No. 08-1371

In the

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF THE UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, JEWISH COUNCIL FOR PUBLIC AFFAIRS, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HUMAN RIGHTS CAMPAIGN, AND NATIONAL COUNCIL OF JEWISH WOMEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici, several of which are rooted in religious communities, are organizations committed to protecting the civil rights, religious liberty, and equal treatment under law for all persons.[1] As part of their core beliefs, *amici* maintain a deep commitment to the principles of religious liberty that are enshrined in the "religion clauses" of the First Amendment. While *amici* believe strongly in robust free exercise rights, *amici* also believe that the separation of church and state advances the cause of religious freedom in America, and that, in order to ensure the free exercise of religion in our country, government funding must not be used to advance a particular religion.

Amici also value our nation's nondiscrimination laws and the role these laws have played in maintaining rights for minorities – including minority religions – in this country. At the same time, *amici* have supported the right for religious organizations to be granted certain exemptions from nondiscrimination laws, based on their sincerely held beliefs. Those exemptions, however, should not apply when the organization receives money from

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

the government. The use of government funds to discriminate is an improper use of any religious exemption and is not acceptable.

The relevant history and mission of the *amici* are summarized below.

The Anti-Defamation League ("ADL")

The ADL was founded in 1913 to stop the defamation of the Jewish people, to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Supreme Court's landmark cases in the area of civil rights and equal protection.[2]

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[2] ADL filed amicus briefs in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of California. v. Bakke*, 438 U.S. 265 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

People for the American Way Foundation ("PFAWF")

PFAWF is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists across the country. PFAWF is firmly committed to the principles of religious freedom and separation of church and state and has frequently represented parties and filed *amicus curiae* briefs in cases involving the Free Exercise and Establishment Clauses of the First Amendment. The resolution of this case is of extreme interest to our organization and its members, particularly the 4,500 ministers in our African American Ministers Leadership Conference.

American Association of University Women ("AAUW")

For more than 125 years, AAUW, an organization of over 100,000 members and 1,000 branches nationwide, has worked to break through educational and economic barriers so that all women have a fair chance. AAUW's 2009-11 member-adopted Public Policy Program states that AAUW is firmly committed to the separation of church and state and vigorous protection of and full access to civil and constitutional rights. AAUW believes that discrimination against any individual person or class of persons has no place in our country, and that all Americans are entitled to equal opportunity under the law.

Jewish Council for Public Affairs ("JCPA")

JCPA, the coordinating body of 14 national and 127 local Jewish community-relations organizations, was founded in 1944 by the Jewish federation system to safeguard the rights of Jews throughout the world, and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and committed to the rule of law, a nation whose institutions continue to function as a public trust.

Human Rights Campaign ("HRC")

HRC, the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 750,000 members and supporters nationwide committed to making this vision of equality a reality. HRC strongly supports the First Amendment rights of religious individuals and groups and respects the important role faith organizations play in many people's lives and the many important contributions those groups make to the community. HRC also strongly believes that all organizations that receive public funds should be required to abide by nondiscrimination laws and policies, including those prohibiting discrimination based on religion, sexual orientation or gender identity.

National Council of Jewish Women ("NCJW")

NCJW is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work to ensure that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated." Consistent with our Resolutions, NCJW joins this brief.

SUMMARY OF ARGUMENT

The neutral nondiscrimination policy at issue in this case does not excessively burden Petitioner's religious freedom. A reversal of the Court of Appeals' decision, however, may well have a significant impact on the resolution of several issues of critical importance beyond just this case. One such issue, on which this *amicus* brief will focus, is the ability of government bodies – state or federal – to condition the grant of public funds for the provision of social services on compliance with neutral rules prohibiting faith-based employment discrimination.

For over one hundred years, federal, state and local governments have conditioned the grant of government funds on adherence to nondiscrimination policies, including faith-based discrimination. These government bodies have made

the affirmative decision to advance the interests of equality, civil rights, and religious freedom for the betterment of society as a whole.

