No. 17-138

In the Supreme Court of the United States

SUSAN H. ABELES,

Petitioner,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, JULIA HODGE, AND VALERIE O'HARA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND JEWS FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

ERIC RASSBACH
Counsel of Record
DANIEL BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W., Ste. 700
Washington, DC 20036
erassbach@becketlaw.org
(202) 955-0095

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.2, The Becket Fund for Religious Liberty and Jews for Religious Liberty respectfully move this Court for leave file the attached brief *amicus curiae* in support of Petitioner Susan Abeles and certiorari. Petitioner has consented to the filing of this brief, but Respondents have withheld consent.

Becket is a non-profit, public-interest legal and educational institute that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Since its founding over 20 years ago, Becket has been involved either as counsel or *amicus curiae* in virtually every case in this Court that has implicated religious liberty.

Jews for Religious Liberty is an unincorporated cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JFRL's members have written extensively on the role of religion in public life. Representing members of the clergy and the legal profession who are adherents of a minority religion, JFRL has a unique interest in ensuring that the Religious Freedom Restoration Act is applied broadly, including for members of the Jewish community.

This case presents a religious liberty issue of critical importance to Becket and JFRL: whether a federal employee plaintiff bringing a "substantial burden" claim under the Religious Freedom Restoration Act must demonstrate that the government's challenged

action was motivated by discrimination. The Fourth Circuit held below that RFRA requires a plaintiff to show intentional discrimination, thus creating an express circuit split with the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, an implicit split with the Tenth, Eleventh, and D.C. Circuits, and contradicting several of this Court's decisions.

Becket and JFRL believe this brief will be of considerable assistance to the Court as it highlights the split of authority created by the Fourth Circuit and how resolution of that split would resolve the questions presented in the petition. Accordingly, Becket and JFRL request that this court grants their motion for leave to file the attached brief *amici curiae*.

Respectfully submitted.

ERIC RASSBACH
Counsel of Record
DANIEL BENSON
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave.
NW, Suite 700
Washington, D.C. 20036
erassbach@becketlaw.org
(202) 955-0095

Counsel for Amici Curiae

AUGUST 2017

QUESTIONS PRESENTED

1. Should the Court grant the petition to resolve the circuit split created by the Fourth Circuit's decision that a plaintiff must demonstrate intentional discrimination to establish a "substantial burden" under the Religious Freedom Restoration Act?

2. Should the Court grant the petition to ensure that federal-state interstate compact entities like the Respondent Metropolitan Washington Airports Authority are not exempt from both federal and state statutory protections for religious liberty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Statutes

Other Authorities

INTEREST OF THE *AMICI*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel for a party in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket has frequently represented religious people and institutions in cases involving workplace disputes over religious observances. For example, Becket represented the successful Petitioner in *Hosanna-Tabor*, the first ministerial exception case to reach this Court. Similarly, Becket filed an amicus brief supporting the Muslim employee in *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), which concerned the availability of a religious accommodation for wearing a hijab while interacting with customers.

---

[1] No party's counsel authored any part of this brief. No person other than *Amici* contributed money intended to fund the preparation or submission of this brief. All parties were notified in advance of the filing of this brief in accordance with Rule 37.2(a). Petitioner has consented to the filing of this brief, but Respondents have withheld consent.

Becket has also frequently represented the interests of Jewish litigants, who, like many other religious minorities, are frequently denied religious accommodations by government officials. See, *e.g.*, *Rigdon* v. *Perry*, 962 F. Supp. 150 (D.D.C. 1997) (obtained free speech ruling in favor of military chaplain clients, including Orthodox Jewish chaplain); *Benning* v. *Georgia*, 391 F.3d. 1299 (11th Cir. 2004) (obtained kosher diet for observant Jewish prisoner in Georgia); *Moussazadeh* v. *Texas Dept. of Crim. Justice*, 703 F.3d 781 (5th Cir. 2012) (same in Texas); *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (same in Florida); *Gagliardi* v. *City of Boca Raton*, No. 17-11820 (11th Cir. brief filed July 28, 2017) (represent Orthodox Jewish synagogue seeking approval to build).

