No. ____

IN THE

Supreme Court of the United States

JACOB N. FERGUSON,
Petitioner,

v.

ROBBIN M. OWEN,
Respondent.

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

Petition for a Writ of Certiorari

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Pro Se Petitioner

QUESTIONS PRESENTED

In 2001, a three-judge panel of the D.C. Circuit — including today's current U.S. Attorney General — was unaware that the definition of religious exercise in the Religious Freedom Restoration Act of 1993 ("RFRA") was amended in 2000 by Congress to mean: any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). As a result, an erroneous precedent was set, which still survives to this day. Incredulously, in the nation's capital, claimants are still losing RFRA cases for lack of stating compellence and centrality on behalf of religious belief. Petitioner applied for a permit to demonstrate at the seat of government in free exercise of religion. The chief of the permit office *admitted to wrongfully denying the activity*. The courts below disposed of the case — ruling that location-specific demonstrations at the federal seat of government are not "required," "central," or "important" to Christianity.

The questions presented are:

1. Whether religious exercise must be required, central, or important to a system of religious belief.

2. Whether the availability of alternative means counsels against finding a substantial burden.

3. Whether the substantial burden test is a religious or secular question of law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacob N. Ferguson respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment below (App. 1a-2a) is unreported. The opinion of the district court dismissing the complaint (App. 3a-34a) is unreported, but available at 2022 WL 2643539. The opinion of the district court denying reconsideration (App. 36a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, is reproduced in the appendix to this petition (App. 54a-57a).

STATEMENT OF THE CASE

"Jesus answered them, 'Is it not written in your law, "I said, 'You are gods'"?'" John 10:34.

Petitioner is a Christian who moved to Washington, D.C., during the presidency of Donald J. Trump to prophesy in the heart of the nation's capital and warn the West — its seat of government and people — about repeating the history of ancient Rome, and its transition of government from republic to empire before the coming of Christ. Petitioner obeyed the law of man and applied for a permit to demonstrate in free exercise of religion at the seat of government in the shape of a Christian cross sprawled out across Washington's historic monuments, memorials, and landmarks on the National Mall.

Respondent, the chief of the permit office for the National Park Service ("NPS") in D.C., denied Petitioner's small, unorthodox demonstrations for years under the pretext of other applicants having applied first, which she later admitted was false only after Petitioner filed a Freedom of Information Act Request with her office, *inter alia*, and brought mandamus against NPS. Thereafter, Respondent confessed, but only to making an honest mistake, while the attorneys of the United States appeared and ran out the clock on that relief. Petitioner then brought the instant case for monetary damages against Respondent in her individual capacity, for violating his free exercise of religion under color of law.

The district court dismissed, mistakenly opining that free religious exercise had to be compelled by, or

central to, a system of religious belief under the Religious Freedom Restoration Act of 1993 ("RFRA"), misguided by the erroneous precedent of the D.C. Circuit above it who admitted later to being unaware of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amending said old language out just a few months prior. *Infra* at 11-14.

I. Petitioner Applied for a Permit to Conduct Demonstrations at the Seat of Government in Free Exercise of Religion

Petitioner submitted a final permit application during the COVID-19 pandemic. Asked what the "purpose" of his activity was, he wrote one sentence: "To attract a crowd with music and convey a religious/political message." The attracting of a crowd with music — best coined perhaps by the NPS as a "musical demonstration" — is a legitimate form of protest not disputed by Respondent. That is good, for the prophets of the Bible did exactly that — prophesied with music. *See* 1 Chronicles 25:1 ("David, together with the commanders of the army, set apart some of the sons of Asaph, Heman and Jeduthun for the ministry of prophesying, accompanied by harps, lyres and cymbals"); *see also* 1 Samuel 10:5 ("As you approach the town, you will meet a procession of prophets coming down from the high place with lyres, timbrels, pipes and harps being played before them, and they will be prophesying.")

Furthermore, Jesus quoted Psalms (a song book) more than any other book in the Bible, and a number of the messianic prophecies that foretold the coming of Christ are lyrics in the book of Psalms. *See* Psalm 110; *see also* Luke 24:44. It should thus also come as

no surprise that the Messiah himself is famously said to come from the seed of David — a successful musician who was skilled in what today could be called the ancient-day equivalent of a guitar — the harp.[1] Music is not insignificant in the scriptures. Moses had a hit song — quite literally called the "Song of Moses" — which is still in heavy rotation today thousands of years later. *See* Deuteronomy 32. And of course the Levites, who were set apart by God[2] from all the twelve tribes of Israel, were the temple musicians. *See* 1 Chronicles 6:31-47.

Last but not least, music is symbolically portrayed throughout the book of Revelation, apparently having significance in the end times. *See* Revelation 14:1-5. Petitioner does not pretend to understand it all yet, but knows this: God sometimes calls people to do things that are not always going to be understood by the human race. Isaiah was once told by God to walk around naked for three years as a prophetic sign unto nations. *See* Isaiah 20:2-4. Ezekiel was instructed to act out symbolic plays on a little model of Jerusalem under siege. *See* Ezekiel 4:1-3. Poor Jeremiah did not earn the nickname "the weeping prophet" for nothing, and was once commanded by God to dress up like an animal and convey a religious/political message to various governments and people of his time. *See* Jeremiah 27-28. To each

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[1] Or lyre — a similar, stringed instrument. *See* https://biblehub.com/1_samuel/16-23.htm

[2] The tribe of Levi managed the tabernacle and the temple, camping in the center of the Israelites during the wilderness wanderings and receiving no inheritance in the Promised Land because "the Lord is their inheritance." *See* Numbers 8:14; *see also* Deuteronomy 18:1-2.

his own, and in continuation of the theme, Petitioner's avenue for prophesying in Washington was to conduct musical demonstrations.

To be clear, while Petitioner will not describe himself as being a prophet (and will let God answer for him one day on that one), he nevertheless wanted to *practice* prophesying in the public square of the nation's capital by giving religious and political speeches of a prophetic nature, accompanied by music that other musicians would perform. All of the music revolved around the speeches, dubbed "truth pitches" by Petitioner, and fashioned as prayers,[3] in which he would pause in between songs, look up, and pray to God one-on-one in full view of the audience, disguising within the prayer itself a revelation that Petitioner had secretly had. In this style of not pushing one's religion and politics onto others in the public square as is often done by protesters in Washington, Petitioner believed that souls might be influenced in the spirit of what the scriptures call the "still small voice" or "gentle whisper" — a mystery that Petitioner is still trying to figure out. *See* 1 Kings 19:12. Furthermore, Petitioner wanted to conquer his greatest fear of public speaking, specifically on the subject of religion and politics, for "God has not given us a spirit of fear." 2 Timothy 1:7.

Petitioner's mission in Washington was free religious exercise, and he went to great lengths to conduct his musical demonstrations in a professional and influential way, incurring great expenses and lost wages along the way while making preparations for the upcoming events. Petitioner purchased thou-

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[3] *See* https://dcstreetperformer.com/

sands of dollars in music equipment, licenses, and insurance; built a website; hired web designers, voice over artists, and session musicians; and even bought a full-size bus capable of transporting the musicians and equipment to and from the demonstrations while staging at the designated pick-up and drop-off zones located near the Reflecting Pool steps of the Lincoln Memorial.

Petitioner did so because NPS's own website at the time[4] stated: "Most band performances take place on the steps of the Lincoln Memorial Reflecting Pool[.]" "Buses can drop off participants and equipment" nearby. After reading this, Petitioner bought one, and then labored over the next few months to convert it into a tour bus suitable for the music project, which he described as a "music fanbase" "modeled after the Judeo-Christian God"[5] and a temple for the "true worshipers" to assemble "in spirit and truth" under the flag of music. *See* John 4:23-24. The project showcased the true music of undiscovered songwriters — both Christian and secular alike — at live shows and online, and Petitioner called it The gods.

Jesus said, "you are gods," to those whom the Word of God came, *see* John 10:34, and quoted Psalm lyrics when he said it, *see* Psalm 82:6. Hence, the

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[4] *See* National Mall and Memorial Parks, Permits FAQs, NPS (Mar. 3, 2020), https://web.archive.org/web/20200303190825/https://www.nps.gov/nama/planyourvisit/permits-faqs.htm; *see also* National Mall and Memorial Parks, Band and Choral Performance Permits, NPS (Feb. 28, 2020), https://web.archive.org/web/20200303192911/https://www.nps.gov/nama/planyourvisit/band-and-choral-performances.htm

[5] https://thegods.org

name. Petitioner's logic is simple: if Christ was God in the flesh, then Christians (who make up the body of Christ) are gods in the flesh. The spirit of God is within them and the Bible literally calls them "the sons of God." *See* Romans 8:14; *see also* Galatians 3:26 ("For you are all sons of God through faith in Christ Jesus.") In the time of Jesus, this was a hard saying for some to accept — that humans can be likened to God — and Jesus would later be convicted at his trial before the Sanhedrin on the charge of blasphemy. Ironically, the Psalm lyrics that Jesus quoted above to defend himself against his opponent's false accusations of blasphemy, describe God presiding over a great assembly as the Judge of judges.[6] Simply put, Petitioner believes that God is teaching his elite servants to be like God ("gods"). The sovereign authority and power given to the Son of God, is also given to the sons of God; and just as Christ had "authority on earth to forgive sins" because he was God on earth, *see* Matthew 9:6, so too Christians are given that same authority, *see* John 20:23 ("If you forgive anyone's sins, their sins are forgiven") because they are gods on earth. Thus, the body of the Son of God is made up of the sons of God — it's that simple.

Petitioner pleaded all of the above, sincere religious belief to the district court, but it appeared skeptical, *see* App. 9a, even though it's unclear what ulterior motives Petitioner might be accused of having, seeing as he pleaded that he has made it a rule to never personally make any money from The gods, nor use it to promote his own name anywhere on the

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[6] https://en.wikipedia.org/wiki/Psalm_82

website or at the live shows, *see* Compl. ¶ 61 (ECF No. 1). Tips and donations were not allowed to be solicited on the National Mall, and Petitioner's one and only song was credited incognito under a made up alias and stage name called "DC Street Performer" — a song available for free to all — which simply repeats the religious and political message of Petitioner's protest, inspired by the apocalyptic books of Daniel and Revelation in the Judeo-Christian scriptures, and the history of ancient Rome.[7]

The point is this — all of the above is the definition of religious exercise (even if idiosyncratic) and should have been granted a lawful permit by Respondent, but was not; and that is because Respondent faked the existence of other applicants. To be clear, Petitioner submitted his application exactly one year in advance (the earliest allowed by law) down to the day and hour, and reminded Respondent three times that the application had been submitted that far in advance. *See* Opp'n to Mot. to Dismiss at 2 (ECF No. 9-1).

Nevertheless, Respondent chose to delay issuing a permit for eleven months and waited until just three days before the demonstrations were scheduled to begin to grant only 10/123 of the dates lawfully applied for, at a downgraded, undignified grassy-hill-area that was never requested and inappropriate for setting up music equipment.

A site designed to oppress:

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[7] *See supra* note 3.

Petitioner then asked Respondent to explain in writing why he was again not permitted for his lawful activity on the dates and times requested, at the unrestricted location that he requested, and remarkably, Respondent gave the exact same answer as before, stating that other applicants had applied first (even though this time that was unlawful).

Now, herein lies the evidentiary crux of the claim, and the smoking gun: Petitioner, before taking any legal action against Respondent, asked her to confirm in writing if a "mistake" had been made (so that she couldn't just make one up later). Respondent replied in writing — stating categorically for the record, "No mistake was made" — and then ceased communications with Petitioner until a lawsuit was filed. And then immediately after becoming aware of that lawsuit, Respondent abruptly about-faced and claimed that she had made a mistake, granting a few dozen more dates to Petitioner for a grand total of 43/123 (one-third) of the demonstrations lawfully applied for, meaning 80/123 (two-thirds) were never permitted by Respondent anywhere in Washington.

The chief of the permit office at the seat of government, in charge of protecting free religious exercise and free speech in the heart of the free world, knowingly violates civil liberty.

Read that sentence again, if you must, because at the time of this filing, it appears as if nobody knows or cares except Petitioner, who naively assumed that the lower federal courts in Washington would be zealous to discover if such a claim has evidence. Yet, the facts of the case cannot even be reached because the district court itself has now made a mistake, dismissing Petitioner's claim because it believed that religious exercise had to be compelled by, or central to, a system of religious belief under RFRA — an erroneous precedent that can be traced back to none other than the D.C. Circuit above it whose three-judge panel mistakenly disregarded the RLUIPA amendment only a few months after its unanimous passage by Congress. Alas, this entire case arises out of the so-called mistake that the chief of the permit office purports to have made, in not granting Petitioner a lawful, demonstration permit on a first-come, first-serve basis. *Make no mistake, the government's mistakes are piling up to the heavens!*

II. The D.C. Circuit Set an *Erroneous Precedent* that Allowed the District Court to Dismiss the RFRA Claim by Inquiring into the Importance of a Religious Exercise

A bipartisan Congress enacted RFRA to provide greater protection for religious liberty in America. Under RFRA, government shall not (1) substantially burden (2) a sincere (3) religious exercise, *see Gonzales v. O Centro Espírita Beneficente União do Vegetal*,

546 U.S. 418, 428 (2006), absent "compelling governmental interest" pursued through "the least restrictive means," 42 U.S.C. § 2000bb-1(a)-(b). If government does violate RFRA, claimants may obtain appropriate relief, including "damages against federal officials in their individual capacities." *Tanzin v. Tanvir*, 141 S. Ct. 486, 488 (2020).

At the time of its passage, RFRA originally applied to only "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1999). However, seven years later, Congress unanimously amended the definition of religious exercise in RFRA to include "any" exercise of religion, "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Now, look at what the D.C. Circuit erroneously opined just a few months later:

> To our court, substantial burden in RFRA is ... whether the government has placed a substantial burden on the observation of a *central* religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.

Henderson v. Kennedy (*"Henderson I"*), 253 F.3d 12, 17 (D.C. Cir. 2001) (citation omitted) (emphasis added). To be clear, the *Henderson* court not only ruled that it was still lawful under RLUIPA-amended RFRA to examine whether or not a person's exercise of religion was *central*, but also if it was *compelled*:

> [D]oes the ban * * * "substantially burden" plaintiffs' exercise of their religion? The answer is clearly no ... plaintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion *requires*.

Id. at 16 (emphasis added).

