**No. 19-71**

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In the Supreme Court of the United States

FNU Tanzin, ET AL.,
*Petitioners,*
*v.*
Muhammad Tanvir, ET AL.,
*Respondents.*

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

# BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND AMERICAN HUMANIST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY


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## INTEREST OF *AMICI CURIAE*[1]

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded in 1978 as a 501(c)(3) nonprofit, FFRF has over 30,000 members, including members in every state and the District of Columbia. FFRF has 23 local and regional chapters across the country. FFRF's purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state/church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is "Freedom depends on freethinkers," works to uphold the values of the Enlightenment.

The American Humanist Association is a national nonprofit membership organization based in Washington, D.C., with over 252 local chapters and affiliates in 43 states and the District of Columbia. Founded in 1941, the AHA is the nation's

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[1] Both Petitioners and Respondents issued consent to filing this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici Curiae* or their counsel made a monetary contribution to this brief's preparation or submission.

oldest and largest Humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—a responsibility to lead a meaningful, ethical life that adds to the greater good of humanity.

The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate of separation of church and state. To that end, the AHA's legal center has litigated dozens of Establishment Clause cases in state and federal courts nationwide, including in the U.S. Supreme Court.

## SUMMARY OF ARGUMENT

The parties' arguments regarding statutory interpretation and the remedies available under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (2012), have obscured a fundamental problem with the nature of the suit in the first place: RFRA is unconstitutional.

RFRA is Congress's overt attempt to take over this Court's role in interpreting the Constitution. "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *Boerne v. Flores*, 521 U.S. 507, 512 (1997). Accordingly, it "contradicts vital principles necessary to maintain separation of powers . . . ." *id.* at 536, and Article V. *Id.* at 529. RFRA also is

beyond Congress's power, as an illegitimate exercise of power under the Commerce Clause.

Regardless of whether 42 U.S.C. 2000bb-1(c) is interpreted to allow for an award of damages against individual government employees as "appropriate relief against the government," RFRA accords religious believers extreme religious liberty rights that yield a political and fiscal windfall in violation of the clearest commands of the Establishment Clause in a long line of cases. *Amici Curiae*, who are concerned that RFRA endangers the vulnerable—who would otherwise be protected by the neutral, generally applicable laws of this country—respectfully asks this Court to hold that RFRA is unconstitutional once and for all, and to restore common sense to United States religious liberty guarantees.

## ARGUMENT

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, is unconstitutional. This Court's prior holdings concerning RFRA—with the exception of *City of Boerne v. Flores*, 521 U.S. 507 (1997)—have failed to address its constitutional defects and the parties in this case, as well as other cases, have failed to address the issue.

The issue of RFRA's constitutionality has not been raised in this case, or the vast majority of other RFRA cases involving federal law, because the religious claimants do not challenge it, the

federal government has chosen not to,[2] and courts rarely take up the issue *sua sponte*.[3] Thus, there have only been a few federal courts reaching the issue. *See, e.g., Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (holding RFRA as applied to Age Discrimination in Employment Act is constitutional as it did not violate the separation of powers principles nor the Establishment Clause, and was a proper exercise of Congressional power under the Commerce Clause, in response to Plaintiff minister invoking age discrimination claim and that RFRA was unconstitutional); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (holding RFRA constitutional as applied to federal law under Art. I powers, after the district court raised question of RFRA's constitutionality).

The decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), is a landmark, summary, and straight

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[2] The Attorney General determines when to defend a federal statute and when not to. The default position is to defend acts of Congress, but this is not a hard and fast rule, and the Attorney General owes fealty to the Constitution, not Congress. *See, e.g.*, Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep. (Feb. 23, 2011), *available at* www.justice.gov/opa/pr/2011/February/ 11-ag-223.html (declining to defend the Defense of Marriage Act in *United States v. Windsor*, 133 S.Ct. 2675 (2013)).

[3] RFRA's constitutionality was neither raised nor adequately addressed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) or *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), which are this Court's only other RFRA cases other than *Boerne v. Flores,* 521 U.S. 507 (1997).

explanation of this Court's entire free exercise jurisprudence, in which this Court carefully considered and weighed the various possibilities and the most appropriate balance between history, doctrine, and the Court's experience over 100 years with free exercise cases. With a simple majority vote for RFRA,[4] Congress shoved the Court aside and handed believers the most extreme religious liberty regime ever in place in the United States.

