No. 16-2424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

and

AIMEE STEPHENS,

Intervenor

vs.

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

Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan,
The Honorable Sean F. Cox
No. 14-13710

BRIEF FOR AMICUS CURIAE UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT EEOC AND INTERVENOR AIMEE STEPHENS, SUPPORTING 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 Hor

Name of counsel: Eric Alan Isaacson

Pursuant to 6th Cir. R. 26.1, Unitarian Universalist Association
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:

The Unitarian Universalist Association is not a subsidiary or affiliate of any publicly owned corporation.

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:

The Unitarian Universalist Assocation is not aware of any publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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/ Eric Alan Isaacson
Eric Alan Isaacson
Law Office of Eric Alan Isaacson

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.

FRAP 26.1 DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

The Unitarian Universalist Association of Congregations (UUA) is a religious denomination and not-for-profit corporation organized under the laws of the State of Massachusetts. The UUA has no parent corporation and is neither owned nor controlled by any publicly traded corporation. The UUA issues no stock.

FRAP 29(a)(4)(E) STATEMENT REGARDING AUTHORSHIP AND FUNDING

This amicus curiae brief was authored exclusively by counsel for the amicus curiae in consultation with the amicus curiae and its general counsel. No party or counsel for any party to the case made any monetary contribution to fund preparing or submitting the brief, and no party or counsel for any party to the case wrote any portion of the brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES

ARTICLES AND BOOKS

Page

Page

Page

Page

SCRIPTURE

I. IDENTITY AND INTEREST OF AMICUS

The Unitarian Universalist Association of Congregations ("UUA") is a religious denomination comprising more than 1,000 congregations nationwide, with deep roots in American history and culture.

The UUA thus has an abiding interest in advancing religious liberty and equal protection of the law for all persons, including racial and religious minorities, and LGBT people.

All parties have consented to the filing of this brief in support of Plaintiff/Appellant EEOC and Intervenor Aimee Stephens, supporting reversal of the judgment below.

II. SUMMARY OF ARGUMENT

The district court properly found, as an initial matter, that the Harris Funeral Homes violated Title VII's proscription of sex discrimination when it fired Aimee Stephens for expressing her intention to present herself as woman and to wear women's clothing. Yet it erred by holding that the Religious Freedom Restoration Act ("RFRA") overrides Title VII when employers contend that their religious beliefs require them to discriminate.[1] For RFRA clearly

[1] Harris Funeral Homes dismissed Aimee Stephens based on its owner's belief 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," DE76:16 (quoting DE54-2.

permits the government to substantially burden an exercise of religion if the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a)-(b).

Indeed, this case is controlled by the Supreme Court's holding in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2783-84 (2014), that RFRA thus provides "no shield" against enforcement of civil-rights laws proscribing workplace discrimination, since those laws advance a compelling governmental interest and already "are precisely tailored to advance that critical goal."

Hobby Lobby cited statutory proscriptions of race discrimination to illustrate this point. Yet, several commentators have asserted that while religious rationales cannot be offered to justify discrimination on the basis of race, they can be for discrimination against LGBT people. Those commentators are mistaken. As discussed below, a theology of

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at ¶42), and that he therefore "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [he] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." DE76 (quoting DE54-2:¶43). The District Court wrote that enforcing Title VII's ban on discrimination in employment would impermissibly burden its owner's "sincere religious belief that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at one of his funeral homes because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift." DE76:31.

racism undergirded both the American institution of slavery, and the era of Jim Crow segregation that followed it. Religious rationalizations have similarly been offered to keep women in their place. Any construction of RFRA's application in Title VII cases must take account of these facts, which eliminate any basis for treating discrimination against transgender people differently than other forms of invidious discrimination that might be rationalized by religious belief.

By allowing religious excuses to override Title VII, the decision below improperly nullifies Aimee Stephens's right to fundamental protection of the Civil Rights Act.

III. ARGUMENT

A. Title VII is a Religiously Neutral Law of General Applicability that According to *Hobby Lobby* Satisfies RFRA's Requirement that it be the Least Restrictive Means of Furthering a Compelling Governmental Interest

Title VII is a facially neutral law of general applicability that was not motivated by any desire to target religious exercise. *See* 42 U.S.C. §2000e-2. As such, under *Employment Division v. Smith,* 494 U.S. 872 (1990), any incidental burden that it places on an employer's religious exercise can raise no substantial free-exercise problem under the First Amendment. *See Hobby Lobby,* 134 S.Ct. at 2751, 2761 (2014)(*Smith* "held that, under the First Amendment, 'neutral, generally applicable

laws may be applied to religious practices even when not supported by a compelling governmental interest.'")(quoting *City of Boerne v. Flores,* 521 U.S. 507, 514 (1997)).

