No. 18-548

In the Supreme Court of the United States

Adorers of the Blood of Christ, United States Province, n/k/a Adorers of the Blood of Christ, United States Region, Successor by Merger to Adorers the Blood of Christ, Province of Columbia, PA, Inc., formerly known as Saint Joseph's Convent, Mother House of Sister Adorers of the Most Precious Blood, Columbia, PA also known as Sisters Adorers of the Most Precious Blood, St. Joseph Convent, Columbia, PA formerly known as Saint Joseph Convent Motherhouse of the Adorers of the Blood of Christ, Columbia, Pennsylvania, Inc.; *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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTRODUCTION

FERC and Transco premise that this is a run-of-the-mill case involving the application of the administrative exhaustion and exclusive jurisdiction provisions of the NGA to RFRA. They are badly mistaken. RFRA is not an ordinary statute, and this is not an ordinary case.

First, FERC and Transco disregard that RFRA is *sui generis* inasmuch as Congress explicitly directed that RFRA apply over and above every other federal law. RFRA amends the entire Federal Code, including the NGA. The prohibitions and remedies of RFRA apply to every federal agency action *regardless* of the provisions of other federal laws, unless Congress exempted the law from RFRA. When RFRA is applied as written, subjecting the NGA to RFRA rather than the other way around, the foundation of Respondents' argument collapses.

Second, in order to force a RFRA claim to fit into the NGA framework, Respondents both rewrite and ignore RFRA's provisions. As this Court made clear, "[o]ur responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes[.]" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

Third, Respondents' arguments evidence troubling assumptions about the power of federal agencies to defy statutory limitations on their authority. The result is the expunction of the very legislative and judicial checks Congress employed in RFRA to protect religious freedoms from harmful government action.

At its core, this case involves extremely important questions regarding both the protection of religious

freedoms and the rise of an unchecked administrative state. The responses by FERC and Transco further highlight that certiorari is warranted in this matter.

ARGUMENT

I. RFRA amends the entire U.S. Code, and the NGA is subject to and controlled by RFRA.

Respondents' arguments derive from the premise that, "[u]nder the NGA, FERC has exclusive authority to regulate sales and transportation of natural gas in interstate commerce." FERC Br. at 2; *see* Transco Br. at 12. According to FERC, as a "potentially affected" landowner, the Adorers were required to raise their prospective RFRA claim for FERC to decide by following the NGA's administrative procedures.[1] Respondents maintain that because the burden on the Adorers' religious exercise may arise as part of Respondents' implementation of a natural gas pipeline, only FERC could decide the RFRA claim during its administrative review of Transco's application. If the Adorers disagreed with FERC's decision, they were required to seek rehearing before FERC and then file a petition for review in the appropriate circuit court. Under Respondents' analysis, "all roads lead to FERC." FERC Br. at 9.

The problem is that under RFRA, no roads lead to FERC. Respondents do not argue, nor could they, that RFRA required the Adorers to submit their RFRA

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[1] Of course, when Transco submitted its application and while FERC was reviewing the application, there was no substantial burden on the Adorers' religious exercise and, thus, no RFRA "claim." *See* Pet. at 20-21.

claim for FERC to decide. Rather, Respondents maintain that the *NGA* required the Adorers to submit their RFRA claim to FERC. Respondents ignore that Congress did something extraordinary in adopting RFRA: it mandated that every federal law be subject to RFRA's provisions, unless such law explicitly excludes itself by reference to RFRA. 42 U.S.C. § 2000bb-3(b). RFRA is "unparalleled in American statutory history" in that, "in one fell swoop, RFRA attaches itself to every [federal] statute, law, ordinance, and rule in the land, as well as those that may be enacted in the future." Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 112 (1996); *see* Christian Turner, *Submarine Statutes*, 55 HARV. J. ON LEGIS. 185, 186 (2018) ("New laws, therefore, have meaning only in light of what RFRA also says."). This Court recognized that the "sweeping coverage" of RFRA "ensures its intrusion at every level of government, *displacing laws* and prohibiting official actions of almost every description and regardless of subject matter." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (emphasis added).

Accordingly, RFRA amends all federal statutes, *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008), thereby "qualif[ying] the entire U.S. Code," Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 255 (1995). The Third Circuit set up a false paradigm, which Respondents espouse, that RFRA would modify the NGA only if the two statutes "conflicted." This interpretation is an artifice that has no basis in the language of RFRA or this Court's application of RFRA. By inventing the requirement that a federal statute is

subject to RFRA only if the two conflict, the Third Circuit flipped the hierarchy, subjecting RFRA to the NGA.

