

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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

v.

Federal Energy Regulatory Commission; *et al.*,  
*Respondents.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Religious Freedom Restoration Act (RFRA) protects the free exercise of religion by prohibiting the government from substantially burdening a person's religious exercise and guaranteeing that individuals may assert a violation of RFRA as a claim in a judicial proceeding and obtain appropriate relief. 42 U.S.C. § 2000bb-1(a), (c). Federal statutory law is subject to RFRA unless specifically exempted. *Id.* § 2000bb-3(b).

The Natural Gas Act (NGA) applies to the transportation of natural gas in interstate commerce and authorizes the Federal Energy Regulatory Commission (FERC) to issue orders granting applications for new pipelines. Third persons to an application must strictly comply with the NGA's administrative procedure to obtain judicial review of an order, including intervening and requesting rehearing before FERC. 15 U.S.C. § 717r(a), (b). A circuit court then has exclusive but limited jurisdiction to "affirm, modify, or set aside" the order. *Id.* § 717r(b). Congress did not exempt the NGA from RFRA.

The questions presented are:

1. Must a person intervene in an application and follow the required administrative procedures for objecting to proposed agency action in order to prevent the government agency from later burdening her religious exercise in violation of RFRA?
2. Does circuit court review of an administrative agency's order satisfy RFRA's guarantee to assert a claim in a judicial proceeding and obtain appropriate relief against the government?

## **PARTIES TO THE PROCEEDING**

Petitioners, who were Plaintiffs below, are the Adorers of the Blood of Christ, United States Province; Sister Sara Dwyer; Sister Maria Hughes; Sister Dani Brought; Sister Mary Alan Wurth; and Sister Therese Marie Smith.

Respondents, who were Defendants below, are the Federal Energy Regulatory Commission; Cheryl A. LaFleur, in her capacity as Commissioner of FERC; and Transcontinental Gas Pipe Line Company, LLC.

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner Adorers of the Blood of Christ is a religious nonprofit corporation organized under the laws of Missouri. It does not have a parent corporation and is not publicly held, nor is it an affiliate of any publicly owned corporation. The remaining Petitioners are individual persons.

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## **PETITION FOR A WRIT OF CERTIORARI**

The Adorers of the Blood of Christ and the individually named Sisters (together, Adorers or Petitioners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### **OPINIONS BELOW**

The Third Circuit's opinion is reported at 897 F.3d 187. App.1-23. The District Court's memorandum and order are reported at 283 F. Supp. 3d 342. App.24-36.

### **JURISDICTION**

The Third Circuit entered judgment on July 25, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App.37-54.

### **INTRODUCTION**

The Adorers are a vowed order of Roman Catholic women, who exercise their religion by honoring and protecting the earth as part of God's creation, consistent with their overall belief in the sanctity of life. The Adorers agree with Pope Francis's teachings that the threat of climate change, caused in large part by the intensive use of fossil fuels, represents a principal challenge facing humanity.

As part of its implementation of the Natural Gas Act (NGA), the Federal Energy Regulatory Commission (FERC or Commission) reviewed the application of Transcontinental Gas Pipe Line Company, LLC (Transco) to construct a high-volume natural gas pipeline and issued a certificate conditionally approving the application. The route of the pipeline runs directly through land that the Adorers own in Lancaster County, Pennsylvania, and the certificate empowered Transco to use eminent domain to obtain an easement for the pipeline. Operation of the pipeline on the Adorers' property violates their deeply-held religious beliefs and conscience by forcing them to use their own land to facilitate a fossil fuel pipeline that will harm the earth.

After FERC issued the conditional certificate but before it authorized any construction activity, the Adorers filed a claim pursuant to the Religious Freedom Restoration Act (RFRA) in district court to prospectively enjoin the construction and use of the pipeline on their property. The district court dismissed the Adorers' action for lack of subject matter jurisdiction. In affirming the district court, the Third Circuit held that the Adorers had to intervene in Transco's application and preemptively raise their religious objection against FERC for FERC to decide as part of its administrative process. Because the Adorers did not do so, the Adorers are now jurisdictionally foreclosed from asserting any RFRA claims that arise as a result of FERC's order. According to the Third Circuit, the Adorers have forever lost the rights and protections guaranteed by RFRA by not following the procedural provisions of the NGA related to Transco's application.

Certiorari is warranted because the Third Circuit decided an important question of federal law in a way that conflicts with decisions of this Court that interpret and apply the plain language of RFRA. The Third Circuit's decision establishes that the broad protections and rights guaranteed by RFRA can be lost by failing to follow a federal statute's intricate administrative process for intervening and raising objections in an agency's review of another party's application. This holding is contrary to this Court's decision in *Hobby Lobby* that RFRA must be interpreted and applied as broadly as possible to *protect* religious liberties, not preemptively *strip* them away before a violation has even occurred.

In addition, the Third Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The Third Circuit held that the administrative provisions of the NGA do not conflict with RFRA and, therefore, can be applied to nullify the statutory protections of RFRA. The holding is contrary to the express language of RFRA mandating the application of RFRA over and above all other federal law, unless the statute explicitly excludes itself from RFRA's coverage. The decision applies to all statutes providing for judicial review of agency action, with the effect of dismantling RFRA protections for innocent third parties in a variety of contexts. The result is the permanent loss of religious liberties, effectively immunizing the government from all future violations.

The issue presented is exceptionally important because it implicates the protection of religious liberties against governmental interference—an



unalienable right that Congress favored for sweeping statutory protection above all other law.

## STATEMENT OF THE CASE

### I. Statutory Background

#### A. The Religious Freedom Restoration Act of 1993

Congress adopted RFRA, 42 U.S.C. §§ 2000bb - 2000bb-4, in recognition that the “free exercise of religion [is] an unalienable right” and “governments should not substantially burden religious exercise without compelling justification.” 42 U.S.C. § 2000bb(a)(1), (3). The dual purposes of RFRA are “(1) to restore the compelling interest test set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*, . . . 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.” *Id.* § 2000bb(b).

