No. 16-1330

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN H. ABELES,

Plaintiff-Appellant,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, JULIA HODGE, AND VALERIE O'HARA,

Defendants-Appellees.

On appeal from the United States District Court
For the Eastern District of Virginia, Alexandria Division

Brief *Amicus Curiae* of The American Jewish Committee and The Becket Fund for Religious Liberty in support of Plaintiff-Appellant and Reversal

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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.

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No. 16-1330 Caption: Abeles v. Metropolitan Washington Airports Authority et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Becket Fund for Religious Liberty
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ 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? ☐ YES ☑ 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))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
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? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Eric Rassbach Date: 6/7/2016

Counsel for: Amicus

CERTIFICATE OF SERVICE

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I certify that on 6/7/2016 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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Pursuant to FRAP 26.1 and Local Rule 26.1,

American Jewish Committee
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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/s/ Eric Rassbach
(signature)

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INTEREST OF THE *AMICI*[1]

The American Jewish Committee ("AJC") is a nonprofit international advocacy organization that was established in 1906 to protect the civil and religious rights of Jews. Over 100 years later, AJC has roughly 170,000 members and supporters, and 26 regional offices, spread across the nation and throughout the world. AJC continues its efforts to promote pluralistic and democratic societies where all minorities are protected. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance democratic values and the human rights of all citizens in the United States and around the world.

AJC historically has been a strong advocate on behalf of religious liberty for people of all backgrounds. Thus, AJC has participated as amicus curiae in numerous cases throughout the last century in defense of religious liberty for all, and has supported many legislative proposals

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[1] Plaintiff has consented to the filing of this brief. Defendants do not consent to the filing of this brief, and have stated that they will "almost certainly oppose" the filing of this brief, necessitating the accompanying motion for leave to file.

No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the *amici curiae*, their members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

designed to protect the constitutional guarantee of the free exercise of religion. As part of its mission to defend the religious freedoms of all Americans, and of Jews in particular, AJC believes that legislative action to accommodate the religious exercise rights of government employees is not only constitutional, but commendable and often mandatory.

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has frequently represented religious people and institutions in cases involving workplace disputes. For example, The Becket Fund represented the successful Petitioner in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), the first ministerial exception case to reach the Supreme Court. The Supreme Court ruled unanimously in favor of religious liberty in the workplace. Similarly, the Becket Fund filed an amicus brief in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), which concerned

the availability of religious accommodation (allowing the wearing of a hijab) for a Muslim employee, and has represented numerous individuals seeking religious accommodation from government employers, *see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Muslim religious accommodation for police officers); *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (Sikh religious accommodation in federal workplace); *Singh v. Carter*, No. CV 16-399 (BAH), 2016 WL 2626844 (D.D.C. May 6, 2016) (Sikh religious accommodation in military workplace).

The Becket Fund is concerned that the district court's decision, if left to stand, will negatively affect the ability of government employees to obtain religious accommodations by wrongly requiring them to demonstrate religious animus as an element of a failure-to-accommodate claim.

The Becket Fund has also frequently represented the interests of Jewish litigants, who like many other religious minorities are frequently denied religious accommodations by government officials. *See, e.g.*, *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (military chaplains); *Congregation Kol Ami v. Abington Twp.*, 161 F. Supp. 2d 432 (E.D. Pa.

2001) (land use case); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (land use case); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (prisons case); *Willis v. Comm'r, Ind. Dep't of Corr.*, No. 11-1071 (7th Cir., government appeal dismissed May 9, 2011) (prisons case); *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (prisons case), *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (prisons case); *Central Rabbinical Congress of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) (circumcision regulation); *Gagliardi v. City of Boca Raton, Fla.*, No. 9:16-cv-80195-KAM (S.D. Fla., Compl. filed Feb. 8, 2016) (land use case).

The Becket Fund is concerned that the district court's decision, if left to stand, will inhibit Jewish religious exercise within the federal workplace and could easily result in a de facto government hiring ban on Orthodox Jews.