The District Court held below that the Harris Funeral Home's discriminatory policy is nonetheless entitled to protection of the Religious Freedom Restoration Act ("RFRA"), which states that when enforcing a facially neutral "rule of general applicability," like that sustained in *Smith,* the "[g]overnment may substantially burden a person's exercise of religion" only if it shows that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a)-(b). According to the District Court, Title VII's proscription of discrimination is not necessarily the least restrictive means of furthering the government's goals.[2]

That the District Court erred is clear from the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751, 2783 (2014), which in construing and applying RFRA's provisions to the Affordable Care Act directly addressed contentions that they might also

[2] The District Court reasoned that the EEOC failed to explore speculative possibilities that Harris Funeral Home agree to abandon its gender-stereotyped dress code in favor of a gender-neutral "unisex" dress code for all its employees, even though nothing in the record suggests that the Harris Funeral Home's religious scruples, requiring employees to dress according to its owner's perception of their "God-given" gender could even accept a unisex dress code.

be applied to impair enforcement of antidiscrimination laws. The Court flatly rejected any "possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction." *Id.* Answering Justice Ginsburg's dissenting suggestion that enforcement of civil rights laws might be indeed imperiled, the opinion of the Court firmly replied: "Our decision today provides no such shield." *Id.* at 2784. "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race," for example, "and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.*

That should have disposed of the Harris Funeral Home's RFRA defense in this case. This Court has soundly held that discrimination on the basis of sex includes discrimination on account of gender identification.[3] And the government has a compelling interest in

[3] *See Barnes v. City of Cincinnati,* 401 F.3d 729, 737 (6th Cir.2005) (transgender plaintiff stated a Title VII claim for sex discrimination "by alleging discrimination . . . for his failure to conform to sex stereotypes"); *Smith v. City of Salem,* 378 F.3d 566 (6th Cir. 2004) (Title VII and equal protection clause cover discrimination on the basis of gender identity); *accord, e.g., Glenn v. Brumby,* 663 F.3d 1312, 1317 (11th Cir. 2011) (discrimination in government employment on the basis of gender identity held unconstitutional because "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"); *Schroer v. Billington,* 577 F.Supp.2d 293, 308 (D.D.C. 2008) (refusal to hire (employer's refusal to hire job applicant because she planned on "sex reassignment surgery was *literally* discrimination 'because of . . . sex'") (court's emphasis).

proscribing discrimination on account of employee's sex, just as it does on the basis of employees' race.[4] Title VII's prohibition on discrimination on account of either sex or race is, as *Hobby Lobby* states, "precisely tailored to achieve th[e] critical goal" of equal opportunity in the workplace, giving no room for less restrictive means of furthering that governmental interest. *Hobby Lobby,* 134 S.Ct. at 2783. It is, after all, is the very same statutory prohibition that bars ***both*** kinds of discrimination.[5]

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[4] *See Board of Directors of Rotary Internat'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (sustaining "the State's compelling interest in eliminating discrimination against women"); *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (sustaining "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the [anti-discrimination] statute to the Jaycees may have on the male members' associational freedoms "); *see also New York State Club Ass'n v. City of New York,* 487 U.S. 1, 7-8 & 14 n.5 (1988) (sustaining New York statute proscribing discrimination against women and reiterating "that the Court has recognized the State's 'compelling interest' in combatting invidious discrimination"); *EEOC v. Pacific Press Publ. Ass'n,* 676 F.2d 1272, 1281 (9th Cir. 1982) (in case alleging sex discrimination, holding that "Title VII establishes a compelling governmental interest in eliminating employment discrimination"); *EEOC v. Mississippi College,* 626 F.2d 477, 488 (5th Cir. 1980) ("the government has a compelling interest in eradicating discrimination in all of its forms").

[5] Title VII provides:

> (a) **Employer practices** It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ***race***, color, religion, ***sex***, or national origin; or

There is, moreover, no less restrictive means of furthering the government's compelling interest than Title VII's proscription of workplace discrimination. Invidious discrimination in and of itself works "a type of personal injury." *Heckler v. Mathews,* 465 U.S. 728, 738 (1984). The Supreme Court has ""repeatedly emphasized [that] ***discrimination itself***, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* at 739-40 (emphasis added; citation omitted); *cf. Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372 (1982) (a black "tester" who applied for housing with no intention of actually renting an apartment suffered "a distinct and palpable injury" sufficient to sue for discriminatory treatment under the Fair Housing Act). Exceptions cannot be made with respect to particular

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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ***race***, color, religion, ***sex***, or national origin.

42 U.S.C. §2000e-2(a) (emphasis added).

persons without compromising Title VII's central compelling purpose of protecting employees from workplace discrimination.

