No. 16-2424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

and

AIMEE STEPHENS,
Intervenor-Appellant

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan

BRIEF OF *AMICUS CURIAE* PRIVATE RIGHTS / PUBLIC CONSCIENCE PROJECT IN SUPPORT OF APPELLANTS

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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 H

Name of counsel: Mary Jane Eaton, Willkie Farr & Gallagher LLP

Pursuant to 6th Cir. R. 26.1, Public Rights / Private Conscience Project (Amicus Curiae)
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:

No.

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:

No.

CERTIFICATE OF SERVICE

I certify that on April, 24, 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/ Mary Jane Eaton

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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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The Public Rights / Private Conscience Project ("PRPCP")[1] is a legal academic policy institute whose mission is to examine—through legal research and scholarship, public policy interventions, advocacy support, and academic and media publications—the myriad contexts in which religious liberty conflicts with or undermines other fundamental rights, such as equality. The PRPCP respects the importance of religious liberty, but recognizes that this right exists within a framework of other competing fundamental rights. PRPCP believes that overly broad religious accommodations or exemptions can unsettle the proper balance of competing fundamental rights and impose impermissible burdens on third parties. Staffed by scholars of constitutional law, the PRPCP has an interest in ensuring that the law develops in a manner that strikes the proper balance between religious liberty and other fundamental rights.

Amicus Curiae believe that the decision in the court below disrupted this balance by improperly privileging the right to free exercise claimed by Appellee R.G. & G.R. Harris Funeral Home, Inc. ("Funeral Home") over Intervenor-Appellant Aimee Stephens's workplace equality rights and freedom from religious

[1] No party or counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. All parties consent to the filing of this brief.

coercion. The district court's expansive, and unprecedented, interpretation of the Religious Freedom Restoration Act ("RFRA") as a defense in a Title VII sex discrimination suit requires the intended beneficiaries of Title VII—employees who have been discriminated against—to bear the costs of an employer's religious beliefs in violation of the Establishment Clause of the First Amendment. Further, the district court's holding impermissibly implicates the government in private discrimination rather than furthering the government's compelling interest in combating such discrimination. PRPCP respectfully submits this brief to underscore the ramifications of the decision below on those important issues of religious liberty and workplace equality.

SUMMARY OF ARGUMENT

Congress enacted RFRA to create a statutory exemption from a federal law—including one of general applicability—when that law "substantially burden[s] a person's exercise of religion" and is not the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. While RFRA is intended to provide ample protections to religious liberty, it does not—and indeed could not—privilege the free exercise of religion over *other* fundamental rights and values. Rather, RFRA leaves unaltered the critical balance between religious liberty and other fundamental rights and freedoms, such as equality, that is vital to our free society. *See Burwell v. Hobby Lobby Stores Inc.*,

134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring) ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests.").

This brief argues that the district court's expansive interpretation of RFRA upsets this balance in two fundamental respects. Part I argues that if employers are permitted exemptions to their Title VII obligations under RFRA, as the district court permitted here, this would improperly impose a significant burden onto their employees in violation of the Establishment Clause. Part II argues that permitting the application of RFRA as a defense to a sex discrimination claim against Appellee would eviscerate the government's compelling interest in preventing discrimination and impermissibly implicate the government in private discrimination.

ARGUMENT

I. RFRA MUST BE CONSTRUED IN ACCORDANCE WITH CONSTITUTIONAL BOUNDARIES.

Congress enacted RFRA in "direct response" to the Supreme Court's decision in *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which marked a departure from the Court's Free Exercise jurisprudence of the preceding decades. *See City of Boerne v. Flores*, 521 U.S. 507, 514 (1997); 42 U.S.C. § 2000bb. In several pre-*Smith* Free Exercise

cases, the Court employed a strict scrutiny test that asked whether a challenged law served a compelling government interest and was the least restrictive means of serving that interest. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd. of the Ind. Emp't Div.*, 450 U.S. 707 (1981). *Smith* changed that calculus. Rather than applying the compelling interest test, the *Smith* Court held that a government regulation does not violate the First Amendment when "prohibiting the exercise of religion is . . . merely the incidental effect of a generally applicable and otherwise valid provision." *Smith*, 494 U.S. at 878. Congress responded by adopting RFRA, which was intended to replicate via statute the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb.

