No. 16-814

In the Supreme Court of the United States

MONIFA J. STERLING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces correctly held that petitioner, a United States Marine, failed to establish that an order directing her to remove signs containing unattributed biblical quotations from her shared workspace substantially burdened her exercise of religion under the Religious Freedom Act of 1993, 42 U.S.C. 2000bb *et seq.*, where petitioner did not assert that the signs had religious significance until trial and where she offered no evidence that she regarded posting the signs at work as important to her religious exercise.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1-47) is reported at 75 M.J. 407. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals (Pet. App. 48-73) is not published in the Military Justice Reporter but is available at 2015 WL 832587.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces (Pet. App. 74) was entered on August 10, 2016. On October 12, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 23, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2) and (3).

STATEMENT

Petitioner, a United States Marine Corps lance corporal, was convicted by special court-martial of one specification of failing to go to her appointed place of duty, one specification of disrespect toward a superior commissioned officer, and four specifications of disobeying a lawful order of a noncommissioned officer, in violation of Articles 86, 89, and 91 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886, 889, 891. Petitioner was sentenced to a reduction in pay grade and a bad-conduct discharge. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed petitioner's convictions and sentence. Pet. App. 48-73. The Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1-47.

1. Petitioner was a lance corporal in the United States Marine Corps. This case arises from her court-martial for repeated failures to follow orders.

a. In December 2012, petitioner was assigned to a communications battalion stationed at Camp Lejeune, North Carolina. Petitioner was responsible for assisting other Marines with their access cards, and those Marines would sit at a desk petitioner shared with another Marine in her unit while she helped them. Pet. App. 4-5.

Petitioner had "contentious," "bellicose," and "antagonistic" relationships with many of her superiors, including her immediate supervisor, Staff Sergeant Alexander. Pet. App. 5, 10. Petitioner characterized those difficulties as people "picking on [her]," but her performance review stated that she "fail[ed] to provide a positive contribution to the unit or Corps"; that she could not "be relied upon to perform the simplest of tasks without 24/7 supervision"; and that she had not

"shown the discipline, professional growth, bearing, maturity, or leadership required to be a Marine." *Id.* at 5 (quoting C.A. App. 182).

In May 2013, after a confrontation with Staff Sergeant Alexander, petitioner posted three signs stating "no weapon formed against me shall prosper" around her desk. Pet. App. 5-6 (brackets omitted). The signs were large enough to be read by Marines seated at the desk and by anyone passing by. *Id.* at 6. Staff Sergeant Alexander ordered petitioner to remove the signs because she did not like their tone and because petitioner shared the desk with another Marine. *Ibid.* Petitioner did not obey, so Staff Sergeant Alexander removed the signs herself. *Ibid.* The next day, Staff Sergeant Alexander saw that petitioner had replaced the signs and again ordered her to remove them. *Ibid.* Once again, petitioner refused. *Ibid.*

The statement "no weapon formed against me shall prosper" is a paraphrase of a biblical passage, but the signs did not attribute the statement to the Bible and Staff Sergeant Alexander was unaware of its religious connotation. Pet. App. 5; see *id.* at 10 n.2, 31 & n.1. Petitioner "never informed [Staff Sergeant] Alexander that the signs had either a religious genesis or any religious significance." *Id.* at 6. Petitioner also did not avail herself of the Department of Defense and Department of the Navy procedures for requesting a religious accommodation. *Ibid.*

b. In August and September 2013, petitioner failed to obey additional orders. In August, she refused orders to wear the appropriate uniform. Pet. App. 6-7. And in September, she refused a series of orders to report for duty on a weekend. *Id.* at 7-8.

2. The government charged petitioner with one specification of failing to go to her appointed place of duty, one specification of disrespect toward a superior commissioned officer, one specification of willfully disobeying a superior commissioned officer, four specifications of disobeying a lawful order of a noncommissioned officer, and one specification of making a false official statement. C.A. App. 11, 13. Most of the charges were based on the August and September 2013 incidents, but two specifications were based on petitioner's refusal to obey the orders to remove the signs from her workspace. Pet. App. 6-8.