Despite this history, Petitioner and a group of religious organizations that submitted an *amicus* brief (the "Faith-Based Amici")[3] urge the Court to announce a novel constitutional standard. They ask the Court to hold that religious groups enjoy a special constitutional right to discriminate in employment and membership while receiving public funding and resources. Under this novel standard, as it relates to religious groups, the federal government and the States will effectively be stripped of their long-recognized powers and discretion to condition the grant of taxpayer funds on compliance with neutral nondiscrimination policies, such as the policy at issue in this case.

At the beginning of this decade, the Executive Branch, relying on a legally incorrect interpretation of this Court's precedent, proclaimed that entities accepting funds under the federal government's Faith-Based and Neighborhood Partnerships program[4] are exempt from nondiscrimination provisions in statutes governing their grants. To support this proclamation, the Executive Branch. Petitioner and the Faith-Based Amici are seeking to impose this same flawed logic on the States, by advocating a novel constitutional standard that requires strict scrutiny of any laws and policies that

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[3] *See* Brief of *Amici Curiae* Association of Christian Schools International, *et al.*

[4] Formerly known as Faith-Based and Community Initiatives.

prohibit faith-based membership nondiscrimination, as applied to religious entities. Petitioner and the Faith-Based Amici effectively seek to invalidate countless federal, state and local nondiscrimination laws and policies in order to force governments to provide public funding to groups that choose to exclude large portions of society.

Although this case does not address the discretion and power of the States and the federal government to condition public funds on compliance with nondiscrimination employment laws, the Court's decision here may well have significant implications for that issue. Petitioner is seeking to eliminate a public university's ability to require that student religious groups comply with a neutral, universally applicable nondiscrimination policy that applies to any student group that seeks access to public resources and funds. Specifically, advancing freedom of association and expression arguments, Petitioner asserts that it is impermissible for the public university to condition access to public benefits on Petitioner's commitment not to engage in membership discrimination. Faith-based groups, such as the Faith-Based Amici, have been advancing essentially the same arguments in seeking to be exempt from universally applicable nondiscrimination employment laws in the context of publicly funded faith-based and community initiatives. Indeed, the Faith-Based Amici are urging the Court to reverse the Ninth Circuit here particularly because they believe that a reversal would support their position that they should always be exempted from employment nondiscrimination polices that are attached to public funding.

The Court has repeatedly upheld the discretion of the States and the federal government to condition public funding on compliance with viewpoint-neutral nondiscrimination laws and policies. Relatedly, the Court has also upheld the right of the States and the federal government to choose not to fund religiously motivated practices. *Amici*, thus, respectfully request that the Court decline the invitation to overrule its prior holdings and urge the Court to affirm the Court of Appeals' decision.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE POTENTIALLY SIGNIFICANT NEGATIVE IMPACT THAT REVERSAL OF THE COURT OF APPEALS MAY HAVE ON THE POWER OF THE STATES AND THE FEDERAL GOVERNMENT TO ENFORCE NEUTRAL NONDISCRIMINATION LAWS AND POLICIES AS TO FAITH-BASED ORGANIZATIONS.

A. The Federal Government Has Long Prohibited Discrimination on the Basis of Religion in Government-Funded Programs.

The federal government possesses broad constitutional powers to protect its citizens from discrimination and promote equality. *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 729-43 (1992) (recognizing the power of the federal government to enact measures to ensure that the most subtle and sophisticated forms of discrimination are eliminated); *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-96 (1954) (recognizing the broad powers of the government to combat racial discrimination). The

government also enjoys broad discretion to impose conditions on public funding to private parties. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (noting the constitutional power of the government to "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way").

