This is illogical and inconsistent with RFRA's purpose and text and this Court's caselaw.

IV. THE GOVERNMENT COULD CHARACTERIZE A GROWING CLASS OF GOVERNMENT ACTIONS AS "INTERNAL AFFAIRS" AND AVOID THE COMPELLING INTEREST ANALYSIS ACROSS THE BOARD.

Consider how this reasoning could harm student groups, like YAF at UCLA. That student group has endured viewpoint discrimination (arguably religious discrimination because the group's activities recent have revolved around support for Israel) to such an extent that amici Young America's Foundation recently filed a lawsuit against the school. *Young America's Foundation, et al. v. Block, et al.*, No. 2:24-cv-08507 (C.D. Cal. filed Oct. 3, 2024).

The biased UCLA administrators named as defendants in that lawsuit have control over room reservations on campus. On the "internal government affairs" logic, the school could deny the chapter room

reservations for speakers who support Israel's right to exist as a Jewish state. In fact, that is exactly what happened when the chapter attempted to bring Robert Spencer to speak on "Everything You Know About Palestine Is Wrong." On the Ninth Circuit's logic, a court might find YAF at UCLA has no judicial recourse because they were seeking to use government real property for the event. This would undermine if not abolish free speech on college campuses.

This is not mere hypothetical posturing. The Ninth Circuit's opinion has already been cited by government actors to deny religious claims. For example in *Knights of Columbus v. National Park Service*, 3:24-cv-363 (E.D. Va.), the claimants sought to hold their annual Memorial Day Mass on public land as they had been doing for 60 years. The government cited *Apache Stronghold* as justification for denying the permit. Under a straightforward application of RFRA's text, the government should not be able to cite *Apache Stronghold* as a "get out of jail free" card simply because the religious expression takes place on public land.

Consider also *Cedar Park Assemblies of God of Kirkland v. Kreidler*, 23-35560 (9th Cir.). There, Washington State cited Apache Stronghold to argue that their abortion mandate was not a burden under the Free Exercise Clause. And in *Loe v. Jett*, 0:23-cv-1527 (D. Minn.) the state of Minnesota cited *Apache Stronghold* to argue that families in a college tuition credit program for high school students that excludes schools with faith statements have no constitutional injury. These arguments make sense only on a twisted

and narrowed interpretation of RFRA's scope and purpose.

Courts have also used the "internal government affairs" exception to reach troubling results. The court in *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. May 15, 2024) relied on the same internal affairs reasoning to hold that the government could force 3-4 year-old children to listen to storybooks intended to "disrupt [a student's] either/or thinking" about gender, without even providing an opt-out mechanism for religious objectors. According to the Fourth Circuit, this presented no constitutional problem because "to show a cognizable burden, the Parents must show that the absence of an opt-out opportunity coerces them or their children to believe or act contrary to their religious views." *Id.* at 208. Contrast *McKnight* with *Kennedy v. Bremerton*, 597 U.S. 507 (2022). In *Kennedy*, this Court found the claimant had a cognizable free exercise claim to pray on school property during work hours. On balance, the government's interest in how it ran a government school and managed its employees on government-owned property came in second to the claimant's religious practice. Clearly, a claimant is not restricted from stating a religious exercise claim based on some inherent authority of government to do whatever it wants based on location. It is plain that the lower courts need guidance on how to view so-called "internal government affairs" within "substantial burden."

Even *Hobby Lobby* could have come out differently under this standard. There, claimants

owed their corporate form to state laws. Additionally, the ACA reflected unprecedented governmental control of health care. A court could have conceptually deemed the HHS mandate at issue there an "internal government affair" based on either of these reasons. On such a finding, claimants would have been forced to provide contraceptives in violation of their sincere religious beliefs. The Court would never have reached the issue of who is a "person" under RFRA or conducted a balancing test.

CONCLUSION

RFRA recognizes that religious practice is, in many cases, more valuable than government plans. Even where a claimant loses on a RFRA claim, the compelling interest test holds the government accountable to finding the least intrusive method to achieving their interest. Where instinct might be to say "government can do what it wants with its own land," RFRA says "not if…." The government's attempt to evade strict scrutiny belies any logical legal position and is simply "an objection to RFRA itself." *Hobby Lobby*, 573 U.S. at 735. The Court should find that a total prohibition by the government on religious practice states a cognizable claim under RFRA, one that fits easily within the meaning of substantial burden.

Respectfully submitted,

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