No. 16-2082
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KAY DIANE ANSLEY; CATHERINE MCGAUGHEY; CAROL ANN PERSON; THOMAS ROGER PERSON; KELLEY PENN; SONJA GOODMAN,

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 AMICUS CURIAE BRENDA BUMGARNER IN SUPPORT OF DEFENDANT-APPELLEE, SEEKING AFFIRMANCE

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STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Appellees have consented to the filing of this brief. Appellants have indicated that they take no position. Amicus Curiae Brenda Bumgarner has filed a Motion for Leave to File concurrently with the submission of this proposed amicus brief.

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or her counsel made a monetary contribution to its preparation or submission.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is not required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-2082

Caption: Ansley et. al. v. Warren

Pursuant to FRAP 26.1 and Local Rule 26.1, Brenda Bumgarner who is Amicus Curiae (appellant/appellee/petitioner/respondent/amicus/intervenor) makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

NO

2. Does party/amicus have any parent corporations?

NO

If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

NO

If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?

NO

If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Mary E. McAlister Date: January 24, 2017

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

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:

/s/ Mary E. McAlister (signature) January 24, 2017(date)

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INTEREST OF AMICUS

Amicus Curiae Brenda Bumgarner has served as a Magistrate in Alexander County, North Carolina for more than ten years. As a magistrate whose duties include solemnization of marriages, Ms. Bumgarner has been directly and deeply impacted by the conflict between same-sex marriage and her sincerely held religious beliefs regarding marriage. She was a Jane Doe plaintiff in the North Carolina Superior Court case *Charlie Smoak, et al. v. John W. Smith, et al.*, which challenged the Administrative Office of the Courts' ("AOC") mandate that magistrates solemnize same-sex relationships as marriages regardless of sincerely held religious beliefs, and in which she sought a reasonable accommodation for her conscience and religious beliefs. The lawsuit was voluntarily dismissed without prejudice following the enactment of Senate Bill 2 ("SB2"), the statute challenged in this action, which provided the reasonable accommodation that Ms. Bumgarner and other plaintiffs had sought. Ms. Bumgarner has benefited directly from the reasonable accommodation provided by SB2, recusing herself from performing all marriages as permitted under SB2, and thereby preserving her religious beliefs and retaining her position. Ms. Bumgarner also sought to intervene as a Defendant in this action challenging the constitutionality of SB2. The district court denied Ms. Bumgarner's motion to intervene without prejudice on August 12, 2016.

As a magistrate judge whose conscience and sincerely held religious beliefs were threatened by the AOC's mandate and are now protected by SB2, Ms. Bumgarner has a personal stake in the outcome of this appeal, as well as firsthand knowledge of the effects of government mandates that conflict with cherished First Amendment rights. Ms. Bumgarner wants to provide this Court with critical information regarding the essential constitutional freedoms that are at stake. Ms. Bumgarner respectfully submits that this information will be important in the Court's analysis of the claims presented. On these bases, Amicus respectfully submits this Brief for the Court's consideration.

INTRODUCTION

When the North Carolina Legislature overrode Governor Pat McCrory's veto of Senate Bill 2, Brenda Bumgarner and fellow magistrates regained the constitutional rights that had been taken from them when the Administrative Office of the Courts ("AOC") ordered that all magistrates in North Carolina must solemnize same-sex relationships as "marriages" or face disciplinary action, including possible fines and loss of their jobs. The AOC ordered that no exemptions or accommodations would be made, including reasonable accommodations for sincerely held religious beliefs that only the union of one man and one woman can be solemnized as a marriage. Magistrates who held those religious beliefs and convictions, such as Ms. Bumgarner, were given the Hobson's

choice of surrendering their sincerely beliefs and violating their conscience or losing their jobs.

The AOC's refusal even to consider accommodating the religious beliefs of magistrates such as Ms. Bumgarner violated the First Amendment of the United States Constitution and Article I, §13 of the North Carolina Constitution, under which the government may **and sometimes must** accommodate the religious beliefs of its citizens. *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 287 (4th Cir. 2000). The AOC's directive also violated Title VII of the Civil Rights Act of 1964, which requires that employers, including the government, reasonably accommodate the religious beliefs and practices of their employees. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir. 1996).

