No. 18-548

In The Supreme Court of the United States

ADORERS OF THE BLOOD OF CHRIST, UNITED STATES PROVINCE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN *AMICUS* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITIONERS

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Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Petitioners in the above-styled case presently before this Court on a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from all of the parties in this case, but written consent was not obtained from Respondent Federal Energy Regulatory Commission.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in protecting the civil liberties of individuals from infringement by the government. The issue presented in this case, *i.e.*, whether the Religious Freedom Restoration Act's grant of the right to a judicial proceeding and judicial relief in a case claiming the government has substantially burdened the religious beliefs and exercise of a religious order, has implications for persons of faith throughout the nation.

The Rutherford Institute is gravely concerned that the decision below that the Petitioners were required to pursue their claim that the government has deprived them of their statutory right to religious freedom through an administrative agency is contrary to the intent of the Religious Freedom Restoration Act and will result in a permanent government-sanctioned invasion of the Petitioner's religious liberty. The *amicus curiae* brief would assist in the resolution of this case by exploring the history and purpose of the Religious Freedom Restoration Act and the need for judicial enforcement of its provisions.

The Rutherford Institute has no direct interest, financial or otherwise, in the outcome of this case, and is concerned solely about the civil liberties issues raised by this case and the judgment below.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Since its founding, the Institute has stood at the forefront of protecting the rights of individuals to freely exercise their religious beliefs, including representing parties before this Court in *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989), and *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001). The Rutherford Institute is interested in this case because the decision of the Court of Appeals below improperly restricts the broad protection of religious liberty intended by Congress when it enacted the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*,, which could have dire effects on the ability of the Petitioners and countless other persons of faith to live and act according to their religious beliefs.

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[1] No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party. Notice of The Rutherford Institute's intent to file this *amicus curiae* brief was provided to counsel of record for all parties as required by Sup. Ct. R. 37.2(a).

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. (RFRA), is a landmark piece of legislation intended to restore the right of free exercise of religion to its historic place among the freedoms Americans enjoy. Those who came to this continent from Europe did so seeking religious freedom. The colonies and societies they established gave broad protection to the rights of individuals to believe and act as dictated by their religion, requiring that the law make accommodations and allowances so that people could freely practice their religion.

After independence when it came time to establish a nation, the founding fathers understood that religious liberty was an essential part of our heritage and must be enshrined in our fundamental law. They did so by adopting the First Amendment and its guarantee to free exercise of religion. However, the right to religious liberty and free exercise of religion was eroded through court decisions, leaving persons of faith without protection from generally applicable laws that burdened their ability to practice their religion.

RFRA was enacted in 1993 in response to the erosion of religious freedom. It was intended by Congress to provide broad protection to religious beliefs and practices and to guarantee that government imposition of burdens on religious practices be supported by a compelling governmental interest. Additionally, Congress sought to ensure protection of religious liberty by including in RFRA a

provision that persons have the right to seek enforcement of their rights in a "judicial proceeding."

The lower court's ruling in this case failed to give RFRA the broad application Congress intended. The court held that the Petitioners, a religious order whose religious beliefs are violated by a government order allowing the operation of a natural gas pipeline through its land, could not seek enforcement of their RFRA claim against the government order in district court, but were required to present that claim to the Federal Energy Regulatory Commission (FERC). Under RFRA, the Petitioners properly sought judicial relief in the district court on their claim that the FERC order substantially burdened their religious beliefs because Congress intended that the "judicial proceeding" it granted under RFRA would be enforced in the courts, not in an administrative proceeding.

The ruling below erred by (1) presuming the statute creating FERC proceedings took precedence over the later-enacted provisions of RFRA that entitle the Petitioners to "judicial relief" in a "judicial proceeding, (2) failing to acknowledge the special role the judiciary has in protecting civil rights and RFRA's intention that courts determine RFRA claims, and (3) ruling that deferent circuit court review of a FERC decision is sufficient to afford a RFRA claimant the kind of independent judicial consideration of a religious freedom claim that Congress intended when it enacted RFRA.