Acting on these broad powers, Congress has traditionally conditioned public funding to private employers on the recipients' commitment not to engage in employment discrimination. That often included a prohibition on faith-based employment discrimination. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(1) ("No person in any State shall on the ground of . . . religion . . . be . . . denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter").[5]

Like Congress, the Executive Branch has also frequently conditioned government funding on

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[5] *See also* Community Development Block Grant of 1974, 42 U.S.C. § 5309(a) ("No person in the United States shall on the ground of . . . religion . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this [Block Grant program]"); Workforce Investment Act, 29 U.S.C. § 2938(a)(2) ("No individual shall be . . . denied employment in the administration of or in connection with, any such program or activity because of . . . religion").

compliance with nondiscrimination policies, which often included a prohibition on faith-based employment discrimination. *See*, *e.g.*, Exec. Order No. 8802, 6 Fed. Reg. 3109 (Jun. 25, 1941) ("[T]here shall be no discrimination in the employment of workers in defense industries or government because of . . . creed").[6]

Amici are aware of no court decisions that have questioned the discretion or authority of the government to protect equal protection and First Amendment interests and rights by conditioning public funding to organizations – including religious organizations – on a commitment by the recipients not to engage in faith-based discrimination, including faith-based membership and employment discrimination.

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[6] *See also* Exec. Order No. 10479, 18 Fed. Reg. 4899 (Aug. 13, 1953) (establishing a committee entrusted with ensuring that entities contracting with the government complied with employment nondiscrimination policies, which included a ban on faith-based discrimination); Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (requiring the inclusion of a provision in all government contracts prohibiting faith-based employment discrimination); 41 C.F.R. § 60–50.1 (implementing within the Department of Labor the anti-discrimination mandate of Executive Order No. 11246, noting that "[m]embers of various religious and ethnic groups . . . such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin . . . [and that t]hese guidelines are intended to remedy such unfair treatment").

Notably, as applied to religious organizations, such nondiscrimination policies may also serve as viable Establishment Clause safeguards. The Establishment Clause prohibits the establishment of a national religion by the government, as well as the preference of one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). The Court has interpreted these constitutional principles as requiring the government to employ sufficient safeguards and monitoring to ensure that public funds are not used to promote faith-based discrimination or religious indoctrination. *Mitchell v. Helms*, 530 U.S. 793, 840, 860-67 (2000) (O'Connor, J., concurring) ("[a]lthough 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J. concurring)).

B. State Governments, Including California, Have Long Prohibited Discrimination on the Basis of Religion in Programs Funded by Public Funds.

Like the federal government, the States possess broad powers to protect their citizens from discrimination and to promote equality. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 623-26 (1984) (reviewing the history of state nondiscrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"); *Evans v. City of Berkeley*, 129 P.3d 394, 398-99 (Cal. 2006) (upholding a city's discretion to deny a scouting

group access to a public marina when the group refused to adequately assure the city that it would not follow the avowed anti-homosexual and anti-Atheist policy of the Boy Scouts, in violation of the nondiscrimination ordinance). In addition, States and local governments enjoy broad discretion when granting public funds and resources to private entities, including religious entities. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 722-25 (2004) (upholding the state of Washington's decision to exclude religious studies from a state scholarship program).

State legislatures, like Congress, have enacted provisions that prohibit employment discrimination, including faith-based employment discrimination, in publicly funded programs. Such provisions are in line with this Court's admonition that "[a] State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, 413 U.S. 455, 467 (1973). For example, the law of California, the state at issue here, mandates that "[e]very state contract and subcontract for public works or for goods or services shall contain a nondiscrimination clause prohibiting discrimination" on the basis of, among other things, religion. Cal. Gov. Code § 12990(c); *see also id* § 12940(a). With limited exceptions, the prohibition on faith-based discrimination in connection with government contracts extends fully to contracts with religious entities.[7]

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[7] Certain religious health care providers are exempt from the faith-based employment nondiscrimination laws to the extent that the person holding the position is responsible for performing religious activities, the

Other states have no exceptions from their employment nondiscrimination policies for religious entities.[8] In addition, thirty-seven states, including California, have Constitutional provisions that specifically address and impose limitations on public funding of religious entities.[9]

Moreover, in *Employment Division v. Smith*, this Court recognized the power and discretion of the States to enforce viewpoint-neutral and universally applicable laws, even when such enforcement has the incidental effect of burdening religious belief or practice. 494 U.S. 872, 877-82 (1990). The California Supreme Court applied *Smith* to reject a free exercise challenge and to uphold the constitutionality of a viewpoint-neutral, generally

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position is that of an executive manager, or the position directly involves providing health services. *See* Cal. Gov. Code § 12926.2(c)-(e). The exemption also extends to religious corporations that operate an educational institution as its sole or primary activity. *See id.* § 12926.2(f)(1). Faith-based organizations that do not fall within the above categories are fully subject to prohibitions against discrimination. *Id.* § 12926.2(f)(2).