The *Henderson* court was apparently unaware of RLUIPA's recent passage. *See Henderson v. Kennedy* (*"Henderson II"*), 265 F.3d 1072, 1073 (D.C. Cir. 2001) (explaining months later that the RLUIPA amendment was "not mentioned by either side when the case was last before us" and admitting that it "remove[s] the doubt expressed in our opinion.") The plaintiffs in *Henderson* petitioned the court for a rehearing, but the three-judge panel just denied it and opted instead merely to walk back its prior opinion language by issuing a new one, and insisting all along that it had only affirmed "the propriety of inquiring into the importance of a religious practice" within the context of a lawful substantial burden analysis. *Id.* at 1074. However, as the Court can clearly read above, that is not what the *Henderson* court ruled; and regardless, inquiring into the "importance" of a religious practice is no different than inquiring into its compellence and centrality, both of which violate the spirit and letter of RLUIPA-amended RFRA.

Tellingly, an almost identical three-judge panel of the D.C. Circuit revisited *Henderson* just a few months later in a First Amendment case, and at-

tempted to do damage control, accusing the appellees in that case of misreading *Henderson*. *See Levitan v. Ashcroft*, 281 F. 3d 1313, 1319 (D.C. Cir. 2002). Indeed, *Levitan* is quite the goldmine for anyone trying to understand the D.C. Circuit's own view of its erroneous *Henderson* precedent at the time; and the Court need not even take Petitioner's word for it — for a judge even as far out as the Southern District of Texas could see the clear mistake:

> In *Levitan,* the court, without citation, stated that the "challenged rule must also burden a central tenet or important practice of the litigant's religion." The court, despite the Supreme Court's warning to the contrary in *Smith,* explained: "Nonetheless, it is sometimes the case that litigants can make no credible showing that the affected practice *is either central or important to their religious scheme.*" ... RFRA seems to foreclose the analysis that the D.C. Circuit used to conclude that some violations are *de minimis.* Whether the affected practice is central or important to a religion is not for the court to determine.

E. Tex. Baptist Univ. v. Sebelius, 988 F.Supp.2d 743, 764 (S.D. Tex. 2013) (Rosenthal, J.) (emphasis added) (citations omitted). The point is that no matter how much the D.C. Circuit attempted to just walk back its erroneous precedent and informally undo it via subsequent cases and dicta — short of overturning it — the damage was done. Jurists in various circuits

continued to cite *Henderson* as instructive case law, thereby anchoring its place into the nation's RFRA jurisprudence. To be clear, the erroneous *Henderson* precedent remains to this day in direct contravention of RLUIPA-amended RFRA. The courts are not allowed to rule against RFRA claimants for lack of stating compellence and centrality on behalf of religious belief — period. Yet, that is exactly what the district court did in the instant case, repeatedly opining that Petitioner had failed to state a claim under RFRA because the *only* thing protected under RFRA is "central" religious exercise:

> RFRA does not protect all actions that are religiously *acceptable*; rather, RFRA protects only the observation of a *central* religious belief or practice. Mr. Ferguson's explicit disavowal of the very claim he would need to make for his RFRA claim to be successful means his RFRA claim cannot succeed.

App. 17a (citation omitted) (emphasis added).

> RFRA is only triggered when the government has placed a substantial burden on the observation of a *central* religious belief or practice. Mr. Ferguson appears to reject this holding.

App. 18a (citation omitted) (emphasis added).

> [T]he denial of a permit application to demonstrate at the Lincoln Memorial is a substantial burden under RFRA only if demonstrating at the Lincoln Memorial is a *central* religious belief or prac-

> tice.

App. 19a (emphasis added).

> [T]here is only a substantial burden when the government restriction prevents an action that is *central* to religious belief. When the plaintiffs do not allege that the restricted action was *central* to a religious belief, there can be no substantial burden.

App. 14a-15a (citation omitted) (emphasis added).

The above are just a few examples; indeed, the district court used RFRA's forbidden word "central" thirty-two times throughout its memorandum opinion in relation to Petitioner's alleged failure therein to state a claim. That is fine, for judges are human too, and make mistakes. What is not fine, however, is that even after Petitioner moved the district court to reconsider its clear error, and pointed out the direct and unambiguous words of Congress explicitly disallowing such an inquiry via RLUIPA's unanimous, bipartisan passage, it still just denied the motion and attempted merely to walk back its prior opinion language with a new one (just like the *Henderson* court did in 2001), paradoxically opining that it was *because* Petitioner's religious exercise was not central to his religious belief, it was therefore not "important" enough to trigger RFRA:

> The Court's analysis did not make the centrality of prophesying and playing music at the Lincoln Memorial to Plaintiff's religious beliefs a threshold question, as Plaintiff's motion suggests. It

> instead concluded that, *because* playing music and prophesying at the Lincoln Memorial was not *central* to Plaintiff's religious beliefs, such demonstration was not so *important* to Plaintiff's beliefs that the denial of Plaintiff's permit applications constituted a substantial burden under RFRA.

App. 43a-44a (citation omitted) (emphasis added). Respectfully, the district court's renewed substantial burden analysis amounts to no more than a word game, and one which directly misapplies the law. Indeed, only after Petitioner moved the district court to reconsider its clear error, did it then come back with a new opinion and begin to analyze the so-called "importance" of Petitioner's religious practice, which was never done before. *See* App. 3a-34a.

Furthermore, in denying Petitioner's motion for reconsideration, the district court also confirmed the other half of the D.C. Circuit's erroneous precedent, opining that Petitioner had also failed to trigger RFRA because his religious exercise was not *compelled* ("require[d]") by a system of religious belief:

> The Court concluded that Defendant's actions did not prevent Plaintiff from engaging in conduct [his] religion *requires*, which Plaintiff could do elsewhere in Washington, D.C., and therefore did not constitute a substantial burden under RFRA.

App. 46a-47a (citation omitted) (emphasis added). Petitioner's religious exercise does not need to be

compelled ("require[d]") by his religion, or "central" to it, for both analyses violate the direct and clear language of RLUIPA-amended RFRA, unambiguous on its face. Equally true, under no circumstances are compellence or centrality allowed to enlighten the "importance" of a religious practice in a lawful substantial burden analysis. Yet, the district court unpacked its renewed substantial burden inquiry by analyzing exactly that, apparently content to punt the D.C. Circuit's erroneous *Henderson* precedent all the way up to this Court:

> Plaintiff appears to suggest that D.C. Circuit precedent may itself be erroneous by permitting consideration of the importance of a religious practice as part of a substantial burden analysis. ("[T]he mere suggestion of a court that notions of *centrality* and/or *requirement* may at all weigh into the substantial burden analysis, is expressly forbidden by Congress."). Justice Alito has, in dissent, noted that "it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect 'any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.'" But until the Supreme Court states that courts may not undertake such an analysis, this Court remains bound by the D.C. Circuit precedent that permits such consideration.

App. 43a (citation omitted).

The district court and the D.C. Circuit remain bound by the Constitution, and the separation-of-powers principles enshrined within it, which delegate the authority of passing laws to the Legislature and *interpreting* those laws to the Judiciary. Thus, when Congress passes a law explicitly forbidding an inquiry into "compelled" and "central" religious exercise, and then the courts dispose of a claim by inquiring into exactly that ("required," "central," and "important" religious exercise), that can hardly be called an interpretative misapplication of the law as opposed to a direct violation of the Separation of Powers.

To be clear, the D.C. Circuit's erroneous *Henderson* precedent was built upon a foundation of sand — that is, ignorance of the RLUIPA amendment — and should have been overturned. Until it is, all of its precedents and progeny are but fruit of the poisonous tree, including *Henderson's* misguided "multitude of means" analysis, whereby a claimant's purported *multitude* of alternative means can counsel against finding a substantial burden under RFRA. In the instant case, that "multitude" was defined by the district court as just *two* locations (the Capitol Building and the White House) where Petitioner had demonstrated at before in years prior, which the district court invoked as wholly sufficient to cover all of Respondent's alleged permit sins, even though Respondent never offered such alternatives to Petitioner, and later admitted that she had no good reason whatsoever to deny the unrestricted location that Petitioner did request. Moreover, according to

NPS's own website, it is *the permit specialist's* duty to offer the alternative means to applicants, not the other way around.[8]

Indeed, the D.C. Circuit's multitude of means analysis is especially inappropriate in the alleged context of a government official *intentionally* violating a citizen's civil liberty. What would it matter if Petitioner had a multitude of alternative means? The courts in Washington are advancing the dangerous, legal fiction that government officials are allowed to just deny free religious exercise at any location they want, so long as the demonstration applicants can just go somewhere else:

> Plaintiff's argument, which relies on the premise that "no alternative means were offered to Plaintiff *anywhere* in Washington," suggests that he misunderstands the Court's alternative means analysis. ... The question informing the Court's substantial burden analysis was not whether Defendant offered Plaintiff alternative locations ... Defendant need not have offered alternative locations or dates for Plaintiff to have had such a multitude of means available to him. ... Plaintiff had adduced that playing at other locations also sufficed as alternative means of practicing his religion ...

[8] *See* National Mall and Memorial Parks, Permits FAQs, NPS (Mar. 6, 2021), https://web.archive.org/web/20210306053754/https://www.nps.gov/nama/planyourvisit/permits-faqs.htm ("Once your application is submitted, a permits specialist will contact you if there is a conflict with the location you specified on your application and attempt to find an alternative site.")

> which Plaintiff could do elsewhere in Washington, D.C., and therefore did not constitute a substantial burden under RFRA.

App 44a-47a. The district court is again referring to the two locations referenced above where Petitioner had demonstrated at before in years prior (in other jurisdictions not under Respondent's authority). Yet, such a dangerous, slippery-slope precedent allows Washington's permit specialists to essentially just play musical chairs with applicants' lawfully requested locations at the seat of government and deny whichever they want without cause, thereby enjoying something akin to absolute immunity under RFRA. Moreover, who's to say that after the applicants go somewhere else, they will not just be given the same answer by a different government entity and denied a permit there too so long as there are yet other available locations still? Indeed, it is not difficult to see how the D.C. Circuit's erroneous multitude of means analysis can oppressively wear down the law-abiding citizen who just wants to freely exercise his religion (which the authors of RFRA called one of "the most treasured birthrights of every American" — "the right to observe one's faith, free from Government interference.") S. Rep. No. 103-111, at 4 (1993).

More importantly, Petitioner specifically pleaded[9] that he felt *led by God* away from one of the locations that he had previously demonstrated at before:

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[9] *See Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015) ("a district court errs in failing to consider a *pro se* litigant's complaint in light of all filings, including filings responsive to a motion to dismiss.")

> "My first ever musical demonstration in Washington, DC, took place on November 2, 2018, outside the United States Capitol Building. However, immediately as I started playing the music, it began to rain. I packed up and from that moment on believed that God was leading me only to the White House, if he was leading me at all."

Ferg. Decl. ¶ 12 (ECF No. 9-2). That leaves one — the closed portion of Pennsylvania Avenue NW outside of the White House — the only other location where Petitioner had ever demonstrated at before, which would soon lose relevance in the aftermath of the 2020 presidential election.

Admittedly, it is tempting to take the bait and spend time picking apart the meritless, *two*-location "multitude of means" analysis put forth by the courts below, but that would threaten to distract from what actually matters here, and that is the fact that Respondent had no good reason whatsoever to deny Petitioner's religious exercise at the lawful, unrestricted location that he did request, and later admitted it. Petitioner pleaded that he applied to musically demonstrate at the Lincoln Memorial — the most popular location in Washington, D.C. ("tied to, or even surpassing, the White House"), Compl. ¶ 95 (ECF No. 1) — because it represented the local public square, and thus the place where his religious and political message could reach the greatest number of people, whom it was intended to help. Petitioner is a Christian (literally a "follower of Christ"), and Jesus Christ himself rode into the capital city of his people

and headed straight for the public square, later conducting somewhat of a demonstration of his own in civil disobedience. *See* Matthew 21:10-13; *cf.* Revelation 11:3-8 (the bodies of his left and right will also one day lie in the "public square[10] of the great city[.]")

There's nothing wrong with wanting to reach large crowds of people with the Word of God. In fact, the opposite is what would be wrong. Yet, the district court and the D.C. Circuit appear to believe that religious exercisers must have some type of semantic, *location-based*, religious significance in order for their desired religious exercise to be protected under RFRA. To this day, Petitioner declines to plead that demonstrating *specifically at the Reflecting Pool steps of the Lincoln Memorial* was a "central" or "required" theological doctrine or creed within Christianity — for that is ridiculous. But rather, Petitioner reasonably pleaded that God simply granted him the authority to freely exercise his religion at any lawful place that he believed was right. "God did not command or *require* Plaintiff to choose the Lincoln Memorial." Opp'n to Mot. to Dismiss at 17 (ECF No. 9-1). It was "*acceptable* to God." *Ibid.* This common sense admission is the entire reason that this case was dismissed, *supra* at 14, and the judgment affirmed.

Petitioner raised everything on appeal, even requesting an initial en banc hearing to review the erroneous *Henderson* precedent, but not a single judge called for a vote. Afterwards, one of the D.C. Circuit's original *Henderson* court judges was as-

[10] *See* https://www.blueletterbible.org/niv/rev/11/8/s_1178008

signed to the case and disposed of it per curiam[11] — along with two of the court's newest judges — *issuing the shortest RFRA opinion in the history of the D.C. Circuit* and opining in only five sentences why the judgment below would be affirmed: because inquiring into the "importance" of a religious practice is still purportedly lawful under RLUIPA-amended RFRA, and Petitioner's free religious exercise was not "required" by his religion due to having a "multitude of means." App. 2a.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit has far departed from the spirit and letter of RLUIPA-amended RFRA, and sanctioned such a departure by the district court, that an exercise of this Court's supervisory review is warranted. Furthermore, the circuits are split and many appear to have departed from the Court's own jurisprudence. *Infra* at 34-35. In a recent RLUIPA dissent, Justice Alito conveniently summed up where the Court currently stands for all three of the questions presented in this case:

> We have not addressed whether, under RLUIPA or its cousin [RFRA], which contains an identical threshold requirement, there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred.

[11] Without oral argument two days after hearing oral argument in United States v. Trump about presidential immunity.

> In past cases, we have assessed regulations that compel an activity that a practitioner's faith prohibits. And, while some Members of this Court have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden (arguing that it is not a substantial burden to require Christian-owned businesses to facilitate the acquisition of abortifacients), a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected belief or practice. Similarly, it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect "any exercise of religion, *whether or not compelled by, or central to,* a system of religious belief." But this does not answer what results when the State offers a prisoner an alternative practice that, in terms of religious significance, is indistinguishable from the prohibited practice.