ARGUMENT

I. RFRA WAS ENACTED TO RESTORE THE FULL AND BROAD PROTECTION OF RELIGIOUS LIBERTY THAT IS AN ESSENTIAL PART OF OUR NATIONAL HERITAGE

The notion that this nation was founded as a haven for the protection of the right of men and women to freely exercise their religious beliefs is far from a romantic myth, but is a fundamental truth about the United States. The 17th century settlers of New England came to the New World in order to establish a Christian Commonwealth. Maryland was established by Catholics as a colony for religious dissenters. And Pennsylvania and Delaware were founded by William Penn as sanctuaries for Quakers. William W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-25 (1990). Numerous colony charters and founding documents contained statements promising and protecting the "free exercise" of religion or "liberty of conscience." Thus, very early in our country's history it was "acknowledged that freedom to pursue one's chosen religious beliefs was an *essential liberty*," and "when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise." *City of Boerne v. Flores*, 521 U.S. 507, 551-52 (1997) (O'Connor, J., dissenting).

Significantly, these early guarantees to religious freedom were broad and intended to take

precedence over other provisions of law that might limit that freedom:

> First, the free exercise provisions expressly overrode any "Law, Statute or clause, usage or custom of this realm of England to the contrary. Second, they extended to all "judgments and contiences in matters of religion"; they were not limited to opinion, speech and profession, or acts of worship. Third, they limited the free exercise of religion only as necessary for the prevention of "Lycentiousnesse" or the injury or "outward disturbance of others," rather than by reference to all generally applicable laws. . . . [T]hese features are consistent with the idea of free exercise exemptions and indicate the lengthy pedigree of modern exemptions under the free exercise clause of the United States Constitution.

McConnell, *supra*, 103 Harv. L. Rev. at 1427-28.

Religious liberty was plainly made an essential part of the fundamental law of the United States when the founders ensured the adoption of the First Amendment and its guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. James Madison, who was a major impetus behind the Bill of Rights, wrote that the individual's duty to the Creator is "precedent both in order of time and degree of obligation, to the claims of Civil Society," and "therefore that in matters of Religion, no man's

right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." 2 Writings of James Madison 184-85 (G. Hunt ed. 1901). And Thomas Jefferson believed that "[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." *City of Boerne*, 521 U.S. at 562 (O'Connor, J., dissenting, quoting 11 The Writings of Thomas Jefferson 428–429 (A. Lipscomb ed. 1904)).

Therefore, the idea that religious exercise and belief is a liberty of the highest order is ingrained in our national consciousness and a fundamental aspect of our heritage. Members of this Court have repeatedly recognized this fundamental truth. In *Sherbert v. Verner*, 374 U.S. 398 (1963), where the Court ruled that the free exercise clause prohibited a state from denying unemployment benefits to a Seventh Day Adventist who was discharged because her religion forbade her from working on Saturdays, Justice Stewart remarked in his concurrence that "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth." *Id.* at 413 (Stewart, J., concurring). Justice Brennan also wrote that "religious freedom - the freedom to believe and to practice strange and, it may be, foreign creeds - has classically been one of the highest values of our society." *Braunfeld v Brown*, 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting).

And in *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940), the Court, writing with respect to First Amendment protections for religion and expression, held "that the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."

However, in 1990 this Court ruled that the protection afforded religious liberty is more limited than the above-cited authority and our national history suggest. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), held that the right of free exercise of religion does not relieve an individual of the obligation to comply with neutral laws of general applicability. Previous cases, such as *Sherbert*, 374 U.S. at 406-07 and *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), had found "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability" unless the government could identify a compelling interest overriding the individual's interest in religious liberty. But *Smith* rejected the compelling interest test as a general rule for evaluating Free Exercise Clause claims. *City of Boerne*, 521 U.S. at 513-14.

