NOS. 16-60477 & 16-60478

In the United States Court of Appeals for the Fifth Circuit

RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY; SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT; RENICK TAYLOR; BRANDILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

PLAINTIFFS-APPELLEES,

v.

GOVERNOR PHIL BRYANT, STATE OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS-APPELLANTS.

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

PLAINTIFFS-APPELLEES,

v.

PHIL BRYANT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN DIVISION
CASES NO. 3:16-CV-417-CWR-LRA (LEAD CASE); 3:156-CV-442-CWR-LRA (CONSOLIDATED)

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANTS AND REVERSAL

Carl H. Esbeck
R.B. Price Professor of Law emeritus
209 Hulston Hall
820 Conley Road
Columbia, MO 65211
(573) 882-6543

Kimberlee Wood Colby
Counsel of Record
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org
ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Timothy Belz
Matthew Belz
Ottsen, Leggat & Belz, L.C.
112 S. Hanley Rd., Suite 200
St. Louis, MO 63105
(314) 728-2800

Counsel for Amici Curiae

Nos. 16-60477 & 16-60478

In the United States Court of Appeals for the Fifth Circuit

RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY; SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT; RENICK TAYLOR; BRANDILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

PLAINTIFFS-APPELLEES,

v.

GOVERNOR PHIL BRYANT, STATE OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS-APPELLANTS.

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

PLAINTIFFS-APPELLEES,

v.

PHIL BRYANT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS-APPELLANTS.

CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
• Rims Barber • Carol Burnett • Joan Bailey • Katherine Elizabeth Day • Anthony Laine Boyette • Don Fortenberry • Susan Glisson • Derrick Johnson • Dorothy C. Triplett • Renick Taylor • Brandiilyne Mangum-Dear • Susan Mangum • Joshua Generation Metropolitan Community Church • Campaign for Southern Equality • Susan Hrostowski	Robert B. McDuff Sibyl C. Byrd Jacob W. Howard MCDUFF & BYRD Beth L. Orlansky John Jopling Charles O. Lee Reilly Morse MISSISSIPI CENTER FOR JUSTICE Alysson Mills FISHMAN HAYWOOD LLP Roberta A. Kaplan Andrew J. Ehrlich William B. Michael Joshua D. Kaye Jacob H. Hupart Alexia D. Korberg Zachary A. Dietert PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Defendants	Defendants' Counsel
• Phil Bryant, Governor Of Mississippi • Jim Hood, Attorney General Of Mississippi • John Davis, Executive Director Of The Mississippi Department Of Human Services • July Moulder, Mississippi State Registrar Of Vital Records	Jonathan F. Mitchell D. John Sauer JAMES OTIS LAW GROUP, LLC Drew L. Snyder OFFICE OF GOVERNOR PHIL BRYANT

	James A. Campbell Kevin H. Theriot ALLIANCE DEFENDING FREEDOM Paul E. Barnes Tommy D. Goodwin Douglas T. Miracle OFFICE OF THE ATTORNEY GENERAL

Amici Curiae	**Amici Curiae's Counsel**
• Christian Legal Society • National Association of Evangelicals	Kimberlee Wood Colby CHRISTIAN LEGAL SOCIETY CENTER FOR LAW & RELIGIOUS FREEDOM Carl Esbeck R.B. Price Professor of Law emeritus Timothy Belz Matthew Belz OTTSEN, LEGGAT & BELZ, L.C.

s/ Kimberlee Wood Colby
KIMBERLEE WOOD COLBY
Counsel for Amici Curiae Christian Legal Society and National Association of Evangelicals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Christian Legal Society ("CLS") is an association of attorneys, law students, and law professors who seek to integrate their Christian faith with their legal calling. CLS has long believed that pluralism, essential to a free society, prospers only when all Americans' First Amendment rights are protected. Religious freedom -- America's most distinctive contribution to humankind -- is fragile, too easily taken for granted and too often neglected. Laws that provide religious exemptions enable religious citizens to live according to their deepest religious beliefs and are essential if all Americans' religious consciences are to be respected.

For four decades, CLS has promoted protections for all Americans' religious exercise. As a leading member of the Coalition for Free Exercise of Religion, CLS was instrumental in passage of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4. CLS also led the effort to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-

[1] In accordance with FRAP 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties' counsel of record have consented to the filing of this brief.

5. *See Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of Christian Legal Society). RFRA has been the preeminent protection for all Americans' religious freedom at the federal level for over two decades. But because RFRA does not extend to state and local levels, a serious need exists for state laws that protect religious conscience from burdens imposed by state and local governments.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE also was a strong supporter of congressional passage of RFRA and RLUIPA.