The proper analysis is not dependent on whether there is a conflict between RFRA and the NGA. Rather, Congress superimposed RFRA on all other federal legislation whether there is a conflict or not. The only way a statute may be exempted from RFRA's reach is if "such law explicitly excludes such application by reference to [RFRA]." 42 U.S.C. § 2000bb-3(b). "Congress thus obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc) (emphasis in original), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). If Congress wanted RFRA claims to be subject to the NGA's procedural regime, it had to say so with explicit reference to RFRA when it amended the NGA in 2005. It did not. Therefore, as a matter of law, the NGA is not exempt from the application of RFRA, and the NGA's exclusive jurisdiction provisions cannot control RFRA. Furthermore, because Congress stated unequivocally that RFRA controls, resort to the judicially-created *Thunder Basin* doctrine is inappropriate.

Given that RFRA trumps the NGA, RFRA's essential provision of "an express private cause of action" to a person whose religious exercise has been burdened in violation of RFRA must be upheld. *Sossamon v. Texas*, 563 U.S. 277, 282 (2011). If a federal agency like FERC takes action that violates

RFRA, a person has the right to assert a claim in a judicial proceeding and obtain appropriate relief against the government. Congress ensured that this right was universally available and uniformly applied, not restrained by any other federal legislation (such as the procedural regime of the NGA), unless Congress specifically said so in that legislation. Transco had it exactly backwards when it claimed that "RFRA simply does not provide an end-run around the NGA's administrative exhaustion requirement." Transco Br. at 17. What Congress actually said was that no federal statute, including the NGA, can do an end-run around RFRA.

RFRA has been described as a "sweeping 'super-statute'" for very good reason: it trumps all other federal legislation, including the NGA's administrative regime, in order to protect the religious liberties of individuals against the federal government. The basis of the Third Circuit's decision and Respondents' arguments is fundamentally flawed and should be reviewed by this Court.

II. Respondents' analysis that FERC must decide a RFRA claim is contrary to the plain language and stated purpose of RFRA.

FERC and Transco embrace the Third Circuit's conclusion that Congress intended FERC to decide a RFRA claim through the NGA's administrative process. Such an argument is belied by the plain language and stated purpose of RFRA.

RFRA guarantees a person whose religious exercise is substantially burdened the right to "assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). The Third Circuit rewrote this critical provision of RFRA, denying the Adorers the right to assert a claim in a judicial proceeding and instead requiring the Adorers to submit their (unripe) RFRA claim for FERC to decide during its administrative proceeding. This analysis cannot be squared with the plain language of § 2000bb-1(c). Not only does it require a RFRA claim to be decided in an administrative proceeding, it also requires a person to exhaust administrative remedies to prosecute a violation that has not even occurred. RFRA has no administrative exhaustion requirement. Furthermore, it limits who can assert a RFRA claim to those with Article III standing.[2] Whether FERC's certificate order can later be reviewed by the circuit court is of no moment because RFRA requires a court, not the offending administrative agency, to adjudicate RFRA claims—"that is how the law works." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

FERC argues that the Seventh Circuit's decision in *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007), "squarely addressed the

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[2] Respondents' argument is a *non sequitur* that, because administrative agencies are not subject to Article III standing requirements, Congress intended the Adorers to submit their claim to FERC, and it only highlights the fact that FERC has no jurisdiction or authority to adjudicate a RFRA claim. If Congress wanted administrative agencies to adjudicate RFRA claims (which agencies are not subject to Article III standing requirements), why would it limit who can assert a claim to those *with* Article III standing?

scope of 42 U.S.C. 2000bb-1(c)." FERC Br. at 12. This is an inaccurate and misleading representation. *St. John's* involved a proposal by the City of Chicago to expand the O'Hare International Airport, for which the City sought funding from the Federal Aviation Authority (FAA). As part of the expansion, the City initially proposed to condemn a cemetery overseen by the Rest Haven Cemetery Association. Rest Haven filed a RFRA claim against the FAA in federal district court. Before the district court ruled on the claim, the expansion plans were modified to exclude the Rest Haven cemetery. The district court accordingly dismissed Rest Haven from the litigation for lack of standing. On appeal, the Seventh Circuit declared that Rest Haven's RFRA claim was not before the court but stated in dicta that, "even if" Rest Haven's "claims were not moot, the district court would still lack jurisdiction." *St. John's*, 502 F.3d at 628. The Seventh Circuit then proceeded to address why Rest Haven apparently was not entitled to a factual hearing before the district court. Not only is the discussion of RFRA in *St. John's* pure dicta, the D.C. Circuit held in a related case predating *St. John's* that the City—not the FAA—was the cause of any religious burden, and therefore, no RFRA claim even existed. *Village of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006). Thus, contrary to FERC's portrayal, the issue currently before this Court was not decided in *St. John's*.