To effectuate its purposes, RFRA proscribes that “Government shall not substantially burden a person’s exercise of religion” unless the government demonstrates that the burden furthers a compelling government interest by the least restrictive means. *Id.* § 2000bb-1(a), (b). To enforce the restraint on government, RFRA guarantees a private cause of action to any “person whose religious exercise has been burdened in violation of this section” to “assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” *Id.* § 2000bb-1(c). Standing to assert a RFRA claim is governed by Article III of the United States

Constitution. *Id.* RFRA is subject to a four-year statute of limitations. 28 U.S.C. § 1658(a).

RFRA applies “to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” *Id.* § 2000bb-3(a). “Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application[.]” *Id.* § 2000bb-3(b). RFRA must be interpreted “in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” *Id.* § 2000cc-3(g).

In adopting RFRA, Congress also amended 42 U.S.C. § 1988(b) to allow a prevailing party to recover attorney’s fees.

## **B. The Natural Gas Act**

The NGA, 15 U.S.C. §§ 717 - 717z, applies to the transportation and sale of natural gas in interstate commerce. 15 U.S.C. § 717(b). FERC has the authority to carry out the provisions of the NGA. *Id.* § 717o. The NGA provides that a certificate of public convenience and necessity (certificate) for a natural gas pipeline “shall be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed” and that the proposed service or construction “is or will be required by the present or future public convenience and necessity[.]” *Id.* § 717f(e). A certificate holder may exercise the right of eminent domain to take private property for the pipeline. *Id.* § 717f(h).

The NGA and its implementing regulations establish the administrative procedure FERC must follow for reviewing and approving a certificate, *id.* § 717f(c)(1)(B), (e), including the process for an outside person to participate, 18 C.F.R. §§ 157.10, 385.214. The person must first become a party by filing a motion to intervene. *Id.* § 385.214(a)(3). The motion must state the position taken by the movant and the interest of the movant in the pending application. *Id.* § 385.214(b)(1), (2). The motion must be filed within the time period prescribed by FERC, *id.* § 385.210(b), and “[f]ailure to make timely filing will constitute grounds for denial of participation in the absence of extraordinary circumstances or good cause shown,” *id.* § 157.10(a)(3); *see also id.* § 385.214(d).

Once FERC issues an order on an application, a party-intervenor then must apply to FERC for a rehearing within 30 days of the issuance of such order. 15 U.S.C. § 717r(a). “No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.” *Id.*

Only after the Commission makes a determination on a petition for rehearing may a party file with the circuit court a “written petition praying that the order of the Commission be modified or set aside in whole or in part.” 15 U.S.C. § 717r(b). The petition must be filed with the court of appeals where the natural gas company is located or has its principal place of business, or the D.C. Circuit. *Id.* “No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing

unless there is reasonable ground for failure so to do.”  
*Id.*

Upon the filing of the party’s petition and the record from FERC, the circuit court retains “exclusive,” but limited, jurisdiction to “affirm, modify, or set aside” FERC’s order. *Id.* The circuit court is bound by the Commission’s factual findings if supported by substantial evidence. *Id.*

The NGA does not permit FERC or the circuit court to award damages or attorney’s fees, since FERC is limited to deciding the merits of an application for a certificate, *id.* § 717f(e), and the circuit court is limited to “affirming, modifying, or setting aside” FERC’s order, *id.* § 717r(b). If any step or deadline in the NGA is missed, a person is jurisdictionally barred from challenging any future decisions and actions implementing the Commission’s order.

The NGA was amended in 2005, *see* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), and does not contain an exemption from RFRA.

## **II. Factual Background**

The Adorers are an ecclesial group of Catholic women living in community, who practice their deeply held religious convictions in their day to day actions. They take vows of poverty, chastity, and obedience and dedicate their lives to pursuing ministries consistent with their faith. The exercise of their religious beliefs includes: making God’s love tangible and known through compassionate acts of service through their ministries and lives; educating and addressing important issues of social and environmental justice, such as poverty, war, racism, and global warming that

separate people from each other in a way that the Adorers do not believe mirrors their hope for the Kingdom of God; celebrating, praying, and deep reflection as part of their individual and communal spirituality; and honoring the earth as a sacred part of God's creation by protecting and preserving the earth as a gift of beauty and sustenance for future generations. App.7; Am. Compl. ¶¶ 21-22, No. 5:17-cv-03163 (E.D. Pa. Aug. 11, 2017), ECF No. 10.

The Adorers adopted a Land Ethic in 2005, which proclaims their long-held religious belief in the "sacredness of all creation" and their commitment to exercise their faith by "striv[ing] to establish justice and right relationships so that all creation might thrive." App.110. The Land Ethic pertinently states: "As leaders, we know our choices impact our interdependent Earth community; we initiate broad-based participation to make decisions focused on our common good. As advocates of Earth, we choose simple lifestyles that avoid excessive or harmful use of natural resources; we work in solidarity with all creation for a healthy and sustainable lifestyle." App.110-11.

The Adorers follow the encyclical letter issued by Pope Francis in 2015, entitled "Laudato Si' . . . On Care For Our Common Home." Am. Compl., Ex. B, ECF No. 10-2. *Laudato Si'* is an appeal to all people regarding the "ecological crisis" facing earth because of environmental degradation. *Id.* ¶¶ 3, 15. Pope Francis references "[a] very solid scientific consensus . . . that we are presently witnessing a disturbing warming of the climatic system" and, also, that "studies indicate that most global warming in recent decades is due to the great concentration of greenhouse gases . . .

released mainly as a result of human activity.” *Id.* ¶ 23. “The problem is aggravated by a model of development based on the intensive use of fossil fuels[.]” *Id.* Pope Francis expresses that “[c]limate change is a global problem with grave implications: environmental, social, economic, political and for the distribution of goods. It represents one of the principal challenges facing humanity in our day.” *Id.* ¶ 25. “Living our vocation to be protectors of God’s handiwork,” the Holy Father urges, “is essential to a life of virtue; it is not an optional or a secondary aspect of our Christian experience.” *Id.* ¶ 217.