SUMMARY OF ARGUMENT

The "Protecting Freedom of Conscience from Government Discrimination Act," Mississippi House Bill 1523, is a statutory religious accommodation of persons holding certain religious beliefs that exempts them from otherwise applicable regulatory duties or burdens. Such religious exemptions are within the discretion of the legislature and have as their purpose the accommodation of religious minorities and other dissenters whose beliefs are inconsistent with prevailing legal culture.

1. The Establishment Clause is not violated when a state enacts regulatory legislation but then provides an exemption to individuals holding religious beliefs that would otherwise be burdened by the legislation. HB 1523 is such a religious exemption, and one not unique in America where we have a venerable history of religious tolerance. In a long line of cases, the United States Supreme Court has six times rejected the argument that a religious exemption to a larger regulatory framework is aid to religion in violation of the Establishment Clause. The district court mistook HB 1523 for a religious preference. A religious preference can indeed be problematic, and such laws have been found to be unconstitutional when they are "unyielding" and thus fail to take into account harm to third parties. However, HB 1523 is a religious exemption and not a religious preference.

2. The Establishment Clause does not permit a legislature to utilize classifications based on sectarian or denominational affiliation to impose burdens or extend benefits. HB 1523 does neither of these things. Rather, HB 1523 defines its exemptions based on an individual's religious beliefs. State and federal religious freedom restoration acts accommodate any and all religious beliefs, whereas HB 1523 is narrower in scope. But there is no Establishment Clause requirement that all must be protected or none can be protected. In HB 1523, the legislature sought to protect those religious beliefs that were actually threatened because newly contrary to the legal culture. The clause does not require superfluous protection of those who, for religious reasons, support same-sex marriage but face no real threat to their ability to live according to their consciences.

3. The Supreme Court in *Obergefell v. Hodges* held that same-sex couples have the same right to marry as is enjoyed by opposite-sex couples. The Court in *Obergefell* did not have before it a claim where a law concerning the right of same-sex couples to marry imposed a burden on those who held traditional religious beliefs concerning marriage. In anticipation of just such a cultural clash, four out of the five Justices writing in *Obergefell* were respectful of traditional religion and religious people. It is the traditional religious view of marriage that is in decline and thus reasonably thought to be in need of protection. An act of

religious tolerance, to shield unpopular religious beliefs, is in the best of America's traditions in accommodating religious minorities. In no way does HB 1523 show malice toward same-sex couples. It most certainly was not, as the district court found, an act of "arbitrary discrimination" toward the LGBT community. The district court mistook protecting dissenters for discrimination. The district court greatly expanded the scope of the constitutional right declared in *Obergefell*, and in particular misread the case as withdrawing from the states the discretionary power to enact exemptions from regulatory legislation so as to protect religious liberty.[2]

[2] *Amici* agree with Appellants that Appellees lack standing but do not brief the issue.

ARGUMENT

I. HB 1523 PROVIDES NECESSARY AND CONSTITUTIONALLY PERMISSIBLE RELIGIOUS EXEMPTIONS AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Text of the Establishment Clause's Negation of Government Power to Legislate is Circumscribed; It Does Not Prohibit Statutory Religious Exemptions.

The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The text does not deny Congress power to "make . . . law" about religion. Rather, it more narrowly denies Congress the power to "make . . . law" about "an establishment" of religion. Assume, for example, that soon after 1791, Congress enacted a comprehensive law regulating conscription into the Army and Navy. In exercising its enumerated power to oversee the armed forces,[3] Congress also provided an exemption from the military draft for religious pacifists. Nothing in the Establishment Clause prohibits such an exemption. *See The Selective Serv. Draft Law Cases*, 245 U.S. 366 (1918) (holding that clergy, theology students, and religious pacifists could be exempt from the military draft consistent with the Establishment Clause). The adoption of an exemption for religious pacifists is certainly to "make [a] law respecting" religion, but it is not to more narrowly make a law about "an establishment" of religion. The

[3] The Constitution grants Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

exemption is not an establishment because it is designed to merely allow pacifists to voluntarily follow practices derived from their own religious beliefs. The object of the exemption is not to advance religion but to advance religious freedom.

As a second example, it would be fully consistent with the scope of the Establishment Clause for Congress to enact comprehensive legislation under the Interstate Commerce and Taxing Clauses[4] requiring large employers to provide unemployment compensation to their employees, but then to exempt religious organizations from the regulation and tax. To enact such an exemption is certainly to "make [a] law respecting" religion, but the exemption is not a law "respecting an establishment" of religion. *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997) (holding that a statutory exemption for faith-based organizations from an unemployment compensation tax did not violate the Establishment Clause). Once again, the statutory exemption is designed to merely allow individuals to follow privately held religious beliefs and practices if they are already so inclined.