This Court correctly held in *Smith* that under the Free Exercise Clause, "the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to [free exercise] cases" involving neutral, generally applicable laws. *Id.* at 885. For the Court, the case was essentially a case of first impression in that it involved a demand for accommodation where the underlying religious conduct was illegal, which distinguished it from the *Sherbert v. Verner*, 374 U.S. 398 (1963), line of cases. Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1673 (2011). The result was that two drug counselors who were fired after using the illegal drug peyote, during Native American Church religious services, could not obtain unemployment compensation, because they had violated state law. The Free Exercise Clause did not provide immunity

[4] RFRA was not passed unanimously in either the House or Senate, despite its proponents' claims. It was passed in the House by a procedure euphemistically called "unanimous consent." 139 CONG. REC. H8713 (daily ed. Nov. 3, 2003).

from the state law governing peyote or unemployment compensation. *Emp't Div. v. Smith*, 494 U.S. at 890.

> This Court explained:
>
> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself— contradicts both constitutional tradition and common sense.

494 U.S. at 885 (internal quotation marks and citations omitted). Accordingly, strict scrutiny in the *Smith* case "would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability." *Boerne*, 521 U.S. at 513.

Lobbyists for religious organizations and some civil rights groups responded to *Smith* with hyperbole and exaggeration, claiming that the Supreme Court had "abandoned" religious liberty.

They mischaracterized the Court's previous holdings. Their representations to Congress that the First Amendment mandates exemptions from neutral, generally applicable laws also incorrectly portray the Framers' intent and the history of free exercise in the states. *See Boerne*, 521 U.S. at 541 (Scalia, J., concurring); *see also* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953 (2010) [hereinafter Hamilton, *Licentiousness*]; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

This Court predicted in *Smith* that legislatures would be amenable to requests for accommodation. 494 U.S. at 890. The decision proved to be prescient: while the rhetoric on Capitol Hill furiously attacked this Court's interpretation of the First Amendment as the end of religious liberty, the federal government and the states where Native American Church members practice their religion enacted exemptions for the sacramental use of peyote.[5] This underscores how misguided the attack on *Smith* was.

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[5] *See, e.g.*, David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65 (1991); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 474–77 (2012).

The hearings before Congress were almost exclusively a litany of criticism against this Court and the *Smith* decision, accompanied by demands that Congress reverse this Court's reading of the First Amendment. As this Court stated, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990)." *Boerne*, 521 U.S. at 512.

RFRA was enacted three years after *Smith* was decided. It handed religious claimants the constitutional standard that drug counselor Smith had demanded but that the Court had thoughtfully rejected. The result was that religious entities obtained extreme rights to trump constitutional, neutral, generally applicable laws, in defiance of the Court's opinion.

In 1997, this Court, in a majority decision authored by Justice Kennedy, held that RFRA was unconstitutional, invoking several bedrock constitutional principles. *See Boerne,* 521 U.S. 507. First, RFRA is a violation of the separation of powers as a takeover of the Court's primary role as interpreter of the Constitution. *Id.* at 519, 523–24. Second, it is beyond Congress's power. *Id.* at 536. Third, RFRA's enactment by simple majority vote circumvented the rigorous requirements under Article V to amend the Constitution. *Id.* at 529. These defects remain, even when RFRA is solely applicable to federal law, and this Court should invalidate RFRA once and for all.

To quote Gertrude Stein, "[a] rose is a rose is a rose." Gertrude Stein, *Sacred Emily*, Geography and Plays (1922). The plain language of RFRA makes the case that it is a shameless takeover of the Free Exercise Clause, constitutional doctrine, and "all . . . free exercise cases." 42 U.S.C. § 2000bb(b)(1) (2012). The very title of the law indicates that it is a "restoration" of something that previously existed. It invokes the "framers" for a standard they would not have adopted. *See* 42 U.S.C. § 2000bb(a)(1) (2012); *see also Boerne*, 521 U.S. at 541 (Scalia, J., concurring); Hamilton, *Licentiousness*, *supra*; Hamburger, *supra*; West, *supra*. It unabashedly states that the statute's purpose is to "restore the compelling interest test as set forth in [the Supreme Court's First Amendment free exercise cases] *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (2012).