When the impact of the *Smith* decision on religious freedom became apparent, Congress promptly acted to restore the nation's historic

commitment to protecting persons of faith by introducing and eventually enacting in 1993 the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq*. Among the findings of Congress supporting the enactment of RFRA were the following:

> (1) [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;
>
> (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification; . . .
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a).

RFRA thereby reestablished broad legal protection for religious beliefs and practices consistent with our history and as was intended by those who established this country. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (RFRA is meant "to provide very broad protection for religious liberty."). Congress mandated

that a substantial burden may be imposed on a person's religious exercise by the government "only if" the government establishes that (1) the burden is required by "a compelling governmental interest" and (2) the method for furthering that interest is "the least restrictive means" of doing so. 42 U.S.C. § 2000bb-1(b). Indeed, Congress made plain its intention that RFRA be applied in a manner that ensures religious liberty is made paramount in each and every case where it is threatened by stating that its purpose in restoring the compelling interest test of *Sherbert* and *Yoder* was "*to guarantee its application in all cases where free exercise of religion is substantially burdened*." 42 U.S.C. § 2000bb(b)(1) (emphasis added).

Congress' commitment to ensuring that the right to free exercise of religion is a paramount concern of courts is demonstrated in other ways. When application of RFRA against state entities was found unconstitutional in *City of Boerne*, 521 U.S. at 536, Congress responded in 2000 by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq., which reestablished the compelling interest test with respect to actions by states that burden the religious exercise of incarcerated persons and religious practices connected with uses of land. As described by this Court, RLUIPA was a step in the "long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). RFRA and RLUIPA are deemed "sister statutes," *Holt v Hobbs*, 135 S. Ct. 853, 859 (2015), and

> [s]everal provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "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). Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." [42 U.S.C.] § 2000cc–3(g). And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."

Holt, 135 S. Ct. at 860.

After RLUIPA was enacted, RFRA was amended by Congress to ensure that it also is interpreted and applied to give "expansive protection for religious liberty." Originally, RFRA defined "religious exercise" as "the exercise of religion under the First Amendment." However, when Congress enacted RLUIPA, it declared that "[t]he term 'religious exercise' includes 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). RFRA was thereafter amended to import the definition of "religious exercise" set forth in RLUIPA. *See* 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title."). "Congress

mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Burwell*, 134 S. Ct. at 2762 (quoting 42 U.S.C. § 2000cc-3(g)).

And while the impetus for the enactment of RFRA was the decision in *Smith* and the desire to reinstate the compelling interest test in cases where a person's religious exercise is burdened, Congress went beyond merely reestablishing the pre-*Smith* standards. RFRA also requires that government action pass a "least restrictive means" test to avoid being declared an unlawful violation of religious liberty. 42 U.S.C. § 2000bb-1(b)(2). Such a requirement was not an established criteria for First Amendment free exercise claims prior to the decision in *Smith*. *City of Boerne*, 521 U.S. at 509. Thus, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Burwell*, 134 S. Ct. at 2761, n. 3.

It is abundantly clear that RFRA was meant to make religious liberty a consideration of the highest order by courts. After *Smith*, Congress intended that there should be a return to the "peculiarly American conception of the relation between religion and government - one that emphasizes the integrity and diversity of religious life rather than the secularism of the state." McConnell, *supra*, 103 Harv. L. Rev. at 1416. Indeed, RFRA was meant to "guarantee" that those whose religious exercise is burdened by the federal government be allowed to raise RFRA as a claim or defense. 42 U.S.C. § 2000bb(b).