The foregoing raises the larger issue regarding the constitutionality of religious exemptions from regulatory burdens, namely: Is such a religious exemption in violation of the Establishment Clause? Is the clause violated when

[4] The Interstate Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." *Id.* art. I, § 8, cl. 3. The Taxing Clause reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.* art. I, § 8, cl. 1.

the exemption leads to harm to third parties? The answer to both questions is no. The district court's conclusions below were in error. ROA.16-60478.809-811.

It is a categorical mistake to presume that a statutory religious exemption is a form of religious favoritism. Look again at the text of the Establishment Clause. Although the government cannot "make [a] law" in support of "an establishment" of religion, it may "make [a] law" in support of religious freedom. Indeed, that would have to be so because the Free Exercise Clause is itself a law in support of religious freedom. Moreover, the 1787 Constitution expressly safeguards independent acts of religious observance: the Religious Test Clause, U.S. CONST. art. VI, cl. 3, and three clauses permitting an affirmation in lieu of an oath to accommodate Quakers and other minority sects.[5] The First Amendment would be nonsensical if the Establishment Clause contradicted the Free Exercise Clause, or if the Establishment Clause overrode or nullified the Constitution's other explicit exemptions for religious exercise.

This plain reading of the text is logical. All agree that the First Amendment is pro-freedom of speech and pro-freedom of the press. By the same token, the First Amendment is pro-religious freedom. This is as true of the Establishment Clause as it is true of the Free Exercise Clause. Government supporting religion,

[5] U.S. CONST. art. I, § 3, cl. 6; *id*. art. II, § 1, cl. 8; *id*. art. VI, cl. 3. These provisions accommodate Quakers and Anabaptists who refuse to swear an oath based on *Matthew* 5: 34-37.

on the one hand, and Government supporting acts of religious freedom, on the other hand, are two very different things.

Another way of stating the Supreme Court's thinking is: Government does not establish religion by leaving its private exercise alone—which is what a religious exemption does. Exemptions also reinforce the desired separation of church and state. *Walz v. Tax Commission*, 397 U.S. 664, 674-76 (1970) (tax exemption for religious organizations complements and reinforces separation of church and state). Hence, it is entirely sensible that the Court has held in six religious-exemption cases that a legislature did not violate the Establishment Clause.

B. For Government to Leave Private Religious Exercise Alone is Not to Establish Religion.

The court below held that the state's authority to enact legislation that accommodates a religious belief is checked by the Establishment Clause, a clause said to require withholding of an exemption when it is thought to harm third parties. ROA.16-60478.809-811. Both the case law and reason say that is in error.

1. In six cases spanning nearly a century, the Supreme Court has rejected the assertion that religious exemptions violate the Establishment Clause.

The Court has consistently held that when regulatory legislation imposes a burden on religious belief, a legislature is free to forestall such a burden by

providing an exemption. A statutory "lifting" of such a burden is what is termed a discretionary religious exemption.[6] This is what Congress did in adopting the Religious Freedom Restoration Act, 42 U.S.C. 2000bb to 2000bb-4 (RFRA), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc to 2000cc-5 (RLUIPA). To exempt religious exercise from regulation has the effect of leaving private religious activity alone. And for the government to leave religion alone is not to establish religion.

In a long line of cases, the Supreme Court has rejected the argument that a religious exemption to a larger regulatory framework violates the Establishment Clause. The leading case is *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), in which the Court upheld a statutory exemption, § 702(a), in Title VII of the Civil Rights Act of 1964. The exemption excuses religious employers from the prohibition on employment discrimination when the adverse employment decision is based on religion. 483 U.S. at 331-33. Mr. Mayson, a building custodian employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints, was discharged because he ceased to be a church member in

[6] Religious exemptions required by the Free Exercise Clause, or what might be termed nondiscretionary religious exemptions, also have been found not to run afoul of the Establishment Clause. *See Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963). This is only logical, for otherwise we would have a situation where the Free Exercise Clause violates the Establishment Clause.

good standing. *Id*. at 327. The Court began by reaffirming that the Establishment Clause does not mean that government must be indifferent to religion, but it aims at government not "act[ing] with the intent of promoting a particular point of view in religious matters." *Id*. at 335. The Title VII exemption, however, was not an instance of government "abandoning neutrality," for "it is a permissible legislative purpose to alleviate" a regulatory burden, thereby leaving religious organizations free "to define and carry out their religious missions" as they see fit. *Id*.