[8] *See* Mark Ragan and David J. Wright, *The Policy Environment for Faith-Based Social Services in the United States: What has Changed Since 2002? Results of A 50-State Study* 38 (Dec. 2005) ("[I]n about one-third of the states religious organizations do not have or retain any right to prefer co-religionists in their hiring practices insofar as they relate to contracts with the government"), *available at* http://www.religionandsocialpolicy.org/docs/policy/State_Scan_2005_report.pdf.

[9] *Id.* at 35.

applicable statute aimed at eradicating discrimination. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81-94 (Cal. 2004).

C. Recent Executive Branch Analysis is Policy Driven and Does Not Withstand Legal Scrutiny.

In January 2001, the White House Office of Faith-Based and Community Initiatives was created, in addition to corresponding offices within five federal agencies, with the goal of increasing the involvement of faith-based organizations in delivering federally funded social services. *See* Exec. Order No. 13198, 66 Fed Reg. 8497 (Jan. 29, 2001); Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001). As part of that effort, faith-based grantees of federal funds were exempted from rules and regulations that prohibited faith-based employment discrimination,[10] a dramatic deviation from the long-standing federal policy described above. Indeed, Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), provided that the prohibition on faith-based employment discrimination in federal contract programs "shall not apply to a Government contractor or subcontractor that is a religious

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[10] *See* The White House, *The Quiet Revolution: The President's Faith-Based and Community Initiative: A Seven-Year Progress Report* 29-30 (Feb. 2008), *available at* http://www.socialpolicyandreligion.org/docs/policy/TheQuietRevolutionFinal.pdf.

corporation, association, educational institution, or society." *Id.*[11]

Further, in connection with this program, a novel and unprecedented analysis was adopted by the Executive Branch relating to the applicability of the Religious Freedom Restoration Act of 1993 ("RFRA") to faith-based grantees of federal funding. Generally, RFRA forbids the federal government from "substantially burden[ing] a person's exercise of religion," unless the government action furthers a "compelling governmental interest" and is the "least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1.

Certain *amici* were supportive of RFRA's enactment. Currently, however, RFRA is being misapplied. The first such instance of RFRA's misapplication was the 2003 enactment of rules, by an arm of the Department of Health and Human Services, which allowed faith-based grantees to apply for and obtain an exemption from the governing act's prohibition on faith-based employment discrimination.[12] The second instance

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[11] President Johnson instituted the prohibition on faith-based employment discrimination for federal contracts in 1965. *See* Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

[12] *See* Public Health Service Act, 42 U.S.C § 300x-57(a)(2); *see also* 42 C.F.R. § 54.6. *See generally* Ira C. Lupu & Robert W. Tuttle, *The State of the Law – 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* 31-33 (Dec. 2008), *available at* http://www.religionandsocialpolicy.org/docs/legal/state_of the_law_2008.pdf.

was announced in a highly controversial 2007 memorandum, issued by the Office of Legal Counsel of the Department of Justice (the "OLC Memorandum").[13] The OLC Memorandum exempted World Vision, Inc., one of the Faith-Based Amici in this case, from the prohibition on faith-based employment discrimination associated with a grant under the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5792a. In both instances, the relevant agency wrongly determined: (i) that RFRA overrode the act governing the federal grant, and (ii) that requiring the faith-based grantees to comply with the universal nondiscrimination employment policy violated RFRA as it constituted a "substantial burden" that did not further a compelling government interest. *See* OLC Memorandum at 6-20.