Jews for Religious Liberty is an unincorporated cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JFRL's members have written extensively on the role of religion in public life. Representing members of the clergy and the legal profession who are adherents of a minority religion, JFRL has a unique interest in ensuring that the Religious Freedom Restoration Act is applied broadly, including for members of the Jewish community.

Becket and JFRL are concerned that that the Fourth Circuit's decision, if left to stand, will negatively affect the ability of federal government employees to obtain religious accommodations by wrongly requiring them to demonstrate intentional discrimination as an element of a "substantial burden" under the Religious Freedom Restoration Act (RFRA). The

Fourth Circuit's decision will inhibit Jewish religious exercise within the federal workplace and could easily result in a *de facto* government hiring ban on Orthodox Jews.

Finally, Becket and JFRL are concerned by the Fourth Circuit's failure to hold that RFRA applies to a class of undisputedly public actors like Respondent Metropolitan Washington Airports Authority that are created by federal law and independent of state and local governments. Exempting organizations with broad police and regulatory powers from both state and federal statutory protections for religious liberty would pose a grave threat to the protection of free exercise envisioned by Congress when it enacted RFRA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Passover has been observed by millions of Jews for thousands of years. It is the quintessential human story of an unjust ruler who seeks to impose his will on a disfavored minority, but who is eventually thwarted by divine intervention. Passover has been a vital link between generations of Jews over the centuries, wherever they have lived. Its observance—particularly the recounting of the Passover history every year during the Passover *seder*—has been part of how Judaism has been able to continue existing despite the many tragedies of Jewish history.

But for Respondent Metropolitan Washington Airports Authority, none of that matters. The Authority does not recognize the significance of Passover for observant Orthodox Jews like Petitioner Susan Abeles. Instead its position is that it can ignore Passover entirely: As long as it does not act out of outright

hostility towards Jews, it can penalize Jews for observing Passover.

The Fourth Circuit's decision below adopted this view. It concluded, in the context of Abeles' Title VII intentional discrimination claim, that the Authority had not "treated [Abeles] differently than other employees because of her religious beliefs," App. 10a, and had applied "neutral rules," App. 14a. This lack of intentional discrimination meant that Abeles "necessarily" suffered no substantial burden under RFRA, so the Fourth Circuit refused to address her RFRA claim. App. 8a n.4.

For observant Orthodox Jews, the Fourth Circuit's position is particularly onerous, because they may not work on either the first two days or the last two days of the eight-day Passover period. If the Fourth Circuit is right—that a federal employee plaintiff must show intentional discrimination to make out a "substantial burden" under RFRA—then federal employers have free rein to terminate any Jew who observes Passover by abstaining from work, so long as the employers are enforcing a facially neutral rule regarding religious holidays and show no overt hostility.

But that is not the law. The Fourth Circuit's decision creates a circuit split by departing from the decisions of the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, all of which expressly (and correctly) rejected the notion that proving a "substantial burden" requires a showing of intentional discrimination. Other Circuits—including the Tenth, Eleventh, and D.C. Circuits—have implicitly rejected the inclusion of an intentional discrimination requirement by articulating "substantial burden"

standards that do not include that element. The petition should be granted so the Court can resolve the circuit split regarding this critical issue.

The Fourth Circuit's intentional discrimination requirement also conflicts with clear holdings from this Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015). For this reason also, the Court should grant the writ.

The Court should do so not least because requiring a religious plaintiff to prove intentional discrimination undermines RFRA's central purpose, which was to protect sincere religious exercise even from burdens that result from facially religion-neutral laws, which "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). This protection is particularly important for religious minorities like Orthodox Jews who face significant hostility to their religious beliefs and practices but who may have difficulty proving it in individual cases.

Because the case is before the Court on appeal from summary judgment, and the relevant questions are entirely legal, this case presents an ideal vehicle for deciding this important doctrinal issue that most of the Courts of Appeals have addressed.