In addition to *Amos*, the Court has on five other occasions turned back an Establishment Clause challenge to a discretionary religious exemption. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (RLUIPA's religious exemption for prisoners does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437, 448-60 (1971) (religious exemption from military draft for those opposed to all war does not violate Establishment Clause); *Walz*, 397 U.S. at 667-80 (property tax exemption for religious organizations does not violate Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 308-15 (1952) (public school policy releasing pupils from state compulsory education law to voluntarily attend private religion classes off school grounds does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft

exemption for clergy, seminarians, and pacifists does not violate Establishment Clause).[7]

All nine Justices in *Board of Education of Kiryas Joel Village School District v. Grumet*[8] said that they approved of religious exemptions, as did all Justices in *Employment Division v. Smith*.[9] Further, in *Texas Monthly, Inc. v. Bullock*,[10] a case that struck down a sales tax exclusion on purchases of sacred

---

[7] In addition to these six decisions, individual Justices have stated that a discretionary religious exemption does not violate the Establishment Clause. *See Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., dissenting); *Sherbert v. Verner*, 374 U.S. at 422-23 (Harlan, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 511 (1961) (Frankfurter, J., separate opinion).

[8] 512 U.S. 687, 705 (1994) (plurality in part) ("the Constitution allows the state to accommodate religious needs by alleviating special burdens" and reaffirming *Amos*); *id.* at 711-12 (Stevens, J., concurring) (distinguishing the facts of *Grumet* from "a decision to grant an exemption from a burdensome general rule"); *id.* at 716 (O'Connor, J., concurring) ("The Constitution permits '*nondiscriminatory* religious-practice exemption[s],"' (quoting *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (emphasis by Justice O'Connor, meaning that exemptions cannot discriminate among faiths)); *id.* at 723-24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) ("The Court has . . . long acknowledged the permissibility of legislative accommodation.").

[9] 494 U.S. 872, 890 (1990) ("a nondiscriminatory religious-practice exemption is permitted"); *id.* at 893-97 (O'Connor, J., dissenting) (regulatory exemptions are not only permitted, but sometimes constitutionally required).

[10] 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (approving *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38-40 (Scalia, J., dissenting) (arguing that regulatory and tax exemptions are generally permitted and sometimes required). Justice White's concurrence said nothing about the exemption issue but would have struck down the tax exemption as

literature promulgating a religious faith, eight Justices explicitly reaffirmed *Amos* and the ninth (Justice White) wrote the opinion in *Amos*.

2. The court below misread *Estate of Thornton v. Caldor.*

The district court's conclusion that HB 1523 violates the Establishment Clause relies on a misreading of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). ROA 16:60478.809-810. *Caldor* is different in two respects, either of which alone makes it inapposite here. First, the state statute at issue was not a religious exemption but a religious preference. Second, the statute created an "unyielding" preference for religious observance, totally disregarding the competing interests of others, such as the claimant's employer and fellow workers.

A religious preference occurs where a dispute has arisen in the private sector that involves a religious claimant. The state decides to intervene and resolve the dispute in favor of the religious claimant. For the government to take the side of religion over the secular quite naturally raises concerns addressed by the Establishment Clause. When a preference fails to take account of the interests of all disputants, the statute may fall.

---

a discriminatory speech regulation in violation of the Free Press Clause. *See id.* at 25-26 (White, J., concurring). No opinion in *Texas Monthly* commanded the vote of more than three Justices, so it is unsuitable as guidance.

Connecticut's legislature had sought to remedy a dispute created by private market forces as a consequence of legalizing retailing on Sunday. Anticipating that repeal of the Sunday-closing law would generate conflict between employers and employees, the legislature took sides, specifically that of the religious claimant over the retail employer. Donald Thornton was an employee of Caldor, a retail department store. He was a Presbyterian and observed Sunday as his Sabbath. When the store first began opening on Sundays, Thornton worked on Sunday once or twice a month. Unhappy with the situation, he invoked the Connecticut statute, seeking Sundays off. The store resisted, and a lawsuit was filed on Thornton's behalf by the State Board of Mediation. *Id*. at 705-07. The store's defense was that the Connecticut statute violated the Establishment Clause, and the Supreme Court agreed. *Id*. at 707, 710-11.

In these circumstances, the Connecticut law forced some in the private sector to assist the religious observance of fellow citizens. That is what a preference does: the government puts one private citizen to work helping another private citizen better practice his or her religion. An exemption does not do so, as *Amos* shows. 483 U.S. at 337 n.15 ("Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

Caldor noted that the "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." 472 U.S. at 709 (footnote omitted). No such right existed before the legislation. This was problematic "[u]nder the Religion Clauses," the Court reasoned, not merely because of increased cost to the store, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id*. at 708. The problem was not merely added business expense, but that the store and co-workers were being compelled to assist Thornton in keeping his Sabbath holy.

