No. 16-60477

In the United States Court of Appeals for the Fifth Circuit

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, AND JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

v.

PHIL BRYANT, GOVERNOR OF MISSISSIPPI, AND JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division
Case No. 3:16-cv-417-CWR-LRA

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION FOR EXPEDITED CONSIDERATION

DREW L. SNYDER
Office of Governor Phil Bryant
P.O. Box 139
Jackson, Mississippi 39205
(601) 359-3150

JAMES A. CAMPBELL
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

JONATHAN F. MITCHELL
D. JOHN SAUER
James Otis Law Group, LLC
12977 North Forty Drive, Suite 214
St. Louis, MO 63141
(314) 682-6067
jmitchell@jamesotis.com

Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
• Rims Barber • Carol Burnett • Joan Bailey • Katherine Elizabeth Day • Anthony Laine Boyette • Don Fortenberry • Susan Glisson • Derrick Johnson • Dorothy C. Triplett • Renick Taylor • Brandiilyne Mangum-Dear • Susan Mangum • Joshua Generation Metropolitan Community Church • Campaign for Southern Equality • Susan Hrostowski	Robert B. McDuff Sibyl C. Byrd Jacob W. Howard MCDUFF & BYRD Beth L. Orlansky John Jopling Charles O. Lee MISSISSIPPI CENTER FOR JUSTICE Alysson Mills FISHMAN HAYGOOD LLP Roberta A. Kaplan Andrew J. Ehrlich William B. Michael Joshua D. Kaye Jacob H. Hupart Alexia D. Korberg Zachary A. Dietert PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Defendants	Defendants' Counsel
• Phil Bryant, Governor Of Mississippi • Jim Hood, Attorney General Of Mississippi • John Davis, Executive Director Of The Mississippi Department Of Human Services • Judy Moulder, Mississippi State Registrar Of Vital Records	Jonathan F. Mitchell D. John Sauer JAMES OTIS LAW GROUP, LLC Drew L. Snyder OFFICE OF GOVERNOR PHIL BRYANT James A. Campbell ALLIANCE DEFENDING FREEDOM Paul E. Barnes Tommy D. Goodwin Douglas T. Miracle OFFICE OF THE ATTORNEY GENERAL

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Appellants

Governor Phil Bryant, on behalf of the State of Mississippi, respectfully seeks a stay of the preliminary injunction entered against House Bill 1523, also known as the "Protecting Freedom of Conscience from Government Discrimination Act" (attached as App. A).

The district court issued its ruling at 11:23 P.M. on the night before the law was scheduled to take effect, which deprived the State of the opportunity to seek appellate review before the statute's effective date. The harm to the State has been compounded by the astonishing nature of the district court's ruling, which held that the State lacked a rational basis for enacting a law that protects the conscientious scruples of its citizens, and held further that a State violates the establishment clause when it enacts legislation to protect or accommodate an enumerated conscientious belief. *See* Memorandum Opinion and Order (doc. 39) at 39, 48–51 (attached as App. B). The reasoning in the district court's opinion would invalidate every piece of conscience-clause legislation that confers specific statutory protections on those who oppose abortion, sterilization, or contraception. *See* Lucas Mlsna, *Stem Cell Based Treatments and Novel Considerations for Conscience Clause Legislation*, 8 Ind. Health L. Rev. 471, 480 (2011) ("[F]orty-six states have enacted conscience clauses that allow some health care professionals to refuse to perform abortions"). And it would nullify at least two federal statutes that protect the conscientious scruples of abortion opponents. *See* 42 U.S.C. § 238n (attached as App. H); Pub. L. No. 111-117, 123 Stat. 3034, 3280 § 508(d)(1) (attached as App. I).

Because the State is suffering irreparable injury from the district court's injunction against its duly enacted law, we respectfully ask the Court to decide this mo-

tion as soon as possible, after time for the plaintiffs to file a response and the State to file a reply. The State also requests expedited consideration of this appeal, regardless of whether the Court grants or denies the stay. Finally, the State moves to consolidate the appeal in *CSE v. Bryant*, No. 16-60478, with the appeal in this case.[1]

STATEMENT OF THE CASE

American law has long protected and accommodated the conscientious scruples of individuals and institutions who cannot participate in certain activities on account of their religious beliefs or moral convictions. Those who do not believe in swearing oaths are permitted to affirm. *See* U.S. Const. art. II, § 1, ¶ 8; *id.* art. VI, ¶ 3. Pacifists are exempted from military conscription. *See Gillette v. United States*, 401 U.S. 437 (1971). And opponents of abortion are protected from retaliation or discrimination when they refuse to participate in abortion-related activities. *See, e.g.*, 42 U.S.C. § 238n; *see also* Mlsna, 8 Ind. Health L. Rev. at 480 ("[F]orty-six states have enacted conscience clauses that allow some health care professionals to refuse to perform abortions."). Each of these laws singles out specific beliefs or convictions for unique legal protections—pacifism, opposition to oath-taking, and opposition to abortion. And each of these laws protects the adherents of those beliefs from being coerced to act in a manner contrary to their conscientious scruples.

[1] The State has filed a motion for a stay in the district court, *see* Fed. R. App. P. 8(a)(2)(A)(i), but as of Monday, July 11, 2016, the district court has not yet ruled on it. We do not expect the district court to stay its decision and respectfully ask this Court to consider this application without waiting for the district court to rule. We will notify the Court as soon as the district court rules on the State's motion.

Until recently, there was no need for the law to protect the conscientious scruples of those who oppose same-sex marriage. That is because it was unthinkable—until recently—that government officials might try to coerce religious organizations or private citizens into participating in same-sex marriage ceremonies, or penalize them for their refusal to do so. But state and local governments are already taking action against Christians who decline to participate in these ceremonies on account of their religious beliefs. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). And at oral argument in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Solicitor General acknowledged that the tax-exempt status of religious institutions could be in jeopardy if they do not recognize same-sex marriage. *See* Oral Argument Transcript, *Obergefell v. Hodges*, No. 14-556, at 36–38 (U.S. Apr. 28, 2015).

Mississippi has responded to these episodes by enacting HB 1523, a statute that gives the opponents of same-sex marriage the same conscientious-objector protections that federal law confers on opponents of abortion. *See, e.g.*, 42 U.S.C. § 238n. HB 1523 ensures that churches, religious organizations, and private citizens may decline to participate in same-sex marriage ceremonies without fear of reprisal from the State. *See* HB 1523 §§ 3(1)(a); 3(5). It also allows private citizens to decline to perform sex-change operations or provide counseling or fertility services that violate their sincerely held religious or moral beliefs. *See id.* § 3(4). And it allows state employees to recuse themselves from licensing same-sex marriages—but only if they provide "prior written notice to the State Registrar of Vital Records" and "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* at § 3(8).

It is likely that Mississippi residents already enjoyed these protections under the state's Religious Freedom Restoration Act—at least to the extent that their conscientious objections rest on religious rather than secular beliefs. *See* Miss. Code Ann. § 11-61-1 (2014). But that statute requires religious-liberty claims to give way when a "compelling governmental interest" is involved, and some judges have construed that phrase broadly when controversial culture-war issues are at stake. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (asserting a "[c]ompelling governmental interest[]" in "uniform compliance with the law"); *see also id.* at 2799–2801 (Ginsburg, J., dissenting) (asserting a "compelling interest" in forcing employers to subsidize their employees' contraception). HB 1523 mitigates this chilling effect on religious freedom by clarifying that the State's residents may follow their conscientious scruples and decline to participate in same-sex marriage ceremonies, without requiring them to gamble their finances and livelihoods on how a future court might interpret the plastic and ill-defined "compelling governmental interest" standard.

Mississippi's statute is carefully crafted and exceedingly limited in its scope. It does not authorize *any* business to discriminate against homosexuals or transgendered people in employment, housing, or access to places of public accommodation.[2] It requires state employees who recuse themselves from same-sex marriages to ensure that the licensing of marriages is not "impeded or delayed." *Id.*

[2] The provisions governing employment and housing discrimination apply only to "religious organizations." That term is defined in the statute, and it does not include business corporations. *See* HB 1523 § 9(4); *compare id.* § 9(3)(b) *with id.* § 9(3)(c).

at § 3(8). And it limits the statute's protections to those who decline, for reasons of religious belief or moral conviction, to participate in activities that they consider immoral or sinful. Homosexuals and transgendered people will still receive marriage licenses, health care, and wedding-related services, but they cannot force private citizens or religious organizations to provide these services in violation of their religious or conscientious beliefs. This regime is no different from the laws that shield doctors and health-care entities who refuse to participate in abortions.

On June 30, 2016, the district court issued a preliminary injunction against HB 1523. The court held that HB 1523 fails rational-basis review, and therefore violates the equal-protection clause. *See* Memorandum Opinion and Order (doc. 39) at 39 (attached as App. B). The court also held that HB 1523 violates the establishment clause by conferring special statutory protections on an enumerated subset of conscientious scruples. *See id.* at 48.[3] In the district court's view, the government must protect *all* conscientious scruples equally; otherwise it is creating "an official preference for certain religious tenets." *Id.*

The governor has appealed on behalf of the State, and respectfully asks for a stay of the injunction pending appeal.

[3] *See* HB 1523 § 2 ("The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.").

ARGUMENT AND AUTHORITIES

In deciding whether to stay a preliminary injunction pending appeal, a court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quotation omitted). Each of these four factors cuts in favor of the State's application.

I. THE STATE IS LIKELY TO PREVAIL ON APPEAL

The district court held that HB 1523 violates both the equal-protection clause and the establishment clause. Neither conclusion is likely to survive appellate review.[4]

A. HB 1523 Easily Satisfies Rational-Basis Review

The district court held that HB 1523 violates the equal-protection clause because it fails rational-basis review. *See* Doc. 39 at 39 ("Even under this generous standard, HB 1523 fails."). That conclusion is untenable. HB 1523 has an obvious

[4] The plaintiffs also lack standing to challenge HB 1523, because the injuries that they allege are either ideological or speculative. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982) (no standing for ideological injuries); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147–50 (2013) (no standing for speculative future injuries). The district court held otherwise, but the State is not seeking a stay on this basis because the district court's resolution of the merits is so clearly wrong, and because the complex and technical nature of Article III standing doctrine makes it difficult to show in a 20-page brief that the district court erred in a manner grave enough to warrant a stay. The State is in no way conceding the issue of standing, and we will vigorously contest the plaintiffs' standing on appeal.

rational basis: Protecting the State's citizens from being forced or pressured to act in a way that violates their deeply held religious or moral beliefs. Even the district court acknowledged that this qualifies as a "legitimate government interest." *Id.*

Yet the district court reached the astounding conclusion that HB 1523 "does not advance" the State's interest in protecting religious liberty. *Id.* at 40. The Court wrote:

> HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity.

Id. That is a non-sequitur. Even if one accepts the district court's premise—that HB 1523 "creates a vehicle for state-sanctioned discrimination"—its conclusion that HB 1523 "does not advance" the State's interest in protecting religious freedom does not follow. The district court is criticizing the *means* by which the State is protecting the religious liberty of its citizens, but that does not show that HB 1523 "does not advance" the State's admittedly legitimate interest in protecting religious liberty. HB 1523 most assuredly advances that interest; it just does so in a way that the district court disapproves. Yet "rational-basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted). Once the district court acknowledged that the protection of religious liberty qualifies as a "legitimate government interest," its task under rational-basis review came to an end.

The district court's rational-basis analysis is also incompatible with *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *Amos* upheld Title VII's statu-

tory exemption for religious organizations as a permissible religious accommodation—even though this statutory exemption "creates a vehicle for state-sanctioned discrimination." Doc. 39 at 40. Yet the Supreme Court held that the authorization of discriminatory behavior did *not* make Title VII's exemption an impermissible or irrational means of protecting religious liberty or autonomy. *See Amos*, 483 U.S. at 334 ("[T]he government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause.") (quotation omitted); *id.* at 340–41 (Brennan, J., concurring in the judgment) (acknowledging that "[a]ny exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees" yet concluding that "religious organizations have an interest in autonomy in ordering their internal affairs"). The district court did not even attempt to explain how its holding could be reconciled with *Amos*, even though the State cited that case repeatedly in its district-court filings. *See* Memo. in Opp. to Pls.' Mot. for Prelim. Inj. (doc. 30) at 30, 33 (attached as App. E).

Finally, the district court's claim that HB 1523 reflects unconstitutional "animus" toward homosexuals and transgendered people is indefensible. Only laws that reflect a "*bare* desire to harm a politically unpopular group" can be invalidated on the ground of "animus." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (emphasis added) (quoting *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973)). Laws that advance a rational or legitimate state interest—such as the protection of religious freedom—do not evince a "*bare* desire to harm a politically unpopular group," even if those laws impose inconveniences or harms on a subset of the citizenry.

Almost every law inflicts harm or disadvantages on someone; if that made a legislature guilty of unconstitutional "animus," then few if any laws would survive judicial review. The test is whether a law exists *only* to harm a politically unpopular group, or whether the law can be said to serve some legitimate or rational end.

HB 1523 advances a purpose that even the district court recognized as legitimate: protecting the religious and conscientious freedom of the State's citizens. *See* Doc. 39 at 39. So long as the law serves that rational and legitimate purpose, it cannot be said to embody a "*bare* desire to harm a politically unpopular group." HB 1523 is no different in this regard from the statutes that protect the conscientious scruples of abortion opponents. *See* 42 U.S.C. § 238n ("Coates amendment") (forbidding governments to penalize or discriminate against any "health care entity" that refuses to perform abortions or provide abortion training or referrals). The Coates amendment does not reflect a "bare desire to harm" abortion patients—even though it likely has the effect of reducing access to abortion—because the law *also* serves the valid and legitimate purpose of protecting the freedom of conscience of abortion opponents. That rational basis for the law defeats any accusation that the law is born of unconstitutional "animus." So too with HB 1523.

B. HB 1523 Does Not Violate The Establishment Clause

The district court's interpretation of the establishment clause is even more off-base. The district court held that the establishment clause forbids the State to protect the specific religious beliefs and moral convictions listed in HB 1523—unless the State confers identical statutory protections on every other conscientious scru-

ple that might be asserted in the State of Mississippi. *See* Doc. 39 at 48–50. To allow a State to protect only an enumerated subset of conscientious scruples would, in the view of the district court, violate the establishment clause by creating an "official preference for certain religious tenets." *Id.* at 48. That is an absurd construction of the establishment clause.

It is perfectly constitutional for statutes and regulations to extend specific protection to conscientious scruples that have come to the government's attention, and which might be endangered by state action, without legislating broadly in the abstract for situations that have not arisen, might never arise, and might present different countervailing considerations. Indeed, almost every conscience clause that exists in federal or state legislation specifies the conscientious scruples that it will protect and accommodate, while declining to extend protections and accommodations to other deeply held beliefs. The federal statutes that protect the conscientious scruples of abortion opponents, for example, offer no protections to opponents of contraception. *See* 42 U.S.C. § 300a-7 ("Church amendment") (attached as App. G); 42 U.S.C. § 238n ("Coates amendment") (attached as App. H); Pub. L. No. 111-117, 123 Stat 3034, 3280 § 508(d)(1) ("Weldon amendment") (attached as App. I). And most of the 46 states that have enacted conscience-clause protections for abortion opponents do not extend those statutory protections to contraception or other types of conscientious scruples. *See* Mlsna, 8 Ind. Health L. Rev. at 480 & nn.42–44 (2011). Yet on the district court's reasoning, all of these statutes violate the establishment clause, because they confer an "official preference" on the conscientious scruples of abortion opponents, while those with conscientious

scruples against contraception (and other controversial health-care practices) are left out in the cold. Doc. 39 at 48.

The district court tried to distinguish these statutes by observing that the Church amendment confers symmetrical protections on abortion-performing and anti-abortion doctors. *See id.* at 54–55. But that is true only of the Church amendment. The Coates and Weldon amendments—and most of the state conscience-clause provisions—protect *only* the health-care entities that *refuse* to participate in abortions, and all of these statutes violate the establishment clause under the district court's reasoning. And the court never addressed the problem posed by these statutes' failure to protect the opponents of contraception. Under the district court's ruling, the failure to extend equal conscience protections to opponents of contraception violates the establishment clause by treating opponents of contraception as "second-class Christians" and "send[ing] a message that they are outsiders, not full members of the political community." Doc. 39 at 48 (citation omitted).

The district court's reasoning is untenable. There are all sorts of valid and legitimate reasons for why a legislature might choose to protect some conscientious scruples over others. Some conscientious scruples may be too insubstantial to warrant statutory protection. Congress might decide, for example, that objections to contraception should receive fewer statutory protections than objections to abortion because contraception (unlike abortion) does not involve the intentional destruction of a human fetus. Other conscientious scruples may be too abhorrent to receive statutory protection. Congress need not, for example, protect the conscientious scruples of racist or eugenic health-care providers who are unwilling to treat

minority patients, and Congress need not protect those "conscientious scruples" on the same terms that it protects the opponents of abortion. And some conscientious scruples may not need statutory protection because they are not under assault by government officials or by the culture. All of these factors go into determining whether a conscientious scruple receives explicit statutory protection—and it is inevitable (and entirely constitutional) that some conscientious scruples will receive greater statutory protection than others. As Professor McConnell has explained:

> It does not follow . . . that accommodations are suspect merely because they accommodate only a particular religious practice. Most accommodations are of this sort; when the legislature becomes aware that a particular law or government action infringes on the religious exercise of a particular religious minority, it typically carves out a particular exception. When Congress enacted Prohibition, it incorporated an exception for sacramental wine; when Congress enacted military conscription, it included an exception for religious conscientious objectors; when Congress extended Social Security to self-employed persons, it included an exemption. That these laws work to the benefit of only those religious groups whose practices are inconsistent with the law in question cannot be an objection.

Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 706 (1992). And Professor James Ryan, in his 1992 student note, uncovered more than 2,000 religious exemptions in federal and state law that protect specific conscientious objections. *See* James Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445–50 (1992) (attached as App. J). All of this would be swept away under the district court's reasoning, and neither the district court nor the plaintiffs have ex-

plained how any of these ubiquitous religious-accommodation statutes could survive if HB 1523 violates the establishment clause.

The district court also defied the Supreme Court's ruling in *Gillette v. United States*, 401 U.S. 437 (1971), which explicitly rejected the view of the establishment clause that the district court has propounded. The petitioners in *Gillette* had brought an establishment-clause challenge to the Selective Service Act of 1967, which exempted from military conscription those who were "conscientiously opposed to participation in war *in any form*," but refused to exempt those with conscientious objections only to a *particular* war. *See* Pub. L. 90-40, § 7 (emphasis added). The petitioners' argument in *Gillette* tracked the district court's reasoning in this case: they argued that Congress had violated the establishment clause by accommodating the conscientious beliefs of full-time pacifists, while withholding those accommodations from part-time pacifists who object only to a particular type of war. This distinction, according to the petitioners, established "a de facto discrimination among religions." *Gillette*, 401 U.S. at 452; *see also id.* at 449 ("[P]etitioners ask how their claims to relief from military service can be permitted to fail, while other 'religious' claims are upheld by the Act.").

Yet the Supreme Court rejected the petitioners' argument, and it specifically held that the establishment clause permits Congress to discriminate among the conscientious scruples that it will recognize and accommodate—so long as Congress extends those statutory protections on equal terms to members of different faiths and religious denominations and refrains from "religious gerrymanders." *Id.* at 452. A law that protects only certain conscientious scruples and not others

"simply does not discriminate on the basis of religious affiliation or religious belief"—even though beliefs about war are heavily correlated with one's religious affiliation and beliefs. *Id.* at 450.