Finally, this Court should grant the petition to ensure that entities like the Respondent—a governmental entity wielding the full force of law, armed with police and eminent domain powers, and tasked with the oversight of two of the busiest airports in the country—cannot declare themselves exempt from

the reach of both federal and state anti-discrimination laws.

REASONS TO GRANT THE WRIT

I. The Fourth Circuit's requirement that Abeles show discriminatory intent to make out a "substantial burden" claim under RFRA creates a circuit split and contradicts this Court's decisions.

The Fourth Circuit rejected Abeles' Title VII intentional discrimination claim by holding that the Authority had not "treated [Abeles] differently than other employees because of her religious beliefs," App. 10a, and had applied "neutral rules," App. 14a. The Fourth Circuit bootstrapped its finding that the Authority had no discriminatory intent under Title VII into a finding that Abeles "necessarily" suffered no substantial burden under RFRA:

> Because we conclude that MWAA did not discriminate against Plaintiff on the basis of her religion in violation of Title VII, and the record indicates MWAA always allowed Plaintiff to observe the Sabbath and religious holidays if she complied with formal procedure, MWAA necessarily did not "substantially burden" Plaintiff's "exercise of religion" in violation of the federal and state religious freedom acts. * * * Therefore, we decline to reach the issue whether those statutes—which apply only to "government" and a "government entity"—apply to MWAA.

App. 8a n.4. The Fourth Circuit thus took the remarkable position that a religious federal employee plaintiff cannot establish a "substantial burden"

claim under RFRA unless she can prove that the government's actions were motivated by an intent to discriminate against her because of her religion.

In non-employee contexts involving RFRA's sister statute the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Fourth Circuit applies a different substantial burden standard. For example, in the context of municipal land-use regulations challenged under RLUIPA, the Fourth Circuit has held that "targeting" is not required because of the text and structure of RLUIPA's land use provisions. *Bethel World Outreach Ministries* v. *Montgomery Cty. Council*, 706 F.3d 548, 556-57 (4th Cir. 2013). And it expressly applies yet another substantial burden standard with respect to RLUIPA's prisoner provisions. See *id.* at 555-56 (distinguishing *Lovelace* v. *Lee*, 472 F.3d 174 (4th Cir. 2006)). But as far as we are aware, no other Fourth Circuit decision has addressed the rights of federal employees under RFRA's substantial burden provision.

One of the main purposes of RFRA was to eliminate the burdensome requirement that a plaintiff make the difficult demonstration that the government "intended to interfere with [her] religious exercise." 42 U.S.C. § 2000bb(a)(2) (Congressional finding). It is thus unsurprising that the Fourth Circuit's adoption of an intentional discrimination requirement puts it at odds with not only every other Circuit to consider the question, but also this Court's rulings.

A. The Fourth Circuit's novel intentional discrimination requirement has been expressly rejected by the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.

Seven circuits have expressly rejected the Fourth Circuit's requirement of intentional discrimination as a necessary condition to showing a substantial burden on religious exercise.[2]

The Second Circuit has distinguished the "substantial burden" standard from a "nondiscrimination" standard in the context of RLUIPA's land use provisions, 42 U.S.C. §§ 2000cc(a), (b)(2). In *Chabad Lubavitch of Litchfield County, Inc.* v. *Litchfield Historic District Commission*, 768 F.3d 183 (2d. Cir. 2014), *cert. denied*, 135 S. Ct. 1853 (2015), the court held that a rule requiring a showing of arbitrary or capricious conduct "would render the substantial burden provision largely superfluous given RLUIPA's nondiscrimination and equal terms provisions, which regulate overtly discriminatory acts that are often characterized by arbitrary or unequal treatment of religious institutions." *Id.* at 195 (citation omitted).

---

[2] Some of these cases involved RFRA, and others RLUIPA. But as this Court has indicated, the "substantial burden" inquiries under RFRA and RLUIPA are the same. See *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *Holt* v. *Hobbs*, 135 S. Ct. 853, 860 (2015).