II. THE RULING BELOW SHOULD BE REVERSED BECAUSE IT FAILS TO GRANT THE BROAD PROTECTION OF RELIGIOUS FREEDOM CONGRESS INTENDED WHEN IT MANDATED RFRA BE ENFORCED IN "JUDICAL PROCEEDINGS"

Despite the broad scope of RFRA and its mandate that there be a "judicial proceeding" available to persons whose religious freedom is burdened by the federal government, 42 U.S.C. § 2000bb-1(c), the Third Circuit ruled that the use of the Petitioners' property for a natural gas pipeline without their consent and in violation of the Petitioners' religious beliefs could not be remedied. It held that the National Gas Act (NGA) required the Petitioners to have sought relief before the Federal Energy Regulatory Commission (FERC). App. 15.[2] It held that no conflict existed between RFRFA's provision entitling persons to seek enforcement of their religious liberty in a "judicial proceeding" and the NGA's provisions giving FERC, a non-judicial entity, primary responsibility for deciding whether the government has adequate justification for burdening religious beliefs and practices. If allowed to stand, the Third Circuit's ruling will result in the Petitioners' suffering an infringement of their religious beliefs and practices in perpetuity.

In finding that the NGA's procedure does not conflict with RFRA's allowance of a "judicial

[2] "App." references are to pages of the Appendix to the Petition for Writ of Certiorari.

proceeding," the lower court relied primarily on the fact that the NGA allows circuit courts to "review" FERC decisions. App. 14-15, n. 6. While the Third Circuit admitted that if there was a conflict between the NGA's procedure and RFRA's requirement of a judicial forum to decide religious liberty claims RFRA's provisions must control, *id.*, it determined that any requirements imposed by RFRA were satisfied by the NGA's circuit court review procedure.

The Third Circuit's ruling failed to acknowledge and give effect to the intent of Congress in enacting RFRA: to reestablish the original understanding of religious liberty and ensure as much as possible that this liberty is protected by the legal system. The protection of religious freedom Congress intended, indeed, which Congress sought to "guarantee," 42 U.S.C. § 2000bb(b)(1), was through the courts, which have the necessary experience and procedures for doing so and have historically stood as the protectors of civil rights. Thus, the ruling that there was no conflict between RFRA and the NGA's administrative process was erroneous and the Petitioner's district court RFRA action should not have been dismissed.

A. The Lower Court Improperly Failed to Give Primacy to RFRA's Provisions

Initially, the Third Circuit erred in its ruling because it assumed that the NGA's provisions should take precedence. The court started from the presumption that "the NGA's procedural regime is controlling here." App. 15. It then went on to review the "highly reticulated" administrative procedure, stressing that the NGA is the "exclusive remedy" for

matters involving interstate pipelines and that it grants circuit courts "exclusive jurisdiction" to review FERC orders. By starting with the assumption that the NGA's provisions are paramount, the Third Circuit's conclusion that the Petitioners were required to raise their RFRA claim before FERC was inevitable.

But the idea that the NGA's procedures should have primacy over RFRA's is wrong and conflicts with express Congressional statements of its intent that RFRA should be considered controlling in the interpretation of federal law. Thus, RFRA's provisions apply "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). As this Court pointed out in *City of Boerne*, 521 U.S. at 532, RFRA was intended to have "sweeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."

The reach of RFRA in displacing existing statutory provisions is demonstrated by the decision in *Gonzalez v. O Centra Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418 (2006), which held that RFRA protected the use of hoasca, a Schedule I controlled substance, in connection with a religious ceremony. This Court ruled that even though hoasca fit the statutory definition of a controlled substance and so was not exempt from the strict statutory control scheme established by Congress, a religious exemption still was available because of the broad protection of religious practices provided by RFRA.

Moreover, RFRA imposed on the government the burden of demonstrating that there was a compelling interest in prohibiting the religious use. "Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day." *Id.* at 432.

If RFRA displaces statutory provisions that establish what are and are not dangerous substances, it certainly displaces federal that establishes the forum in which religious freedom claims may be brought.

Moreover, the Third Circuit's decision to give precedence to 15 U.S.C. § 717r(b) (the section of the NGA establishing the administrative procedures), which was enacted in 1938, over RFRA, which became law in 1993, contradicts statutory construction rules relating to later-enacted statutes. Under those rules, the terms of a later-enacted statute control over the terms of an earlier-enacted statute regardless of whether there is any language in the later statute about the earlier one. *Dorsey v. United States*, 567 U.S. 260, 274 (2012) (citing *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring)). *See also Callahan v. United States*, 285 U.S. 515, 518 (1932) (later statute superseded the provisions of a prior statute embracing the same subject).