In concluding that the prohibition on faith-based discrimination constituted a "substantial burden" on World Vision, the OLC Memorandum drew an analogy between the circumstances of World Vision and the circumstances of the appellant in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, a South Carolina statute conditioned eligibility for unemployment compensation on the applicants' availability to work on Saturday. *Id.* at 400-01. The Court held that, as so applied, the statute abridged Ms. Sherbert's right to the free exercise of her

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[13] *See* Memorandum Opinion from the Office of Legal Counsel for the General Counsel Office of Justice Programs, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 1, 25 (Jun. 29, 2007), *available at* 2007 WL 5633562.

religion as a member of the Seventh-Day Adventist Church. *Id.* at 409-10.

The OLC Memorandum's analogy is flawed for at least two reasons. First, while faith-based hiring practices may constitute a form of religious expression, they are not compelled by religious convictions – certainly not when the hiring pertains to provision of government-funded secular social services. Second, the South Carolina statute left Ms. Sherbert with no meaningful choice as she relied on the unemployment benefit for subsistence. World Vision, on the other hand, was free to rely on its extensive private funding and to forbear from taking the federal grant, which pertained only to the provision of secular social services and did nothing to threaten its continued existence as a faith-based organization.[14]

Prior to 2003, no administration had taken the position that requiring religious grantees of public funds to comply with neutral nondiscrimination employment policies constitutes an impermissible substantial burden on religion.[15] Similarly, *amici*

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[14] *See* OLC Memorandum at 3 ("For the relevant fiscal year, the grant represents approximately 10% of the entire budget for World Vision's domestic community-based programs").

[15] Certain *amici* co-wrote an open letter to President Obama urging him to disavow the OLC Memorandum and its faulty legal basis. *See* Letter from the Coalition Against Religious Discrimination to President Obama (Feb. 4, 2010), *available at* http://www.adl.org/Civil_Rights/letter_presidentobama_2010.asp.

are aware of no court that has recognized such an argument, let alone invalidated a government law or policy that required religious recipients of public funds to comply with neutral nondiscrimination policies.

Instead, courts have generally held that a government rule may constitute a substantial burden on religion only when it forces a religious person or entity to perform an act that clearly conflicts with their creed or prohibits them from performing actions that are required by their creed. *See, e.g.*, *Sherbert*, 374 U.S. 398; *Wisconsin v. Yoder*, 406 U.S. 205, 219-21 (1972) (Wisconsin's attempt to compel school attendance of Amish children beyond the eighth grade was "in sharp conflict with the fundamental mode of life mandated by the Amish religion").

Requiring religious entities to comply with a rule that obliges all recipients of a federal grant to comply with a neutral nondiscrimination employment policy is not coercive in either of these ways, as such entities are free to decline the government funds and maintain their practices without such funds. For example, in *Locke*, 540 U.S. 712, this Court upheld the state of Washington's decision to exclude a student majoring in devotional theology from Washington's Promise Scholarship Program. The Court distinguished between a rule barring religious practices, which may constitute a substantial burden, and a "mere refusal to fund" religiously motivated practices, which constitutes only a "relatively minor burden." *Id.* at 721-22, 725. It noted that Washington did not bar devotional theology studies, but merely refused to pay for them.

Id. at 721. In addition, the student was not excluded from the program because of his faith – he was free to use the scholarship for secular studies and fund his devotional theology with private money. *Id.* at 724-25. Faith-based organizations are similarly free to avoid public funding and the restrictions that may come with such funding.

D. Petitioner and the Faith-Based Amici Ask the Court to Announce a Novel Constitutional Standard That is Contrary to Court Precedent.

Petitioner and the Faith-Based Amici argue that the Constitution mandates that, as applied to religious entities, any federal or state rule conditioning government funds on compliance with a prohibition on faith-based discrimination in the context of membership or employment must be "subject to strict and generally fatal scrutiny." Petitioner Br. at 41; *see also* Faith-Based Amici Br. at 27-41. This argument is flawed and groundless.

As demonstrated above, this argument contradicts the long and valuable history of federal and state nondiscrimination laws and cannot be reconciled with Court precedent. Moreover, the key Court precedent on which Petitioner and the Faith-Based Amici rely – *Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Bradfield v. Roberts*, 175 U.S. 291 (1899), *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Sherbert*, 374 U.S. 398 – lends no support to their position.

