

The following amicus brief, Chittenden v The Waterbury Center Community Church, Inc., was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Supreme Court of the State of Vermont, January 13, 1998.

**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

ERIC CHITTENDEN and
FRANCINE CHITTENDEN
Plaintiffs-Appellants

v.

THE WATERBURY CENTER
COMMUNITY CHURCH, INC., *et al.*
Defendants-Appellees_____

Supreme Court Docket No. 97-235

Appeal from the Washington Superior Court
Docket No. S 622-92 WnC

**BRIEF OF *AMICI CURIAE*
THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS, *et al.*,
IN SUPPORT OF DEFENDANTS-APPELLEES**

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STATEMENT OF CASE AND INTEREST OF AMICI

This case involves a constitutional challenge under the Establishment Clause of the United States Constitution and under Chapter I, Article 3 of the Vermont Constitution. The challenge is directed at 12 V.S.A. § 462 (1996) (“§ 462”), which provides an exception for government and charitable organizations — including religious organizations — to Vermont’s rules governing the adverse possession of property or the obtaining of a prescriptive easement, as is at issue here.¹ *Amici* are churches, religious organizations and other charitable organizations, some of whose affiliated organizations own or otherwise hold real property in the State of Vermont. All are vitally concerned with the development of Establishment Clause jurisprudence in the courts of the United States and in the courts of the various States, including Vermont. Full identification of the various *amici* and information regarding their interests in this case are attached at Appendix A.

STATEMENT OF ISSUE PRESENTED

While other issues are addressed by the parties, this brief focuses only on the constitutionality of 12 V.S.A. § 462 (1996), as analyzed under the Establishment Clause of the United States Constitution and under Chapter 1, Article 3 of the Constitution of the State of Vermont.

STANDARD OF REVIEW

The constitutionality of a statute presents a question of pure law subject to review by this court. *See In re Estate of Johnson*, 158 Vt. 557, 559 (1992). All statutes are accorded a presumption

¹Appellants claim that the doctrines of both adverse possession and easement by prescription may apply to this case. While *amici* dispute that either doctrine applies, for ease of reference *amici* will refer to adverse possession throughout this brief as shorthand for both doctrines. The doctrines will not be treated separately as the Establishment Clause analysis of both is identical.

of constitutionality. *See State v. Read*, 165 Vt. 141, 147 (1996); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

INTRODUCTION

The exemption at issue in this case is extremely simple and longstanding. Recognizing that certain types of property should not be subject to the general rules governing adverse possession, the Vermont Legislature crafted a statutory provision exempting various types of property from adverse possession and prescriptive easement claims. This exemption -- first passed in 1801 -- specifically provides that claims based on adverse possession may not be made against "lands given, granted, sequestered, or appropriated to a public, pious, or charitable use." 12 V.S.A. § 462.

Now, as this statutory exemption nears its two-hundredth birthday, appellants would have this Court hold for the first time that the exemption is unconstitutional because it somehow violates the Establishment Clause of the United States Constitution and its sister provision contained in Chapter 1, Article 3 of the Vermont Constitution. Their argument is a familiar one: Because religion -- or in this case, religious property -- is exempted from a statutory mechanism determining when adverse possession may occur, religion is receiving a benefit from the State that other general property holders do not share. Consequently, appellants' argument concludes, the State is impermissibly providing aid to religion in violation of the Establishment Clause.

This well-worn argument has been flatly rejected by the United States Supreme Court on several occasions. In the two leading cases, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), and *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court was confronted, exactly as here, with statutory provisions exempting religious organizations from otherwise generally applicable state laws. In both

cases, plaintiffs brought Establishment Clause claims asking that statutory religious exemptions be struck down. In both, plaintiffs argued that the statutory exemptions provided an impermissible benefit to religion because they allowed churches to be free from otherwise restrictive statutory schemes. And in both, with remarkable unanimity, the United States Supreme Court flatly rejected any suggestion that the exemptions violated the constitutional proscription against the establishment of religion.

Taken separately, each of these cases provides a strong and direct answer to the issue currently before this Court. Taken together, that answer becomes unequivocal and compelling. Add to this the host of similar decisions across the country and the authority is overwhelming. Simply stated, a legislatively crafted exemption to the operation of Vermont's adverse possession rules in no way establishes religion in violation of the United States or Vermont Constitutions.