In the same opinion, the court separately analyzed RLUIPA's nondiscrimination provision, holding that "the plain text of the provision makes clear that, unlike the substantial burden and equal terms provisions, evidence of discriminatory *intent* is required to establish a claim." *Id.* at 198 (citing 42 U.S.C. § 2000cc(b)(2)) (emphasis in original).

In *Brown* v. *Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), the Third Circuit rejected the local government defendant's attempt to equate the substantial burden standard with intentional discrimination. 35 F.3d at 849-50.[3] The court explained that Government actions that "intentionally discriminat[e] against religious exercise * * * serve no legitimate purpose" and clearly violate the Free Exercise Clause. *Id.* at 850. By contrast, RFRA's substantial burden requirement "balance[s] the tension between religious rights and *valid* government goals advanced by neutral and generally applicable laws which create an incidental burden on religious exercise." *Id.* at 849 (emphasis added; quotation marks and citation omitted). Government actions can thus impose a substantial burden even when "designed to achieve legitimate, secular purposes." *Id.* at 850.

In *Sossamon* v. *Lone Star State of Texas*, the Fifth Circuit held that a prisoner had alleged a substantial burden under RLUIPA where he was denied access to

---

[3] This decision could apply RFRA to a municipality because it was decided pre-*Boerne*.

a prison chapel to engage in communal worship. 560 F.3d 316, 333 (5th Cir. 2009), *aff'd sub nom. Sossamon* v. *Texas*, 563 U.S. 277 (2011). The court rejected Texas' argument that because the prison was not discriminating among religions, there could be no substantial burden: "The fact that the chapel is off limits to all congregational worship does not answer whether Sossamon's religious exercise has been substantially burdened." *Ibid.*

The Sixth Circuit expressly rejected the intentional discrimination requirement in *Livingston Christian School* v. *Genoa Charter Township*, 858 F.3d 996, 1005 (6th Cir. 2017), holding that "although several other circuits have taken evidence of alleged discrimination into account in considering whether there was a substantial burden on religious exercise, we decline to adopt this approach." *Ibid.*

The Seventh Circuit was equally clear in distinguishing the "substantial burden" standard from intentional discrimination in *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). The government argued that a church couldn't show a substantial burden on its religious exercise "so long as it is treated no worse than other applicants." *Id.* at 900. But the court held that "substantial burden" must "mean something different from 'greater burden than imposed on secular institutions.'" *Ibid.* (citing 42 U.S.C. § 2000cc(b)(1); cf. *Erickson* v. *Board of Governors*, 207 F.3d 945, 951 (7th Cir. 2000) (Easterbrook, J.) ("[I]t takes express or intentional discrimination to violate [the Free Exercise Clause]," but "RFRA * * * jettison[s] neutrality in favor of accommodation.").

In *Native American Council of Tribes* v. *Weber*, 750 F.3d 742, 748 (8th Cir. 2014), the Eighth Circuit held that "RLUIPA 'prohibits substantial burdens on religious exercise, without regard to discriminatory intent[.]'" *Id.* at 748 (quoting *Van Wyhe* v. *Reisch*, 581 F.3d 639, 654 (8th Cir. 2009)).

The Ninth Circuit has adopted the Eighth Circuit's reasoning in *Van Wyhe*, concluding that in the context of a sovereign immunity analysis, RLUIPA "'does not unambiguously prohibit discrimination—it prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Holley* v. *California Dep't of Corr.*, 599 F.3d 1108, 1113 (9th Cir. 2010) (quoting *Van Wyhe*, 581 F.3d at 654).[4]

---

[4] Two decisions have held that Title VII *preempts* RFRA claims in the context of federal employment. See *Francis* v. *Mineta*, 505 F.3d 266, 273 (3d Cir. 2007); *Harrell* v. *Donahue*, 638 F.3d 975, 983 (8th Cir. 2011). But those decisions were both expressly predicated on the now-debunked proposition that RFRA did nothing more than "restore pre-*Smith* case law." *Francis*, 505 F.3d at 270; see also *Harrell,* 638 F.3d at 984 ("the purpose of RFRA was to return to what Congress believed was the pre-*Smith* status quo"). *Hobby Lobby* specifically rejected that interpretation of RFRA. See *Hobby Lobby*, 134 S. Ct. at 2772. Nor do other courts follow this approach in deciding federal employment claims. See, *e.g.*, *Walden* v. *Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (analyzing RFRA and Title VII claims separately).