Petitioner represented herself at trial with assistance from counsel. Pet. App. 8. In the middle of trial, petitioner moved to dismiss the two specifications related to the signs, asserting for the first time that the signs were "of a religious nature." *Ibid.* Petitioner stated that she had posted the signs to invoke the Christian Trinity and "to serve as a 'mental note'" or a "mental reminder to her when she came to work . . . because she did not know why these people were picking on her." *Id.* at 8-9 (brackets omitted). Petitioner argued that the orders to remove the signs were "unlawful under the grounds of her religion" and that she should have been allowed to practice her religion "as long as it's within good order and discipline." *Id.* at 8 (brackets omitted). Petitioner submitted Department of Defense Instruction 1300.17 (Jan. 22, 2014) (Instruction 1300.17), which establishes procedures for requesting religious accommodations and which references the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Pet. App. 8-9. But petitioner did not offer any argument or comment on

Instruction 1300.17, and she did not assert that Staff Sergeant Alexander's orders violated RFRA. *Ibid.*

The military judge denied petitioner's motion to dismiss, finding that the orders were "reasonably necessary to safeguard * * * good order and discipline" because the signs "could easily be seen as contrary to good order and discipline." Pet. App. 9. Petitioner was convicted on all but two of the charges, including both specifications based on her refusal to remove the signs. *Id.* at 1.[1] She was sentenced to a bad-conduct discharge and a reduction in pay grade. *Id.* at 1-2.

3. The NMCCA affirmed. Pet. App. 48-73. On appeal, petitioner for the first time specifically argued that Staff Sergeant Alexander's orders violated RFRA, which provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering" a "compelling g overnmental interest." 42 U.S.C. 2000bb-1(a) and (b). The court rejected petitioner's RFRA argument, appearing to conclude that her act of posting the signs did not qualify as an "exercise of religion" because it was not "part of a system of religious belief." Pet. App. 59-60 (citations omitted).

4. The CAAF affirmed in an opinion by Judge Ryan. Pet. App. 1-47.

a. The CAAF rejected the NMCCA's apparent conclusion that religiously motivated conduct cannot qualify as an "exercise of religion" unless it is "part of a system of religious belief." Pet. App. 15-16 (citations

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[1] Petitioner was acquitted on the charge of making a false official statement. C.A. App. 174. The military judge dismissed without prejudice the charge of willfully disobeying a superior commissioned officer after the government declined to proceed on that specification. *Id.* at 13.

omitted). The court explained that RFRA defines religious exercise to include "any exercise of religion, *whether or not compelled by, or central to, a system of religious belief*." *Id.* at 16 (quoting 42 U.S.C. 2000cc-5(7)(A) and citing 42 U.S.C. 2000bb-2(4)). The court stated that given this "broad definition," petitioner's "posting of signs could qualify" as religious exercise. *Ibid.* But the court emphasized that petitioner also had to show (1) that "the conduct was based on a sincerely held religious belief"—that is, that her belated assertion of a religious motivation was not "a post-hoc justification for posting signs that were combative in nature"—and (2) that the orders to remove the signs substantially burdened her exercise of religion. *Id.* at 16-17.

With respect to the sincerity requirement, the CAAF noted that petitioner "only raised religion as an explanation for the signs in the middle of trial" and that "the NMCCA's factual analysis, which [wa]s not clearly erroneous," indicated that the signs were a response to petitioner's confrontation with Staff Sergeant Alexander rather than a sincere exercise of religion. Pet. App. 19. Under the circumstances, the court stated that it "could simply hold that it was [petitioner's] burden to affirmatively establish the sincerity of her belief" and that "she failed to do so." *Ibid.* The court concluded, however, that petitioner had also failed "to establish that the orders to remove the signs were a substantial burden." *Ibid.* And because the court could "resolve the case on th[at] basis," it "assume[d] arguendo that [petitioner's] conduct was based on a sincerely held religious belief." *Ibid.*

In holding that petitioner had not established a substantial burden, the CAAF observed that RFRA

"does not define 'substantially burden'" and stated that courts of appeals have articulated "different formulations." Pet. App. 20. But the court concluded that petitioner could not prevail "under any of these formulations." *Id.* at 20-21 n.5. The court emphasized that "no court interpreting RFRA has deemed that any interference with or limitation upon * * * religious conduct is a substantial interference with the exercise of religion." *Id.* at 20-21. Instead, "courts have focused on the subjective importance of the conduct to the person's religion, as well as on whether the regulation at issue forced claimants to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." *Id.* at 21 (brackets, citations, and internal quotation marks omitted).

The CAAF emphasized that courts may not second-guess "the importance of a religious practice to a practitioner's exercise of religion" or "impose any type of centrality test," but it concluded that "a claimant must at least demonstrate an honest belief that the practice is important to her free exercise of religion." Pet. App. 22 (brackets, citation, and internal quotation marks omitted). And in this case, the court held that petitioner failed to carry that burden because she "did not present any testimony that the signs were important to her exercise of religion" or that "she believed it is any tenet or practice of her faith to display signs at work." *Id.* at 24.

