No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

and

AIMEE STEPHENS,

Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Michigan
Case No. 2:14-cv-13710, Hon. Sean F. Cox

Brief of Seventy-Six Members of the Clergy; Americans United for Separation of Church and State; The Anti-Defamation League; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Hadassah, the Women's Zionist Organization of America, Inc.; The Interfaith Alliance Foundation; Keshet; Muslim Advocates; People for the American Way Foundation; Reconstructionist Rabbinical Association; Reconstructionist Rabbinical College / Jewish Reconstructionist Communities; Union for Reform Judaism; The United Synagogue of Conservative Judaism; and Women of Reform Judaism as *Amici Curiae* Supporting Appellant and Intervenor and Reversal

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-2424 Case Name: EEOC v. R.G & G.R. Harris Funeral

Name of counsel: Richard B. Katskee

Pursuant to 6th Cir. R. 26.1, the amici religious and civil-rights organizations
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on April 26, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Richard B. Katskee

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are seventy-six members of the clergy and fourteen religious and civil-rights organizations. *Amici* represent diverse denominations and faith traditions but share a common commitment to robust constitutional and statutory protections for religious freedom. These protections include the rights of individuals and their houses of worship to preach, teach, and practice their faith but do not include the right to impose one's faith on others or to harm third parties in derogation of federal or state antidiscrimination laws.

In this case, a for-profit mortuary invokes the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, to exempt itself from Title VII's prohibitions against workplace discrimination. If this Court were to afford RFRA the expansive interpretation and application that the mortuary seeks and the district court applied, the result would be massive and unconstitutional encroachment on the religious-freedom rights of all persons. *Amici* therefore have a strong interest in ensuring that the Court correctly applies RFRA so that it remains the shield for religious freedom that

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

Congress intended, and does not become a sword in the hands of some to impose their religious beliefs on others.

The *amici*, described in more detail in the Appendix, are:

- Seventy-six members of the clergy, representing a wide array of faiths and denominations.
- Americans United for Separation of Church and State.
- The Anti-Defamation League.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Keshet.
- The Interfaith Alliance Foundation.
- Muslim Advocates.
- People for the American Way Foundation.
- Reconstructionist Rabbinical Association.
- Reconstructionist Rabbinical College / Jewish Reconstructionist Communities.
- Union for Reform Judaism.
- The United Synagogue of Conservative Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

Aimee Stephens lost her job of six years—her vocation and her livelihood—because she did not conform to her boss's views on sex roles and gender identity.

As a matter of law, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior." *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). Hence, firing Stephens, a transgender employee, for "failure to conform to sex stereotypes" (*Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005)) violated Title VII's prohibitions against sex discrimination (*see, e.g.*, *id.*; *Smith*, 378 F.3d at 575). The court below acknowledged this binding precedent, correctly concluding that the EEOC had stated a valid sex-stereotyping claim. R. 76, Opinion & Order Mots. Summ. J., PageID #2197–98.

But the defendant mortuary asserted that it had a religious motivation for firing Stephens and argued that the Religious Freedom Restoration Act exempts for-profit corporations from otherwise-applicable antidiscrimination laws whenever their unlawful actions are based on or reflect religious belief. Hence, the mortuary contended, Title VII's bar on sex discrimination cannot be enforced against it because the mortuary owner's views about what men and women ought to look like are informed by his faith. The court below

agreed, adopting an unprecedented interpretation of RFRA that allows for-profit employers to flout federal employment-discrimination law.

That interpretation cannot be correct. *Amici* agree with the EEOC and the Intervenor that prohibiting the mortuary from firing Stephens serves the compelling governmental interest of combatting sex discrimination in the workplace, and that it does so using the least restrictive means. But this Court need not reach those questions to decide this appeal, because RFRA is inapplicable as a matter of law; and even if it were applicable, the mortuary failed to satisfy RFRA's statutory prerequisites.

1. The Supreme Court has made clear that when analyzing religious exemptions from generally applicable laws—including RFRA, its sister statute the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and accommodations sought thereunder— "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). To do otherwise would violate the Establishment Clause. *Id.* This constitutional limitation prohibits providing a religious exemption, under RFRA or otherwise, when, as here, it would impose meaningful harms on third parties.

2. Even if RFRA could be applied here, the mortuary failed to satisfy RFRA's prerequisite. When a party asserts a RFRA claim or defense, it bears the legal burden to show that the challenged governmental action places a

"substantial[ ] burden" on the party's "exercise of religion." 42 U.S.C. § 2000bb-1(b). Only if the RFRA claimant first successfully makes that showing does the legal burden shift to the government to justify its behavior as narrowly tailored to serve a compelling interest. Here, the precondition is not met: Being forbidden to fire an employee because she does not conform to one's religious beliefs about how men and women are supposed to dress is not a legally cognizable substantial burden on one's religious exercise. Hence, the compelling-interest test is not triggered, and the mortuary's RFRA defense fails at the outset.