So it is perfectly acceptable for the government to exempt conscientious objectors who oppose all forms of warfare, without extending identical protections to those who oppose only a particular war. *See id.* at 450. It is also acceptable for the government to protect the conscientious scruples of health-care workers who oppose abortion, without extending similar protections to those who oppose contraception. *See* 42 U.S.C. § 238n. It is also acceptable for the government to protect churches and clergy that oppose same-sex marriage, without extending similar protections to churches and clergy that oppose interracial marriage. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). And it is acceptable for the Religious Freedom Restoration Act to protect religiously motivated conscientious scruples, without extending similar protections to conscientious scruples rooted in secular moral belief. *See Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005).[5] None of this violates the establishment clause—and neither does HB 1523.

And just what "religion" has the State "established" by enacting HB 1523? Opponents of same-sex marriage can be found in *every* faith tradition and religious denomination, and the statute protects all of them—including non-believers whose conscientious objections rest exclusively on secular moral beliefs. *See* HB 1523 § 2.

[5] It is not clear how the federal Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act could survive under the district court's interpretation of the establishment clause, since each of these statutes discriminates by limiting their protections and accommodations to *religious* conscientious scruples.

So how can this be an establishment of *religion*? And if so, *what is* the religion that the State has established?

The district court and the plaintiffs argue that HB 1523 establishes a de facto "denominational preference" because the opponents of same-sex marriage are more likely to be found among the ranks of the Southern Baptists than the Episcopalians. *See, e.g.*, Doc. 39 at 49–50 ("HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine. . . ."). If that makes a statute violate the establishment clause, then every conscience-protection and religious-accommodation law is unconstitutional, because there will always be disagreements among faith traditions over the issues that trigger the need for such a law, and conscientious objectors will never be equally distributed across religious denominations.

That may be exactly what the plaintiffs want—and they have never tried to explain how 42 U.S.C. § 238n and the state-law conscience-clause protections for abortion opponents could survive under their theory of the establishment clause. But it is hard to imagine that this Court (or the Supreme Court) would adopt that interpretation of the establishment clause on appeal.[6]

[6] The district court also erred by holding that the establishment clause forbids religious accommodations that have adverse impacts on third parties. Exempting pacifists from military conscription compels non-pacifists who would otherwise escape conscription to be drafted and sent to fight and die on battlefields. Yet these exemptions are perfectly constitutional. *See Gillette*, 401 U.S. 437. In all events, HB 1523 does not impose substantial burdens on third parties, for the reasons discussed in Part III, *infra*.

C. The District Court Should Not Have Awarded A Preliminary Injunction

Even if one thinks that the district court's reasoning is plausible, its decision to issue a *preliminary injunction* on these claims was indefensible. Both the Supreme Court and this Court have repeatedly held that a preliminary injunction is an "extraordinary remedy," which is not to be granted unless the applicant makes a "clear showing" that he is likely to succeed on the merits. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) ("This court has *repeatedly* cautioned that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." (emphasis added) (citation omitted)). Yet the plaintiffs' legal challenges to HB 1523 are (at best) debatable, and they cannot support a preliminary injunction even if one thinks that the plaintiffs should ultimately prevail in the end.

To its credit, the district court recited the proper standard for awarding a preliminary injunction. *See* Doc. 39 at 31. But although the district court mouthed the words, it did not hold the plaintiffs to the demanding standard that the law imposes on those who seek preliminary injunctions—especially a preliminary injunction that enjoins the law of a sovereign State. *See Ex Parte Young*, 209 U.S. 123, 166 (1908) ("[N]o injunction ought to be granted unless in a case reasonably free from doubt."). No reasonable jurist could conclude that the plaintiffs made a "clear showing" that HB 1523 fails the rational-basis test, or a "clear showing" that HB

1523 violates the establishment clause. And it is unacceptable that a State's duly enacted laws can be temporarily thwarted by a single district judge in the absence of a "clear showing" that the law is invalid. *See generally* David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 6 (1964).

II. The State Will Suffer Irreparable Injury Absent A Stay

The State will suffer irreparable injury absent a stay because the district court's injunction prevents the State from enforcing a duly enacted statute. *See Abbott*, 734 F.3d at 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *see also Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation and internal quotation marks omitted)).

III. The Plaintiffs Will Not Be Harmed By A Stay

HB 1523 operates only to shield conscientious objectors from penalty or punishment for following the dictates of their conscience. This statute does not impose *any* legal obligations on the plaintiffs, and it does not threaten them with prosecution or any type of legal consequence. The plaintiffs may encounter psychological distress over the prospect that conscientious objectors will be protected from penalty or punishment, but that is not a legally cognizable harm. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Any harms that might befall the plaintiffs if the injunction is stayed are trivial and speculative. It is hard to see how anyone is "harmed" by receiving a marriage license from a state employee who is not conscientiously opposed to same-sex marriage—rather than from an employee who *is* conscientiously opposed—especially when the statute ensures that the issuance of marriage licenses will not be "impeded or delayed." *See* HB 1523 § 3(8). Perhaps the plaintiffs will derive psychological satisfaction from forcing a conscientious objector to issue a same-sex marriage license against the dictates of his religion, but an unfulfilled desire to see others coerced into violating their conscience does not qualify as injury-in-fact under Article III and should not qualify as "harm" when deciding whether a stay should issue. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106–07 (1998).

And it is exceedingly unlikely that a stay will cause any of the plaintiffs to be denied services or access to facilities from a conscientious objector. First, none of the plaintiffs allege that they will be seeking marriage licenses or celebrating a wedding during the appeal. Nor have they announced that they intend to seek marriage licenses, wedding-related services, or any type of business from someone who opposes same-sex marriage or transgender behavior. So there is no reason to think that any plaintiff will even encounter a conscientious objector during this appeal.

Second, *even if* one of the plaintiffs were to be denied services by a conscientious objector, it is hard to see how a stay from this Court would have *caused* that denial to occur. Even if the district court's injunction remains in effect, it is still legal in Mississippi for individuals, businesses, and religious organizations to decline to participate in same-sex marriages. There is no state law that outlaws discrimina-

tion on account of sexual orientation or gender identity, and the anti-discrimination ordinance in Jackson must give way to the state's Religious Freedom Restoration Act. *See* Miss. Code Ann. § 11-61-1 (2014). So almost all conscientious objectors will remain free under state law to decline to participate in same-sex marriages; the only conscientious objectors who might be compelled in the absence of a stay are residents of Jackson whose objections are secular rather than religious.

Third, the district court's injunction against HB 1523 does not extend to the state's judiciary. *See Ex parte Young*, 209 U.S. 123, 162 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our government."); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997) (federal district court's rulings do not bind state courts and cannot bind future litigants in state court). So HB 1523 will continue to shield conscientious objectors in state-court proceedings between private litigants, even if the district court's injunction remains in place, unless the state judge is persuaded by the district court's analysis.

So even if one of the plaintiffs could credibly allege that he (1) intends to seek a marriage license, wedding-related service, or other service covered by HB 1523, (2) during the next few months while the appeal is pending, (3) from a conscientious objector, he would *still* have to show that the conscientious objector would capitulate if the district court's preliminary injunction remains in effect. That seems unlikely, given that: (1) The state's Religious Freedom Restoration Act continues to protect religious conscientious objectors; (2) There is no state law that prohibits discrimination on account of sexual orientation or gender identity; and (3) The conscientious objector can still invoke HB 1523 in state-court proceedings regard-

less of what happens with the preliminary injunction. So the effect of a stay pending appeal is extremely unlikely to produce new conscientious objectors at the margin. Finally, even if one indulges the speculative and unrealistic assumption that a stay pending appeal will cause new conscientious objectors to emerge, there will still be an abundance of LGBT-friendly churches and businesses available to provide whatever services and facilities the plaintiffs need.

IV. A Stay Pending Appeal Is In The Public Interest

The statutory policy of the Legislature "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). If the Court agrees with the State that HB 1523 is constitutional, then a stay pending appeal is by definition in the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

V. The Court Should Expedite This Appeal

This Court has granted expedited consideration when district courts enjoin state officials from enforcing a State's duly enacted laws. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008; *Voting for Am., Inc. v. Steen*, No. 12-40914; *Tex. Med. Providers v. Lakey*, No. 11-50814. The issues in this case are equally important and worthy of expedited review.

Conclusion

The emergency motion for stay pending appeal and the motion for expedited consideration should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
D. JOHN SAUER
James Otis Law Group, LLC
12977 North Forty Drive, Suite 214
St. Louis, MO 63141
(314) 682-6067
jmitchell@jamesotis.com

DREW L. SNYDER
Office of Governor Phil Bryant
P.O. Box 139
Jackson, Mississippi 39205
(601) 359-3150
drew.snyder@governor.ms.gov

JAMES A. CAMPBELL
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
jcampbell@adflegal.org

Counsel for Appellants

Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF or electronic mail on July 11, 2016, upon:

Alysson Mills
201 St. Charles Avenue
Suite 4600
New Orleans, LA 70170
amills@fishmanhaygood.com

Roberta A. Kaplan
Andrew J. Ehrlich
William B. Michael
Joshua D. Kaye
Jacob H. Hupart
Alexia D. Korberg
1285 Avenue of the Americas
New York, NY 10019-6064
rkaplan@paulweiss.com
aehrlich@paulweiss.com
wmichael@paulweiss.com
jkaye@paulweiss.com
jhupart@paulweiss.com
akorberg@paulweiss.com

Zachary A. Dietert
2001 K Street NW
Washington, DC 20009
zdietert@paulweiss.com

Robert B. McDuff
Sibyl C. Byrd
Jacob W. Howard
McDuff & Byrd
767 North Congress Street
Jackson, MS 39202
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

Beth L. Orlansky
John Jopling
Charles O. Lee
Mississippi Center For Justice
P.O. Box 1023
Jackson, MS 39205-1023
borlansky@mscenterforjustice.org

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

Certificate of Electronic Compliance

Counsel also certifies that on July 11, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

Certificate of Conference

On July 11, 2016, counsel for the plaintiffs indicated by way of e-mail that they oppose this motion and intend to file a response.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

APPENDIX

Appendix Table of Contents

Part I — Statutory Text

Part II — Documents Filed in *Barber v. Bryant*, No. 3:16-cv-00417

Part III — Other Conscience-Protecting Statutes

A

MISSISSIPPI LEGISLATURE REGULAR SESSION 2016

By: Representatives Gunn, Arnold, Bounds, Carpenter, Gipson, Shirley, Boyd, Eubanks

To: Judiciary B

HOUSE BILL NO. 1523
(As Sent to Governor)

AN ACT TO CREATE THE "PROTECTING FREEDOM OF CONSCIENCE FROM GOVERNMENT DISCRIMINATION ACT"; TO PROVIDE CERTAIN PROTECTIONS REGARDING A SINCERELY HELD RELIGIOUS BELIEF OR MORAL CONVICTION FOR PERSONS, RELIGIOUS ORGANIZATIONS AND PRIVATE ASSOCIATIONS; TO DEFINE A DISCRIMINATORY ACTION FOR PURPOSES OF THIS ACT; TO PROVIDE THAT A PERSON MAY ASSERT A VIOLATION OF THIS ACT AS A CLAIM AGAINST THE GOVERNMENT; TO PROVIDE CERTAIN REMEDIES; TO REQUIRE A PERSON BRINGING A CLAIM UNDER THIS ACT TO DO SO NOT LATER THAN TWO YEARS AFTER THE DISCRIMINATORY ACTION WAS TAKEN; TO PROVIDE CERTAIN DEFINITIONS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. This act shall be known and may be cited as the "Protecting Freedom of Conscience from Government Discrimination Act."

SECTION 2. The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that:

(a) Marriage is or should be recognized as the union of one man and one woman;

(b) Sexual relations are properly reserved to such a marriage; and

(c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

SECTION 3. (1) The state government shall not take any discriminatory action against a religious organization wholly or partially on the basis that such organization:

(a) Solemnizes or declines to solemnize any marriage, or provides or declines to provide services, accommodations, facilities, goods or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act;

(b) Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act; or

(c) Makes any decision concerning the sale, rental, occupancy of, or terms and conditions of occupying a dwelling or other housing under its control, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(2) The state government shall not take any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(3) The state government shall not take any discriminatory action against a person who the state grants custody of a foster or adoptive child, or who seeks from the state custody of a foster or adoptive child, wholly or partially on the basis that the person guides, instructs or raises a child, or intends to guide, instruct, or raise a child based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(4) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. This subsection (4) shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or

emergency medical treatment necessary to cure an illness or injury as required by law.

(5) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person has provided or declined to provide the following services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act:

(a) Photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services; or

(b) Floral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods.

(6) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner

consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(7) The state government shall not take any discriminatory action against a state employee wholly or partially on the basis that such employee lawfully speaks or engages in expressive conduct based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act, so long as:

(a) If the employee's speech or expressive conduct occurs in the workplace, that speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed; or

(b) If the employee's speech or expressive conduct occurs outside the workplace, that speech or expressive conduct is in the employee's personal capacity and outside the course of performing work duties.

(8) (a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the State Registrar

of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal.

(b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the Administrative Office of Courts, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The Administrative Office of Courts shall take all necessary steps to ensure that the performance or solemnization of any legally valid marriage is not impeded or delayed as a result of any recusal.

SECTION 4. (1) As used in this act, discriminatory action includes any action taken by the state government to:

(a) Alter in any way the tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay,

revoke, or otherwise make unavailable an exemption from taxation of any person referred to in Section 3 of this act;

(b) Disallow, deny or otherwise make unavailable a deduction for state tax purposes of any charitable contribution made to or by such person;

(c) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any state grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, or other similar benefit from or to such person;

(d) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any entitlement or benefit under a state benefit program from or to such person;

(e) Impose, levy or assess a monetary fine, fee, penalty or injunction;

(f) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any license, certification, accreditation, custody award or agreement, diploma, grade, recognition, or other similar benefit, position, or status from or to any person; or

(g) Refuse to hire or promote, force to resign, fire, demote, sanction, discipline, materially alter the terms or conditions of employment, or retaliate or take other adverse

employment action against a person employed or commissioned by the state government.

(2) The state government shall consider accredited, licensed or certified any person that would otherwise be accredited, licensed or certified, respectively, for any purposes under state law but for a determination against such person wholly or partially on the basis that the person believes, speaks or acts in accordance with a sincerely held religious belief or moral conviction described in Section 2 of this act.

SECTION 5. (1) A person may assert a violation of this act as a claim against the state government in any judicial or administrative proceeding or as defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party.

(2) An action under this act may be commenced, and relief may be granted, in a court of the state without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(3) Violations of this act which are properly governed by Chapter 46, Title 11, Mississippi Code of 1972, shall be brought in accordance with that chapter.

SECTION 6. An aggrieved person must first seek injunctive relief to prevent or remedy a violation of this act or the effects of a violation of this act. If injunctive relief is granted by

the court and the injunction is thereafter violated, then and only then may the aggrieved party, subject to the limitations of liability set forth in Section 11-46-15, seek the following:

(a) Compensatory damages for pecuniary and nonpecuniary losses;

(b) Reasonable attorneys' fees and costs; and

(c) Any other appropriate relief, except that only declaratory relief and injunctive relief shall be available against a private person not acting under color of state law upon a successful assertion of a claim or defense under this act.

SECTION 7. A person must bring an action to assert a claim under this act not later than two (2) years after the date that the person knew or should have known that a discriminatory action was taken against that person.

SECTION 8. (1) This act shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the state and federal constitutions.

(2) The protection of free exercise of religious beliefs and moral convictions afforded by this act are in addition to the protections provided under federal law, state law, and the state and federal constitutions. Nothing in this act shall be construed to preempt or repeal any state or local law that is equally or more protective of free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to narrow the

meaning or application of any state or local law protecting free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to prevent the state government from providing, either directly or through an individual or entity not seeking protection under this act, any benefit or service authorized under state law.

(3) This act applies to, and in cases of conflict supersedes, each statute of the state that impinges upon the free exercise of religious beliefs and moral convictions protected by this act, unless a conflicting statute is expressly made exempt from the application of this act. This act also applies to, and in cases of conflict supersedes, any ordinance, rule, regulation, order, opinion, decision, practice or other exercise of the state government's authority that impinges upon the free exercise of religious beliefs or moral convictions protected by this act.

SECTION 9. As used in Sections 1 through 9 of this act, the following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(1) "State benefit program" means any program administered or funded by the state, or by any agent on behalf of the state, providing cash, payments, grants, contracts, loans or in-kind assistance.

(2) "State government" means:

(a) The State of Mississippi or a political subdivision of the state;

(b) Any agency of the state or of a political subdivision of the state, including a department, bureau, board, commission, council, court or public institution of higher education;

(c) Any person acting under color of state law; and

(d) Any private party or third party suing under or enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state.

(3) "Person" means:

(a) A natural person, in his or her individual capacity, regardless of religious affiliation or lack thereof, or in his or her capacity as a member, officer, owner, volunteer, employee, manager, religious leader, clergy or minister of any entity described in this section;

(b) A religious organization;

(c) A sole proprietorship, or closely held company, partnership, association, organization, firm, corporation, cooperative, trust, society or other closely held entity operating with a sincerely held religious belief or moral conviction described in this act; or

(d) Cooperatives, ventures or enterprises comprised of two (2) or more individuals or entities described in this subsection.

(4) "Religious organization" means:

(a) A house of worship, including, but not limited to, churches, synagogues, shrines, mosques and temples;

(b) A religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; and

(c) An officer, owner, employee, manager, religious leader, clergy or minister of an entity or organization described in this subsection (4).

(5) "Adoption or foster care" or "adoption or foster care service" means social services provided to or on behalf of children, including:

(a) Assisting abused or neglected children;

(b) Teaching children and parents occupational, homemaking and other domestic skills;

(c) Promoting foster parenting;

(d) Providing foster homes, residential care, group homes or temporary group shelters for children;

(e) Recruiting foster parents;

(f) Placing children in foster homes;

(g) Licensing foster homes;

(h) Promoting adoption or recruiting adoptive parents;

(i) Assisting adoptions or supporting adoptive families;

(j) Performing or assisting home studies;

(k) Assisting kinship guardianships or kinship caregivers;

(l) Providing family preservation services;

(m) Providing family support services; and

(n) Providing temporary family reunification services.

SECTION 10. The provisions of Sections 1 through 9 of this act shall be excluded from the application of Section 11-61-1.

SECTION 11. This act shall take effect and be in force from and after July 1, 2016.

B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY; SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT; RENICK TAYLOR; BRANDIILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH; CAMPAIGN FOR SOUTHERN EQUALITY; and SUSAN HROSTOWSKI — **PLAINTIFFS**

V.

CAUSE NO. 3:16-CV-417-CWR-LRA
consolidated with
CAUSE NO. 3:16-CV-442-CWR-LRA

PHIL BRYANT, Governor; JIM HOOD, Attorney General; JOHN DAVIS, Executive Director of the Mississippi Department of Human Services; and JUDY MOULDER, State Registrar of Vital Records — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

The plaintiffs filed these suits to enjoin a new state law, "House Bill 1523," before it goes into effect on July 1, 2016. They contend that the law violates the First and Fourteenth Amendments to the United States Constitution. The Attorney General's Office has entered its appearance to defend HB 1523. The parties briefed the relevant issues and presented evidence and argument at a joint hearing on June 23 and 24, 2016.

The United States Supreme Court has spoken clearly on the constitutional principles at stake. Under the Establishment Clause of the First Amendment, a state "may not aid, foster, or

promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citation omitted). Under the Equal Protection Clause of the Fourteenth Amendment, meanwhile, a state may not deprive lesbian and gay citizens of "the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, 517 U.S. 620, 630 (1996).

HB 1523 grants special rights to citizens who hold one of three "sincerely held religious beliefs or moral convictions" reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected – the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells "nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation marks and citation omitted). And the Equal Protection Clause is violated by HB 1523's authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.

