No. 16-2082

In the United States Court of Appeals for the Fourth Circuit

KAY DIANE ANSLEY, *et al.*

Plaintiffs – Appellants,

v.

MARION WARREN, in his official capacity as Director of the North Carolina Administrative Office of the Courts,

Defendant – Appellee.

On Appeal from the United States District Court
For the Western District of North Carolina at Asheville

BRIEF OF THE THOMAS MORE LAW CENTER AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

Richard Thompson
Kate Oliveri
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
Suite J 3200
Ann Arbor, MI 48106
(734) 827-2001
rthompson@thomasmore.org
koliveri@thomasmore.org

Counsel for Amicus Curiae
Thomas More Law Center

B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
tbrooks@mgsattorneys.com

Counsel for Amicus Curiae
Thomas More Law Center

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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If yes, identify entity and nature of interest:

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Thomas More Law Center ("TMLC") is a non-profit, national public interest law firm based in Ann Arbor, Michigan. TMLC defends and promotes America's Judeo-Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. This action implicates weighty issues of religious liberty on which TMLC can provide important perspective due to its years of experience in litigating cases involving the First Amendment's religion clauses. Additionally, TMLC seeks to address in greater detail the impact this Court's decision could have for the free exercise of religion by public employees in North Carolina and elsewhere in the Fourth Circuit.

SOURCE OF AUTHORITY TO FILE

The Thomas More Law Center has filed a motion for leave to file this brief as amicus curiae in support of affirming the District Court's judgment for defendant-appellee. Undersigned counsel has notified counsel for the parties of the intent to seek leave to file this amicus curiae brief. Counsel for plaintiffs-appellants indicated that they take no position on the motion for leave to file, while counsel for defendant-appellee indicated that he does not oppose the motion.

CERTIFICATION PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), it is hereby affirmed that no counsel for any party authored this brief, in whole or in part, and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. It is further affirmed that no person—other than the Thomas More Law Center, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This is not a case about the definition of marriage or even LGBTQ rights generally. Instead, it is a case about whether a private citizen's objection to religious accommodations for governmental employees gives rise to Article III standing. As explained in the well-reasoned brief of defendant-appellee, Supreme Court precedent decidedly answers this question in the negative. Moreover, plaintiffs' position threatens to disrupt the extension of reasonable religious accommodations by governmental employers, with the ultimate result being that persons of faith will be dissuaded from entering public service. Because such a result would undermine, rather than uphold religious liberty, plaintiffs' position should be rejected, and the judgment of the District Court dismissing plaintiffs' complaint should be affirmed.

ARGUMENT

I. A STATE GOVERNMENT CAN AND SHOULD PROTECT THE EXERCISE OF CONSCIENCE BY PERSONS OF FAITH.

A. Religious Beliefs Have Long Received Robust Protection From The Law.

The United States Supreme Court has repeatedly affirmed that "[t]he freedom to hold religious beliefs and opinions is *absolute*." *Braunfeld v. Brown*, 366 U.S. 599, 603, *reh'g denied*, 368 U.S. 869 (1961) (emphasis added) (citing *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) and *Reynolds v. United States*, 98 U.S. 145, 166 (1878)). This freedom finds potent constitutional protection in the First Amendment's Free Exercise Clause. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"); *see also* N.C. Const. art. I, § 13 ("All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."). "The Free Exercise Clause commits government itself to religious tolerance, and . . . all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu*

Aye v. City of Hialeah, 508 U.S. 520, 547 (1993). Moreover, "the guarantee of the Free Exercise Clause . . . is 'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981)). To the contrary, a sincere religious belief may receive protection, even if it is not widely-held by other persons of faith, *see, e.g., Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1212-13 & n.20 (5th Cir. 1991), and furthermore, "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere," *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988).

Religious liberty is also protected by the First Amendment's guarantee of free speech. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]"); *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.") (citations omitted); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) "([T]he right of freedom of thought protected by the

First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") (individual could not be compelled to display message on license plate that offended his religious beliefs). "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760. As such, religious speech has as much ability to occupy the public square as any other form of expression and may not be censored because of its religious content. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993) (school district could not prohibit showing of religious film after hours); *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822-23 (2014) ("[The] government may not seek to define permissible categories of religious speech.").

Similarly, when a government extends a benefit generally, it may not prohibit receipt by those who will utilize that benefit for a religious purpose. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (noting that, in enforcing the Establishment Clause, courts must not "prohibit [a state] from extending its general state law benefits to all its citizens

without regard to their religious belief"). Thus, to cite but one notable example, a state university that generally provides funding to student organizations for printing materials may not withhold those funds from a religious organization simply because they would be used to promote a religious message. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843-44 (1995). "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 839 (citations omitted).