In summary, a religious exemption is when government lifts a burden on religious belief that was of the government's own making in the first place. The exemption has the effect of government leaving religion alone to continue to privately be exercised. In contrast, a religious preference is when government reaches out to intervene in a private dispute and confers on religion a naked advantage that the religious claimant would not have had without legislative assistance.

It was in this context that the Court in *Caldor* said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id*. at 710 (internal citations and quotations omitted). That passing remark could, if left unexplained, be too sweeping by putting at risk

all religious accommodations. But clarification concerning this "fundamental principle" came quickly in two Supreme Court cases decided within two years.

3. The Supreme Court explained *Caldor* in *Hobbie* and *Amos*.

The first case to clarify *Caldor* was *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136 (1987), in which the Court ruled on the application of the Free Exercise Clause to a religious employee seeking benefits under a state's unemployment compensation law. Florida refused compensation because the employee, having adopted a different religion, was discharged for refusing to continue to work on Saturday, her new Sabbath.

Tracking *Caldor*'s "fundamental principle," Florida argued that to compel accommodation of an employee's Sabbath entailed having the employer alter its secular conduct to meet the employee's religious needs. 480 U.S. at 145. Rejecting Florida's argument, the Court began to cabin *Caldor*'s "fundamental principle":

> In *Thornton [v. Caldor]*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

Id. at 145 n.11 (internal citations omitted; brackets in original).

The preference in *Caldor* favored the religious claimant "unyieldingly." The statute disregarded entirely the interests of the employer and coworkers. That did not occur with the relief compelled by the Free Exercise Clause in *Hobbie*, which like all fundamental constitutional rights entails a weighted balancing test that takes into account others' interests.

A few months later the *Amos* Court addressed the sweep of the "fundamental principle" passage in *Caldor*. In *Amos*, a religious exemption in Title VII permitted religious employers to avoid the general prohibition on employment discrimination when the employer is motivated by its religion. Mayson, a building custodian, claimed that the statutory exemption shifted a burden to him resulting in the loss of his job. 483 U.S. at 337. Tracking *Caldor*'s "fundamental principle" passage, Mayson argued that the Title VII exemption caused him to feel pressure to conform his conduct to the religious necessities of the LDS Church. This taking sides in favor of religion was, Mayson claimed, a violation of the Establishment Clause. The Supreme Court disagreed:

> Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job. This is a very different case than *Estate of Thornton v. Caldor, Inc.* . . . . In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force

> of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. *See Hobbie* . . . 480 U.S. [at] 145 n.11. In the present case, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.

Id. at 337 n.15.

The Court thus distinguished *Caldor* from *Amos* in two respects. First, the Connecticut statute was not a mere shield from a larger regulatory burden imposed by the state, but a sword forcing others in the private sector to facilitate the religious practices of Thornton. Unlike *Caldor*'s naked preference where the state statute had government intervening in a private-sector dispute on the side of religion, in *Amos* Congress did not vest religious employers with new powers but left them with the same powers as they had before the passage of Title VII. *Id*. at 337. Thus it was the actions of the church and not the Title VII exemption that was the cause of Mayson losing his job. Second, the statute in *Caldor* favored the religious claimant absolutely, thus disregarding the interests of others in the private sector.

The distinction between an exemption and a preference brings to mind the statutory accommodation in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The provision at issue, a religious preference, appears in Title VII of the

Civil Rights Act of 1964, 42 U.S.C. 2000e(j). It requires employers to adjust to the religious needs of their employees. However, the employer's duty of religious accommodation is not "unyielding," for the duty dissolves in the face of the employer meeting its burden of showing an "undue hardship." The Supreme Court did not reach the claim that § 2000e(j) was in violation of the Establishment Clause, albeit the prospect of such a ruling likely influenced the Court's interpretation of § 2000e(j) not being operable if the employer shows "undue hardship." 432 U.S. at 89 (Marshall, J., dissenting) ("The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of [TWA's] constitutional challenge unnecessary."). The Court held:

> To require TWA to bear more than a *de minimis* cost in order to give [the employee-claimant] Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.

Id. at 84 (footnote omitted). The Court sought to avoid a preference favoring the religion of the employee-claimant over other employees who also might want the day off, for such a preference had the look of a religious establishment.