The CAAF also relied on "two additional salient facts" in concluding that petitioner had not established a substantial burden. Pet. App. 25. First, petitioner "never told the person who ordered her to take down the signs * * * that they even had a religious conno-

tation." *Ibid.* Second, petitioner failed to avail herself of the accommodation process available under applicable regulations, which "permitted [her] to request an accommodation for any rule or regulation that she believed substantially burdened her religion, but required that she adhere to and follow orders while awaiting a determination on the matter." *Id.* at 27. The court noted that RFRA does not "contain an exhaustion requirement" and that a claimant is not required to seek an accommodation before asserting a RFRA claim. *Ibid.* But it observed that "the established and expeditious option to request an accommodation" serves to "reduc[e] any substantial burden otherwise threatened by an order or regulation of general applicability." *Id.* at 28. And the court also observed that it would "make[] no sense" to allow "military members to disobey orders now and explain why later"—as in this case, where petitioner first raised her asserted religious basis for refusing to take down the signs in the middle of trial. *Id.* at 25-26.

b. Judge Ohlson dissented. Pet. App. 30-47. He acknowledged that even under what he viewed as the proper legal standard, petitioner "may not have prevailed" because RFRA protects only sincere religious exercise and would not cover "invoking a biblical passage in order to engage in a passive-aggressive display of contempt for military leadership." *Id.* at 32. But in his view, the CAAF erred in requiring evidence that petitioner regarded posting the signs as important to her religious exercise and in taking account of petitioner's failure to identify the asserted religious basis for her actions or to seek an accommodation. *Id.* at 43-47.

ARGUMENT

Petitioner contends (Pet. 11-36) that this Court should grant review to resolve an asserted disagreement among the courts of appeals on the meaning of RFRA's substantial-burden standard. The CAAF's decision does not implicate that asserted conflict because the CAAF did not adopt the legal holdings petitioner attributes to it. Rather, on the particular (and sparse) record in this case, the CAAF correctly held that petitioner failed to establish a substantial burden on her exercise of religion. That decision does not conflict with any decision of this Court or another court of appeals. And in any event, the circuit conflict petitioner asserts does not exist. In addition, this case would be a poor vehicle in which to consider the meaning of RFRA's substantial-burden standard even if that issue otherwise warranted this Court's review. The petition for a writ of certiorari should be denied.

1. The United States "places a high value on the rights of members of the Military Service to observe the tenets of their respective religions," and it is the policy of the Department of Defense to "accommodate individual expressions of sincerely held beliefs." Instruction 1300.17 § 4(a) and (b). Consistent with that goal, the Department has established an accommodation process that not only incorporates RFRA's standards, but also requires accommodations in some circumstances where RFRA does not. *Id.* § 4(e). The Department of the Navy has likewise adopted a policy that requires "making every effort to accommodate religious practices" when accommodation requests are made. Secretary of the Navy Instruction 1730.8B (Oct. 2, 2008). The United States thus has no disagreement with those who emphasize the vital importance of pro-

tecting the religious exercise of our Nation's service-members. Cf. Retired Generals Amicus Br. 6-10; Goldman Amicus Br. 16-17. But, as the CAAF explained, "this is not the usual case" of religious exercise in the military context. Pet. App. 2. And on the particular facts of this case, the CAAF correctly held that the limited record petitioner developed below failed to establish a substantial burden on her exercise of religion.

a. RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). RFRA incorporates the definition of "exercise of religion" in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, which defines that phrase to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A); see 42 U.S.C. 2000bb-2(4).

A RFRA claimant bears the burden of establishing a substantial burden on her religious exercise. See *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (*O Centro*) (describing burden to establish a prima facie case for pretrial relief); see also *Holt* v. *Hobbs*, 135 S. Ct. 853, 862 (2015) (applying the parallel provisions of RLUIPA). The claimant must prove both that her conduct is "sincerely based on a religious belief" and that the challenged government action "substantially burdened that exercise of religion." *Holt*, 135 S. Ct. at 862. If the claimant makes those showings, the government

must demonstrate that the burden is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2).

RFRA "adopts a statutory rule comparable to the constitutional rule rejected in [*Employment Division* v. *Smith*, 494 U.S. 872 (1990)]." *O Centro*, 546 U.S. at 424. Before *Smith*, this Court's decisions applying the First Amendment's Free Exercise Clause employed "a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest." *Holt*, 135 S. Ct. at 859. Congress enacted RFRA "to restore the compelling interest test as set forth in" this Court's pre-*Smith* decisions such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). 42 U.S.C. 2000bb(b)(1).