Finally, the Becket Fund is concerned by the district court's ruling that the Religious Freedom Restoration Act (RFRA) does not apply to a class of undisputedly public actors that are created by federal law and independent of state and local governments, like Defendant Metropolitan

Washington Airports Authority. Exempting organizations with broad police and regulatory powers from both state and federal anti-discrimination laws, as the district court did when it declined to analyze the Authority's actions under either RFRA or the Virginia Religious Freedom Act, would pose a grave threat to the protection of free exercise envisioned by Congress when it passed RFRA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Passover has been observed by millions of Jews for thousands of years. It is the quintessential human story of an unjust ruler who seeks to impose his will on a disfavored minority, but who is eventually thwarted by divine intervention. Passover has been a vital link between generations of Jews over the centuries, wherever they have lived. Its observance—particularly the recounting of the Passover history every year during the Passover *seder*—has been part of how Judaism has been able to continue existing despite the many tragedies of Jewish history.

But for Defendant Metropolitan Washington Airports Authority none of that matters. The Authority does not recognize the significance of Passover for observant Orthodox Jews like Ms. Abeles. Instead its position is that it can ignore Passover entirely: As long as it does not act out of outright hostility towards Jews, it can penalize Jews for observing Passover. Specifically, it claims that if it is enforcing a "neutral" policy and makes no overt show of discriminatory intent, then it cannot be subject to a failure-to-accommodate claim under Title VII.

For observant Orthodox Jews, the Authority's position is particularly onerous, because they may not work on either the first two days or the

last two days of the eight-day Passover period. If the Authority's argument is right—that a plaintiff must show intentional discrimination to make out a failure to accommodate claim under Title VII—then it has free rein to terminate any Jew who observes Passover by abstaining from work, so long as the Authority is enforcing a facially neutral rule regarding religious holidays and shows no overt hostility.

But that is not the law. Title VII requires that employers make reasonable accommodations for religious employees just as they do for disabled employees. And governments like the Authority are liable if they fail to make those reasonable accommodations, regardless of their officials' state of mind with respect to the protected characteristic. Here, Ms. Abeles brought forward evidence showing that the Authority did not reasonably accommodate her request to take the last two days of Passover off from work in accordance with her religious beliefs and in accordance with her longstanding practice. That should have been enough to deny summary judgment, and therefore the decision below should be reversed.

The Authority makes a second argument this Court should reject out of hand. Can a governmental entity wielding the full force of law, armed

with police and eminent domain powers, and tasked with the oversight of two of the busiest airports in the country, properly declare itself exempt from the reach of both state and federal anti-discrimination law? The District Court said yes, but the law says no.

The Authority is a quintessential state actor, and a federal one at that. The Authority is a creature of federal statute, specifically 49 U.S.C. § 49106. Three of its board members are appointed by the President of the United States, with the advice and consent of the Senate, and are required to ensure that "adequate consideration is given to the national interest" when it conducts its operations. 49 U.S.C. § 49106(c)(6)(B). Four additional board members are appointed by the Mayor of Washington D.C., which for RFRA purposes is a part of the federal government. In total, seven of the seventeen board members are federal appointees.

The Authority's contracts are reviewed by the Comptroller General of the United States, who reports his findings to committees in the Senate and the House of Representatives. It is authorized by Congress to issue bonds, levy fees, and use the power of eminent domain, among other powers. In short, the Authority—which no one disputes is a governmental entity of some sort—is *for RFRA purposes* a federal entity.

It acts under color of federal law and is an instrumentality of the federal government. To hold otherwise would allow the Authority to avoid all sorts of federal and state anti-discrimination laws solely because it is a governmental chimera. That cannot be what Congress had in mind when it created the Authority. This error by the district court should also be reversed.

ARGUMENT

I. Failure-to-accommodate claims do not require a showing of animus.

A. The text of Title VII requires treating failure-to-accommodate claims differently from intentional discrimination claims.

The District Court held that Ms. Abeles could not prevail because she made no showing that the Authority failed to accommodate her "because of her religion" or because "religious animus played any role." J.A. 512. That approach, if credited, would gut "failure to accommodate" claims and be a wholesale reworking of Title VII jurisprudence in this Circuit.

Title VII provides that:

> The term "religion" includes 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 or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). This provision means that an employer has a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977).