B. "Religious Liberty" has Long Been Cited to Rationalize Discrimination on the Basis of Race

Any suggestion that Title VII's protections of civil rights must yield to religious objections must consider the frequency and the facility with which religious rationales have historically been advanced for discrimination on the basis of characteristics such as race.

Those who today advocate "conscience exemptions" and "conscientious objector" status for people who cite their religion and morality as reasons to discriminate against LGBT people typically ignore the historical importance of religious rationales for white supremacy and segregation. Professor Robin Fretwell Wilson has suggested that discrimination against LGBT people is more defensible than discrimination on the basis of race because, she asserts, the kind of "religious and moral convictions" cited for discriminating against LGBT people "simply cannot be marshaled to justify racial discrimination."[6]

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[6] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS at 101 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin

But Wilson is quite mistaken. Religious rationales for racial discrimination have had remarkably wide currency in American culture. They once were offered in earnest defense of slavery.[7] With

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Fretwell Wilson, eds.; Rowman & Littlefield Publishers for The Becket Fund, 2008). The Heritage Foundation's Ryan T. Anderson quotes Fretwell as gospel truth on the point in his own recent book portraying same-sex couples' right to marry under *Obergefell* as a grave threat to Christians' religious liberty. RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 133 (Washington, D.C.: Regnery Publishing, 2015) (quoting Wilson).

[7] *See e.g.*, JOHN RICHTER JONES, SLAVERY SANCTIONED BY THE BIBLE (Philadelphia: J.B. Lippincott & Co., 1861); THOMAS D. STRINGFELLOW, SCRIPTURAL AND STATISTICAL VIEWS IN FAVOR OF SLAVERY (Richmond, Virginia: J.W. Randolph, 4th ed. 1856); JOSIAH PRIEST, BIBLE DEFENSE OF SLAVERY (Glasgow, Kentucky: W.S. Brown, 1851); RICHARD FURMAN, EXPOSITION OF THE VIEWS OF THE BAPTISTS, RELATIVE TO THE COLOURED POPULATION OF THE UNITED STATES (Charleston: A.E. Miller, 1823); *see generally* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (New York: Oxford University Press, 2002); William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,* 45 GA. L. REV. 657, 665-72 (2011). As it happens, what today is America's largest Protestant denomination was organized at Augusta, Georgia, in May of 1845 to defend the religious liberty of Bible-believing Christians to hold other human beings (of African descent) as slaves. *See generally* MARY BURNHAM PUTNAM, THE BAPTISTS AND SLAVERY 1840-1845 at 46-92 (Ann Arbor: George Wahr Publishers, 1913); H. LEON MCBETH, THE BAPTIST HERITAGE 381-91 (Nashville: Broadman Press, 1987); C.C. GOEN, BROKEN CHURCHES, BROKEN NATION: DENOMINATIONAL SCHISMS AND THE COMING OF THE CIVIL WAR 90-98 (Macon, Georgia: Mercer University Press, 1985); E. LUTHER COPELAND, THE SOUTHERN BAPTIST CONVENTION AND THE JUDGMENT OF HISTORY: THE TAINT OF AN ORIGINAL SIN 7-8 (Lanham, Maryland: University Press of America, rev. ed. 2002). A resolution on the denomination's one-hundred and fiftieth anniversary acknowledged and apologized for "the role that slavery played in the formation of the Southern Baptist Convention." *Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention,* Atlanta, Georgia, 1995, http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention (last visited April 24, 2017).

slavery abolished by the Civil War amendments, proponents of segregation repurposed the white-supremacist theology of slavery, revising it as needed to provide religious justifications for segregation and Jim Crow. "Indeed, Christian theology was 'deeply interwoven' into 'the segregationist ideology that supported the discriminatory world of Jim Crow.'"[8] After the Supreme Court's landmark May 1954 decision striking down racial segregation in public education,[9] a rash of white supremacist sermons and pamphlets cited scripture to justify segregation as God's own plan.[10] In construing RFRA's application to

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[8] GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 145 n.* (New York & London: Liveright Publ. Co., 2017) (quoting Jane Dailey, *Sex, Segregation, and the Sacred after* Brown, 91 J. AM. HIST. 119, 121-22 (2004)); *see also* Eskridge, *Noah's Curse, supra* note 7, at 665-78; Michael Kent Curtis, *A Unique Religious Exemption for Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for those Who Discriminate Against Married or Marrying Gays in Context,* in THE RULE OF LAW AND THE RULE OF GOD 81, 93-94 (Simeon O. Ilesanmi, Win-Chiat Lee & J. Wilson Parker, eds.; New York: Palgrave MacMillan, 2014); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages,* 50 Harv. C.R.-C.L. L. Rev. 99 (2015).

[9] *Brown v. Board of Education,* 347 U.S. 483 (1954).