SB2 resolved these conflicts and re-established the primacy of the free exercise and conscience rights of North Carolina magistrates by providing them with the opportunity to recuse themselves from performing **all** marriages, thereby avoiding the conflict between their beliefs and mandates requiring the solemnization of same-sex relationships. At the same time, **SB2 grants same-sex couples the same access to a magistrate as is available to other couples** by providing that a judicial officer be available during hours designated for marriages,

even if an officer has to come from another county or assume duties he otherwise does not normally assume. N.C GEN. STAT. §51-5.5(c).

Therefore, SB2 appropriately balances the free exercise rights and rights of conscience guaranteed to magistrates (as to all other citizens), with the rights granted to same-sex couples to have their relationships solemnized as "marriages." SB2 is not only reasonable and permissible, but is actually **required** to prevent the state from violating the U.S. and North Carolina constitutions and Title VII.

ARGUMENT

I. BY ENACTING SB2, THE LEGISLATURE HAS CREATED A RELIGIOUS ACCOMMODATION FOR MAGISTRATES AS IS REQUIRED UNDER BOTH THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS.

A. SB2 Preserves And Protects The Free Exercise And Conscience Rights Guaranteed To All North Carolina Citizens Under The United States And North Carolina Constitutions.

As citizens of the State of North Carolina, Ms. Bumgarner and her fellow magistrates are constitutionally guaranteed the right to freely exercise their religion and maintain their conscience inviolate. Under the First Amendment of the United States Constitution citizens are protected from laws restricting the free exercise of religion. Citizens of North Carolina have even greater protections under Article I, §13 of the state constitution: "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." North Carolina's constitutional protection of religious liberty, like its United States' counterpart, acknowledges that "[t]he free exercise of religion is impaired not only by governmental prohibition of that which one's religious belief demands but also by governmental compulsion of that which one's religious belief forbids." *In re Williams*, 152 S.E.2d 317, 326 (N.C. 1967), *cert. denied*, 388 U.S. 918 (1967). That was the situation faced by Ms. Bumgarner and fellow magistrates, whose sincerely held religious beliefs dictate that marriage is the union of one man and one woman and forbid them from solemnizing any other relationship as marriage, but who were ordered by the AOC to solemnize same-sex relationships or face disciplinary action.

SB2 was enacted to preserve the guarantees of both the First Amendment and Article I §13 for Ms. Bumgarner and other civil servants. As the North Carolina Supreme Court stated:

> The freedoms protected by these constitutional provisions are not limited to clergymen. Indeed, they are not limited to members of an organized religious body, and consequently, **are not contingent upon proof that others share the views of the individual** who asserts his own constitutional right to the freedom to exercise his religion or "right of conscience."

Id. at 325 (emphasis added). In addition, "[t]he constitutional provisions extend their protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many." *Id.* The AOC's mandate that magistrates must solemnize same-sex relationships or face disciplinary action, issued with no

exemption or reasonable accommodation for sincerely held religious beliefs, conflicted with the United States and North Carolina constitutions and the North Carolina Supreme Court's zealous protection of the free exercise and conscience rights of all citizens. The North Carolina Legislature enacted SB2 to resolve that conflict and restore to magistrates the religious rights guaranteed to them as citizens of the state. SB2 was necessary to ensure that the magistrates' conscience and rights to free exercise were not violated.

B. Religious Accommodations Such As SB2 Are In Keeping With The Historical Understanding Of Religious Free Exercise In The First Amendment.

Studying the history of the Republic prior to and contemporaneous with the passage of the U.S. Constitution and the First Amendment reveals that free exercise exemptions such as SB2 are more consistent with the original understanding than are concepts such as facially neutral legislation or religion-free public workplaces.[1]

> [T]he record shows that exemptions on account of religious scruple should have been familiar to the framers and ratifiers of the free exercise clause. **There is no substantial evidence that such exemptions were considered constitutionally questionable**, whether **as a form of establishment** or as an invasion of liberty of conscience. Even opponents of exemptions did not make that claim. **The modern argument against religious exemptions, based on the establishment clause, is thus historically unsupportable.** Likewise unsupportable are suggestions that free exercise of religion is limited

[1] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990).

