No. 21-1297

IN THE

Supreme Court of the United States

CLARE THERESE GRADY, CARMEN TROTTA, MARTHA HENNESSY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The question presented in this case is simple: does the Religious Freedom Restoration Act (RFRA) mean what it says. The specific and plain language of RFRA requires the government to "demonstrate" that its action, in support of a compelling interest which infringes on religious liberty, is the "least restrictive means" to effectuate that interest:

> 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.A. § 2000bb-1 (emphasis added)

In its brief in opposition (BIO), the government proposes that the burden under RFRA requires no affirmative steps on its part, but allows it to merely and passively reject, without explanation or detail, alternatives proffered by those whose religious liberty has been curtailed. This position "effectively exempts the [g]overnment from being required to prove what the statute requires, *i.e.*, that it has employed 'the least restrictive means of furthering [its] compelling governmental interest,' 42 U.S.C. § 2000bb–1, and casts the burden on [Petitioners] to offer 'alternative schemes' which then are subject to being refuted, with evidence, by the [g]overnment." *Legatus v. Sebelius*, 988 F.Supp.2d 794, 811 (E.D. Mich. 2013). This interpretation of RFRA, consistent with the holding in *United States v. Wilgus*, 638 F.3d 1274 (10th Cir.

2011) and embraced by the Eleventh Circuit below, contradicts RFRA's specific terms and conflicts with the decisions of several other circuits. For this reason alone, the petition should be granted to resolve this split.

More importantly, if this principle is allowed to stand, it will have ramifications far beyond the facts of this case. Not simply religious protestors such as the present Petitioners, but religious employers or members of a religious community or anyone whose religious liberty is infringed in the face of governmental assertion of a "compelling interest" will have no faith that the infringement is actually the "least restrictive means" since the government's burden will have been lifted. As this Court held in *Holt* and *Burwell*, "[t]he least-restrictive-means standard is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015)(citing *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 728 (2014)(citation cleaned up). As the *Wilgus* principle cannot be what Congress intended in enacting RFRA, nor what this Court has held in development of RFRA jurisprudence, the petition should be granted and the decision below reversed.

I. The Government Misunderstands the Role of RFRA in the Criminal Context

In opposing certiorari, the government misstates the question presented and focuses almost entirely on the specific facts of this case, as though the facts could somehow absolve failure to adhere to RFRA's clear mandate. And while recognizing in one breath that RFRA provides a defense to criminal prosecution,

BIO 9 (citing *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2016)), this is merely canard since the government's entire argument leaves little room for such a defense in the RFRA sphere. With no support, the government essentially advances a theory that defense to criminal prosecution is effectively extracted from any consideration under RFRA, and most certainly unavailable in the context of criminal charges relating to alleged damage to governmental property. Such was not the case in *United States v. Hoffman*, 436 F. Supp. 3d 1272 (D. Ariz. 2020).

In that case, religious aid workers were convicted of misdemeanors for violating "regulations governing the Cabeza Prieta National Wildlife Refuge . . ." *Id*. at 1276. The workers had entered the Refuge without a permit in order to leave supplies for undocumented immigrants entering the United States, despite regulations which "specifically prohibit the leaving of 'water bottles, water containers, food, food items, food containers, blankets, clothing, footwear, [and] medical supplies' [at the Refuge]." *Id*. at 1278. A magistrate judge found the defendants guilty but the district court overturned these verdicts, finding "that Defendants demonstrated that their prosecution for this conduct substantially burdens their exercise of sincerely held religious beliefs, and that the Government failed to demonstrate that prosecuting Defendants is the least restrictive means of furthering any compelling governmental interest." *Id.* at 1277. This acquittal came in the face of the government's argument (among others) that the actions of the defendants had a damaging impact on the Refuge property. Despite these assertions, the district court found that RFRA required the ostensible criminal violations to balance against the religious exercise at issue, and

weighed this assessment in favor of those exercising their religious beliefs.

Presently, the government embraces the Eleventh Circuit's determination that "forbidding the specific 'religious exercise practiced in this case' is the least restrictive means of furthering the government's compelling interest." BIO 11. The Circuit erroneously arrogated to itself the right to determine the nature and scope of the religious exercise of the Petitioners. The Circuit adopted a new rule, that in a criminal case "*neither the district court nor this Court could consider* whether lesser restrictive alternatives were available for the Plowshares group to protest in *a different manner than the destructive manner* in which they did in the late-night hours of April 4, 2018." Pet. App. 16a (emphasis added). But this Court and other federal courts have been deferential to religious actors in characterizing the scope of the religious practices at issue. *See, e.g.*, *Holt*, 574 U.S. at 361 (2015) ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief."); *Jones v. Slade*, 23 F.4th 1124, 1141 (9th Cir. 2022) ("We have read RLUIPA's reference to 'any exercise of religion' literally (and thus broadly in favor of inmates) to include not only 'the belief and profession' of faith, but also individual 'physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine.') (quoting *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 987 (9th Cir. 2008) (alteration in original), and *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