[10] *See, e.g.,* D.B. RED, A CORRUPT TREE BRINGETH FORTH EVIL FRUIT: A PLEA FOR RACIAL SEGREGATION BASED ON SCRIPTURE, HISTORY AND WORLD CONDITIONS (Hattiesburg, Miss.: self-published, ca. 1956); CAREY DANIEL, GOD THE ORIGINAL SEGREGATIONIST AND SEVEN OTHER SEGREGATION SERMONS (Lawndale, Texas: published by the author, pastor of the First Baptist Church of West Dallas, n.d., ca. 1957); AUSTIN EARLE BURGES, WHAT PRICE INTEGRATION? 99-100 (Dallas, Texas:

Title VII, this Court should not overlook "the testimony of the many who believed," along with the pastor of Montgomery, Alabama's Highland Baptist Church, "that segregation was 'the commandment and law of God.'"[11]

When schools were eventually integrated, local white pastors typically led the resistance – with the Rev. Wesley Pruden and other local clergy, for example, organizing the battle against desegregation in Arkansas at Little Rock's Central High School.[12] Researchers from Harvard University's Laboratory of Social Relations who interviewed thirteen of Little Rock's segregationist clergy, including Pruden himself,

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American Guild Press, 1956) (quoting scripture and citing with approval Pastor Carey Daniel's GOD THE ORIGINAL SEGREGATIONIST); WILLIAM MANLIUS NEVINS, SEGREGATION VERSUS INTEGRATION: AN EXHAUSTIVE STUDY OF THE RACIAL QUESTION, PRESENTING FACTS AND IMPLICATIONS 14 (Columbus, Georgia: The Georgia Tribune Press, n.d., ca. 1959).

[11] Dailey, *supra* note 8, at 122 & n.6 (quoting the pastor of the Highland Baptist Church of Montgomery, as quoted in NEIL R. MCMILLAN, THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-1964, at 174 (Urbana: University of Illinois Press, 1971)).

[12] *See* ERNEST Q. CAMPBELL & THOMAS F. PETTIGREW, CHRISTIANS IN RACIAL CRISIS: A STUDY OF LITTLE ROCK'S MINISTRY 36, 38, 41 (Washington, D.C.: Public Affairs Press, 1959); REED SARRATT, THE ORDEAL OF DESEGREGATION: THE FIRST DECADE 269 (New York & London: Harper & Row, 1966) ("Pruden was affiliated with the Southern Baptist Convention; the others in his group were members of fundamentalist Baptist splinter sects.").

found that they were "armed with the firm conviction that God intends the races to be separate," and were "prepared to quote the Bible chapter and verse to prove it."[13]

Segregationist theology is, moreover, specifically referenced and rejected as a sufficient justification for race discrimination in at least three Supreme Court decisions: *Loving v. Virginia*, 388 U.S. 1, 3 (1967); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n.5 (1968); and *Bob Jones University v. United States,* 461 U.S. 574 (1983).

1. Loving v. Virginia

Patently religious justifications underlay Virginia's law outlawing interracial marriage in *Loving*. When the Supreme Court unanimously struck the law down in 1967, it quoted from the court before whom Richard and Mildred Loving were convicted and sentenced, which had stated the rationale behind Virginia's law banning mixed-race marriages:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for

[13] CAMPBELL & PETTIGREW, *supra* note 12, at 50.

> such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[14]

In 1878, Virginia's Supreme Court had declared: "The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent – all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."[15] By 1955, Virginia's Supreme Court was still holding that people of different races could not marry because "the natural law which forbids their

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[14] *Loving,* 388 U.S. at 3 (quoting the Circuit Court of Caroline County). *See* Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question,* 32 Cardozo L. Rev. 2019, 2073 (2011) ("religious justification for Virginia's statute lurked in *Loving*"); Curtis, *supra* note 8, at 93.

[15] *Kinney v. Commonwealth,* 71 Va. (30 Gratt) 858, 869 (1878); *see* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 71 (New York: Oxford University Press, 2009) (quoting *Kinney*); WERNER SOLLORS, INTERRACIALISM: BLACK-WHITE MARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 96 (Oxford University Press, 2001) (quoting *Kinney*); 1 JOSEPH HENRY BEALE, JR., A SELECTION OF CASES ON THE CONFLICT OF LAWS 93, 98 (Cambridge, Massachusetts: Harvard University Press, 1907) (reprinting *Kinney* in relevant part).

intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures."[16]

Nor were Virginia's courts alone in so holding. "After the Civil War, judges used interracial sex and marriage as a foundational example of the supposed links between the God-given 'natural law' and the 'natural separation of the races' both inside and outside miscegenation law."[17] Pennsylvania's Supreme Court sustained segregation in railroad transportation as part of God's divine plan to keep the races apart, for fear that social mixing could lead to inter-marriage between the races: "God has made them dissimilar, with those natural instincts and feelings which He always imparts to His Creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them."[18] Other states' courts adopted the decision's theological rationale for segregation, parroting its

[16] *Naim v. Naim,* 197 Va. 80, 84, 87 S.E. 2d 749, 752 (Va. 1955).