Although RFRA was intended to "ensure broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2761, it did not, and could not, alter or impinge upon the protections otherwise guaranteed by the Constitution. Indeed, it is axiomatic that a federal statute may not be interpreted or applied in a manner that conflicts with constitutional limits. *See City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.").

Recognizing the fundamental supremacy of constitutional limits on Congress's legislative authority, the Supreme Court has developed "a rule of statutory construction" that "where an otherwise acceptable construction of a statute would plainly raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will [] not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."). Thus, courts interpreting RFRA must avoid construing the statute in a manner that violates Constitutional guarantees. As demonstrated below, the district court's application of RFRA as a defense to a Title VII discrimination claim runs afoul of this rule of statutory construction, resulting in a violation of the Establishment Clause, and should be reversed.

II. THE DISTRICT COURT'S OVERBROAD READING OF RFRA VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT FORCES STEPHENS TO BEAR THE SIGNIFICANT COST OF HER EMPLOYER'S RELIGIOUS BELIEFS.

A. Religious Accommodations Cannot Impose Substantial Burdens On Third Parties.

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weismann*, 505 U.S. 577, 587 (1992). Among

those "fundamental limitations" is that the "government may not coerce anyone to support or participate in religion." *Id.*; *see also Estate of Thornton v. Caldor*, 472 U.S. 703, 708 (1985) (the government "must take pains not to compel people to act in the name of any religion"); *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989) (the government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherants to support [religious] practices"). Although the "Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause," *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-5 (1987), it has also warned that "[a]t some point accommodation may devolve into an unlawful fostering of religion." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987).

A religious accommodation, whether claimed under the First Amendment or a federal statute, exceeds these constitutional limits when it imposes a significant burden on an identifiable third party.[2] *See Bd. of Educ. of Kiryas Joel Vill. Sch.*

[2] There are two narrow exceptions to the rule that religious exemptions cannot burden third parties and neither is relevant here. First, the Supreme Court has upheld an exemption for church-affiliated nonprofits from Title VII's prohibition against religious discrimination. *See Amos*, 483 U.S. at 334-35 (upholding an exemption under Title VII that prohibited a discrimination suit against a nonprofit gymnasium run by the Mormon Church after it fired a janitor who failed to qualify as a member of the Church). The Court held that the exemption had the "permissible legislative purpose [of] alleviat[ing] significant governmental interference with the ability of religious organizations

Dist. v. Grumet, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment."); *see also* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, Balkinization (Dec. 9, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html ("When the government provides a religious exemption that imposes substantial burdens directly on third parties, it effectively compels them to pay for another's religious observance."); Frederick Mark Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraceptive Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343, 357-63 (2014).

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to define and carry out their religious missions." *Id.* at 335. This exception was narrowly drawn and is not applicable here, where the party seeking an exemption from the Title VII prohibition against sex discrimination is a for-profit organization that is not affiliated with any church. Opinion, R.76, PageID #2185.

The second exception involves religious accommodations that impose small and diffuse burdens on a very large group of people or the country as a whole. *See, e.g., Walz v. Tax Comm'n of The City of New York*, 397 U.S. 664, 672 (1970) (providing tax exemptions for non-profit organizations, including religious organizations, does not violate the Establishment Clause); *United States v. Seeger*, 380 U.S. 163 (1965) (extending a legislative exemption from the military draft for religious pacifists to apply to those with philosophical objections to war). These cases, which involve *de minimis* harm to the general population, provide no support for the religious accommodation at issue here which has caused Ms. Stephens significant harm. *See infra* at Part II.B.

The Supreme Court affirmed this principle recently in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), where it considered whether the Religious Land Use and Institutionalized Persons Act ("RLUIPA")—a statute nearly identical to RFRA—violated the Establishment Clause. The Court explained that, to avoid violating the Establishment Clause, a religious accommodation must strike the proper balance between the right of free exercise and other competing interests. *Id.* at 722 ("Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."). Although the Court rejected a facial challenge to RLUIPA because it had "no cause to believe that [the law] would not be applied in an appropriately balanced way," the Court noted that "as-applied challenges would be in order" if accommodations requested under the statute "become excessive [or] impose unjustified burdens on other[s]." *Id*. at 726.