The original draft of RFRA would have reached any government action that "burden[ed]" religious exercise. Congress added the qualifier "substantially" to "make it clear that the compelling interest standards set forth in the act" apply only to "substantial burden[s]" and that "pre-*Smith* law is applied under the RFRA in determining" whether a burden qualifies as substantial. 139 Cong. Rec. 26,180 (1993) (Sen. Kennedy); see *ibid.* (Sen. Hatch). Congress thus expected courts to "look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same).

b. This Court's decisions applying RFRA and the parallel provisions of RLUIPA establish that the government substantially burdens the exercise of religion

if it requires religious adherents to "engage in conduct that seriously violates their religious beliefs." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (*Hobby Lobby*); see *Holt*, 135 S. Ct. at 862 (same). In *Hobby Lobby*, for example, the Court held that a requirement that employers provide health coverage that included contraceptive coverage substantially burdened the religious exercise of employers who "object[ed] on religious grounds to providing" such coverage. 134 S. Ct. at 2775. And in *Holt*, the Court held that a prison policy prohibiting beards substantially burdened the religious exercise of a prisoner who believed that growing a beard was a "dictate of his religious faith." 135 S. Ct. at 862. Those decisions make clear that legal prohibitions on religiously motivated conduct can impose substantial burdens on the exercise of religion.

This Court's pre-*Smith* decisions indicate that substantial burdens on religious exercise may also result from the denial of important government benefits. In *Sherbert*, the Court held that a State could not deny a person unemployment benefits because she refused to work on the Sabbath, reasoning that such a rule would force her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion * * * on the other." 374 U.S. at 404. Later decisions reaffirmed that a denial of benefits can result in a substantial burden if it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); see *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

RFRA and RLUIPA provide that a protected exercise of religion need not be "compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A); see 42 U.S.C. 2000bb-2(4). A claimant thus need not show that the government coerced her to refrain from conduct that her religion requires or to engage in conduct that her religion forbids. *Holt*, 135 S. Ct. at 862. But "[a]n inconsequential or *de minimis* burden on religious practice does not rise to th[e] level" of a substantial burden, "nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); see *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1316 (10th Cir.) (collecting cases), cert. denied, 562 U.S. 967 (2010). Accordingly, to establish a substantial burden, a claimant must at minimum show that the challenged government action restricts his conduct in a manner that interferes with a practice he regards as "important to his free exercise of religion." *Abdulhaseeb*, 600 F.3d at 1316 (citation omitted); see *Sossamon* v. *Lone Star State*, 560 F.3d 316, 332 (5th Cir. 2009) (same), aff'd on other grounds, 563 U.S. 277 (2011).

c. The CAAF correctly held that petitioner failed to establish that Staff Sergeant Alexander's orders to remove the signs from her shared workspace substantially burdened her exercise of religion.

The CAAF's decision rests largely on the particular facts of this case, and thus reflects no failure to recognize the importance of religious faith in the military. Petitioner's claim of a substantial burden rested exclusively on a few lines of her testimony at trial. Petitioner stated that the signs were "of a religious nature" and that she posted them to invoke the "trinity" because she is a "religious person" and wanted a "men-

tal reminder" and the "protection of three." C.A. App. 78, 111, 114; see Pet. App. 16. If credited as sincere, that testimony would establish "that posting the signs was religiously motivated in part." Pet. App. 24. But petitioner "did not present any testimony that the signs were important to her exercise of religion" and "did not testify that she believed that it [wa]s any tenet or practice of her faith to display signs at work." *Ibid.* Accordingly, as the CAAF observed, "the trial evidence d[id] not even begin to establish how the orders to take down the signs interfered with any precept of [petitioner's] religion let alone forced her to choose between a practice or principle important to her faith and disciplinary action." *Id.* at 25

Given petitioner's extremely limited evidentiary showing, the CAAF explained that she could succeed in establishing a substantial burden only if the court accepted her assertion that "every interference with conduct motivated by a sincere religious belief constitutes [a] substantial burden." Pet. App. 20. The court correctly rejected that view as inconsistent with RFRA and unsupported by precedent. *Ibid.* To adopt such a rule would be to "read out of RFRA the condition that only *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added), cert. denied, 535 U.S. 986 (2002). A host of regulations—from tax laws, to zoning regulations, to employment rules, to time, place, and manner restrictions on expressive activity—impose some limits on religiously motivated conduct. But this Court's pre-*Smith* decisions make clear that not every such limitation constitutes a substantial burden triggering the compelling-interest standard. See, *e.g.*,

Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290, 303-305 (1985) (holding that minimum wage laws did not substantially burden the religious exercise of employees who objected to receiving wages because they could "be paid in the form of [in-kind] benefits" or could "return[]" their cash wages). Accordingly, "no court interpreting RFRA has deemed that any interference with or limitation upon * * * religious conduct" automatically amounts to "a substantial interference with the exercise of religion." Pet. App. 20-21.