[17] PASCOE, *supra* note 15, at 71.

[18] *West Chester & Pa. RR v. Miles,* 55 Pa. 209, 213 (Pa. 1867).

warning that "[f]rom social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."[19]

Though *Loving* bluntly acknowledged the view that God condemns interracial marriages, the Supreme Court's opinion never suggested that recognizing Richard and Mildred Loving's right to marry might impinge upon legitimate religious-liberty interests of those who believed God disapproved of the union. The very suggestion would have been deemed preposterous. In fact, the Court derided the religious-liberty defense of discrimination as "patently frivolous" the following year in *Newman v. Piggie Park Enterprises, Inc.*[20]

2. Newman v. Piggie Park Enterprises

Newman v. Piggie Park Enterprises arose under the Civil Rights Act of 1964's provisions banning discrimination on account of race, color, religion or national origin, in restaurants and other public

[19] *See, e.g., Bowie v. Birmingham R.&E. Co.*, 125 Ala. 397, 409, 27 So. 1016, 1020 (1899); *State v. Gibson*, 36 Ind. 389, 405 (1871); *Harris v. Louisville*, 165 Ky. 559, 572 (1915), *rev'd sub nom. Buchanan v. Warley,* 245 U.S. 60 (1917); *Berea College v. Commonwealth*, 123 Ky. 209, 225, 94 S.W. 623, 628 (1906), *aff'd sub nom. Berea College v. Kentucky,* 211 U.S. 45 (1908); *cf. State ex. rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 359 (1872)(Garber, J., dissenting).

[20] 390 U.S. 400, 402 n.5 (1968).

accommodations.[21] L. Maurice Bessinger, the owner of several Charleston, South Carolina restaurants, was a devout Southern Baptist who believed that social mixing of the races violated God's law, and who accordingly insisted on racial segregation by excluding black people from the public dining areas of his restaurants.[22] When three black

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[21] *Id.* at 400-01. For Bessinger's own account of the case, see MAURICE BESSINGER, DEFENDING MY HERITAGE: THE MAURICE BESSINGER STORY (West Columbia, South Carolina: LMBONE-LEHONE Publishing Co., 2001).

[22] Bessinger's February 2014 obituary describes him as "a devout Baptist who supported missionaries abroad." John Monk, *Barbeque eatery owner, segregationist Maurice Bessinger dies at 83*, THE STATE, February 24, 2014 (online at http://www.thestate.com/news/business/article13839323.html (last visited April 22, 2017) (noting that by 2001 Bessinger's restaurants still were "distributing pro-slavery audiotapes and gave customers a discount if they bought his literature," and that Bessinger claimed Antebellum "South Carolina had 'biblical slavery,' . . . which was kinder . . . than other forms of slavery."). In 1952, Bessinger was "married in the First Baptist Church of Orangeburg," BESSINGER, *supra* note 21, at 53, which is affiliated with the Southern Baptist Convention, and which developed its own record of supporting segregation. *See* DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 134-35 & 248 n.7 (Chapel Hill & London: University of North Carolina Press, 2004) (describing correspondence in Southern Baptist Convention archives from "[t]he Rev. Fred Laughon of First Baptist Church, Orangeburg, S.C. (quoting or paraphrasing segregationist leaders in his congregation)"); KATE TEST DAVIS, A CENTURY OF ACHIEVEMENT: THE FIRST BAPTIST CHURCH, ORANGEBURG, SOUTH CAROLINA 26-27 (Orangeburg, South Carolina: First Baptist Church, 1960) (describing the Orangeburg Baptist Church's June 3, 1957, adoption during Rev. Laughon's pastorate of a pro-segregationist resolution expressing the view "that the best interests of both white and negro would be served by having separate schools and that the Kingdom of God will be best served by maintaining separate churches and institutions"). Bessinger's funeral services were held at the First Baptist Church of West Columbia, South Carolina, also a member of the Southern Baptist Convention. *See First Baptist Church of West Columbia: Our History*, http://wcolumbiafirstbaptist.com/?page_id=20 ("The church is actively affiliated with and supports the work of the Lexington Baptist Association, South Carolina

citizens filed suit seeking injunctive relief under Title II of the Civil Rights Act, Bessinger's answer to their complaint declared:

> Defendant Bessinger believes as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God. As applied to this Defendant, the instant action and the Act under which it is brought constitute State inference with the free practice of his religion which interference violates The First Amendment of the United States Constitution.[23]

At trial, Bessinger testified that he was a Baptist, for whom racial segregation "is very much part of my belief as a Christian."[24] Asked for the Biblical basis for his segregationism, Bessinger testified that "in the Old Testament God commanded the Hebrews not to mix with other peoples and races."[25] Bessinger insisted that both Orthodox Jews and

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Baptist Convention, and Southern Baptist Convention. To God Be the Glory!") (posted Oct. 11th, 2012: last visited April 23, 2017).