Murphy v. Collier, 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting) (citation omitted). And as for where the twelve[12] circuits stand: 9/12 have opined that the substantial burden inquiry is a question of

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[12] The Federal Circuit is excluded.

law for the courts to decide; 5/12 have ruled that alternative means can counsel against finding a substantial burden; 5/12 have held that religious exercise must be compelled by a system of religious belief; and only 1/12 (the D.C. Circuit) still to this day inquires into the centrality and/or "importance" of a religious practice:[13]

	Question of Law	Alternative Means	Compelled ("Required")	Central & Important
1			✓	
2	✓			
3	✓	✓		
4				
5	✓			
6	✓	✓	✓	
7	✓			
8		✓	✓	
9	✓	✓		
10	✓		✓	
11	✓			
D.C.	✓	✓	✓	✓

I. The Questions Presented Are Important

The most obvious reason why this case is important is because it involves the citizen's most basic and fundamental right to demonstrate at the seat of government in free exercise of religion, which oc-

[13] Petitioner conducted somewhat of a poor man's empirical analysis, but it should be largely accurate. The cases can be cited to in the briefs.

cupies a privileged position in the hierarchy of free exercise jurisprudence inside the quintessential and traditional public fora of the nation's capital. Religious liberty is *the first freedom* of every American, which Jefferson called "the most inalienable and sacred of all human rights." 19 The Writings of Thomas Jefferson (Memorial edition, 1904) 408, 417. That is by no means *un*important. Thus, even if the circuit split above did not exist, that alone should suffice to warrant the Court's supervisory review, because Washington, D.C., is the one and only custodian of the nation's federal seat of government, which the D.C. Circuit alone has exclusive jurisdiction over.

The Court can imagine what dreams may come, if the unelected, chief bureaucrats of the executive branch who administer all citizens' rights to peaceably assemble and protest in the heart of the free world, are allowed to intentionally violate said rights under color of law and be shielded by the unlawful, erroneous precedent of the D.C. Circuit. Indeed, moral hazard dictates that in the absence of deterrence, said constitutional violations of the highest order are a cancer in the Republic that, if left untreated, is in danger of metastasizing.

II. The D.C. Circuit Has Far Departed from RLUIPA-Amended RFRA's Substantial Burden Test, and the Circuits Are Split

The D.C. Circuit is an outlier among the circuits, and the fruits of *Henderson* can be clearly seen via conducting a quick empirical analysis of its case law, which shows that RFRA claimants only succeed past the substantial burden test in a dismal 5.3% of all

decisions that have ever cited to it as instructive.[14] Contrast that with RFRA's already low 37% average win rate nationwide (according to one of the latest studies)[15] and clearly something is wrong. Recall that the district court originally dismissed Petitioner's RFRA claim because the erroneous *Henderson* precedent instructed that *location-specific* demonstrations at the seat of government had to be "central" to Christianity, *supra* at 14-15, and then later walked back its language, opining anew that such demonstrations must merely be "important," *supra* at 15-16.

Yet, what exactly is the difference between centrality and importance? If centrality is the color black, importance is a dark shade of gray. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). "It is no more appropriate for judges to determine the 'centrality' of religious beliefs * * * than it would be for them to determine the 'importance' of ideas * * *." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 886-887, 110 S.Ct. 1595 (1990). "It is not the role of a court to tell religious believers what is and isn't important to their reli-

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[14] Google Scholar's "How cited" for *Henderson I* and *Henderson II* shows that claimants have succeeded in 1/19 of all published and unpublished D.C. Circuit and district court decisions. *See* https://docs.google.com/spreadsheets/d/1ufEySfCcsdPWgdql8r91y8-FjE2XmvX_jSIq0e1UKHI/edit?usp=sharing

[15] *See* Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since *Hobby Lobby*. Abrams, M. (2019). HRLR Online, 4(1): 12, 17. https://hrlr.law.columbia.edu/files/2019/11/Meredith-Abrams-Empirical-Analysis-of-RFRA.pdf

gion, so long as their belief in the religious importance is sincere." *On Fire Christian Center, Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020) (Walker, J.). Yet, the district court and the D.C. Circuit have embarked upon the slippery slope of doing exactly that — analyzing religious questions of "importance" via the unlawful *Henderson* precedent.

This Court has held that religious questions are not to be analyzed by the courts. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion." *Smith*, 494 U.S. at 887; *see also Thomas* v. *Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.") And yet, the district court made such a determination, explicitly distinguishing between religious exercise that was "*acceptable*" to God, and that which was "central." *Supra* at 14. Then after the error was pointed out, the district court reframed Petitioner's religious beliefs as if he had never pleaded that musically demonstrating at his lawfully requested location was important to his religious belief, all the while accepting his religious beliefs as sincere. Thus, the district court did to Petitioner exactly what the Tenth Circuit dissent accused the majority of doing in *Little Sisters of the Poor for the Aged v. Burwell*:

> Where did [the majority] go wrong? It does not doubt the sincerity of the plaintiffs' religious belief. But it does not accept their statements of what that belief is. * * * Rather, it reframes their belief ... If one accepts this reframing of

> plaintiffs' belief, the analysis of the panel majority may be correct; perhaps one could say that the exercise of this reframed belief was not substantially burdened. But it is not the job of the judiciary to tell people what their religious beliefs are. * * * [T]he panel majority recognizes the plaintiffs' belief but is simply refusing to recognize its *importance* ... The Supreme Court has refused to examine the reasonableness of a sincere religious belief—in particular, the reasonableness of where the believer draws the line between sinful and *acceptable*."

799 F. 3d 1315, 1317 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing en banc) (emphasis added) *cert. granted sub nom.* Indeed, "acceptable" religious exercise is protected in our secular Republic, for "religion is a matter which lies solely between man and his God; [] he owes account to none other for his faith or his worship." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861). "[W]hat is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be *acceptable* to him." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785) (emphasis added).

Religious questions are not allowed to be analyzed by the courts, and this Court called out the lower court in *Holt v. Hobbs* for committing a similar error, "suggesting that the burden on petitioner's religious

exercise was slight because, according to petitioner's testimony, his religion would 'credit' him for attempting to follow his religious beliefs, even if that attempt proved unsuccessful. RLUIPA, however, applies to an exercise of religion regardless of whether it is 'compelled.'" 135 S. Ct. 853, 862 (2015).

That provides a perfect segue into Petitioner's next point. Why does Petitioner's religious exercise have to be "required" by Christianity? The D.C. Circuit disposed of Petitioner's case because his religious exercise was not "required." *See* App. 2a. Yet, it's unclear what the purported difference is between and "required" and "compelled." What do the dictionaries say? "Require" means to "impose an obligation on; compel." *The American Heritage Dictionary of the English Language* 1533 (3d ed. 1992). "Compel" means to "force, require or command the doing of something." *Webster's Third New International Dictionary*. "Require" means to "direct, order, demand, instruct, command, claim, compel, request, need, exact." *Black's Law Dictionary* 1304 (6th ed. 1992). The two words are exactly synonymous within the context of RLUIPA-amended RFRA, and thus religious exercise does not need to be "required" ("compelled") by a system of religious belief. *See* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

Similarly, different synonyms are used throughout the other circuits as well, but the English language dictionaries are still controlling. For example, in the First and Sixth Circuits, the word "mandated" is used instead. *See Perrier-Bilbo v. U.S.*, 954 F. 3d 413, 431 (1st Cir. 2020) ("a substantial burden on one's exercise of religion exists where the state

denies a benefit because of conduct *mandated* by religious belief") (cleaned up) (emphasis added); *see also Mich. Catholic Conf. & Catholic Fam. Serv's. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014) (same).

Compare the aforementioned, however, to a Third Circuit ruling in which the court of appeals corrected the district court below it for improperly inquiring into *prescribed* religious conduct. *See Davis v. Wigen*, 82 F.4th 204, 210 (3rd Cir. 2023) (The Third Circuit stated: "we take this opportunity to clarify that a substantial burden under RFRA extends to *non-mandatory* religious conduct and expression, i.e. conduct or expression not 'compelled by, or central to, a system of religious belief'") (citation omitted) (emphasis added). Likewise, in *Navajo Nation v. U.S. Forest Service*, the Ninth Circuit also corrected its district court, vacating and remanding because it "erred by disregarding [RFRA's] amended definition" and requiring the claimants to prove a burden upon religious conduct which the faith "mandates." 479 F.3d 1024, 1033 (9th Cir. 2007). All such words are synonymous with each other, and thus precluded from analysis within the context of a proper substantial burden test under RLUIPA-amended RFRA.

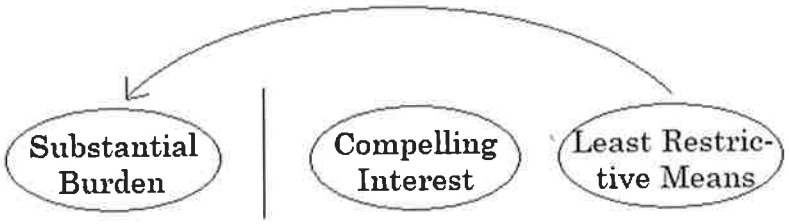
Moreover, the circuits are split over whether alternative means can counsel against finding a substantial burden. Again, different phrases are used. The D.C. Circuit, for example, disposed of Petitioner's case because he purportedly had a "multitude of means" available to him. *Supra* at 19-20. The Sixth Circuit, in comparison, uses the phrase "feasible alternative[s]" to conduct the same analysis, while others circuits merely examine "alternatives."

See New Doe Child #1 v. Cong. of U.S., 891 F.3d 578, 590 (6th Cir. 2018). Whatever synonymous words and phrases are used, this Court has expressly rejected conducting an alternative means test in the RLUIPA-amended RFRA context, distinguishing the statute from First Amendment cases:

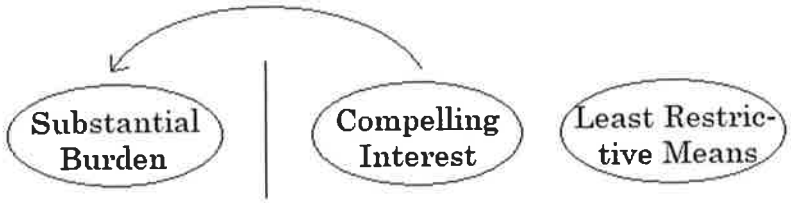
> Under [First Amendment] cases, the availability of alternative means of practicing religion is a relevant consideration, but RLUIPA provides greater protection. RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise * * *, not whether the RLUIPA claimant is able to engage in other forms of religious exercise."

Holt, 135 S. Ct. at 862. Indeed, "*Holt* considered a RLUIPA claim, but the Supreme Court relies on its precedent for the two laws interchangeably." *Doster v. Kendall,* 54 F.4th 398, 419 (6th Cir. 2022). Thus, an alternative means inquiry is not allowed under RFRA either.

Basically what the courts are doing by making the claimant first prove that he has exhausted alternative means before RFRA is triggered, is essentially pivoting the government's own least restrictive means test over to the claimant's side of the equation, and repackaging it anew under "substantial burden," thereby shifting strict scrutiny upon *the claimant* and inverting the law:



That would be no different than shouldering the compelling government interest test burden upon the claimant (like the D.C. Circuit has also done) by first making the claimant show that it is *he* who has a compelling (*i.e.*, "required," "central," or "important") reason for even wanting to exercise his religion in the first place, before the government's own compelling interest test can kick in.



Strict scrutiny belongs exactly where Congress intended it, for it is not the people who owe an account for their free exercise in sacred, religious liberty cases, but the government who must justify why such liberty could not be reasonably accommodated. Thus, substantial burden refers not to the importance, centrality, or compellence of a *claimant's* religious belief, but rather, to the size and scope of the *government restriction*. Recall, a substantial burden exists when *government* puts "substantial pressure" on an adherent to modify his behavior and violate his beliefs. *See Thomas,* 450 U.S. at 718. Nowhere in that sentence or substantial burden

analysis is the onus placed upon the religious substantiality of the *claimant's* tenet, doctrine, or creed, but rather, upon the secular substantiality of the *government's* penalty, sanction, or restriction ("pressure"). *Ibid.* The courts must steer clear of making theological determinations and asking religious questions, and therefore, substantial burden can only be a *secular* question of law:

> Courts may properly adjudicate the question of "secular costs" under RFRA — that is, whether the legal sanctions for disobeying a burdensome law are "substantial." The Supreme Court, however, has consistently held that judicial review of the substantiality of "religious costs" is precluded by the Court's "religious-question" doctrine, which bars courts from adjudicating issues of theology, doctrine, or belief.

Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA,* 85 Geo. Wash. L. Rev. 94 (2017) (citations omitted). Indeed, the Court's own decisions — the only two to have ever interrogated the substantial burden test under RFRA — reflect the same analysis, both of which recognized *secular* government burdens only ("economic" and "financial" consequences). *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014); *see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2390 (2020). In fact, in *Little Sisters of the Poor*, the Court even appears to have gone so far as to *compartmentalize* the

judicial wheat and chaff of a proper substantial burden analysis into "two parts," by separating the religious question (whether merely submitting a form violated a religious entity's beliefs "*as it sincerely understands them*") from the secular question (the "adverse practical consequences" that would result) — assigning the former to the sincere religious belief prong of RFRA where it belongs, and only the latter to RFRA's substantial burden test. *Id.* at 2389.

In the absence of the Court's two-part distinction, how else can the courts divine which religious beliefs are substantial and which are not across the broad spectrum of religious ideas that abound in our society? "As in *Hobby Lobby*, 'it is not for us to say that [] religious beliefs are mistaken or insubstantial.'" *Id.* at 2390 (citation omitted). Put another way, it is not for the courts to determine which religious beliefs are essentially "a big deal" to a claimant and which are not, like the district court did in the instant case. *Secular* substantiality is fair game, but *religious* substantiality is precluded, and thus the claimant does not need to plead it. Put even simpler still, what Congress basically amended RFRA to mean when it said, "whether or not compelled by, or central to," a system of religious belief, 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), was *whether or not substantial* to a system of religious belief.