ARGUMENT

Perhaps no principle of Establishment Clause jurisprudence is as firmly established and clearly articulated as the principle that a state or federal legislature may constitutionally relieve religious institutions of the burdens that accompany many otherwise generally applicable laws. Indeed, the reporters are replete with cases recognizing that "government[s] may (and sometimes must) accommodate religious practices" and may certainly do so "without violating the Establishment Clause." *Amos*, 483 U.S. at 334 (citations omitted).² Whatever other requirements the Establishment

²Each of the following cases upholds a religious exemption from an otherwise generally applicable law in the face of a constitutional challenge: *Amos*, 483 U.S. at 335; *Gillette v. United States*, 401 U.S. 437, 453 (1971) (upholding draft registration exemption for religious objections in face of establishment clause challenge); *Walz*, 397 U.S. at 674-76; *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (upholding exemption from federal drug laws for members of the Native American Church); *South Ridge Baptist Church v. Industrial Comm'n*, 911 F.2d 1203 (6th Cir. 1990) (upholding exemption from workers' compensation statute for ministers); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) (upholding exemption from state licensing requirements for religiously affiliated day-care centers); *Jaggard v. Commissioner*, 582 F.2d 1189 (8th Cir. 1978) (upholding exemption from self-employment tax for members of certain religious faiths); *Von Stauffenberg v. District Unemployment Compensation Bd.*, 459 F.2d 1128 (D.C. Cir. 1972) (upholding exemption for religious organization from District's unemployment compensation tax); *Swallow v. United States*, 325 F.2d 97 (4th Cir. 1963) (summarily

Clause may impose, it simply does not require that "government show a callous indifference to religious groups." *Id.* at 335 (quoted authority omitted). Indeed, the Supreme Court has not only upheld statutory exemptions for religious groups, but has affirmatively invited such action. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court rejected an argument that the Free Exercise Clause compelled the recognition of a judicially created religious exemption from a generally applicable law, but declared that, while not required, such exemptions for religious conduct are "permitted, or even *desirable*" as the subject of legislative action. *Id.* at 890 (emphasis added). In short, our finest traditions of democracy and tolerance permit government, through statutory exemptions, to free religious organizations from burdens generally imposed on other individuals and entities.

A. Walz Directly and Unambiguously Controls this Case.

In every material respect, *Walz* controls this case. In *Walz*, just as in this case, a party registered an Establishment Clause challenge to a state (New York) statute that exempted real property owned by religious corporations (among others) and used for religious purposes (among others) from state taxation. *See* 397 U.S. at 667. The statute in *Walz*, just as the statute here, specifically exempted property owned by "religious" or "charitable" organizations and used for "religious" or

rejecting any suggestion that income tax exemptions for charitable and religious donations violated the Establishment Clause); *Forté v. Coler*, 725 F. Supp. 488 (M.D. Fla. 1989) (upholding exemption for religiously affiliated day-care centers from state licensing requirements); *In re Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987) (upholding state religious objection exemption from inoculation for school requirements); *Arkansas Day Care Ass'n v. Clinton*, 577 F. Supp. 388 (E.D. Ark. 1983) (another day care licensing case); *Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980) (upholding religious exemption from state employment discrimination laws); *Kleid v. Board of Educ.*, 406 F. Supp. 902 (W.D. Ky. 1976) (another inoculation case); *Church of the Brethren v. City*, 17 Cal. Rptr. 30 (Cal. Dist. Ct. App. 1961) (upholding property tax exemptions); *Konecny v. District of Columbia Dep't of Employment Servs.*, 447 A.2d 31 (D.C. Ct. App. 1982) (upholding exemptions for religious organizations from unemployment compensation plan); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Ada County*, 849 P.2d 83 (Idaho 1993) (indicating the property tax exemption for parsonages was not suspect under the Establishment Clause); *Murray v. Comptroller of the Treasury*, 216 A.2d 897 (Md. Ct. App. 1966) (upholding property tax exemption for property held for public worship); *In re Elwell*, 284 N.Y.S.2d 924 (Fam. Ct. 1967) (another inoculation case); *General Fin. Corp. v. Archetto*, 176 A.2d 73 (R.I. 1961) (upholding religious organization exemption from property tax laws); *Bexar County Appraisal Review Bd. v. First Baptist Church*, 846 S.W.2d 554 (Tex. Ct. App. 1993).

“charitable” purposes. Wrestling for the first time with a challenge to a statutory exemption from taxation for property held by religious organizations and used for religious purposes, the Court declared that the principal thrust of the Establishment Clause was to proscribe “government sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Id.* at 668. Rejecting the suggestion, advanced by appellants here, that state government could not by statute do anything that would benefit religion, the Court declared:

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms -- economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes: exemption constitutes a reasonable and balanced attempt to guard against those dangers.

Id. at 673.