[23] *Newman v. Piggie Park Enterprises*, Supreme Court Transcript of Record, Appendix at 9a, ¶2 (reproducing Bessinger's February 5, 1965, Answer to the Complaint). Bessinger reiterated his First Amendment defense in his First Amended Answer, filed August 23, 1965, and in a Second Amended Answer filed March 30, 1966. *See, id*., Appendix at 12a, ¶2 (reproducing Bessinger's August 23, 1965, First Amended Answer); *id* at 12a, *Sixth Defense* (reproducing Second Amended Answer).

[24] *Id*. at 124a, 126a (trial transcript at 226, 227).

[25] *Id*. at 126a (trial transcript at 227).

"the Black Moslem" shared his conviction that races must not mix when dining.[26]

The district court properly thought little of Bessinger's free-exercise argument, "that the Act violates his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever.'"[27] Acknowledging Bessinger's "constitutional right to espouse the religious beliefs of his own choosing," the district court "refuse[d] to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."[28]

When Bessinger's case reached the Supreme Court (mainly on issues relating to statutory attorneys' fee awards) the eight justices participating in the case unanimously rejected Bessinger's contention

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[26] *Id*. at 127a-128a (trial transcript at 228-29).

[27] *Newman v. Piggie Park Ent., Inc.,* 256 F.Supp. 941, 944 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir. 1967), *aff'd in relevant part and modified on other grounds,* 390 U.S. 400 (1968); *see Hobby Lobby,* 134 S.Ct. at 2804 (Ginsburg, J., dissenting).

[28] *Newman,* 256 F.Supp. at 945.

that the Civil Rights Act, as applied to him, "'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'"[29] Bessinger's argument that his religious scruples should exempt him from complying with the Civil Rights Act was not just meritless, the Supreme Court found it "so patently frivolous that a denial of counsel fees" to Bessinger's opponents "would be manifestly inequitable."[30]

It is worth noting that the Supreme Court decided *Newman* only a few years after it held in *Sherbert v. Verner,* 374 U.S. 398 (1963), that South Carolina's denial of unemployment benefits to a Seventh-day

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[29] *Newman,* 390 U.S. at 402 n.5 (quoting *Newman v. Piggie Park Enterprises, Inc.,* 377 F.2d 433, 438 (4th Cir. 1967) (en banc) (Winter, J., concurring) (quoting Bessinger's argument below)).

[30] *Newman,* 390 U.S. at 402 n.5; *see* Elizabeth Sepper, *Gays in the Moralized Marketplace,* 7 ALA. C.R. & C.L. L. REV. 129, 129-30 (2015). For Bessinger's account of the case, see MAURICE BESSINGER, DEFENDING MY HERITAGE: THE MAURICE BESSINGER STORY (West Columbia, South Carolina: LMBONE-LEHONE Publishing Co., 2001). Bessinger has actually been lionized in some quarters. *See, e.g.,* ERIC DABNEY & MIKE COKER, HISTORIC SOUTH CAROLINA: AN ILLUSTRATED HISTORY 84 (San Antonio, Texas: South Carolina Historical Society & Lammert Inc.'s Historical Publishing Network, 2006) ("The life of Piggie Park Enterprises founder Maurice Bessinger would make a terrific movie. It would tell the story of a man of humble origins who worked hard all his life to build a multi-million dollar business, and then was willing to risk it all to stand for his principles. The movie might be called *Defending My Heritage*, the title of the book Bessinger wrote about his success in the barbeque restaurant business and to explain his defense of the Southern way of life.").

Adventist who refused to work on her Sabbath placed an "incidental burden on the free exercise of [her] religion" that could be justified only "by a 'compelling state interest.'"[31] *Sherbert* placed on the state the burden of demonstrating that "no alternative forms of regulation" was available to advance that compelling interest without burdening religious exercise.[32] Thus, it was against the background of *Sherbert's* standard for evaluating claimed burdens on free exercise that the Supreme Court dismissed Bessinger's religious-liberty argument – as so utterly frivolous that it warranted shifting his opponents' attorneys' fees as a sanction for misconduct.[33]

Congress of course incorporated legislative findings in RFRA, declaring its purpose as restoring the law before *Employment Division v. Smith,* and thus "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free

[31] *Sherbert,* 374 U.S. at 403 (quoting *NAACP v. Button,* 371 U.S. 415, 438 (1963)); *see id.* at 406-09 (finding no such "compelling state interest").