"It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633. The plaintiffs' motions are granted and HB 1523 is preliminarily enjoined.

I. The Parties

A. Plaintiffs

The plaintiffs in this matter are 13 individuals and two organizations – Joshua Generation Metropolitan Community Church (JGMCC) and the Campaign for Southern Equality (CSE).

All of the individual plaintiffs are residents, citizens, and taxpayers of Mississippi who disagree with the beliefs protected by HB 1523. They fall into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects.

The first group includes Rev. Dr. Rims Barber, Rev. Carol Burnett, Rev. Don Fortenberry, Brandiilyne Mangum-Dear, Susan Mangum, and Rev. Dr. Susan Hrostowski. Rev. Dr. Barber is an ordained minister in the Presbyterian church. Rev. Burnett is an ordained United Methodist minister. Rev. Fortenberry is an ordained United Methodist minister and the retired chaplain of Millsaps College. Mangum-Dear is the pastor at JGMCC, while Mangum is the director of worship at that church. Rev. Dr. Hrostowski is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as an employee of the University of Southern Mississippi.

Katherine Elizabeth Day, Anthony (Tony) Laine Boyette, Dr. Susan Glisson, and Renick Taylor comprise the second group of plaintiffs.[1] Day is a transgender woman; Boyette is a transgender man. Dr. Glisson, an employee of the University of Mississippi, is unmarried and in a long-term sexual romantic relationship with an unmarried man. Taylor is a gay man who is engaged to his male partner. The couple plans to marry in the summer of 2017.

The third group of individual plaintiffs includes Joan Bailey, Derrick Johnson, and Dorothy Triplett. Bailey is a retired therapist whose practice was primarily devoted to lesbians.

[1] Mangum-Dear, Mangum, and Rev. Dr. Hrostowski also fall into this group.

Johnson is the Executive Director of the Mississippi State Conference of the NAACP, and Triplett is a retired government employee and a longtime activist.

JGMCC is a ministry in Forrest County, Mississippi, whose members fall into all three categories. It "welcomes all people regardless of age, race, sexual orientation, gender identity, or social status." Docket No. 1, ¶ 16, in Cause No. 3:16-CV-417 [hereinafter *Barber*]. In particular, the church sponsors "a community service ministry that promotes LGBT+ equality." *Id.* Approximately 90% of its members in Forrest County identify as LGBT. Transcript of Hearing on Motion for Preliminary Injunction at 168, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 23, 2016) [hereinafter Tr. of June 23]. There are over 400 Metropolitan Community Churches worldwide. *Id.*

CSE is a non-profit organization that works "across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life." Docket No. 2-2, at 2, in Cause No. 3:16-CV-442 [hereinafter *CSE IV*]. It is based in North Carolina but has worked in Mississippi since 2012. *Id.* CSE claims to advocate for Mississippians in all three categories of plaintiffs. *Id.* at 4.

B. Defendants

Governor Phil Bryant is sued in his official capacity as the chief executive of the State of Mississippi. State law charges him with the responsibility to "see that the laws are faithfully executed." Miss. Code Ann. § 7-1-5(c).

Attorney General Jim Hood is also sued in his official capacity. Among his powers and duties, he is required to "intervene and argue the constitutionality of any statute when notified of a challenge." *Id.* § 7-5-1; *see In the Interest of R.G.*, 632 So. 2d 953, 955 (Miss. 1994).

John Davis is the Executive Director of the Mississippi Department of Human Services. Under Mississippi Code § 43-1-2(5), he is tasked with implementing state laws protecting children. One of the offices under his purview, the Division of Family and Children's Services, is "responsible for the development, execution and provisions of services" regarding foster care, adoption, licensure, and other social services. Miss. Code Ann. § 43-1-51.[2]

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for "carry[ing] into effect the provisions of law relating to registration of marriages." *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523 § 3(8)(a).

II. Factual and Procedural History

A. Same-Sex Marriage

Because HB 1523 is a direct response to the Supreme Court's 2015 same-sex marriage ruling, it is necessary to discuss the background of that ruling.

This country had long debated whether lesbian and gay couples could join the institution of civil marriage. *See, e.g.*, Andrew Sullivan, *Here Comes the Groom*, The New Republic, Aug. 27, 1989. The debate played itself out on the local, state, and national levels via constitutional amendments, legislative enactments, ballot initiatives, and propositions.

In its most optimistic retelling, "[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting). *But see* David Carter, Stonewall: The Riots that Sparked the Gay Revolution 109-10, 183-84 (2004) (describing the 1966

[2] During the 2016 legislative session, Mississippi's lawmakers created the Department of Child Protective Services, a standalone agency independent of the Department of Human Services. *See* 2016 Miss. Laws, SB 2179. The new department was created upon passage, but the bill allows a transition period of up to two years. *Id.*

Compton's Cafeteria riots by transgender citizens in San Francisco, and the famous 1969 Stonewall riots in New York City). Less charitably, but also true, is the reality that every time lesbian and gay citizens moved one step closer to legal equality, voters and their representatives passed new laws to preserve the status quo.

In the 1990s, for example, Hawaii's same-sex marriage lawsuit inspired the federal Defense of Marriage Act (DOMA) and a wave of state-level "mini-DOMAs." *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 915 (S.D. Miss. 2014) [hereinafter *CSE I*]. Mississippi's politicians joined the movement by issuing an executive order and passing a law banning same-sex marriage. *Id.* It was not until 2013 that DOMA was struck down in part. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Mississippi's mini-DOMA lasted until 2015. *CSE I*, 64 F. Supp. 3d at 906.

In the early 2000s, *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, cases that found in favor of lesbian and gay privacy and marriage rights, respectively, resulted in a wave of state constitutional amendments banning same-sex marriage. *CSE I*, 64 F. Supp. 3d at 915. Mississippians approved such a constitutional amendment by the largest margin in the nation. *Id.*; *see* Michael Foust, *'Gay Marriage' a Loser: Amendments Pass in all 11 States*, Baptist Press, Nov. 3, 2004.

The lawfulness of same-sex marriage was finally resolved in 2015. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. The decision applies to every governmental agency and agent in the country. "The majority of the United States Supreme Court dictates the law of the land, and lower courts are bound to follow it."

Campaign for Southern Equality v. Mississippi Dep't of Human Servs., --- F.3d ---, 2016 WL 1306202, at *14 (S.D. Miss. Mar. 31, 2016) [hereinafter *CSE III*].

Many celebrated the ruling as overdue. Others felt like change was happening too quickly.[3] And some citizens were concerned enough to advocate new laws "to insulate state officials from legal risk if they do not obey the decision based on a religious objection."[4] Lyle Denniston, *A Plea to Resist the Court on Same-Sex Marriage*, SCOTUSblog, July 9, 2015.

The Supreme Court's decision *had* taken pains to reaffirm religious rights. Its commitment to the free exercise of religion is important and must be quoted in full.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Obergefell, 135 S. Ct. at 2607.

"As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals . . . ." Laurence H. Tribe, *Equal Dignity:*

[3] It is fair to say that same-sex marriage rights went "from unthinkable to the law of the land in just a couple of decades." Nate Silver, *Change Doesn't Usually Come This Fast*, FiveThirtyEight, June 26, 2015.

[4] Sadly, this was predicted years ago. In 1999, four members of Congress expressed concern that religious freedom legislation "would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, lesbians and gays." H.R. Rep. No. 106-219, at 41 (1999), *available at* 1999 WL 462644.

Speaking Its Name, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015). *Obergefell*'s author, Justice Kennedy, had also reaffirmed this principle in *Burwell v. Hobby Lobby Stores*. "[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests." 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring).

In the immediate wake of *Obergefell*, the Fifth Circuit issued a published opinion declaring that "*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court." *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) [hereinafter *CSE II*]. The court issued the mandate forthwith. *Id.*

A few hours later, with this mandate in hand, this Court issued a Permanent Injunction and a Final Judgment enjoining enforcement of Mississippi's statutory and constitutional same-sex marriage ban. The Attorney General's Office soon advised Circuit Clerks to issue marriage licenses "to same-sex couples on the same terms and conditions accorded to couples of the opposite sex." *In re Steve Womack*, 2015 WL 4920123, at *1 (Miss. A.G. July 17, 2015).

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to HB 1523. The next chapter of this back-and-forth has begun.

B. House Bill 1523

Mississippi's highest elected officials were displeased with *Obergefell*. Governor Bryant stated that *Obergefell* "usurped [states'] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of

many in the United States and that are certainly out of step with the majority of Mississippians."[5] Governor Phil Bryant, *Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, June 26, 2015. [6]

Legislative leaders felt similarly. Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an "overreach of the federal government." Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, The Clarion-Ledger, June 26, 2015.[7] Speaker of the House Philip Gunn said *Obergefell* was "in direct conflict with God's design for marriage as set forth in the Bible. The threat of this decision to religious liberty is very clear." *Id.*[8] Representative Andy Gipson, Chairman of the House Judiciary B Committee, pledged to study whether Mississippi should stop issuing marriage licenses altogether. *Id.*[9]

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[5] Governor Bryant's statement is only partially true. While states have mostly been permitted to regulate marriage within their borders, the Supreme Court has stepped in to ensure that "self-governance" complies with equal protection. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.").

[6] The Governor's remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* "represents an unwarranted invasion of the rights and powers of the states." Charles C. Bolton, William F. Winter and the New Mississippi: A Biography 97 (2013). In 1962, before a joint session of the Mississippi Legislature – and to a "hero's reception" – Governor Ross Barnett was lauded for invoking states' rights during the battle to integrate the University of Mississippi. Charles W. Eagles, The Price of Defiance: James Meredith and the Integration of Ole Miss 290-91 (2009) [hereinafter Price of Defiance].

[7] The State has objected to the Court's use of newspaper articles. In an Establishment Clause challenge, however, a District Court errs when it takes "insufficient account of the context in which the statute was enacted and the reasons for its passage." *Salazar v. Buono*, 559 U.S. 700, 715 (2010). The Fifth Circuit agrees: "context is critical in assessing neutrality" in this area of the law. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001).

[8] Using God as a justification for discrimination is nothing new. It was Governor Barnett who proclaimed that "[t]he Good Lord was the original segregationist. He made us white, and he intended that we stay that way." Price of Defiance at 282. Warping the image of God was not reserved to Mississippi politicians. In testimony before Congress during the debate on the Civil Rights Act of 1964, a Maryland businessman testified before a Senate committee that "God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth." Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways"*, 95 B.U. L. Rev. 891, 917 (2015). He continued, "Christ himself never lived an integrated life, and . . . when he chose His close associates, they were all white. This doesn't mean that He didn't love all His creatures, but it does indicate that He didn't think we had to have all this togetherness in order to go to heaven." *Id.*

[9] The suggestion was (again) familiar. A few months after the Supreme Court's decision in *Brown*, Mississippians – those who were permitted to vote, that is – "voted two to one approving a constitutional amendment abolishing the state schools system if it integrated." Dennis J. Mitchell, A New History of Mississippi 404 (2014).

The angst was not limited to the executive and legislative branches. Two Justices of the Mississippi Supreme Court also expressed their disgust with *Obergefell*. In 2014, a lesbian had petitioned that body for the right to divorce her wife in a Mississippi court. *Czekala-Chatham v. State ex rel. Hood*, --- So. 3d ---, 2015 WL 10985118 (Miss. Nov. 5, 2015). While her case was pending, the U.S. Supreme Court handed-down *Obergefell*. Although a majority of the Mississippi Supreme Court concluded that *Obergefell* resolved her case in her favor, Justices Dickinson and Coleman argued that the *Obergefell* Court had legislated from the bench and overstepped its authority. *Id.* at *3 (Dickinson, J., dissenting). They opined that "state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation," and claimed "a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than . . . an exercise in judicial will." *Id.* at *4, *6.[10] *Obergefell* was "[w]orthy only to be disobeyed," they said. *Id.* at *5.

Mississippi's legislators formally responded to *Obergefell* in the next legislative session.[11] Speaker Gunn drafted and introduced HB 1523, the "Protecting Freedom of Conscience from Government Discrimination Act."[12] The bill overwhelmingly passed both chambers, and the Governor signed it into law on April 5, 2016. It goes into effect on July 1.

HB 1523's meaning is contested. A layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts.

[10] *But see James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise.").

[11] This had happened before in the religious liberty context. In 1994, "[o]n a wave of public sentiment and indignation over the treatment of a Principal . . . who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996). The statute was unconstitutional. *Id.*

[12] "'After the Supreme Court decision in Obergefell (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay marriage and the right to gay marriage created by the decision,' [Speaker] Gunn said." Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted Out of State*, Mississippi Today, May 17, 2016. One commentator concluded that "HB 1523 was hatched" after the issuance of this Court's Permanent Injunction. Sid Salter, *Constitutional Ship has Sailed on Same-Sex Marriage*, The Clarion-Ledger, May 8, 2016. "Clearly, House Bill 1523 seeks to work around the federal *Obergefell* decision at the state level." *Id.*

Arielle Dreher, *Hundreds Rally to Repeal HB 1523, State Faces Deadline Today Before Lawsuit*, Jackson Free Press, May 2, 2016 (quoting Chad Griffin, President of the Human Rights Campaign, as saying, "it's sweeping and allows almost any individual or organization to justify discrimination against LGBT people, against single mothers and against unwed couples."). Someone else reading the same article might conclude that HB 1523 simply "reinforces" the First Amendment. *Id.* (quoting Speaker Gunn as saying the gay community "can do the same things that they could before"). So any discussion should begin with the plain text of the bill.

HB 1523 enumerates three "sincerely held religious beliefs or moral convictions" entitled to special legal protection. They are,

> (a) Marriage is or should be recognized as the union of one man and one woman;
> (b) Sexual relations are properly reserved to such a marriage; and
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

HB 1523 § 2. These will be referred to as the "§ 2" beliefs.

The bill then says that the State of Mississippi will not "discriminate" against persons who act pursuant to a § 2 belief. *Id.* §§ 3-4.[13] For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State "discrimination."

"Discrimination" is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other

[13] HB 1523 § 9(2)-(3) defines "State government" to include private persons, corporations, and other legal entities.

enumerated things, for your § 2 beliefs. *Id.*[14] An organization or person who acts on a § 2 belief is essentially immune from State punishment.[15]

The Governor's signing statement recognized that consequences under federal law are unchanged. States "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009).

Parts of the law provide fodder for both its opponents and its proponents. One section of HB 1523 guarantees that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief. *Id.* § 3. There is nothing new or controversial about that section. Religious organizations already have that right under the Free Exercise Clause of the First Amendment.

Citizens also enjoy substantial religious rights under existing state law. The Mississippi Constitution ensures that "the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred," and "no preference shall be given by law to any religious sect or mode of worship."[16] Miss. Const., § 18. In addition, a 2014 law called the "Mississippi Religious Freedom Restoration Act" (RFRA) states that the government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). HB 1523 does not change either of these laws.[17]

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[14] This is more expansive than other anti-discrimination laws, such as Title VII or Title IX.

[15] The broad immunity provision may violate the Mississippi Constitution, which provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Miss. Const. § 24.

[16] Despite the inclusive language just quoted, § 18 of the Mississippi Constitution then says that "[t]he rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school."

[17] Mississippi's RFRA is also part of the political back-and-forth on LGBT rights. "State-based RFRAs were passed to preemptively provide religious exemptions to people in advance of a Supreme Court ruling on gay marriage, [Professor Doug] NeJaime said." Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against*

We return to HB 1523. Several parts of the bill are unclear. One says the State will not take action against foster or adoptive parents who intend to raise a foster or adoptive child in accordance with § 2 beliefs. HB 1523 § 3(3). It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian.

Another section discusses a professional's right to refuse to participate in "psychological, counseling, or fertility services" because of a § 2 belief. *Id.* § 3(4). But some professions' ethical rules prohibit "engag[ing] in discrimination against prospective or current clients . . . based on . . . gender, gender identity, sexual orientation, [and] marital/ partnership status," to name a few categories. American Counseling Association, Code of Ethics § C.5 (2014). Under HB 1523, though, a public university's faculty must confer a degree upon, and the State must license, a person who refuses to abide by her chosen profession's Code of Ethics.[18]

Section 3(8)(a) of the law, in contrast, is crystal clear. It says that a government employee with authority to issue marriage licenses may recuse herself from that duty if it would violate one of her § 2 beliefs. HB 1523 § 3(8)(a). The employee must provide prior written notice to the State Registrar of Vital Records and be prepared to "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* The State's attorneys agree that this section "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages." Docket No. 41, at 6, in Cause No. 3:14-CV-818.

Gay Parents?, The Atlantic, Sept. 23, 2015. Mississippi's RFRA fits this timeline perfectly. In summer 2013, the Supreme Court's ruling in *United States v. Windsor* foreshadowed an imminent victory for same-sex marriage. A few months later, Mississippi's elected officials enacted the State RFRA.

[18] Relatedly, in other states, citizens have successfully sued so-called "gay conversion" therapists for consumer fraud and professional malpractice. *See* Olga Khazan, *The End of Gay Conversion Therapy*, The Atlantic, June 26, 2015. HB 1523 § 4 would bar a Mississippi court from enforcing such a verdict.

The significance of this section is in the eye of the beholder. The plaintiffs argue that it facilitates discrimination against LGBT Mississippians by encouraging clerks to opt-out of serving same-sex couples.

HB 1523's defenders respond that the bill protects *against* discrimination by ensuring that clerks do not have to violate their religious beliefs. When Senator Jenifer Branning shepherded the bill through the Senate floor debate, she argued that the legislation actually *lifts* a burden imposed by *Obergefell*.[19] H.B. 1523, Debate on the Floor of the Mississippi Senate, at 7:02 (Mar. 31, 2016) (statement of Sen. Jenifer Branning) [hereinafter Senate Floor Debate]. In her view, HB 1523 is "balancing" legislation allowing those who oppose same-sex marriage to continue to perform their jobs with a "clear conscience," while protecting the rights of same-sex couples to receive a marriage license from another clerk. *Id.* at 26:55, 32:27.[20]

C. These Suits

On June 3, 2016, Rev. Dr. Barber, Rev. Burnett, Bailey, Day, Boyette, Rev. Fortenberry, Dr. Glisson, Johnson, Triplett, Taylor, Mangum-Dear, Mangum, and JGMCC filed the first suit encompassed by this Order. *See* Docket No. 1, in *Barber*. They asserted Establishment and Equal Protection claims against Governor Bryant, General Hood, Executive Director Davis, and Registrar Moulder. *Id.* They requested a declaratory judgment that HB 1523 is unconstitutional on its face, as well as preliminary and permanent injunctive relief enjoining its enforcement.

[19] Mississippi does not have formal legislative history; however, the Mississippi College School of Law's Legislative History Project archives the floor debate for bills that pass. The HB 1523 videos are available at http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016. Unofficial transcripts were also introduced into evidence. *See* Docket No. 33-14, in *CSE IV*.

[20] These arguments are apparently increasingly common. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2560-61 (2015) (arguing that proponents of traditional morality "now emphasize different justifications for excluding same-sex couples from marriage -- for example, that marriage is about biological procreation or that preserving 'traditional marriage' protects religious liberty. At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.").

CSE and Rev. Dr. Hrostowski sued the same defendants on June 10, 2016. *See* Docket No. 1, in *CSE IV*. They asserted an Establishment Clause claim and sought the same relief as the *Barber* plaintiffs. *Id.*

The various plaintiffs conferred and moved to consolidate. The State was prepared to argue *Barber*, but objected to consolidation to avoid an abbreviated briefing schedule and a hearing in *CSE IV*. *See* Docket No. 22, in *Barber*. During a status conference, the Court heard the parties' positions and granted the State its requested response deadline. The Court also delayed the motion hearing – which was converted into a joint hearing – by two days. The State renewed its objection to the consolidated hearing and was overruled. These reasons follow.