In this Circuit, to establish a prima facie religious accommodation claim, a plaintiff must show that "'(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.'" *Chalmers v. Talon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)). None of the three elements of the prima facie case focuses on the state of mind of the employer, much less whether the employer bears any animus towards or seeks to discriminate against the employee. Nothing in the text of 42 U.S.C. § 2000e(j) or this Circuit's standard requires such a showing; the district court's holding to the contrary was therefore error.

Aside from the text and the relevant caselaw, it is also simple common sense to analyze failure-to-accommodate claims without requiring evidence of intentional discrimination. From the viewpoint of the religious (or disabled—*see below*) plaintiff, the burden without an accommodation is the same whether the government meant to burden the plaintiff or was simply indifferent. Either way, the plaintiff is being excluded due to her protected characteristic. Claims based on animus are

designed to root out discriminatory intent among employers. By contrast, claims based on failure-to-accommodate are an affirmative mandate to assist the protected class, in this case religious minorities. The district court's decision ignores this affirmative mandate.

B. Caselaw under the parallel provisions of the Americans with Disabilities Act requires failure-to-accommodate claims to be treated differently from intentional discrimination claims.

The district court's decision also runs afoul of precedents decided under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* This Court has held that the "reasonable accommodation" provisions of Title VII at issue here should be interpreted consistently with the "reasonable accommodations" provisions of the ADA. In *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008), for example, this Court relied on a Supreme Court ADA case in interpreting 42 U.S.C. § 2000e(j). *See Firestone Fibers*, 515 F.3d at 314 (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)). Other Courts of Appeals also analyze 42 U.S.C. § 2000e(j) and the reasonable accommodations provisions of the ADA in light of one another. *See, e.g.*, *Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 146 n.9 (1st Cir. 2014); *Pond v. Michelin N. Am., Inc.*, 183 F.3d 592, 596 (7th Cir. 1999); *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149,

1155 (10th Cir. 2000). As then-Judge Alito put it in a Third Circuit decision concerning reasonable religious accommodation in the workplace: "It is true that the ADA requires employers to make 'reasonable accommodations' for individuals with disabilities. 42 U.S.C. § 12111(b)(5)(A). However, Title VII of the Civil Rights Act of 1964 imposes an *identical obligation* on employers with respect to accommodating religion. 42 U.S.C. § 2000e(j) (1994)." *Fraternal Order of Police Newark*, 170 F.3d at 365 (emphasis added).

ADA caselaw makes clear that intentional discrimination and failure-to-accommodate are entirely separate claims. As this Court held earlier this year:

> We recognize that some of the standard analytic language used in evaluating ADA claims—"failure to make reasonable accommodations"; "denial of meaningful access"—carries with it certain negative connotations. We would be remiss in not highlighting that the record is devoid of any evidence that the defendants acted with discriminatory animus in implementing Maryland's absentee voting program. . . .
>
> However, the ADA and the Rehabilitation Act do more than simply provide a remedy for intentional discrimination. They reflect broad legislative consensus that making the promises of the Constitution a reality for individuals with disabilities may require even well-intentioned public entities to make certain reasonable accommodations. Our conclusions here are not driven by concern that defendants are manipulating the election apparatus intentionally to discriminate against

> individuals with disabilities; our conclusions simply flow from the basic promise of equality in public services that animates the ADA.

Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 510 (4th Cir. Feb. 9, 2016) (finding that, even without intentional discrimination, the government defendants had failed to accommodate plaintiffs' disabilities).

Indeed, this Court made clear in *National Federation of the Blind* that intentional discrimination and disparate impact claims are fundamentally different from reasonable accommodation claims:

> Title II allows plaintiffs to pursue three distinct grounds for relief: (1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations. *A Helping Hand, LLC*, 515 F.3d at 362. Defendants somewhat mischaracterize plaintiffs' claims as advancing a disparate impact theory of discrimination. *See, e.g.*, Br. of Appellants 38. While some sort of disparity will necessarily be present in cases of discrimination, that does not mean that all discrimination cases are legally evaluated as "disparate impact" cases; we do not interpret plaintiffs' arguments as advancing a legal disparate impact theory (and the district court did not evaluate them as such). We understand plaintiffs to be pursuing their claims on the theory that defendants have failed to make reasonable accommodations that would afford disabled individuals meaningful access to Maryland's absentee voting program.