The preference in *TWA* is unlike the exemption in *Amos*. In *TWA*, there was no larger regulatory act binding on an employee from which he or she was, by a statutory exception, to be "relieved of" for religious reasons. Rather, Congress

enacted § 2000e(j) to address a private dispute first created by market forces. The government stepped in and took the side of the religious claimant over that of the employer. In that sense, § 2000e(j) is like *Caldor*, a religious preference, and one about which the Court harbored Establishment Clause concerns. However, unlike in *Caldor*, the § 2000e(j) preference is not absolute in that the employer need not comply if it can show that the requested accommodation would create an "undue hardship." The *TWA* Court avoided reaching the Establishment Clause question by interpreting the statute as excusing the employer when the burden was any more than *de minimis*. The idea was that so long as the statutory preference costs the employer nothing or next to nothing, then it is not really a preference, or at least not a preference harmful to the employer or identifiable third parties.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), is another example of a religious preference. *Larkin* struck down a veto right vested in churches over the issuance of liquor licenses within a 500-foot radius of a church. Religion was preferred over secular interests, and the preference was unyielding. The Court pointed out, however, that a city may consider, balanced with others factors, the desire of churches to not have noisy and rowdy neighbors. That would be permissible if the ordinance did not go so far as to grant an absolute veto in favor of religion. *Id.* at 124 nn.7-8.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the religious exemption at issue was by operation of RLUIPA at a state correctional facility. A substantial burden on an inmate's religious belief would in most cases require correctional authorities to provide an exemption, even as other nonreligious inmates would have to comply with the prison rule in question. Justice Ginsburg, writing for the Court, said that the "foremost" reason RLUIPA did not violate the Establishment Clause was that "it alleviates exceptional government-created burdens on private religious exercise." *Id*. at 720. That is always the case with an exemption. Next, the Court noted that in prior cases of this sort accommodations had fallen because they failed to "take adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries." *Id*. *Caldor* was cited as the example of the latter transgression. But this second observation was not said to be essential to the holding, as RLUIPA was in any event a true exemption.

From *Hobbie*, *Amos*, *TWA*, *Larkin,* and *Cutter*, two rules emerge. First, religious exemptions do not violate the Establishment Clause. Second, religious preferences do violate the Establishment Clause if they create an "unyielding" preference for a religious observance to the harm of third parties. Because HB 1523 is a religious *exemption*, it is constitutional.

C. The Juridical Category of "Third-Party Harms" is Undefined and Impossibly Expansive.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Solicitor General of the United States did not argue that RFRA violated the Establishment Clause because it imposed a third-party harm on Hobby Lobby employees. However, the Solicitor General made a parallel argument: Such a burden on third parties categorically tipped RFRA's prescribed compelling-interest test against the employer.

The Court rejected that argument:

> [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

Id. at 2781 n.37. Thus, while RFRA does require taking into account any harm to third parties, it does so by a balancing test not a categorical rule. The Court went on to point out how easily a supposed third-party harm can be concocted and thus—under the Solicitor General's theory—would overthrow RFRA:

> By framing any Government regulation as benefitting a third party, the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.

Id.

That lesson squarely applies to this challenge to HB 1523. It is all too easy for Plaintiffs to frame the operation of the religious exemption, which is what HB 1523 is, as causing a harm to third parties. But in the military draft exemption cases,[11] does it count as "harm to third parties" when some do not serve yet others are drafted? In the instance of property tax exemptions for religious nonprofits,[12] does it count as "harm to third parties" when others must pay their taxes? Or is the "harm to others" that the government has less tax revenue to spend causing harm to people who would benefit if the government had more dollars to dispense?

Such creative framing of supposed injuries by Plaintiffs would render HB 1523 a nullity. Under Plaintiffs' expansive theory, "the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds." *Id.* Such an unfettered theory of harm would eviscerate any meaningful protection for religious conscience.

II. HB 1523 IS NOT A CLASSIFICATION THAT DISCRIMINATES BETWEEN OR AMONG RELIGIOUS SECTS OR DENOMINATIONS.

The Establishment Clause does prohibit a legislature from intentionally discriminating between types of sects, as well as between religious groups or

[11] *Gillette*, 401 U.S. at 448-60 (religious exemption from military draft for those opposed to all war does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft exemption for clergy, seminarians, and pacifists does not violate Establishment Clause).

[12] *Walz*, 397 U.S. at 667-80 (property tax exemption for religious organizations do not violate Establishment Clause).

denominations. Indeed, a legislature may not utilize classifications based on sectarian or denominational affiliation to impose burdens or extend benefits. HB 1523 does neither of these things. Rather, HB 1523 defines an accommodation based on an individual's religious beliefs. This is the case with all religious exemptions; they extend protection based on an individual's religious beliefs not based on an individual's religion or denomination. Moreover, an exemption may extend to some religious beliefs but not all.[13]

The leading case is *Larson v. Valente*, 456 U.S. 228 (1982). States routinely regulate charities that solicit donations. In *Larson*, a new religious movement, the Unification Church, challenged a provision in Minnesota's charitable solicitations act. The provision exempted those religious organizations that derived fifty percent or more of their money from their members. *Id*. at 230-32. This favored longstanding religious organizations while disfavoring new religious movements. *Id*. at 244, 246-47. The Court found that the discrimination was intentional and thus violated the Establishment Clause. *Id*. at 246 n.23, 253-55.