2. Petitioner identifies no sound reason to question the CAAF's conclusion, grounded on the specific facts of this case, that she failed to establish a substantial burden on her religious exercise. To the contrary, her arguments rest largely on two fundamental misreadings of the court's opinion.

a. Petitioner first asserts (Pet. 23) that the CAAF "concluded that no substantial burden arose because [her] conduct was merely religiously *motivated* rather than religiously *compelled*." See Pet. 2-3, 23-26. Consistent with that premise, petitioner formulates the question presented as whether a substantial burden requires "a forced choice between what religion and government command." Pet. i. But the CAAF did not purport to limit RFRA's protection to conduct that is religiously compelled. To the contrary, the court emphasized that RFRA expressly forecloses such a limitation by defining "religious exercise" as "any exercise of religion, *whether or not compelled by, or central to, a system of religious belief*." Pet. App. 16 (quoting 42 U.S.C. 2000cc-5(7)(A)).

Consistent with this Court's decisions, the CAAF recognized that it would have been *sufficient* for peti-

tioner to establish that removing the signs prevented her "from engaging in conduct her religion requires." Pet. App. 24 (brackets and citations omitted); see *Holt*, 135 S. Ct. at 862. But the court made it quite clear that such a showing was not *necessary*. Rather, it 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.'" Pet. App. 25 (brackets and citation omitted).

Petitioner asserts (Pet. 24-25) that the CAAF erred in imposing even that minimal requirement because courts are not equipped to make judgments about the importance of religious practices. But the CAAF explained that it would not "assess the importance of a religious practice to a practitioner's exercise of religion or impose any type of centrality test." Pet. App. 22. Instead, the court required that petitioner offer evidence that *she* believed "that the practice is important to her free exercise of religion." *Ibid.* (brackets and citation omitted). Just as courts may determine whether a RFRA claimant's asserted beliefs are sincere without trenching on forbidden territory, see *Hobby Lobby*, 134 S. Ct. at 2774 & n.28, they may also determine whether a claimant regards a particular practice as important to her exercise of religion. Indeed, this Court has frequently done just that. See, *e.g.*, *Holt*, 135 S. Ct. at 862 (observing that the challenged prison grooming policy required the plaintiff to "engage in conduct that seriously violates his religious beliefs") (brackets and citation omitted); *Hobby Lobby*, 134 S. Ct. at 2775 (same).

b. Petitioner also asserts that the CAAF held that RFRA does not apply at all to "direct prohibition[s] on religious exercise" and instead reaches only govern-

ment actions that impose a "dilemma" by requiring a religious adherent to suffer a penalty (or forgo a benefit) if she chooses to exercise her religion. Pet. 26-28. Again, that characterization of the decision below forms a critical component of the petition, including the question presented. Pet. i; see, *e.g.*, Pet. 1, 3, 23. And again, that characterization is inaccurate.

As an initial matter, petitioner's distinction between "direct prohibition[s]" and "dilemmas" is largely illusory, because most direct prohibitions on religious exercise can be reformulated as dilemmas. For example, petitioner identifies (Pet. 27) prison and military rules as the paradigmatic examples of "direct prohibition[s]." But, as this Court's decision in *Holt* illustrates, a prison policy directly prohibiting religious exercise can also be described as one imposing a dilemma: "If [the adherent] contravenes th[e] policy * * * , he will face serious disciplinary action." 135 S. Ct. at 862. Here, too, petitioner had a choice: She could either obey the order to remove the signs or face disciplinary consequences.[2]

Nothing in the CAAF's opinion indicates that the court relied on any distinction between direct prohibitions and dilemmas, or that it found petitioner's RFRA claim lacking because Staff Sergeant Alexander's orders took the form of a direct prohibition. Instead,

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[2] In similar fashion, laws that petitioner characterizes as imposing dilemmas can also be described as direct prohibitions. For example, petitioner states (Pet. 27) that the compulsory-education law at issue in *Yoder* created a dilemma because it "impose[d] a fine on those who refuse[d] to take actions their religion forbids." But the law took the form of a direct prohibition, barring parents, "under threat of criminal sanction," from withholding their children from school. 406 U.S. at 218.

the relevant portion of the opinion rejected petitioner's RFRA claim because she failed to "provide evidence indicating an honest belief that 'the practice was important to her free exercise of religion.'" Pet. App. 25 (brackets and citation omitted). The court did not suggest, much less hold, that the *form* of the challenged restriction as a "direct prohibition" prevented petitioner from meeting her burden. The opinion thus does not adopt the legal proposition petitioner attacks.