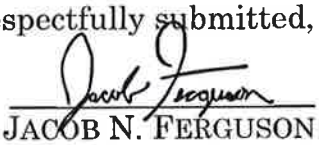
Any exercise of religion is protected; it neither needs to be "required," "central," or "important," nor exhaust alternative means under RLUIPA-amended RFRA when government is alleged to have intentionally violated basic civil liberties without any good reason whatsoever — under color of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 8, 2024

Respectfully submitted,



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Pro Se Petitioner

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5102 September Term, 2023
1:21-cv-02512-RC Filed On: January 11, 2024

JACOB N. FERGUSON,
Appellant,
v.
ROBBIN M. OWEN,
Appellee.

On Appeal from the United States District Court for the District of Columbia

Before: Henderson, Childs, and Pan, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's orders filed July 8, 2022, and March 6, 2023, be affirmed. The district court did not err in dismissing appellant's Religious Freedom Restoration Act claim for failure to state a claim upon which relief could be granted because he has not alleged that the government substantially burdened his religious exercise within the meaning of that Act. See 42 U.S.C. § 2000bb-1; Kaemmerling v. Lappin, 553 F.3d 669,

677 (D.C. Cir. 2008). Appellant has not shown that the district court erred by inquiring, as part of its assessment of whether a substantial burden existed, into the importance of appellant's proposed religious exercise to his religious belief. See Henderson v. Kennedy, 253 F.3d 12, 16-17 (D.C. Cir. 2001). Appellant also has not established that appellee's permitting decision imposed a substantial burden on his religious exercise because he has not shown that the decision prevented conduct required by his religion or placed substantial pressure on him to violate his beliefs. See Kaemmerling, 553 F.3d at 678 (citing Thomas v. Review Bd., 450 U.S. 707, 718 (1981)); Henderson, 253 F.3d at 16. Nor has he shown that the challenged decision was more than a restriction on one of a multitude of means by which he could engage in his desired religious exercise. See Mahoney v. Doe, 642 F.3d 1112, 1121 (D.C. Cir. 2011); Henderson, 253 F.3d at 17. Appellant's other arguments likewise do not show any error in the district court's dismissal of his claim or the denial of reconsideration.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Daniel J. Reidy
Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB N. FERGUSON, *Plaintiff,* *v.* ROBBIN M. OWEN, *Defendant.*	Civil Action No.: 21-02512 (RC) Re Document No.: 7

MEMORANDUM OPINION

GRANTING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

There are two questions in this case. The first is whether there can be a substantial burden under the Religious Freedom Restoration Act ("RFRA") when a government restriction of an individual's religiously motivated activity does not prevent the individual from fulfilling a central religious practice and provides the individual with alternative means of conducting the religiously motivated activity. The second is whether the Court should extend the *Bivens* remedy to the First Amendment context for a denied demonstration permit application. The answer to both questions is no.

Jacob N. Ferguson, proceeding *pro se*, brings a RFRA claim and a *Bivens* action against Robbin M. Owen, the Chief of the Division of Permits Management for the National Park Service ("NPS"), in her individual capacity for alleged deprivations of his right to religious free exercise under the First Amendment and RFRA arising from NPS's denial of

his permit application for a 4-month long demonstration at the Lincoln Memorial in Washington D.C. in 2021. Mr. Ferguson brings his lawsuit under RFRA, 42 U.S.C. § 2000bb *et seq.*, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Mr. Ferguson seeks an unspecified amount of nominal, compensatory, and punitive damages and attorney's fees and costs from Ms. Owens.

II. FACTUAL BACKGROUND

Mr. Ferguson is a musician, a demonstrator, and a street performer. Compl. ¶¶ 13, 54, 64, ECF No. 1-1. Mr. Ferguson came to Washington "to prophesy in the heart of the nation's capital and convey a sincerely held religious belief in free exercise of religion." *Id.* ¶ 47. Since Mr. Ferguson's arrival in Washington, he has sought to hold musical demonstrations to "attract a crowd with music and convey a religious/political message." *Id.* ¶¶ 13, 47. Mr. Ferguson's decision to demonstrate in Washington has religious significance for him because D.C. "is the political subject of [his] religious message" and he believes "that great parallels can be drawn between the present time and that of the transition of Rome's government from republic to empire, before the coming of Christ." *Id.* ¶ 93.

Mr. Ferguson also specifically wanted to demonstrate at the Lincoln Memorial Reflecting Pool area. *Id.* ¶¶ 27–28, 93–96. Mr. Ferguson had general religious motivations to reach a large audience to spread his religious message and to confront his fear of public speaking, as well as a particular religious motivation to demonstrate in the heart of the

nation's capital, and the Lincoln Memorial Reflecting Pool area satisfied these religious criteria. *Id.* ¶¶ 93–96. But Mr. Ferguson, while presenting a religious reasoning for his choice of location, claiming that the Lincoln Memorial "represents the appropriate and symbolic epicenter for [his] religious/political message," *id.* ¶ 95, specifically disclaims the notion that his religious beliefs made demonstrating at the Lincoln Memorial a religious necessity, *id.* ¶ 96 (expressing Mr. Ferguson's belief that the location he selected "was acceptable to God"); *see also* Opp'n to Mot. to Dismiss ("Opp'n") at 17, ECF No. 9-1 ("Plaintiff did not *know* which site God wanted him to demonstrate at, or even if God was so pedantic at all.").

Mr. Ferguson has more than three years' worth of grievances against Ms. Owen, but this case concentrates on a single permit denial. *Id.* ¶¶ 11–12. As a result of previous denials, Mr. Ferguson developed an increasingly sophisticated understanding of the regulations that govern the NPS permit application process, and he began to plan his musical demonstrations further and further in advance. *Id.* ¶ 4. Mr. Ferguson's greater sophistication and planning, however, did not result in successful permit approvals, compounding his disappointments and frustrations, and leading to this lawsuit. *Id.* ¶¶ 74–82. Mr. Ferguson has brought this suit *pro se*, having invested considerable time and energy in bringing the present case. *Id.* ¶ 74; Opp'n at 3.

The present controversy begins on April 9, 2020. *Id.* ¶ 18.[1] On April 9, 2020, Mr. Ferguson submitted

[1] Because the Court is considering a Rule 12(b)(6) motion to dismiss, the Court presumes that "all [the] factual allegations in

an application to demonstrate from April 9 through August 9, 2021, at the Lincoln Memorial Reflecting Pool area. *Id.* ¶ 18. NPS uses a first-come, first served system to issue permits. Compl. ¶ 20; *see also* 36 C.F.R. § 7.96(g)(4)(i) ("NPS processes permit applications for demonstrations and special events in order of receipt . . . . Use of a particular area is allocated in order of receipt of fully executed applications, subject to the limitations in this section."). One year is the maximum amount of time that an applicant can apply in advance. Compl. ¶ 20; *see also* 36 C.F.R. § 7.96(g)(4)(i) ("NPS will not accept applications more than one year in advance of a proposed continuous event (including set-up time, if any)."). And yet, despite applying exactly one year in advance for 123 dates at the Lincoln Memorial Reflecting Pool area, NPS issued Mr. Ferguson zero permits to demonstrate at that location. Compl. ¶ 28.[2] Mr. Ferguson speculates that NPS denied his applications because of religious prejudice, but he admits that he has no evidence for this claim. Compl. ¶¶ 42–44.

After Ms. Owen correctly filed Mr. Ferguson's application, she still refused to grant Mr. Ferguson any dates to demonstrate at the Lincoln Memorial Reflecting Pool area, claiming that other applicants

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[Mr. Ferguson's] complaint are true . . . ." *KBI Transp. Servs. v. Med. Transp. Mgmt., Inc.*, 679 F. Supp. 2d 104, 107 (D.D.C. 2010).

[2] NPS clearly reserves the Lincoln Memorial Reflecting Pool area for three weeks in late June and early July for the annual Fourth of July Celebration, so the denial of his applications for those three weeks needs no further explanation. 36 C.F.R. § 7.96(g)(4)(ii)(C); *see also* Owen Decl. ¶ 16, ECF No. 7-2.

had filed before him. *Id.* ¶ 28. Mr. Ferguson monitored the Reflecting Pool and did not see any demonstrations on several of the dates that NPS denied his application. Compl. ¶¶ 29–30. He alerted Ms. Owen of this observation. *Id.* ¶ 31. Ms. Owen responded that the approved permit applicants must have failed to appear on those dates. *Id.* Mr. Ferguson alleges that, despite Ms. Owen's assertion to him of the contrary, there were no other applicants on some of the dates that he requested. *Id.* ¶¶ 29–31.

Mr. Ferguson sought redress through several channels. Mr. Ferguson tried to call Deputy Superintendent Sean Kennealy but was unable to reach him. Compl. ¶ 32. He reached out to Congresswoman Eleanor Holmes Norton, who sent multiple inquiries to NPS on his behalf. *Id.* ¶ 34. He filed a complaint with the NPS Office of Professional Responsibility and a separate complaint with the Inspector General of the U.S. Department of the Interior, but both declined to pursue further action. *Id.* ¶ 34. He submitted a Freedom of Information Act request, but he did not receive any information from it.[3] *Id.* ¶ 35.

On May 21, 2021, Mr. Ferguson filed a petition for a writ of mandamus in District of Columbia District Court, requesting that the court immediately order NPS to issue him "a public gathering permit to conduct 1st Amendment demonstrations on the lower plaza of the Lincoln Memorial" on the dates requested by his April 9, 2020, application. Pet. for

[3] Mr. Ferguson has not raised a Freedom of Information Act claim in the present action, and so the Court does not address it.

Writ of Mandamus, *Ferguson v. National Park Service*, Civ. A. No. 21-1425 (D.D.C. Sept. 9, 2021), ECF No. 1-1; Compl. ¶ 36. On June 9, 2021, the court informed Mr. Ferguson that he had not filed a proposed summons. Min. Order, *Ferguson*, Civ. A. No. 21-1425, ECF No. 4 (June 9, 2021). On June 17, 2021, the court electronically issued a summons to NPS. Summons, *Ferguson*, Civ. A. No. 21- 1425, ECF No. 5. On July 6, 2021, Mr. Ferguson filed an amended petition for a writ of mandamus. Am. Pet. for Writ of Mandamus, *Ferguson*, Civ. A. No. 21-1425, ECF No. 7. On August 30, NPS requested to move its deadline to respond to October 1, 2021, and the court granted the motion the next day. Mot. for Extension of Time, *Ferguson*, Civ. A. No. 21-1425, ECF No. 11; Ferguson Decl. ¶ 32, ECF No. 9-2. The permit application at issue had been for demonstrations from April 9 through August 9, 2021. Compl. ¶ 18. On September 8, 2021, Mr. Ferguson voluntarily dismissed the suit, August 9 having already passed without injunctive relief. Notice of Voluntary Dismissal, *Ferguson*, Civ. A. No. 21-1425, ECF No. 12.[4]

Mr. Ferguson has continued to seek NPS permits. While Mr. Ferguson has succeeded in receiving permits from NPS, he claims that NPS is not granting him the permits he wants. Ferguson Decl.

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[4] According to Ms. Owen, "To the extent Plaintiff argues that his action was mooted by the end of his requested four-month demonstration, Plaintiff may have still had a viable claim to the extent the alleged First Amendment violation is capable of repetition yet evades review." Reply to Opp'n to Mot. to Dismiss at 8, ECF No. 11 (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

¶¶ 35–39. Mr. Ferguson and Ms. Owen have continued not to see eye to eye on the NPS permitting process and the regulations that govern it. *Id.* ¶ 40. Those disputes, however, which postdate the April 9, 2020, permit application, are not at issue in the present case.

On September 27, 2021, Mr. Ferguson filed a complaint against Ms. Owen, bringing a RFRA claim and a *Bivens* action against her in her individual capacity for alleged deprivations of his right to religious free exercise under the First Amendment and RFRA. Compl. ¶¶ 83–116. Ms. Owen moved to dismiss pursuant to Rule 12(b)(6). Def.'s Mot. at 26. Alternatively, Ms. Owen requested summary judgment. *Id.*[5]

III. LEGAL STANDARD

In order to survive a Rule 12(b)(6) motion to dismiss, the plaintiff must state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "[A] Rule 12(b)(6) motion does not test a plaintiff's ultimate likelihood of success on the merits; rather, it tests whether a plaintiff has properly stated a claim." *Coulibaly v. Kerry*, 213 F. Supp. 3d 93, 123 (D.D.C. 2016). At the motion to dismiss stage, a court must assume the veracity of the complaint's factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) ("[A] court must take the allegations as true, no matter how skeptical the court may be."). A court need not, however, accept conclusory assertions or legal conclusions. *Id.* at 678; *Bell Atl. Corp. v.*

[5] Because the Court is granting Ms. Owen's motion to dismiss, the Court has not considered Ms. Owen's alternative motion for summary judgment.

Twombly, 550 U.S. 544, 555 (2007). The plaintiff meets the standard of facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

When a complaint is brought *pro se*, the court should construe the *pro se* plaintiff's pleadings liberally in determining whether to dismiss a complaint for failure to state a claim upon which relief can be granted. *Taylor v. District of Columbia*, 606 F. Supp. 2d 93, 95 (D.D.C. 2009). "[A] district court errs in failing to consider a *pro se* litigant's complaint in light of all filings, including filings responsive to a motion to dismiss." *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015). Complaints filed by *pro se* litigants "must be held to less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)), but *pro se* litigants still "must present a claim on which the [c]ourt can grant relief." *Belton v. Shinseki*, 637 F. Supp. 2d 20, 23 (D.D.C. 2009) (quoting *Chandler v. Roche*, 215 F. Supp. 2d 166, 168 (D.D.C. 2002)). The Court must be careful to avoid reading *pro se* complaints too liberally, placing itself "more in the role of advocate than judge and . . . denying the defendant fair notice and an opportunity to respond to identifiable allegations of wrongdoing." *Nichols v. Vilsack*, No. 13- cv-01502, 2015 WL 9581799, at *1 (D.D.C. Dec. 30, 2015).