The Adorers’ land in Lancaster County, Pennsylvania, is at the center of the present action. As with all land that they own, the Adorers use their Lancaster County property with intention and consistent with their religious beliefs. Part of their property is used to house and care for the elderly through sponsorship of St. Anne’s Retirement Community. Another part of the property includes a 24 acre tract used to grow agricultural crops (Property). App.7; Am. Compl. ¶ 39.

Pursuant to the procedures of the NGA, Transco sought permission from FERC for a high-capacity natural gas pipeline known as the Atlantic Sunrise Pipeline. The proposed 42-inch-diameter pipe is capable of transporting 1.7 million dekatherms (1.7 billion cubic feet) of natural gas per day. App.5-6. The project includes 199.5 miles of new “greenfield” pipeline connecting the fracking fields in the northern part of Pennsylvania to an existing pipeline network that runs to South Carolina. App.5. The proposed route of the pipeline runs directly through the Adorers’ Property.

The pipeline will facilitate the extraction and intensive use of fossil fuels.

On March 31, 2015, Transco filed an application for the proposed pipeline pursuant to the NGA. App.6-7. FERC published the Notice of Application in the Federal Register on April 15, 2015, requiring motions to intervene to be filed by April 29, 2015. App.57, 59. The Adorers did not formally intervene in Transco's application. However, while the application was pending, the Adorers repeatedly advised Transco that they objected to the pipeline on religious grounds and refused to grant Transco an easement because using their land to facilitate the pipeline would directly violate their religious beliefs and vows. Mot. for Inj. Pending Appeal, Ex. E, Case 17-3163 (3d Cir. Oct. 3, 2017), ECF No. 3112743372 (Decl. of M. Drumm).

FERC conducted an administrative review of Transco's application under the procedures set forth in the NGA. On February 3, 2017, FERC issued an Order Issuing Certificate, which granted Transco's application subject to 56 conditions including conditions precedent to beginning construction activities. App.60, 65-91. By virtue of the certificate, Transco had the power to use eminent domain to take private property. On July 7, 2017, after the Adorers had refused on religious grounds all monetary offers for a right-of-way through their Property, Transco acted under federal law to condemn an easement over the Adorers' Property. App.9-10. While the Adorers maintain ownership of the Property, Transco has the right to use the Adorers' Property for its pipeline in perpetuity.

On July 14, 2017, within one week of the condemnation and well before FERC granted Transco permission to commence any construction activities on the Adorers' Property, Petitioners filed the underlying RFRA complaint in the United States District Court for the Eastern District of Pennsylvania. App.10. On August 16, 2017, the Adorers filed a motion for a preliminary injunction with the District Court. No. 5:17-cv-03163, ECF No. 11. On September 15, 2017, over the Adorers' pending litigation and motion for injunction, FERC issued Transco a Notice to Proceed with construction in Lancaster County, Pennsylvania, including on the Adorers' Property. App.100.

On October 16, 2017, Transco commenced construction on the Adorers' Property. Federal Marshals were at the Property with specific instructions to arrest and transport to Philadelphia any of the Adorers who entered the pipeline easement on their Property as an act of religious exercise. App.96.

Since the filing of the complaint, FERC has refused to examine whether its implementation of the NGA, which forces the Adorers to use their own land for a high-capacity pipeline, results in a substantial burden to the Adorers' free exercise of religion in violation of RFRA. Instead, FERC opposed the Adorers' RFRA claim at every turn by filing opposition papers to Petitioners' complaint, appeal, and motions for injunction and to expedite the appeal. Significantly, following the filing of the Adorers' complaint, FERC issued multiple approvals authorizing pipeline



construction and natural gas activities on the Adorers' Property.

Transco's construction of the pipeline neared completion in the summer of 2018. Counsel for Petitioners sent a letter to FERC dated August 31, 2018, urging FERC not to authorize the commencement of natural gas service, consistent with its duty not to substantially burden the Adorers' exercise of religion. App.103-07. FERC never responded to the letter.

On October 4, 2018, FERC authorized Transco to place the pipeline into service, and Transco did shortly thereafter. App.108-09. Natural gas presently is flowing through the Adorers' Property in direct violation of the Adorers' religious practice and sincerely-held beliefs.

### **III. Proceedings Below**

Petitioners' complaint invoked the original jurisdiction granted to district courts pursuant to 28 U.S.C. § 1343(a)(4) to hear any civil action brought under "any Act of Congress providing for the protection of civil rights[.]" Am. Compl. ¶ 2. The complaint also invoked the court's federal question jurisdiction under 28 U.S.C. § 1331. *Id.* ¶ 2. Petitioners asserted violations of RFRA against FERC and Transco on the basis that the forced and perpetual use of the Adorers' Property for a 42-inch-diameter fossil fuel pipeline will facilitate global warming and cause harm to the earth, which substantially burdens the Adorers' religious practices and beliefs. The Adorers sought declaratory and injunctive relief to prevent the pipeline from being constructed and used on their Property, as well as attorney's fees, other fees and costs, and any other

relief deemed appropriate. *Id.* p. 19. Both FERC and Transco filed motions to dismiss. Petitioners also filed a motion for preliminary injunction, which FERC and Transco opposed and the court denied.

The district court dismissed for lack of subject matter jurisdiction, finding that the NGA required Petitioners to have submitted their RFRA claim to FERC and to have followed the NGA's administrative review scheme for challenging a FERC order, whereupon a relevant court of appeals would have "exclusive" jurisdiction to "affirm, modify, or set aside" FERC's order. App.28-29. The district court characterized Petitioners' RFRA claim as requesting collateral review of a FERC order, which it concluded was prohibited by the NGA's exclusive jurisdiction provision. App.29.