B. The Fourth Circuit's novel intentional discrimination requirement has been implicitly rejected by the Tenth, Eleventh, and D.C. Circuits.

Other Circuits have implicitly rejected an intentional discrimination requirement. For instance, the Tenth Circuit focuses its "substantial burden" inquiry "only on the coercive impact of the government's actions," thus precluding an intentional discrimination requirement. *Yellowbear* v. *Lampert,* 741 F.3d 48, 55 (10th Cir. 2014); see also *id.* at 62 ("The whole point of RFRA and RLUIPA *is to make exceptions* for those sincerely seeking to exercise religion.").

The Eleventh Circuit has applied a "substantial burden" standard that does not include any element of discriminatory intent, thus implicitly rejecting such a requirement: "we look to 'whether the [government's rule] imposes a substantial burden on the ability of the objecting part[y] to conduct [himself] in accordance with [his] religious beliefs.'" *Davila* v. *Gladden*, 777 F.3d 1198, 1205 (11th Cir.), cert. denied *sub nom. Davila* v. *Haynes*, 136 S. Ct. 78 (2015) (quoting *Hobby Lobby*, 134 S. Ct. at 2788).[5]

---

[5] Five Courts of Appeals and one state supreme court have held that the Free Exercise Clause, post-*Smith* and post-*Lukumi*, does not require a showing of animus toward religious conduct or beliefs. See *Fraternal Order of Police Newark Lodge 12* v. *City of Newark*, 170 F.3d 359 (3d. Cir. 1999) (Alito, J.); *Ward* v. *Polite*, 667 F.3d 727,

The D.C. Circuit has also treated the substantial burden and discrimination inquiries as separate: "As to the validity of the regulation under RFRA, we start with the proposition that the regulation is neutral; it is generally applicable and it does not discriminate among viewpoints." *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). "Under RFRA, then, the question is: does the ban on selling t-shirts on the Mall 'substantially burden' plaintiffs' exercise of their religion?" *Ibid.*

The closest any other Circuit has come to adopting the position of the Fourth Circuit is the First Circuit in its decision in *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78 (1st Cir. 2013). In that case, the First Circuit identified

> some factors that courts have considered relevant when determining whether a particular land use restriction imposes a substantial burden on a particular religious organization, but

---

738-40 (6th Cir. 2012) (Sutton, J.); *Shrum* v. *City of Coweta*, 449 F.3d 1132 (10th Cir. 2006) (McConnell, J.); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004); *Mitchell Cty.* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012). If the Free Exercise Clause requires no such showing, then *a fortiori* RFRA does not either, since RFRA was enacted to provide "greater protection for religious exercise than is available under the First Amendment." *Holt* v. *Hobbs*, 135 S. Ct. 853, 859-60 (2015).

> we do not suggest that this is an exhaustive list. One factor is whether the regulation at issue appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself.

Id. at 96. But the First Circuit does not appear to look for this factor in other contexts. For example, in *Spratt* v. *Rhode Island Department of Corrections*, the First Circuit found a substantial burden on a prisoner's ability to preach his beliefs without addressing discriminatory intent. 482 F.3d 33, 38 (1st Cir. 2007). At most, then, the First Circuit views discriminatory intent as a relevant, but not dispositive, factor.

