**Case No. 16-60477**
**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*.

---

**Cons w/16-60478**

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; JOHN DAVIS, in his Official Capacity as Executive Director of the Mississippi Department of Human Services,

*Defendants – Appellants*.

---

On appeal from the United States District Court for the Southern District of Mississippi
Cases No. 3:16-cv-417-CWR-LRA (lead case);
3:16-cv-442-CWR-LRA (consolidated)

---

# UNOPPOSED MOTION OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND DENIAL OF THE PETITION FOR REHEARING EN BANC

---

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
*Addition Counsel Listed Inside Cover*

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

*Counsel for Amici Curiae*

**Case No. 16-60477**
**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*.

---

**Cons w/16-60478**

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; JOHN DAVIS, in his Official Capacity as Executive Director of the Mississippi Department of Human Services,
*Defendants – Appellants*.

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record for *amici curiae* Christian Legal Society ("CLS") and National Association of Evangelicals ("NAE") states that CLS and NAE are nonprofit corporations with no parent, subsidiary, or stock held by any person or entity, including any publicly held company. Counsel further 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.

- Campaign for Southern Equality, Plaintiff-Appellee
- Susan Hrostowski, Plaintiff-Appellee
- Kaplan and Company LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Roberta Kaplan and Rachel Tuchman representing)
- Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Jaren Janghorbani and Joshua D. Kaye)
- Fishman Haygood, LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Alysson Mills representing)
- Dale Carpenter, Counsel for all Plaintiffs-Appellees in Case No. 16-60478
- Rims Barber, Plaintiff-Appellee
- Carol Burnett, Plaintiff-Appellee
- Joan Bailey, Plaintiff-Appellee
- Katherine Elizabeth Day, Plaintiff-Appellee
- Anthony Laine Boyette, Plaintiff-Appellee
- Don Fortenberry, Plaintiff-Appellee
- Derrick Johnson, Plaintiff-Appellee
- Susan Glisson, Plaintiff-Appellee
- Dorothy C. Triplett, Plaintiff-Appellee
- Renick Taylor, Plaintiff-Appellee
- Brandiilyne Mangum-Dear, Plaintiff-Appellee
- Susan Mangum, Plaintiff-Appellee
- Joshua Generation Metropolitan Community Church, Plaintiff-Appellee
- Lambda Legal Defense and Education Fund, Inc., Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Susan Sommer and Beth Littrell representing)
- Mississippi Center for Justice, Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Beth Orlansky, John Jopling, Charles O. Lee, and Reilly Morse representing)
- McDuff & Byrd, Counsel for Plaintiffs-Appellees Rims Barber, Carol Burnett, Joan Bailey, Ktherine Elizabeth Day, Anthony Laine Boyette, Don Fortenberry, Susan Glisson, Derrick Johnson, Dorothy C. Triplett, Renick Taylor, Brandilyne Mangum-Dear, Susan Mangum, and Joshua Generation

Metropolitan Community Church ("Barber Plaintiffs-Appellees") (Robert B. McDuff, Sibyl C. Bird, and Jacob W. Howard representing

- Robert B. McDuff, Counsel for all Plaintiffs-Appellees in Case No. 16-60477
- Phil Bryant, in his official capacity as the Governor of the State of Mississippi, Defendant-Appellant
- John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services, Defendant-Appellant
- Judy Moulder, Mississippi Registrar of Vital Records, Defendant in the matter below
- Jim Hood, Mississippi Attorney General, Defendant in the matter below
- Office of the Attorney General for the State of Mississippi, Counsel for Defendant-Appellant John Davis (Tommy D. Goodwin, Paul E. Barnes, and Douglas T. Miracle representing)
- Mississippi Department of Human Services, Counsel for Defendant-Appellant John Davis (Mack A. Reeves and Daniel Bradshaw representing)
- James Otis Law Group, LLC, Counsel for Defendants-Appellants Phil Bryant and John Davis (Jonathan F. Mitchell and D. John Sauer representing)
- Johnathan F. Mitchell, Counsel for Defendant-Appellants Phil Bryant and John Davis
- Alliance Defending Freedom, Counsel for Defendants-Appellants Phil Bryant and John Davis (Kevin H. Theriot representing)
- Kevin H. Theriot, Alliance Defending Freedom, Counsel to Defendants-Appellants
- Drew L. Snyder, Counsel for Defendant-Appellant Phil Bryant
- Christian Legal Society (CLS), Amicus Curiae
- National Association of Evangelicals (NAE), Amicus Curiae
- Kimberlee Wood Colby, Counsel for Amicus Curiae CLS and NAE
- Carl H. Esbeck, Counsel for Amicus Curiae CLS and NAE
- Ottsen, Leggat, & Belz, L.C., Counsel for Amicus Curiae CLS and NAE (Timothy Belz and J. Matthew Belz representing)