Petitioners filed a timely appeal with the Third Circuit, as well as a motion for injunction pending appeal. The Third Circuit denied the motion and the appeal based on reasoning similar to that of the district court. Although Petitioners had invoked the district court's original jurisdiction of statutory civil rights cases under 28 U.S.C. § 1343(a)(4), the Third Circuit held that "a claim under RFRA . . . , brought pursuant to the general jurisdictional grant of a federal question under 28 U.S.C. § 1331, does not abrogate or provide an exception to a specific and exclusive jurisdictional provision prescribed by Congress for judicial review of an agency's action." App.22-23.

The Third Circuit found no conflict between RFRA and the NGA but acknowledged that "the NGA would have to necessarily yield to RFRA if the two statutes indeed conflicted." App.12. Rather, the Third Circuit

concluded that “the NGA merely provides for complementary procedural requirements that a claimant must adhere to when exercising their RFRA right to a ‘judicial proceeding.’” App.12. (citing 42 U.S.C. § 2000bb-1(c)). The court concluded that RFRA does not give a person the right to file a private cause of action but only to some type of a “judicial proceeding.” While acknowledging that the FERC proceeding alone would not qualify as a “judicial proceeding” under RFRA, the Court stated that “the NGA’s ‘FERC + Court of Appeals’ framework so qualifies.” App.14-15 n.6. The NGA’s statutory-review scheme was controlling, the court expressed, because the jurisdiction of the circuit courts is “exclusive” and the “exhaustion provision” requiring application for rehearing “makes clear Congress’ intent to confer exclusive jurisdiction to the NGA by a highly reticulated statute nullifying any procedural alternatives[.]” App.15. Because the Adorers did not intervene in Transco’s application, did not apply for rehearing before FERC within 30 days of its order, and did not file a written petition to modify or set aside FERC’s order within 60 days of the rehearing order, “the Adorers have foreclosed judicial review of their substantive RFRA claims.” App.15.

Having found that the NGA expressly precluded jurisdiction of the Adorers’ RFRA claim, the court further opined that the NGA implicitly precluded jurisdiction. The court applied the judicial framework of *Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994), which provides a factor test to determine whether Congress intended to allocate initial review to an administrative agency or a district court, where Congress’s intent is not explicit. In applying the

*Thunder Basin* inquiry, the Third Circuit focused exclusively on the provisions of the NGA, finding that it was Congress's intent for RFRA claims to be decided by FERC pursuant to the statutory structure of the NGA. The court opined that "meaningful judicial review" could occur via the circuit court's review of a FERC order, and the Adorers' claims are not "wholly collateral" to the NGA's review provisions. App.16-17. Although the Adorers did not present any constitutional claims, the Court inexplicably expressed that "the constitutional claims may be outside of FERC's expertise," but "this is tempered by the court of appeals's review, which regularly resolves constitutional issues." App.17.

The Court also addressed the fact that the Adorers had not yet suffered a RFRA violation at the time they were required to intervene in Transco's application (and, thus, did not have a RFRA claim to raise). The Third Circuit explained that "FERC may hear any claim raised before it—even potential violations of federal law," and FERC "may adjudicate these claims in a way it believes appropriate." App.21.

Lastly, although Petitioners did not request damages, the Court noted that neither FERC nor the circuit court had authority to award damages under the NGA's administrative review scheme but declined to consider whether this limitation would conflict with RFRA's guarantee of "appropriate relief against a government." App.22 n.11.

## **REASONS FOR GRANTING THE PETITION**

Certiorari is warranted under this Court's traditional criteria.

First, the Third Circuit decided an important question of federal law in a way that conflicts with the plain language of RFRA and with relevant decisions of this Court. Rather than applying RFRA "to all federal law" in a broad and sweeping manner, consistent with the statutory language and the precedent of this Court, the Third Circuit interpreted the NGA to override RFRA and to foreclose the statutory protections guaranteed by RFRA.

Second, the Third Circuit erroneously decided a legal question that has not been, but should be, settled by this Court. The decision incorrectly disregarded a clear conflict between RFRA and the NGA, which must be resolved in favor of RFRA. Rather than prohibiting government from burdening religion consistent with RFRA, the Third Circuit imposed an affirmative duty on a person to intervene in another party's administrative application to try to preemptively stop an agency from violating RFRA. The Third Circuit declared that FERC must decide any RFRA "claim" in an administrative proceeding, tempered only by limited, deferential judicial review. The precedential decision has broad implications for religious liberties, as it immunizes agency action from RFRA as long as such action is subject to judicial review.

**I. The decision below conflicts with this Court's precedents.**

The Third Circuit's application of the administrative procedures of the NGA to eliminate the proscriptions and protections of RFRA squarely conflicts with this Court's precedent.

As with any question of statutory interpretation, this Court begins with the plain language of RFRA, in recognition that “[o]ur responsibility is to enforce RFRA as written” without regard to “[t]he wisdom of Congress’s judgment[.]” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

Consistent with RFRA's plain terms, this Court has expressed that “the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion, ‘even if the burden results from a rule of general applicability.’” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb–1(a)). In the event of a substantial burden to religious exercise, it is the government’s burden to demonstrate that its action furthers a compelling state interest by the least restrictive means. *See Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). This prohibition against government interfering in the free exercise of religion is mandatory and absolute. There are no prerequisites or contingencies a person must meet to be entitled to its protection. *See Hobby Lobby*, 134 S. Ct. at 2759 (RFRA applies to “any action” taken by the Federal Government).

In addition to imposing a statutory duty upon government, this Court has observed that Section

2000bb-1(c) provides “an express private cause of action” to a person whose religious exercise has been burdened in violation of RFRA. *Sossamon v. Texas*, 563 U.S. 277, 282 (2011) (“RLUIPA also includes an express private cause of action that is taken from RFRA[.]”). This is consistent with one of the stated purposes of RFRA “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 U.S.C. § 2000bb(b)(2).