* * *

Were the district court's decision to stand, for-profit businesses would have broad—indeed, nearly limitless—license to engage in unlawful and invidious discrimination through a simple expedient: describing their discrimination as religiously based. Employers could prohibit employees from becoming pregnant out of wedlock, refuse to place women in managerial positions, or require employees to wear the symbols of the employer's religion—and fire those who do not comply. RFRA provides important safeguards for religious exercise. But it does not and cannot upend all employment-discrimination law. The district court's decision should be reversed.

ARGUMENT

The proper application of RFRA necessarily turns on two considerations: the Establishment Clause—which prohibits the government from granting religious exemptions that materially harm third parties—and RFRA's own statutory prerequisite that only religious exercise that has been substantially burdened may receive the Act's protections. The asserted defense here fails in both respects.

I. The Establishment Clause Forbids Religious Accommodations That Harm Third Parties.

The Establishment Clause prohibits granting religious exemptions from generally applicable laws if those exemptions would have a "detrimental effect on any third party." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). Yet the court below concluded that RFRA could and did permissibly exempt the mortuary from Title VII, thereby allowing violations of third parties' Title VII rights, because the motivation for the violation was religiously based. That reading of RFRA cannot be squared with binding Supreme Court precedent or the Establishment Clause's requirements.

1. The constitutional rule against affording religious exemptions that impose material burdens on third parties is well-settled.

In *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), for example, the Supreme Court invalidated a statute that guaranteed employees the day off on the Sabbath of their choosing. *Id.* at 709–10. Because the statute required "those who observe a Sabbath . . . as a matter of religious conviction [to] be relieved of the duty to work on that day, no matter what burden or inconvenience this impose[d] on the employer or fellow workers," it "impermissibly advance[d] a particular religious practice" and could not stand. *Id.* at 708–09, 710.

Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court struck down a sales-tax exemption for religious periodicals that would have "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications." *Id.* at 18 n.8. In doing so, the Court explained that it had upheld religious exemptions from general laws only when the "legislative exemptions . . . did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs." *Id.*

2. The Supreme Court's Free Exercise Clause jurisprudence underscores this limitation by recognizing that governmental action taken in the name of protecting religion or religious exercise cannot be required—or

even permitted—when that action would transgress the Establishment Clause's bar on third-party harms.

In *United States v. Lee*, 455 U.S. 252 (1982), the Court rejected an Amish employer's request for a religious exemption from paying social-security taxes, explaining that the exemption would impermissibly "operate[ ] to impose the employer's religious faith on the employees." *Id.* at 261. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court refused to recognize an exemption from a Sunday-closing law for orthodox Jews, whose businesses were already closed on Saturday for the Jewish Sabbath. *Id.* at 609. The Court explained that the requested exemption, if allowed, may have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on [Sunday]." *Id.* at 608–09. And in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court denied a request for an exemption from child-labor laws to allow minors to distribute religious literature, because while "[p]arents may be free to become martyrs themselves . . . it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." *Id.* at 170.[2]

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[2] *See also, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (religious exemption from compulsory-education law granted only after Amish parents "carried the . . . difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education" to meet the children's educational needs); *cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80–81 (1977) (Title VII's reasonable-accommodation requirement

3. Indeed, there has been only one narrow set of circumstances (in two cases) in which the Supreme Court has ever upheld religious exemptions that had the effect of burdening third parties in any meaningful way—and that was when the Free Exercise Clause required the exemption because of the core constitutional protections (embodied in the Establishment and Free Exercise Clauses) for the autonomy and ecclesiastical authority of religious institutions. In *Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), the Court held that the Americans with Disabilities Act could not be enforced against a church in a way that would interfere with the church's selection of its ministers. And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337–39 (1987), the Court upheld under Title VII's limited religious exemption (not applicable here) a church's firing of an employee who was not in religious good standing.

These exemptions from antidiscrimination statutes did not amount to impermissible religious favoritism and were constitutionally permissible under the Establishment Clause because they applied to the internal

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does not authorize religious exemptions that would burden employer or other employees); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (religious exemption from flag-salute requirement under Free Speech Clause "does not bring [plaintiffs] into collision with rights asserted by any other individual," and "refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to [participate]").

governance and management of religious institutions. Those institutions are entitled to hire only their coreligionists so as not to intrude on their ability to minister to their congregants and propagate their religious tenets in accordance with the dictates of their faith. *Hosanna Tabor* and *Amos* were about avoiding interference in the internal workings of the churches, which would have raised serious concerns under both the Free Exercise and Establishment Clauses.

In contrast, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, . . . the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. Avoiding interference with the core ecclesiastical functions of a religious institution simply has no bearing on a private, for-profit business's desire to violate Title VII by engaging in sex discrimination—even if that desire to discriminate is religiously motivated.

4. As a matter of both substantive constitutional law and constitutional avoidance, therefore, RFRA should be interpreted so as not to authorize exemptions that harm third parties, because to do otherwise would require invalidation of the Act, either facially or on an as-applied basis. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the

necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail" because the courts must assume that Congress intended that its statutes be enforceable).