Similarly, in *Caldor*, the Court struck down a Connecticut law providing a Sabbath observer an unqualified right not to work on his Sabbath. *See* 472 U.S. at 708. The Court held that the law was invalid under the Establishment Clause because of its "unyielding weighting in favor of Sabbath observers over *all other interests.*" *Id.* at 710 (emphasis added); *see also id.* (explaining that the statute impermissibly failed to account for whether it imposed "substantial economic burdens or . . . would require the imposition of significant burdens . . . on other employees required to work in place of the Sabbath observers"). By requiring

third parties to "conform their business practices to the particular religious practices of [an] employee," the act crossed over from an acceptable accommodation of religion to an improper establishment of religion. *Id.* at 709; *see also Texas Monthly*, 489 U.S. at 15 (striking down a sales tax exemption for religious periodicals because it "burden[ed] nonbeneficiaries markedly" and "convey[ed] a message of endorsement to slighted members of the community") (internal quotations omitted).

In addition to striking down religious accommodations that impose material third-party harms under the Establishment Clause, the Supreme Court has repeatedly held that the Free Exercise Clause does not provide a right to such accommodations.[3] For example, in *United States v. Lee*, 455 U.S. 252, 261 (1982),[4] the Court held that exempting an Amish employer from social security

[3] As with its Establishment Clause jurisprudence, the Court's Free Exercise cases have carved out a narrow exception for *religious institutions* and permitted exemptions from discrimination laws despite the fact that these exemptions clearly impose costs on third parties. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (shielding a parochial school from liability for discharging a minister in violation of the Americans with Disabilities Act on the grounds that penalizing a church for firing an unwanted minister "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs"). Because this case does not involve a religious organization or affiliated non-profit, this exception is not relevant to this action.

[4] Although *Lee*, and other cases discussed herein, were decided under the Free Exercise Clause, RFRA—as demonstrated above, *see supra*, at Part I.—is subject to the same constitutional limitations.

taxes would impermissibly "impose the employer's religious faith on [his] employees." In so holding, the Court distinguished the requested exemption from an existing exemption for *self-employed* Amish, which would not affect persons outside the religious community. *Id.* Similarly, in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), the Court held that the Free Exercise Clause did not provide a non-profit religious organization with an exemption from compliance with the minimum wage requirement of the Fair Labor Standards Act in part because the requested exemption would harm workers generally. Importantly, the Court reached that result notwithstanding the fact that the employees in this case claimed to support the exemption. *Id.* at 302 ("If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.") (internal citations omitted).

Even where the Supreme Court has upheld religious accommodations under the Free Exercise Clause, it has done so only after being assured that third parties would not be harmed. Indeed, in both *Sherbert* and *Yoder*, the impact of the challenged accommodations was central to the Court's analysis. For instance, in *Sherbert*, the Court held that the requested exemption did not amount to an establishment of religion because, among other reasons, it did not "serve to abridge

any other person's religious liberties." *Sherbert*, 374 U.S. at 409. Similarly, in *Yoder*, the Court held that Amish parents were entitled to an exemption from a mandatory education law that violated their religious beliefs. The Court distinguished prior cases in which it had rejected religious exemptions from child protection laws, explaining that this case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Yoder*, 406 U.S. at 230. To the contrary, the Court found that "[t]he record strongly indicate[d] that accommodating the religious objections of the Amish . . . [would] not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship." *Id.* at 234. Moreover, because "there [was] no suggestion whatever in the record that the religious beliefs of the children here concerned differ[ed] in any way from those of their parents," *id.* at 237 (Stewart, J., concurring), the case did not implicate the religious coercion concerns that arise when the burdens of an accommodation are placed on non-adherents. *See also id.* at 231 ("[It was never argued] that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary.").