The State essentially argued that there were too many HB 1523-related lawsuits – there are four – to fully prepare for a hearing in *CSE IV*. It entered into the record a Mississippi Today article in which General Hood said, "'I and over half of our lawyers in the Civil Litigation Division are working overtime and weekends attempting to prepare for the hearings.'" Docket No. 22-2, in *Barber*. General Hood added that budget cuts prevented him from hiring an expert to prepare "for the highly specialized area of the law seldom litigated in Mississippi -- the Establishment Clause." *Id.* (ellipses omitted).

The first hurdle for the State is the substantial overlap in subject matter between *Barber* and *CSE IV*. The similar briefing suggests that little additional work was required to defend *CSE IV*. *Barber*, in fact, has a greater number of substantive claims than *CSE IV*. Having prepared for the more comprehensive hearing, it is difficult for the State to object to the narrower one.

The second, more significant problem with the State's argument is the utter predictability of these lawsuits. The media started reporting the likelihood of litigation on April 5, the day the Governor signed HB 1523 into law. *See, e.g.*, Arielle Dreher, *'Total Infringement': Governor*

Signs HB 1523 Over Protests of Business Leaders, Citizens, Jackson Free Press, Apr. 5, 2016 ("'You will see several lawsuits filed before it becomes law if the governor signs it,'" one attorney said); Caray Grace, *Local Residents and City Leaders React to House Bill 1523*, WLOX, Apr. 5, 2016 ("'the lawyers were already starting to draft up lawsuits so that as soon as he signed it, they could start filing them,' said [Molly] Kester.").

General Hood apparently knew these lawsuits were coming as early as April 5, when he said he would make "case-by-case" decisions on whether to defend the lawsuits, and warned that the bill doesn't override federal or constitutional rights. *Legal Pressure May Be Ahead for Mississippi Law Denying Service to Gays*, Chicago Tribune, Apr. 5, 2016.

The media even telegraphed the exact Establishment Clause arguments the plaintiffs eventually asserted. In early April, the press reported that 10 law professors from across the country released a memorandum outlining several ways in which HB 1523 violates the Establishment Clause. *See* Sierra Mannie, *Will Mississippi's "Religious Freedom" Act Impact Children in Public and Private Schools?*, The Hechinger Report, Apr. 8, 2016. In May, Jackson attorney Will Manuel, a partner at Bradley LLP, said, "'[b]y only endorsing certain religious thought, I believe it is in violation of the Establishment Clause of the First Amendment which prohibits government from establishing or only protecting one religion. That should be a fairly clear cut constitutional challenge." Ted Carter, *Feds Unlikely to Ignore Mississippi's HB1523, Lawyers Say*, Mississippi Business Journal, May 26, 2016; *see also* Arielle Dreher, *HB 1523: Bad for the Business Sector*, Jackson Free Press, June 8, 2016 (noting other legal concerns).

Perhaps the State's best argument against a hearing in *CSE IV* was that it would be unprepared to cross-examine religion experts because it did not have time to find its own

expert.[21] Its objection fell flat when its attorneys filed the article in which General Hood said that *budget cuts* caused the lack of expert assistance.[22] If budget cuts explain the State's lack of expert assistance, no extension of time could have helped it prepare for a hearing.

For these reasons, the hearings were consolidated. Now, having considered the evidence and heard oral argument, the motions for preliminary injunction have been consolidated into this Order. The cases remain their separate identities pending further motion practice.

That brings us to the State's initial legal arguments.

III. Threshold Questions

A. Standing

The State first challenges the plaintiffs' capacity to bring these suits.

The United States Constitution limits the jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks and citation omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

As the party seeking to invoke this Court's jurisdiction, the plaintiffs must demonstrate all three elements of standing: (1) an injury in fact that is concrete and particularized as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and

[21] The Court has sought to understand what kind and amount of evidence would show a forbidden religious preference. In this case, it finds the plain language of HB 1523 and basic knowledge of local religious beliefs to be sufficient. Today's outcome is informed by but does not turn on the expert testimony heard in *CSE IV*.
[22] It also weakens the State's objection to the Court's use of newspaper articles.

(3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In a standing analysis, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). Standing is not handed out in gross. *CSE III*, 2016 WL 1306202, at *2. A case with multiple plaintiffs can move forward as long as one plaintiff has standing as to each claim. *CSE I*, 64 F. Supp. 3d at 916.

1. Injury in Fact

To establish an injury in fact, the plaintiffs must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks and citation omitted). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. An injury is concrete when it is "real, not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1556 (2016) (quotation marks and citation omitted). Intangible injuries can satisfy the concreteness requirement. *Id.* at 9. A plaintiff must demonstrate "that he has sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quotation marks and citations omitted).

a. Equal Protection Injuries

The *Barber* plaintiffs in category two – *i.e.*, the LGBT plaintiffs and Dr. Glisson – allege that HB 1523 violates their rights under the Equal Protection Clause of the Fourteenth Amendment.[23] Claims under the Equal Protection Clause can include both tangible and intangible injuries. As noted in *Heckler v. Matthews*,

[23] In discussing the Equal Protection claim, references to LGBT citizens should also be read to include unmarried-but-sexually-active citizens. The latter group may have been a collateral consequence of HB 1523.

> discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. 728, 739-40 (1984) (quotation marks and citation omitted). "Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine." *CSE I*, 64 F. Supp. 3d at 917 (quotation marks and citation omitted).

The State first challenges standing on the basis that the plaintiffs' injuries are speculative and not imminent, arguing that the plaintiffs have not alleged the denial of any right or benefit as a result of HB 1523. It points to *Clapper v. Amnesty International, USA*, which held that "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." 133 S. Ct. 1138, 1147 (2013) (quotation marks and citation omitted).

This language, however, supports that the plaintiffs *do* have imminent injuries. If it goes into effect on July 1, plaintiffs say, HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses.

The plaintiffs also say that HB 1523 will limit the protections LGBT persons currently have under state, county, city, and public school anti-discrimination policies. In the City of Jackson, for example, a municipal ordinance provides protection from discrimination on the basis of religion, sexual orientation, and gender identity, among other characteristics. Docket No. 32-17, in *Barber*. This ordinance protects several of the plaintiffs. *Id.* The plaintiffs then point to

University of Southern Mississippi's (USM) anti-discrimination policy, which guarantees equal access to "educational, programmatic and employment opportunities without regard to" religion, sexual orientation, or gender identity. Docket No. 32-18, in *Barber*. If HB 1523 goes into effect, USM's policy cannot be fully enforced. USM employees who invoke a § 2 belief will enjoy enhanced protection to decline to serve others on the basis of sexual orientation, and USM will not be able to discipline those employees who violate its internal anti-discrimination policy.[24]

In this context, the imminent injury to the plaintiffs, other LGBT persons, and unmarried persons is exactly the same as the injury recognized by the Supreme Court in *Romer*. In striking down an amendment to Colorado's constitution, the Court found that:

> Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions . . . . Not confined to the private sphere, Amendment 2 also operates to repeal and forbid laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

517 U.S. at 629.

A closer analogue is difficult to imagine. As in *Romer*, HB 1523 "withdraws from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others, specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies." *Id.* at 627. If individuals had standing to file *Romer* before Amendment 2 went into effect, these plaintiffs may certainly do the same.

The State's argument overlooks the fundamental injurious nature of HB 1523 – the establishment of a broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status. This type of differential treatment

[24] Imagine that two USM students, who are a gay couple, walk into the cafeteria but are refused service because of the worker's religious views. Could that employee be disciplined for refusing service? It is not clear what remedy they would have to remove the sting of humiliation.

is the hallmark of what is prohibited by the Fourteenth Amendment. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) ("The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially."). To put it plainly, the plaintiffs' injuries are "certainly impending" today, and without Court intervention, the plaintiffs will suffer actual injuries. *Clapper*, 133 S. Ct. at 1147.

The State then argues that the plaintiffs lack standing because they are not the "objects" of HB 1523. The argument comes from *Lujan*'s statement that "standing depends considerably upon whether the plaintiff is himself an object of the" government's action or inaction at issue. *Lujan*, 504 U.S. at 561. The true objects of the law, the State claims, are those persons who want to freely exercise a § 2 belief. Docket No. 30, at 18, in *Barber*.

The Court is not persuaded. A robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens. At oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*, stating, "after *Obergefell*, citizens who hold the beliefs that are protected by 1523 were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*." Transcript of Hearing on Motion for Preliminary Injunction at 324, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 24, 2016) [hereinafter Tr. of June 24].

It is therefore difficult to accept the State's implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer. *See Romer*, 517 U.S. at 626.

Members of the LGBT community and persons like Dr. Glisson will suffer a concrete and particular injury as a result of HB 1523. Part of the injury is stigmatic, *see CSE I*, 64 F. Supp. 3d at 917, but that stigmatic injury is linked to the tangible rights that will be taken away

on July 1, including the tangible rights *Obergefell* extended. There are almost endless explanations for how HB 1523 condones discrimination against the LGBT community, but in its simplest terms it denies LGBT citizens equal protection under the law. Thus, those plaintiffs who are members of the LGBT community, as well as Dr. Glisson, have demonstrated an injury in fact sufficient to bring their Equal Protection claim.

b. Establishment Clause Injuries

All plaintiffs have asserted Establishment Clause claims.

In Establishment Clause actions, the injury in fact requirement may vary from other types of cases. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 194 (5th Cir. 2006). "The concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Id.*

Plaintiffs can demonstrate "standing based on the direct harm of what is claimed to be an establishment of religion" or "on the ground that they have incurred a cost or been denied a benefit on account of their religion." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30 (2011). Courts also recognize that taxpayers have standing to challenge direct government expenditures that violate the Establishment Clause. *Id.* at 138-39; *see Flast*, 392 U.S. at 106. The Supreme Court has found standing in a wide variety of Establishment Clause cases "even though nothing was affected but the religious or irreligious sentiments of the plaintiffs." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-50 (9th Cir. 2010) (en banc) (collecting cases).

In *Croft v. Governor of Texas*, the Fifth Circuit concluded that a citizen had standing to challenge a public school's daily moment of silence because his children were enrolled in the school and were required to observe the moment of silence. 562 F.3d 735, 746 (5th Cir. 2009)

[hereinafter *Croft I*]. This injury was sufficient because the plaintiff and his family demonstrated that they were exposed to and injured by the mandatory moment of silence. *Id.* at 746-47.[25]

In our case, the State contends that the plaintiffs' alleged non-economic injuries are insufficiently particular and concrete. It cites *Valley Forge Christian College v. Americans United for Separation of Church and State*, which found that:

> [the plaintiffs] fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though that disagreement is phrased in constitutional terms.

454 U.S. 464, 485-86 (1982).

In *Valley Forge*, an organization and four of its employees who lived in the Washington D.C. area challenged the constitutionality of a land conveyance from a government agency to a religious-affiliated education program in Pennsylvania. *Id.* at 468-69. The plaintiffs had learned of the land conveyance from a press release. *Id.* at 469. They merely observed the alleged constitutional violation from out-of-state.

The facts in the present case are quite different. Here, the plaintiffs are 13 individuals who reside in Mississippi, a Mississippi church, and an advocacy organization with members in Mississippi. The plaintiffs may have become aware of HB 1523 from news, friends, or social media, but regardless of how they learned of the legislation, it is set to become the law of *their state* on July 1. It will undeniably impact their lives. The enactment of HB 1523 is much more than a "psychological consequence" with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others.

[25] The Fifth Circuit distinguished *Croft* from *Doe v. Tangipahoa Parish School Board*, where it had declined to find standing in a case challenging prayers at school board meetings because the plaintiffs had never attended a school board meeting.

A more applicable case is *Catholic League*. There, the plaintiffs included a Catholic civil rights organization and devout Catholics who lived in San Francisco. 624 F.3d at 1048. They sued over a municipal resolution that expressly denounced Catholicism and the Catholic Church's beliefs on same-sex couples. *Id.* at 1047. The appellate court found that they had standing to bring such a case against their local government.

Similarly, today's individual plaintiffs have attested that they are citizens and residents of Mississippi, they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State's disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a message that the state government is unwilling to protect them. *See, e.g.*, Docket Nos. 32-2; 32-3; 32-5 (all in *Barber*).

Plaintiff Taylor, for example, is "a sixth-generation Mississippian" and "former Navy combat veteran." Docket No. 32-8, in *Barber*. He is also a gay man engaged to be married next year. *Id.* Taylor thinks HB 1523 is hostile toward his religious values and targets LGBT persons. *Id.*

Dr. Glisson describes herself as "a member of the Southern Baptist Church co-founded by my grandparents" who has "studied and reflected upon my faith choice almost all my life." Docket No. 32-6, in *Barber*. "I am convinced that the heart of the Gospel is unconditional love. To condemn the presence of God in another human being, especially using faith claims or scripture to do so, is wrong and violates all of the tenets of my Christian faith." *Id.*

Dorothy Triplett explained her religious objections in detail. "I am a Christian, and nowhere in scripture does Jesus the Christ condemn homosexuality," she said. Docket No. 32-9, in *Barber*. "He instructed us to love our neighbors as ourselves. In St. Paul's Letter to the

Galatians 3:28: New Revised Standard Version (NRSV): 'There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.'" *Id.*

Based on their allegations and testimony, each individual plaintiff has adequately alleged cognizable injuries under the Establishment Clause. The "sufficiently concrete injur[ies]" here are the psychological consequences stemming from the plaintiffs' "exclusion or denigration on a religious basis within the political community." *Catholic League*, 624 F.3d at 1052; *see Awad*, 670 F.3d at 1123.

Their injuries are also imminent. HB 1523 is set to become law on July 1. "There is no need for [the plaintiffs] to wait for actual implementation of the statute and actual violations of [their] rights under the First Amendment where the statute" violates the Establishment Clause. *Ingebretson v. Jackson Public Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996).

2. Causation

The State next argues that the plaintiffs have not shown that their injuries have a causal connection to the defendants' conduct. It cites *Southern Christian Leadership Conference v. Supreme Court of Louisiana* for the proposition that an injury cannot be the result of a third party's independent action, and instead must be traceable to the named parties. 252 F.3d 781, 788 (5th Cir. 2001). The contention here is that any injuries will be caused by third parties – like a clerk who refuses to promptly issue a marriage license to a same-sex couple – and therefore that the plaintiffs should sue those third parties.

The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. *See Santa Fe*, 530 U.S. at 302; *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010). Regardless of any third-

party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs' injuries are therefore caused by the State – and specifically caused by the Governor who signed HB 1523 bill into law – and will at a minimum be enforced by officials like Davis and Moulder.

In addition, in similar cases under the Establishment and Equal Protection Clauses, the Supreme Court has found a state's governor to be a proper defendant for the causal connection requirement of standing. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Romer*, 517 U.S. at 620.

Accordingly, the plaintiffs have demonstrated that there is a causal connection between their injuries and the defendants' conduct.

3. Redressability

The final prong of standing requires the plaintiffs to demonstrate that a favorable judicial decision will redress their grievances. *Lujan*, 504 U.S. at 561. The State argues that "Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminary enjoins the named Defendants today." Docket No. 30, at 24, in *Barber*. It fails to support this claim with any further argument or facts.

"[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740 (quotation marks and citation omitted). "By declaring the [statute] unconstitutional, the official act of the government becomes null and void." *Catholic League*, 624 F.3d at 1053.

Here, the harm done by HB 1523 would be halted if the statute is enjoined. Nothing in the plaintiffs' briefs, oral argument, or testimony indicates that they expect a favorable ruling to change the hearts and minds of Mississippians opposed to same-sex marriage, transgender

equality, or sex before marriage. They simply ask the Court to enjoin the enforcement of a state law that both permits arbitrary discrimination based on those characteristics and endorses the majority's favored religious beliefs. That is squarely within the Court's ability. *See Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012).

"Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned." *Catholic League*, 624 F.3d at 1053.

The Court concludes that the individual plaintiffs have standing to bring these claims.

4. Associational Standing

In some instances, organizations may bring suit on behalf of their members. To establish associational standing, the organization must show that: (1) its members would have standing to sue on their own behalf; (2) the interests it seeks to safeguard are germane to the organization's purpose; and (3) neither the claim asserted nor the requested relief necessitate the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977).

JGMCC seeks associational standing as a church with many LGBT members and a community service ministry that promotes LGBT+ equality. Because members of the church have standing to bring suit on their own behalf – at least two of its members are individual plaintiffs – the first element of associational standing is satisfied. Ensuring that its members are not discriminated against on the basis of sexual orientation, gender identity, or religion is undoubtedly germane to its purpose. And JGMCC's facial challenge does not require the participation of individual members. JGMCC has associational standing.

The same is true for CSE. That organization also has a member participating in this lawsuit, is aligned with the arguments and relief sought in this suit, and need not have additional members to assert its particular cause of action. It has associational standing. *Accord CSE I*, 64 F. Supp. 3d at 918; *CSE III*, 2016 WL 1306202, at *11.

B. *Ex Parte Young*

The next issue is whether these defendants are properly named in this suit.

1. Legal Standard

Under the Eleventh Amendment, citizens cannot sue a state in federal court. U.S. Const. amend. XI; *see Hutto v. Finney*, 437 U.S. 678, 699 (1978). In *Ex parte Young*, however, the Supreme Court carved out a narrow exception to this rule. 209 U.S. 123 (1908). The resulting *Ex parte Young* "fiction" holds that "because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc). When a plaintiff sues a state official in his official capacity for constitutional violations, the plaintiff is not filing suit against the individual, but instead the official's office, and can proceed with the constitutional claims. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

The *Ex parte Young* fiction requires that the state officer have "some connection with the enforcement of the act" or be "specially charged with the duty to enforce the statute," and also that the official indicate a willingness to enforce it. *Ex parte Young*, 209 U.S. at 157, 158. The officer's authority to enforce the act does not have to be found in the challenged statute itself; it is sufficient if it falls within the official's general duties to enforce related state laws.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quotation marks, citation, and brackets omitted).

2. Discussion

All four defendants – the Governor, the Attorney General, the Executive Director of the Department of Human Services, and the Registrar of Vital Records – are state officials sued in their official capacities. These suits are effectively brought against their various offices. All four defendants also have a connection to the enforcement of HB 1523.

Although Governor Bryant is the chief executive of the State, *Ex parte Young* does not permit a suit against a governor solely on the theory that he is "charged with the execution of all of its laws." *Ex parte Young*, 209 U.S. at 157. A more specific causal connection is required. *Id.* That connection is satisfied here. The Governor is the manager and supervisor of his staff, so he is personally required to enforce HB 1523's terms prohibiting adverse action against any of his employees who exercise a § 2 belief. Since the Governor has also indicated his willingness to enforce HB 1523 to the full extent of his authority, he is a proper defendant. *See* CB Condez, *Mississippi Governor: Christians Would Line up for Crucifixion Before Abandoning Faith*, The Christian Times, June 2, 2016 ("'[HB 1523's critics] don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and Savior Jesus Christ,' [Governor Bryant] said.").[26]

[26] The Governor's remarks are reminiscent of what Circuit Judge Tom P. Brady, later Mississippi Supreme Court Justice Brady, warned in his infamous Black Monday Speech. Judge Brady called on others to disobey *Brown v. Board of Education* by saying, "We have, through our forefathers, died before for our sacred principles. We can, if necessary, die again." Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till 10 (1988).

In Establishment and Equal Protection Clause cases in particular, governors are often properly included as named defendants. *See Romer,* 517 U.S. at 620 (Gov. Roy Romer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Gov. Edwin W. Edwards); *Wallace*, 472 U.S. at 38 (Gov. George C. Wallace); *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (Gov. Rick Perry, as the sole defendant) [hereinafter *Croft II*]; *Croft I*, 562 F.3d at 735 (same).