Ultimately, the Court concluded that the tax exemption simply was not aimed at “establishing, sponsoring, or supporting religion,” that it did not result in an excessive entanglement, and that it did not therefore offend in any way the Establishment Clause. *Id.* at 674-76. Accordingly, the Court upheld the tax exemption, and indeed expressed considerable surprise that anyone would question the longstanding practice:

It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment.

Id. at 680. Thus, the *Walz* Court made clear that its holding was not novel Establishment Clause jurisprudence but expressly confirmed a long-held view. In short, the Court firmly established the

proposition that religious and similar entities can be expressly exempted from the operation of particular statutory provisions generally imposed on others without violating the Establishment Clause.

That *Walz* controls the resolution of this case under the Establishment Clause can hardly be questioned. Both cases involve express statutory exemptions for religious organizations. Both exemptions affect real property used for religious purposes. Both exemptions have long histories of unchallenged operation.³ In addition, the constitutional questions in both cases are strictly Establishment Clause challenges. Indeed, the only distinction between the cases is the fact that one exemption lifts the burden of taxation while the other avoids the operation of adverse possession laws. That insignificant difference does not distinguish these cases in any constitutional sense, and thus *Walz* holds that appellants' challenge here is without merit.

Recognizing, at least implicitly, that *Walz* may control this case and is fatal to their position, appellants go to great lengths to distinguish the case. Those efforts, however, are simply unavailing. First, appellants suggest that § 462 must be struck down because the group benefitted by the statute is too narrow and “religion” too big a part. *See* Appellants' Opening Brief at 8. This argument can be dismissed easily for two critical reasons: the facts *and* the law are to the contrary. An exemption for public, charitable, and religious uses of property does not benefit only churches. Indeed, the exemption covers a wide array of property and organizations. More critically, as outlined more fully below, the Supreme Court has held that religious entities *alone* can be exempted from statutory schemes without working any offense to the Establishment Clause when the state is lifting a burden from religious organizations. *See Amos*, 483 U.S. at 338. Thus, appellants' argument that the group benefitted by §

³ Section 462 dates back to 1801, *see* 12 V.S.A. § 462 (history), and the exemption at issue in *Walz* traces its history back to 1799 -- the date the state constitutional provision on which it relies was originally adopted.

462 is too small to survive an Establishment Clause challenge is directly contradicted by the facts and controlling case law.

Next, appellants suggest that, unlike the statute at issue in *Walz*, § 462's predominant effect is to benefit religion. *See* Appellants' Opening Brief at 9. This argument is addressed more fully in Section C(1), *supra*, but several points are pertinent here. First, appellants' position ignores their own point that most of the cases arising under this section benefit public land and not land used for "pious" purposes. *See* Appellants' Opening Brief at 9 (claiming that of the five cases arising under § 462, four have involved public lands). Clearly, the "predominant effect" is not to benefit religion. Second, appellants' position, which, in their words, is that a law that benefits only religions necessarily violates the Establishment Clause, again ignores the critical teachings of *Amos* addressed below. Despite their efforts, appellants cannot avoid the fact that *Walz* is fatal to their claims.

B. *Amos* Also Compels the Conclusion that § 462 Does Not Present Any Serious Establishment Clause Concerns.

While *Walz* alone requires the rejection of Appellants' Establishment Clause challenge, *Amos* provides perhaps even more compelling authority for upholding § 462. *Amos* involved an Establishment Clause challenge to a congressional statutory exemption for religious organizations from the anti-discrimination in employment provisions of Title VII. Applying the *Lemon* test, the Court upheld the exemption, declaring:

A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have a forbidden "effect" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.

483 U.S. at 337. The Court expressly rejected the notion, advanced here, that the exemption, which applied *only* to religious organizations, violated the Establishment Clause because it singled out religions for a governmental benefit.

We find unpersuasive the District court's reliance on the fact that § 702 singles out religious entities for a benefit. . . . [I]t has never [been] indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause.

Id. at 338.

Clearly, *Amos* provides even stronger authority for rejecting Appellant's position than *Walz* for at least two reasons. First, the statutory framework from which religious organizations were exempted in *Amos* prohibited discrimination in employment. *See* 42 USC § 2000e-2. The governmental and societal interest in the elimination of a racial or religious discrimination is an interest of the highest order. Indeed, it is one of the few interests that has qualified as a "compelling governmental interest." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). By contrast, the exemption in this case operates to exempt churches only from the operation of adverse possession laws. Thus, the government has virtually no interest in enforcing this statute against religious organizations.