The protections created by the United States Constitution establish a floor, rather than a ceiling, for religious liberty. Thus, the federal government, along with many states, has enacted laws that shield religious beliefs from governmental interference more vigorously than does the First Amendment alone. Two such laws are the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, each of which prevents a law of general application from burdening

the exercise of religion absent the government carrying its burden of proving a compelling governmental interest and use of the least restrictive means of achieving that compelling governmental interest. *See* 42 U.S.C. § 2000bb-1; *id.* § 2000cc-1(a). Furthermore, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment, including public employment, on the basis of religion. *See* 42 U.S.C. § 2000e-2(a); *see also id.* § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief").

So important is the issue of religious liberty that the Supreme Court took pains to note that its decision recognizing a constitutional right to same-sex marriage should not result in limiting the rights of persons of faith. In its opinion, the Court "emphasized that religions, *and those who adhere to religious doctrines*, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (emphasis added). Rather than signal any retreat from the broad protections already granted, the Court went on to note that "[t]he First Amendment ensures that religious organizations and *persons* are given proper protection as they seek to teach the principles

that are so fulfilling and so central to their lives and faiths[.]" *Id.* (emphasis added).

The case currently before the Court tests whether the promise made in *Obergefell* will endure or be treated only as rhetoric to be cast aside when it is no longer expedient.

B. Providing An Accommodation To An Employee Of Faith, As Is Achieved By The Challenged State Statute, Does Not Violate The First Amendment.

The plaintiffs in this case struggle to explain how they have been injured, which is why they attempt to invoke the doctrine of "taxpayer standing."[1] *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) ("[A] plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause."). A reasonable

[1] The Thomas More Law Center agrees with defendant-appellee that the plaintiffs here lack even taxpayer standing. TMLC further agrees with defendant-appellee that the narrow exception for taxpayer standing is limited to federal spending as directed by Congress under its Article I spending powers. Expansion of this exception to the spending of state legislatures is incompatible with the Supreme Court's insistence on the narrowness of the exception, *see Hein*, 551 U.S. at 605-09, and furthermore offends principles of federalism, *cf. Alden v. Maine*, 527 U.S. 706, 714 (1999) ("The States thus retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.") (internal citation omitted).

accommodation of religious faith, though, does not violate the First Amendment. *See, e.g., Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) ("[T]here is ample room for accommodation of religion under the Establishment Clause.") (Establishment Clause not violated by exemption in Title VII for religious employers). Accordingly, plaintiffs cannot establish that they have standing to sue.

Shortly before the announcement of the Supreme Court's opinion in *Obergefell*, the North Carolina General Assembly enacted Senate Bill 2 ("S.B. 2"). Nothing about S.B. 2 precludes or burdens marrying another individual of the same sex. Instead, the law provides, *inter alia*, that magistrates may recuse themselves from performing "all lawful marriages . . . based on any sincerely held religious objection." S.B. 2 § 1 (codified at N.C. Gen. Stat. § 51-5.5). Nevertheless, the chief district court judge is charged with "ensur[ing] that all individuals issued a marriage license seeking to be married before a magistrate may marry." *Id.*; *see also* S.B. 2 § 4 (codified at N.C. Gen. Stat. § 7A-292(b) (setting minimum amount of time that a magistrate must be available in the district to perform marriage ceremonies).

What bothers plaintiffs is that the North Carolina General Assembly decided to recognize reasonable accommodations for state employees who cannot, in good conscience, participate in officiating weddings that would violate the tenets of their faiths. If accepted, however, plaintiffs' position would not mean simply that a person is entitled to a benefit from the state (here, a marriage). Instead, acceptance of plaintiffs' position would mean that a plaintiff could use federal litigation to compel a *particular government employee* to provide that governmental benefit simply because the legislature has taken steps to allow that employee to abide by her conscience. This is a radical position that threatens to undermine all religious accommodation legislation.

United States Supreme Court precedent is unambiguous in holding that the mere creation of a reasonable exemption to accommodate religious beliefs does not constitute establishment of religion in violation of the First Amendment's Establishment Clause. *See, e.g., Amos*, 483 U.S. at 338; *Gillette v. United States*, 401 U.S. 437, 460 (1971) (military draft exemption for conscientious objectors did not violate Establishment Clause); *Walz v. Tax Com. of N.Y.*, 397 U.S. 664,

680 (1970) (exemption for religious organizations from payment of state property tax does not violate Establishment Clause). As a result of this precedent, the federal courts have been largely relieved of adjudicating state government employment policies absent a truly aggrieved party. Plaintiffs, though, seek to change this analysis and characterize such accommodations—at least insofar as they may be attributed to legislative action—as injurious to their own constitutional rights and therefore make them a basis for Article III standing.