In short, RFRA is "restoring" this Court's doctrine in cases where this Court had held it did not belong. *See also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65, 119–20 (1996) (arguing that based on its "proclaimed purpose, RFRA violates the separation of powers doctrine . . . .").

RFRA plagiarizes this Court's doctrinal terminology and approach by choosing the Court's trigger for free exercise cases and a level of

scrutiny from prior cases. It even replicates the burdens on the parties in free exercise cases:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (2012). This plain language establishes that Congress was aggrandizing its power by taking over this Court's power to interpret the Constitution. On its face, therefore, RFRA is not an ordinary statute, and is in violation of the separation of powers and Art. V. Moreover, the only class of beneficiaries for these extreme rights against constitutional laws is religious, which violates the Establishment Clause. No matter how much one pretends that RFRA is "just a statute," it is in fact an unconstitutional enactment.

## I. RFRA Violates the Separation of Powers

There is nothing subtle about RFRA's encroachment on this Court's power. With RFRA, Congress selected the constitutional standards it prefers and required them to be applied in every circumstance where the Court has ruled it should not be applied. *See* Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995) (arguing that RFRA violates the separation of powers doctrine because "it undermines the most fundamental power held by any branch of government: the power to determine its own limitations").

RFRA was and is a novel statute, which has not yet been replicated. For that reason alone, this Court should be wary. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S.Ct. 3138, 3159 (2010)) (internal quotation marks omitted).

RFRA is Congress's attempt to concoct its own free exercise clause out of the Court's constitutional doctrine. This Court's terminology is Congress's terminology. The title alone says Congress is restoring a doctrine, not introducing

anything new. RFRA lifts this Court's doctrinal language including "substantial burden" and "compelling interest."[6] And Congress "restores" its two favorite free exercise decisions, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). RFRA even replicates the burdens on the parties. 42 U.S.C. § 2000bb-1.

At the same time, Congress shopped among various other constitutional parameters. To these pre-existing free exercise doctrines, it cherry-picked a new element for the benefit of religious believers. As this Court noted in *Boerne*, the "least restrictive means" test was not the test used in previous free exercise cases, *Boerne*, 521 U.S. at 535, even in *Sherbert* or *Yoder*. The concept of extremely narrow tailoring for strict scrutiny, however, is present in this Court's other constitutional cases invoking strict scrutiny, *e.g.*, under the Equal Protection Clause when a law includes a race-based distinction. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507–08 (1989). Then Congress ordered the federal courts to apply this new package of free exercise rights to the very laws this Court had held should not receive the benefit of strict scrutiny: neutral, generally applicable laws. *Boerne*, 521 U.S. at 515; *Smith*, 494 U.S. at 879.

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[6] Congress borrowed free exercise doctrine up to the point it could hand religious lobbyists the maximum benefit, but was not even satisfied with that. It also added a "least restrictive means" element not yet seen in the Court's free exercise cases.

RFRA's legislative history supports reading it as a takeover of this Court's power to interpret the Constitution, as it focuses nearly exclusively on members of Congress and testimony castigating the Supreme Court for its First Amendment interpretation in *Smith*. To say that RFRA is not in fact an attempt to overrule this Court's constitutional interpretation is to engage in high-level intellectual gymnastics divorced from its text, history, and fundamental common sense.

If it were constitutional, RFRA is a formula that would make it possible for Congress to meddle with any constitutional doctrine and decision, and move the Court to the sidelines as political winds shift constitutional standards by simple majority votes. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469–70 (1994) (arguing that RFRA is unconstitutional because it violates principles of religious freedom, it exceeds Congress' authority, and it is an "assault upon the judiciary's interpretive autonomy"). It ignores this Court's long experience in crafting and considering the proper balance of rights. Before RFRA, this Court's role was to engage in ongoing oversight and consideration of how each constitutional rule operates through the decades and centuries most effectively to achieve the Constitution's multiple ends. If Congress can unilaterally insert its preferred standards whenever politically pressured to do so, this Court's role has been preempted. *See* Aurora R. Bearse, Note, *RFRA: Is it Necessary? Is it Proper?*, 50

RUTGERS L. REV. 1045, 1066 (1998); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998).