Similarly, the Oregon Supreme Court has treated absence of evidence of discriminatory intent as a relevant, but not dispositive factor with respect to the substantial burden test. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *City of W. Linn*, 111 P.3d 1123, 1130 (Or. 2005) (en banc) ("Nor is there any evidence in the record to suggest that the city's denial was motivated by religious animus.") It also does not treat discriminatory intent as a dispositive factor in proving up substantial burden.

Summing up, there are seven Circuits that expressly disagree with the Fourth Circuit's substantial burden standard, three Circuits that implicitly disagree by ignoring discriminatory intent as a factor, and one Circuit and the Oregon Supreme Court that treat "substantial burden" as a relevant, but not solely dispositive factor. The Court should intervene to resolve this split and clarify that a "substantial bur-

den" claim under RFRA does not require a plaintiff to show intentional discrimination.

C. The Fourth Circuit's intentional discrimination requirement conflicts with this Court's decisions in *Boerne*, *Hobby Lobby*, and *Holt* v. *Hobbs*.

This Court has repeatedly recognized that making out a "substantial burden" requires no showing of intentional discrimination. The Fourth Circuit ignored these cases and decided just the opposite.

In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court explained that RFRA's very purpose was to eliminate the need to prove intentional discrimination—or even differential treatment of religious plaintiffs. *Boerne* noted that Congress had decided that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Boerne*, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb(a)). In enacting RFRA, "Congress' concern was with the incidental burdens imposed" on religious exercise, "not the object or purpose of the legislation." *Boerne*, 521 U.S. at 531. Thus "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 534.

Far from requiring intentional discrimination, "RFRA's substantial-burden test * * * is not even a discriminatory effects or disparate-impact test." *Boerne*, 521 U.S. at 535. A substantial burden that stems from "a law of general application" does not require "that the persons affected have been burdened any more than other citizens, let alone burdened be-

cause of their religious beliefs." *Ibid.* The Fourth Circuit's rule thus directly contradicts *Boerne*.

In *Hobby Lobby,* this Court held that the Affordable Care Act's contraceptive mandate substantially burdened the plaintiffs' religious exercise without inquiring into the government's motive for imposing the mandate or asking whether the government treated the religious plaintiffs any differently than it did other organizations. See *Hobby Lobby*, 134 S. Ct. at 2775-79. To find a substantial burden, the Court needed only to recognize that the mandate "demand[ed]" that the plaintiffs "engage in conduct that seriously violates their religious beliefs," on pain of "severe" consequences. *Id.* at 2775.[6]

Similarly, in *Holt* v. *Hobbs*, the Court held that prison officials substantially burdened a Muslim prisoner's exercise of religion when they prohibited him from growing a half-inch beard in accordance with his religious beliefs. 135 S. Ct. 853, 860-62 (2015) (RLUIPA case). The Court found a substantial burden because the prison's grooming policy "put[ ] [him] to [the] choice" of either "seriously violat[ing his] religious beliefs" by shaving his beard or "fac[ing] serious disciplinary action." *Id.* at 862. There was no

---

[6] This Court does consider governmental motive when it assesses whether the government is using "the least restrictive means of furthering [a] compelling governmental interest." *Hobby Lobby*, 134 S. Ct. at 2780 (quotation omitted).

indication that the prison adopted its grooming policy because of animus toward Islam or any other religious beliefs. See *id.* at 863-65. Yet the Court found a substantial burden all the same. *Id.* at 862.

The Fourth Circuit's limitation of "substantial burden" to instances of intentional discrimination directly contradicts this Court's consistent interpretation of the phrase.[7]

D. Requiring religious plaintiffs to show intentional discrimination would strip religious minorities like Orthodox Jews of RFRA's core protections.

Allowing the Fourth Circuit's decision to stand would also lead to unjust results for religious minorities in general and Orthodox Jews in particular.