A second illustrative case is *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 702-08 (1994) (plurality opinion in part).

[13] *See, e.g.*, the classifications with respect to the six religious-exemption cases upheld by the Supreme Court. *See, supra*, Part I.B. Only three of the six cases involved an accommodation of all religious beliefs and practices. *Cutter*; *Amos*; *Walz*. The other three cases involved legislative exemptions to some religious beliefs but not all. *Gillette*; *Zorach*; *The Selective Draft Law Cases*.

Grumet's instructive value requires a focus on those parts of the lead opinion that commanded a majority. The New York legislature carved-out a special public school district to coincide with the residences of adherents of Satmar Hasidim, a sect of Judaism. *Id*. at 690, 708. Justice Souter, for the Court, said the "nature of the legislature's exercise of state authority in creating this district for a religious community" was in violation of the principle "that government should not prefer one religion over another." *Id*. at 703. The Court took care to reaffirm, but distinguish, cases such as *Amos* on the basis that the exemption in *Amos* merely "allowed religious communities and institutions to pursue their own interests free from government interference." *Id*. at 706. The legislatively created school district "singles out a particular religious sect for special treatment," whereas the Establishment Clause makes it "clear that neutrality as among religions must be honored." *Id*. at 706-07.[14]

The rationale for this rule is that the Supreme Court wants to avoid making membership in a religious denomination more or less attractive. If this was not the rule of law, then merely holding religious membership in a particular sect or

[14] *See also Fowler v. Rhode Island*, 345 U.S. 67 (1953) (ordinance interpreted to permit "religious sermons" in city parks but not "religious addresses" unconstitutionally preferred some religious denominations over others); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (unconstitutional discrimination to deny use of city park for Bible talks by sect when permits were issued to other religious denominations).

denomination would result in the availability of a desired civil advantage. *Cf. Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829 (1989) (holding that state could not turn away free exercise claimant because he was not a formal member of a church or denomination that observed Sunday as its Sabbath). For example, if Congress were to confer conscientious objector draft status "on all Quakers," that might induce conversions (real or pseudo) to Quakerism. *Gillette v. United States*, 401 U.S. 437, 448-60 (1971); *see Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment). Such classifications would have the very real implication of raising up one church over another, that is, to establish the favored church.

The district court speculates that HB 1523 will have the effect of protecting some denominations but not others. ROA.16-60478.801-809. Speculation aside, even if such speculation were to come true, a law which has an adverse disparate impact on some sects or denominations but not others does not rise to a violation of the Establishment Clause. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 696 (1989); *Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1982); *Larson*, 456 U.S. at 246 n.23.

The district court points out that the state religious freedom restoration act accommodates any and all religious beliefs and practices, whereas HB 1523 is narrower in scope. ROA.16-60478.794. But there is no Establishment Clause

requirement that all must be protected or none can be protected.[15] In HB 1523, the legislature sought to protect those religious beliefs that were actually threatened because newly contrary to the legal culture. The Establishment Clause does not require the superfluous protection of those who, for religious reasons, support same-sex marriage but face no real threat to their ability to live according to their consciences.

III. PLAINTIFFS FAIL TO STATE A CLAIM CONCERNING THE CONSTITUTIONAL RIGHT TO MARRY.

The district court found that HB 1523 was in violation of the right of same-sex couples to marry found in the Equal Protection Clause. ROA.16-60478.786-795. That was error. An act of religious tolerance, to shield or safeguard unpopular religious beliefs, is in the American tradition of shielding religious minorities. It is the traditional religious view of marriage that is in decline and thus reasonably thought to need protection. In no way does HB 1523 show malice toward same-sex couples. It most certainly was not, as the district court found, an act of "arbitrary discrimination" toward the LGBT community and their supporters. The district court mistook protecting dissent for discrimination. The district court greatly inflated the scope of the constitutional right declared in *Obergefell v. Hodges*, 135

[15] *See Gillette v. United States*, 401 U.S. 437 (1971) (upholding constitutionality of draft exemption for those who oppose all wars for religious reasons but not those who oppose only unjust wars for religious reasons). *Cf. Larson*, 456 U.S. at 247 n.23 (distinguishing and explaining *Gillette*).

S. Ct. 2584 (2015), and in particular misread the case as withdrawing from the states the discretionary power to enact exemptions from regulatory legislation so as to protect religious liberty.