IV. ANALYSIS

As noted above, Mr. Ferguson brings claims

against Ms. Owen in her individual capacity for money damages for an alleged deprivation of his religious free exercise under RFRA and free speech and free exercise under *Bivens*. The Court addresses the claims in the order they appear in the Complaint.[6]

A. RFRA

Congress enacted RFRA to provide broad protections for religious exercise. RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). RFRA guarantees that the federal "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental

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[6] Mr. Ferguson makes scattered reference to "intentional tort," Compl. ¶¶ 7, 41, 111, but it appears that these references are elements of his *Bivens* claim and not indications that he is bringing a standalone tort claim, *id.* ¶ 111 (referring to "a federal official knowingly commit[ting] an intentional tort" as part of his *Bivens* argument). If Mr. Ferguson did intend to bring a standalone tort claim separate from his RFRA and *Bivens* claims, it is not clear what tort action he intended to bring, nor whether he exhausted his administrative remedies as required by the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2675(a); *Edwards v. District of Columbia*, 616 F. Supp. 2d 112, 116 (D.D.C. 2009) ("In order to bring suit under the FTCA, a claimant must first exhaust his or her administrative remedies."). Accordingly, the Court has considered Mr. Ferguson's RFRA and *Bivens* claims and has not considered a standalone tort claim.

interest." 42 U.S.C. § 2000bb1(a)–(b); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that RFRA cannot constitutionally constrain state and local governments). "A challenger under RFRA has the initial burden of showing that the Government's conduct 'substantially burdens his religious exercise.'" *Mahoney v. U.S. Capitol Police Bd.*, No. CV 21-2314, 2022 WL 523009, at *10 (D.D.C. Feb. 22, 2022) (quoting *Holt*, 574 U.S. at 361 (discussing burden under the analogous Religious Land Use and Institutionalized Persons Act)).

Showing a substantial burden is an essential component of a RFRA claim. "Whether a government action substantially burdens a plaintiff's religious exercise is a question of law for a court to decide." *Sabra v. Pompeo*, 453 F. Supp. 3d 291, 328 (D.D.C. 2020) (quoting *Singh v. McHugh*, 109 F. Supp. 3d 72, 82 (D.D.C. 2016)). RFRA does not define substantial burden, but courts have explained its contours. A "regulation [that] forces [individuals] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires" can constitute a substantial burden. *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001); *see also Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (holding that a substantial burden must prevent the adherent "from engaging in conduct or having a religious experience which the faith mandates" and must be "an interference with a tenet or belief that is central to religious doctrine" (quoting *Graham v. Commissioner*, 822 F.2d 844, 850–51 (9th Cir. 1987)). "A 'substantial burden' exists when government action rises above *de minimis* inconveniences and puts 'substantial pres-

sure on an adherent to modify his behavior and to violate his beliefs.'" *Roman Catholic Archbishop of Wash. v. Bowser*, 531 F. Supp. 3d 22, 35 (D.D.C. 2021) (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)).

The D.C. Circuit has held that a substantial burden requires more than government restriction of religiously motivated conduct. *Henderson* explicitly rejected "whether the governmental restriction forced 'adherents of a religion to refrain from religiously motivated conduct'" as the test for a substantial burden under RFRA. 253 F.3d at 17 (quoting *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996)). Instead, *Henderson* endorsed "a narrower test[:] . . . whether 'the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Id.* (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384– 85 (1990)). The difference between "religiously motivated conduct" and "the observation of a central religious belief or practice" is important. *See id.* As the *Henderson* court explained, "[o]ne can conceive of many activities that are not central or even important to a religion, but nevertheless might be religiously motivated." *Id.* Congress only intended RFRA's compelling interest requirement to be triggered by a substantial burden, and "[t]o make religious motivation the critical focus is . . . to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Id.*

The restriction of one—among several—means of fulfilling a central religious belief does not rise to the level of a substantial burden. In *Henderson*, the D.C. Circuit found that a "ban on selling t-shirts on the Mall [did not] 'substantially burden' plaintiffs' exercise of their religion[.]" *Id.* at 16. While proselytizing was a central religious belief for the plaintiffs, selling t-shirts on the Mall was not; no central religious belief of the plaintiffs prevented them from proselytizing by giving away t-shirts on the Mall or, alternatively, selling t-shirts at another nearby location. *Id.*; *see also Mahoney v. U.S. Capitol Police Bd.*, 2022 WL 523009, at *11 (ruling that although plaintiff "felt called by God to hold the September 11th prayer vigil on the Western Front Lawn," the refusal to allow an audience of twenty or more was not a substantial burden under RFRA because he had "not alleged that his sincerely held religious belief required him to conduct his September 11 vigil with more than 19 people" (citation omitted)). Selling t-shirts on the Mall and having a prayer vigil with more than 19 people on the Western Front Lawn were both expressions of sincerely held religious beliefs, but neither were protected by RFRA. *Henderson*, 253 F.3d at 16; *Mahoney v. U.S. Capitol Police Bd.*, 2022 WL 523009, at *11. While proselytizing and holding prayer vigils can be practices central to religious belief protected by RFRA, it does not follow that every government restriction on proselytizing and holding prayer vigils is a substantial burden. Rather, there is only a substantial burden when the government restriction prevents an action that is central to religious belief. *Henderson*, 253 F.3d at 17. When the plaintiffs do not allege that

the restricted action was central to a religious belief, there can be no substantial burden. *Id.*

Mr. Ferguson had both religious and practical reasons for demonstrating at the Lincoln Memorial. Mr. Ferguson explains that he "chose the *place*, the Reflecting Pool steps of the Lincoln Memorial in Washington, D.C., for a few reasons." Compl. ¶ 93. First, he chose D.C. because "Washington, D.C., is the political subject of [his] religious message." *Id.* Second, he "chose the Reflecting Pool steps because it resembles an amphitheatre," and people can conveniently gather and watch his demonstration there. *Id.* ¶ 94. Third, he "chose the Lincoln Memorial because it is the #1 most heavily trafficked and international tourist destination in the nation's capital . . . therefore . . . represent[ing] the appropriate and symbolic epicenter for [his] religious/political message . . . ." *Id.* ¶ 95. Fourth, "because [Mr. Ferguson] knows his greatest fear is speaking in front of people" and because "the Lincoln Memorial consistently attracts the largest crowds of people in Washington, D.C.," Mr. Ferguson believed his choice of the Lincoln Memorial "was acceptable to God, '[f]or God has not given us a spirit of fear' (quoting 2 *Timothy* 1:7)." *Id.* ¶ 96.

Religious demonstrations are central to Mr. Ferguson's religious beliefs. Mr. Ferguson is clear that a "central tenet of Christianity is called prophecy," and he came to Washington "to prophesy in the heart of the nation's capital . . . ." *Id.* ¶¶ 46–47. This Court does not question the sincerity or religious nature of Mr. Ferguson's call "to prophesy in the heart of the nation's capital and convey a sincerely

held religious belief in free exercise of religion," and RFRA protects Mr. Ferguson's right to do so regardless of whether prophecy is a "central tenet of Christianity." *Id.* ¶ 46; *see Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 293–94 (D.D.C. 2020) ("RFRA defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (citing U.S.C. §§ 2000bb-2(4), 2000cc-5(7))); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("The litigant's beliefs must be sincere and the practices at issue must be of a religious nature." (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993))). But nowhere in Mr. Ferguson's Complaint does he suggest that prophesying at the Lincoln Memorial is a "central tenet" of his belief rather than merely a means of prophesying that he believed "was acceptable to God." Compl. ¶¶ 46, 96.

Mr. Ferguson explicitly *disclaims* the possibility that demonstrating at the Lincoln Memorial Reflecting Pool area was central to his religious belief. In his Complaint, Mr. Ferguson claims that the Lincoln Memorial "was [religiously] acceptable" rather than claiming it was central to his religious belief. *Id.* ¶ 96. Mr. Ferguson explicates the meaning of this claim in greater detail in his Opposition. Mr. Ferguson explains:

> Plaintiff did not know which site God wanted him to demonstrate at, or even if God was so pedantic at all. Plaintiff chose carefully the words of his complaint, kicking around the sentence

> many times (foreseeing Defendant's argument) before invariably giving up and settling once again upon the truth. The Lincoln Memorial was chosen because Plaintiff "believed it was *acceptable* to God[]" . . . . God did not command or *require* Plaintiff to choose the Lincoln Memorial (though Plaintiff prayed about it many times actually).

Opp'n at 17 (quoting Compl. ¶ 96). RFRA does not protect all actions that are religiously *acceptable*; rather, RFRA protects only "the observation of a *central* religious belief or practice." *See Henderson*, 253 F.3d at 17 (emphasis added) (citation omitted). Mr. Ferguson's explicit disavowal of the very claim he would need to make for his RFRA claim to be successful means his RFRA claim cannot succeed.

Even accepting that prophesying in the heart of the nation's capital was central to Mr. Ferguson's religious belief, Mr. Ferguson's RFRA claim still fails. Mr. Ferguson concedes that Ms. Owen offered him a permit for "Korean War Veterans Memorial Site #6A." Compl. ¶ 27. Mr. Ferguson had a religious motivation "to prophesy in the heart of the nation's capital." *Id.* ¶ 47. Both the Reflecting Pool and the Korean War Veteran Memorial are located in the heart of the nation's capital on heavily trafficked public land, so both should have satisfied Mr. Ferguson's religiously motivated desire to demonstrate in Washington and reach an audience with his religious message. Mr. Ferguson found the Korean War Veteran Memorial unsatisfactory because it is "awkwardly detached from the people

and logistically impractical for a large setup of music equipment." *Id.* ¶ 27. These complaints are practical, not religious. Moreover, Mr. Ferguson did not believe that the Lincoln Memorial was the only suitable location to conduct his demonstrations, and he conducted demonstrations at other locations in D.C. *See* Ferguson Decl. ¶ 12 (noting that Mr. Ferguson conducted his "first ever musical demonstration in Washington, DC, . . . [in] 2018, outside the United States Capitol Building" after receiving the appropriate permits from "the United States Capitol Police and White House Metropolitan Police Department," and Mr. Ferguson also "was able to successfully conduct First Amendment musical demonstrations front and center outside of the White House on the closed portion of Pennsylvania Avenue NW"). RFRA protects religious free exercise, but RFRA does not protect the practically motivated choice of a specific location, even if the location is used for a religiously motivated activity. *See Henderson*, 253 F.3d at 17.

RFRA is only triggered when "the government has placed a substantial burden on the observation of a central religious belief or practice . . . ." *Id.* (quoting *Jimmy Swaggart Ministries*, 493 U.S. at 384). Mr. Ferguson appears to reject this holding. He rhetorically asks, "Must one have religious beef with Abraham Lincoln in order to prophesy at his memorial?" Opp'n at 18. The essence of Mr. Ferguson's rhetorical question, applied to this case, is this: Must an individual have a central religious belief that requires demonstrating at the Lincoln Memorial in order for the denial of permit applications to demonstrate at the Lincoln Memorial—accompanied by the approval of permit applications to demonstrate at

nearby locations—to constitute a substantial burden under RFRA? The answer to this question is yes.

Mr. Ferguson appears to be confusing the substantial burden analysis under RFRA with general First Amendment protections. Everyone has a First Amendment right to demonstrate, and everyone may apply for a permit to demonstrate at the Lincoln Memorial. But the denial of a permit application to demonstrate at the Lincoln Memorial is a substantial burden under RFRA only if demonstrating at the Lincoln Memorial is a central religious belief or practice. RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment," *Holt*, 574 U.S. at 357, but RFRA is only triggered upon the showing of a substantial burden, *Henderson*, 253 F.3d at 17.

The availability of alternative means of fulfilling religious obligations also cautions against the finding of a substantial burden. The *Henderson* court reasoned that "[b]ecause the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation." *Henderson*, 253 F.3d at 17 ("Plaintiffs can still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall."). Similarly, in *Mahoney v. Doe*, the D.C. Circuit held that a prohibition on sidewalk chalking in front of the White House was not a substantial burden under RFRA because the plaintiff "may still spread his message through picketing, a public prayer vigil, or other similar activities in which he has previously engaged," as well as "chalking elsewhere." 642 F.3d 1112, 1121 (2011). When a government action only

forecloses one of many ways an individual may engage in religiously required conduct, there is no substantial burden.

Mr. Ferguson argues that the existence of alternative means of demonstrating should not affect his RFRA claims. *See* Opp'n at 38 (first citing *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997); and then citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). The cases that Mr. Ferguson cites arise in the context of the First Amendment, and they do not apply to RFRA. The government may not impermissibly deny an individual the use of one forum solely because other fora are available. *See Mahoney v. Babbitt*, 105 F.3d at 1459 ("[There is] no authority for the proposition that the government may choose for a First Amendment actor what public forums it will use."). In "'public places' historically associated with the free exercise of expressive activities . . . the government's ability to permissibly restrict expressive conduct is very limited . . . ." *Grace*, 461 U.S. at 177 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

But court holdings on the importance of alternative channels of communication in the First Amendment context have no bearing on this case. The desire to demonstrate in a particular time or place is protected by the First Amendment. *See Grace*, 461 U.S. at 180 (holding that a statutory prohibition on picketing on a sidewalk outside the United States Supreme Court building was unconstitutional even though "there [were] sufficient alternative areas within the relevant forum [to protest], such as the streets around the Court or the sidewalks across

those streets"). In the RFRA context, unlike the First Amendment, the availability of alternative channels suggests that there has not been a substantial burden, preventing RFRA from being triggered in the first place. *Compare Henderson*, 253 F.3d at 17 ("Because the . . . [prohibition] . . . is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation."), with *Mahoney v. Babbitt*, 105 F.3d at 1459 ("[There is] no authority for the proposition that the government may choose for a First Amendment actor what public forums it will use."); *see also Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997) (considering alternatives in determining whether there was a substantial burden). The existence of alternative means of fulfilling a religiously motivated activity may be considered in determining whether there has been a substantial burden on free exercise.

Mr. Ferguson also argues that his case is distinguishable from *Henderson* on the facts. *See* Opp'n at 19. Mr. Ferguson notes (1) that the *Henderson* court found it significant that no "religious group [has] as one of its tenets selling t-shirts on the National Mall," *id.* (quoting *Henderson*, 253 F.3d at 16); (2) that selling t-shirts was not "central" to the religious beliefs of the litigants in that case, *id.* at 19–20 (quoting *Henderson*, 253 F.3d at 16), but prophecy is central to Mr. Ferguson's beliefs, *id.* at 20 (citing Compl. ¶¶ 46, 88); (3) that among the alternative channels available to the litigants in *Henderson* was distributing t-shirts on the Mall for free, Opp'n at 20 (citing *Henderson*, 253 F.3d at 17), and Mr. Ferguson did not plan to collect any donations at the Lincoln Memorial, *id.* (citing Compl. ¶¶ 10, 18, 60–61); and

(4) that he would be opening himself up to government prosecution if he demonstrated at the Lincoln Memorial without a permit, Opp'n at 20.