Finally, as with its Free Exercise jurisprudence, the Supreme Court has carefully considered the impact that *statutory-based* religious accommodations

may have on third parties who do not share those religious beliefs and/or find their own rights and interests negatively impacted by the requested religious accommodation. Indeed, since RFRA's enactment, the Court has upheld accommodations only where they have not imposed material burdens on third parties. Most recently, in *Hobby Lobby*, the Court upheld the application of exemptions to the Affordable Care Act's contraceptive coverage mandate to closely-held, for-profit companies. All of the justices, writing in three separate opinions, endorsed the principle that religious accommodations may not burden third parties. Writing for the majority, Justice Alito acknowledged that "courts *must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (emphasis added). The four dissenting justices reiterated this limitation, finding no support in the law for "a religion-based exemption when the accommodation would be harmful to others." *Id.* at 2801 (Ginsburg, J., dissenting); *see also id.* at 2786 (Kennedy, J., concurring). Indeed, central to the Court's decision upholding the accommodation were its findings that neither Hobby Lobby's employees nor their insurance companies would be forced to bear the burden of Hobby Lobby's religious beliefs. *See id.* at 2759 (finding that Hobby Lobby employees would have "precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such

coverage," and that the accommodation scheme "imposes no net economic burden on the insurance companies that are required to provide or secure the coverage").[5] Thus, *Hobby Lobby* affirms the notion that statutory religious liberty rights claimed under RFRA reach their limit when third parties are asked to subsidize an employer's exercise of religion. *See also Holt v. Hobbs*, 135 S. Ct. 853 (2015) (holding that RLUIPA required an accommodation permitting a Muslim inmate to wear a half-inch beard because this would not harm or undermine overarching prison safety interests); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427 (2006) (holding that a RFRA exemption from criminal penalties for a religious group that used a hallucinogenic drug would not harm or undermine overarching drug policy).

Like the Supreme Court, this Court's Establishment Clause, Free Exercise Clause, and statutory exemption jurisprudence has recognized that accommodation of religious belief breaches constitutional limits when the requested accommodation creates material third-party harms. In the employment context this includes harms or costs shifted from the person claiming the exemption to the

[5] The Court strenuously objected to the dissents' charge that the majority holding would give for-profit companies "free rein to take steps that impose disadvantages . . . on others." *Id.* at 2760 ("[W]e certainly do not hold or suggest that RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.") (internal quotations omitted).

employer, to other coworkers, to other non-believers, or in some cases to the public. For example, in *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *vacated on other grounds*, 433 U.S. 903 (1977), this Court upheld a provision of Title VII that required employers to reasonably accommodate the religious practices of their employees. In so holding, this Court found that the statute "require[d] only a reasonable accommodation of an employees' religious practices, and *only if* that can be accomplished *without undue hardship* on the employer's business." *Id.* at 554 (alteration in original) (emphasis added). And, in *Ams. United For Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992), this Court upheld a city's authorization of a private religious display on public property only after finding that it "neither creates a realistic danger of oppressing non-believers, nor has a meaningful and practical detrimental impact on the lives of those who will see [it]."

South Ridge Baptist Church v. Industrial Commission of Ohio, 911 F.2d 1203 (6th Cir. 1990), is to the same effect. There, this Court held that the Free Exercise Clause did not mandate an accommodation from the state workers' compensation program because such an accommodation "clash[ed] with important state interests in the welfare of others." *Id.* at 1211. In contrast, the Court noted that an existing exemption that applied only to "ministers" (employees who by definition shared their employers' religious beliefs) did not "operate[] to impose

the employer's religious belief on the employee[]." *Id.* at 1209 (quoting *U.S. v. Lee*, 455 U.S. at 253). *See also Gibbs v. Johnson*, 73 F.3d 361 (6th Cir. 1995) (holding that RFRA did not permit an inmate to keep a metal crucifix that could be used as a weapon); *Haight v. Thompson*, 763 F.3d 554, 564 (6th Cir. 2014) (denying summary judgment for the prison in a RLUIPA case involving inmates' access to a Native American sweat lodge where the claimants agreed "the timing and number of ceremonies could be flexible; and whatever safety and security procedures the prison wanted, the inmates would follow").

In sum, neither the Free Exercise Clause nor RFRA permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others.

B. Exempting the Funeral Home From Its Obligations Under Title VII Imposes Significant Harms On Ms. Stephens In Violation Of The Establishment Clause.