Plaintiffs' position here overlooks the fact that the Supreme Court has held that the Constitution itself may compel a religious accommodation. *See, e.g., Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 144-45 (1987) (citing *Wis. v. Yoder*, 406 U.S. 205 (1972) and *Walz*, 397 U.S. 664). Moreover, under Title VII, employers—including governmental employers—must take reasonable steps to accommodate the religious beliefs and practices of their employees. *See* 42 U.S.C. § 2000e *et seq.*; *see, e.g., Rodriguez v. City of Chi.*, 156 F.3d 771, 775-77 (7th Cir. 1998) ("[A]n employer must reasonably accommodate an employee's religious observance or practice[.]") (Roman Catholic police officer was properly accommodated by city under Title VII when it

offered him transfer to district with no abortion clinics). Religious accommodations may also be required under the RLUIPA and RFRA. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784-85 (2015) (striking down HHS contraception mandate under RFRA). Such laws do not give rise to a violation of the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005) (upholding constitutionality of RLUIPA against Establishment Clause challenge); *see also Hankins v. Lyght*, 441 F.3d 96, 108 (2d Cir. 2006) (rejecting argument that RFRA violates the Establishment Clause).

Indeed, the Supreme Court has noted with approval the existence of legislatively enacted religious exemptions to laws of general application. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990). "What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not[.]" *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring)).

Were plaintiffs' position to be accepted, however, a range of statutes aimed at making available religious accommodations could be challenged and overturned as unconstitutional establishments of religion. For example, under plaintiffs' theory, a state legislature could not provide that an assistant district attorney with religious objections to capital punishment may be excused from participating in death penalty prosecutions. A law making clear that Jewish and Muslim workers in state-operated kitchens and cafeterias need not handle pork would likewise fall within these crosshairs. So, too, would a statute that required the state to provide accommodations to its employees for leave on religious holidays.

A public employee should not be forced to decide between following her chosen career and following the teachings of her faith. *See generally Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). Ultimately, it is plain that, if plaintiffs' conception of what constitutes establishment of a religion is accepted, then religious accommodations would quickly disappear from state employment. Public sector employment would become incompatible with and even hostile to the exercise of faith, and religious individuals would be driven out of public

service. *See, e.g.,* Peter Kirsanow, in *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Rights*, at 111, United States Commission on Civil Rights (2016), *available at* http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF (last visited Jan. 24, 2017) ("Refusing to provide robust protection of First Amendment rights is a dangerous narrowing of our freedom. People who live in accordance with their unfashionable religious beliefs will be unable to work in many professions . . . Traditional believers will have very few careers where they can both make a living and live according to their faith."). This result is impossible to square with principles of tolerance, the protection of conscience, or the constitutional guarantee of free exercise of one's religion and should therefore be rejected.

II. THE STATE STATUTE AT ISSUE IS A REASONABLE MEASURE DESIGNED TO PROTECT THE RELIGIOUS LIBERTIES OF STATE EMPLOYEES.

The constitutional right of one person to marry another of the same sex is new, to say the least. The earliest judicial suggestion that the law compels legal recognition of same-sex unions came in a 1993 decision of the Hawaii Supreme Court. *See Baehr v. Lewin*, 852 P.2d 44 (Haw.1993) (holding that a statute restricting marriage to opposite-sex

individuals mandated strict scrutiny). In response to this decision, bipartisan majorities in Congress passed the Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419, which was signed by President Bill Clinton on September 21, 1996. *See, e.g.,* 1 U.S.C. § 7 ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

By the time of the Supreme Court's 2015 decision in *Obergefell*, a majority of states possessed state constitutional or statutory provisions defining marriage as a union between one man and one woman. *See, e.g.,* Pew Research Center, *Same-Sex Marriage, State by State* (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ (last visited Jan. 24, 2017). The voters in one of those states, North Carolina, had passed an amendment to the state constitution in 2012 prohibiting state recognition of same-sex marriage by a margin of approximately 61% to 39%.[2] *See* North Carolina State Board of Elections, Official Results: May 8, 2012 Primary Election, http://results.enr.clarityelections.com/NC/36596/85942/en/summary.htm

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[2] Previously, marriage was defined by state statute as a union between a man and a woman. *See* N.C. Gen. Stat. § 51-1.2.

l (last visited Jan. 24, 2017). At the time of this vote by the people of North Carolina, even then-President Obama was on record opposing same-sex marriage. *See, e.g.,* Tom Curry, *The 'Evolution' of Obama's Stance on Gay Marriage*, MSNBC.com (May 9, 2012 2:36 pm), http://nbcpolitics.nbcnews.com/_news/2012/05/09/11623172-the-evolution-of-obamas-stance-on-gay-marriage?lite (last visited Jan. 24, 2017).