In anticipation of the very cultural clash addressed by HB 1523, four of the five Justices writing in *Obergefell* went out of their way to be respectful of not only traditional religion and religious people, but of their religious freedom. 135 S. Ct. at 2602, 2607 (Kennedy, J., for the Court), *id*. at 2625-26 (Roberts, C.J., dissenting); *id*. at 2638-39 (Thomas, J., dissenting); and *id.* at 2642-43 (Alito, J. dissenting).

As in most states, Mississippi permits state judges and magistrates to perform marriages. *Obergefell* established that the right to marry for same-sex couples must be the same as for opposite-sex couples. But that constitutional right does not extend, for example, to a same-sex couple being able to demand that their wedding ceremony be performed by a particular judicial magistrate. That is so especially if the magistrate they ask does not wish to perform the marriage for reasons of religious conscience. Indeed, an opposite-sex couple could no more demand, as a matter of constitutional right, a magistrate of their choosing to officiate at their nuptials. A state retains authority to arrange the many duties of its judicial officers so that some are available to perform a civil marriage ceremony.

The state retains the power to accommodate the religious conscience of one of its magistrates so long as an alternate is reasonably provided to a same-sex couple.

The same is true regarding the other protections safeguarded by HB 1523. Thanks to the accommodation, state licenses and certificates cannot be withheld because of one's traditional religious view on marriage. Similarly, state grants, contracts, scholarships, jobs, and other state benefits cannot be withheld because of one's traditional religious view on marriage. Likewise, a religious college's accreditation cannot be withdrawn as punishment for the college's view of marriage.

The decision below does more than overrule accommodations of religious beliefs concerning marriage. Under the district court's rationale, all religious exemptions would be subject to challenge under the Establishment Clause. Such a rule has no logical stopping point. A 1992 study estimated there were 2,000 religious exemptions on the state and federal statute books. Note, James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 & n.215 (1992). In the last twenty-five years, hundreds more such exemptions have been enacted at the federal, state, and local level.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

s/ Kimberlee Wood Colby

Kimberlee Wood Colby
Counsel of Record
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
(703) 894-1087
kcolby@clsnet.org

Carl H. Esbeck
R.B. Price Professor
of Law emeritus
209 Hulston Hall
820 Conley Road
Columbia, MO 65211
(573) 882-6543

Timothy Belz
Matthew Belz
Ottsen, Leggat & Belz, L.C.
112 S. Hanley Rd., Suite 200
St. Louis, MO 63105
(314) 728-2800

Counsel for Amici Curiae

NOVEMBER 2, 2016

CERTIFICATE OF SERVICE

I certify that this Brief *Amicus Curiae* of Christian Legal Society and National Association of Evangelicals in Support of Appellants and Reversal has been filed with the Clerk of the Court and served by ECF or email on November 2, 2016, upon:

Alysson Mills
201 St. Charles Avenue
Suite 4600
New Orleans, LA 70170
amills@fishmanhaygood.com

Roberta A. Kaplan
Andrew J. Ehrlich
William B. Michael
Joshua D. Kaye
Jacob H. Hupart
Alexia D. Korberg
1285 Avenue of the Americas
New York, NY 10019-6064
rkaplan@paulweiss.com
aehrlich@paulweiss.com
wmichael@paulweiss.com
jkaye@paulweiss.com
jhupart@paulweiss.com
akorberg@paulweiss.com

Robert B. McDuff
Sibyl C. Byrd
Jacob W. Howard
McDuff & Byrd
767 North Congress Street
Jackson, MS 39202
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

Zachary A. Dietert
2001 K Street NW
Washington, DC 20009
zdietert@paulweiss.com

Beth L. Orlansky
John Jopling
Charles O. Lee
Reilly Morse
Mississippi Center for Justice
P.O. Box 1023
Jackson, MS 39205-1023
borlansky@mscenterfor justice.org

Jonathan F. Mitchell
D. John Sauer
James Otis Law Group, LLC
12977 North Forty Drive, Suite 214
St. Louis, MO 63141
(314) 682-6067
jmitchell@jamesotis.com

Drew L. Snyder
Office of Governor Phil Bryant
P.O. Box 139
Jackson, Mississippi 39205
(601) 359-3150

Kevin H. Theriot
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

s/ Kimberlee Wood Colby
Kimberlee Wood Colby
Counsel for Amici Curiae

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel certifies that on November 2, 2016, this Brief *Amicus Curiae* of Christian Legal Society and National Association of Evangelicals in Support of Appellants and Reversal was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Webroot SecureAnywhere Endpoint Protection v 9.0.12.52 and is free of viruses.

s/ Kimberlee Wood Colby
Kimberlee Wood Colby
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 6765 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14 Times New Roman, or

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

s/ Kimberlee Wood Colby

Attorney for *Amici Curiae* Christian Legal Society and National Association of Evangelicals

Dated: November 2, 2016