Respondents also point to *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6th Cir. 2000), and *Radio Luz v. FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), *aff'd* 213 F.3d 629 (3d Cir. 2000) (Tbl.), as holding that RFRA is subject to and controlled by statutes with administrative exhaustion and exclusive jurisdiction

provisions. These two cases are factually distinguishable. Both involved radio broadcasters seeking to stop enforcement actions by the Federal Communications Commission (FCC) for illegally broadcasting without a license. Each broadcaster had submitted a license application to the FCC and simultaneously filed a preemptive RFRA claim in district court seeking injunctive relief. *See La Voz*, 223 F.3d at 320. The courts denied their attempts "to obtain more than one bite at the judicial apple." *Luz*, 88 F. Supp. 2d at 376-77. The present case involves a stranger to a third party's administrative application who, rather than attempting to litigate in two forums, has been precluded from raising a RFRA claim in any forum. *La Voz* and *Luz* are not applicable to the instant matter and, in any event, exemplify the adage that bad facts make bad law.

To the extent that the above decisional law supports that RFRA must be subjected to the administrative exhaustion and jurisdictional provisions of other federal legislation, these cases represent a fundamental misunderstanding of RFRA. The development of this body of case law based on such a profound misinterpretation of RFRA simply reinforces the urgent need for this Court to address this matter.

III. Respondents' analysis violates basic separation of powers principles and promotes the unfettered expansion of the administrative state.

While Respondents argue that FERC has unlimited authority to make decisions about natural gas pipelines, they fail to acknowledge that in enacting RFRA, Congress expressly limited the authority of

FERC, and every other federal agency, to take action that burdens religious exercise. 42 U.S.C. § 2000bb-1(a), (b). "[T]he import of RFRA is that, whatever other statutes may (or may not) say, 'the Federal Government may not, *as a statutory matter*, substantially burden a person's exercise of religion." *Rweyemamu*, 520 F.3d at 202 (quoting *Gonzales*, 546 U.S. at 424) (emphasis in original). Thus, RFRA is "an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 211 (1994); *see also* Acting Attorney General Whitaker Statement on the 25th Anniversary of RFRA, Nov. 16, 2018 ("It is a remarkable thing for any government to impose such restraints on itself.").[3]

FERC, like every other federal agency, "is entirely a creature of Congress and the determinative question is not what [FERC] thinks it should do but what Congress has said it can do." *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). Congress said FERC could not take *any* action that substantially burdens religious exercise unless FERC expressly justifies such action. *See City of Boerne*, 521 U.S. at 533-34 ("If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and

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[3] RFRA's limitation on government's authority to take action in violation of RFRA, 42 U.S.C. § 2000bb-1(a), is independent of the "Judicial relief" provisions found in subsection (c). Therefore, whether the district court had jurisdiction to consider the Adorers' RFRA claim did not absolve FERC of complying with RFRA.

show that the law is the least restrictive means of furthering its interest."). FERC and Transco have not, and cannot, justify their actions in forcing the Adorers to use their own land in violation of their religious beliefs.[4] As such, FERC's action was *ultra vires*. This Court has held that judicial review must be available when a federal agency exceeds a plain and unambiguous statutory command or prohibition in clear disregard of its statutory authority. *Oestereich v. Selective Service System*, 393 U.S. 233, 238 (1968); *see also Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.").

Furthermore, Congress subjected all federal law to RFRA, which is to say that "every federal statute and program is now conditioned by a supervening requirement of accommodating religious liberty." Paulsen at 275. Thus, when FERC issued its Certificate Order to Transco, Congress legislatively

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[4] Transco makes the disingenuous claim that the Pipeline is providing "clean-burning natural gas." Transco Br. at 1. What Transco does not mention is the United States government's recent report that concludes that climate change is occurring at an alarming rate, with a direct causal connection to greenhouse gas emissions, and will disproportionately affect people who are already vulnerable, including lower-income and other marginalized communities. Fourth National Climate Assessment, Summary Findings, *available at* https://nca2018.globalchange.gov/ (last visited Jan. 6, 2019). This objectively reinforces the Adorers' deeply held religious beliefs about the urgent need to protect the earth and its inhabitants from the serious consequences of climate change caused by the continued development and use of fossil fuels.

superimposed upon that Order a condition that the Atlantic Sunrise Pipeline could not be implemented in violation of RFRA. The RFRA condition was no different than the 56 environmental conditions FERC expressly attached to the Order. Importantly, the Adorers did not need to do anything for RFRA to attach. Accordingly, FERC had no authority to issue a notice to place the pipeline into operation when it knew the action would violate the condition imposed by RFRA.

Finally, the Third Circuit's decision represents an attack on one of this Country's most basic legal doctrines: the separation of powers. As Justice Brandeis observed, "[t]he doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. U.S.*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Here, Congress adopted a statute expressly prohibiting government action and made it clear that if the government violated the statute, a person can bring a private cause of action in a court. Congress then took the extraordinary measure of applying the protection over and above every other federal law, in recognition that free exercise rights are unalienable and worthy of the utmost protection. The Third Circuit's decision violates legislation duly enacted by Congress and, also, Congress's command that the judiciary provide a check on the executive branch for violations of the legislation. This precedential ruling, if not reviewed, eliminates the very checks Congress placed on an ever-expanding and

powerful administrative state, which can now violate individuals' religious freedoms with impunity. "[T]he danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

The petition for a writ of certiorari should be granted.

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