Nat'l Fed'n of the Blind, 813 F.3d at 503 n.5 (citing *A Helping Hand, LLC v. Baltimore Cty, Md.*, 515 F.3d 356, 362 (4th Cir. 2008)).

Since Title VII must be interpreted in the light of ADA jurisprudence, it follows that reasonable accommodation claims under 42 U.S.C. § 2000e(j) are separate from intentional discrimination or disparate impact claims. The district court's holding to the contrary should be reversed.

C. Requiring religious plaintiffs to show animus or intentional discrimination to prove a failure-to-accommodate claim would lead to unjust results, particularly in the context of widespread discrimination against Orthodox Jews.

Allowing the district court's decision to stand would also lead to unjust results for religious minorities in general and Orthodox Jews in particular.[2] There are several reasons this is so.

First, proving intent—including intentional discrimination—is difficult in any case, civil or criminal. As the Supreme Court pointed out

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[2] Given the historical context and the fundamental rights at stake in this case, the Court should undertake an "independent examination" of the record to ensure a vigorous protection of freedom of religion. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011). Indeed, Orthodox Jews are precisely the sort of "discrete and insular" minority that the federal courts have long seen the need to protect from the results of majoritarian political processes that often leave them out. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that governmental actions affecting minorities, including "religious" minorities, require higher judicial scrutiny).

earlier this year, for most employees it is likely "more complicated and costly" to prove illegal motive than to make out a case of unequal treatment. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1419 (2016); *see also Gen. Analytics Corp. v. CNA Ins. Cos.*, 86 F.3d 51, 54 (4th Cir. 1996) ("As a state of mind, intent is often difficult to prove."); *United States v. Siegel*, 536 F.3d 306, 320 (4th Cir. 2008) ("Intent is often a difficult element to prove"). Interpolating an intentional discrimination element into a 42 U.S.C. § 2000e(j) failure-to-accommodate claim thus would have profound negative consequences for plaintiffs seeking religious accommodations.

Second, religious minority plaintiffs would have a harder time than other plaintiffs proving intentional discrimination. Because minorities' religious practices are by their nature less familiar to government officials than the religious practices of larger religious communities, minority practices are more likely to run afoul of "neutral" government rules. This makes it more difficult for a court to determine whether the application of the "neutral" policy to the detriment of the minority religious believer was intentional or not. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official

action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.") For example, Christmas is a federal holiday, so the practice of not working on Christmas is unlikely to become the subject of a religious accommodation dispute. Yet Passover and other Jewish religious holidays frequently have been. *See, e.g.*, *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 279 (3d Cir. 2001).

Third, the Court should not ignore the broader context of this case: Orthodox Jews are currently subject to widespread discrimination often centered on the uniqueness of their religious practices or simple bald-faced antisemitism.

To take one example, governments often attempt to exclude Orthodox Jews from certain areas using "neutral" land use regulations. The Second Circuit noted that several New York municipalities were incorporated out of "animosity toward Orthodox Jews as a group." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [i.e., Orthodox Jews] out of this neighborhood").

It is a well-known fact that Orthodox Jews may not drive on the Sabbath and that they therefore must reside within walking distance of a synagogue. Thus if a community wishes to prevent Orthodox Jews from moving into the neighborhood, it will manipulate land use regulations to forbid the synagogue from being opened in the neighborhood. *See, e.g.*, *United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel*, 899 N.Y.S.2d 63 (N.Y. Sup. Ct. 2009) (Orthodox synagogue excluded because town defined it as a "community center" rather than a house of worship); *Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (neighborhood association sought to keep Orthodox synagogue out of neighborhood); *Landau v. Twp. of Teaneck*, 555 A.2d 1195 (N.J. Super. Ct. Law Div. 1989) (neighbors sought to invalidate sale of land to Orthodox synagogue); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214 (11th Cir. 2004) (town applied zoning ordinances to allow synagogues only beyond walking distance for most of the Orthodox Jewish population); *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280 (S.D. Fla. 2008) (city violated civil rights laws by using zoning ordinances to prevent Orthodox Jewish Outreach Center from opening); *Westchester Day Sch. v. Vill. of*