That the district court's acceptance of the Funeral Home's RFRA defense imposed a significant harm on Ms. Stephens cannot be seriously disputed. The district court found "direct evidence to support a claim of employment discrimination." Opinion, R.76, PageID #2199. The district court's acceptance of RFRA as a defense to liability under Title VII therefore deprives Ms. Stephens of the statutory remedies available to her, including but not limited to back pay and

front pay, compensation for pecuniary (*e.g.*, job search expenses) and non-pecuniary (*e.g.*, emotional pain and suffering) harms, and injunctive relief.

But the harm caused by the accommodation of the Funeral Home's religious beliefs is not limited to the denial of those statutory remedies. By denying relief for the workplace sex discrimination that Ms. Stephens indisputably endured, the district court effectively granted its *imprimatur* on Appellee's religious beliefs over and against Intervenor-Appellant's individual right of conscience. *Cf. Amos*, 483 U.S. at 340-41 (Brennan, J., concurring) ("An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in these cases, employment itself. The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."). The harm suffered by Ms. Stephens, like that imposed on non-Sabbatarians in *Caldor*, conveys a clear and impermissible message: "The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it." *Caldor*, 472 U.S. at 711 (O'Connor, J., concurring).

If permitted to stand, the district court's decision would eviscerate the statutory protections of Title VII—one of the most important antidiscrimination laws in U.S. history—which are intended to protect workers from discrimination and animus in the workplace and safeguard them from dignitary harms. *See, e.g.*,

Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring) ("While the main concern of [Title VII] was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from [discrimination]."); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) (acknowledging the lasting "dignitary wounds" caused by its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

By recognizing a broad RFRA exemption to Title VII, the government would force employees to submit to their employers' otherwise discriminatory religious beliefs or risk losing their jobs. Such a Hobson's choice violates a core guarantee of the Establishment Clause—that the government may not "further the interests of religion through the coercive power of the government." *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also Sherbert*, 374 U.S. at 402 (the government may not "compel affirmation of a repugnant [religious] belief"). Nor is there any basis in the district court's decision to conclude that its broad reading of RFRA is limited to the sex stereotyping context; rather, the district court's reasoning could also require a employee to wear secular headwear rather than a yarmulke or tagiyah in order to accommodate his employer's religious opposition to hiring Jews or Muslims. Thus, the third-party harm limitation on religious accommodations is essential not only to ensure that religion

is not improperly elevated above other rights, but also as an essential protection for religious freedom itself. *See* Gedicks & Van Tassell, *supra*, at 383 (arguing that religious exemptions that impose material harm on third parties are a "violation of 'religious liberty'—the liberty long protected by the Establishment Clause, to live one's life free of the religious commitments of others").

This Court should, therefore, reverse the district court's grant of summary judgment in favor of the Funeral Home, because RFRA—as-applied as a defense to a Title VII sex discrimination claim against a for-profit corporation—violates the Establishment Clause.

III. THE DISTRICT COURT'S OVERLY-BROAD INTERPRETATION OF RFRA RENDERS THE STATE A PARTNER IN THE DENIAL OF WORKPLACE EQUALITY.

A. The Government Has A Compelling Interest In Prohibiting, Not Enabling, Discrimination.

When Congress passed and the President signed the Civil Rights Act of 1964, they codified the fundamental principle that the government has an historical, overarching, and enduring moral and legal responsibility to prohibit discrimination, including in the workplace. As President Lyndon Johnson expressed it on July 2, 1964 when he signed the Civil Rights Act into law: "My fellow citizens, we have come now to a time of testing. We must not fail. Let us close the springs of racial poison. Let us pray for wise and understanding hearts.

Let us lay aside irrelevant differences and make our nation whole." President Lyndon B. Johnson, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1963-64*, Volume II, entry 446, pp. 842-844, Washington, D.C.: Government Printing Office, 1965. President George H.W. Bush re-affirmed this compelling public responsibility when he signed the Civil Rights Act of 1991, strengthening, among other things, the law's protections against workplace discrimination: "Since the Civil Rights Act was enacted in 1964, our Nation has made great progress toward the elimination of employment discrimination. I hope and expect that this legislation will carry that progress further. Even if such discrimination were totally eliminated, however, we would not have done enough to advance the American dream of equal opportunity for all." President George H.W. Bush, *Statement on Signing the Civil Rights Act of 1991* (Nov. 21, 1991), http://www.presidency.uscb.edu/ws/?pid=20258.