And, in fact, that is precisely how the Supreme Court has already interpreted both RFRA and its sister statute, RLUIPA.[3] Hence, in *Cutter*, which upheld RLUIPA's protections for religious exercise by inmates, the Supreme Court explained that to "[p]roperly apply[ ] RLUIPA"—and necessarily, therefore, RFRA as well—courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation does "not override other significant interests." 544 U.S. at 720, 722 (citing *Thornton*, 472 U.S. at 709–10). In other words, a religious exemption cannot materially harm nonbeneficiaries, for if it did, the governmental action of granting that accommodation—e.g., of enacting or applying RFRA or RLUIPA—would have the effect of preferring and supporting the religious views of the requesting party while compelling nonadherents to pay the price. In that case, the accommodation would run afoul of the Establishment Clause's clear mandates.

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[3] RFRA and RLUIPA employ virtually identical language and serve the same congressional purposes. *Compare* 42 U.S.C. § 2000bb-1 *with* 42 U.S.C. § 2000cc-1. *See generally Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006). Accordingly, courts rely on RFRA and RLUIPA cases interchangeably in interpreting and applying the statutes. *Id.*; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004).

The Supreme Court again underscored this rule in *Hobby Lobby*. In concluding that certain closely held corporations are entitled to a religious accommodation with respect to the Affordable Care Act's contraceptive-coverage requirement, the *Hobby Lobby* Court reaffirmed the test from *Cutter* and then applied it to hold that the requested accommodation (i.e., the application of RFRA) was constitutionally permissible because it could be provided without "any detrimental effect on any third party." 134 S. Ct. at 2781 n.37 (citing *Cutter*, 544 U.S. at 720). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. *See id.*; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting). The majority held that RFRA could (and therefore did) provide a right to the requested accommodation only after the majority first determined that "the effect of the . . . accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." *Id.* at 2760; *see also id.* at 2781–82. The same was true in *Holt*, in which the Court granted a Muslim inmate an exemption from prison-grooming regulations where "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." 135 S. Ct. at 867 (Ginsburg, J., concurring).

5. Interpreting RFRA not to license religious exemptions that materially harm third parties is correct not just as a matter of First Amendment jurisprudence and constitutional avoidance, but also as a matter of congressional intent.

Before 1990, the Supreme Court had interpreted the Free Exercise Clause to require application of the compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Court held that generally applicable laws that are facially neutral with respect to religion (i.e., they do not specifically favor one faith or denomination over others) are presumed to be constitutional and therefore are subject to only minimal rational-basis review. Thus, the Court held in *Smith* that the enforcement of neutral drug laws—and the concomitant denial by Oregon of unemployment benefits to persons fired for drug use—did not violate the free-exercise rights of members of the Native American Church who ingested peyote as a sacrament. *Id.* at 890.

Congress responded by enacting RFRA to restore by statute the pre-*Smith* free-exercise jurisprudence that the Supreme Court had abrogated. *See* 42 U.S.C. § 2000bb; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); *Navajo Nation v. U.S. Forest Serv.*, 535

F.3d 1058, 1069 (9th Cir. 2008); S. Rep. No. 103-111, at 8 (1993). In doing so, Congress necessarily adopted into RFRA the limitations on religious exemptions in pre-*Smith* free-exercise law, because those limitations define the constitutional metes and bounds of accommodation. Congress therefore never contemplated that RFRA would afford religious accommodations that imposed material costs, burdens, or harms on third parties. *See, e.g.*, 139 Cong. Rec. S14,350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise").[4]

[4] The scope of accommodations considered during the congressional debate is illustrative. *See* 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (contemplated accommodations included burying veterans only on days of the week permitted or required by decedents' religious beliefs and refraining from conducting religiously forbidden autopsies); 139 Cong. Rec. E1216-01 (daily ed. May 11, 1993) (statement of Rep. Margolies-Mezvinsky) (contemplated accommodations included protecting ability to take communion and to abide by kosher diet); 139 Cong. Rec. S14,350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations included allowing individuals to volunteer at nursing homes).

Congress's intent is clear: RFRA protects religious exercise, but it is not an instrument for imposing one's beliefs on others. The mortuary cannot, therefore, assert a cognizable RFRA defense.

* * *

The district court created an exemption from Title VII to allow for-profit businesses to discriminate against employees on the basis of sex-stereotyping, thereby granting to businesses the otherwise-unlawful statutory right to force employees to comply with their employers' religious beliefs on pain of termination. That ruling cannot be squared with unambiguous Supreme Court precedent and the clear intent of the Congress that enacted RFRA. Aimee Stephens lost her job because she did not conform to her boss's views on sex roles and gender identity. Under any other circumstance, Title VII would have protected her. The result can be no different when RFRA is invoked, because RFRA does not—and cannot—elevate an asserted religious interest in discriminating over the rights of innocent third parties who are the victims of the discrimination. The Establishment Clause admits of no other conclusion.