3. Petitioner asserts (Pet. 13-22) that the CAAF's decision implicates a conflict among the courts of appeals on the meaning of the substantial-burden standard in RFRA and RLUIPA. In particular, petitioner argues that the Third, Fourth, Ninth, and D.C. Circuits have departed from the decisions of other circuits by (i) limiting RFRA and RLUIPA to conduct that is religiously compelled and (ii) excluding direct prohibitions on religious exercise from scrutiny. Even if that characterization were correct, such a circuit conflict would not be implicated here because the CAAF did not adopt either of the limitations petitioner attributes to the Third, Fourth, Ninth, and D.C. Circuits—and because no court of appeals has recognized a substantial burden under circumstances like those present in this case. And in any event, the conflict petitioner posits does not exist.

a. Even if petitioner accurately characterized the state of the law in the circuits, the conflict she asserts would not be implicated here. As demonstrated above, see pp. 15-18, *supra*, the CAAF did not limit RFRA to conduct that is religiously compelled or to burdens that take the form of dilemmas rather than direct prohibitions. Instead, the relevant portion of the CAAF's opinion simply rejected petitioner's contention that

"every interference with conduct motivated by a sincere religious belief constitutes [a] substantial burden." Pet. App. 20; accord *id.* at 15. And the court emphasized that although courts of appeals have articulated the substantial-burden standard using somewhat "different formulations," petitioner could not prevail "under any of the[m]." *Id.* at 20-21 & n.5.

Petitioner has not identified any decision, by any court, recognizing a substantial burden where, as here, the religious adherent failed to offer any evidence that the challenged government action interfered with conduct that the adherent herself regarded as important to her religious exercise. To the contrary, even courts of appeals that petitioner identifies as applying the correct interpretation of RFRA and RLUIPA have squarely rejected the contention that "every interference with conduct motivated by a sincere religious belief constitutes [a] substantial burden." Pet. App. 20. For example, petitioner cites (Pet. 18) the Tenth Circuit's decision in *Abdulhaseeb*. In that case, the Tenth Circuit emphasized that it "d[id] not intend to imply that every infringement on a religious exercise will constitute a substantial burden." 600 F.3d at 1316. Instead, like the CAAF, the Tenth Circuit held that "the adherent must have an honest belief that the practice is important to his free exercise of religion." *Ibid.* (citation omitted).

The Second, Fifth, Seventh, Eighth, and Eleventh Circuits—which petitioner also identifies (Pet. 17-21) as applying the correct approach—have adopted the same view.[3] Petitioner thus has not identified any

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[3] See, *e.g.*, *Ford* v. *McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.) ("The substantial burden test * * * presupposes that there will be cases in which it comfortably could be said that a

court of appeals that would recognize a substantial burden where, as here the plaintiff "d[id] not even begin to establish" how the challenged government action "interfered with any precept of her religion" or prevented her from engaging in conduct she regarded as important to her religious exercise. Pet. App. 25.

b. In any event, petitioner errs in asserting that the Third, Fourth, Ninth, and D.C. Circuits have limited RFRA and RLUIPA to conduct that is religiously compelled or excluded direct prohibitions on religious exercise from scrutiny.

First, none of the decisions on which petitioner relies held that RFRA or RLUIPA applies only to conduct that is religiously compelled. In fact, the D.C.

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belief or practice is so peripheral to the plaintiff's religion that any burden can be aptly characterized as constitutionally de minimis."); *Sossamon*, 560 F.3d at 332 (5th Cir.) ("[T]he adherent must have an honest belief that the practice is important to his free exercise of religion."); *Schlemm* v. *Wall*, 784 F.3d 362, 364-365 (7th Cir. 2015) (holding that a challenged restriction must have "a serious effect" on the adherent's exercise of religion, which excludes restrictions that only "modestly" burden religious exercise); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 657 (8th Cir. 2009) ("We do not demand doctrinal justification to support the desired religious exercise, but the inmate does bear the burden of establishing a *substantial* burden on a religious exercise," which requires more than a showing that the challenged regulation limits religiously motivated conduct.), cert. denied, 560 U.S. 925 (2010), and 563 U.S. 969 (2011); *Smith* v. *Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007) ("[A]t a minimum the substantial burden test requires that a RLUIPA plaintiff demonstrate that the government's denial of a particular religious item or observance was more than an inconvenience to [the plaintiff's] religious practice."). The Second Circuit's decision in *Ford* arose under the First Amendment rather than RFRA, but the court assumed that the substantial-burden test applied, 352 F.3d at 592-593, and petitioner thus cites *Ford* (Pet. 19) as illustrative of the court's understanding of RFRA.