In *Amos*, this Court upheld the constitutionality of Section 702 of the Civil Rights Act of 1964, which exempts religious organizations from the act's general prohibition on employment discrimination. 483 U.S. at 339. As an initial matter, *Amos* has nothing to do with public funding. At issue there was a church function that was fully funded by private money. *Id.* at 330-31. *Amos* recognized Congress' power to accommodate religious organizations under such circumstances. While upholding the constitutionality of Congress' decision to grant the exemption, *Amos* does not in any way hold that Congress was required to provide the exemption. Indeed, the Court has never suggested that the Civil Rights Act's pre-Section 702 prohibition on faith-based employment discrimination, as applied to religious organizations, was unconstitutional.

Lukumi, like *Amos*, does not involve public funding. In *Lukumi*, the Court invalidated local ordinances that sought to outlaw animal sacrifice in the Santerian religion. 508 U.S. at 526-27, 546-47. The Court determined that the municipality had deliberately drafted the ordinances so as to ban only ritual sacrifice, and virtually no other form of animal killing. *Id.* at 542. Because of their apparent discriminatory treatment, the Court held that the ordinances were not entitled to the deference generally available to neutral government policies. *Id.* at 546. The policy that Petitioner and the Faith-Based Amici seek to subject to strict scrutiny (*i.e.*, Hastings' nondiscrimination policy), however, is wholly neutral and universally applicable – exactly the type of policy that, pursuant to the Court's

reasoning in *Lukumi*, merits a rational basis analysis. *Id.*; *see also Smith*, 494 U.S. at 877-882.

Bradfield and *Bowen* too are of no consequence here, as neither addresses the power or discretion of the government to place conditions on public funding to religious entities. In *Bradfield*, the Court upheld Congress' decision to fund a hospital that was incorporated as a "purely secular" corporation and did "not limit the exercise of its corporate powers to the members of any particular religious denomination." 175 U.S. at 298-299. In *Bowen*, the Court held that the Adolescent Family Life Act was not unconstitutional "on its face," but remanded to the district court to determine whether the act violated the Establishment Clause "as applied." 487 U.S. at 620-21. Significantly, in holding that it is permissible, in certain circumstances, for the government to grant religious organizations funding for secular functions, the Court provided as an example the circumstances of *Bradfield*, emphasizing "the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter." *Id.* at 609.

Sherbert, as demonstrated above (see pp. 16-17), presents a fact pattern that has no bearing on the issue here.

Finally, in addition to reliance on these inapplicable cases, throughout their brief, the Faith-Based Amici argue that there is no reason for the nondiscrimination laws to apply to religious entities because religious employment discrimination can never – under any circumstances – be "invidious." *See*, *e.g.* Faith-Based Amici Br. at 20-26. However,

there is no authority from this Court that the government must exclude religious entities from rules prohibiting faith-based discrimination in government-funded programs. Moreover, purposeful discrimination is a key component of what constitutes "invidious" discrimination. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Where the claim is invidious discrimination in contravention of the First . . . Amendment, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose") (citing *Lukumi*, 508 U.S. at 540-41). And this Court has recognized that religious entities can engage in invidious faith-based discrimination. *See Norwood*, 413 U.S. at 467. In testimony before Congress, Rabbi David N. Saperstein warned that, if faith-based employment discrimination were to be allowed, "a job notice could be placed in the newspaper seeking employees for a government funded social service program run by a Protestant church that reads 'Jews, Catholics, Muslims need not apply' or 'No unmarried mothers will be hired.'"[16] There is no reason to turn back the clock decades on the progress of Civil Rights, as Faith-Based Amici suggest.

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[16] *See* Constitutional Role of Faith-Based Orgs. in Competition for Fed. Soc. Serv. Funds, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. (2001) (prepared statement of Rabbi David N. Saperstein), *available at* http://commdocs.house.gov/committees/judiciary/hju72981.000/hju72981_0f.htm.