In terms of RFRA’s scope and application, this Court has held that RFRA must “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” *Hobby Lobby*, 134 S. Ct. at 2762 (quoting § 2000cc-3(g)) (internal quotation marks omitted). The Court interprets RFRA “to provide very broad protection for religious liberty,” “far beyond what this Court has held is constitutionally required.” *Id.* at 2767. This “sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). “RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.” *Id.* Simply stated, it is “universal in its coverage.” *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (internal quotation marks and alteration omitted); *see also Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (“RFRA is unusual in that it amends the entire United States Code.”); *Korte v. Sebelius*, 735 F.3d 654, 679 (7th Cir. 2013) (RFRA’s coverage “is comprehensive in that

it applies across the United States Code and Code of Federal Regulations and restrains the conduct of all federal officials.”).

Rather than interpreting RFRA to displace other federal law, as required by the plain language of RFRA and this Court’s precedent, the Third Circuit found the NGA to be “controlling.” The Third Circuit did not construe the NGA as “subject to [RFRA],” but instead used the NGA to “foreclose” the Adorers’ RFRA claim. The decision defies this Court’s pronouncements that RFRA’s coverage is “universal,” applying “to all Federal law, and the implementation of that law,” and “prohibiting official actions of almost every description and regardless of subject matter.” (In fact, the Third Circuit did not cite a single opinion of this Court examining RFRA.) The Third Circuit did not interpret RFRA “in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” Instead, it elevated the NGA over RFRA with the effect of eliminating religious protection for innocent bystanders.

Indeed, the Third Circuit’s decision leads to an absurd result, in that FERC and Transco are free to substantially burden the Adorers’ religious exercise in violation of RFRA, and the Adorers have no recourse to stop it. By applying the NGA to overcome RFRA, the Third Circuit required the Adorers to intervene in a stranger’s administrative application and follow the highly-reticulated process of the NGA to preserve future RFRA rights long before their religious exercise even was burdened. The application of the NGA to foreclose the Adorers’ RFRA claim was the functional



equivalent of imposing a statute of limitations that expired before a RFRA violation occurred. The result is the permanent loss of religious liberties exacerbated by governmental immunity to continue violating them.

Correctly applying RFRA and this Court's precedent, the Adorers had the statutory right to file a private cause of action in federal district court. Consistent with the Article III standing requirements of RFRA, 42 U.S.C. § 2000bb-1(c), the Adorers filed their complaint when the harm to their religious rights appeared concrete and imminent: after Transco condemned their Property and before FERC authorized any construction activities thereon. Until then, there was no actual or imminent harm to the Adorers' exercise of religion. Their rights were not burdened during FERC's review of Transco's application. At that time, the pipeline may never have received approval, and any potential harm would have been purely conjectural. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting forth Article III standing requirements).

FERC's conditional order granting Transco's application imposed no burden because it did not authorize any pipeline construction or natural gas activities on the Adorers' Property until Transco obtained additional permits and approvals and was granted a notice to proceed from FERC. *See City of Fall River, Mass. v. FERC*, 507 F.3d 1, 7 (1st Cir. 2007) (FERC's conditional certificate will have no immediate effects, since it is conditioned on subsequent authorizations and approvals). Likewise, Transco's condemnation of the Adorers' Property merely authorized Transco to possess the easement; Transco

needed a notice to proceed from FERC before it could commence any pipeline activities on the Property. *See Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 247 (3d Cir. 2018) (“[T]he activity that FERC’s certificate allows to commence—bringing a condemnation action—cannot, without a series of additional steps (among them the prohibited construction activities), result in” pipeline activity.). It was at this point, when construction of the pipeline appeared impending, that the Adorers filed their RFRA claim in court, seeking injunctive and declaratory relief. FERC and Transco had the burden of evidence and persuasion to establish if an exception to RFRA’s general prohibition applied. *Holt*, 135 S. Ct. at 863. This Court has made it clear that courts hear and decide RFRA claims, not administrative agencies. *Gonzales*, 546 U.S. at 434.

The Third Circuit’s decision allows FERC to defy Congress’s intent by taking action that substantially burdens the Adorers’ exercise of religion without consequence. On October 4, 2018, more than a year after the Adorers filed suit under RFRA and over their strenuous objections, FERC authorized Transco to begin conveying natural gas through the Adorers’ Property. This violation of RFRA will continue as long as the pipeline remains operational.

Instead of applying RFRA as written, the Third Circuit imposed the administrative provisions of the NGA to override the religious protections and rights guaranteed by RFRA in contravention of this Court’s jurisprudence.

**II. The Third Circuit decided an important question of federal law that has not been, but should be, settled by this Court.**

The Third Circuit applied the mandatory procedural requirements of an administrative review statute to foreclose a third party's RFRA claim and, yet, concluded that the administrative statute does not conflict with the statutory guarantees provided by RFRA. This Court has not directly decided this issue, but should, because its resolution significantly affects the protection of religious exercise against the actions of federal agencies.

**A. The administrative provisions of the NGA conflict with the statutory provisions of RFRA, and Congress statutorily resolved the conflict in favor of RFRA.**

Congress included in RFRA an "Applicability" section that, in general, "applies [RFRA] to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). The section further contains a "Rule of construction" that subjects all federal statutory law adopted after November 16, 1993, to RFRA "unless such law explicitly excludes such application by reference to this chapter." *Id.* § 2000bb-3(b). The Second, Seventh, and Tenth Circuits have interpreted this provision as a statutory mandate requiring courts to apply RFRA over and above all other federal legislation in favor of religious accommodation. *See Korte*, 735 F.3d at 673; *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013) (en banc); *Rweyemamu*, 520 F.3d

at 202. As the Seventh Circuit stated, “RFRA is structured as a sweeping ‘super-statute,’ cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . It is ‘both a rule of interpretation’ and ‘an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place.’” *Korte*, 735 F.3d at 673 (citations and internal quotation marks omitted).