> to opinions or to profession of religious opinions, as opposed to conduct….[2]
>
> Indeed, the evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the "universal sovereign" precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by nature and scope of religious duty. A religious duty does not cease to be a religious duty merely because the legislature [or in this case, the AOC] has passed a generally applicable law [or regulation] making compliance difficult or impossible.
>
> Moreover, in the actual free exercise controversies in the colonies and states prior to passage of the first amendment, the rights of conscience were invoked in favor of exemptions from such generally applicable laws as oath requirements, military conscription, and ministerial support. Many of the framers, including Madison, a majority of the House of Representatives in the First Congress, and the members of the Continental Congress of 1775, believed that a failure to exempt Quakers and others from conscription would violate freedom of conscience. These experiences, while not so frequent or notorious as to warrant firm conclusions, nonetheless suggest that exemptions were part of the legal landscape. They are sufficient to shift the burden of persuasion to those who contend that the free exercise clause precludes exemptions.[3]

Consequently, as this Court and the United States Supreme Court have repeatedly recognized, the government may, **and sometimes must**, accommodate religious practices. *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 287 (4th Cir. 2000) (citing *Hobbie v. Unemployment Appeals Comm'n*, 480

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[2] *Id.* at 1511-12 (emphasis added).

[3] *Id.* at 1512-13.

U.S. 136, 144 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). *See also, City of Boerne v. Flores*, 521 U.S. 507, 558 (1997) (O'Connor, J., dissenting) ("[L]ong before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation."). As this Court said in upholding Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), "[o]ur society has a long history of accommodation with respect to matters of belief and conscience." *Madison v. Riter*, 355 F.3d 310, 321 (4th Cir. 2003). "If Americans may not set their beliefs above the law, there must be room to accommodate belief and faith within the law." *Id.*at 321-22. "**[L]egislative bodies have every right to accommodate free exercise, so long as government does not privilege any faith, belief, or religious viewpoint in particular**." *Id.* at 322 (emphasis added).

As was true of Section 3 of RLUIPA, SB2 "fits comfortably within this broad tradition." *Id.* This is particularly true in light of SB2's broad language. "Every magistrate has the right to recuse from performing **all** lawful marriages under this Chapter based upon any sincerely held religious objection." N.C GEN. STAT. §51-5.5(a) (emphasis added). The inclusive and general wording of the statute reveals the legislature's intent to accommodate the free exercise of any and all religions with regard to all types of marriages as defined by the state, as opposed to targeted protection of a particular religious tradition's beliefs regarding

particular types of marriages. As was true with RLUIPA's Section 3, SB2 does not privilege any faith, belief or religious viewpoint in particular, and is, therefore, in keeping with the long-established tradition of accommodating religion.

C. SB2 Strikes The Proper Balance Between Free Exercise Rights And The Establishment Clause.

Accommodating religious beliefs and conscience through exemptions such as SB2 has been recognized by this Court and the U.S. Supreme Court as striking the proper balance between the promises of the Free Exercise Clause and the prohibitions of the Establishment Clause. Reiterating that religious accommodation is sometimes required by the Free Exercise Clause, this Court has explained how such accommodations balance the sometimes competing provisions in the First Amendment:

> Just as the Free Exercise Clause does not give the citizen having religious scruples an absolute right to escape the burdens of otherwise valid, neutral laws of general applicability,…neither does the Establishment Clause preclude a government from "accommodating" religious scruple by, for example, voluntarily exempting those with the particular religious scruple from the burden imposed by the legislation, even though the Constitution would not, in that circumstance, oblige an accommodation.

Brown v. Gilmore, 258 F.3d 265, 274 (4th Cir. 2001) (citing *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 881–82, 890 (1990)). "This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government

would find itself effectively and unconstitutionally promoting the absence of religion over its practice." *Ehlers–Renzi*, 224 F.3d at 287.

The Supreme Court has long held that "[t]here is ample room for accommodation of religion under the Establishment Clause" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). **That room includes spending public funds for accommodations**. *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2781 (2014). In fact, dollars spent to provide religious accommodation cannot be deemed an Establishment Clause violation if certain statutes (*e.g.*, RFRA or RLUIPA) require the Government to expend additional funds to accommodate religious beliefs. *Id.* Therefore, the hypothetical fact that a county might occasionally spend some public funds to provide marriage solemnizations in counties where all magistrates might recuse themselves under SB2 would not create an Establishment Clause violation.

In fact, the Supreme Court has repeatedly rejected the argument that religious exemptions violate the Establishment Clause.