Circuit decision petitioner cites (Pet. 16) did just the opposite, emphasizing that "the burdened practice need not be compelled by the adherent's religion to merit statutory protection." *Kaemmerling*, 553 F.3d at 678. The Third, Fourth, and Ninth Circuit decisions on which petitioner relies likewise recognized that RFRA and RLUIPA "do[] not permit a court to determine whether the belief or practice in question is 'compelled by, or central to, a system of religious belief.'" *Washington* v. *Klem*, 497 F.3d 272, 277 (3d Cir. 2007) (quoting 42 U.S.C. 2000cc-5(7)); see *Lovelace* v. *Lee*, 472 F.3d 174, 186-187 & n.2 (4th Cir. 2006) (same); *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1068, 1076 (9th Cir. 2008) (en banc) (same), cert. denied, 556 U.S. 1281 (2009). And the Ninth Circuit has specifically rejected the argument that a claimant must "show [that] he was prevented from 'engaging in conduct mandated by his religious faith.'" *Alvarez* v. *Hill*, 518 F.3d 1152, 1156 (2008); see *Parks-El* v. *Fleming*, 212 Fed. Appx. 245, 247 (4th Cir. 2007) ("[T]he religious practice does not have to be mandated by the religion in order for the burden to be found 'substantial.'").

Second, petitioner is quite wrong to assert that the Third, Fourth, Ninth, and D.C. Circuits exclude "direct prohibitions" on religious exercise from RFRA and RLUIPA scrutiny. In fact, two of the decisions petitioner cites (Pet. 15-16) refute that characterization by finding substantial burdens in cases involving direct prohibitions. In *Klem*, the Third Circuit held that a direct prohibition on prisoners possessing more than ten books at a time imposed a substantial burden on a prisoner whose religious exercise consisted of reading a prescribed number of books each day. 497

F.3d at 281-282. And in *Lovelace*, the Fourth Circuit held that a prison policy substantially burdened a prisoner's religious exercise in part because it completely prohibited him from participating in group prayer sessions during Ramadan. 472 F.3d at 187-188.

Most of the other decisions on which petitioner relies (Pet. 14-16) simply held that plaintiffs could not establish a substantial burden where the challenged government actions were "offensive to the [p]laintiffs' religious sensibilities," *Navajo Nation*, 535 F.3d at 1070, but did not "impose[] any restriction on what [the plaintiffs could] believe or do," *Kaemmerling*, 553 F.3d at 680.[4] Those decisions indicate that a substantial burden requires *some* government restriction on a plaintiff's religious conduct, but they do not require that the restriction take the form of a "dilemma" rather than a "direct prohibition."

The Ninth Circuit's decision in *Oklevueha Native American Church of Hawaii, Inc.* v. *Lynch*, 828 F.3d

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[4] See *Kaemmerling*, 553 F.3d at 679-680 (extraction of DNA from tissue samples that the plaintiff had no religious objection to providing); *Snoqualmie Indian Tribe* v. *FERC*, 545 F.3d 1207, 1213-1215 (9th Cir. 2008) (license of a hydroelectric project that interfered with a waterfall the plaintiffs considered sacred); *Navajo Nation*, 535 F.3d at 1062-1063, 1071-1073 (use of wastewater on government-owned land the plaintiffs considered sacred); see also *Ruiz-Diaz* v. *United States*, 703 F.3d 483, 486 (9th Cir. 2012) (holding that an immigration regulation did not substantially burden the plaintiffs' exercise of religion because it "d[id] not affect [the plaintiffs'] ability to practice their religion"). Those decisions followed from this Court's pre-*Smith* decisions in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Bowen* v. *Roy*, 476 U.S. 700 (1986), which held that religious adherents are not substantially burdened by the government's internal operations or the management of government-owned land. See *Lyng*, 485 U.S. at 448-449 (discussing *Bowen*).

1012, cert. denied, 137 S. Ct. 510 (2016), held that the plaintiffs had not established that the federal laws prohibiting the possession of cannabis substantially burdened their exercise of religion. *Id.* at 1015-1016. But the court did not rely on the fact that the federal drug laws impose a "direct prohibition." Instead, the court explained that the plaintiffs regarded cannabis as "merely a substitute for peyote" and had made no showing that peyote was unavailable. *Id.* at 1017; see *ibid.* ("[Plaintiffs] have stated in no uncertain terms that many other substances including peyote are capable of serving the exact same religious function as cannabis.").[5]

4. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. That is true for at least three reasons.