While agreeing “that the NGA would have to necessarily yield to RFRA if the two statutes indeed conflicted,” the Third Circuit “conclude[d] that the two statutes do not conflict.” App.12. The Third Circuit found that “the NGA merely provides for complementary procedural requirements that a claimant must adhere to when exercising their RFRA right to a ‘judicial proceeding.’” App.12. Accordingly, the Third Circuit held that NGA’s “procedural regime is controlling here” and that the NGA’s exhaustion provision “makes clear Congress’ intent to confer exclusive jurisdiction to the NGA by a highly reticulated statute nullifying any procedural alternatives an aggrieved party may otherwise have.” App.15. “By failing to avail themselves of the protections [under the NGA],” the Court continued, “the Adorers have foreclosed judicial review of their substantive RFRA claims.” App.15.

This Court should review the Third Circuit’s decision because the administrative and jurisdictional provisions of the NGA are fundamentally at odds with the substantive prohibitions and rights of RFRA.

### **1. RFRA’s protections are not subject to jurisdictional prerequisites.**

RFRA empowers individuals to assert violations of RFRA “as a claim . . . in a judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. § 2000bb-1(c). There are no predicate, administrative requirements to file a RFRA claim, and courts have declined “to read an exhaustion requirement into RFRA where the statute contains no such condition . . . and the Supreme Court has not imposed one.” *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (RFRA claimant did not need to seek an exemption to the Controlled Substances Act from the Drug Enforcement Administration before filing in court); *see Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) (service member was not required to exhaust administrative remedies in a court-martial before asserting RFRA claim in court). Indeed, in *Gonzales*, this Court reviewed a RFRA challenge to the Controlled Substances Act without requiring the claimant to first seek a religious use exemption from the Drug Enforcement Administration. 546 U.S. at 434. This Court has repeatedly stressed that RFRA’s statutory protections apply to “any action” taken by a government agency or official. *Hobby Lobby*, 134 S. Ct. at 2759; *Holt*, 135 S. Ct. at 859; *see* 42 U.S.C. §§ 2000bb-1(a), 2000bb-2(1).

By contrast, the NGA “sets forth a highly reticulated” administrative procedure that must be carefully followed. *Am. Energy Corp. v. Rockies Exp. Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Exhaustion of the administrative process is a

jurisdictional prerequisite to judicial review. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 433-34 (5th Cir. 1987). Each of the statutory requirements must be met, including filing an application for rehearing before FERC within 30 days of FERC's order; preserving for judicial review all objections by including them in the application for rehearing; and, within 60 days of the rehearing decision, filing a petition requesting the circuit court modify or set aside FERC's order. 15 U.S.C. § 717r(a), (b). "Neither the Commission nor the courts are given any form of jurisdictional discretion." *Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978).

The conflict between the administrative exhaustion requirements of RFRA – none – and the NGA – highly reticulated and jurisdictional – could not be starker. As described *supra*, the Third Circuit resolved the conflict to annul all RFRA protections.

## **2. RFRA claims cannot be decided by an administrative agency.**

RFRA provides for "Judicial relief" by guaranteeing a "person whose religious exercise has been burdened in violation of this section" the right to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Congress described the identical language in RLUIPA as a "Cause of Action." *Id.* § 2000cc-2(a). The plain language of this section makes clear that courts, not administrative agencies, are to decide RFRA claims, "that is how the law works." *Gonzales*, 546 U.S. at 434.

This Court and at least eleven circuit courts, including the Third Circuit, have concluded that RFRA (and/or RLUIPA) claimants are guaranteed a “private cause of action” for a court to decide a RFRA claim.<sup>1</sup> Circuit courts have held that this provision includes the right to recover monetary damages, in addition to seeking declaratory and injunctive relief. *See Tanvir*, 894 F.3d at 467; *Mack*, 839 F.3d at 302. The Civil Rights Attorney’s Fees Award Act permits “the court, in its discretion,” to award attorney’s fees to a prevailing RFRA claimant. 42 U.S.C. § 1988(b).

The Third Circuit acknowledged that if § 2000bb-1(c), entitled “Judicial Relief,” is interpreted to provide a private cause of action in district court, “we would have to conclude that the NGA unlawfully conflicted with RFRA.” App.14-15 n.6. Yet, it inexplicably found no such right, notwithstanding the Third Circuit’s pronouncement in *Mack* that RFRA “explicitly provides a private cause of action against the government for

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<sup>1</sup> *See Sossamon*, 563 U.S. at 282; *Tanvir v. Tanzin*, 894 F.3d 449, 459 (2d Cir. 2018); *Ware v. Louisiana Dep’t of Corr.*, 866 F.3d 263, 267–68 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1181 (2018); *Mack v. Warden Loretto FCI*, 839 F.3d 286, 301 (3d Cir. 2016); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013), *cert. granted, judgment vacated sub nom. Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014), *abrogated by Hobby Lobby*, 134 S. Ct. 2751; *Van Wyhe v. Reisch*, 581 F.3d 639, 653 (8th Cir. 2009); *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (per curiam); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc); *Smith v. Allen*, 502 F.3d 1255, 1269 (11th Cir. 2007), *abrogated on other grounds by Sossamon*, 563 U.S. 277; *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006); *Charles v. Verhagen*, 348 F.3d 601, 606 (7th Cir. 2003); *Malik v. Kindt*, 107 F.3d 21, at \*2 (10th Cir. 1997).

appropriate relief.” 839 F.3d at 301 (internal quotation marks omitted).