First, proving intent—including intentional discrimination—is difficult in any case, civil or criminal. As this Court pointed out just last year, for most employees it is likely "more complicated and costly" to prove illegal motive than to make out a case of unequal treatment. *Heffernan* v. *City of Paterson, N.J.*, 136 S. Ct. 1412, 1419 (2016). Interpolating an intentional discrimination element into RFRA's "substantial burden" inquiry thus would have profound nega-

---

[7] See also *Sossamon* v. *Texas*, 563 U.S. 277, 292 (2011) ("The text of [RLUIPA] does not prohibit 'discrimination'; rather, it prohibits 'substantial burden[s]' on religious exercise.").

tive consequences for religious plaintiffs seeking relief.

Second, religious minority plaintiffs would have a harder time than other plaintiffs proving intentional discrimination. Because minorities' religious practices are by their nature less familiar to government officials than the religious practices of larger religious communities, minority practices are more likely to run afoul of "neutral" government rules. This makes it more difficult for a court to determine whether the application of the "neutral" policy to the detriment of the minority religious believer was intentional or not. Cf. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). For example, Christmas is a federal holiday, so the practice of not working on Christmas is unlikely to become the subject of a religious accommodation dispute. Yet Passover and other Jewish religious holidays frequently have been. See, *e.g.*, *Abramson* v. *William Paterson Coll. of N.J.*, 260 F.3d 265, 279 (3d Cir. 2001).

Third, this Court should not ignore the broader context of this case: Orthodox Jews are currently subject to widespread discrimination often centered on the uniqueness of their religious practices or on simple antisemitism. To take one example, governments often attempt to exclude Orthodox Jews from certain areas using "neutral" land use regulations. The Second Circuit noted that several New York municipalities were incorporated out of "animosity toward Or-

thodox Jews as a group." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) ("the reason [for] forming this village is to keep people like you out of this neighborhood"). Since Orthodox Jews must walk to synagogue, some communities that wish to exclude Orthodox Jews focus on excluding the synagogue. See, *e.g.*, *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (town zoned synagogues only in areas beyond walking distance for most of the Orthodox Jewish population). Other towns attempt to keep out Orthodox Jews by forbidding *eruvim*, Sabbath activity boundary lines. See, *e.g.*, *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d. Cir. 2002) (borough violated Free Exercise Clause by selectively invoking municipal ordinance to prohibit *eruv*); *Jewish People for the Betterment of Westhampton Beach* v. *Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015) (*eruv* conflict); *Bergen Rockland Eruv Ass'n* v. *Twp. of Mahwah*, No. 2:17-cv-6054 (D.N.J., Compl. filed Aug. 11, 2017) (ongoing *eruv* conflict). Cf. Jon Stewart, *The Thin Jew Line*, The Daily Show (Mar. 23, 2011), http://on.cc.com/1ZabXA5.

Of course not every case involving Orthodox Jewish plaintiffs has merit. But there is indubitably a long history of masked hostility towards Orthodox Jews. Given that latent animus, it is all the more important that this Court ensure that courts hew to the text of RFRA, which does not require religious plaintiffs to prove up intentional discrimination in order to make out a "substantial burden" claim.

E. This appeal represents a good vehicle for resolving the question of whether intentional discrimination is a required element of a RFRA claim.

This case provides an ideal vehicle for addressing the split created by the Fourth Circuit because the question is entirely one of law, not fact. The case is up on appeal from a grant of summary judgment. The Fourth Circuit refused to address Abeles' RFRA claim at all because it "conclude[d] that MWAA did not discriminate against Plaintiff on the basis of her religion in violation of Title VII, *and* the record indicates MWAA always allowed Plaintiff to observe the Sabbath and religious holidays if she complied with formal procedure." App.8a n.4 (emphasis added). Should the Court grant review and determine that MWAA's discriminatory intent or lack thereof is irrelevant to Abeles' RFRA claim, the Court could reverse and remand without reaching the merits of Abeles' RFRA claim or delving into the factual question of whether Abeles used proper notification procedures. The Court need only decide the legal question of whether the majority of Circuits or the Fourth Circuit is correct regarding the discriminatory intent element.