General Hood is the state's chief law enforcement officer, but his general duty to represent the state in litigation is inadequate to invoke the *Ex parte Young* exception. Like the Governor, though, HB 1523 prohibits General Hood from taking any action against one of his employees who acts in accordance with a § 2 belief. The Attorney General's Office employs hundreds of people across Mississippi, so he may very well be confronted with an HB 1523 issue.

Executive Director Davis, until authority is formally transferred to the new Department of Child Protective Services, is responsible for administering a variety of social programs. *See* Miss. Code Ann. § 43-1-51. HB 1523 has at least two sections that fall under his purview. *See* HB 1523 § 3(2)-(3). Under HB 1523, for example, DHS cannot take action against a foster or adoptive parent who violates DHS policies based on a § 2 belief. Davis's attorneys have given every impression that he will fully enforce his duties under HB 1523.

As discussed above, Registrar Moulder is responsible for executing state laws concerning registration of marriages. *See* Miss. Code Ann. § 51-57-43. HB 1523 adds a new responsibility to her existing obligations: she must record the recusal of any circuit clerk who refuses to issue a marriage license because of a § 2 belief. HB 1523 § 3(8)(a). Thus, she has a connection with HB 1523's enforcement. Her counsel has also indicated her intent to comply with her new duties.

Lastly, the plaintiffs' requested relief also satisfies the Eleventh Amendment and *Ex parte Young*. In both cases, they have requested declaratory and prospective injunctive relief that would enjoin the enforcement of HB 1523 and prevent state officials from acting contrary to well-established precedent. Courts frequently grant this type of relief against state officials in constitutional litigation. *See, e.g.*, *Romer*, 517 U.S. at 620; *Wallace*, 472 U.S. at 38.

Accordingly, the *Ex parte Young* exception to the Eleventh Amendment applies and these suits may proceed to seek declaratory and injunctive relief against these defendants.

IV. Motion for Preliminary Injunction

A. Legal Standard

To receive a preliminary injunction, the movant must show "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012) (citation omitted). "Each of these factors presents a mixed question of fact and law." *Id.* (citation omitted).

"A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four . . . prerequisites." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

B. Substantial Likelihood of Success on the Merits

The movant's likelihood of success is determined by substantive law. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). "To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [HB 1523] is constitutional. If the plaintiffs successfully show [it] to be unconstitutional in every application, then that provision will be struck down as invalid." *Croft II*, 624 F.3d at 164.

1. The Equal Protection Clause

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of this Amendment means that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves concerning personhood and citizenship rights enumerated in the Civil Rights Act of 1866.[27]

The Equal Protection Clause is no longer limited to racial classifications. That is not because racial discrimination and racial inequality have ceased to exist. Rather, as discrimination against groups becomes more prominent and understood, we turn to the Equal Protection clause to attempt to level the playing field. *Compare Bradwell v. Illinois*, 83 U.S. 130 (1872) (denying women equal protection of the laws) *with United States v. Virginia*, 518 U.S. 515 (1996)

[27] United States Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. "This abolishes all class legislation in the States and does away with the injustice subjecting one caste of persons to a code not applicable to another," he said. "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man . . . the equal protection of law?" Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

(recognizing that women are entitled to equal protection of the laws). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557; *see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) ("The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."). One hundred and fifty years after its passage, the Fourteenth Amendment remains necessary to ensure that all Americans receive equal protection of the laws.

Sexual orientation is a relatively recent addition to the equal protection canon. In 1996, the Supreme Court made it clear that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause. *See Romer*, 517 U.S. at 635. Seven years later, the Court held that the Constitution protects LGBT adults from government intrusion into their private relationships. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

"After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause." *Gill v. Delvin*, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012). Now, *Obergefell* makes clear that LGBT citizens have "equal dignity in the eyes of the law. The Constitution grants them that right." 135 S. Ct. at 2608.

a. Animus

"The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of

that group." *Windsor*, 133 S. Ct. at 2693 (citation omitted). Laws motivated by "an improper animus" toward such a group require special scrutiny. *Id.*

When examining animus arguments, courts look at "the design, purpose, and effect" of the challenged laws. *Id.* at 2689; *see also Romer*, 517 U.S. at 627-28. The *Windsor* Court, for example, considered DOMA's title, one House Report from the bill's legislative history, and the law's "operation in practice." *Windsor*, 133 S. Ct. at 2693-94. From these it found that DOMA has a "principal purpose . . . to impose inequality," places same-sex couples in second-tier relationships, "demeans the couple, whose moral and sexual choices the Constitution protects," and "humiliates tens of thousand of children now being raised by same-sex couples." *Id.* at 2694. The Court concluded that "the history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.* at 2693.

Animus was also a critical part of the Court's analysis in *Romer*, where plaintiffs brought a pre-enforcement facial challenge to Amendment 2 of the Colorado Constitution. 517 U.S. at 623. "[T]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from [anti-discrimination] ordinances that had been passed in various Colorado municipalities." *Id.* Voters approved Amendment 2 to invalidate those ordinances and preclude "all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on the homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 620. In striking down Amendment 2 as an unconstitutional act of majority animus against a minority group, the Supreme Court wrote that "[a] state cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

The State argues that the plaintiffs have failed to show that the motivation behind the passage of HB 1523 was driven by "animus," "irrational prejudice," or "desire to harm" anyone. Docket No. 30, at 36, in *Barber*. Certainly, discerning the actual motivation behind a bill can be treacherous. But *Romer* and *Windsor* are instructive. This Court need only apply *Romer* and *Windsor* to ascertain that the design, purpose, and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law.

1. Design and Purpose

The State says the primary motivating factor behind HB 1523 was to address the denigration and disfavor religious persons felt in the wake of *Obergefell.* Tr. of June 24 at 324, 327. The sponsors of the bill presented it to their respective chambers as post-*Obergefell* legislation.[28] A number of news articles confirmed the same.[29]

HB 1523's title, the "Protecting Freedom of Conscience from Government Discrimination Act," obviously implies that the purpose of the legislation was to halt governmental discrimination.

The legislative debate fleshes out the intended meaning of that title. Senator Willie Simmons asked whether the government was discriminating against religious citizens. Senate Floor Debate at 28:44. Senator Branning responded, "it potentially could." *Id.* at 28:44. Later,

[28] Representative Gipson said HB 1523 would merely "add an additional layer of protection that currently does not exist in the post-*Obergefell*" world. H.B. 1523, Debate on the Floor of the Mississippi House of Representatives, at 6:24 (Feb. 19, 2016) (statement of Rep. Andy Gipson). Senator Branning introduced HB 1523 as "post-*Obergefell* balancing legislation . . . presenting a solution to the crossroads we find ourselves in today as a result of *Obergefell v. Hodges*." Senate Floor Debate at 2:16, 32:20. She later added that although Mississippians may have religious beliefs against gambling, the death penalty, alcohol, and payday loan interest rates, HB 1523 is "very specific to same-sex marriage." *Id.* at 37:20.

[29] As Speaker Gunn said shortly after the decision was handed-down, "I don't care what the Supreme Court says. Marriage will always be between one man and one woman in holy matrimony." Emily Wagster Pettus, *House Speaker Protested by Flag Supporters at Neshoba*, Hattiesburg American, July 30, 2015. Representative Andy Gipson agreed. "What the Supreme Court's decision does not and cannot change is the firmly held conviction of faith of myself and most Mississippians. We still believe that marriage is defined by God as the union of one man and one woman." Pender, *supra*. Representative Gipson is correct: the Supreme Court cannot change his beliefs, nor does it intend to.

though, she wholeheartedly agreed with one of her colleagues that the government does not want to protect people of faith, and that it is time for people of faith to say, 'enough is enough.' *Id.* at 50:30. She agreed that the bill would ensure that LGBT citizens would not be able to sue a baker, florist, or other business for declining to serve them. *Id.* at 53:36. She agreed that the intent of the bill was to "level the playing field," ensure that certain groups had equal rights but not "special rights," and not "reverse discriminate against people." *Id.* at 54:15 (quoting Sen. Filingane).

The Senate debate also revealed another purpose of HB 1523. Senator Simmons asked if a Baptist college's refusal to employ lesbian and gay citizens was a form of discrimination. *Id.* at 31:29. Senator Branning responded, "if this bill passed, it would not be." *Id.* at 31:29.

The title, text, and history of HB 1523 indicate that the bill was the State's attempt to put LGBT citizens back in their place after *Obergefell*. The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were "put in a solitary class with respect to transactions and relations in both the private and governmental spheres" to symbolize their second-class status. *Romer*, 517 U.S. at 627. As in *Romer*, *Windsor*, and *Obergefell*, this "status-based enactment" deprived LGBT citizens of equal treatment and equal dignity under the law. *Romer*, 517 U.S. at 635.

2. Effect

Next up is the impact HB 1523 will have on LGBT Mississippians. Although the bill is far-reaching and could have consequences in many areas of daily life, *Romer* suggests that this Court should devote attention to HB 1523's effect on existing anti-discrimination laws and policies. The Court turns to that narrow issue now.

As a state law, HB 1523 would preempt, or invalidate, all city, county, and public school ordinances and policies that prohibit discrimination on the basis of sexual orientation or gender identity. *See* HB 1523 § 8(2)-(3). The same was true in *Romer*.

The plaintiffs submitted two policies that HB 1523 would invalidate in part: the City of Jackson's recent anti-discrimination ordinance and USM's anti-discrimination policy. Docket Nos. 32-17 and 32-18, in *Barber*. Both protect citizens from sexual orientation and gender identity discrimination in a variety of contexts.

HB 1523 would have a chilling effect on Jacksonians and members of the USM community who seek the protection of their anti-discrimination policies. If HB 1523 goes into effect, neither the City of Jackson nor USM could discipline or take adverse action against anyone who violated their policies on the basis of a § 2 belief.

The State attempts to distance HB 1523 from Amendment 2 in *Romer* by arguing that HB 1523 does not "expressly prohibit[] any law meant to protect gay or lesbian citizens from discrimination." Docket No. 30, at 40, in *Barber*. Sentences later, though, the State identifies the problem with its argument: "H.B. 1523 would invalidate local ordinances only to the extent those ordinances do not provide the same level of protection for religious freedom and free exercise as provided by H.B. 1523." *Id.* at 41. But no other local ordinance or policy purports to do what HB 1523 does. The State has not pointed to any existing anti-discrimination ordinance or policy that would survive HB 1523's preemptive reach.

In a last-gasp attempt to distinguish HB 1523 from Amendment 2, the State then contends that HB 1523 "is actually strikingly similar" to Jackson and USM's policies because they all prohibit discrimination on the basis of religion. *Id.* at 40-41. The argument ignores the critical difference: Jackson and USM's anti-discrimination policies provide equal protection

regardless of religion, sexual orientation, or gender identity. HB 1523 draws a stark line, with LGBT and unmarried-but-sexually-active citizens on one side, and everyone else on the other.

As in *Romer* and *Windsor,* the effect of HB 1523 would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.

b. Scrutiny

This brings the Court to whether the government has a legitimate basis for HB 1523. While most laws classify and make distinctions, all laws do not violate equal protection. *Romer*, 517 U.S. at 631. The Supreme Court has attempted to reconcile this dilemma by holding that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* (citation omitted).

"When social or economic legislation is at issue, the Equal Protection Clause allows States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citation omitted). "But we would not be faithful to our obligations under the Fourteenth Amendment if we apply so deferential a standard to every classification. . . . Thus we have treated as presumptively invidious those classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right." *Plyler*, 457 U.S. at 216-17.

Neither the Supreme Court nor the Fifth Circuit "has recognized sexual orientation as a suspect classification or protected group; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate

governmental aims."[30] *Johnson v. Johnson*, 385 F.3d 503, 530-31 (5th Cir. 2004) (citation and brackets omitted). "Rational basis review places the burden of persuasion on the party challenging a law, who must disprove every conceivable basis which might support it." *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quotation marks and citations omitted). "So the party urging the absence of any rational basis takes up a heavy load." *Id.* This means the government usually prevails.

Even under this generous standard, HB 1523 fails. The State contends that HB 1523 furthers its "legitimate governmental interest in protecting religious beliefs and expression and preventing citizens from being forced to act against those beliefs by their government." Docket No. 30, at 37-38, in *Barber*. This is a legitimate governmental interest, but not one with any rational relationship to HB 1523.

The Supreme Court "has long recognized that the government may accommodate religious practices without violating the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (citations and ellipses omitted). The First Amendment, the Mississippi Constitution, and Mississippi's RFRA all protect Mississippi's citizens' religious exercise – and in a broader way than HB 1523. Mississippi's RFRA in particular states that the government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann.

[30] In *CSE I*, this Court discussed the doctrinal instability on the proper standard of review. 64 F. Supp. 3d at 928. "The circuit courts of appeal are divided on which level of review to apply to sexual orientation classifications. In the Second Circuit, homosexuals compose a quasi-suspect class that is subject to heightened scrutiny. In this circuit, sexual orientation classifications are subject to rational basis review." *Id.* (quotation marks, citations, and brackets omitted). Then as now, the Court questions whether sexual orientation should be afforded rational basis review. *Id.* ("If this court had the authority, it would apply intermediate scrutiny to government sexual orientation classifications."). *Obergefell* did not resolve the dispute. When Judge Jordan examined *Obergefell* earlier this year, however, he concluded that "the [Supreme] Court applied something greater than rational-basis review." *CSE III*, 2016 WL 1306202, at *13. As this Court is bound by Fifth Circuit precedent, it will consider HB 1523 under rational basis review.

§ 11-61-1(5)(b) (emphasis added). Its plain language provides substantial protection from governmental discrimination on the basis of religious exercise.

Mississippi's RFRA grants *all* people the right to seek relief from governmental interference in their religious exercise, not just those who hold certain beliefs. This critical distinction between RFRA and HB 1523 cannot be overlooked.

Although states are permitted to have more than one law intended to further the same legitimate interest, HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.

The State then claims that HB 1523 "is about the people of conscience who need the protection of H.B. 1523, and does not 'target' Plaintiffs."[31] Docket No. 30, at 3, in *Barber*. The argument is unsupported by the record. It is also inconceivable that a discriminatory law can stand merely because creative legislative drafting limited the number of times it mentioned the targeted group. The Court cannot imagine upholding a statute that favored men simply because the statute did not mention women.

The State next focuses on marriage licenses. It contends that because HB 1523 does not allow the denial, delay, or impediment of marriage licenses, that licenses are issued on the same terms as opposite-sex couples. Thus, the State argues, there is no differential treatment that would constitute a violation of the Equal Protection Clause. *Id.* at 6. The only way a same-sex couple could be treated differently, it says, is if the issuance of their marriage license was "*impeded or delayed as a result of any recusal*." *Id.*

[31] Rather than protect its citizens from "government discrimination," HB 1523 could actually subject more citizens to federal civil rights lawsuits. Persons feeling emboldened by HB 1523 may not understand that the law provides immunity only from State sanctions.

To the contrary, the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment. "A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633. There cannot be one set of employees to serve the preferred couples and another who is 'willing' to serve LGBT citizens with a "clear conscience," as Senator Branning put it. Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in *Romer*, *Lawrence*, *Windsor*, *CSE I*, *Obergefell*, and *CSE II*.

On this point, it is important to note that HB 1523's supposed protection against any delayed service applies only to marriage licenses and some health care issues. Tr. of June 24 at 339. The other areas of permissible discrimination – counseling, fertility services, etc. – do not place any duty on the recusing individual to ensure that LGBT citizens receive services.[32]

The State is correct that no one can predict how many LGBT citizens may be denied service under HB 1523. But it cannot be disputed that the broad language of the bill "identifies persons by a single trait and then denies them protection across the board." *Romer*, 517 U.S. at 633. Thus, the State cannot prevail on its argument that HB 1523's plain language does not create a separate system designed to diminish the rights of LGBT citizens.

The deprivation of equal protection of the laws is HB 1523's very essence. *See Windsor*, 133 S. Ct. at 2693. It violates the Fourteenth Amendment.

[32] There is an almost endless parade of horribles that could accompany the implementation of HB 1523. Although the Court cannot imagine every resulting factual scenario, HB 1523's broad language "identifies persons by a single trait and then denies them protection across the board." *Romer*, 517 U.S. at 633.

2. The Establishment Clause

a. General Principles

The First Amendment begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. Const. amend. I.

"The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970). The Supreme Court has "struggled" to chart a path respecting both of them. *Id.* It is a thankless task. Part of the difficulty lies in the fact that each Clause is "cast in absolute terms" and would "clash with the other" if taken to its logical conclusion. *Id.* at 668-69; *see also Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

The Supreme Court has repeatedly rejected the notion that *states* may establish religion because the text of the Establishment Clause only references *Congress*. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In truth, "[t]he very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended [the] prohibition to state support for religion in general." *McCreary Cnty.*, 545 U.S. at 878 (quotation marks and citation omitted).

Another popular misconception holds that the Establishment Clause is in error since the Constitution does not contain the phrase "separation of Church and State." Adherents of this belief have read the text correctly but missed its meaning. "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

Nor was the Establishment Clause forced upon the sovereign states by an overreaching federal government. Far from being a federal mandate, the Clause "was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people." *McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 215-16 (1948) (Frankfurter, J., concurring).

In any event, the Supreme Court has emphasized that "there is room for play in the joints" between the two Clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quotation marks and citation omitted). It has sought to "chart a course that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz*, 397 U.S. at 672.

b. Historical Context

America as a whole is "a rich mosaic of religious faiths." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1849 (2014) (Kagan, J., dissenting). Here, 80% of Mississippians identify as Christians.[33] Tr. of June 24 at 250.

Given the pervasiveness of Christianity here, some Mississippians might consider it fitting to have explicitly Christian laws and policies. They also might think that the Establishment Clause is a technicality that lets atheists and members of minority religions thwart their majority (Christian) rule.[34]

The public may be surprised to know the true origins of the Establishment Clause. As chronicled by the Supreme Court, history reveals that the Clause was not originally intended to protect atheists and members of minority faiths. It was written to protect Christians from other Christians. *See Wallace*, 472 U.S. at 52 & n.36. Only *later* were other faith groups protected.

[33] A full 30% of Mississippians are white evangelical Christians. Tr. of June 24 at 250.
[34] The feeling is understandable. Headlines trumpet perceived anti-Christian conduct, inflaming passions. *See, e.g.*, Kate Royals, *Brandon Band Reportedly Not Allowed to Perform Christian Hymn*, The Clarion-Ledger, Aug. 22, 2015. But, of course, "[t]he First Amendment is not a majority rule." *Town of Greece*, 134 S. Ct. at 1822.

The story behind this begins with the colonists.[35] "It is a matter of history that [the] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Engel v. Vitale*, 370 U.S. 421, 425 (1962). For decades at a time in 16th- and 17th-century England, Christian sects fought each other to control the Book of Common Prayer, in order to amend it and advance their particular beliefs. *Id.* at 425-27. The fighting was disruptive and deadly. *Id.* at 426. Those in power occasionally executed their opponents. *Id.* at 427 n.8. Some of the persecuted fled to America. *Id.* at 425.

The Puritans, for example, were originally a religious minority in England that "rejected the power of the civil government to prescribe ecclesiastical rules." C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 Tex. Wesleyan L. Rev. 291, 309 (2005). They specifically opposed the monarch's "requirement that clergy wear particular vestments while celebrating the liturgy." *Id.* at 308 n.94 (quotation marks and citation omitted). Today it is *inconceivable* that the *government* could require clergy to wear particular clothing.[36] But the Puritans were disparaged for their opposition and other beliefs. *Id.* at 309. Thousands left.

In the New World, several colonies established their particular Christian beliefs as their official religion. *Engel*, 370 U.S. at 427-28; *see also McCollum*, 333 U.S. at 214 (Frankfurter, J., concurring). That again proved unsatisfactory.