As this Court stated in *Boerne*, "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

## II. RFRA Violates Article V

Article V imposes extraordinary limits on amendments to the Constitution, resulting in only 27 amendments over the course of 225 years:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any

> Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V. The Framers chose this complicated and difficult route to ensure stability and maintenance of the separation of powers. *See* Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1447 (1998). *Cf.* William Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292–303 (1996), cited in *Boerne*, 521 U.S. at 529.

This Court in *Boerne* explained the separation of powers defects under the umbrella of Congress's power under the Fourteenth Amendment, by reasoning first from this Court's role vis-à-vis the Bill of Rights regarding the "traditional separation of power between Congress and the Judiciary," stating that, "[t]he first eight Amendments to the Constitution set forth self-executing prohibitions on government action, and this Court has had primary authority to interpret those prohibitions." *Boerne*, 521 U.S. at 524. The Court considered the argument that Sec. 5 of the Fourteenth Amendment was intended to invest Congress with a new power to create constitutional rights against the states—with the understanding that they could *not* be created against the federal

government. While the history of the Fourteenth Amendment supports that Congress may enforce constitutional rights against the states, even in a prophylactic manner, the Court concluded that under the Fourteenth Amendment, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524. This Court's cases further confirmed that even Sec. 5 of the Fourteenth Amendment had not "endowed Congress with the power to establish the meaning of constitutional provisions." *Id.* at 527. With RFRA, Congress unilaterally usurped that authority: RFRA "appears . . . to attempt a substantive change in constitutional protections." *Id.* at 532; *see also id*. at 534.

RFRA 's defenders say that RFRA is "just a statute," rather than a constitutional amendment. Yet, everything passed by Congress is "just a statute." It is a meaningless truism to say that just because a law passes through Congress and is signed by the President, it is a statute. Some statutes are aggrandizements of Congress's power, or fail to follow required procedures, and, therefore, are unconstitutional statutes. *E.g., Clinton v. City of New York,* 524 U.S. 417 (1998) (holding Line Item Veto Act unconstitutional); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 211 (1995) (holding § 27A(b) of the 1934 Act unconstitutional because it would require federal courts to reopen final judgments entered before the provision was enacted); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 253 (1991) (holding that congressional delegation of veto power to review board composed

of congressmen unconstitutional); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional a section of the Immigration and Nationality Act authorizing a one-house resolution to invalidate Executive Branch decision to allow deportable alien to remain in the country); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General, as congressional agent, may not exercise executive functions). That describes RFRA.

## III. RFRA Is Not a Valid Exercise of Congressional Power

In *Hobby Lobby*, this Court wrote, "As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work . . . ." 573 U.S. at 695. This remarkable position suggests that the enumerated power justifying RFRA changes with the law from which a plaintiff seeks exemption. This cannot be the case, because RFRA is not a carveout to a specific federal law and Article I grants no federal enumerated power to Congress that justifies RFRA as applied to *all* federal laws. In reality, RFRA is an enactment by simple majority vote of constitutional doctrines that Congress prefers. There is no enumerated power over religious liberty. The only conceivable theory to support its application to federal law as a whole is the Commerce Clause, and it is an illegitimate law under this Court's Commerce Clause jurisprudence.

The Commerce Clause cannot be used to regulate that which is noneconomic. RFRA is

nothing other than a constitutional standard of review, which means it is solely aimed at laws. That is what constitutional standards of review measure. Yet, the law by its nature is noneconomic.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a legitimate exercise of power under the Commerce Clause requires a direct and substantial effect on commerce, and that to uphold the Gun-Free School Zones Act in that case, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.[7] *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2646 (2012) (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants."). To conclude that RFRA is a direct regulation of commerce with a substantial effect on commerce, this Court would have to "pile inference upon inference." *Sebelius*, 132 S.Ct. at 2586–87.

RFRA does not directly regulate any activity in commerce itself, but rather the law, which is noneconomic in nature. To be sure, religious entities have tried to undergird Congress's power to enact RFRA by arguing that religious entities otherwise

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[7] In *Lopez*, the Court also held that the Gun-Free School Zones Act was unconstitutional in part because Congress did not consider its authority under the Commerce Clause. 514 U.S. at 562-63. The same is true of RFRA.

operate in commerce. "But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." 132 S.Ct. at 2648.

Under similar reasoning, the private right of action in the Violence Against Women Act was held as beyond Congress's power under the Commerce Clause, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also Reno v. Condon*, 528 U.S. 141, 142 (2000); *cf. Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (finding law valid under the Commerce Clause where it "directly regulates economic commercial activity"). *See also* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2382 (2004).