Mamaroneck, 417 F. Supp. 2d 477, 539 (S.D.N.Y. 2006, *aff'd*, 504 F.3d 338 (2d Cir. 2007) (Jewish school denied use permit "not because it failed to comply with the Village Code or otherwise would have an adverse impact on public health, safety or welfare, but rather upon undue deference to the opposition of a small but politically well-connected group of neighbors"); Second Amended Complaint Attachment 2 at ¶¶ 150-155, *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F.Supp.2d 574, (S.D.N.Y. 2013) (No. 7:07-cv-06304) (citizen said that hearing about Orthodox Jewish communities "literally" made her "nauseous" and want to "throw up"); *id.* at ¶ 153 (citizen group designed to use zoning laws to stop "population growth in Ramapo's Hassidic communities"); *id.* at ¶¶ 176-193 (publications referred to Orthodox neighborhoods as "tribal ghetto[s]" and to Orthodox Jews as "fake people" and "blood sucking self centered leeches" who create Jonestown-like cults where they drink "spiked kool aid . . . kosher of course."). *Id.* at ¶¶ 187, 188, 189.

A variation on the attempt to use exclusionary zoning to keep Orthodox Jews out concerns *eruvim*, boundary lines typically consisting of wire, string, or plastic strips that Orthodox Jews use to mark a

continuous boundary around their communities. An *eruv* sets a boundary inside which Orthodox Jews may engage in certain activities on the Sabbath—for example carrying objects or pushing a stroller—without breaking religious laws. They are an unobtrusive way to relieve Orthodox Jewish families from being confined to their homes for the duration of the Sabbath. But some people do not like living near *eruvim*—comparing them to "ghetto[s]" and an unwelcome "ever-present symbol" of the Orthodox Jews' religious presence. *See* Michael A. Helfand, *An* eruv *in the Hamptons? Why not? The fight over a proposed* eruv *in Westhampton Beach, N.Y., is about much more than string and telephone lines.*, L.A. Times (Aug. 15, 2012).

One important *eruv* case was *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002). In that case, the Borough of Tenafly refused to allow demarcation of an *eruv* on telephone poles in the borough. This decision came after Tenafly residents "expressed vehement objections prompted by their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly." 309 F.3d at 153. One Council member at a public meeting noted "a concern that the Orthodoxy would take over." *Id.* (quotation omitted). Another "voiced his 'serious concern' that 'Ultra-

Orthodox' Jews might 'stone [ ] cars that drive down the streets on the Sabbath.'" *Id.* (quoting *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 155 F. Supp. 2d 142, 153-54 (D.N.J. 2001) (alteration in original)). The Borough invoked a supposedly "neutral" municipal ordinance that prohibited affixing items to telephone poles to require removal of the *eruv*; however, the Borough did not apply this ordinance to other items such as house numbers, which it had long allowed to be affixed to the poles. *Id.* at 167. The Third Circuit held that the Borough's discriminatory approach violated the Free Exercise Clause. *Id.* at 168.

Some of the most contentious of these disputes have taken place in Westhampton Beach, New York, where those opposed to an Orthodox Jewish presence attempted for many years to use municipal regulatory authority to prevent an *eruv* from being erected. *See Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015). Indeed, in their television appearances opponents of the *eruv* were open—even absurdly so—about their goal of keeping Orthodox Jews out of their community. *See* Jon Stewart, *The Thin Jew Line*, The Daily Show (Mar. 23, 2011), http://www.cc.com/video-clips/1jsrl7/the-daily-show-with-jon-stewart-the-thin-jew-line; *see also*

ACLU v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987) (rejecting residents' Establishment Clause challenge to the erection of an *eruv*); *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985) (same).

None of this is to say that every case involving Orthodox Jewish plaintiffs has merit. It is merely to note that the federal courts do not write on a blank slate—there is long history of masked hostility towards Orthodox Jews. Given that latent animus, it is all the more important that the federal courts hew to the text of Title VII, which does not require religious plaintiffs to demonstrate intentional discrimination in order to make out a failure-to-accommodate claim.