II. The Mortuary Has Failed To Demonstrate A Substantial Burden On Its Religious Exercise.

"However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious

needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Recognizing this limitation, Congress expressly wrote into RFRA the same critical prerequisite to free-exercise claims found in pre-*Smith* free-exercise law: The party invoking RFRA must demonstrate that the government has imposed a substantial burden on its religious exercise. Only then does the burden of persuasion shift to the government to show that its actions are narrowly tailored to serve a compelling governmental interest. 42 U.S.C. § 2000bb-1; *O Centro*, 546 U.S. at 424; *Gen. Conference Corp. of Seventh-day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010).

As a matter of both statutory construction and congressional intent, the substantial-burden-on-religious-exercise prerequisite must be read to have meaningful and objective content. It cannot be the case—nor is it—that mere invocation of religious belief as a rationale for violating the law is sufficient to trigger RFRA's burden-shifting and heightened scrutiny. Indeed, should courts automatically jump to strict-scrutiny analysis whenever a religious motivation is cited, as the mortuary proposes here, the result would be to violate the basic canon that a "'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

The mortuary has failed to make this required threshold showing.

1. To assert a defense under RFRA, a party must "demonstrat[e] the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). The religious practice need not be "central to the adherent's religious belief system" (*id.*[5]), but there must be a sufficient "nexus" between the religious belief and the asserted religious practice to show that the government is "forc[ing the parties] to engage in conduct that their religion forbids or . . . prevent[ing] them from engaging in conduct [that] their religion requires" (*Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001))). Merely asserting that an action is religiously motivated is insufficient to make that action "religious exercise" under RFRA.

Suppose, for example, that federal law required that all children living on a military base receive a wellness check-up before enrolling in the base's daycare, but a parent asserted that RFRA exempted her children from this requirement because of that parent's religious objection to blood transfusions. The religious objection, though sincere, would be inadequate to establish that refusing wellness check-ups is RFRA-protected religious exercise, because

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[5] RFRA's definition of "exercise of religion" was amended by RLUIPA in 2000 to cover "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5; *id.* § 2000bb-2(4).

medical check-ups are not blood transfusions. *See, e.g.*, *Wilson v. James*, No. 15-5338, 2016 WL 3043746, at *1 (D.C. Cir. May 17, 2016) (RFRA did not protect member of National Guard against discipline for sending e-mail decrying marriage of same-sex couples as a "mockery to god" because Guardsman "failed to show this letter of reprimand substantially burdened any religious action or practice"); *Mahoney*, 642 F.3d at 1120–21 (RFRA did not protect plaintiff's drawing on White House sidewalk because plaintiff described no religious belief that required him to make the drawings); *Henderson*, 253 F.3d at 16 (RFRA did not protect selling of T-shirts on National Mall, in violation of ban on peddling, because plaintiffs "d[id] not claim to belong to any" "religious group that has as one of its tenets selling [T]-shirts on the National Mall"); *United States v. Sterling*, 75 M.J. 407, 418–19 (C.A.A.F. 2016) (RFRA did not protect Marine corporal's placement of religious signage in public workspace on military base because, though corporal testified about her religious beliefs, "she did not testify that she believed it is any tenet or practice of her faith to display signs at work"), *petition for cert. filed*, 2016 WL 7494794 (U.S. Dec. 23, 2016) (No. 16-814); *see also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397–98 (4th Cir. 1990) (pre-*Smith* free-exercise law did not protect church school's decision to pay men more than women, in violation of Fair Labor Standards Act, because

"church members testified that the Bible does not mandate a pay differential based on sex").

2. Were the rule otherwise, every time a party ventured to assert that an official act somehow implicated religion, the courts would immediately and automatically have to apply strict judicial scrutiny, forcing the government to satisfy the extraordinarily onerous compelling-interest test. That would not be workable for government or the courts—which would grind to a halt under an avalanche of litigation. Nor would it provide the protection for religious exercise that Congress intended. For without the gatekeeping function of RFRA's prerequisite, genuine claims for religious accommodation would receive just the same treatment as, and therefore be difficult to distinguish from, mere rhetoric. And Congress and the Executive Branch might be deterred from accommodating religious exercise in the future for fear that any accommodation could likewise be expansively invoked to the point that it derails the government's entire regulatory program. Religious freedom is far better served by providing for a system of accommodations that treats substantial claims seriously, as Congress has specified.

3. What is more, this Court has rightly held that RFRA's prerequisite substantial-burden-on-religious-exercise "hurdle is high and . . . determining its existence is fact intensive." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007). Courts have thus identified

only two ways that governmental action might constitute a substantial burden on religious exercise: by "putting substantial pressure on an adherent . . . to violate his beliefs" (*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)), or by forcing an adherent to choose between practicing his faith and receiving a generally available public benefit (*see Navajo Nation*, 535 F.3d at 1070; *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007); *see also Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 1914 (2015)). Simply put, RFRA "does not require the Government to justify every action that has some effect on religious exercise." *See* 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch); *see also Town of Surfside*, 366 F.3d at 1227 (substantial-burden requirement means "more than an inconvenience on religious exercise").