In this case, the lower courts should not have approached the jurisdictional issue from the standpoint of whether RFRA's requirement that religious freedom claims be determined in a "judicial

proceeding" could stand in light of the provisions of the NGA. Instead, the issue should have been approached from the standpoint of whether there were substantial reasons for denying the Petitioners the right to have their claim decided in a judicial, as opposed to administrative, proceeding as the later-enacted RFRA directs. Given the broad reach of RFRA and Congress' purpose of ensuring that religious liberty is protected, there are no reasons for giving the NGA's provisions primacy.

B. Deferent Judicial Review of An Administrative Decision Does Not Constitute a "Judicial Proceeding" for Purposes of RFRA

The Third Circuit's ruling that Petitioners were required to have pursued their RFRA claim through the administrative process is also contrary to RFRA because the administrative process set forth in the NGA cannot be deemed a "judicial proceeding," even with the involvement of circuit courts in the process. Again, RFRA, in a subsection titled "Judicial relief," provides persons with the right to assert a claim or defense that their religious freedom has been burdened in a "judicial proceeding." 42 U.S.C. § 2000bb-1(c). Clearly, the Petitioners would not have been allowed a "judicial proceeding" for resolving their RFRA by filing objections or a request for rehearing with FERC because FERC cannot in any respect be considered a judicial body. It is not an Article III court. *See, e.g., McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 287-88 (1984) (arbitration decision was not a "judicial proceeding"). Indeed, it was acknowledged by the Third Circuit below that the "'agency proceeding alone would not

qualify as such a judicial proceeding[.]'" App. at 14-15, n. 6.

However, according to the Third Circuit the "judicial proceeding" requirement of RFRA is satisfied by the involvement of a circuit court in reviewing FERC's order under 15 U.S.C. § 717r(b). Without explanation, the court ruled that the "FERC + Court of Appeals framework" is enough to give those facing a deprivation of their religious liberty (and in this case, a loss in perpetuity) the judicial remedy promised by RFRA.

But this ruling ignores the extremely limited nature of the review function of courts of appeal over the decisions of FERC. This Court described the scope and extent of that review as follows:

> First, [the court] must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the

> relevant public interests, both existing and foreseeable. *The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*

In re Permian Basin Area Rate Cases, 390 U.S. 747, 791-92 (1968) (emphasis added). *Accord Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 583 n. 13 (D.C. Cir. 1979).

A reviewing court must uphold FERC's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 967 (D.C. Cir., 2000). Additionally, 15 U.S.C. § 717r(b) requires the reviewing court uphold factual findings of FERC if supported by "substantial evidence."

If a court is only required to assure that FERC gave "reasoned consideration" to a RFRA claim raised before it, or if the court applies the highly deferential "abuse of discretion" standard to FERC's decision of a RFRA claim, it cannot be said that claimants such as the Petitioners have been allowed to raise the claim in a "judicial proceeding." The judicial involvement deemed sufficient by the Third Circuit to satisfy RFRA involves a very narrow standard of review that does not allow the circuit court to substitute its judgment for that of FERC. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.

402, 416 (1971). A RFRA claimant before FERC is not given independent consideration of its religious freedom claim by a judicial body. The RFRA decision is instead made by an administrative agency in proceedings that are clearly not "judicial."

This kind of deferent review is inconsistent with the role the judiciary has historically been given as a protector of civil liberties. The importance of judicial decision-making on matters involving civil rights was set forth in *McDonald v. City of West Branch, Mich.*, *supra*. In the course of holding that the rulings of arbitrators on civil rights issues should not give rise to collateral estoppel or res judicata, this Court wrote as follows:

> Because [42 U.S.C.] § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable. Indeed, as we explained in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *See also Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982). And, although arbitration is well suited to resolving contractual disputes, our decisions . . . compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and

> constitutional rights that § 1983 is designed to safeguard.