While *Obergefell* swept away numerous state laws, the religious definition of marriage retains its traditional meaning for millions of Americans of faith. For example, according to Roman Catholicism, marriage is one of the seven sacraments of the Church and is the means "by which *a man and a woman* establish between themselves a partnership of the whole of life." *Catechism of the Catholic Church*, Part Two, Sect. Two, Chpt. Three, Art. 7, Par. 1601, *available at* http://www.vatican.va/archive/ENG0015/__P50.HTM (last visited Jan. 24, 2017) (emphasis added). Numerous other faiths, including non-Christian faiths, likewise continue to adhere to the traditional definition of marriage. In point of fact, the religious denomination in the State of North Carolina with the single largest membership is the

Southern Baptist Convention. *See, e.g.,* Rebecca Tippett, *Religion in North Carolina: Southern Baptists Dominate, Catholicism and Non-Denominational Affiliation Rising*, UNC Carolina Demography Center, (June 2, 2014), http://demography.cpc.unc.edu/2014/06/02/religion-in-north-carolina-southern-baptists-dominate-catholicism-and-non-denominational-affiliation-rising/ (last visited Jan. 24, 2017). The SBC officially holds that "[m]arriage is the uniting of *one man and one woman* in covenant commitment for a lifetime" and does not recognize same-sex unions. Southern Baptist Convention, *Basic Beliefs: Family*, *available at* http://www.sbc.net/aboutus/basicbeliefs.asp (last visited Jan. 24, 2017) (emphasis added).

S.B.2 is a reasonable measure in the spirit of the RLUIPA and RFRA and is designed to accommodate the religious liberties of state employees with sincerely held religious beliefs. The statute does not purport to allow a state employee to deny any person the means by which to become married. To the contrary, the statute ensures that, even if the beliefs one or more state employees must be accommodated, the state itself will nonetheless provide the means to guarantee the newly recognized constitutional right to marry an individual of the

same sex. In so doing, it protects the consciences and faiths of those employees who might otherwise be dissuaded from public service because they would be compelled to participate in an action that violates their religion.

More than seventy years ago, Justice Robert Jackson wrote that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Unfortunately, in the twenty-first century, the venerable principle embodied in these famous words has come under legal assault. Too often now the law is used as a bludgeon to punish those who refuse to express ideas inimical to their faith. *See, e.g.*, Eugene Volokh, *Massachusetts Churches May be Covered by Transgender Discrimination Bans as to Secular Events*, The Volokh Conspiracy (Wash. Post website) (Sept. 8, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/08/massachusetts-churches-may-be-covered-by-transgender-discrimination-bans-as-to-secular-events/?utm_term=.2c96851e49fa

(last visited Jan. 24, 2017); *see generally* Mary Eberstadt, *It's Dangerous to Believe: Religious Freedom and Its Enemies* 86-100 (2016) (describing, among other things, various forms of litigation and laws that have targeted Catholic institutions, including foster care, adoption services, hospitals, and shelters, due to their adherence to traditional Catholic teachings). Granting standing for the plaintiffs in this case would add another means by which to silence those who seek to practice their faith while remaining in public service.

Fidelity to our nation's tradition of religious liberty demands tolerance of divergent beliefs. To that end, Congress and state legislatures must have the freedom to develop policies that will accommodate the religious views of diverse government employees. Providing a reasonable accommodation to a public employee does not offend the First Amendment and does not otherwise injure parties like the plaintiffs here.

CONCLUSION

Accordingly, this Court should affirm the District Court's dismissal of this action.

ORAL ARGUMENT STATEMENT

Pursuant to Rule 29(a)(8) of the Federal Rules of Appellate Procedure, if the Court sets this matter for oral argument, the Thomas More Law Center would respectfully request the ability to participate in oral argument for such amount of time as might be deemed appropriate by the Court.

Respectfully submitted,

Richard Thompson
Kate Oliveri
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
Suite J 3200
Ann Arbor, MI 48106
(734) 827-2001
rthompson@thomasmore.org
koliveri@thomasmore.org

Counsel for Amicus Curiae
Thomas More Law Center

s/ B. Tyler Brooks
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
tbrooks@mgsattorneys.com

Counsel for Amicus Curiae
Thomas More Law Center

Dated: January 24, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 3,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century font.

s/ B. Tyler Brooks
B. Tyler Brooks
Counsel for Amicus Curiae
Thomas More Law Center

Dated: January 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on January 24, 2017, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

s/ B. Tyler Brooks
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
tbrooks@mgsattorneys.com

Counsel for Amicus Curiae
Thomas More Law Center

Dated: January 24, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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____________________ as the

(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

s/ B. Tyler Brooks
(signature)

B. Tyler Brooks
Name (printed or typed)

919-836-0090
Voice Phone

Millberg Gordon Stewart PLLC
Firm Name (if applicable)

919-836-8027
Fax Number

1101 Haynes Street, Suite 104
Raleigh, NC 27604
Address

tbrooks@mgsattorneys.com
E-mail address (print or type)

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I certify that on January 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 serving a true and correct copy at the addresses listed below:

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