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

## UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

*Amici Curiae* Christian Legal Society and National Association of Evangelicals ("*Amici*") respectfully move this Court, pursuant to Fed. R. App. P. 29(b)(2), for leave to file the accompanying Brief *Amicus Curiae* of Christian Legal Society and National Association of Evangelicals in Support of Defendants-Appellants and Denial of the Petition for Rehearing En Banc. All parties have indicated that they do not oppose this motion.

## I. IDENTITY OF MOVANTS AND STATEMENT OF INTEREST

For four decades, *Amici* have worked to defend all Americans' religious freedom. As a result, *Amici* have gained significant expertise and insights regarding the jurisprudence developed by the Supreme Court for proper implementation of the federal Religion Clauses of the First Amendment. That jurisprudence is central to the issues raised in the petitions for rehearing en banc and a primary reason why the petitions for rehearing en banc should be denied.

**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.

Committed to authentic pluralism and the First Amendment, CLS works through its Center for Law & Religious Freedom to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act, 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See, e.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student groups' meetings). For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens.

CLS works to protect all Americans' religious exercise rights, as well as their free speech rights. 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-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 states 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.

## II. THE ACCOMPANYING *AMICUS CURIAE* BRIEF IS DESIRABLE AND USEFUL TO THE COURT'S CONSIDERATION WHETHER TO GRANT THE PETITIONS FOR REHEARING EN BANC.

As the accompanying *amicus curiae* brief explains, the Supreme Court has repeatedly rejected the argument that the Establishment Clause is violated when a state enacts regulatory legislation that 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 with its venerable history of protecting religious freedom for religious dissenters.

The accompanying brief details the six leading cases in which the United States Supreme Court has rejected the argument that a religious exemption to a larger regulatory framework somehow aids religion in violation of the Establishment Clause. The brief also addresses the district court's misreading of Supreme Court jurisprudence that caused the district court to mistake HB 1523 for an impermissible religious preference rather than a permissible religious exemption.

While the Supreme Court's rulings clearly uphold the constitutionality of statutes that provide religious exemptions, too often this basic point has been lost in recent controversies involving religious freedom. The accompanying brief is intended to help avoid such a grave

misunderstanding of the Religions Clauses so that our nation remains one in which all Americans are allowed to live according to their deepest values without fear of government coercion or retaliation.

## CONCLUSION

*Amici* respectfully move this Court to grant this unopposed motion and grant them leave to file the accompanying *amicus curiae* brief and order the Clerk's office to accept the accompanying brief for filing.

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

*Counsel for Amici Curiae*

AUGUST 9, 2017

## CERTIFICATE OF SERVICE

I hereby certify that this Unopposed Motion of Christian Legal Society and National Association of Evangelicals For Leave To File *Amicus Curiae* Brief in Support of Defendants-Appellants and Denial of the Petition for Rehearing En Banc has been electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system on August 9, 2017.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 9, 2017

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) and Fed. R. App. P. 29(b)(4) because:

☒ this motion contains 889 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), or

☐ this motion 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word, version 2013 in 14 point size and Times New Roman font, or

☐ this motion 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
Kimberlee Wood Colby

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

Dated: August 9, 2017

**Case No. 16-60477**
**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*.

---

**Cons w/16-60478**

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; JOHN DAVIS, in his Official Capacity as Executive Director of the Mississippi Department of Human Services,

*Defendants – Appellants*.