[32] *Id.* at 407.

[33] *Newman,* 390 U.S. at 402 n.5

exercise of religion is substantially burdened." 42 U.S.C. §2000bb(b)(1). Decided in 1968, right between those two decisions, *Newman* must be understood as consistent with them – and thus as holding that their "compelling interest test," now embodied in RFRA, cannot protect violations of the Civil Rights Act's antidiscrimination provisions.

3. Bob Jones University

A religious-liberty defense of discrimination failed again in 1983 when the Supreme Court held in *Bob Jones University v. United States,*[34] that public policy fully supported denying tax-exempt status to schools discriminating on the basis of race. The Court acknowledged that Bob Jones University's governing sponsors "genuinely believe that the Bible forbids interracial dating and marriage."[35] "Since its incorporation in 1983, Goldsboro Christian Schools," the other educational institution before the Court, also had "maintained a racially discriminatory admissions policy based upon its interpretation of the Bible,"[36] according to which

[34] 461 U.S. 574 (1983).

[35] *Id.* at 580.

[36] *Id.* at 583.

> race is determined by descendance from one of Noah's three sons — Ham, Shem, and Japheth. Based on this interpretation, Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command.[37]

Though the Court accepted the sincerity of these institutions' claimed religious motivations for racial discrimination, an eight-justice majority held that the compelling governmental interest in discouraging discrimination "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs," and that any countervailing interest in religious liberty "cannot be accommodated with that compelling government interest."[38] Only Justice Rehnquist dissented. Although he agreed that Congress could lawfully "deny tax-exempt status to educational institutions that promote racial discrimination," he objected that it had not done so.[39] Not a single justice suggested that denial of tax-exempt status burdened religious exercise in a way that could be accommodated without compromising a compelling governmental interest in discouraging discrimination.

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[37] *Id.* at 583 n.6.

[38] *Id.* at 604.

[39] *Id.* at 613 (Rehnquist, J., dissenting).

Notably, *"Bob Jones* was decided in a strict scrutiny era, before *Employment Division v. Smith* (1990) rendered rational basis review the norm in free exercise cases; even so the university [and the Goldsboro Christian Schools] lost."[40] Thus, its holding is directly relevant to RFRA's provisions restoring the pre-*Smith* regime of strict scrutiny to require a compelling government interest, and mandating that any burden on religious exercise be shown "the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. §2000bb-1(b).

Just like *Bob Jones,* this case involves a compelling governmental interest in discouraging discrimination and, just as in *Bob Jones,* the Harris Funeral Home's religiously motivated desire to discriminate "cannot be accommodated with that compelling government interest."[41]

C. Employers have Offered Religious Rationalizations for Subordinating Women in the Workplace

This brief so far has focused on religious rationalizations for racial discrimination. But religious rationalizations might also be offered

[40] JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 242 (New York: Oxford University Press, 4th ed. 2016).

[41] *Bob Jones University,* 461 U.S. at 604.

grounds for sex discrimination in many ways besides what is specifically at issue in this case.

Employers could, for example, all too easily assert a religious conviction that women's proper place is in the home, raising children and obeying their husbands, rather than in the workplace.[42] The Supreme Court's own Justice Bradley once insisted that states may refuse to let women practice law because "'[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.'"[43] Even Justice Frankfurter authored an opinion of the Court sustaining a Michigan law allowing women to tend bar only in taverns owned by their own husbands or fathers.[44]

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[42] *See Hobby Lobby,* 135 S.Ct. at 2804-05 (Ginsburg, J., dissenting) (citing *In re Minnesota ex rel. McClure,* 370 N.W.2d 844, 847 (Minn.1985) (owners of for-profit health clubs believed that the Bible proscribed employing anyone "living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," or any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)).

[43] *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973) (quoting *Bradwell v. State,* 16 Wall. 130, 141 (1873) (Bradley, J., concurring)); *see also Alexander v. Louisiana,* 405 U.S. 625, 640 (1972)(conc. quoting Justice Bradley); *cf. Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1169 (4th Cir. 1985) (dictum).

[44] *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948) ("Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature."), *overruled by Craig v. Boren,* 429 U.S. 190, 210 n.23 (1976).

Employers also might also offer scriptural excuses for refusing to promote women to positions of authority over men in the workplace. Paul's First Epistle to Timothy, with its statement that "I do not permit a woman to teach or to assume authority over a man," might be cited as a basis for keeping women subordinate to men in the workplace – or even for denying them employment based on their status as women and to keep them home raising children.[45] Paul reportedly advised the Corinthians "that the head of every man is Christ, and the head of the woman is man," 1 Cor. 11:3 (NIV), and to the Ephesians he wrote: "Wives, submit yourselves to your own husbands as you do to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything."