Second, unlike the exemption at issue here which applies to a broad class of organizations, the exemption in *Amos* protected *only* religious organizations. Clearly an exemption protecting only religious organizations is much more susceptible to Establishment Clause challenge than one such as § 462, which applies broadly to all property used for "pious, charitable or public" purposes or owned by the State. Notwithstanding the seeming vulnerability of the *Amos* exception to an Establishment Clause challenge (that only religions benefitted from its provisions), the Supreme Court upheld the exemption.

Indeed, the Court made clear that the question was not even close, proclaiming that “the exemption involved here is in no way questionable under the *Lemon* analysis.” *Id.* at 335. In short, if the exemption at issue in *Amos* passed constitutional muster under the Establishment Clause, § 462 so clearly satisfies the constitutional standard that there cannot be any serious question. *Amos* unequivocally establishes that § 462 is constitutional.

C. While *Walz* and *Amos* Standing Alone Require the Rejection of Appellant's Establishment Clause Challenge, Analysis of the Statute under the Court's Current Three-Prong Establishment Clause Test Reinforces the Conclusion that § 462 Does Not Offend the Constitutional Proscription Against Government Establishment of Religion.

Following *Walz*, and based in large part on its holding, the Supreme Court developed the oft-cited three-prong *Lemon* test, which has been applied historically to determine whether a law violates the Establishment Clause.⁴ The *Lemon* test requires that laws challenged under the Establishment Clause (1) serve a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) avoid any excessive entanglement of church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Amos*, the Court first applied this test to a statutory religious exemption. In upholding the statute, the *Amos* Court concretely established as indicated above that government can exempt religious organizations from otherwise generally applicable statutes, even if those entities are singled out for seemingly special treatment. Indeed, application of the Court's current three-prong test to this case establishes beyond dispute that § 462 is constitutional.

⁴ The *Walz* court analyzed virtually the same factors that have come to be known as the *Lemon* test. For example, the Court examined the purpose of the legislation, concluding that the “legislative purpose of a property tax exemption [was] neither the advancement nor the inhibition of religion.” 397 U.S. at 672. In addition, the Court analyzed the practical effect of the statute or the benefit it conferred on religious entities, *id.* at 674-75, and discussed whether the statute resulted in “an excessive government entanglement with religion.” *Id.* at 674.

Recently, in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), the Court reaffirmed its reliance on a three-prong test, but articulated the test somewhat differently than it had before.⁵ First, the Court indicated that it continues to ask whether the statute has the purpose of either advancing or inhibiting religion. *Id.* at 2010. Essentially, this test prevents government "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters" and "does not mean that the law's purpose be unrelated to religion." *Amos*, 483 U.S. at 335. Section 462 satisfies that test.

1. Section 462 Does Not Advance Religion and Has a Secular Purpose.

Excluding from adverse possession laws property used piously, as well as property used publicly, charitably, or property belonging to the state simply does not advance religion. Indeed, an exemption from adverse possession laws provides religions far less benefit than historical exemptions from property and most other taxation laws. Nevertheless, the *Walz* Court declared that examination of the governmental purpose for granting tax exemptions makes clear that no "strong case" exists for holding unconstitutional this historic practice. 397 U.S. at 686-87. The Court identified two appropriate purposes for granting real property tax exemptions to religious organizations.

⁵ The first difference between the tests articulated in *Agostini* and *Lemon* is that *Lemon* states that a statute must have a secular purpose while *Agostini* indicates that the statute's purposes must neither advance nor inhibit religion. As the Supreme Court has recognized, the tests are identical as a practical matter. *See* 117 S. Ct. at 2010 ("To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided."). Indeed, in *Amos* the Court stated that the first prong of the *Lemon* test did "not mean that the law's purpose must be unrelated to religion" and allowed government to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Thus, it seems that the *Lemon* articulation of the test had been applied consistently with the *Agostini* articulation. Indeed, that is surely the reason for the subtle change in the Court's pronouncement of the test. Most importantly, either way it is articulated, § 462 clearly satisfies the test.

The other difference in the test is in the third prong. The *Agostini* Court suggests that the entanglement analysis is similar and should be considered simply a part of the effect analysis of the second prong. Consolidation of the two prongs does not change the substance of the analysis, however, and would not therefore affect the outcome of this case. Accordingly, regardless of the Establishment Clause test to be applied, § 462 survives any constitutional challenge.

First, religious organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community. . . .

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.

Id. at 687. Based on those purposes, the Court concluded that the State of New York "has an affirmative policy that considers these groups [churches and other charitable institutions] as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 673. Similar justifications exist here. *See* Vt. Const. ch. 2, § 68.