None of these distinctions are legally significant. First, Mr. Ferguson has never claimed that music or prophecy *at the Lincoln Memorial* are central to his religious beliefs, and so Mr. Ferguson's case is like *Henderson* in this respect. Second, spreading a religious message was central to the religion of the litigants in *Henderson*, as it is for Mr. Ferguson, but just as spreading a religious message on the National Mall was not central to their beliefs, prophesying at the Lincoln Memorial is not central to Mr. Ferguson's. *Compare Henderson*, 253 F.3d at 17 ("[P]laintiffs have . . . alleged that it is their vocation to spread the gospel by 'all available means.'"), *with* Opp'n at 20 ("Plaintiff *has* alleged that prophecy is a central tenet of Christianity." (citing Compl. ¶¶ 46, 88)). Third, that the plaintiffs in *Henderson* sold t-shirts rather than distributing them for free was only important because the regulation at issue in that case prohibited selling but permitted distributing for free. 36 C.F.R. § 7.96(k)(2) (2019); *Henderson*, 253 F.3d at 14. The distinction between selling and giving has no general importance for RFRA and has no bearing on this case. The fourth distinction is not a difference at all, as the plaintiffs in *Henderson* were similarly subject to government prosecution for violating a government regulation.

Mr. Ferguson's case is also not analogous to recent cases holding that Covid rules that prevent in-person gatherings at houses of worship are a substantial burden under RFRA. Two recent district

court cases in the D.C. Circuit have overturned restrictions on in-person religious gatherings on RFRA grounds. *Capitol Hill Baptist Church*, 496 F. Supp. at 296 (finding a substantial burden under RFRA because "[t]he District has not, as it contends, banned merely one 'method of worship,' but instead has foreclosed the Church's *only* method to exercise its belief in meeting together as a congregation, as its faith requires"); *Roman Catholic Archbishop of Wash.*, 531 F. Supp. 3d at 35–36 (reaching a similar holding). A recent Supreme Court decision enjoined a New York restriction on in-person religious gatherings on First Amendment grounds. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020). RFRA "covers the same types of rights as those protected under the Free Exercise Clause." *Tyndale House Publrs., Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (citation omitted).

The plaintiffs in *Capitol Hill Baptist Church*, *Roman Catholic Archdiocese of Wash.*, and *Roman Catholic Diocese of Brooklyn* all claimed that in-person religious gathering was central to their religion, and the challenged government actions prevented them from gathering in person to perform their religious activities. *Capitol Hill Baptist Church*, 496 F. Supp. 3d at 291; *Roman Catholic Archbishop of Wash.*, 531 F. Supp. 3d at 35; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68. "It is not the role of a court to tell religious believers what is and isn't important to their religion," *Roman Catholic Archbishop of Wash.*, 531 F. Supp. 3d at 36 (citation omitted), and this Court presumes that prophesying in the heart of Washington and publicly performing music are central to Mr. Ferguson's religion. Mr.

Ferguson's case might be analogous to these cases if the government prevented Mr. Ferguson from prophesying or performing music publicly anywhere in Washington. As Mr. Ferguson concedes, however, that is not what happened, *see* Compl. ¶ 27, thus his case is not analogous to the cases concerning in-person gatherings to worship.

For all of these reasons, Mr. Ferguson has no claim under RFRA. Mr. Ferguson has not shown that his free exercise of religion was substantially burdened, so he has failed to state a cause of action.

B. *Bivens*

The Court now turns to Mr. Ferguson's *Bivens* claim. There is a two-part test for deciding when implied damages under *Bivens* are recognized: "First, we must consider whether the plaintiff seeks to extend *Bivens* into a 'new context.' If so, we then must consider whether there are any 'special factors counselling hesitation.'" *Loumiet v. United States*, 948 F.3d 376, 381 (D.C. Cir. 2020) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–60 (2017)). The Supreme Court conceives of "new context" broadly, encompassing any context "different in a meaningful way from previous *Bivens* cases decided by this Court." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting *Abbasi*, 137 S. Ct. at 1859)).

Existing *Bivens* remedies are only applicable to an exceedingly narrow scope of claims. Currently, *Bivens* claims "are cognizable only in three, narrow factual contexts." *Robinson v. Pilgram*, Civ. A. No. 20-cv-2965, 2021 WL 5987016, at *10 (D.D.C. Dec. 17, 2021) (citing *Abbasi*, 137 S. Ct. at 1860). In

Bivens, the context was a "claim against FBI agents for handcuffing a man in his own home without a warrant." *Abbasi*, 137 S. Ct. at 1860. In *Davis v. Passman*, 442 U.S. 228 (1979), the context was "a claim against a Congressman for firing his female secretary." *Id.* In *Carlson v. Green*, 446 U.S. 14 (1980), the context was a "claim against prison officials for failure to treat an inmate's asthma." *Id.* The Supreme Court "has 'consistently refused to extend *Bivens* to any new context or new category of defendants' . . . for the past 30 years." *Abbasi*, 137 S. Ct. at 1857 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

If a claim arises in a new context, a court must then "proceed to the second step and ask whether there are any 'special factors that counsel hesitation' about granting the extension." *Hernandez*, 140 S. Ct. at 743 (cleaned up) (quoting *Abbasi*, 137 S. Ct. at 1857)). If such factors are present, the court must reject the extension of *Bivens*. *Id.* The Supreme Court "ha[s] not attempted to 'create an exhaustive list' of factors that may provide a reason not to extend *Bivens*, but [the Court] ha[s] explained that 'central to [this] analysis' are 'separation-of-powers principles.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857). The court must "consider the risk of interfering with the authority of the other branches . . . ask[ing] whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy' . . . and 'whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed . . . .'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

Courts have identified Congressional action as an important special factor. The existence of an "alternate remedial scheme" counsels against extending a *Bivens* remedy. *Pinson v. U.S. Dep't of Justice*, 514 F. Supp. 3d 232, 243 (D.D.C. 2021); *see also Abbasi*, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action."). The alternate remedial scheme does not need to supply a remedy to an individual plaintiff. *Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008) ("The special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue."). "Instead, the existence of an alternative scheme implies that 'congressional inaction' in declining to provide a damages remedy 'has not been inadvertent,' so the Judiciary should not interfere." *Pinson*, 514 F. Supp. 3d at 243 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)). "[A] comprehensive statutory scheme precludes a *Bivens* remedy even when the scheme provides the plaintiff with 'no remedy whatsoever.'" *Wilson*, 535 F.3d at 709 (quoting *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988)). Relatedly, "Congress' activity in the field" is a special factor counselling against extending *Bivens*. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Applying these principles to Mr. Ferguson's claims makes clear that no *Bivens* remedy should be recognized on these facts.

1. Mr. Ferguson's *Bivens* Claims Arise in a New Context

Mr. Ferguson's First Amendment claims involve

free speech and free exercise. Mr. Ferguson alleges that the government restricted his speech by arbitrarily denying him a permit at the time and place he requested. Compl. ¶ 114. Mr. Ferguson also alleges that because of the religious nature of his planned activities, the denial of the permits "deprived [him] of free religious exercise . . . ." *Id.* ¶ 115. Mr. Ferguson and Ms. Owen agree that recognizing a *Bivens* remedy in this case would be a "new context." *Id.* at ¶ 106; Def's Mot. at 13. They are correct. "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Abbasi*, 137 S. Ct. at 1859. When "the constitutional right at issue" is different, the case is meaningfully different. *Id.* at 1860. The Supreme Court "ha[s] never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012); *see also Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 30 (D.D.C. 2021) ("The plaintiffs' First Amendment claim arises in a new context because the Supreme Court has never extended *Bivens* to a claim brought under the First Amendment." (citing *Hernandez*, 140 S. Ct. at 741)).

2. Special Factors Weigh Against Extending *Bivens* to Mr. Ferguson's Claims

Separation of powers concerns are central to the "special factors" inquiry. *See Hernandez*, 140 S. Ct. at 743. In this case, there is an "alternate remedial scheme," *Pinson*, 514 F. Supp. 3d at 243, and congressional "action in the field," *Chappell*, 462 U.S. at 304. While freedom of speech and free exercise are fundamental rights protected by the First Amendment, special factors counsel hesitation in judicially

creating a damages remedy against federal officials who deny permit applications. In cases like this one, courts are not "well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858; *see also Storms v. Shinseki*, 319 F. Supp. 3d 348, 355 (D.D.C. 2018) ("Ultimately, in the complex, fraught arena of free speech, Congress is better suited than the Judiciary to determine whether a damages action should arise."). The Court declines to expand *Bivens* to cover Mr. Ferguson's claims.

To the extent that Ms. Owen's actions may have impeded Mr. Ferguson's religious freedom, Congress has sought to protect free exercise, including with money damages against federal officials in their individual capacities, with RFRA. 42 U.S.C. § 2000bb *et seq*; *Tanvir v. Tanzin*, 889 F.3d 72, 76 (2d Cir. 2018) (ruling that RFRA permits litigants to obtain monetary damages against federal officials in their individual capacity). When Congress "provide[s] meaningful safeguards" to protect the "[constitutional] rights," an extension of *Bivens* may be foreclosed. *Chilicky*, 487 U.S. at 425.

Congressional "activity in the field" through RFRA also counsels against extending *Bivens*. *Chappell*, 462 U.S. at 304. That Mr. Ferguson has failed to state a claim under RFRA, as discussed above, does not affect the relevance of RFRA to the special factors analysis. Insofar as RFRA does not provide relief to Mr. Ferguson, this lack of remedy suggests Congress's intention to limit causes of action for monetary damages against federal offi-

cials. *Chilicky*, 487 U.S. at 414 ("[T]he courts must give appropriate deference to indications that congressional inaction has not been inadvertent, and should not create *Bivens* remedies when the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations . . . ."). Given the extensive attention Congress has given to religious freedom, inadvertent neglect is unlikely. Because Congress has already acted, this Court should not interfere.

Furthermore, Mr. Ferguson could have sought—and did seek—equitable relief in the courts to enjoin the government to grant him a permit. Pet. for Writ of Mandamus, *Ferguson*, Civ. A. No. 21-1425, ECF No. 1-1; Def.'s Mot. at 16; Opp'n at 32–33. Mr. Ferguson did not receive the mandamus relief he requested because he voluntarily dismissed his action before it was considered on the merits. Notice of Voluntary Dismissal, *Ferguson*, Civ. A. No. 21-1425, ECF No. 12. Although Mr. Ferguson did not cite the Administrative Procedure Act ("APA") in either action, individuals who believe that NPS is acting in an arbitrary, capricious, unlawful, or unconstitutional manner can also sue under the APA. 5 U.S.C. §§ 706(2)(A)–(D); *see Henke v. DOI*, 842 F. Supp. 2d 54, 64 (D.D.C. 2012) ("If Plaintiffs believe NPS's future closure decision—should it occur—to be arbitrary and capricious, or otherwise unlawful or unconstitutional, they can challenge that decision under the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)–(D), at that time."); *Mausolf v. Babbitt*, 125 F.3d 661, 669 (8th Cir. 1997). Individuals convicted of violating NPS regulations can also raise the APA as

a defense. *See United States v. Picciotto*, 875 F.2d 345, 349 (D.C. Cir. 1989) (reversing the conviction of the defendant demonstrator because the relevant NPS regulation was not adopted in conformity with the APA's procedural requirements).

According to Mr. Ferguson, an injunction could have provided him with only "partial relief," and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Opp'n at 32–33 (quoting *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67). Mr. Ferguson's citation of *Roman Catholic Diocese of Brooklyn* is inapt for two reasons. First, the plaintiff in that case received injunctive relief, not money damages. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 69. Second, *Abbasi* specifically recognizes "an injunction" and "some other form of equitable relief" as adequate alternative remedies. *Abbasi*, 137 S. Ct. at 1865 (2017). The Supreme Court has "refused to create a *Bivens* action even [when] it assumed a First Amendment violation and acknowledged that 'existing remedies do not provide complete relief for the plaintiff." *Chilicky*, 487 U.S. at 423 (quoting *Bush v. Lucas*, 462 U.S. 367, 388 (1983)). Lack of a path to seek "relief for injuries" is not sufficient to extend *Bivens*; it is enough for Congress to have provided for an "administrative . . . process." *Wilkie v. Robbins*, 551 U.S. 537, 553 (2007). The injunctive relief open to Mr. Ferguson, even if only promising partial relief, counsels against an extension of *Bivens*.

Mr. Ferguson also filed several administrative complaints, including with the NPS Office of Professional Responsibility. Compl. ¶ 34. "'Alternative re-

medial structures' can take many forms, including administrative, statutory, equitable, and state law remedies." *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018). The existence of an administrative process to contest permit denials by the NPS represents an alternative remedial structure. The Supreme Court has recently made clear that agency regulations can also be the basis for an alternative remedial structure that forecloses a *Bivens* action. *Egbert v. Boule*, No. 21-147, 2022 WL 2056291, at *8–9 (U.S. June 8, 2022) (determining that a regulation requiring the Border Patrol to accept grievances and investigate misconduct foreclosed a *Bivens* remedy because "[s]o long as Congress *or the Executive* has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy" (emphasis added)).

For all of these reasons, no *Bivens* cause of action exists for Mr. Ferguson's claim, and under the analysis required by *Abbasi*, this Court should not create one. *See Abbasi*, 137 S. Ct. at 1859. The complaint therefore fails to state a claim upon which relief can be granted.[7]

* * *

Mr. Ferguson's RFRA and *Bivens* claims for monetary damages are subject to dismissal. The Court perceives, however, that Mr. Ferguson may have a claim for injunctive relief if his allegations are

[7] Because Mr. Ferguson has failed to state a claim, there is no occasion to consider whether Ms. Owens would be entitled to qualified immunity.

correct that the NPS has not issued, and continues not to issue, permits to him in conformity with the relevant regulations. *See* Compl. ¶¶ 28–30 (citing 36 C.F.R. § 7.96) (alleging that NPS did not process permit applications for demonstrations and special events in order of receipt); 36 C.F.R. § 7.96(g)(4)(i) ("NPS processes permit applications for demonstrations and special events in order of receipt.").