E. A Reversal of the Court of Appeals' Decision May Well Have Significant Injurious Effects on the Powers of the States and the Federal Government to Enforce Nondiscrimination Policies.

A reversal of the Court of Appeals' decision may well have significant injurious effects on the power of the States and the federal government to enforce viewpoint-neutral nondiscrimination laws and policies on religious entities, including in the context of Faith-Based and Neighborhood Partnerships. Specifically, a decision by this Court to adopt the standard that Petitioner and the Faith-Based Amici are advocating may render invalid numerous nondiscrimination laws and policies, as applied to religious entities, and deny governments of all levels a critical tool – which they have used for decades – to prevent discrimination and address equal protection, free exercise and separation of church and state concerns.

1. Reversal of the Court of Appeals' Decision May Invalidate State Powers That the Court Has Explicitly Upheld.

Even if the Executive Branch's misapplication of RFRA was sustainable, which it is not, RFRA is inapplicable to states and local governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Petitioner and the Faith-Based Amici, nevertheless, are seeking a ruling that will effectively turn the prior administration's interpretation of RFRA, as applied in the context of the Faith-Based and Neighborhood Partnerships, into a constitutional standard, which will apply to every government in this country.

If accepted, the proposed standard will render meaningless the Court's holding in *Boerne* that RFRA does not apply to state governments. It may well also overrule the Court's holding in *Locke*, 540 U.S. 712, which upheld the state of Washington's discretion to refuse to fund religiously motivated activities, among other reasons, because the State's powers to place restrictions on pubic funding of religious activities are rooted in the State's Constitution and are even greater than those required by the Establishment Clause. *Id.* at 725. The Court should decline the invitation to overrule its previous holdings and, instead, uphold the States' discretion to enforce laws and rules designed to combat discrimination.

2. Congress Already Has Rejected the Standard That Petitioner and the Faith-Based Amici Advocate.

Congress already has rejected a standard virtually identical to the standard Petitioner and the Faith-Based Amici are seeking here. In 2001, Congress rejected a proposed bill that stated: "[A] religious organization that provides assistance under a [federally-funded] program may, notwithstanding any other provision of law[, including the program's governing statute], require that its employees adhere to the religious practices of the organization." Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201. Petitioner and the Faith-Based Amici are, thus, improperly seeking to establish by a judicial decision a standard that has been rejected by the elected representatives.

Congress is the proper forum to address this issue of public policy. The Court's decision in *Amos*

recognizes exactly that. There, the Court upheld Congress' power to accommodate private selective hiring practices by religious entities. *Amos* does not require Congress to accommodate such practices, but recognizes only that it has the discretion to do so. Further, this Court has explicitly stated: "That the Constitution may compel toleration of *private* discrimination in some circumstances does not mean that it requires *state support* for such discrimination." *Norwood*, 413 U.S. at 463 (emphasis added). Thus, Congress clearly has the discretion to decline to exempt religious entities from laws and policies prohibiting employment discrimination with respect to secular programs funded with public money. A reversal of the Court of Appeals here may threaten this critical congressional power, which the Court has explicitly upheld.[17]

CONCLUSION

Amici have a deep respect for the free exercise of religion and, to this end, support the right of religious organizations to enjoy exemptions from

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[17] *Amici* strongly believe that the Ninth Circuit's decision should be affirmed. However, if the Court is inclined to reverse, based on university-setting equal protection considerations such as those discussed in *Rosenberger*, 515 U.S. 819, *Amici* respectfully request that the Court's decision be limited to such a setting and to such considerations, avoiding broad statements that may implicate employment discrimination issues and thereby threaten the discretion of both the States and the federal government to combat discrimination.

nondiscrimination laws in appropriate circumstances. However, when pubic funds are involved, it is critical to preserve the discretion of the government to enforce neutral, generally applicable nondiscrimination laws on any and all grantees of such funds, including religious organizations. Although this case involves a faith-based student organization in a public university setting, the issue of discrimination by organizations receiving public funds is not only prominent here, but is ubiquitous in all contexts of publicly-funded activities and programs.

For all the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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