Moreover, the "purpose" here is identical to that approved in *Amos* and other cases. *Amos* sustained the exemption of a religious organization from liability for religious discrimination in employment in *all* of its activities, not just its "religious" ones. The Court assumed that the broad exemption was not required by the Free Exercise Clause (483 U.S. at 334), but it held "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)). The statute lifted a substantial burden from religion by freeing it from liability for making religiously based employment decisions while carrying out its mission. In addition, the Court said it "ha[d] never indicated that statutes that give special consideration to religious groups are per se invalid"; when "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." *Id.* at 338 (emphasis added). One could hardly imagine a more direct rejection of appellants' Establishment Clause arguments. *Amos* distinguished sharply between accommodating religious exercise and

promoting it. *See id.* at 337. Here, § 462 does nothing to encourage religious practice. It simply removes a burden from religious organizations; losing property clearly burdens religious practice and religion in the most fundamental way. The removal of this considerable burden, however, is not a purpose that raises even the slightest constitutional concerns.

Indeed, numerous other decisions uphold similar religious exemptions from generally applicable statutory schemes in the face of Establishment Clause challenges. For example, *Gillette v. United States*, 401 U.S. 437, 453 (1971), upheld the congressional exemption from draft laws for religious conscientious objectors. The Court declared that “[i]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with ‘our happy tradition’ of avoiding clashes with the dictates of conscience.” *Id.* at 453. Similarly in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld the release of students from public school classes to attend private religion classes off the school campus. More critically, in *Employment Division v. Smith*, the Court declared that while exemptions for religious conduct are generally not required by the Free Exercise Clause, they do serve the value of free exercise and therefore it may be “permitted, or even . . . desirable,” for legislatures to enact them. 494 U.S. at 890. In short, the cases make clear that § 462’s purpose is constitutionally unassailable.

Apparently ignoring the cases, appellants’ present arguments with regard to *Lemon*’s first prong are without merit. First, the analysis they suggest flies in the face of accepted constitutional analysis. They urge the court to determine whether there is a secular purpose for the “pious use” provision standing alone and not to review the whole statute. This approach directly contradicts that utilized by the Supreme Court in *Walz* and in virtually every other reported Establishment Clause case.

Moreover, appellants' suggestion that no "secular purpose" *can* exist for exempting "pious uses" is directly contradicted by the declaration of *Amos* that the exemption there that benefitted *only* religion was not constitutionally suspect in any way. *See Amos*, 483 U.S. at 335. In addition, it is clear that the purpose of § 462 is not to advance religion, but to lift the potential burden of losing property used for pious purposes. The Supreme Court has made abundantly clear that the lifting of burdens from religion, as is involved here, is an appropriate governmental purpose. *Id.* at 338. To suggest that the level of governmental activity at issue here violates the first prong of the *Lemon* test is simply to ignore the teachings of *Walz*, *Amos*, *Gillette*, *Zorach*, and dozens of other cases.

2. Section 462's Primary Effect is Not to Advance or Inhibit Religion.

Second, a statute cannot have the primary effect of advancing or inhibiting religion. *Agostini*, 117 S. Ct. at 2010. For a law to violate the Establishment Clause under this prong, the government itself must have "advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Indeed, the Court has held that this prong requires a showing of "direct government action endorsing religion or a particular religious practice." *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (quoted authority omitted). The statute here simply does not violate this standard. Far from directly endorsing religion or a particular religious practice, the statute merely excludes property used for pious purposes from adverse possession laws. To be sure, the statute provides some benefit to religious institutions, but the Establishment Clause was not intended to eliminate any benefit flowing to religious institutions. As the Supreme Court has declared, "if the Establishment Clause did bar religious groups from receiving general government benefits, then a 'church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citation omitted). The Court has summarily rejected the view that these

kinds of services cannot be provided to religious organizations. *Id.* Indeed, to offend the Establishment Clause, a statute must enhance a religion's ability to propagate its faith, not just provide passive assistance. *Walz*, 397 U.S. at 690. Section 462 simply does not rise to this level.