Rather, the Third Circuit concluded that the Adorers had to submit their RFRA “claim” to FERC to “adjudicate these claims in a way it believes appropriate.” App.21. Yet, RFRA statutorily requires RFRA claims to be asserted and adjudicated in a judicial proceeding, not in an administrative proceeding. Moreover, FERC’s authority is derived from and limited by the NGA, and FERC, an agency of the executive, simply does not have the power to adjudicate a RFRA claim. The NGA does not allow a party to assert a “claim,” but only to raise objections to a private company’s application. 18 C.F.R. § 385.214(b)(1) (prospective intervenor must state its “position”); 15 U.S.C. § 717r(b) (petitioner may “object[ ]” to FERC’s order).

In addition, RFRA requires a court to evaluate whether a plaintiff shows a substantial burden on religious exercise, and if so, whether the government “demonstrates” that the burden furthers a compelling interest by the least restrictive means. 42 U.S.C. § 2000bb-1(a), (b). The term “demonstrates” is specifically defined by RFRA to mean “meets the burdens of going forward with the evidence and of persuasion.” *Id.* § 2000bb-2(3). RFRA uses terms of art related to a full evidentiary hearing in a court proceeding. Under the NGA, however, FERC would be both the “adjudicator” and “defendant” of a RFRA “claim.” Thus, FERC would have to simultaneously go forward with its burden of evidence and persuasion while deciding if it is entitled to RFRA’s limited statutory exception. This untenable scenario, with



FERC as defendant and judge, simply reinforces the clear conflicts between the statutes.

Even if FERC could “adjudicate a RFRA claim,” no justiciable claim even exists when FERC is undertaking its administrative review of a pending pipeline application because no violation has occurred. Thus, counter to the Third Circuit’s directive, there is nothing for FERC to “adjudicate.” In any event, RFRA would preclude the assertion of a “claim” at this juncture since standing to assert a RFRA claim is “governed by the general rules of standing under Article III of the Constitution,” thereby prohibiting a preemptive, speculative RFRA claim. *Id.* § 2000bb-1(c). As described, the Adorers’ religious exercise was not actually substantially burdened until FERC approved and Transco began conveying natural gas through the pipeline on the Adorers’ Property in October of 2018.

Finally, FERC has no jurisdiction or authority to award “appropriate relief against a government” (*i.e.*, against itself), such as monetary relief, and cannot award attorney’s fees, 15 U.S.C. § 717f(e), whereas RFRA guarantees the availability of all such relief, 42 U.S.C. § 2000bb-1(c).

RFRA requires RFRA claims to be asserted and decided by a court in a judicial proceeding. Thus, the NGA directly conflicts with this statutory right because it mandates, as a jurisdictional matter, that FERC decide all objections (including any RFRA objections) raised by an intervenor during FERC’s administrative proceedings for a third party’s pipeline application.

**3. The NGA's provision for limited circuit court review of agency orders does not satisfy RFRA's guarantee to assert a claim in a judicial proceeding and obtain relief against the government.**

According to the Third Circuit, “[a]lthough an agency proceeding alone would not qualify as . . . a ‘judicial proceeding,’ we conclude that the NGA’s ‘FERC + Court of Appeals’ framework so qualifies.” App.15. This attempt to reconcile two conflicting statutes instead of following Congress’s directive as set forth in the plain language of RFRA constitutes clear error that should be reviewed by this Court.

Congress chose its words carefully in providing a right to judicial relief if a person’s “religious exercise has been burdened in violation of this section.” 42 U.S.C. § 2000bb-1(c). This statutory right, identified as one of the two purposes of the Act, states a person “may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” *Id.*

The Third Circuit violated basic canons of statutory interpretation by extracting the term “judicial proceeding” and interpreting it as a stand alone provision, rather than as inextricably tied to the right to “assert . . . a claim” in a “judicial proceeding.” This led to a decision that effectively rewrites this section from guaranteeing a person the right to *assert a claim in a judicial proceeding* to requiring a person to *assert a claim in an administrative proceeding if a statute provides for judicial review*. See, e.g., *South Fork Band Council of Western Shoshone of Nev. v. U.S. Dep’t of*

*Interior*, No. 3:08-cv-00616, 2009 WL 73257, at \*2 (D. Nev. 2009) (noting RFRA’s purpose is not to “permit judicial review” but to “provide a claim or defense to persons whose religious exercise is substantially burdened by government”). RFRA’s statutory rights cannot be replaced with a judicially created hybrid process requiring submission of a RFRA claim to an administrative agency simply because a court can later review the agency’s decision.

Furthermore, the NGA curtails the circuit court’s jurisdiction, permitting only a deferential review of FERC’s orders. It cannot hear testimony, take evidence, or award all appropriate relief, such as damages or attorney’s fees. Rather, the circuit court may only “affirm, modify, or set aside” the Commission’s order and must defer to the factual findings of the Commission as conclusive if supported by substantial evidence. *Compare* 15 U.S.C. § 717r(b), *with* 42 U.S.C. § 2000bb-1(a), (b). *See Northern Arapaho Tribe v. Ashe*, 925 F. Supp. 2d 1206, 1211 (D. Wy. 2012) (RFRA provides a separate cause of action with a different standard of review from a court’s review of an agency decision); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) (describing circuit court’s limited scope of review in reviewing FERC order).

To summarize, the Third Circuit’s decision illustrates numerous conflicts between the NGA and RFRA. In order to resolve these conflicts, the Third Circuit had no reason to resort to judicial doctrines like *Thunder Basin* to try to discern Congress’s intent when Congress *by statute* unequivocally declared its intent. Congress mandated that the provisions of RFRA

control over all other federal legislation, including the NGA, unless specifically exempted by Congress. 42 U.S.C. § 2000bb-3(b); *Korte*, 735 F.3d at 673.<sup>2</sup> As Judge, now Justice, Gorsuch opined, “[t]he tie-breaker is found not in our own opinions about good policy but *in the laws Congress enacted*. Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty.” *Hobby Lobby v. Sebelius*, 723 F.3d at 1156 (Gorsuch, J., concurring) (emphasis added). This Courts review is required to right the balance.