4. The requisite nexus between belief and practice does not exist here. In his affidavit, mortuary-owner Thomas Rost explains that he "believe[s] that the Bible teaches that God creates people male or female" (R. 54-2, Rost Aff. ¶ 41, PageID #1334); that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex" (*id.* ¶ 42); that "it is wrong for a biological male to deny his sex by dressing as a woman" (*id.* ¶ 44); and that it is wrong for Rost himself

to "be directly involved in supporting the idea that sex is a changeable social construct" (*id.* ¶¶ 43, 45, 46, PageID #1334–35).

Yet Rost's own explanation for why he fired Ms. Stephens has nothing to do with any of that. Rather, Rost identifies ordinary business interests—namely that, in his view, having a transgender employee would "disrupt the grieving process for the families" using the mortuary's services (*id.* ¶ 37, PageID #1333), "disrupt our clients' healing process" (*id.* ¶ 38), "harm[ ] my clients and my business and business relationships" (*id.* ¶ 39), and "drive[ ] away many of my prospective clients" (*id.* ¶ 40, PageID #1334). Far from contending that his religious beliefs forbid employing (or require firing) transgender persons, he expressly states that he "would not have dismissed Stephens if Stephens had expressed to me a belief that [s]he is a woman" and would "present as a woman outside of work, so long as [s]he would have continued to conform to the dress code for male funeral directors while at work." *Id.* ¶ 50, PageID #1336. Firing Stephens because he thinks that her presence at the mortuary would be bad for business has nothing whatever to do with Rost's proffered beliefs that her gender identity or her actions consistent with it are sinful.

5. But even if Rost's decision to fire Stephens was genuinely motivated by his religious beliefs rather than by business concerns, his declaration to the contrary notwithstanding, the required nexus would still be missing. Title

VII does not force Rost to violate his religious beliefs about sex and gender. What is required of him and of the mortuary is that they not bar employees, on pain of termination, from acting against the employees' own beliefs and identity. Objecting to others' conduct, even on religious grounds, is not a cognizable substantial burden on religious exercise under RFRA.

Thus, in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), the D.C. Circuit held that the Federal Bureau of Prisons could collect and store a sample of the inmate-plaintiff's DNA, notwithstanding the plaintiff's sincere belief that "'DNA sampling, collection and storage' 'defile[ ] God's temple.'" *Id.* at 677–80 (quoting complaint). The court concluded that there was no substantial burden on the plaintiff's religious exercise in having his DNA collected because, although the plaintiff was required to submit to the collection, he himself was not coerced into doing the collecting and storing of the samples. Thus, he was objecting to the actions of others, not to actions required of him. *Id.* at 679–80; *cf. Thornton*, 472 U.S. at 710 ("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.") (quoting *Otten v. Balt. & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).[6]

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[6] Because RFRA was intended to return free-exercise law to its pre-*Smith* contours (*see* 42 U.S.C. § 2000bb; *see also* Part I, *supra*), the courts regularly look to pre-*Smith* Free Exercise Clause jurisprudence—such as *Thornton*—in determining whether the threshold requirement of a

6. Nor can it be said that the government has in any legally cognizable way coerced Rost to "be directly involved in supporting the idea" that one's sex may be changed (R. 54-2, Rost Aff. ¶¶ 43, 45, 46, PageID #1334–35). Title VII requires employers to hire and fire without regard to race, sex, color, national origin, and religion. Bare compliance with the law does not constitute "support" for employees' race, sex, religion, or anything else—much less does it amount to legally cognizable compelled support for an employee's actions, consistent with that employee's own faith, on matters of marriage, pregnancy, abortion, choice in or number of romantic partners, use or non-use of birth control, use or non-use of fertility treatments, or anything else.

Employers are required to—and do—comply with all manner of antidiscrimination requirements every day. Yet no court of which we are aware has ever considered compliance with those legal obligations to constitute personal endorsement of the protected employees' behavior. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (requiring universities to allow military recruiters on campus did not violate universities' First Amendment rights because even "high school students can appreciate the difference between speech a school sponsors and

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"substantial burden" on the "exercise of religion" has been met. *See e.g.*, *Kaemmerling*, 553 F.3d at 678–80. As the Ninth Circuit explained: "[T]he cases that RFRA expressly adopted and restored—*Sherbert* [374 U.S. at 398], *Yoder* [406 U.S. at 205], and federal court rulings prior to *Smith*—also control the 'substantial burden' inquiry." *Navajo Nation*, 535 F.3d at 1069.

speech the school permits because legally required to do so"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42 (1995) (being required to provide funds on equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (views expressed by members of public who speak on shopping-mall property under equal-access policy are not attributable to mall's owner); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 69–70 (N.M. 2013) (serving all customers on equal basis in compliance with antidiscrimination statute does not express support for customers' decisions to marry partners of the same sex); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 287 (Colo. App. 2015) (same), *petition for cert. filed*, 2016 WL 3971309 (U.S. July 25, 2016) (No. 16-111).