In this case, as the courts below noted, Petitioners "contend they entered the naval base to discharge

themselves of what they viewed as complicity through inaction, to 'preach the gospel of nonviolence directly to Navy and Marine personnel caught up in the contagion of sin[,]' and to protest, as they believe their religion dictates, the threat to humanity posed by the nuclear warheads they believe are located on the base." Pet. App. 60a. As the Petitioners have previously said, their required religious exercise "was to perform 'nonviolent acts of prophetic witness against the governments [sic] possession of nuclear weapons,'" Pet. App. 38a. Given the stunning lack of security at the Kings Bay Naval Base, Petitioners were able to freely roam the grounds of the base for hours until they could *directly* "preach the gospel of nonviolence" to the base personnel who confronted them. Pet. 18. Greater security, which would have prevented their access to the base in the first place, would not have diminished their religious exercise since they would have "preached that gospel *directly*" to whomever confronted them whenever and wherever. *Id.*

Further, in the face of what their religious exercise actually was in this case, it is difficult to see how the alternatives Petitioners proffered (i.e., reducing the number and severity of the charges, civil injunction, ban and bar letters, pretrial diversion), would not have satisfied the same interests of the government albeit in a clearly less restrictive way. But since the government has failed to examine alternatives in any meaningful way, it has been improperly absolved of its responsibilities under RFRA. *See, e.g., Christie*, 825 F.3d at 1063 (the court "may not ease the government's burden by rubberstamping vague or generalized arguments about means and ends."). Moreover, while the alternatives proffered by Petitioners may be "less *punitive*," Pet. App. 50a, that does not, as the courts below suggest, diminish them as properly

invoked under RFRA. If RFRA is a vehicle for defense in the criminal context, then advancement of a mitigated application of criminal provisions in a specific case is a viable aspect of that defense. Contrary to the government's position, not only did it fail to affirmatively address alternatives to the level and severity of the prosecution it advanced, it now adopts the erroneous position of the lower courts that again relieve it of any analytical responsibility regarding the "least restrictive means" prong of RFRA. In doing so, it fails to explain why the alternatives proffered by Petitioners are unsatisfactory, or why the prosecutorial path it has chosen was its only recourse. This misread of RFRA affects not only this case but could have damaging consequences going forward.

II. The Government Fails to Recognize the Actual Circuit Split at Issue

It has long been recognized that in curtailing religious liberty, "[t]he Government 'must demonstrate that 'no alternative forms of regulation would suffice to accomplish the Government's compelling interest." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 480 (5th Cir. 2014) (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)(cleaned up). The *Wilgus* doctrine noted above, and as noted in the Petition, diminishes the government's responsibility to take any affirmative steps in effectuating this "demonstration." *See* Pet. 9-16. The Eleventh Circuit below enhanced this principle, holding that "[t]he government ***does not bear the burden*** of proffering less restrictive alternatives or demonstrating that it actually considered and rejected those alternatives." Pet. App. 15a. This not only ignores the clear language of RFRA but also stands contrary to decisions from other circuits. A number of these cases are outlined

in the Petition and include reference to cases applying the same analytical framework to RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. Pet. 10-14. *See, e.g., Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007) (RLUIPA); *Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007) (RLUIPA); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (RLUIPA); *Legatus v. Sebelius*, 988 F.Supp.2d 794 (E.D. Mich. 2013) (RFRA suit for preliminary injunction); *Cryer v. Spencer*, 934 F.Supp.2d 323 (D. Mass. 2013) (RLUIPA).

For its part, the government attempts to dismiss the conflicting decisions arising from these circuits by grasping one aspect of the *Wilgus* holding which is not the subject of circuit split and is not at issue here. In supporting its compelling interest, it is indisputable that the government need not "refute each and every conceivable alternative scheme." *Wilgus*, 638 F.3d at 1289. The cases at odds with *Wilgus* do not take issue with that premise. But there is a great deal of space between refuting "every conceivable alternative" and doing nothing at all. The circuits in conflict are clear in their requirement that the government take affirmative steps in assessing available means and determining what is and is not "less restrictive." District courts are fully capable of reviewing the government's actions and holding it to an appropriate level of due diligence without requiring a venture into the "every conceivable" forest. That is what the decisions cited by Petitioners require. It is what *Wilgus* (and the Eleventh Circuit below) negate. The government's failure to recognize the nuance between the decisions that accept the *Wilgus* principle and those that do not is insufficient reason to not address the real and specific circuit split these decisions represent. In a world where religious exercise and governmental

regulation are ubiquitous and so often intersect, leaving these vastly different interpretations of RFRA unreconciled can only do mischief to both religious liberty and proper governmental action.

III. The Government Mistakenly Suggests Pre-RFRA Caselaw Governs this Case

The question presented in this case (i.e., whether RFRA's "least restrictive means" prong imposes a burden on the government or on those whose religious liberty is impaired) has universal importance regardless of the type of religious exercise that is at issue. Answer to that question is of the utmost importance to the exercise of religion and impacts all aspects of that exercise. Granting review in this case has implications far beyond the interests of the present Petitioners. The government, however, argues that the facts and circumstances of this case somehow extract it from the body of law developed under RFRA and instead make it amenable to pre-RFRA jurisprudence. The government bolts this argument to the fact that the actions in question took place on a military base. This is a rather remarkable position, one which has not the slightest support in the decisions of any circuit, much less this Court. Asserting its jurisdiction over a facility such as Naval Submarine Base Kings Bay, the government essentially argues that it is immune from the rigors of RFRA. There is nothing in RFRA nor the body of law developed under it which gives any place to this astonishing argument. To suggest that it should be a basis for this Court's declination of review of such a vital issue as this case raises is equally as astonishing.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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