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<sup>2</sup> In addition, the Third Circuit invoked its decision in *Francis v. Mineta*, 505 F.3d 266 (3d Cir. 2007), for the proposition that “Congress did not intend RFRA to subsume other statutory schemes.” App.18 n.7. (quoting *Francis*, 505 F.3d 270) (internal quotation marks omitted). Nothing in the plain language of RFRA or its legislative history supports this proposition. Rather, RFRA intrudes “at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *City of Boerne*, 521 U.S. at 532. Moreover, *Francis* is factually distinct, as it involved an employee’s claim that his employer (the Transportation Security Administration) burdened his religious exercise, which claim the *Francis* court determined should have been reviewed by the Equal Employment Opportunity Commission through the remedial procedures of Title VII. *Francis*, 505 F.3d at 271-72. By contrast, Petitioners rights had not even been burdened when the Third Circuit would have required them to assert their RFRA “claim” to FERC, an agency overseeing energy policy, to allow FERC to decide whether FERC itself would later burden Petitioners’ religious rights.

**B. District courts have exclusive jurisdiction of RFRA claims.**

The Third Circuit’s jurisdictional analysis wrongly focused on the district court’s general federal question jurisdiction pursuant to 28 U.S.C. § 1331 and ignored the Adorers’ invocation of jurisdiction under 28 U.S.C. § 1343(a)(4). The court’s decision turned on this error, inasmuch as it held that “a claim under RFRA . . . brought pursuant to the general jurisdictional grant of a federal question under 28 U.S.C. § 1331, does not abrogate or provide an exception to a specific and exclusive jurisdictional provision prescribed by Congress for judicial review of an agency’s action.” App.22-23.

The Adorers, however, identified in their complaint and prominently highlighted in briefing before the Third Circuit that the district court had jurisdiction over the Adorers’ RFRA claims pursuant to 28 U.S.C. § 1343(a)(4). Section 1343(a)(4) provides that “[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights[.]” 28 U.S.C. § 1343(a)(4).

Pursuant to this section, a civil rights claim based upon a statute may only be brought in a United States district court. *See Rogers v. U.S.*, 14 Cl. Ct. 39, 50 (1987) (district court had “exclusive jurisdiction” under 28 U.S.C. § 1343(a)(4) for claims based on racial discrimination pursuant to 42 U.S.C. § 2000d), *aff’d*, 861 F.2d 729 (Fed. Cir. 1988), *cert. denied*, 109 S. Ct. 1930 (1989). Because RFRA is an Act of Congress providing for the protection of civil rights, *only* the

district court has jurisdiction to hear a claim. The Third Circuit relied upon the wrong jurisdictional basis in its decision.

Congress's directive that a RFRA "claim" is to be "asserted" in a "judicial proceeding" further reinforces the district court's exclusive jurisdiction. 42 U.S.C. §2000bb-1(c). This statutory language clearly contemplates both a proceeding before a court *and* that a court would decide a RFRA claim. *See Gonzales*, 546 U.S. at 434. This amounts to a specific jurisdictional grant, as the only "judicial proceeding" within which a private cause of action can be asserted is in the federal district court. Based on RFRA's broad application over and above all federal law, the specific right to assert a private cause of action for appropriate judicial relief is both a substantive right *and* a jurisdictional grant to the district court, consistent with 28 U.S.C. § 1343(a)(4).

### **III. The Third Circuit's precedential decision will have a significant adverse impact on the protection of religious liberties.**

Certiorari is warranted for the independent reason that the Third Circuit decided a question that will result in the nullification of RFRA's statutory protections for untold numbers of innocent bystanders simply because they did not become a party to agency action and follow an administrative review process.

First, the Third Circuit's holding applies to all administrative review statutes that include "a specific and exclusive jurisdictional provision prescribing a particular procedure for judicial review of an agency's

action.” App.5.<sup>3</sup> As a leading treatise observes, “a startling array of specific statutory provisions establish court of appeals jurisdiction to review actions of agencies” and “[c]omplete enumeration of the statutes probably would be impossible at any given moment.” 16 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 3941 (3d ed.). “The sweep of the issues that may come on for judicial review under these provisions covers the spectrum from immediately individual claims for personal compensation to the broadest issues of contemporary social, economic, environmental, and political regulation.” *Id.* “Some of the statutes that provide for court of appeals review of administrative decisions expressly provide that this method of review is exclusive.” *Id.* § 3943.

Second, even statutes that do not confer exclusive jurisdiction on a reviewing court often are interpreted to imply exclusivity, foreclosing an action in district court. *E.g.*, *Whitney Nat. Bank in Jefferson Par. v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 422 (1965). The specific judicial forum for review varies from statute to statute, and “litigants are often unsure of where they should bring their challenge. Litigants who guess incorrectly face the prospect of losing out on

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<sup>3</sup> For example, the decision also forecloses the rights of religious claimants affected by FERC’s decisions under the Federal Power Act, 16 U.S.C. §§ 791a - 828c (FPA), which contains an administrative review scheme that “parallels” the NGA’s. *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989); 16 U.S.C. § 825l. The FPA applies to hydroelectric dams, reservoirs, diversion structures, and other appurtenances, as well as electric transmission facilities. Like the NGA, the FPA grants permittees the power to obtain private property by eminent domain. 16 U.S.C. §§ 814, 824p(e)(1).

very short deadlines, often sixty days, for bringing an action,” and “[t]here are perhaps hundreds of statutes which require a petition for review to be filed within sixty days.” Joseph W. Mead & Nicholas A. Fromherz, *Choosing A Court to Review the Executive*, 67 Admin. L. Rev. 1, 19 & n.122 (2015).

By applying these administrative review statutes to foreclose statutory rights guaranteed by RFRA, the Third Circuit’s decision casts a long shadow over the free exercise of religion, which Congress found to be an unalienable right and which this Court characterized as among the most precious rights guaranteed under the Constitution. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

### CONCLUSION

The petition for a writ of certiorari should be granted.

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