Hence, employers who believe that sex outside wedlock is a sin do not express support for nonmarital sex when they comply with the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), by not firing unmarried pregnant employees. Devout Jewish employers do not support non-Jewish faiths when they adhere to Title VII by retaining employees who decline to wear a yarmulke; and non-Jewish employers do not support Judaism when they retain employees who do wear one. Non-Muslim employers do not support Islam by retaining employees who wear hijab. *Cf. EEOC v. Abercrombie &*

Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015). Monotheists do not support polytheism when they fail to fire employees who are Hindu. Non-Sikhs do not support Sikhism when they fail to fire male employees who wear long hair and a turban. And white employers who believe in their own racial superiority as a matter of divine mandate do not suffer RFRA-triggering burdens on their religious exercise when they obey the law by not firing African-American employees. In the same way, RFRA-protected religious exercise is not implicated when the mortuary here is prevented from firing Stephens, even if the mortuary owner disfavors on religious grounds Stephens' gender identity or her actions in accordance therewith.

* * *

Thomas Rost was and is free to believe as he wishes and to act consistently with those beliefs, including by living his own life according to his personal religious views about gender and sex roles. True, the mortuary cannot fire employees who fail to live according to its owner's religious beliefs. But that really just means that sometimes at work one has to be around others who practice a different faith—or those who are of a different race or sex or national origin—or those who live in accordance with ***their*** beliefs—or those who may at some point and in some way fail to live up to one's own beliefs about how to live. If that were a legally cognizable substantial burden on religious exercise—and especially if an employer

merely had to assert such religious differences to trigger strict scrutiny under RFRA—Title VII's mandates against workplace discrimination would be voided whenever an employer articulated a religious basis for otherwise-illegal conduct. This incorrect interpretation of RFRA would also encourage the civic "divisiveness based upon religion" (*Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring)) that is so injurious to a pluralistic society, and is one of the prime evils that both of the First Amendment's Religion Clauses were designed to forestall. And because authority and sheer numbers in the workplace will surely matter in determining who gets treated with favor and who with disfavor, the approach advocated by the mortuary would be especially injurious to religious minorities—those most in need of RFRA's protections.

CONCLUSION

RFRA does not and cannot apply when a requested accommodation or exemption from a general law like Title VII would detrimentally impose the costs of the RFRA claimant's religious beliefs or practices on third parties. And even if RFRA could potentially apply, Harris Funeral Homes has failed to satisfy the Act's congressionally mandated prerequisite—a requirement that is critical to safeguarding the very religious freedom for all persons that RFRA was designed to protect. Hence, this Court need not reach the

compelling-interest test to conclude that the mortuary's RFRA defense fails as a matter of law.

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ *Richard B. Katskee*

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitations of Rules 29(a)(5) and 32(a)(7)(B) because it contains 5,986 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013 and is set in Century Schoolbook font in a size that measures to 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on April 26, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

APPENDIX OF *AMICI CURIAE*

MEMBERS OF THE CLERGY

The individual *amici* are seventy-six members of the clergy who represent a wide array of faiths and denominations. These faith leaders believe in the robust right of free exercise of religion, which protects the right to believe and to practice one's faith but does not grant license to use the law to impose one's faith on others.

- Rabbi Adina Allen, The Jewish Studio Project, Berkeley, California.
- The Reverend J.D. Allen, Pastor, First United Methodist Church, Boyd, Texas.
- The Reverend Phillip B. Allen, Providence Baptist Church, Hendersonville, North Carolina.
- The Reverend Victoria Reed Bailey, University United Methodist Church, Austin, Texas.
- Rabbi Shelley Kovar Becker, Gishrei Shalom Jewish Congregation, Southington, Connecticut.
- Rabbi Phyllis Berman, Philadelphia, Pennsylvania.
- Rabbi Jonathan Biatch, Temple Beth El, Madison, Wisconsin.
- The Reverend Anna K. Blaedel, University of Iowa Wesley Foundation, Iowa City, Iowa.
- The Reverend Brian Carter, Aldersgate United Methodist Church, Windsor Heights, Iowa.
- The Reverend Nancy E. Brink, The Donna (Ford) and Fahmy Attallah Endowed Director of Church Relations, Chapman University, Orange, California.
- The Reverend Steven Clunn, Upper New York Annual Conference, United Methodist Church, Alexandria, Virginia.

- Rabbi Eric S. Cohen, Ph.D., Temple Israel, Manchester, New Hampshire.
- The Reverend Harry T. Cook, Detroit, Michigan.
- Jennifer E. Copeland, Ph.D., Executive Director, North Carolina Council of Churches.
- The Reverend Dr. Monica Corsaro, Director of Spiritual Life, Knox College, Galesburg, Illinois.
- The Reverend William Donaher, Christ Church of Cranbrook, Bloomfield Hills, Michigan.
- The Reverend Elizabeth Morris Downie, St. Augustine's Episcopal Church, Wilmette, Illinois.
- Pastor Manisha Dostert, Christ Church of Cranbrook, Bloomfield Hills, Michigan.
- The Reverend Elizabeth M. Edman, Episcopal Priest and author of *Queer Virtue: What LGBTQ People Know About Life and Love and How It Can Revitalize Christianity*, New York, New York.
- The Reverend Becky Edmiston-Lange, Emerson Unitarian Universalist Church, Houston, Texas.
- The Reverend Dr. Marvin M. Ellison, Director of Alumni/ae Relations, Union Theological Seminary, New York, New York.
- Rabbi Dr. Andrew Vogel Ettin, Spiritual Leader, Temple Israel, Salisbury, North Carolina.
- Rabbi David Fainsilber, Morrisville, Vermont.
- Rabbi Jeffrey Falich, Birmingham Temple, Farmington Hills, Michigan.
- The Reverend Paul A. Fleck, Pastor, Hamden Plains United Methodist Church, Hamden, Connecticut.
- The Reverend Morris V. Fleischer, Pastor, Newport–Mt. Olivet United Methodist Church, Newport, Virginia.
- The Reverend Charles A. Fredrickson, The Lutheran Church of the Good Shepherd, San Antonio, Texas.