RFRA's novel tack of usurping this Court's constitutional doctrine as the substance of an ordinary statute is unconstitutional as against the states because it is beyond Congress's power, see *Boerne*, and unconstitutional when applied to federal law, because the Commerce Clause does not

justify regulation of the law *per se*, which is noneconomic in nature.[8]

## IV. RFRA Violates the Establishment Clause

Defenders of RFRA say it cannot be unconstitutional on the theory that Congress can carve up its laws however it sees fit. After all, Congress's own efforts are scaled back by this self-imposed law. This is, in fact, an incomplete description of the necessary issues to be considered under the Religion Clauses.

The Establishment Clause prevents Congress from favoring religious individuals or entities. It is after all, "[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). RFRA carves up every neutral, generally

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[8] Nor could RFRA be constitutional under Congress's spending or taxing powers. Such a preference for religious believers to overcome neutral, generally applicable fiscal or tax laws would be an extraordinary financial benefit designed solely for religious actors, and a patent violation of the Establishment Clause, as discussed in the next section. RLUIPA's prison provisions have been upheld under the Spending Clause, but RLUIPA regulates states and local governments, not individuals, and the relevant funding flows to prisons, not religious persons. *See Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *aff'd*, 131 S.Ct. 1651 (2011); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006); *Benning v. Georgia*, 391 F.3d 1299, 1306–07 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606–09 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002).

applicable federal law (i.e., those that are constitutional under the Free Exercise Clause) for the benefit solely of religious actors and it does so by granting extreme rights against otherwise constitutional statutes. This violates the Establishment Clause.[9]

This Court has explained how extreme RFRA's "stringent test," *Boerne*, 521 U.S. at 533, is as applied to state law, and the principle is no different when applied to federal law:

> The stringent test RFRA demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law

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[9] Even if this Court did not invalidate RFRA under the Establishment Clause on its face, it is undoubtedly unconstitutional as a violation of the separation of church and state in many applications. *See, e.g.,* Sara Brucker, Navajo Nation v. United States Forest Service*: Defining the Scope of Native American Freedom,* 31 ENVIRONS ENVTL. L. & POL'Y J. 273, 292 (2008). The same can be said about RLUIPA. *See, e.g.*, Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 189 (2001).

> substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If compelling interest really means what it says, many laws will not meet the test. The test would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

*Boerne*, 521 U.S. at 533–34 (citations omitted) (internal quotation marks omitted).

Imposing this gauntlet on every federal law forces the needs of other believers and nonbelievers to be subservient to the believers invoking RFRA. That creates an undue preference for one religion over another, which this Court's cases have long forbidden. *See* Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455, 465, 473 (2002) (arguing that the Court could have decided *City of*

*Boerne* by ruling that RFRA violated the Establishment Clause because the compelling interest standard "pose[d] the problem of possibly providing undue preferential treatment to religious entities without balancing other interests . . ." and thus, RLUIPA is also "unconstitutional not because it violates City of Boerne's proportionality and congruence test, but because it violates the Establishment Clause in its attempt to protect religious freedom"). *See generally* Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 230 (2006) (arguing that the RLUIPA, as applied to auxiliary use claims, may violate the Establishment Clause because it "favor[s] religion over irreligion").

Moreover, if RFRA is interpreted to allow for a damages award against individual government employees, it would become the burden of each such employee to evaluate their actions under the "most demanding test known to constitutional law." *Boerne*, 521 U.S. at 533–34. Because of the way that RFRA operates, this case represents just the tip of the iceberg. As Justice Kennedy noted, the test in RFRA creates the potential for mandatory religious exemptions from civil obligations of almost every conceivable kind. *See id.* Expanding RFRA to include personal liability for government employees will stifle countless legitimate exercises of government authority at the expense of those the laws are meant to protect.

If RFRA is expanded in this way, religious exemptions will become every government employee's default position, regardless of the legitimate interests underlying the challenged law. There is no limit to the variety of religious beliefs in the United States, and government employees will throw up their hands before attempting to correctly weigh the government's interest against a person's claimed religious interest, let alone decide whether the law they've been tasked to carry out is narrowly tailored and the least restrictive means.