This litigation is still in an early stage, so the Court will permit Mr. Ferguson to file for leave to amend his complaint. *See Tyson v. District of Columbia*, 20-cv-1450, 2021 WL 860263, at *14 (D.D.C. Mar. 8, 2021) ("[G]iven the early stage in the litigation . . . the Court will allow the Plaintiff to amend his complaint."); *Thomas v. District of Columbia*, No. 21-cv-00584, 2021 WL 5769443, at *3 (D.D.C. Dec. 6, 2021) (granting the motion to dismiss without prejudice and "invit[ing] [the plaintiff] to file a motion for leave to file an amended complaint, attaching the proposed amendment, within 30 days"). "The practice of freely giving leave to amend is particularly appropriate in the circumstance of *pro se* litigants." *Kidd v. Howard Univ. Sch. of L.*, No. 06-cv-1853, 2007 WL 1821159, at *2 (D.D.C. June 25, 2007) (citing *Wyant v. Crittenden*, 113 F.2d 170, 175 (D.C. Cir. 1940)); *see also Moore v. Cap. Realty Grp., Inc.*, No. 21-cv-1099, 2022 WL 1049248, at *1 (W.D.N.Y. Apr. 7, 2022) ([G]iven his *pro se* status, [the plaintiff] may amend his complaint to allege, if possible, a viable claim . . . .").

Mr. Ferguson is proceeding *pro se*, so it is important that this Court inform him about the litigation process. Mr. Ferguson "is advised that an amended

complaint is intended to *completely replace* the prior complaint in the action and thus 'renders [any prior complaint] of no legal effect.'" *Moore*, 2022 WL 1049248, at *1 (quoting *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977) (advising a *pro se* plaintiff of the law surrounding amended complaints)); *see also Halldorson v. Sandi Grp.*, 934 F. Supp. 2d 147, 156 (D.D.C. 2013) ("It is hornbook law that an amended complaint supersedes the prior complaint and renders it of no legal effect."). Any proposed amended complaint must include all allegations so that the amended complaint may stand alone. Mr. Ferguson is also advised that "[a] motion for leave to file an amended pleading shall attach, as an exhibit, a copy of the proposed pleading as amended." LCvR 15.1. After receiving the motion for leave to file an amended pleading, the Court will determine whether to permit or deny the proposed amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[T]he grant or denial of an opportunity to amend is within the discretion of the District Court."). This Court may deny the amendment as "futile if the amended complaint would not withstand a motion to dismiss." *Hall & Assocs. v. Env't Prot. Agency*, 956 F.3d 621, 630 (D.C. Cir. 2020).

V. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss (ECF No. 7) is **GRANTED**, and the complaint is **DISMISSED WITHOUT PREJUDICE**. If the Plaintiff does not seek leave to file an amended complaint and accompanying motion within 30 days, the Court will dismiss the case with prejudice. An order consistent with this Memorandum Opinion is

separately and contemporaneously issued.

Dated: July 8, 2022

RUDOLPH CONTRERAS
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB N. FERGUSON, *Plaintiff,* *v.* ROBBIN M. OWEN, *Defendant.*	Civil Action No.: 21-02512 (RC) Re Document No.: 7

ORDER

GRANTING DEFENDANT'S MOTION TO DISMISS

For the reasons stated in the Court's Memorandum Opinion separately and contemporaneously issued, it is hereby:

ORDERED that Defendant's motion to dismiss (ECF No. 7) is **GRANTED**, and the complaint is **DISMISSED WITHOUT PREJUDICE.**

It is **FURTHER ORDERED** that if Plaintiff wishes to seek leave to file an amended complaint, Plaintiff shall file a motion for leave to file an amended complaint, attaching a proposed amended complaint, on or before August 8, 2022. Failure to do so will result in a dismissal of this case with prejudice.

SO ORDERED.

Dated: July 8, 2022

RUDOLPH CONTRERAS
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB N. FERGUSON, *Plaintiff,* *v.* ROBBIN M. OWEN, *Defendant.*	Civil Action No.: 21-2512 (RC) Re Document No.: 15

MEMORANDUM OPINION

DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND COMPLAINT

I. INTRODUCTION

Plaintiff Jacob Ferguson ("Mr. Ferguson" or "Plaintiff"), proceeding *pro se*, requests that the Court reconsider its dismissal of his claim under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, arguing that the Court erred in failing to consider how the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") amended RFRA over 20 years ago. In the alternative, Plaintiff seeks leave to amend his Complaint. For the reasons explained below, the Court denies Plaintiff's Motion for Reconsideration or, in the Alternative, for Leave to Amend Complaint.

II. BACKGROUND

The Court presumes familiarity with its prior opinion in this matter, which recounted the factual background of this case and dismissed Plaintiff's

claims under RFRA and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Ferguson v. Owen*, No. 21-cv-02512 (RC), 2022 WL 2643539, at *1–3 (D.D.C. July 8, 2022). Noting at the time that "[t]he Court perceives . . . that Mr. Ferguson may have a claim for injunctive relief if his allegations are correct that the NPS has not issued, and continues not to issue, permits to him in conformity with the relevant regulations," the Court permitted Plaintiff to file for leave to amend his Complaint. *Id.* at *11.

Plaintiff has filed a motion seeking reconsideration of the Court's dismissal of his claim under RFRA or, in the alternative, leave to amend his Complaint. Pl.'s Mot. for Recons. or, in the Alternative, for Leave to Amend Compl. ("Pl.'s Mot."), ECF No. 15. He has submitted a Proposed Amended Complaint that purportedly "clarif[ies] the nature of [Plaintiff's] religious belief." Pl.'s Mem. in Supp. Pl.'s Mot. ("Pl.'s Mem.") at 13, ECF No. 15-1. Defendant Robbin M. Owen ("Defendant"), Chief of the Division of Permits Management of the National Park Service, opposes the motion. Def.'s Mem. Opp'n to Pl.'s Mot., ECF No. 16. Plaintiff filed a reply in support of his motion. Pl.'s Reply Supp. Pl.'s Mot., ECF No. 17. The motion is now ripe for consideration.

III. LEGAL FRAMEWORK

A. Motion for Reconsideration

A court may reconsider any interlocutory order under Federal Rule of Civil Procedure 54(b) "as justice requires," *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 227 (D.C. Cir. 2011)

(internal quotations omitted), but "[i]n this District, that abstract phrase is interpreted narrowly," *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*No. II*), No. 20-mc00008, 2021 WL 1909777, at *5 (D.D.C. May 12, 2021) (internal quotations omitted). Reconsideration may be appropriate "when a court has 'patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or where a controlling or significant change in the law has occurred.'" *Ali v. Carnegie Inst. of Wash.*, 309 F.R.D. 77, 80 (D.D.C. 2015) (quoting *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp. 2d 258, 268 (D.D.C. 2012)). "The burden is on the moving party to show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied." *Westrick*, 893 F. Supp. 2d at 268. "A court's discretion under Rule 54(b) . . . is 'limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *Mahoney v. United States Capitol Police Bd.* ("*Mahoney II*"), 566 F. Supp. 3d 22, 26 (D.D.C. 2022) (quoting *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)).

B. Motion to Amend Complaint

Pursuant to the Federal Rules of Civil Procedure, a party may amend its pleading once as a matter of course within 21 days after serving it, or within a specified amount of time if the pleading is one to which a responsive pleading is required. Fed. R. Civ.

P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

The decision to grant or deny leave to amend "is committed to a district court's discretion." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). Leave to amend a complaint should be freely granted by the court "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court should also be mindful that a *pro se* litigant's complaint should be "construed liberally and is held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Lemon v. Kramer*, 270 F. Supp. 3d 125, 133 (D.D.C. 2017) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). Nevertheless, a court "may deny a motion to amend if such amendment would be futile," *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 113 (D.D.C. 2012) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)), such as if the amendment "merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss," *id.* (quoting *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002)); *see also, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) ("Courts may deny a motion to amend a complaint as futile . . . if the proposed claim would not survive a motion to dismiss.").

IV. ANALYSIS

Plaintiff has failed to meet the standard for reconsideration. The Court did not make an error and fail to consider how RLUIPA amended the definition of

the "exercise of religion" in RFRA or to follow controlling D.C. Circuit precedent. Nor did the Court patently misunderstand Plaintiff's filings when it considered, as part of its substantial burden analysis, the alternative means available to Plaintiff for prophesying and playing music consistent with his religious beliefs. Moreover, because Plaintiff's proposed Amended Complaint remains substantially similar to his Complaint and its reiterated claim under RFRA would not withstand a motion to dismiss, the Court denies Plaintiff's motion seeking leave to amend his Complaint.

A. Motion for Reconsideration

Plaintiff contends that the Court ought to reconsider its dismissal of his RFRA claim for two reasons. First, according to Plaintiff, the Court's opinion failed to consider how RLUIPA amended RFRA's definition of the "exercise of religion" over 20 years ago. Specifically, Plaintiff argues, "RLUIPA changed RFRA's definition of religious exercise to mean: 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" Pl.'s Mem. at 3 (citation omitted). Thus, the Court's consideration as part of its substantial burden analysis of whether playing music and prophesying at the Lincoln Memorial was central to Plaintiff's religious beliefs not only reflected outdated D.C. Circuit precedent, *see id.* at 8–9, but was also "antithetical to the direct and clear language of RFRA unambiguous on its face" and "expressly forbidden by Congress," *id.* at 7. Second, Plaintiff states, the Court has patently misunderstood Plaintiff's filings because Defendant in fact did not grant alternative means for his musical

demonstrations and further denied or failed to act on the majority of his permit applications. *Id.* at 10–11. The Court considers each of these arguments in turn.

First, Plaintiff's motion is incorrect in asserting that the Court failed to consider the D.C. Circuit's controlling precedent on RFRA. In Plaintiff's retelling of the relevant precedent's history, the panel that decided *Henderson v. Kennedy* ("*Henderson I*"), 253 F.3d 12 (D.C. Cir. 2001), was "unaware of RFRA's newly amended 'exercise of religion' definition" as set forth under RLUIPA. Pl.'s Mem. at 4. The "precedential language that circulates RFRA case law in the D.C. Circuit today" is thus that from *Henderson I*, even though the D.C. Circuit later "attempted to walk back its language" in *Henderson v. Kennedy* ("*Henderson II*"), 265 F.3d 1072 (D.C. Cir. 2001). Pl.'s Mem. at 4. The D.C. Circuit then, "in an attempt to mitigate the looming fallout of such a dangerous anti-RFRA precedent" in *Henderson I*, "made itself crystal clear" in *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002), "that a person has *never* had to prove that their religious exercise is 'required' by or 'central' to religious belief." Pl.'s Mem. at 5.

Plaintiff acknowledges, however, that, the question of whether a religious exercise is required by or central to one's religious beliefs "*can* . . .be [a] relevant factor[] in the substantial burden analysis" according to the D.C. Circuit. *Id.* (citation omitted). And the D.C. Circuit has indeed stated consistently that, "[a]lthough the amendments [under RLUIPA] extended the protections of RFRA to 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' the amendments did not

alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists." *Henderson II*, 265 F.3d at 1074 (internal citation omitted); *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (rejecting plaintiff's argument that RLUIPA overruled *Henderson I* by amending RFRA's definition of "exercise of religion"); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened. . . . . An inconsequential or *de minimis* burden on religious practice does not rise to this level [of substantial burden], nor does a burden on activity unimportant to the adherent's religious scheme."). Moreover, the availability of a "multitude of means" for engaging in a religious exercise weighs against finding a substantial burden under RFRA. *Doe*, 642 F.3d at 1121 (quoting *Henderson I*, 253 F.3d at 17); *see also Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.* ("*Archdiocese of Washington II*"), 897 F.3d 314, 333 (D.C. Cir. 2018) ("Sincere religious beliefs are not impermissibly burdened by restrictions on evangelizing in a non-public forum where a 'multitude of means' remains for the same evangelization." (citation omitted)); *Frederick Douglass Found., Inc. v. D.C.*, 531 F. Supp. 3d 316, 342 (D.D.C. 2021).

As an initial matter, contrary to Plaintiff's assertion that the Court must have been unaware of the change to RFRA's definition of religious exercise, the Court explicitly cited to RFRA's definition of the

"exercise of religion" as amended by RLUIPA. *See Ferguson*, 2022 WL 2643539, at *6 (citing *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 293–94 (D.D.C. 2020)). But more importantly, the Court's opinion is consistent with D.C. Circuit precedent.[1] The D.C. Circuit did not overrule *Henderson I*; it denied the petition for rehearing in *Henderson II* and clarified that RLUIPA's amendments did not affect a court's ability to assess the importance of a religious practice in conducting a substantial burden analysis. *See Henderson II*, 265 F.3d at 1074. Consistent with that guidance, the Court here considered the importance of demonstrating at the Lincoln Memorial to Plaintiff's religious beliefs. The Court's analysis did not make the centrality of prophesying and playing music at the Lincoln Memorial to Plaintiff's religious beliefs a threshold question, as Plaintiff's motion suggests. It instead concluded that, because playing music and prophesying at the Lincoln Memorial was not central

[1] Plaintiff appears to suggest that D.C. Circuit precedent may itself be erroneous by permitting consideration of the importance of a religious practice as part of a substantial burden analysis. *See* Pl.'s Mem. at 7 ("[T]he mere suggestion of a court that notions of *centrality* and/or *requirement* may at all weigh into the substantial burden analysis, is expressly forbidden by Congress."). Justice Alito has, in dissent, noted that "it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect 'any exercise of religion, *whether or not compelled by, or central to,* a system of religious belief.'" *Murphy v. Collier*, 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting) (citation omitted). But until the Supreme Court states that courts may not undertake such an analysis, this Court remains bound by the D.C. Circuit precedent that permits such consideration.

to Plaintiff's religious beliefs, such demonstration was not so important to Plaintiff's beliefs that the denial of Plaintiff's permit applications constituted a substantial burden under RFRA. *See Kaemmerling*, 553 F.3d at 678. That is, Defendant's actions neither "force[d Plaintiff] to engage in conduct that [his] religion forbids or . . . prevent[ed] [him] from engaging in conduct [his] religion requires." *Doe*, 642 F.3d at 1121 (quoting *Henderson I*, 253 F.3d at 16). The Court thus did not fail to consider controlling D.C. Circuit precedent or a change in the law.