II. The Religious Freedom Restoration Act applies to the Authority.

RFRA applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). The district court held that RFRA does not apply to the Authority. J.A. 518. Yet as demonstrated below, the Authority both acts under color of federal law and is a federal instrumentality. And because it is therefore subject to RFRA, the district court's ruling must be reversed.

A. The Authority acts under color of federal law because it wields federal power.

"A person acts under color of federal law in respect to a cause of action by claiming or wielding federal authority in the relevant factual context." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011).

The Authority wields federal authority. Most importantly, both the Authority's existence and the powers it exercises come directly from a federal statute enacted by Congress, 49 U.S.C. § 49106. The Authority is authorized by Congress to exercise various powers, such as the powers to issue bonds, enter into contracts, and "levy fees or other charges." 49 U.S.C. § 49106(b)(1)(E). And the powers the Authority wields are, like other federal authority, supreme to Virginia law. *See Parkridge 6 LLC. v. U.S. Dep't of Transp.*, 2010 WL 1404421, at *6 (E.D. Va. Apr. 6, 2010).

The Authority is also organically connected to the rest of the federal government. Seven of its seventeen board members are appointed by federal government officials. 49 U.S.C. § 49106(c). The presidential appointees to the Authority's board of directors are explicitly required to consider the federal government's interests while carrying out their duties. 49 U.S.C. § 49106(c)(6)(B). The Authority's contracts are reviewed by the Comptroller General of the United States, who reports his findings

to committees in the Senate and the House of Representatives. 49 U.S.C. § 49106(g).

The Authority argues that it does not act under color of federal law based on two district court cases that do nothing more than demonstrate that the Authority is not formally a federal agency or department. *See San Jose Constr. Group, Inc. v. Metro. Wash. Airports Auth.*, 415 F. Supp. 2d 643, 645-46 (E.D. Va. 2006) (Authority is not a federal agency); *United States ex rel. Blumenthal-Kahn Elec. L.P.*, 219 F. Supp. 2d 710, 711 (E.D. Va. 2002) (Authority is not a department of the federal government). But neither case addresses the question of whether the Authority wields federal power or acts under color of federal law.

B. The Authority is a federal instrumentality under *Lebron*.

The Authority is also a federal instrumentality. An organization is a federal instrumentality if the federal government created the organization "for the furtherance of governmental objectives," and controls its operation through federal appointees. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

The Authority was created after the Secretary of Transportation proposed that further development of Washington-area airports required

the creation of a "regional authority with power to raise money by selling tax-exempt bonds." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise Inc.*, 501 U.S. 252, 257 (1991). It was created by Congress by means of a federal statute, 49 U.S.C. § 49106. The Authority, therefore, was unquestionably created for the purpose of furthering federal government objectives.

It is also subject to federal control. Seven out of seventeen members of Authority's board are appointed by federal officials—either the President or the Mayor of the District of Columbia. *See* 49 U.S.C. § 49106(c). (The remaining members of the board are appointed by the Governors of Virginia and Maryland. *Id.*) The Authority's contracts are reviewed by the Comptroller General of the United States, who reports his findings to committees in the Senate and the House of Representatives. 49 U.S.C. § 49106(g). And since it is both a creature of Congress and subject to ongoing federal control, the Authority is a federal instrumentality.

The Authority attempts to undermine this analysis by citing the Federal Circuit's decision in *Corr v. Metropolitan Washington Airports Authority*, as support for its claim that it is immune to RFRA. J.A. 147. But *Corr* is distinguishable. In *Corr*, the Federal Circuit determined only

that the Authority was not an instrumentality "for the purpose of [p]etitioners' claim" under the Little Tucker Act, which allows plaintiffs to file small claims "against the United States." 702 F.3d 1334, 1336-37 (Fed. Cir. 2012). Whether the Authority is liable for small claims made against the government of the United States is a vastly different consideration than whether it is required to comply with the antidiscrimination protections afforded by RFRA or similar civil rights laws.

In the end, the Authority's argument that it is immune from both federal and state civil rights laws protecting religious freedom solely by virtue of its hybrid form proves far too much. As the Supreme Court has admonished, "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397. The Authority is subject to the Constitution and it is subject to federal civil rights statutes like RFRA.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,094 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on June 7, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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