RFRA's "least restrictive means" analysis already tilts the balance away from those protected by the law and toward the religious claimant determined to overcome the law. If government employees are asked to take on the role of courts and personally evaluate a law's legitimacy, it is citizens who will pay the price.

The RFRA preference is not only a matter of believers obtaining a political advantage over public policy issues. RFRA also rewards believers with financial benefits. For example, it permits for-profit businesses like Hobby Lobby and Conestoga Wood to carve up neutral, generally applicable laws to their financial benefit, and to the financial detriment of other arts and crafts and cabinet stores of other faiths or no faith. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Outside of RFRA, this Court has never allowed the government to pick and choose who receives financial benefits according to belief (or lack thereof). *Zelman v. Simmons-Harris,* 536 U.S. 639,

662–63 (2002) (upholding voucher system only because it covered all schools, religious and non-religious); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 2 (1989) (holding unconstitutional tax exemption only applicable to religious publications); *Estate of Thornton v. Caldor, Inv.*, 472 U.S. 703 (1985) (holding statute unconstitutional because it imposed an absolute duty on employers and employees to conform their business practices to the practices of one particular religion); *Larkin*, 459 U.S. at 116 (state statute granting churches and schools the power to reject liquor license applications for locations within 500-foot radius of the church or school violates the Establishment Clause. *See also Mitchell,* 530 U.S. at 840 (2000) (O'Connor J., concurring), quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 847 (1995) (O'Connor, J. concurring) ("Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (holding that a statute creating separate school district for religious enclave violated the Establishment Clause).[10]

If RFRA is expanded to allow for damage awards against individual government employees,

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[10] Post-*Hobby Lobby*, RFRA also creates perverse profit incentives for for-profit businesses to claim religious rights in order to drive down their overhead costs as compared to their competitors.

religious persons will stand to receive a financial windfall. Because federal law rewards believers who prevail under RFRA with attorneys' fees, individual employees may suffer significant financial loss to pay for believers to demand personal accommodations that are not constitutionally required. 42 U.S.C. § 1988 (2012). That would be a novel and truly stunning benefit accorded to believers alone. The Establishment Clause violation is straightforward: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

The financial imbalance between religious believers and other citizens is even more extreme than it might seem at first blush, because RFRA lets religious citizens rewrite any federal law they don't like, to their benefit. RFRA allows religious citizens alone to circumvent all legislative channels to pursue their policy convictions in federal court. Believers, like all citizens, can ask Congress for exemptions, *see Smith*, 494 U.S. at 879–80, but if an exemption is denied through duly enacted legislation, RFRA invites the believer into the judicial system to trump the duly enacted public policy. This imbalance would only be compounded if RFRA were expanded to allow religious persons to sue government employees individually. Public servants would find themselves in the position of expending their own funds in federal litigation to defend the law as written, and they would have to do so under a standard that places a heavy thumb

on the side of the balance of the religious plaintiff. In fact, religious persons could take the government out of the equation entirely, by bringing actions solely against individual government employees. In short, religious plaintiffs are already getting two bites at the public policy apple under RFRA, and expanding the available claims under RFRA would only compound the problem.

RFRA's invalidation of constitutional laws to the benefit solely of religious actors is a patent preference for believers, which violates long-settled and critically important principles under the First Amendment's Establishment Clause. Rather than expanding the scope of RFRA by allowing for private actions against government employees, RFRA itself should be declared unconstitutional.

## CONCLUSION

The Religious Freedom Restoration Act was held unconstitutional in *Boerne v. Flores* as a violation of separation of powers, federalism, and Art. V procedures. Under pressure from religious lobbyists, and intent on trumping this Court's constitutional free exercise doctrine, Congress ignored much of the *Boerne* reasoning, and amended RFRA following *Boerne* as a law that only applies to every federal law. Its constitutionality has not been widely considered, because the religious claimants do not raise it, the Attorney General has chosen not to, and courts have not raised it *sua sponte*. The result is that this novel federal statute, which is one of the most aggressive

attacks on this Court's role in constitutional interpretation in history, has fomented culture wars in the courts. This Court is now being invited to expand RFRA's scope.

RFRA violates the separation of powers and Article V, exceeds Congress's enumerated powers, and violates the Establishment Clause. Accordingly, *Amici Curiae* request this Court address its constitutionality and hold RFRA unconstitutional.

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