In numerous decisions and in varied contexts, courts have affirmed that the state's interest in prohibiting discrimination is compelling and of the highest order. *See, e.g., E.E.O.C. v. Pac. Press*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority'. . . . Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."). This of course

includes circumstances where the right of religious liberty has been asserted as an overriding interest. The Supreme Court, however, has repeatedly and expressly declined to endorse religious liberty as a justification for discrimination. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court held that the Internal Revenue Service did not violate the Free Exercise Clause by denying tax exempt status to universities that engaged in racial segregation on account of their religious opposition to interracial relationships. The "Government's fundamental, overriding interest in eradicating racial discrimination in education," the Court held, "substantially outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs." *Id.* at 2020-21.

Most recently, in *Hobby Lobby*, the Supreme Court explicitly held that a statutory commitment to the protection of religious exercise could not justify discrimination on the basis of race. The Court wrote that, despite the dissent's concern that racial discrimination "might be cloaked as religious practice to escape legal sanction," RFRA provided "no such shield" precisely because "the Government has a compelling interest in providing an equal opportunity to participate in the workforce." *Hobby Lobby*, 134 S. Ct. at 2783.

Courts have consistently affirmed the compelling nature of the state's interest in prohibiting discrimination in the workplace, in public accommodations, and in other contexts even where—indeed, especially where—religious beliefs

have been raised as a justification for an exception to the prohibitions contained in the Civil Rights Act. The overarching goal furthered by this and similar equality enhancing legislation was "to eliminate the last vestiges of injustice in our beloved country." President Lyndon B. Johnson, *Public Papers*, *supra*, at 842-44. Such a claim was considered so "patently frivolous" that it was summarily dismissed in a footnote in *Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402n.5 (1968), when the owner of a restaurant claimed that desegregating his private, for-profit business would violate his religious beliefs. More recently, when courts have been asked to balance the free exercise rights of some citizens against the equality rights of others, they have affirmed the principle that "[i]n a constitutional form of government, personal, religious, and moral beliefs, when acted upon to the detriment of someone else's rights, have constitutional limits." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 78 (N.M. 2013) (Bosson, J. concurring); *see also Barber v. Bryant*, 193 F. Supp. 3d 677, 710 (S.D. Miss. 2016).

By contrast, Appellee's argument in this case, endorsed by the court below, represents a remarkable and radical departure from this well-established rule. Not only does it undermine the state's compelling interest in the eradication of workplace discrimination, but it creates a perverse scenario where the state serves as a guardian of the interests of parties who seek to violate the Civil Rights Act.

The Supreme Court has consistently repudiated statutory measures that use the power of the state to undermine the fundamental public purpose of preventing discrimination. In *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967), for instance, the Supreme Court struck down an amendment to the California constitution adopted in the wake of the passage of certain fair housing laws. The California amendment provided property owners "absolute discretion" in refusing to sell or rent property to any person for any reason. It forbade the state from intervening even where a private party declined to rent or sell for discriminatory reasons. The Court found that the amendment "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." *Id.* at 376. By granting private citizens a right to refuse to sell or rent housing for any reason, "[t]hose practicing racial discriminations [would] need no longer rely solely on their personal choice [but] could now invoke express constitutional authority, free from censure or interference of any kind from official sources." *Id.* at 377. Thus, the Court held that the amendment, which both protected and encouraged discrimination, violated the Equal Protection Clause.

Similarly, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court struck down an amendment to the Akron, Ohio city charter that prohibited the city from implementing any ordinances restricting discrimination in housing. The Court held that the amendment "wield[ed] state power" to further "discrimina[tion] against

minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 389, 393.

In *Romer v. Evans*, 517 U.S. 620, 624 (1996), the Supreme Court struck down a Colorado constitutional amendment that overturned municipal sexual orientation antidiscrimination protections and barred all levels of government from taking any action to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." The Court held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense," *id.* at 633, and rejected the law's primary rationale of protecting other citizens' rights, including "the liberties of landlords or employers who [have] . . . religious objections to homosexuality." *Id.* at 635.