McDonald, 466 U.S. at 290.

When Congress took action to provide broad protection to religious freedom by enacting RFRA and giving persons the right to a "judicial proceeding," it surely did not envision that the judicial branch would act in a subordinate role and in deference to the decision of an administrative agency. Under the ruling below, the primary responsibility for determining a claim that the government has improperly burdened religious freedom is given to an administrative agency, with only limited judicial review of that decision as to both the facts found and the legal conclusions made. That limited review is not the kind of judicial involvement that is considered necessary to protect civil liberties. The Third Circuit's ruling that circuit court review satisfies RFRA's grant of a "judicial proceeding" to claimants fails to provide the kind of independent check on government infringements of religious liberty that the judiciary has historically provided, and so conflicts with the protection of civil rights granted by RFRA.

C. The Administrative Process Is Not Suited to Provide the Protection of Religious Freedom Claims Congress Intended in Enacting RFRA

That the Petitioners' RFRA claim was within the jurisdiction of the district court also is supported by this Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), which

involved a challenge to the constitutionality of actions by the Immigration and Naturalization Service (INS) in reviewing applications under an amnesty program for undocumented aliens. As in the instant case, the government sought dismissal of the lawsuit, which was brought in district court, on jurisdictional grounds, arguing that it was barred by a provision of the statute creating the program that required review of orders under the program by the circuit courts. However, this argument was rejected and the constitutional claims against the INS actions were upheld. *Id.* at 494.

The *McNary* decision rested on two factors that are also relevant to the jurisdictional question presented by the instant Petition for Writ of Certiorari. First, *McNary* stressed that the "abuse of discretion" standard for judicial review of administrative determinations would be inappropriate for the constitutional and statutory claims raised. Although the "abuse of discretion" standard makes sense for judicial review of administrative determinations uniquely within the purview of an agency, it makes no sense and is inappropriate for judicial consideration of "constitutional or statutory claims, which are reviewed *de novo* by the courts." *McNary*, 498 U.S. at 493.

Similarly, the judicial review allowed under the NGA would make little or no sense for the statutory RFRA claim raised by the Petitioners, a claim that is in substance an assertion of a constitutional right. Given the courts' historic role as independent guardians of civil rights, *McDonald*, 466 U.S. at 290, a rule that a court must defer to an

administrative agency's decision on religious liberty inappropriately diminishes that role. This rule is particularly apt in the instant case in light of Congress' specific grant of a right to a "judicial proceeding" and "judicial relief" to RFRA claimants, 42 U.S.C. § 2000bb-1(c), and its intent to provide extensive protection to religious freedom.

Second, *McNary* indicated that the INS, as an administrative agency, was not an appropriate forum to adequately address constitutional and statutory claims outside of its area of expertise. This Court stressed that the agency "would lack the fact-finding and record-developing capabilities of a district court" which would frustrate the ability of a circuit court to provide meaningful review of constitutional and statutory claims. *McNary*, 498 U.S. at 497. Thus, restricting judicial involvement to court of appeals review "is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.*

The same considerations apply here. FERC cannot be expected to engage in the kind of fact-finding and decision-making on RFRA claims that a federal district court would conduct. Understanding the importance of religious liberty, Congress made sure to provide RFRA claimants with a right to a "judicial proceeding" on their claims so that the essential freedom protected by RFRA is given heightened protection. The Third Circuit's ruling that administrative procedures plus circuit court review satisfy RFRA's requirements should be reversed.

CONCLUSION

Preserving our nation's heritage of religious liberty is essential if we are to retain our identity as a country dedicated to protecting the freedom of everyone, regardless of their faith or creed. Congress recognized this when it enacted RFRA and provided a judicial remedy to persons whose religious freedom has been violated. If allowed to stand, the ruling below would limit the broad protections RFRA is meant to provide and, as applied to the Petitioners, would result in a permanent deprivation of religious freedom that is wholly contrary to the purpose of RFRA. Therefore, the Petition should be granted.

Respectfully submitted,

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