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[45] Paul's First Epistle to Timothy states:

> A woman should learn in quietness and full submission. I do not permit a woman to teach or to assume authority over a man; she must be quiet. For Adam was formed first, then Eve. And Adam was not the one deceived; it was the woman who was deceived and became a sinner. But women will be saved through childbearing—if they continue in faith, love and holiness with propriety.

1 Timothy 2:11-15 (NIV). It appears that some colleges have restricted the courses that women may be employed to teach. *See EEOC v. Mississippi College,* 626 F.2d at 479, 487 & n.12 (noting that Mississippi College "hires only males to teach courses concerning the Bible," and that its president "explained that the practice of not hiring women to teach religion courses was based upon Bible scriptures").

Ephesians 5:22-24 (NIV). These passages carry considerable influence in some circles, and particularly among certain Christians who believe women should remain subordinate to men.[46] They have, moreover, been cited in the past to justify paying women less than men.[47]

Were Harris Funeral Homes to prevail in this case, it is simply too easy to imagine employers invoking scriptural passages to assert a religious belief that women must be subordinate to men in the workplace, and to favor male employees over female employees. In light of the compelling government purpose that Title VII serves, which is

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[46] Inspired by such passages America's largest Protestant denomination, the Southern Baptist Convention, in 1973 formally resolved to "reaffirm God's order of authority for his church and the Christian home: (1) Christ the head of every man; (2) man the head of the woman; (3) children in subjection to their parents--in the Lord." Southern Baptist Convention, *Resolution on the Place of Women in Christian Service,* Portland, Oregon, 1973 (available online: http://www.sbc.net/resolutions/1090/resolution-on-the-place-of-women-in-christian-service).

[47] *See, e.g., Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1392 (4th Cir. 1990) (independent Baptist elementary school paid women teachers less than married men because "[w]hen we turned to the Scriptures . . . we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family . . . thinking our opportunity and responsibility of basing our practice on clear biblical teaching would not be a matter of question"); *EEOC v. Fremont Christian Sch.,* 781 F.2d at 1364 (Assembly of God school cited belief "based on, *inter alia,* Ephesians 5:23, that in any marriage, the husband is the head of the household and is required to provide for that household" as reason for compensating "married male employees at a rate higher than similarly-situated female employees"); *EEOC v. Tree of Life Christian Schools*, 751 F. Supp. 700 (S.D. Ohio 1990) (religious beliefs given as basis for paying married men more than women).

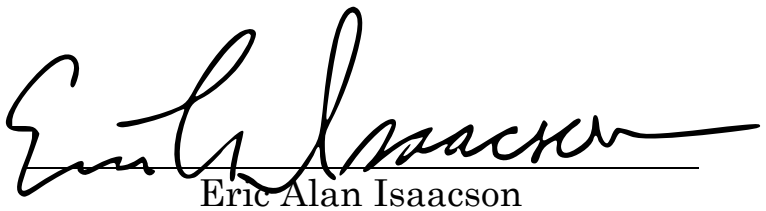
narrowly tailored to that interest – proscribing discrimination – RFRA does not prescribe, and *Hobby Lobby* does not permit, that result.

IV. CONCLUSION

The judgment below should be reversed. Title VII serves a compelling governmental interest in proscribing discrimination. Religious objections offered by those who wish to discriminate cannot be accommodated without compromising that compelling governmental interest.

Respectfully submitted

DATED: April 24,2017



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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

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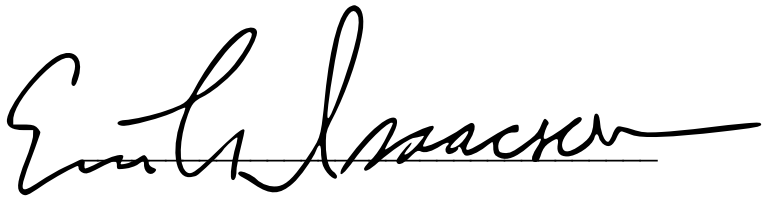

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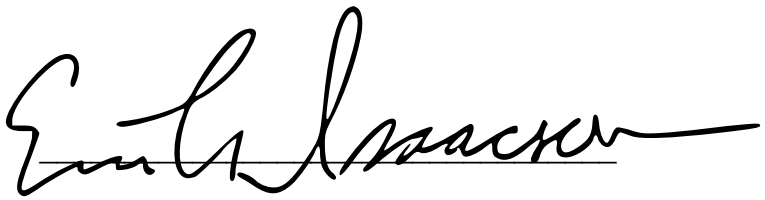

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Document Description	Docket Entry ("DE")	PageID# Range
Affidavit of Thomas Rost	54-2	1325-1338
Summary Judgment Opinion	76	2179-2234