---

On appeal from the United States District Court for the Southern District of Mississippi
Cases No. 3:16-cv-417-CWR-LRA (lead case);
3:16-cv-442-CWR-LRA (consolidated)

---

# BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF DEFENDANTS-APPELLANTS AND DENIAL OF THE PETITION FOR REHEARING EN BANC

---

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

*Counsel for Amici Curiae*

**Case No. 16-60477**
**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*.

---

**Cons w/16-60478**

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; JOHN DAVIS, in his Official Capacity as Executive Director of the Mississippi Department of Human Services,

*Defendants – Appellants*.

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record for *amici curiae* Christian Legal Society ("CLS") and National Association of Evangelicals ("NAE") states that CLS and NAE are nonprofit corporations with no parent, subsidiary, or stock held by any person or entity, including any publicly held company. Counsel further 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.

- Campaign for Southern Equality, Plaintiff-Appellee
- Susan Hrostowski, Plaintiff-Appellee
- Kaplan and Company LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Roberta Kaplan and Rachel Tuchman representing)
- Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Jaren Janghorbani and Joshua D. Kaye)
- Fishman Haygood, LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Alysson Mills representing)
- Dale Carpenter, Counsel for all Plaintiffs-Appellees in Case No. 16-60478
- Rims Barber, Plaintiff-Appellee
- Carol Burnett, Plaintiff-Appellee
- Joan Bailey, Plaintiff-Appellee
- Katherine Elizabeth Day, Plaintiff-Appellee
- Anthony Laine Boyette, Plaintiff-Appellee
- Don Fortenberry, Plaintiff-Appellee
- Derrick Johnson, Plaintiff-Appellee
- Susan Glisson, Plaintiff-Appellee
- Dorothy C. Triplett, Plaintiff-Appellee
- Renick Taylor, Plaintiff-Appellee
- Brandiilyne Mangum-Dear, Plaintiff-Appellee
- Susan Mangum, Plaintiff-Appellee
- Joshua Generation Metropolitan Community Church, Plaintiff-Appellee
- Lambda Legal Defense and Education Fund, Inc., Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Susan Sommer and Beth Littrell representing)
- Mississippi Center for Justice, Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Beth Orlansky, John Jopling, Charles O. Lee, and Reilly Morse representing)
- McDuff & Byrd, Counsel for Plaintiffs-Appellees Rims Barber, Carol Burnett, Joan Bailey, Ktherine Elizabeth Day, Anthony Laine Boyette, Don Fortenberry, Susan Glisson, Derrick Johnson, Dorothy C. Triplett, Renick Taylor, Brandilyne Mangum-Dear, Susan Mangum, and Joshua Generation Metropolitan Community Church (“Barber Plaintiffs-Appellees”) (Robert B. McDuff, Sibyl C. Bird, and Jacob W. Howard representing
- Robert B. McDuff, Counsel for all Plaintiffs-Appellees in Case No. 16-60477

- Phil Bryant, in his official capacity as the Governor of the State of Mississippi, Defendant-Appellant
- John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services, Defendant-Appellant
- Judy Moulder, Mississippi Registrar of Vital Records, Defendant in the matter below
- Jim Hood, Mississippi Attorney General, Defendant in the matter below
- Office of the Attorney General for the State of Mississippi, Counsel for Defendant-Appellant John Davis (Tommy D. Goodwin, Paul E. Barnes, and Douglas T. Miracle representing)
- Mississippi Department of Human Services, Counsel for Defendant-Appellant John Davis (Mack A. Reeves and Daniel Bradshaw representing)
- James Otis Law Group, LLC, Counsel for Defendants-Appellants Phil Bryant and John Davis (Jonathan F. Mitchell and D. John Sauer representing)
- Johnathan F. Mitchell, Counsel for Defendant-Appellants Phil Bryant and John Davis
- Alliance Defending Freedom, Counsel for Defendants-Appellants Phil Bryant and John Davis (Kevin H. Theriot representing)
- Kevin H. Theriot, Alliance Defending Freedom, Counsel to Defendants-Appellants
- Drew L. Snyder, Counsel for Defendant-Appellant Phil Bryant
- Christian Legal Society (CLS), Amicus Curiae
- National Association of Evangelicals (NAE), Amicus Curiae
- Kimberlee Wood Colby, Counsel for Amicus Curiae CLS and NAE
- Carl H. Esbeck, Counsel for Amicus Curiae CLS and NAE
- Ottsen, Leggat, & Belz, L.C., Counsel for Amicus Curiae CLS and NAE (Timothy Belz and J. Matthew Belz representing)