Second, Plaintiff posits that the Court must have patently misunderstood Plaintiff's filings by concluding that the availability of alternative means to Plaintiff for demonstrating musically weighed against finding a substantial burden. In particular, Plaintiff argues, Defendant in fact left him with no alternative means for his musical demonstrations and further denied or failed to act on the majority of his permit applications. *See* Pl.'s Mem. at 10–11. But Plaintiff's argument, which relies on the premise that "no alternative means were offered to Plaintiff *anywhere* in Washington," suggests that he misunderstands the Court's alternative means analysis. *Id.* at 11. The question informing the Court's substantial burden analysis was not whether Defendant offered Plaintiff alternative locations for demonstrating on each of his requested dates, but rather whether Plaintiff still had a "multitude of means" available to him for prophesying consistent with his religion. *Doe*, 642 F.3d at 1121 (quoting *Henderson I*, 253 F.3d at 17). Defendant need not have offered alternative locations or dates for Plaintiff to have had such a

multitude of means available to him.[2]

Consider, for instance, *Archdiocese of Washington II*, wherein the Archdiocese of Washington challenged as a violation of the First Amendment and RFRA the Washington Metropolitan Area Transit Authority's ("WMATA") guidelines prohibiting advertisements that promoted or opposed any religion, religious practice, or belief. *See* 897 F.3d at 318–19. The D.C. Circuit concluded that the Archdiocese was not likely to succeed on its RFRA claims, even though the Archdiocese "allege[d] that advertising on public buses provide a 'unique and powerful format' for its evangelization campaign because it 'offers high visibility with consistent daily views.'" *Id.* at 333 (citation omitted). The D.C. Circuit noted that "[s]incere religious beliefs are not impermissibly burdened by restrictions on evangelizing in a non-public forum where a 'multitude of means' remains for the same evangelization," and the Archdiocese "ha[d] acknowledged that it has many other ways to pursue its evangelization efforts: in newspapers, through social media, and even on D.C. bus shelters." *Id.* (citation omitted).

Here, the Court recognized in its prior opinion that "prophesying in the heart of Washington and publicly performing music" are important to Plaintiff's religious beliefs. *Ferguson*, 2022 WL 2643539, at *6, 8. As the Court's opinion highlighted, however,

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[2] Given its irrelevance to the question at issue, the Court does not consider whether Defendant's assignment of an alternate location for some of Plaintiff's requested dates, or her alleged failure to do so for others, complied with regulatory requirements.

Plaintiff's filings indicated that he had not only previously demonstrated in other locations in Washington, D.C., but that his "complaints" regarding the alternative site offered by Defendant were "practical, not religious." *Id.* at *6. Defendant's authorization of Plaintiff playing at the Korean War Veterans Memorial provided him with alternative means;[3] but even if Defendant had not provided such authorization, Plaintiff had adduced that playing at other locations also sufficed as alternative means of practicing his religion. In short, the Court's analysis here again circles back to the same issue: did Plaintiff claim that prophesying and playing music at the Lincoln Memorial was so important to his religious beliefs that disallowing him from doing so left him with no alternative means of prophesying and playing music consistent with his religious beliefs, which would weigh toward finding that Defendant's actions constituted a substantial burden on Plaintiff's beliefs? The Court concluded that Defendant's

[3] Plaintiff protests that Defendant's assignment of this alternate location did not provide him with an alternative means for practicing his religion because consigning him to the Korean War Veterans Memorial "unreasonably restricted [his] ability to musically demonstrate; it was realistically impossible to do." Pl.'s Mem. at 10–11. But Plaintiff's gripes with playing at the "metaphorical lepers colony" that is the Korean War Veterans Memorial are not motivated by his religious beliefs; he objects to the location because it is "awkwardly detached from the people and logistically impractical for a large setup of music equipment." Compl. ¶ 27, ECF No. 1. Plaintiff has shown only that playing at the Korean War Veterans Memorial would be unsatisfactory to him because he may not be able to play in front of the number of people or use the musical equipment that he would prefer. He has not shown that it does not provide an alternative means of practicing his religion.

actions did not prevent Plaintiff from "engaging in conduct [his] religion requires," which Plaintiff could do elsewhere in Washington, D.C., and therefore did not constitute a substantial burden under RFRA. *Doe*, 642 F.3d at 1121 (citation omitted). The Court did not patently misunderstand Plaintiff's filings in so concluding.

B. Motion to Amend Complaint

Although the Court considered Plaintiff's Complaint in light of all of his filings before dismissing his claims, *see Ferguson*, 2022 WL 2643539, at *3 (quoting *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015)), the Court also permitted Plaintiff to file for leave to amend his Complaint because it "perceive[d] . . . that [Plaintiff] may have a claim for injunctive relief if his allegations are correct that the NPS has not issued, and continues not to issue, permits to him in conformity with the relevant regulations," *id.* at *11. But Plaintiff has opted not to amend his Complaint to raise a potential claim under the Administrative Procedure Act and states that he "perceives that the Court perceives his RFRA claim is workable, and seeks leave to amend it only[.]" Pl.'s Mem. at 13.

Plaintiff's Proposed Amended Complaint does not differ substantially from his Complaint and prior filings in its explanation of Plaintiff's religious beliefs. In short, Plaintiff originally sought to prophesy and play music at five locations in Washington, D.C. that together formed the shape of a cross. Pl.'s Proposed Am. Compl. ¶ 105, ECF No. 15-2. According to Plaintiff, he heard a command from God that he interpreted to mean that he should prophesy in

Washington, D.C. at "the Capitol, the White House, the Lincoln Memorial, and/or any other location that Plaintiff chose to freely exercise his religion at." *Id.* at ¶¶ 110–11. It was, moreover, "always Plaintiff's original intent to conduct successful demonstrations at all five major locations." *Id.* at ¶ 108. In time, even though "Plaintiff did not hear a direct command from God to specifically choose the Lincoln Memorial," *id.* at ¶ 110, Plaintiff came to focus his efforts on the Lincoln Memorial "out of a sincerely held religious belief that God has granted him authority to make a sovereign choice without God's direct command, and therefore, to believe that God's grace covered him," *id.* at ¶ 115. Plaintiff's Proposed Amended Complaint indicates that he has chosen the Lincoln Memorial in particular for several reasons: it is not only "the #1 most heavily trafficked and international tourist destination in the nation's capital" and "attracts the largest crowds of people in Washington, D.C.," thus making it a "public square" like that to which the biblical prophets of God are sent, *id.* at ¶¶ 101–02 (citation omitted), but it was also "the *last* place, theoretically, that Plaintiff would want to publicly speak at due to fear" and therefore "the most acceptable place to God," *id.* at ¶ 104. In addition, Plaintiff offers that Defendant's refusal to permit his demonstrations at the Lincoln Memorial have spurred him further "because he increasingly began to believe that God might be raising him up to fight for his free religious exercise." *Id.* at ¶ 106.

Though Plaintiff's Proposed Amended Complaint further elucidates his reasons for seeking to perform at the Lincoln Memorial, it nevertheless suffers from the same deficits as did his Complaint. As the Court

understands Plaintiff's proffered reasons, Plaintiff has himself *chosen* the Lincoln Memorial as the site of his demonstrations out of five possible locations where Plaintiff could prophesy consistent with his religious beliefs. Plaintiff has not attributed any religious significance to demonstrating at the Lincoln Memorial in particular, other than stating that it is an ideal public square that he feels would be most acceptable to God. *See id.* at ¶¶ 101–04; Pl.'s Reply Supp. Pl.'s Mot. at 3, ECF No. 17 ("Plaintiff has already pleaded that the Lincoln Memorial was important to his religion via its symbolism as the public square where Plaintiff could best conquer his greatest spiritual fear of public speaking and Plaintiff's prophecy could reach the greatest number of people—whom it was intended to help."). As articulated, Plaintiff's claim is comparable to that in *Mahoney v. United States Capitol Police Bd.* ("*Mahoney I*"), 566 F. Supp. 3d 1 (D.D.C.), *on recons. in part*, 566 F. Supp. 3d 22 (D.D.C. 2022), wherein the plaintiff claimed that the defendants' denial of his permit application to hold a prayer vigil on the West Front Lawn of the United States Capitol violated RFRA. *Id.* at 4–5. Another court in this District, despite recognizing that the plaintiff "'felt called by God to hold the September 11th prayer vigil on the Western Front Lawn,' and that '[t]his was Rev. Mahoney's honest conviction,'" concluded that the plaintiff "[had] not alleged that his sincerely held religious belief required him to conduct his September 11 vigil with more than 19 people." *Id.* at 18 (citation omitted). The court noted that it did not question the sincerity of the plaintiff's belief, but stated that "[i]ts mere 'existence,' . . . and 'even the sincere desire to

act in accordance with it,' is 'not enough to sustain a claim.'" *Id.* (quoting *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.* ("*Archdiocese of Washington I*"), 281 F. Supp. 3d 88, 114 (D.D.C. 2017), *aff'd*, 897 F.3d at 335).

Likewise, here, the Court does not question that Plaintiff feels called to prophesy and play music at the Lincoln Memorial. But the fact that the activity would be religiously motivated does not suffice to establish the substantial burden necessary for a RFRA violation. *See Archdiocese of Washington I*, 281 F. Supp. 3d at 114 ("[T]o make religious motivation the critical focus is to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." (quoting *Doe*, 642 F.3d at 1121)). Plaintiff's Proposed Amended Complaint makes clear that the choice of where to prophesy is his to make because "the servant of God is granted authority to act sovereignly and do whatever *the servant* believes is right according to *the servant's* own free 'will.'" Pl.'s Proposed Am. Compl. at ¶ 113 (citation omitted); *see also, e.g., id.* at ¶ 120 ("Plaintiff is therefore sovereign and granted authority on earth by God to make any sovereign choice that he believes is right."). Thus, playing at the Lincoln Memorial specifically is not "conduct [that Plaintiff's] religion *requires*," but a choice that Plaintiff feels that his religion empowers him to decide himself. *Doe*, 642 F.3d at 1121 (emphasis added). To the extent that Plaintiff's religion requires that he prophesy and play music, he can do so elsewhere in Washington, D.C.—such as at the other locations where he has previously demonstrated—and therefore has a "multitude of means" still avail-

able to him for acting in accordance with his religious beliefs. *Doe*, 642 F.3d at 1121 (quoting *Henderson I*, 253 F.3d at 17).

Accordingly, Plaintiff's Proposed Amended Complaint again does not establish the substantial burden required for a RFRA violation. Having concluded that Defendant did not substantially burden Plaintiff's religious exercise, the Court need not assess whether Defendant's actions impose the least restrictive means of furthering a compelling governmental interest. For the reasons stated above and in the Court's previous related opinion, the Court denies Plaintiff's request seeking leave to amend his Complaint as futile because the Proposed Amended Complaint would not survive a motion to dismiss.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion for Reconsideration or, in the Alternative, for Leave to Amend Complaint. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: March 6, 2023 RUDOLPH CONTRERAS
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB N. FERGUSON, *Plaintiff,* *v.* ROBBIN M. OWEN, *Defendant.*	Civil Action No.: 21-2512 (RC) Re Document No.: 15

ORDER

DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND COMPLAINT

For the reasons stated in the Court's Memorandum Opinion separately and contemporaneously issued, the Court **DENIES** Plaintiff's Motion for Reconsideration or, in the Alternative, for Leave to Amend Complaint.

SO ORDERED.

Dated: March 6, 2023

RUDOLPH CONTRERAS
United States District Judge

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5102 September Term, 2022
1:21-cv-02512-RC Filed On: June 1, 2023

JACOB N. FERGUSON,
Appellant,
v.
ROBBIN M. OWEN,
Appellee.

Before: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

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ORDER

Upon consideration of appellant's petition for initial hearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Daniel J. Reidy
Deputy Clerk

Appendix G

42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the 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;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(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.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in 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; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(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).

(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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

No. ____

IN THE

Supreme Court of the United States

JACOB N. FERGUSON,
Petitioner,

v.

ROBBIN M. OWEN,
Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 8,349 words, excluding all parts exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on April 8, 2024.

JACOB N. FERGUSON
2020 Pennsylvania Avenue NW, #469
Washington, D.C. 20006
jacob.n.ferguson@gmail.com
(202) 840-5696

Acknowledgment Notary Certificate (Only for use in AR, AZ, CO, CT, DC, DE, GA, ID, IA, IL, KS, KY, MA, MD, ME, MN, MO, MT, NH, NJ, NM, NY, NV, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, WA)

Document Name: Certificate of Compliance

STATE OF Maryland
COUNTY OF Calvert County
(County where notarization occurred)

This record was acknowledged before me on 8th day of April, 2024, by Jacob N Ferguson (name(s) of signer(s)), who personally appeared before me and (is personally known to me or whose identity was proved on the basis of satisfactory evidence) to be the person whose name is subscribed to in this document.

KIMIRA L BAILEY
Notary Public
St. Mary's County
Maryland
My Commission Expires Dec. 27, 2027

(Signature of notary public)

Kimira L Bailey, Notary Public
(Name of notary public)

Official Seal

My commission expires: December 27th 2027

Personally known _____ OR
Produced identification ✓ Type of identification produced: Washington DC Driver's License

No. ____

IN THE

Supreme Court of the United States

JACOB N. FERGUSON,
Petitioner,

v.

ROBBIN M. OWEN,
Respondent.

CERTIFICATE OF SERVICE

I certify that on April 8, 2024, I electronically served and mailed three copies of the Petition for a Writ of Certiorari at least as expeditious as first-class, postage prepaid, upon all parties required, and one copy upon the Solicitor General, below:

Steven H. Hazel
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950 Pennsylvania Avenue NW
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Counsel for Respondent

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(202) 514-2203

Counsel for Respondent

I also mailed forty copies to the Court. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on April 8, 2024.

JACOB N. FERGUSON
2020 Pennsylvania Avenue NW, #469
Washington, D.C. 20006
jacob.n.ferguson@gmail.com
(202) 840-5696

Acknowledgment Notary Certificate (Only for use in AR, AZ, CO, CT, DC, DE, GA, ID, IA, IL, KS, KY, MA, MD, ME, MN, MO, MT, NH, NJ, NM, NY, NV, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, WA)

Document Name: Certificate of Service

STATE OF Maryland
COUNTY OF Calvert County
(County where notarization occurred)

This record was acknowledged before me on 8th day of April, 2024, by Jacob N Ferguson (name(s) of signer(s)), who personally appeared before me and (is personally known to me or whose identity was proved on the basis of satisfactory evidence) to be the person whose name is subscribed to in this document.

KIMIRA L BAILEY
Notary Public
St. Mary's County
Maryland
My Commission Expires Dec. 27, 2027

(Signature of notary public)

Kimira L Bailey, Notary Public
(Name of notary public)

Official Seal

My commission expires: December 27th 2027

Personally known _____ OR
Produced identification ✓ Type of identification produced: Washington DC Driver's License