Here, as in *Walz*, the exemption constitutes “mere passive state involvement with religion and not the affirmative involvement” proscribed by the Establishment Clause. *Id.* In fact, religion is not advanced in any way. Religious organizations simply need not worry about losing real property by the operation of law. Lifting this burden constitutes such minimal benefit to religious organizations that it can hardly be said to advance religion. In short, § 462 easily satisfies the second prong of the Court’s current three-prong analysis.⁶

Appellants argue that because § 462 acts as a bar to actions by private citizens and requires the involvement of Vermont courts to be enforceable, it is much more than the passive exemption at issue in *Walz*. This argument does not withstand even cursory scrutiny. First, the exemptions at issue in *Walz* and *Amos*, as well as dozens of other cases, also bar potential actions against religious organizations and require court action to enforce them. Indeed, *Amos* is the direct result of a religious organization raising the statutory exemption defense to a discrimination claim. But the Supreme Court’s and other federal courts’ involvement in *Amos* did not violate the Establishment Clause, and such involvement does not, as appellants purport, constitute the provision of special dispensation or subsidy to religious property owners. Moreover, to accept appellants’ argument would be to preclude any recourse to the courts by religious organizations. Religious entities could not enforce any statutory

⁶ The Supreme Court has indicated that the history behind a provision, while not dispositive, is also an important factor to be considered. Indeed, the *Walz* Court remembered the teachings of Justice Holmes that a “page of history is worth a volume of logic” and more importantly the truism that “[i]f a thing has been practiced for two hundred years” [the approximate age of this statute or practice in Vermont] the court would “need a strong case” to invalidate under the provisions of the Constitution. 397 U.S. at 675-76 & 678. Thus, the long historical practice represented by this statute must not be lightly discarded by this Court.

exemptions because virtually all exemptions re-quire court action to “enforce.” Moreover, appellants’ position would preclude religious entities from ever raising a First Amendment defense. Free Exercise defenses have been recognized and upheld in hundreds of cases⁷ without any indication that court action violated the Establishment Clause. Appellants' contention that court action to enforce the statute violates the Establishment Clause is constitutional nonsense and should give this court little cause for concern.

3. Section 462 Does Not Impermissibly Entangle Church and State

Third, the court must insure that the statute does not impermissibly entangle church and state. The *Agostini* Court indicated that this analysis is virtually synonymous with the "effect" analysis discussed above; thus, "it is simplest" to consider it a part of that analysis. 117 S. Ct. at 2015. Regardless of whether it is analyzed separately or with the effect prong, however, § 462 clearly does not result in any impermissible entanglement. As was the case with the property tax at issue in *Walz*, either subjection to or exemption from the operation of adverse possession statutes will necessitate some interaction between the state and churches. Here, however, just as in *Walz*, exemption from the statute obviously involves much less intrusion into any church affairs by the state than subjection to it. Rather than being involved, through its courts, with a determination of whether by operation of state law a state citizen has acquired the property of a religious organization without its consent, Vermont has determined to exempt religious organizations from any such concerns. Thus, § 462 clearly separates rather than entangles churches and the State of Vermont. The words of the *Amos* Court are instructive on this point.

⁷See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 503-04 (1979); *Minker v. Baltimore Annual Conference*, 894 F.2d 1354, 1356 (D.C. Cir. 1990); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

It cannot be seriously contended that § 702 impermissibly entangles church and state; the [exemption] statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry . . . engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.

483 U.S. at 339. Section 462 creates no risk of impermissible entanglement between church and state. Indeed, it insures more complete separation of these two entities. Because it easily with-stands scrutiny under the third prong of the test articulated in *Agostini*, § 462 does not offend the Establishment Clause.

Appellants' arguments with regard to the third prong must again be rejected. Appellants suggest that excessive entanglement will result because the state and a religious entity will be part of an active relationship in the conduct of judicial proceedings and because a court will have to decide what the term "pious use" means. These arguments are absolutely without merit and bor-der on the spurious. First, to suggest that a religious entity's efforts to enforce this statute in court create an excessive entanglement simply proves too much!! Were the court to adopt appellants' argument, religious entities could never sue to enforce their legal rights, whether contractual, statutory, common law, or constitu-tional. Perhaps more troubling from this court's perspective, religious entities could likewise never be sued. While *amici* may be tempted by the absolute immunity this approach seems to offer, it is clearly not the law.

In addition, appellants' argument that the construction of the phrase "pious use" results in excessive entanglement is contradicted by their own arguments. Appellants cite and acknowledge that courts routinely determine whether a particular practice is "religious" or "religiously motiva-ted" without offending the Establishment Clause. In the next breath, however, they claim that the judicial analysis required by the "pious use" restriction violates the Establishment Clause. This glaring contradiction

demonstrates that appellant's contention is without merit. Courts simply will not excessively entangle themselves in religious matters by determining whether real property is used for "pious" purposes. Indeed, in *Walz* the Court had to determine that the property was used for religious purposes, yet this inquiry did not constitute excessive entanglement.