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

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases:**

**Constitutional Provisions and Statutes:**

## 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.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States.

## SUMMARY OF ARGUMENT

Because the panel correctly ruled that Appellants lack standing to challenge HB 1523, the petition for rehearing should be denied. But even if

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amicus,* its members, or its counsel, contributed money intended to fund preparing or submitting this brief, which is accompanied by a motion for leave to file.

standing existed, the district court's ruling was erroneous as a matter of law. The Establishment Clause is not violated when a state enacts regulatory legislation but provides an exemption to individuals holding religious beliefs that would otherwise be burdened by the legislation. HB 1523 is such a religious exemption. The Supreme Court six times has 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. HB 1523 is not an impermissible religious preference, but rather a permissible religious exemption.

## ARGUMENT

The district court held that the state's authority to enact legislation that accommodates a religious belief is checked by the Establishment Clause, which the court erroneously claimed requires withholding of an exemption when it is thought to harm third parties. ROA.16-60478.809-811.

### I. In Six Cases Spanning Nearly a Century, the Supreme Court Has Rejected the Assertion that Religious Exemptions Violate the Establishment Clause.

The Supreme 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. 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, which does not establish religion.

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. The Title VII exemption 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, 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 v. Tax Commission of City of New York*, 397 U.S. 664, 667-80 (1971) (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).

All nine Justices in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), said that they approved of religious exemptions, as did all Justices in *Employment Division v. Smith*, 494 U.S. 872 (1990).

## II. The District Court 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.

Where a dispute has arisen in the private sector that involves a religious claimant, a religious preference occurs when the state intervenes and resolves the dispute in favor of the religious claimant. When such a preference fails to take account of the interests of all disputants, the statute may fall.

Connecticut's legislature had sought to resolve a dispute arising among private parties as a consequence of legalizing retailing on Sunday. 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 observed Sunday as his Sabbath. When the store 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 705-707. The store's defense was that the Connecticut statute violated the Establishment Clause, and the Supreme Court agreed. *Id*. at 707, 710-11.

The Court 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 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. 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.

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 cabined *Caldor*:

> 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 used a weighted balancing test that took 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. Mr. 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, violating 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.

*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. Second, the statute in *Caldor* favored the religious claimant absolutely, thus disregarding the interests of others in the private sector.

*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. *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.

From *Hobbie*, *Amos*, *Larkin*, and *Cutter*, two rules emerge. First, religious exemptions do not violate the Establishment Clause. Second, religious preferences

may 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.

## III. 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 U.S. Solicitor General 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 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,[2] 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,[3] does it count as "harm to third parties" when others must pay their taxes or services are lost? 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.

[2] *Gillette*, 401 U.S. at 448-60; *The Selective Draft Law Cases*, 245 U.S. 366 (1918).
[3] *Walz*, 397 U.S. at 667-80.

## CONCLUSION

Because the judgment of the district court should be reversed as a matter of law even if standing existed, the petition for rehearing should be denied.

Respectfully submitted.

s/ Kimberlee Wood Colby

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

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

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

*Counsel for Amici Curiae*

AUGUST 9, 2017

## CERTIFICATE OF SERVICE

I hereby certify that this Brief *Amicus Curiae* of Christian Legal Society and National Association of Evangelicals in Support of Defendants-Appellants and Denial of the Petition for Rehearing En Banc has been electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system on August 9, 2017.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 9, 2017

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) and Fed. R. App. P. 29(b)(4) because:

☒ this brief contains 2573 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 Microsoft Word, version 2013 in 14 point size and Times New Roman font, 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
Kimberlee Wood Colby

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

Dated: August 9, 2017