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[35] "History provides enlightenment; it appraises courts of the subtleties and complexities of problems before them." *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983).

[36] In seeing the Establishment Clause as a sword wielded against the majority, we forget that the Establishment Clause is actually a shield protecting religion from governmental meddling. Who wants the government dictating their priest, rabbi, or imam's clothing? It's difficult to imagine a greater violation of American law and custom. *See, e.g.*, *McCollum*, 333 U.S. at 232 ("If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'") (Frankfurter, J., concurring); *Engel*, 370 U.S. at 430 ("the people's religions must not be subjected to the pressures of government"); *Engel*, 370 U.S. at 431 ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*."); *see also Lee v. Weisman*, 505 U.S. 577, 589-90 (1992).

For one, state-established religion was perceived as a *British* custom – not something independent, revolutionary Americans would want to retain. *Engel*, 370 U.S. at 427-28. Baptists especially "chafed under any form of establishment." *Larson v. Valente*, 456 U.S. 228, 244 & n.19 (1982). They argued that if the British had no right to tax Americans, then it was also unjust for them to be taxed to support an official religion they denied. *Id.*

And then there was the division-of-power problem. In Virginia, the established Episcopal Church became a minority when the Presbyterians, Lutherans, Quakers, and Baptists banded together "into an effective political force." *Engel*, 370 U.S. at 428. Faced with the prospect of losing power, James Madison and Thomas Jefferson persuaded the Virginia Assembly to pass its famous "Virginia Bill for Religious Liberty." *Everson*, 330 U.S. at 12.[37]

By the time the Constitution was adopted, therefore,

> there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the . . . Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Engel, 370 U.S. at 429-30; *see Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) ("in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce").

[37] "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245.

This history involved disputes between Christians. Americans were weary of the British and then Colonial back-and-forth between Catholics and Protestants, Episcopalians and Presbyterians, and so on. It was better to have a neutral government than to constantly struggle for power – or live under the yoke of a rival sect for decades at a time.

"[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (quotation marks and citation omitted). The essential insight from history is that the First Amendment was originally enacted to prohibit a state from creating second-class Christians. And while the law has expanded to protect persons of other faiths, or no faith at all, the core principle of government neutrality between religious sects has remained constant through the centuries.[38, 39]

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[38] In 1833, Justice Joseph Story wrote that "[t]he real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects." *Wallace*, 472 U.S. at 52 n.36 (quoting 2 J. Story, Commentaries on the Constitution of the United States § 1877, at 594 (1851)). (Despite the 1851 date, the Commentaries were first published in 1833.)

In 1870, "Judge Alphonso Taft, father of the revered Chief Justice, . . . stated the ideal of our people as to religious freedom as one of 'absolute equality before the law, of all religious opinions and sects.'" *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214-15 (1963).

In 1871, the Court found that American "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. 679, 728 (1871).

In 1890, the Court held that the First Amendment was intended "to prohibit legislation for the support of any religious tenets." *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by Romer*, 517 U.S. at 620.

In 1952, the Court wrote that Americans "sponsor an attitude on the part of government that shows no partiality to any one group. . . . The government must be neutral when it comes to competition between sects." *Zorach*, 343 U.S. at 313-14.

In 1968, the Court held that a state could not "aid, foster, or promote one religion *or religious theory* against another," and that the First Amendment "forbids . . . the preference of a religious doctrine." *Epperson*, 393 U.S. at 104, 106 (emphasis added). That case in particular concluded that Arkansas and Mississippi's "anti-evolution" statutes violated the Establishment Clause by giving preference to "a particular interpretation of the Book of Genesis by a particular religious group." *Id.* at 101, 103 & n.11.

In 1971, the Court found that "as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religious exemption law where "no particular sectarian affiliation or theological position is required.").

In 1982, the Court wrote that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244.

In 1985, Justice Sandra Day O'Connor wrote that the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

In 1987, the Court invalidated a Louisiana law giving "preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator." *Edwards*, 482 U.S. at 593.

c. HB 1523

The question now is whether, in light of history and precedent, HB 1523 violates the Establishment Clause. The Court concludes that it does in at least two ways.

i. HB 1523 Establishes Preferred Religious Beliefs

First, HB 1523 establishes an official preference for certain religious beliefs over others.

In 1989, the Court said it had "come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization." *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), *abrogated by Town of Greece*, 134 S. Ct. at 1811. "Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." *Id.* at 605.

Also in 1989, the Court wrote that it was "settled jurisprudence that the Establishment Clause prohibits government from . . . [placing] an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (quotation marks and citations omitted).

In 1992, the Court held that "the central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590.

In 1994, the Court reaffirmed that "proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (quotation marks and citations omitted). *Kiryas Joel* struck down a New York statute that delegated state authority "to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Id.*

In 1995, the Court held that the Establishment Clause is satisfied "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995).

In 2005, the Court wrote that there is "[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *McCreary Cnty.*, 545 U.S. at 860 (quotation marks, citations, and ellipses omitted).

In 2010, the Court justified a cross on public property in part by noting that its placement "was not an attempt to set the *imprimatur* of the state on a particular creed." *Salazar v. Buono*, 559 U.S. 700, 715 (2010).

All in all, "[i]t is firmly established that the government violates the establishment clause if it discriminates among religious groups." Erwin Chemerinsky, Constitutional Law § 12.2.2 (5th ed. 2015).

[39] The Arkansas law struck down in *Epperson* was adapted from a Tennessee law that had already been repealed. One commenter had this to say about the Tennessee law:

> Much wonder has been expressed both in this country and in Europe as to the factors which made such legislation possible. These factors were three in number: (1) an aggressive campaign by a militant minority of religious zealots of the "Fundamentalist" faith; (2) lack of knowledge of modern scientific and religious thought in the rural districts which control Tennessee politically; (3) political cowardice and demagogy.

William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 Yale L.J. 191 (1925).

Under applicable precedent, "when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions" or "differentiate[s] among sects." *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989) (citation omitted).

"We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In an Establishment Clause challenge, though, a court must also take consider "the context in which the statute was enacted and the reasons for its passage." *Salazar v. Buono*, 559 U.S. 700, 715 (2010); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001).

Section 2 of HB 1523 begins, "[t]he sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: . . . ." HB 1523 § 2. It then enumerates three beliefs entitled to protection. In the remainder of the bill, every protection from discrimination is explicitly tied to the § 2 beliefs.

On its face, HB 1523 constitutes an official preference for certain religious tenets. If three specific beliefs are "protected by this act," it follows that every other religious belief a citizen holds is *not* protected by the act. Christian Mississippians with religious beliefs contrary to § 2 become second-class Christians. Their exclusion from HB 1523 sends a message "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members." *McCreary Cnty.*, 545 U.S. at 860. The same is true for members of other faith groups who do not subscribe to the § 2 beliefs.

The State suggests that the bill is neutral because it does not name a denomination. The argument is foreclosed by *Larson*, which struck down a Minnesota statute that had made

"explicit and deliberate distinctions between different religious organizations" without identifying any denomination by name. 456 U.S. at 246 n.23.

For Reverends Barber, Burnett, Fortenberry, and Hrostowski (who are Presbyterian, United Methodist, United Methodist, and Episcopalian, respectively), their religious values cause them to believe that same-sex couples may marry in a Christian ceremony blessed by God. They also believe that same-sex couples may consummate that marriage as any other. As Rev. Dr. Hrostowski testified, "sex is a gift from God, and it is precious and wonderful and should be treated as such," but § 2's definition of sex is "incomplete because now holy matrimony is available to again both straight and gay couples." Tr. of June 23 at 126.

The Reverends, however, are not entitled to any of the protections of HB 1523. The bill instead shows the State's favor for the exact *opposite* beliefs by giving special privileges to citizens who hold § 2 beliefs. In so doing the State indicates that the Reverends hold disfavored, minority beliefs, while citizens who hold § 2 beliefs are preferred members of the majority entitled to a broad array of special legal immunities. *See McCreary Cnty.*, 545 U.S. at 860.[40]

The First Amendment prohibits states from putting their thumb on the scales in this way. Laws must make religious rights and protections available "on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 245, 246 n.23. "[L]egislators—and voter—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245, 246 n.23. But HB 1523 favors Southern Baptist over

[40] One of the more unique conflicts between religious belief and § 2 was elicited during Rabbi Jeremy Simons' testimony. He explained that as early as 1800 years ago, Judaism recognized "four distinct genders that are possible, male, female, then a category called tumtum, which is someone whose gender is essentially ambiguous, unable to be ascertained and then androgenous, someone who displays both sex characteristics." Tr. of June 23 at 105. Rabbi Simons said that rabbis in that era "truly struggle[d] with it, in what to do in these cases where it is ambiguous. But what you don't see is them condemning the child or saying that this child cannot be a part of the community or is any less human or holy than anyone else." *Id.*

Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.[41]

Some Jewish and Muslim citizens may sincerely believe that their faith prevents them from participating in, recognizing, or aiding an interfaith marriage. *See, e.g.*, Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 Ind. L.J. 743, 755-56 (2009) (relaying that under "classical Shari'a regulations: a Muslim man may marry a Christian or Jewish woman but no other unbeliever; a Muslim woman may not marry a non-Muslim under any circumstances. . . . Some Muslim clerics . . . have discouraged interfaith unions altogether."); Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law*, 30 Women's Rts. L. Rep. 479, 520 (2009) ("Interfaith marriage is not simply prohibited by Judaism; it is also not recognized (if performed elsewhere) due to its categorization as an inherently meaningless act. . . . Although Israeli law does not allow interfaith marriages regardless of the sex of the Jewish partner, Israeli culture[] disproportionately scorns Jewish women who cohabit with or marry non-Jewish men."). Why should a clerk with such a religious belief not be allowed to recuse from issuing a marriage license to an interfaith couple, while her coworkers have the full protections of HB 1523?

[41] *See* Southern Baptist Convention, Position Statements ("We affirm God's plan for marriage and sexual intimacy – one man, and one woman, for life. Homosexuality is not a 'valid alternative lifestyle.'"); Unitarian Universalist Association, Marriage Equality ("UU congregations and clergy have long recognized and celebrated same-sex marriages within our faith tradition."); U.S. Conference of Catholic Bishops, Issues and Action, Same Sex Unions, Backgrounder on Supreme Court Marriage Cases ("The USCCB supports upholding the right of states to maintain and recognize the true meaning of marriage in law as the union of one man and one woman."); Docket No. 2-1, at 11-13, in *CSE IV* (letter from the Bishop of The Episcopal Church in Mississippi permitting same-sex religious marriage as of June 3, 2016); Tr. of June 23 at 97-110 (expert testimony on views of same-sex marriage and transgender persons among Jewish denominations); Seth Lipsky, *U.S. Gay Marriage Ruling Puts Orthodox Jews on Collision Course With American Law*, Haaretz, June 28, 2015; *see generally* Docket No. 2-2, at 7, in *CSE IV* (resolution of the United Church of Christ supporting same-sex religious marriage); Brief for President of the House of Deputies of the Episcopal Church, et al. as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief for Major Religious Organizations as Amici Curiae Supporting Respondents, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). To be clear, Rabbi Simons' testimony indicated that the term "Orthodox" encompasses a variety of different sects of Judaism, some of which may permit same-sex marriage. Tr. of June 23 at 108-09. Most Jews in Mississippi belong to the Reform denomination and support same-sex marriage, he said. *Id.* at 96.

The State argues that there is no religious preference because some members of *all* religious traditions are opposed to same-sex marriage. That is, because some Unitarians, some Episcopalians, and some Reform Jews oppose same-sex marriage, HB 1523 is neutral between religious sects. *See* Docket No. 38-2, at 2, in *Barber*.

Every group has its iconoclasts. The larger the group, the more likely it will have someone who believes the sun revolves around the Earth, a doctor who thinks smoking unproblematic, or a Unitarian opposed to same-sex religious marriage. But most people in a group share most of that group's beliefs. That is the point of being in a *group*. And in the HB 1523 context, the State has favored certain *doctrines*, regardless of how many individuals deviate from official doctrine on an issue.[42]

The State's *we-prefer-some-members-of-all-religions* argument also fails to understand another function of the Establishment Clause. "Intrafaith differences . . . are not uncommon among followers of a particular creed," the Supreme Court once wrote, in its typical understated fashion. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981); *see Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). It is precisely because those internal disputes are common – and contentious – that the framers long ago decided that the government should stay out of those battles, for the benefit of both sides. *See, e.g.*, Sarah McCammon, *Conservative Christians Grapple With Whether 'Religious Freedom' Includes Muslims*, National Public Radio, June 29, 2016 (describing one ongoing internal debate).

Rev. Burnett's testimony illustrates the problem nicely. She said her church, the United Methodist Church, opposes same-sex religious marriage but is in the process of reconsidering its

[42] The Supreme Court has rejected this kind of sophistry: "the Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452 (1971). Courts are expected to look beyond superficial explanations. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam); *see Edwards v. Aguillard*, 482 U.S. 578, 585-86 (1987) (invalidating Louisiana statute under the Establishment Clause although the statute's "stated purpose" was "to protect academic freedom").

position. Tr. of June 23 at 158. Rev. Burnett objected to what she perceived as the State of Mississippi's attempt to weigh in on that doctrinal debate via HB 1523. *Id.* at 159.

Governor Bryant is also a member of the United Methodist Church. *See* David Brandt, *Mississippi Church a Window into National Gay Rights Debate*, Assoc. Press, Apr. 12, 2016. There are same-sex couples in his congregation. *Id.*

HB 1523 violates the Establishment Clause because it chooses sides in this internal debate. In so doing it says persons like Gov. Bryant are favored and persons like Rev. Burnett are disfavored. So the fact that some members of all religions oppose same-sex marriage does not mean the State is being neutral. It means the State is inserting itself into any number of intrafaith doctrinal disputes, tipping the scales toward some believers and away from others. That is something it cannot do. "[T]he people's religions must not be subjected to the pressures of government." *Engel*, 370 U.S. at 430.

The State then argues that HB 1523 is defensible as supporting moral values, not religious beliefs. As the testimony in this case showed, however, religious beliefs are inextricably intertwined with moral values. Plus, the Free Exercise Clause only protects "beliefs rooted in *religion*." *Thomas*, 450 U.S. at 713 (citations omitted and emphasis added). So the State cannot simultaneously contend that HB 1523 is a reasonable accommodation of religious exercise and that it protects only moral beliefs. If HB 1523 was passed to encourage exclusively moral values, it was not passed to further the free exercise of religion.

Because § 2 "clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents," the law must be treated as "suspect" and subject to strict scrutiny. *Larson*, 456 U.S. at 246-47. That means § 2 "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that

interest." *Id.* The *Lemon* test need not be applied. *Id.* at 252 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); *see also Hernandez*, 490 U.S. at 695; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987).[43]

"For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy. [The government] must identify an actual concrete problem – mere speculation of harm does not constitute a compelling state interest." *Awad*, 670 F.3d at 1129 (quotation marks, citations, and brackets omitted).

As mentioned, the State says HB 1523 is justified by a compelling government interest in accommodating the free exercise of religion. The underlying premise of this interest is that members of some religious sects believe that any act which brings them into contact with same-sex marriage or same-sex relationships makes the believer complicit in the same-sex couples' sin, in violation of the believer's own exercise of religion. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2522-23 & n.23 (2015). The idea is that baking a cake for a same-sex wedding "makes a baker complicit in a same-sex relationship to which he objects." *Id.* at 2519.

The problem is that the State has not identified any actual, concrete problem of free exercise violations. Its defense speaks in generalities, but "Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad*, 670 F.3d at 1130 (collecting cases). Mississippi has run

[43] The Court need not consider the bill's "secular purpose." *See Doe*, 240 F.3d at 468; Chemerinsky § 12.2.2 (noting similarities between neutrality analysis and elements of the *Lemon* test). If it did, however, it would conclude that HB 1523 "was not motivated by any clearly secular purpose – indeed, the statute had *no* secular purpose," for the reasons listed in *Wallace*, 472 U.S. at 56. *See also Edwards*, 482 U.S. at 592.

into the same hurdle Oklahoma did in *Awad*: its attorneys have not identified "even a single instance" where *Obergefell* has led to a free exercise problem in Mississippi. *Id.*

In this case, moreover, it is difficult to see the compelling government interest in favoring three enumerated religious beliefs over others. "[T]he goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference" for one set of beliefs. *Edwards*, 482 U.S. at 588. It is not within our tradition to respect one clerk's religious objection to issuing a same-sex marriage license, but refuse another clerk's religious objection to issuing a marriage license to a formerly-divorced person. The government is not in a position to referee the validity of Leviticus 18:22 ("Thou shalt not lie with mankind, as with womankind: it is abomination.") versus Leviticus 21:14 ("A widow, or a divorced woman, or profane, or an harlot, these shall he not take.").[44, 45]

Even if HB 1523 had encouraged the free exercise of *all* religions, it does not actually contribute anything toward that interest. Again, as discussed above, a clerk with a religious objection to same-sex marriage may invoke existing constitutional and statutory defenses without HB 1523. *E.g.*, *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 140 (1987). The State has not identified a purpose behind HB 1523 "that was not fully served by" prior laws. *Wallace*, 472 U.S. at 59.

Finally, the State claims that HB 1523 is akin to a federal statute permitting persons to opt-out of performing abortions. The comparison is inapt. For one, that statute is neutral to the extent it prohibits retaliation against doctors who decline to provide abortions as well as doctors

[44] All quotes from and citations to the Bible are drawn from the King James Version.
[45] We do not single out religious beliefs in this way. No state law explicitly allows persons to decline to serve a payday lender based on a religious belief that payday lending violates Deuteronomy 23:19. No state law explicitly allows recusals because of a belief that wearing "a garment mingled of linen and wool[]" is forbidden. *Leviticus* 19:19. If a marriage license was withheld for "foolish talking" or "jesting," *see* Ephesians 5:4, we would undoubtedly have many fewer marriages.

who choose to provide abortions. *See* 42 U.S.C. § 300a-7(c)-(e). HB 1523 is not so even-handed. Tr. of June 24 at 327.

It is true that part of the abortion statute permits individuals or entities to opt-out of performing all abortions. *Id.* § 300a-7(b). That still is not analogous to HB 1523. If doctors can opt-out of all abortions, the apples-to-apples comparison would let clerks opt-out of issuing all marriage licenses. A clerk who transfers from the marriage licensing division to the court filings division, for example, would be honoring her religious beliefs by declining to be involved in a same-sex marriage, but would not be picking and choosing which persons to serve.

The Court now turns to why that kind of selective service is unlawful.

ii. HB 1523's Accommodations Injure Other Citizens

HB 1523 also violates the First Amendment because its broad religious exemption comes at the expense of other citizens.

Supreme Court precedent has repeatedly upheld "legislative exemptions [for religion] that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (collecting cases). A religious accommodation which does no harm to others is much more likely to survive a legal challenge than one which does.

Estate of Thornton v. Caldor is a good example of this principle at work. In that case, a Connecticut statute gave workers an "absolute right not to work on their chosen Sabbath." 472 U.S. 703, 704-05 (1985). Donald Thornton invoked the statute and chose not to work on Sundays. The resulting conflict with his employer led Thornton to quit. Litigation ensued.

The Supreme Court invalidated the Connecticut law. The statute violated the Establishment Clause by requiring that "religious concerns automatically control over all secular

interests at the workplace." *Id.* at 709. The statute did not take into account "the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710. "Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute," the Court found, and it was wrong to make them "take a back seat to the Sabbath observer." *Id.* at 710 n.9. Because "[t]he statute has a primary effect that impermissibly advances a particular religious practice," it violated the First Amendment. *Id.* at 710.

HB 1523 fails this standard. The bill gives persons with § 2 beliefs an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service. Like *Caldor*, it contains "no exception [for] when honoring the dictates of [religious] observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the [religious] observers." *Caldor*, 472 U.S. at 709-10.