In addition, appellants' suggestion that recognition of the statute will create a risk that individuals will view the state as endorsing religion must be rejected. Appellants contend that because religious organizations here are receiving a benefit generally reserved for the State, the message that the state is endorsing religion is present. Appellants ignore the fact that in *Walz* and *Swallow*, property and income tax exemptions for religious organizations were challenged and that those exemptions were also generally reserved for the state itself. Notwithstanding, no risk of inappropriate endorsement was created. Indeed, all of the cases upholding statutory exemptions for religious organizations, and there are many, directly contradict this curious contention. Accordingly, this court should reject the argument.

D. The Vermont Constitution Does Not Contravene Clear Establishment Clause Jurisprudence to Invalidate § 462.

With Vermont's statutory exemption well within the boundaries of the Establishment Clause, we turn next to Vermont's own constitutional provisions. The question of whether the statutory exemption creates any difficulty under the Vermont Constitution, however, is easily answered. To the extent allowed under the federal Establishment Clause, the Vermont Constitution actually provides for broader interaction between state and religion, and recognizes special protections for religious organizations.⁸

Chapter 2, § 68 of the Vermont Constitution provides:

⁸Appellants fail to address the Vermont Constitution separately and suggest that the analysis is the same as under the U.S. Constitution.

All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes,⁹ shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy. . . .

(Footnotes added.) It comes as no surprise, then, that this court recognized only a few short years ago that in "[e]stablishment of religion cases, the protections of the First Amendment to the United States Constitution are greater than those in Article 3 [of the Vermont Constitution]." *State v. DeLaBreure*, 154 Vt. 257, 264-65 (1990) (citing *Vermont Educ. Bldgs. Fin. Agency v. Mann*, 127 Vt. 262, 269 (1968)). Simple logic completes the analysis: If, as *Walz*, *Amos*, and a host of other cases dictate, the Vermont statutory exemption for religious organizations does not violate the Establishment Clause of the United States Constitution, as a matter of course such an exemption cannot violate Article 3 of the Vermont Constitution.

CONCLUSION

Because § 462 is in complete harmony with the holdings of *Walz*, *Amos*, and their progeny, this Court should reject appellants' constitutional challenge to the statute.

DATED at Burlington, Vermont, this 13th day of January, 1998.

⁹The language of this constitutional provision expressly declares that the term "pious purposes" includes more than the advancement of religion. Thus, it provides additional authority for the proposition that § 462's purpose is not constitutionally suspect.

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS, *et al.*

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Appendix A

Statement of Interest

The Church of Jesus Christ of Latter-day Saints

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 10 million with more than 24,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping almighty God according to the dictates of our own conscience and allow all men the same privilege let them worship how, where, or what they may." Article of Faith, No. 11.

The Church has 3,500 members in Vermont in 11 wards and branches.

Baptist Joint Committee on Public Affairs

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

Christian Legal Society

The Christian legal Society ("CLS"), through Center for Law and Religious Freedom (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious autonomy, association and exercise. Founded in 1961, CLS is an ecumenical professional association of over 4,000 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such

inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The First Church of Christ, Scientist

The First Church of Christ, Scientist, in Boston, Massachusetts, represents one of the major indigenous American religious denominations -- Christian Science. Christian Science is the name given by Mary Baker Eddy to her discovery of the principles of Christian and spiritual healing through prayer, as illustrated in the Bible and, in particular, by the words and works of Christ Jesus. Following this discovery, Mrs. Eddy established in 1879 and reorganized in 1892, her church (which she named The First Church of Christ, Scientist). The Church is founded on these principles of spiritual healing which are practiced by its members worldwide, in about seven different countries. In Vermont there are thirteen Christian Science churches and societies. The First Church of Christ, Scientist, supports the preservation of religious rights for all.

The General Council on Finance and Administration United Methodist Church The New England Annual Conference The Troy Annual Conference

The General Council on Finance and Administration (GCFA) is the finance and administrative arm of The United Methodist Church. The United Methodist Church is a worldwide religious denomination with approximately 9 million members in the United States, and it has approximately 36,000 local churches in the United States. The denomination is embedded not only in the tradition and teachings of religious tolerance but also seeks to provide for the maintenance of worship, the edification of behaviors, and the redemption of the world. All local church property in the denomination is held in trust as places of divine worship for the denomination as a whole, pursuant to the denomination's polity, as set forth in *The Book of Discipline* (§ 2502). GCFA has an interest in this litigation because it is officially assigned under *The Book of Discipline* to safeguard and protect the legal rights and interests of the denomination.