First, the CAAF's holding that petitioner failed to establish a substantial burden rested not only on the absence of evidence that she regarded posting signs at her desk as important to her religious exercise, but also on the "additional salient facts," Pet. App. 25, that petitioner did not tell Staff Sergeant Alexander the signs were religious and that she failed to avail herself of the "established and expeditious option to request an accommodation" under applicable Department of

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[5] Petitioner also cites (Pet. 21 n.5) Judge Fletcher's dissent in *Navajo Nation* and Judge Kavanaugh's dissent from the denial of rehearing en banc in *Priests for Life* v. *HHS*, 808 F.3d 1 (D.C. Cir. 2015). Those dissents disagreed with the courts' rejection of the (very different) RFRA claims presented in those cases. But they do not suggest that the courts' decisions limited RFRA to conduct that is religiously compelled or excluded direct prohibitions on religious exercise.

Defense and Navy regulations, *id.* at 28; see *id.* at 25-28. As the CAAF explained, it would "make[] no sense" to allow "military members to disobey orders" and then give notice of the religious basis for their actions only "much later," when they are court-martialed for disobedience. *Id.* at 26. The question on which petitioner seeks this Court's review (Pet. i) does not encompass that additional basis for the CAAF's decision.[6]

Second, even if petitioner had established a substantial burden, the CAAF strongly suggested that it would have rejected her RFRA challenge on the alternative ground that she failed to demonstrate that her actions were a sincere exercise of religion. The CAAF emphasized that the record failed to substantiate petitioner's belated assertion—offered for the first time in

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[6] Petitioner briefly challenges this aspect of the CAAF's decision in the body of the petition (Pet. 32-33). That discussion is insufficient to preserve the issue for this Court's review. Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). In any event, petitioner's arguments lack merit. The CAAF did not impose a "system of prior restraint" or an "exhaustion requirement" (Pet. 33). It simply held that where, as here, the government provides a process for seeking religious accommodations, the substantial-burden inquiry must take account of the availability of that option because it may "reduc[e] any substantial burden otherwise threatened by an order or regulation of general applicability." Pet. App. 28; see, *e.g.*, *United States* v. *Friday*, 525 F.3d 938, 947-948 (10th Cir. 2008), cert. denied, 555 U.S. 1176 (2009). In some cases, RFRA plaintiffs may be able to establish a substantial burden notwithstanding the availability of an accommodation process. Here, however, petitioner has not even attempted to show that seeking an accommodation would have substantially burdened her religious exercise. And at a minimum, the existence of this additional and unusual feature of this case would make it a poor vehicle in which to consider the question presented.

the middle of trial—that the signs were sincerely motivated by her religious faith. Pet. App. 19. Under the circumstances, the court stated that it "could simply hold that it was [petitioner's] burden to affirmatively establish the sincerity of her belief by a preponderance of the evidence at trial and that she failed to do so." *Ibid.*; see *id.* at 32 (Ohlson, J., dissenting). The court declined to follow that path only because it "c[ould] resolve the case on the basis of [petitioner's] failure to establish that the orders to remove the signs were a substantial burden." *Id.* at 19.

Third, even if petitioner prevailed on her RFRA claim, it likely would not alter her sentence. Petitioner's RFRA challenge relates to only two of the six specifications on which she was convicted. C.A. App. 11, 13. Three of the four remaining specifications likewise authorized a bad-conduct discharge. See *Manual for Courts-Martial United States* pt. IV, ¶¶ 13(e), 15(e)(5), at IV-18, IV-23 (2012). Although the sentence imposed was a general one, petitioner would be unlikely to receive a different sentence if the challenged specifications were set aside. That is particularly true because her counsel "essentially argued for a punitive discharge" at sentencing, affirmatively requesting a sentence that "quickly brings [her] association with her command and the Marine Corps to an end" because petitioner no longer wished to be a Marine. Pet. App. 71 & n.32 (citation omitted).

5. The government recognizes and supports the importance of religious expression and belief in sustaining members of the military in the face of the significant challenges and responsibilities placed on them. As noted, the Department of Defense and the Department of the Navy have adopted rules and procedures

requiring that religious exercise be accommodated where possible. But the atypical circumstances present here—including petitioner's extremely limited evidentiary showing, her failure to establish the sincerity of her asserted beliefs, and her failure to invoke (or challenge the adequacy of) the available accommodation process—would make this case a very poor vehicle for considering the meaning of RFRA's substantial-burden standard. Those same features of the case, which the CAAF repeatedly emphasized, see, *e.g.*, Pet. App. 2-3, 19, 24-25, 27-29, refute petitioner's assertion (Pet. 35-36) that the CAAF's rejection of her highly unusual claim will in any way undermine RFRA's important protections for the religious exercise of our Nation's servicemembers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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