- The Reverend Beth Galbreath, Crossroads United Methodist Church, Brookfield, Illinois.
- The Reverend Dr. Daniel R. Gangler, Retired, Meridian Street United Methodist Church, Indianapolis, Indiana.
- The Reverend Wendall Gibbs Jr., 10th Bishop of Michigan, Episcopal Church of the United States, Detroit, Michigan.
- Rabbi Seth Goldstein, President of the Reconstructionist Rabbinical Association, Olympia, Washington.
- The Reverend Gregory D. Gross, Deacon, Berry United Methodist Church, Chicago, Illinois.
- The Reverend Dr. Sid Hall III, Senior Minister, Trinity Church of Austin, United Methodist Church and United Church of Christ, Austin, Texas.
- The Reverend Victoria Jewell, St. Mary Magdalen Catholic Faith Community, Baltimore, Maryland.
- The Reverend Elizabeth Jones, United Methodist Church, Seal Rock, Oregon.
- The Reverend Dr. Neal Jones, Main Line Unitarian Church, Devon, Pennsylvania.
- The Reverend Dr. David W. Key Sr., National Board Chair-Elect of the Association of Welcoming and Affirming Baptists, Lake Oconee, Georgia.
- The Reverend Cindy Kennedy, Gathering House Ministries, Whitesboro Texas.
- The Reverend Dr. D. Andrew Kille, Silicon Valley Interreligious Council, San Jose, California.
- Rabbi Jason Kimelman-Block, Bend the Arc: A Jewish Partnership for Justice, Washington, D.C.
- Rabbi Tamara Kolton, Detroit, Michigan.
- Rabbi Van Lanckton, Temple B'nai Shalom, Braintree, Massachusetts.

- Rabbi Alan LaPayover, Reconstructionist Rabbinical College, Philadelphia, Pennsylvania.
- The Reverend Ardis Letey, United Methodist Church, Seal Rock, Oregon.
- Rabbi Sarra Lev, Reconstructionist Rabbinical College, Philadelphia, Pennsylvania.
- The Reverend Douglas S. Long, Umstead Park United Church of Christ, Raleigh, North Carolina.
- The Reverend Dr. James Lumsden, First Church of Christ, Pittsfield, Massachusetts.
- Rabbi Marc Margolius, West End Synagogue, New York, New York.
- The Reverend Joyce Matthews, Christ Church of Cranbrook, Bloomfield Hills, Michigan.
- The Reverend Dr. Fran Mayes, Retired, Universal Fellowship of Metropolitan Community Churches, Whitmore Lake, Michigan.
- Rabbi Margot Meitner, The Meeting Point and Hebrew College, Boston, Massachusetts.
- The Reverend Sharon L. Moe, Senior Minister, First United Methodist Church, Seattle, Washington.
- The Reverend Gary Nims, Grace United Methodist Church, Des Moines, Iowa.
- The Reverend Zach Oaster, Worship Director, Trinity United Methodist Church, Grand Rapids, Michigan.
- The Reverend Jonathan C. Page, Senior Minister, First Congregational Church, Houston, Texas.
- Chris O'Rear, Licensed Clinical Pastoral Therapist, Nashville, Tennessee.
- Catherine Lesley Randall, Priestess of Wicca, The Church of Our Lady of the Woods, Inc., Jemez Springs, New Mexico.
- The Reverend Imogen Rhodenhiser, Christ Church of Cranbrook, Bloomfield Hills, Michigan.