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 669 (1970). Citing *Walz*, the Supreme Court unanimously upheld Section 3 of RLUIPA, which protects the free exercise rights of institutionalized people, because "[o]ur decisions recognize that 'there is room for play in the joints' between the [religion] Clauses,…some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Even while invalidating a religious exemption as impermissibly benefitting one particular sect, the Supreme Court emphasized that such exemptions are generally permissible under the Establishment Clause. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). "[W]e do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Id.*

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890.

The critical factor, and one that was absent in the provision invalidated in *Grumet*, is that "neutrality as among religions must be honored." *Id.* at 707. That

factor is indisputably present in SB2, which permits recusal from solemnizing marriages based "upon **any** sincerely held religious objection." N.C GEN. STAT. §51-5.5(a) (emphasis added). Therefore, as is true of Section 3 of RLUIPA and property tax exemptions for real property used for religious purposes, SB2 creates a religious accommodation that properly balances the free exercise rights of magistrates and the prohibition against government establishment of religion. *See Cutter*, 544 U.S. at 719; *Walz*, 397 U.S. at 669.

D. SB2 Ensures That Public Employees Are Not Forced To Surrender Their Free Exercise Rights When They Accept Public Employment.

When it enacted SB2, the North Carolina Legislature protected the free exercise rights of Ms. Bumgarner and other magistrates who otherwise faced the Hobson's choice of renouncing their sincerely held religious beliefs or losing their jobs and livelihoods. The Supreme Court has unequivocally rejected the idea that citizens can be compelled to relinquish First Amendment rights when they accept public employment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See also, Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

> After all, public employees do not renounce their citizenship when they accept employment, and **this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights**.

Lane v. Franks, 134 S. Ct. 2369, 2377 (2014) (emphasis added) (citing *Keyishian*, 385 U.S. at 605). "There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. 'Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government.'" *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386–87 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

While many of the above-cited cases addressed free speech rights, the Supreme Court has made it clear that public employees' free exercise rights are also protected. *Hobbie*, 480 U.S. at 144. In *Hobbie*, the Court flatly rejected the proposition that it constituted actionable misconduct, *i.e.*, intentional disregard of the employer's interests, for a public employee to "adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs." *Id.* at 143-44. "The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." *Id.* at 144. "The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved." *Id.* The Court compared the burden imposed on Ms. Hobbie to that imposed on religious adherents in *Sherbert v. Verner*, 374 U.S. 398 (1963) and

Thomas v. Review Board, 450 U.S. 707 (1981), *i.e.*, the employee is "forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." *Id.* Similarly here, the AOC's mandate forced Ms. Bumgarner and other magistrates to choose between fidelity to their religious beliefs and continued employment so as to constitute a substantial burden on their sincerely held religious beliefs. By enacting SB2, the legislature ensured that the state's public servants are not deprived of their fundamental rights under both the U.S. and North Carolina constitutions. This is in keeping with this Court's determination that "legislative bodies have every right to accommodate free exercise, so long as government does not privilege any faith, belief, or religious viewpoint in particular." *Riter*, 355 F.3d at 322.

E. SB2 Protects Magistrates From An Impermissible Religious Test For Public Office.

SB2 also protects magistrates such as Ms. Bumgarner from an administrative mandate that acted as a *de facto* religious test for public service, in violation of the U.S. Constitution. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3. If the AOC's directive had been permitted to stand, then magistrates whose religious beliefs prohibit them from solemnizing same-sex relationships would be precluded from serving as magistrates. This would have effectively created a religious test.

i.e., those who have sincerely held religious beliefs about marriage as the union of one man and one woman would be disqualified from serving.

Such a requirement resembles a Maryland constitutional provision invalidated by the Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961). The provision at issue in *Torcaso* required that candidates for public office declare a belief in God, which the Court said constituted "a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland." *Id.* at 489-90. "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.'" *Id.* at 490. Such provisions are "abhorrent to our tradition," memorialized in Article VI, of putting the people "securely beyond the reach" of religious test oaths. *Id.* at 491 (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). Likewise, the AOC's directive put the power and authority of the State of North Carolina on the side of those who are willing to say that marriage is not limited to the union of one man and one woman as provided in the Judeo-Christian scriptures, creating the very kind of "abhorrent" religious test invalided in *Torasaco*. SB2 corrects that error and puts magistrates "securely beyond the reach" of a religious test.

II. BY ENACTING SB2, THE LEGISLATURE ACTED IN ACCORDANCE WITH ITS OBLIGATIONS UNDER TITLE VII TO ACCOMMODATE THE MAGISTRATES' FREE EXERCISE RIGHTS.