If upheld, the district court's recognition of RFRA as a defense to Ms. Stephens's Title VII claim against the Funeral Home likewise would result in governmental facilitation of private discrimination in a way that impermissibly subordinates, if not surrenders outright, the state's compelling interest in eradicating inequality in the workplace. *See* Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DePaul L. Rev. 907, 938 (2016) ("The application of RFRA as a 'defense' to discrimination

would implicate legal rules and give rise to state action."); *see also* James M. Olseke, Jr., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 Univ. of Colorado L. Rev. 1 (2016). Interpreted in this manner, RFRA would allow employers to discriminate "free from censure or interference of any kind from official sources" provided such discrimination was grounded on a religious principle. *Reitman*, 387 U.S. at 377. Further, this expansive application of RFRA would necessarily make it "more difficult for one group of citizens"—namely, employees who do not conform their behavior to their employers' religious beliefs—"than for all others to seek aid from the government" under Title VII and other fundamental anti-discrimination laws. *Romer*, 517 U.S. at 633.

Moreover, if permitted to stand, the district court's decision would force the EEOC to take an active role, and hopelessly intertwine it, in private discrimination. Invocation of RFRA defenses by employers under EEOC investigation would effectively require the EEOC to sanction discrimination of private employers whenever that discrimination is motivated by a religious belief. This would require far more from the EEOC than passive acquiescence in private discrimination; rather, as demonstrated in the decision below, it would require the EEOC to actively explore the contours of an employer's religious beliefs and design accommodations, notwithstanding their discriminatory impact on an employee. The district court opinion states that, to appropriately respond to the Funeral

Home's RFRA defense, the EEOC should have negotiated with the Funeral Home as to the exact sex stereotypes to which Ms. Stephens must adhere in order to avoid termination. *See, e.g.*, Opinion, R.76, PageID #2216 ("the EEOC's briefs do not contain *any discussion* to indicate that the EEOC has ever . . . explored the possibility of any solutions or potential accommodations"); *id.* at PageID #2219 ("couldn't the EEOC propose a gender neutral dress code (dark-colored suit, consisting of a matching business jacket and pants, but without a neck tie) as a reasonable accommodation"). Such "overt, significant participation of the government" in private discrimination would run directly contrary to the spirit of Title VII by too closely entwining the state in the discriminatory actions of a private party. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620, 622 (1991).[6]

B. The Government Cannot Facilitate Sex Discrimination, Even In The Interests Of Protecting Religious Pluralism.

The government's interest in protecting religious pluralism, as embodied in RFRA, does not justify its facilitation of private discrimination. Although religious liberty can be a legitimate government interest when the accommodation

[6] While *Edmonson* was a case that specifically addressed state action in the context of discrimination under the Equal Protection Clause, the state action doctrine imposes a more exacting standard than what we are urging herein: that the trial court's broad application of RFRA not only runs afoul of the Establishment Clause but does so while contravening the state's compelling interest in combatting, not enabling, private discrimination in the workplace.

is narrowly tailored, *see, e.g.*, *Amos*, 483 U.S. at 335 (1987) ("It is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."), the government's interest in protecting religious practice cannot support discriminatory treatment in violation of equal protection norms.

Because interpreting RFRA to provide a defense to a sex discrimination claim under Title VII would improperly implicate the government in the facilitation of private sex discrimination—in direct opposition to the state's compelling interest in combating workplace discrimination—the district court's decision must be reversed.

CONCLUSION

The district court's application of RFRA as a defense to a sex discrimination claim under Title VII oversteps the bounds of both the Establishment Clause and the right to equal opportunity in the workplace by imposing burdens on third parties and impermissibly involving the government in private discrimination. For these reasons, the judgment of the district court must be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE REGARDING LENGTH OF BRIEF

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure ("Fed. R. App. P."), the undersigned hereby certifies that this document complies with Fed. R. App. P. 29(a)(5) and is no more than one-half of the type-volume limitations for a principal brief set forth in Fed. R. App. P. 32(a)(7)(B).

This document has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. Exclusive of the exempted portions of the brief set forth in Fed. R. App. P. 32(f), and in accordance with the letter from the Clerk of this Court to counsel for the parties, dated March 30, 2017 (ECF No. 32), the undersigned hereby certifies that this document contains 6,180 words, as determined by a word processing system used to prepare this brief.

/s/ Mary Jane Eaton
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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