Burwell v. Hobby Lobby confirms this 'do no harm' principle. In that case, the Court relieved three closely-held corporations from federal contraceptive regulations which substantially burdened the corporate owners' religious beliefs. 134 S. Ct. at 2759. At first blush that sounds analogous to HB 1523: if the corporate owners could opt-out of the federal regulation, why can't clerks opt-out of serving same-sex couples? The difference is that the *Hobby Lobby* Court found that the religious accommodation in question would have "precisely zero" effect on women seeking contraceptive coverage, and emphasized that corporations do not "have free rein to take steps that impose disadvantages on others." *Id.* at 2760 (quotations marks, citation, and ellipses omitted). The critical lesson is that religious accommodations must be

considered in the context of their impact on others. *See also Bullock*, 489 U.S. at 14 (striking down Texas law requiring non-religious periodicals to subsidize religious periodicals).

Unlike *Hobby Lobby*, HB 1523 disadvantages recusing employees' coworkers and results in LGBT citizens being personally and immediately confronted with a denial of service. The bill cannot withstand the *Caldor* line of cases. As Judge Learned Hand once said, "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710 (quotation marks, citation, and ellipses omitted).

For these reasons, the plaintiffs are substantially likely to succeed on their claim that HB 1523 violates the First and Fourteenth Amendments.[46, 47]

C. Irreparable Harm

The plaintiffs are then required to demonstrate "a substantial threat of irreparable harm if the injunction is not granted." *Opulent Life Church*, 697 F.3d at 288. They must show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). "An injury is irreparable only if it cannot be undone through monetary remedies." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (citation omitted).

[46] A point of clarification is in order. The Establishment Clause claim brought by all of the plaintiffs is substantially likely to succeed in declaring § 2 of the bill unconstitutional. The *Barber* plaintiffs' Equal Protection Clause claim is also substantially likely to secure that result as to § 2, but may in fact enjoin the entire bill, as in *Romer*. The question is moot at this juncture because an injunction as to § 2 renders every other section inoperable as a matter of law. The result is that the HB 1523 is entirely "immobilized." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2632 n.1 (2013) (Ginsburg, J., dissenting)

[47] In Establishment Clause cases, a finding of substantial likelihood of success on the merits has led the Fifth Circuit to suggest that the final three factors of preliminary injunctive relief require only cursory review. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993). Nevertheless, the Court will proceed to the conclusion of the formal legal analysis.

The plaintiffs have sufficiently shown that HB 1523 represents an imminent and "substantial threat to [their] First Amendment rights. Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." *Ingebretsen*, 88 F.3d at 280 (citations omitted). This applies with equal force to the Equal Protection claim, since the plaintiffs are substantially likely to be irreparably harmed by the unequal treatment HB 1523 sets out for them. *CSE I*, 64 F. Supp. 3d at 950.

As a result, this element is satisfied. *Accord Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993).

D. Balance of Hardships

Here, the plaintiffs must show that the injuries they will suffer if HB 1523 goes into effect outweigh any harm that an injunction may do to the State. If a court has found irreparable harm, a party opposing injunctive relief will "need to present powerful evidence of harm to its interests" to prevent the scales from weighing in the movant's favor. *Opulent Life Church*, 697 F.3d at 297. On the other hand, "the injunction usually will be refused if the balance tips in favor of defendant." 11A Charles A. Wright et al., Fed. Prac. & Proc. § 2948.2 (3d ed.).

The State contends that granting an injunction will result in the "irreparable harm of denying the public interest in the enforcement of its laws." Docket No. 28, at 34, in *CSE IV* (quotation marks and citation omitted). This argument will be taken up with the public interest factor.

The State also says that enjoining HB 1523 would impose a hardship on conscientious objectors who are presently being denied the free exercise of their religion. Even setting aside the State's lack of support for this contention, the Fifth Circuit has not looked favorably upon this argument in similar Establishment Clause litigation. An injunction that enjoins HB 1523 will

preserve the status quo, so it "would not affect [citizens'] existing rights to the free exercise of religion and free speech. Therefore, [citizens] continue to have exactly the same constitutional right to pray as they had before the statute was enjoined." *Ingebretsen*, 88 F.3d at 280. Since *Ingebretsen* was decided, moreover, Mississippi has exacted its own RFRA to provide additional protection to religious Mississippians.

The Court concludes that the plaintiffs' constitutional injuries outweigh any injury the State suffers from an injunction that preserves the status quo.

E. Public Interest

Lastly, the plaintiffs must show that a preliminary injunction will not disserve the public interest. "Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue." Wright et al. § 2948.4.

The State argues that the public interest is served by enforcing its democratically adopted laws. The government certainly has a powerful interest in enforcing its laws. That interest, though, yields when a particular law violates the Constitution. In such situations "the public interest is not disserved by an injunction preventing its implementation." *Opulent Life Church*, 697 F.3d at 298 (citations omitted); *accord Ingebretsen*, 88 F.3d at 280.

In this case, it is also relevant that Mississippi has been subjected to widespread condemnation and an economic boycott as a result of HB 1523's passage. *See*, Docket Nos. 32-11 (letter to Mississippi's leaders from nearly 80 CEOs urging HB 1523's repeal as "bad for our employees and bad for business"); 32-12 (statement of Mississippi Manufacturers Association opposing HB 1523); 32-13 (statement of Mississippi Economic Council opposing HB 1523); 32-19 (newspaper article indicating opposition to HB 1523 from nearly every Mayor on the Mississippi Gulf Coast); 32-20 (statement of the Gulf Coast Business Council describing "the

growing list of negative impacts" of HB 1523 on the State economy), all in *Barber*; *see also* Sherry Lucas, *MS Theater Groups Worry About HB 1523 Fallout*, The Clarion-Ledger, June 13, 2016 (reporting that copyright holders are presently prohibiting Mississippians from performing West Side Story, Footloose, Wicked, Godspell, and Pippin). The public interest is served by bringing this boycott to an end.

F. Other Considerations

The plaintiffs have made other First Amendment arguments and noted a preemption theory concerning 42 U.S.C. § 1983. In light of the substantive claims addressed above, and appreciating "the haste that is often necessary" in preliminary injunction proceedings, the Court declines to take up those other theories of relief at this time. *Monumental Task Comm., Inc v. Foxx*, --- F. Supp. 3d ---, 2016 WL 311822, at *3 (E.D. La. Jan. 26, 2016).

V. Conclusion

Religious freedom was one of the building blocks of this great nation, and after the nation was torn apart, the guarantee of equal protection under law was used to stitch it back together. But HB 1523 does not honor that tradition of religion freedom, nor does it respect the equal dignity of all of Mississippi's citizens. It must be enjoined.

The motions are granted.

IT IS HEREBY ORDERED that the defendants; their officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with the defendants or their officers, agents, servants, employees, or attorneys; are hereby preliminarily enjoined from enacting or enforcing HB 1523.

SO ORDERED, this the 30th day of June, 2016.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, and JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs,

v. **Civil Action No. 3:16-cv-417-CWR-LRA**

PHIL BRYANT, GOVERNOR OF MISSISSIPPI; JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; and JUDY MOULDER, MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS,

Defendants.

AMENDED COMPLAINT

INTRODUCTION

1. This is a federal constitutional challenge to House Bill 1523 of the 2016 Session of the Mississippi Legislature. With the passage and approval of that bill, the Legislature and the Governor breached the separation of church and state, and specifically endorsed certain narrow religious beliefs that condemn same-sex couples who get married, condemn unmarried people who have sexual relations, and condemn transgender people. By endorsing and providing exclusive protection for those beliefs, H.B. 1523 violates the First and the Fourteenth Amendments to the United States Constitution. This lawsuit seeks

declaratory and injunctive relief. Unless this Court issues a preliminary injunction, this unconstitutional statute will take effect July 1, 2016.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights), and 42 U.S.C. § 1983. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper under 28 U.S.C. § 1391(b)(1)-(2) as relevant acts and omissions occurred, and one or more of the defendants reside, within the Southern District of Mississippi.

PARTIES

Plaintiffs

4. The Rev. Dr. Rims Barber is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. He is the director of the Mississippi Human Services Coalition and an ordained Presbyterian minister.

5. The Rev. Carol Burnett is an adult resident citizen of Jackson County, Mississippi and of the City of Ocean Springs. She is an ordained Methodist minister.

6. Joan Bailey is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. She is a retired therapist with a practice largely devoted to lesbian women.

7. Katherine Elizabeth Day is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. She is an artist and activist. She is a transgender woman.

8. Anthony ("Tony") Laine Boyette is an adult resident citizen of Harrison County, Mississippi. He is a transgender man.

9. The Rev. Don Fortenberry is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. He is an ordained Methodist minister and the retired Chaplain of Millsaps College.

10. Dr. Susan Glisson is an adult resident citizen of Lafayette County Mississippi and of the City of Oxford. She is the Senior Fellow on Reconciliation and Founding Director of the William Winter Institute for Racial Reconciliation at the University of Mississippi. She is an unmarried woman in a long-term romantic relationship with an unmarried man that includes sexual relations.

11. Derrick Johnson is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. He is the Executive Director of the Mississippi State Conference of the NAACP.

12. Dorothy C. Triplett is an adult resident citizen of Hinds County, Mississippi and of the City of Jackson. She is a retired state and municipal government employee and a longtime community and political activist.

13. Renick Taylor is an adult resident citizen of Harrison County, Mississippi and of the City of Biloxi. He is a political activist and a Field Engineer at CBIZ Network Solutions. He is a gay man and is engaged to be married to his male partner. The couple plans to marry during the summer of 2017.

14. Brandiilyne Mangum-Dear (aka Brandiilyne Irvin) is an adult resident citizen of Forrest County, Mississippi and of the City of Hattiesburg. She is the Pastor at the Joshua Generation Metropolitan Community Church in Hattiesburg, Mississippi. She is a lesbian woman who has been married to her partner, Susan Mangum, since 2015.

15. Susan Mangum is an adult resident citizen of Forrest County, Mississippi and of the City of Hattiesburg. She is the Director of Worship at the Joshua Generation Metropolitan Community Church in Hattiesburg, Mississippi. She is a lesbian woman who has been married to her partner, Brandiilyne Mangum-Dear, since 2015.

16. The Joshua Generation Metropolitan Community Church is an inclusive ministry located in Forrest County, Mississippi, in the City of Hattiesburg, that welcomes all people regardless of age, race, sexual orientation, gender identity, or social status. The church sponsors a number of ministries, including a community service ministry that promotes LGBT+ equality. The Church's membership includes a number of people who are within the three groups that are targeted by Section 2 of H.B. 1523 – same-sex couples who are married or intend to marry, unmarried people engaged in relationships that include sexual relations, and transgender people.

17. Each of the individual plaintiffs is a citizen, resident, and taxpayer of the State of Mississippi.

18. Because of the enactment by the Legislature and the Governor of H.B. 1523, including its endorsement of the religious beliefs and moral convictions set forth in H.B. 1523, each of the plaintiffs has been confronted with that endorsement. Each of the plaintiffs has read and become familiar with the text of H.B. 1523. Each has been exposed

to the intense controversy surrounding the bill and has followed much of the extensive media coverage. Each is aware that, unless enjoined, H.B. 1523 will become the law of the State of Mississippi on July 1, 2016.

19. The plaintiffs do not subscribe to any of the religious beliefs and moral convictions that are endorsed in Section 2 of H.B. 1523 and that are given special protection by H.B. 1523. The plaintiffs disagree with those beliefs and convictions and are offended by the State's endorsement and special protection of them. The endorsement and special protection of those beliefs and convictions conveys a state-sponsored message of disapproval and hostility to those who do not share those beliefs and convictions, including the plaintiffs and many other Mississippians, and indicates that their status is disfavored in the social and political community of their own home state. At the same time, the endorsement and special protection of those beliefs and convictions sends a message to Mississippians who do share those beliefs and convictions that they are favored members of the social and political community.

20. As mentioned previously, Plaintiff Renick Taylor is a gay man who is engaged to be married to his male partner, and Plaintiff Brandiilyne Mangum-Dear and Plaintiff Susan Mangum are a married lesbian couple. Their relationships and marriages are contrary to the State's endorsement in H.B. 1523 of the belief and conviction that "Marriage is or should be recognized as the union of one man and one woman." That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to these particular plaintiffs and to other

gay and lesbian citizens of Mississippi, indicating that the status is disfavored in the social and political community of their own home state.

21. As mentioned previously, Plaintiff Dr. Susan Glisson is an unmarried woman in a long-term romantic relationship with an unmarried man that includes sexual relations. This is contrary to the State's endorsement in H.B. 1523 of the belief and conviction that "Sexual relations are properly reserved to … a marriage [between one man and one woman]." That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to Dr. Susan Glisson and other unmarried adult citizens of Mississippi who are involved in sexual relationships, indicating that their status is disfavored in the social and political community of their own home state.

22. As mentioned previously, Plaintiff Katherine Elizabeth Day is a transgender woman and Plaintiff Tony Boyette is a transgender man. This is contrary to the State's endorsement in H.B. 1523 of the belief and conviction that "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth." That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to Katherine Elizabeth Day, Tony Boyette, and other transgender citizens of Mississippi, indicating that their status is disfavored in the social and political community of their own home state.

Defendants

23. Phil Bryant is the Governor of the State of Mississippi. After the Legislature passed H.B. 1523, he signed it into law. Thus, he is one of those responsible for its enactment. He is the chief executive officer of the State and has oversight of the executive branch of state government. H.B. 1523 prohibits all state officials, including the Governor and those who work in the executive branch of state government, from taking certain actions against people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2 of the bill and who receive special privileges and exemptions as a result. If the bill is unconstitutional, an injunction should be issued directing the Governor not to abide by the prohibitions and restrictions contained in the bill and not to provide those people and religious organizations with special privileges and exemptions that no one else receives.

24. Jim Hood is the Attorney General of the State of Mississippi. He is the chief law enforcement officer of the State. H.B. 1523 prohibits all state officials, including the Attorney General, from taking certain actions against people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2 of the bill and who receive special privileges and exemptions as a result. If the bill is unconstitutional, an injunction should be issued directing the Attorney General not to abide by the prohibitions and restrictions contained in the bill and not to provide those people and religious organizations with special privileges and exemptions that no one else receives.

25. John Davis is the Executive Director of the Mississippi Department of Human Services (DHS). H.B. 1523 prohibits all state officials, including the Executive Director and the other employees of the DHS, from taking certain actions against people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2 of the bill and who receive special privileges and exemptions as a result. If the bill is unconstitutional, an injunction should be issued directing the Executive Director of the DHS not to abide by the prohibitions and restrictions contained in the bill and not to provide those people and religious organizations with special privileges and exemptions that no one else receives.

26. Judy Moulder is the Mississippi State Registrar of Vital Records. Under Section 8 of H.B. 1523, she is required to receive and record recusal notices from clerks, registers of deeds, and the deputies of both who subscribe to the religious beliefs and moral convictions that are endorsed in Section 2 and who are thereby granted the option of recusing themselves from providing marriage licenses to those who are disfavored under H.B. 1523. If the bill is unconstitutional, an injunction should be issued to the Registrar of Vital Records directing her not to record the recusal notices that she is otherwise required to collect under the bill.

27. All defendants are sued in their official capacities

FACTUAL ALLEGATIONS

28. The text of Section 2 of H.B. 1523 provides as follows:

> The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that:

(a) Marriage is or should be recognized as the union of one man and one woman;

(b) Sexual relations are properly reserved to such a marriage; and

(c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

29. H.B. 1523 provides a number of protections exclusively for people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2. These protections include immunity from certain actions by the state government. Without listing all of them, here are some examples:

a. Section 3(1) of the bill purports to prohibit the state government from taking action against any "religious organization" for certain actions if they are "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act." Section 9(4) defines "religious organization" to include (among other things) a "house of worship," a "religious group … ministry … or similar entity," and an "officer, owner, employee, manager, religious leader, clergy or minister" of any house or worship or religious group, ministry, or similar entity. Plaintiffs Barber, Burnett, Fortenberry, Mangum-Dear, Mangum, and the Joshua Generation Metropolitan Community Church are "religious organizations" (as that phrase is defined in the bill) who are not accorded the purported rights provided by Section 3(1) to "religious organizations" that subscribe to the beliefs and convictions endorsed by H.B. 1523.

b. Section 3(3) of the bill purports to prohibit the state government from taking action against a person who has been granted custody of a foster or adoptive child and who

instructs or raises that child "consistent with a sincerely held religious belief or moral conviction described in Section 2 of this Act." Presumably, this would mean that even if something about the particular circumstances of the raising of a particular foster or adoptive child in a particular home "consistent with" the beliefs and convictions endorsed by Section 2 was so harmful that action otherwise would be taken to remove the child, the state government would be prohibited from doing so.

c. Section 3(4) of the bill purports to prohibit (among other things) the state government from taking action against a person for declining to provide psychological or counseling services "based upon a sincerely held religious belief or moral conviction described in Section 2 of this act," and presumably would preclude the state government from requiring a psychologist or counselor paid with public funds to provide services to a transgender youth if the psychologist or counselor refuses to do so based upon the beliefs and convictions endorsed in Section 2(c) of the bill.

d. Section 3(6) of the bill purports to prohibit the state government from taking action against a person who "establishes sex-specific standards or policies concerning employees or student dress or grooming" based upon the beliefs and convictions endorsed in Section 2(c) of the bill.

e. Section 3(7) purports to give state employees special protection regarding their speech so long as that speech is "consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act." Plaintiff Susan Glisson is an employee of the State of Mississippi, but because she does not subscribe to the religious beliefs and moral convictions that are endorsed in Section 2, she is not entitled to the special protection

that Section 3(7) purports to give to state employees who do subscribe to those beliefs and convictions.

f. Section 3(8)(a) allows individual clerks, registers of deeds, and their deputies, all of whom are government employees, to refuse to issue marriage licenses to couples if they do so "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act" and if they take all necessary steps to ensure that the licensing of any legally valid marriage is not impeded or delayed by their recusal. Section 3(8)(b) allows individual judges – even those who otherwise perform weddings for anyone who has a license – to refuse to perform weddings of couples "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act." This section allows clerks and judges who hold either of the first two religious beliefs or moral convictions endorsed in Section 2 of the bill to refrain from facilitating marriages between same-sex couples and couples who have engaged in sexual relations before being married. The statute may also extend to people who are divorced and wish to subsequently marry other people: a clerk or judge's strongly held religious belief or moral conviction that a marriage is "between one man and one woman" may regard any marriage as eternal, regardless of civil laws, making subsequent marriages bigamous.

g. Section 4(a)-(e) limits the State's ability to make decisions about taxes, benefits, and fines with respect to those people and religious organizations who subscribe to the beliefs and convictions endorsed in Section 2 and engage in the actions described in Section 3 of the bill.

h. Section 5 purports to give people who subscribe to the beliefs and convictions endorsed in Section 2 the right to raise those beliefs and convictions as a claim in the courts for violations of the provisions of the bill, and to raise violations of the bill as a defense in any judicial or administrative proceeding.

i. Section 8(3) of the bill purports to prevent any agency or subdivision of the state government, presumably including any county or municipality, from adopting an ordinance, regulation, or policy that would be contrary to the provisions of the bill. Presumably, this means that a municipality which adopted an ordinance prohibiting businesses from discriminating against people based upon their sexual orientation would nevertheless be unable to enforce that ordinance against businesses that declined to provide marriage-related accommodations, facilities, goods, and services to same-sex couples based upon the religious beliefs and moral convictions endorsed in Section 2 of the bill.