As well as protecting magistrates' rights under the U.S. and North Carolina constitutions, SB2 provides the religious accommodation necessary to comply with Title VII of the Civil Rights Act of 1964. Title VII makes it an unlawful employment practice 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." 42 U.S.C. §2000e-2(a)(1). Although Title VII similarly lists religion, sex, and race as illegal classifications, "the definition of 'religion' in the statute places it in a special category." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (1996). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* (citing 42 U.S.C. § 2000e(j)). Therefore, employers can be liable not only for disparate treatment based upon religious observance or practice, but also for a failure to "accommodate" an employee's religious expression. *Id.* (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977)). In *Hardison*, the Supreme Court explained that employers must provide reasonable accommodations of employees' religious practices unless the

employer can demonstrate that such accommodations will create an undue hardship. *Hardison*, 432 U.S. at 75; *See also, E.E.O.C. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (citing *Hardison*). As this Court clarified in *Chalmers*,

> In a religious accommodation case, an employee can establish a claim even though she cannot show that other (unprotected) employees were treated more favorably or cannot rebut an employer's legitimate, non-discriminatory reason for her discharge. **This is because an employer must, to an extent, actively attempt to accommodate an employee's religious expression or conduct** even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge.

Chalmers, 101 F.3d at 1019 (emphasis added).

The requirement for reasonable accommodation of religious beliefs and conduct extends to public employers such as the State of North Carolina. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (applying the reasonable accommodation standard to a public school district). Courts have even extended the concept of reasonable accommodation under Title VII to first responders and emergency medical personnel, albeit with a lower threshold for what is reasonable in recognition of public health and safety concerns associated with their positions. *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 228 (3d Cir. 2000) (nurse in neonatal ICU); *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir.1998) (police officer); *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1473 (9th Cir. 1996), as amended (Nov. 19, 1996) (border station

officer); *Beadle v. City of Tampa*, 42 F.3d 633, 637 (11th Cir. 1995) (finding that a police department was not required to alter its rotating shift schedule because, "[w]hen the employer's business involves the protection of lives and property, courts should go slow in restructuring [its] employment practices.").

If government employers are required to make reasonable accommodations for employees' religious beliefs and conduct even for first responders and medical personnel, then they certainly must make such accommodations for employees such as county clerks and magistrates, whose jobs do not affect public health and safety as directly and immediately as first responders.[4]

> The clerk's office is not charged with public safety, and clerks are not responsible for matters of life and death as part of their job. Moreover, clerks process applications that involve no real discretion.[5]

Unlike situations involving criminal activity or medical emergencies, the magistrates' ability to serve the public by solemnizing marriages "is unlikely to be threatened by shuffling what is a rote, infrequent, predictable task to co-workers who have no objection."[6] Because of the demands of Title VII the State of North Carolina could not do as the AOC attempted to do, *i.e.* require that all magistrates

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[4] Robin Fretwell Wilson, *Insubstantial Burdens: The Case For Government Employee Exemptions To Same-Sex Marriage Laws*, 5 NW J. L. & SOC. POL'Y 318, 358 (2010).

[5] *Id.*

[6] *Id.*

must officiate same-sex ceremonies as a condition of employment or face termination.[7]

> Title VII sets up the norm that not only should the government accommodate the employee if it reasonably can without undue hardship, but that the accommodation should reasonably preserve that employee's employment status. Thus, it would seem insufficient without more to simply say to religious objectors "put up or shut up."[8]

The common refrain repeated by the AOC, *i.e.*, that religious objectors in government service should do all of their job or resign, disregards the government employers' obligations under Title VII and also "conflates the public receipt of a service offered by the state with the receipt of that service from each and every employee in the office who is available to do it." [9] While courts have ordered that same-sex couples can receive marriage licenses and have their marriages solemnized by magistrates, that does not mean that they have the right to receive the service on demand from all magistrates, including those magistrates whose conscience would be profoundly violated by that act.[10] Instead, the state can, and, under Title VII, must, establish procedures that provide marriage solemnization services to all those qualified to receive them while accommodating the sincerely

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7 *Id.* at 357.

8 *Id.*

9 Robin Fretwell Wilson, *The Calculus Of Accommodation: Contraception, Abortion, Same-Sex Marriage, And Other Clashes Between Religion And The State*, 53 B.C. L. REV. 1417, 1482 (2012).