- The Reverend Renee Roederer, Community Chaplain, Presbytery of Detroit, Ann Arbor, Michigan.
- The Reverend Dr. Rollin O. Russell, Conference Minister Emeritus, Southern Conference, United Church of Christ, Hillsborough, North Carolina.
- Rabbi Merrill Shapiro, Retired from Temple Shalom of Deltona, Palm Coast, Florida.
- The Reverend Barry Sharp, United Methodist Deacon, Cedar Park, Texas.
- The Reverend Dr. Douglas Sharp, Colorado Springs, Colorado.
- Rabbi Becky Silverstein, Los Angeles, California.
- Rabbi Samuel M. Stahl, Emeritus, Temple Beth-El, San Antonio, Texas.
- The Reverend Terri Stewart, Associate Pastor, Roverton Park United Methodist Church, Tukwila, Washington.
- The Reverend Jerald M. Stinson, Senior Minister Emeritus, First Congregational Church, Long Beach, California.
- The Reverend Les Switzer, Retired, First Congregational Church, Houston, Texas.
- The Reverend Dr. Christy Thomas, Retired, United Methodist Pastor, Frisco, Texas.
- The Reverend Adrienne Trevathan, Deacon & Associate Minister, Holy Covenant United Methodist Church, Chicago, Illinois.
- The Reverend Linda Walker, Lead Pastor, Crossroads of Life Prison Faith Community, Lincoln, Illinois.
- Rabbi Deborah Waxman, Ph.D., President, Reconstructionist Rabbinical College / Jewish Reconstructionist Communities, Wyncote, Pennsylvania.
- Rabbi Elyse Wechterman, Executive Director, Reconstructionist Rabbinical Association, Wyncote, Pennsylvania.

- The Reverend Ken Wilson, Co-Pastor, Blue Ocean Faith Church, Ann Arbor, Michigan.
- The Reverend Robert A. Wilson, Retired, First United Methodist Church, Pittsburgh, Pennsylvania.
- The Reverend Kevin Young, Senior Minister, St. John's United Methodist Church, Lubbock, Texas.

RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that works to protect the rights of individuals and communities to worship as they see fit and to preserve the separation of church and state as a vital component of democratic governance. Americans United represents more than 125,000 members and supporters across the country, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

The Anti-Defamation League

The Anti-Defamation League was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations

fighting hatred, bigotry, discrimination, and anti-Semitism, and safeguarding individual religious liberty. ADL is a staunch supporter of antidiscrimination laws and of the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. It vigorously supported the Religious Freedom Restoration Act as a means to protect individual religious exercise, but not as a vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with more than 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the

United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of gender identity.

The Interfaith Alliance Foundation

The Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, the Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. The Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

Keshet

Keshet is a national organization that works for full LGBTQ equality and inclusion in Jewish life. Led and supported by LGBTQ Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Our work is guided by a vision of a world where all Jewish organizations and communities are strengthened by LGBTQ-inclusive

policy, programming, culture, and leadership, and where Jews of all sexual orientations and gender identities can live fully integrated Jewish lives.

Muslim Advocates

Muslim Advocates is a national legal-advocacy and educational organization formed in 2005 that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

People for the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that the Religious Freedom Restoration Act and the Free Exercise Clause of the Constitution are a shield for the exercise of religion, protecting individuals of all faiths. Indeed, PFAWF's advocacy affiliate, People For the American Way, was deeply

involved in drafting and helping secure the enactment of RFRA. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to attack other important interests and harm third parties when actual religious exercise has not been substantially burdened. PFAWF is thus concerned about efforts to interpret RFRA to require religious accommodations that harm the interests of third parties.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)3 organization that serves as the professional association of 340 Reconstructionist rabbis and the rabbinic voice of the Reconstructionist movement and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality. As a part of the Reconstructionist movement, we have recently released a comprehensive statement on the advocacy for and inclusion of people who are transgender, nonbinary, and gender nonconforming.

Reconstructionist Rabbinical College / Jewish Reconstructionist Communities

The Reconstructionist Rabbinical College / Jewish Reconstructionist Communities is the central organization of the Reconstructionist movement.

We train rabbis and other leaders, provide support and resources for more than 100 affiliated communities, and are actively involved in imagining a vital Jewish future. We work to bring about a more just and compassionate world where creative Jewish living and learning guide us toward lives of holiness, meaning, and purpose. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination and equality. As a part of the Reconstructionist movement, we have recently released a comprehensive statement on the advocacy for and inclusion of people who are transgender, nonbinary, and gender nonconforming.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue rooted in our proud legacy of defending both religious freedom and civil rights.

The United Synagogue of Conservative Judaism

The United Synagogue of Conservative Judaism is the congregational arm of Conservative Judaism in North America. USCJ is committed to dynamic Judaism that is learned and passionate, authentic and pluralistic, joyful and accessible, egalitarian and traditional, and thereby seeks to create the conditions for a powerful and vibrant Jewish life for the individual members of its sacred communities, regardless of gender identity or sexual orientation.

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Document Description	*Record No.*	*PageID# Range*
Amended Complaint	21	241–249
Answer	22	250–256
EEOC's Motion for Summary Judgment	51	591–640
Harris Funeral Homes' Motion for Summary Judgment	54	1285–1321
Affidavit of Thomas Rost	54-2	1325–1338
Harris Funeral Homes' Response to Motion for Summary Judgment	60	1770–1801
EEOC's Response to Motion for Summary Judgment	63	1889–1948
Harris Funeral Homes' Reply Supporting Motion for Summary Judgment	67	2097–2121
EEOC's Reply Supporting Motion for Summary Judgment	69	2124–2134
District Court Opinion and Order on Motions for Summary Judgment	76	2179–2234
Notice of Appeal	78	2236–2237