II. The Fourth Circuit's ruling would *de facto* exempt the Authority from the Religious Freedom Restoration Act.

The Court should also grant the petition to ensure that entities like the Authority cannot declare themselves exempt from both federal and state religious liberty protections. RFRA applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United

States, or of a covered entity," the latter term including the District of Columbia. 42 U.S.C. § 2000bb-2(1). The district court held that neither RFRA nor the Virginia Religious Freedom Act, Va. Code Ann. § 57-2.02(B), applies to the Authority because it is an entity with both federal and state aspects. App. 28a-29a. By wrongly holding that Abeles failed to demonstrate a "substantial burden" under RFRA, the Fourth Circuit sidestepped the question of whether the Authority is subject to RFRA in the first place. App. 8a n.4.

But there are two reasons the Authority—which no one disputes is a governmental entity of some sort—is *for RFRA purposes* a federal entity. As a federal-state interstate compact entity, the Authority acts under color of federal law. And it is an instrumentality of the federal government.

1. The Authority acts under color of federal law. First, as an interstate compact entity—albeit an odd one involving one state, Virginia, and one federal entity, the District of Columbia—the Authority is a creature of "federal law subject to federal rather than state construction." *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981).

Second, "[a] person acts under color of federal law in respect to a cause of action by claiming or wielding federal authority in the relevant factual context." *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011). The Authority wields federal authority because both the Authority's existence and the powers it exercises come directly from a federal statute enacted by Congress, 49 U.S.C. § 49106. The Authority is authorized by Congress to exercise various powers, such as the powers to issue bonds, enter into

contracts, and "levy fees or other charges." 49 U.S.C. § 49106(b)(1)(E).

Third, the Authority is organically connected to the rest of the federal government. Seven of the seventeen board members are appointed by federal government officials. 49 U.S.C. § 49106(c). The presidential appointees to the Authority's board of directors are explicitly required to consider the federal government's interests while carrying out their duties. 49 U.S.C. § 49106(c)(6)(B). The Authority's contracts are reviewed by the Comptroller General of the United States, who reports his findings to committees in the Senate and the House of Representatives. 49 U.S.C. § 49106(g). The Secretary of Transportation may hire two "staff individuals" at the Authority's expense, and call on the assistance of the Authority's clerical staff. 49 U.S.C. § 49106(f).

2. The Authority is also a federal instrumentality. An organization is a federal instrumentality if the federal government created the organization "for the furtherance of governmental objectives," and controls its operation through federal appointees. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

The Authority was created after the Secretary of Transportation proposed that further development of Washington-area airports required the creation of a "regional authority with power to raise money by selling tax-exempt bonds." *MWAA* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 257 (1991). It was created by Congress by means of a federal statute, 49 U.S.C. § 49106. The Authority, therefore, was unquestionably created for the purpose of furthering federal government objectives.

It is also subject to federal control. Seven out of seventeen members of the Authority's board are appointed by federal officials—either the President or the Mayor of the District of Columbia. See 49 U.S.C. § 49106(c). (The remaining members of the board are appointed by the Governors of Virginia and Maryland. *Id.*) The Authority's contracts are reviewed by the Comptroller General of the United States, who reports his findings to committees in the Senate and the House of Representatives. 49 U.S.C. § 49106(g). And since it is both a creature of Congress and subject to ongoing federal control, the Authority is a federal instrumentality.

3. To conclude otherwise would allow the Authority to avoid all sorts of federal and state anti-discrimination laws solely because it is a governmental chimera that does not fit easily into the normal categories of federalism. That cannot be what Congress had in mind when it created the Authority. As this Court has admonished, "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397. That is just as true of federal-state interstate compact entities like the Authority. The Authority is subject to the Constitution and it ought to be subject to federal civil rights statutes like RFRA.

CONCLUSION

The petition should be granted.

Respectfully submitted.

ERIC RASSBACH
Counsel of Record
DANIEL BENSON
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave.
NW, Suite 700
Washington, D.C. 20036
erassbach@becketlaw.org
(202) 955-0095

Counsel for Amici Curiae

AUGUST 2017