10 *Id.*

held religious beliefs of magistrates.[11] Without such protections, magistrates will face the "cruel choice: your conscience or your livelihood."[12] As the Supreme Court has said, such Hobson's choices are impermissible. *Hobbie*, 480 U.S. at 144, *Sherbert*, 374 U.S. 398; *Thomas*, 450 U.S. 707.

This is particularly true in light of the fact that solemnizing same-sex relationships is a very recent phenomenon which was not even considered possible when Ms. Bumgarner took her oath of office. When she agreed to faithfully fulfill her duties as a magistrate more than 10 years ago, Ms. Bumgarner understood that her duties would include solemnizing marriages, which for hundreds of years had consisted solely of the union of one man and one woman. It was the law that changed, not Ms. Bumgarner's religious convictions, and, in a tolerant and civilized nation with a rich tradition of religious liberty, the law should (and indeed must) afford a means for Ms. Bumgarner to continue in her faith.

Solemnizing marriages is unlike providing other goods and services which are not imbued with religious meaning.[13]

> Many laws prohibiting discrimination on the basis of race and other prohibited classifications date to the 1960s and 1970s, long before same-sex marriage was widely considered. These laws largely address commercial services, like hailing taxis, ordering burgers, and leasing apartments, for which it is hard to imagine that a refusal to serve another individual can reflect anything other than animus toward that

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11 *Id.* at 1487-89.

12 *Id.* at 1477.

13 *Id.* at 1476.

> individual. Refusals to assist a same-sex marriage are different in character, however–they can stem from something other than anti-gay animus. For many people, marriage is a religious institution and wedding ceremonies are a religious sacrament. For them, assisting with marriage ceremonies has a religious significance that ordering burgers and hailing taxis simply do not have. Many of these people have no objection generally to providing services to lesbians and gays, but they would object to facilitating a marriage directly–just as some religious believers would object to facilitating an interfaith or second marriage.[14]

Therefore, compelling magistrates to solemnize marriages is wholly different from compelling restaurant owners to serve or hire minorities, which was the impetus for Title VII and the rest of the Civil Rights Act. This makes the Hobson's choice all the more insidious, particularly in light of the fact that many magistrates have held their positions for many years and accrued certain salaries and benefits that would be particularly devastating to lose.

> Moreover, dismissal or resignation will likely be very costly for these employees. A job in the state licensure office pays well, and many long-time employees have built up retirement and other benefits that would be wiped out or significantly curtailed if they felt forced to exit rather than violate a religious conviction.[15]

These are the kinds of devastating consequences Ms. Bumgarner and other magistrates faced as a consequence of the AOC's ultimatum, which also made the state liable for violations of Title VII by categorically denying any religious accommodation for magistrates.

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14 *Id.* at 1476-77.

15 *Id.* at 1484.

SB2 provides the religious accommodation required under Title VII in a manner that allows same-sex couples to have their ceremonies solemnized **under the same terms as other couples**. The Legislature carefully crafted SB2 to provide the same availability of solemnization ceremonies as was present prior to the court orders granting same-sex couples the right to receive marriage licenses. At the same time, SB2 protects the conscience and free exercise rights of magistrates in a way that does not favor or disfavor any religious denomination or target any particular couple seeking marriage solemnization. Magistrates like Ms. Bumgarner can continue to serve the people of North Carolina without sacrificing their fundamental constitutional rights.

The Legislature acted in accordance with its obligations under Title VII when it enacted SB2. This Court should reject the Appellants' attempts to overturn SB2 and affirm the district court's ruling dismissing the claims.

CONCLUSION

SB 2 is constitutionally and statutorily necessary to preserve and protect the fundamental free exercise and conscience rights of North Carolina's magistrates. The state's zealous protection of sincerely held religious beliefs in its Constitution, coupled with the protections afforded by the U.S. Constitution and Title VII, mean that magistrates such as Ms. Bumgarner must be granted reasonable accommodations in carrying out their duties. SB2 accomplishes that goal in a

manner that also protects the rights of same-sex couples to receive marriage solemnization services.

For these reasons, the district court's decision dismissing Appellants' challenge to SB2 should be affirmed.

Dated: January 24, 2017.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

I hereby certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief contains 5,381 words.

/s/ Mary E. McAlister
Mary E. McAlister

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on January 24, 2017 via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/ Mary E. McAlister
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