The United Methodist Church is known as a connectional denomination, and under this structure the "annual conference" is the fundamental body of the denomination, which "connects" the local churches of a geographic region together for a common purpose. There are 68 annual conferences in the United States. The bishops in The United Methodist Church serve as the denomination's spiritual leaders. Each bishop is assigned to an episcopal area, which consists of one or more annual conferences over which the bishop serves as the general superintendent for spiritual purposes. The bishop of an area also serves as the presiding officer over the annual conference(s) in the bishop's area when the annual conference(s) holds its annual business meeting.

The New England Annual Conference (NEAC) is the annual conference in The United Methodist Church that covers most of the New England states. There are approximately 114,000 United Methodists in the NEAC. Bishop Susan Hassinger is the resident bishop. The NEAC covers part of the State of Vermont and is responsible for the local churches in Vermont that are within the annual conference. Bishop Hassinger is responsible for appointing pastors to serve in those local churches. The NEAC and Bishop Hassinger thus have an interest in this litigation because of their connectional responsibilities over certain churches located in Vermont.

The Troy Annual Conference (TAC) is the annual conference in the United Methodist Church that covers most of the State of Vermont, as well as portions of New York. There are approximately 62,000 United Methodists in the TAC. The appellee in this case is a local church within the TAC. Bishop Susan Morrison is the resident bishop. Bishop Morrison is responsible for appointing pastors to serve in the local churches with the TAC. The TAC and Bishop Morrison thus have an interest in this litigation because of their connectional responsibilities over certain local churches in Vermont, including the appellee.

**Clifton Kirkpatrick, as Stated Clerk of the
General Assembly of the Presbyterian Church (U.S.A.)**

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. There are currently 9 Presbyterian congregations within the confines of the state of Vermont with 733 members.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

This brief is consistent with the policies of the General Assembly regarding the establishment of the clause of the First Amendment, and the denomination's policies on exemption of church property

from taxes and other general applicable municipal regulations. The Stated Clerk urges this court to affirm the lower court decision in favor of the local congregation.

Reorganized Church of Jesus Christ of Latter Day Saints

The Reorganized Church of Jesus Christ of Latter Day Saints is organized as an unincorporated religious association on a worldwide basis. The Church has its major concentration in North America, but is officially established in over 35 countries. Church membership is approximately 245,000 with over 1,500 congregations and with the vast majority of its members in North America. The Church has an active membership and leadership in the state of Vermont.

Seventh-day Adventists Church

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which has more than 9.4 million members worldwide, including some 815,000 in the United States and approximately 650 in 12 congregations in Vermont.

As the surest way of securing full religious liberty, the Seventh-day Adventist Church advocates the separation of church and state commanded by our Lord, who said, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matthew 22:21). It believes: "The union of the church with the state, be the degree ever so slight, while it may appear to bring the world nearer to the church, does in reality but bring the church nearer the world." Ellen G. White, *The Great Controversy* at 264 (1974).

The state should never invade the distinct realm of the church to affect, in any way, freedom of conscience or the right to profess, practice, and promulgate religious beliefs and should respect the rights of all citizens, not just those of the majority. Conversely the church must avoid the distinctive realm of the state, even in the furtherance of an otherwise valued, public purpose. Upon these principles the Seventh-day Adventist Church encourages each branch of government to support a high degree of separation between church and state and a high level of First Amendment rights for churches and their members as they profess, practice, and promulgate their religious beliefs.

The United House of Prayer for All People of the Church on the Rock of Apostolic Faith

Amicus Curiae The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith ("United House of Prayer") is a religious society incorporated in the District of Columbia with 135 congregations in 25 states. The United House of Prayer was founded by the late Bishop C. M. Grace in the 1920s and now has a nationwide membership in the millions. The United House of Prayer was founded on principles of racial equality and religious freedom.

Worldwide Church of God

The Worldwide Church of God, a California corporation, began in the early 1930s in Eugene, Oregon. Subsequently, it was incorporated in California in 1947 where it maintains its worldwide headquarters.

As of October 1, 1997, the Church had grown until it had more than 826 local church congregations throughout the world. As of that date, the Church had approximately 100,000 adult baptized members, co-workers and donors, and approximately 1,543 ordained and com-missioned ministers, a large portion of whom had studied at the Church's School of Theology, Ambassador University.

The governance of the Church is hierarchical with ecclesiastical government from the top down in accord with what it deems to be the biblical example.

The Church has an interest in owning property on which are located buildings for the purpose of holding Church services and other religious activities. Therefore, the Church has not only a direct interest in this case but also a general interest in preservation of religious liberties and the prevention of religious discrimination.