30. To reiterate, the examples just listed are not an exhaustive catalogue of the provisions of the bill.

31. H.B. 1523 was clearly enacted for religious purposes, specifically the promotion, endorsement, and special protection of the narrow religious beliefs and moral convictions explicitly set forth in Section 2 of the bill. Each of the provisions of H.B. 1523 – and the bill as a whole – promote, endorse, and protect these specific religious beliefs and moral convictions.

32. H.B. 1523 is not a permissible government accommodation of religion. In 2014, the State of Mississippi enacted the Mississippi Religious Freedom Restoration Act (MS RFRA), Miss. Code Ann. § 11-61-1. To the extent government accommodation is

required for the religious beliefs that are endorsed and given special protection by Section 2 of H.B. 1523, those beliefs were already sufficiently protected by MS RFRA in a manner which did not specifically endorse and give special status and exclusive protection to certain particular religious beliefs.

33. H.B. 1523 specifically targets for disfavor and unequal treatment, and is the result of animus towards, the particular groups of people who are condemned in Section 2 of the bill – same sex couples who are married and who will marry in the future, unmarried people who engage in sexual relations, and transgender people. The statute also targets for disfavor and unequal treatment, and is the result of animus towards, those who do not subscribe to the beliefs and convictions endorsed in Section 2. There is no rational basis for this discriminatory treatment of those who are disfavored by H.B. 1523, and there is no rational basis for endorsing and providing special protections exclusively for those who subscribe to the narrow religious beliefs and moral convictions set forth in Section 2 of H.B. 1523, to the disfavor of those who do not.

34. Paragraphs 18-22 of this complaint describe some of the other harms faced by the plaintiffs as a result of the enactment of H.B. 1523.

35. Unless it is enjoined by this Court, H.B. 1523's endorsement and special protection of the religious beliefs and moral convictions set forth in Section 2 of the bill will become the law of the plaintiffs' home state on July 1, 2016. Thus, the harms faced by the plaintiffs and other Mississippians who do not share those favored religious beliefs and moral convictions is imminent.

VIOLATIONS

36. H.B. 1523, which endorses certain specific religious beliefs and moral convictions, which purports to provide certain protections for people and religious organizations which subscribe to those beliefs and convictions, and which was enacted for religious purposes, violates the Establishment Clause of the First Amendment to the United States Constitution.

37. By singling out for special protection only those who subscribe to the religious beliefs and moral convictions set forth in Section 2 of the bill, and disfavoring those who do not, H.B. 1523 violates the Free Speech Clause of the First Amendment.

38. By singling out for special protection only those who subscribe to the religious beliefs and moral convictions set forth in Section 2 of the bill, and by disfavoring those who do not, H.B. 1523 violates the Equal Protection Clause of the Fourteenth Amendment.

39. By targeting same-sex couples who are married or may marry in the future, unmarried people who engage in sexual relations, and transgender people, and by endorsing the religious views and moral convictions that condemn those targeted groups, H.B. 1523 violates the Equal Protection Clause of the Fourteenth Amendment.

REQUEST FOR RELIEF

Accordingly, this Court should grant the following relief:

a. Issue a declaratory judgment that H.B. 1523 is unconstitutional;

b. Issue a preliminary and permanent injunction prohibiting enforcement of H.B. 1523;

c. Award plaintiffs their reasonable costs and attorneys' fees;

d. Issue such other relief as is appropriate.

June 23, 2016

Respectfully submitted,

s/ Robert B. McDuff
ROBERT B. MCDUFF, MSB # 2532
SIBYL C. BYRD, MSB # 100601
JACOB W. HOWARD, MSB #103256
MCDUFF & BYRD
767 North Congress Street
Jackson, MS 39202
(601) 259-8484
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

REILLY MORSE, MSB # 3505
BETH L. ORLANSKY, MSB # 3938
JOHN JOPLING, MSB # 3316
CHARLES O. LEE, MSB #99416
MISSISSIPPI CENTER FOR JUSTICE
P.O. Box 1023
Jackson, MS 39205-1023
(601) 352-2269
borlansky@mscenterforjustice.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of the Court using the ECF system, which sent notification to all counsel who have entered their appearance in this matter.

This the 22nd day of June, 2016.

s/ Robert B. McDuff
ROBERT B. MCDUFF

D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, and JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs,

v. **Civil Action No. 3:16-cv-417-TSL-RHW**

PHIL BRYANT, GOVERNOR OF MISSISSIPPI; JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; and JUDY MOULDER, MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS,

Defendants.

AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This lawsuit is a federal constitutional challenge to House Bill 1523 of the 2016 Session of the Mississippi Legislature.[1] With the passage and approval of that bill, the Legislature and the Governor breached the separation of church and state, and

[1] This amended memorandum is identical to the memorandum filed June 3, 2016, except for the following changes: (1) the name of the current Executive Director of the Mississippi Department of Human Services is substituted in the caption for the name of the prior director, (2) a paragraph regarding Section 3(1) of H.B. 1523 is added at the beginning of the description of the bill in the background section, (3) in the discussion of standing in the argument section, a sentence is added regarding certain plaintiffs who are "religious organizations" under H.B. 1523, (4) a sentence is added to the paragraph discussing *Larson v. Valente*, 456 U.S. 228 (1982) in the argument section, and (5) further discussion is added in the argument section regarding *Romer v. Evans,* 517 U.S. 620 (1997).

specifically endorsed and provided special protections for specific religious beliefs and moral convictions that (1) condemn same-sex couples who get married, (2) condemn unmarried people who have sexual relations, and (3) condemn transgender people. H.B. 1523 was clearly enacted for religious purposes. Specifically, the bill was enacted to promote, endorse, and provide special protection for these particular beliefs and convictions. H.B. 1523 also targets for disfavor and unequal treatment, and is the result of animus towards, the particular individuals and groups who are condemned by these beliefs and convictions. There is no rational basis for the discriminatory treatment of those who are disfavored by the State through H.B. 1523, and no rational basis for exclusively endorsing and providing special protections for those people who subscribe to these beliefs and convictions. Accordingly, H.B. 1523 violates the First and Fourteenth Amendments to the Constitution.

The individual plaintiffs in this case are citizens, residents, and taxpayers of the State of Mississippi. The plaintiffs include ministers, community leaders, civic activists, and a Hattiesburg church. They also include a married lesbian couple, a gay man who plans to marry his male partner this summer, an unmarried woman who is involved in a long-term romantic relationship with an unmarried man that includes sexual relations, a transgender woman, and a transgender man. The plaintiffs – who have read the text of H.B. 1523 and followed the extensive media coverage of this controversial bill – disagree with the beliefs and convictions endorsed by the State through H.B. 1523 and are deeply offended by the State's endorsement and special protection of them. The endorsement and special protection of these beliefs and convictions conveys a state-sponsored message

of disapproval and hostility to those people who do not share these beliefs, including the plaintiffs and many other Mississippians, and indicates that their status is disfavored in the social and political community of their own home state. The endorsement and special protection of these beliefs and convictions sends an especially hostile message to those plaintiffs and other Mississippians whose relationships and identities are condemned by these beliefs and convictions.

Unless it is enjoined by this Court, the State's endorsement and special protection of these beliefs and convictions through H.B. 1523 will become the law of the plaintiffs' home state on July 1, 2016. Thus, the harms faced by the plaintiffs and other Mississippians who do not share these beliefs and convictions is imminent.

BACKGROUND

House Bill 1523

The text of Section 2 of H.B. 1523 provides as follows:

> The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that:
>
> (a) Marriage is or should be recognized as the union of one man and one woman;
>
> (b) Sexual relations are properly reserved to such a marriage; and
>
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

H.B. 1523, 2016 Leg. Reg. Sess., §2 (Miss. 2016).

H.B. 1523 provides a number of special protections exclusively for people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2. These protections include immunity from certain actions by the state government. Without listing all of them, here are some examples:

Section 3(1) of the bill purports to prohibit the state government from taking action against any "religious organization" (a) for solemnizing or declining to solemnize a marriage, providing or declining to provide services and facilities related to a marriage celebration or recognition, (b) for making an employment-related decision regarding an individual whose conduct or religious beliefs are inconsistent with those of the organization, or (c) for making a decision concerning sale, rental, or occupancy of a dwelling, if any of these acts are done "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act." Section 9(4) defines "religious organization" to include (among other things) a "house of worship," a "religious group … ministry … or similar entity," and an "officer, owner, employee, manager, religious leader, clergy or minister" of any house or worship or religious group, ministry, or similar entity.

Section 3(3) of the bill purports to prohibit the state government from taking action against a person who has been granted custody of a foster or adoptive child and who instructs or raises that child "consistent with a sincerely held religious belief or moral conviction described in Section 2 of this Act." Presumably, this would mean that even if something about the particular circumstances of the raising of a particular foster or adoptive child in a particular home "consistent with" the beliefs and convictions

endorsed by Section 2 was so harmful that action otherwise would be taken to remove the child, the state government would be prohibited from doing so.

Section 3(4) of the bill purports to prohibit (among other things) the state government from taking action against a person for declining to provide psychological or counseling services "based upon a sincerely held religious belief or moral conviction described in Section 2 of this act," and presumably would preclude the state government from requiring a psychologist or counselor paid with public funds to provide services to a transgender youth if the psychologist or counselor refuses to do so based upon the beliefs and convictions endorsed in Section 2(c) of the bill.

Section 3(6) of the bill purports to prohibit the state government from taking action against a person who "establishes sex-specific standards or policies concerning employees or student dress or grooming" based upon the beliefs and convictions endorsed in Section 2(c) of the bill.

Section 3(7) purports to give state employees special protection regarding their speech so long as that speech is "consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act."

Section 3(8)(a) allows individual clerks, registers of deeds, and their deputies, all of whom are government employees, to refuse to issue marriage licenses to couples if they do so "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act" and if they take all necessary steps to ensure that the licensing of any legally valid marriage is not impeded or delayed by their recusal. Section 3(8)(b) allows individual judges – even those who otherwise perform

weddings for anyone who has a license – to refuse to perform weddings of couples "based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act." This section allows clerks and judges who hold either of the first two religious beliefs or moral convictions endorsed in Section 2 of the bill to refrain from facilitating marriages between same-sex couples and couples who have engaged in sexual relations before being married. The statute may also extend to people who are divorced and wish to subsequently marry other people: a clerk or judge's strongly held religious belief or moral conviction that a marriage is "between one man and one woman" may regard any marriage as eternal, regardless of civil laws, making subsequent marriages bigamous.

Section 4(a)-(e) limits the State's ability to make decisions about taxes, benefits, and fines with respect to those people and religious organizations who subscribe to the beliefs and convictions endorsed in Section 2 and engage in the actions described in Section 3 of the bill.

Section 5 purports to give people who subscribe to the beliefs and convictions endorsed in Section 2 the right to raise those beliefs and convictions as a claim in the courts for violations of the provisions of the bill, and to raise violations of the bill as a defense in any judicial or administrative proceeding.

Section 8(3) of the bill purports to prevent any agency or subdivision of the state government, presumably including any county or municipality, from adopting an ordinance, regulation, or policy that would be contrary to the provisions of the bill. Presumably, this means that a municipality which adopted an ordinance prohibiting

businesses from discriminating against people based upon their sexual orientation would nevertheless be unable to enforce that ordinance against businesses that declined to provide marriage-related accommodations, facilities, goods, and services to same-sex couples based upon the religious beliefs and moral convictions endorsed in Section 2 of the bill.

To reiterate, the examples just listed are not an exhaustive catalogue of the provisions of House Bill 1523 or the special protections that it provides to the religious beliefs and moral convictions endorsed in Section 2 of the bill.

The Plaintiffs

The plaintiffs to this lawsuit are: (1) The Rev. Dr. Rims Barber, the director of the Mississippi Human Services Coalition and an ordained Presbyterian minister; (2) The Rev. Carol Burnett, an ordained Methodist minister; (3) Joan Bailey, a retired therapist with a practice largely devoted to lesbian women; (4) Katherine Elizabeth Day, a transgender woman who is an artist and activist; (5) Anthony ("Tony") Laine Boyette, a transgender man; (6) Rev. Don Fortenberry, an ordained Methodist minister and the retired Chaplain of Millsaps College; (7) Dr. Susan Glisson, the Senior Fellow on Reconciliation and Founding Director of the William Winter Institute for Racial Reconciliation at the University of Mississippi, who is an unmarried woman in a long-term romantic relationship with an unmarried man that involves sexual relations; (8) Derrick Johnson, the Executive Director of the Mississippi State Conference of the NAACP; (9) Dorothy C. Triplett, a retired state and municipal government employee and a longtime community and political activist; (10) Renick Taylor, a political activist and a

Field Engineer at CBIZ Network Solutions, who is a gay man engaged to be married to his male partner during the summer of 2016; (11) Brandiilyne Mangum-Dear, the Pastor at the Joshua Generation Metropolitan Community Church, who is a lesbian woman and has been married to her partner, Susan Mangum, since 2015; (12) Susan Mangum, the Director of Worship at the Joshua Generation Metropolitan Community Church, who is a lesbian woman and has been married to her partner, Brandiilyne Mangum-Dear, since 2015; and, (13) the Joshua Generation Metropolitan Community Church, an inclusive ministry that welcomes all people regardless of age, race, sexual orientation, gender identity, or social status and includes a number of members who are within the three groups that are targeted by Section 2 of H.B. 1523 – same-sex couples who are married or intend to marry, unmarried people engaged in relationships that include sexual relations, and transgender people. Each of the individual plaintiffs is a citizen, resident, and taxpayer of the State of Mississippi.

Because of the public enactment by the Legislature and the Governor of H.B. 1523, including its endorsement of the religious beliefs and moral convictions set forth in H.B. 1523, each of the plaintiffs has been confronted with that endorsement. Each of the plaintiffs has read and become familiar with the text of H.B. 1523. Each has been exposed to the intense controversy surrounding the bill and has followed much of the extensive media coverage. Each is aware that, unless enjoined, H.B. 1523 will become the law of their home state of Mississippi on July 1, 2016.

The plaintiffs do not subscribe to any of the religious beliefs and moral convictions that are endorsed in Section 2 of H.B. 1523 and that are given special

protection by H.B. 1523. The plaintiffs disagree with those beliefs and convictions and are offended by the State's endorsement and special protection of them. The endorsement and special protection of those beliefs and convictions conveys a state-sponsored message of disapproval and hostility to those who do not share those beliefs and convictions, including the plaintiffs and many other Mississippians, and indicates that their status is disfavored in the social and political community of their own home state. At the same time, the endorsement and special protection of those beliefs and convictions sends a message to Mississippians who do share those beliefs and convictions that they are favored members of the social and political community.

As mentioned previously, Plaintiff Renick Taylor is a gay man who is engaged to be married to his male partner, and Plaintiff Brandiilyne Mangum-Dear and Plaintiff Susan Mangum are a married lesbian couple. Their relationships and marriages are contrary to the State's endorsement in H.B. 1523 of the belief and conviction that "Marriage is or should be recognized as the union of one man and one woman." H.B. 1523, 2016 Leg. Reg. Sess., §2(a) (Miss. 2016). That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to these particular plaintiffs and to other gay and lesbian citizens of Mississippi, indicating that they are disfavored in the social and political community of their own home state.

As mentioned previously, Plaintiff Dr. Susan Glisson is an unmarried woman in a long-term romantic relationship with an unmarried man that includes sexual relations. This is contrary to the State's endorsement in H.B. 1523 of the belief and conviction that

"Sexual relations are properly reserved to … a marriage [between one man and one woman]." H.B. 1523, 2016 Leg. Reg. Sess., §2(b) (Miss. 2016). That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to Dr. Susan Glisson and other unmarried adult citizens of Mississippi who are involved in sexual relationships, indicating that they are disfavored in the social and political community of their own home state.

As mentioned previously, Plaintiff Katherine Elizabeth Day is a transgender woman and Plaintiff Tony Boyette is a transgender man. This is contrary to the State's endorsement in H.B. 1523 of the belief and conviction that "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth." H.B. 1523, 2016 Leg. Reg. Sess., §2(c) (Miss. 2016). That endorsement and the special protection of that belief and conviction sends a state-sponsored message of disapproval and hostility to Katherine Elizabeth Day, Tony Boyette, and other transgender citizens of Mississippi, indicating that they are disfavored in the social and political community of their own home state.

ARGUMENT

"The four elements a plaintiff must establish to secure a preliminary injunction are:

> (1) Substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest."

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (citation omitted). In this case, the plaintiffs have established each element.

I. THE PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

Clearly, the plaintiffs have standing. Among other things, they are citizens, residents, and taxpayers in Mississippi who do not subscribe to the religious beliefs and moral convictions that are endorsed in House Bill 1523, and who are offended by the State's endorsement and special protection of those beliefs and convictions. In at least two of the crèche-menorah cases, the plaintiffs were described by the United States Supreme Court simply as "residents" of the county and the city in which the religious symbols were displayed. *County of Allegheny v. ACLU,* 492 U.S. 573, 587-88 (1989); *Lynch v. Donnelly,* 465 U.S. 668, 671 (1984). In *Croft v. Governor of Texas,* 562 F.3d 735 (5th Cir. 2009), the Fifth Circuit addressed standing in an Establishment Clause challenge to a moment of silence:

> The Crofts have alleged that their children are enrolled in Texas public schools and are required to observe the moment of silence daily. . . . The Crofts' children are definitely present for the moment of silence, and . . . we can assume that they or their parents have been offended—else they would not be challenging the law. That is enough to establish standing at this [summary judgment] stage of the suit.

Id. at 746.

The fact that the plaintiffs here are challenging a religious endorsement expressed through a statute rather than through a symbolic, physical object like a crèche, an oral event like a prayer, or a moment of silence, does not matter for purposes of standing. In *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), the Tenth Circuit held that a Muslim

plaintiff had standing to challenge an Oklahoma referendum to amend the state constitution to prohibit state courts from considering or using international law or Shariah law. In so doing, the Court noted that the "personal and unwelcome contact" the plaintiff had with the constitutional amendment was no different for standing purposes than the "personal and unwelcome contact" other plaintiffs had with government sponsored religious symbols. *Id.* at 1122.

> In some respects, Mr. Awad's alleged injuries are similar to those found sufficient to confer standing in our religious symbol Establishment Clause cases. Like the plaintiffs who challenged the highway crosses in *American Atheists* [*v. Davenport*, 637 F.3d 1095 (10th Cir. 2010)], Mr. Awad suffers a form of 'personal and unwelcome contact' with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment. As a Muslim and citizen of Oklahoma, Mr. Awad is 'directly affected by the law [ ] ... against which [his] complaints are directed.' *See Valley Forge [Christian College v. Americans United for Separation of Church and State*], 454 U.S. [464] at 487 n. 22 [(1982)] (*quoting, Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963)). As further spelled out below, that is enough to confer standing. *See Schempp*, 374 U.S. at 224 n. 9.

Awad, 670 F.3d at 1122. In discussing further the plaintiff's standing in the case, the Tenth Circuit also noted that "Mr. Awad is facing the consequences of a statewide election approving a constitutional measure that would disfavor his religion relative to others." *Id.* at 1123.

Like the plaintiffs in *Croft* enduring a moment of silence to which they were subjected, the plaintiffs here are required to endure an endorsement of religion in the law of their own state to which they object. And like the plaintiff in *Awad,* the plaintiffs here are "facing the consequences" of a statutory enactment "that would disfavor [their

beliefs] relative to others." *Awad*, 670 F.3d at 1122. Just as standing was established in those cases, so it is here.[2]

In addition to the standing of the plaintiffs as people whose beliefs are disfavored because they do not subscribe to the state-endorsed beliefs and convictions set forth in H.B. 1523, Plaintiffs Taylor, Mangum-Dear, Mangum, Glisson, Day, and Boyette are among the groups who are targeted by the State's endorsement of the beliefs and convictions condemning same-sex couples who are married or plan to marry (Taylor, Mangum-Dear, and Mangum), who are unmarried and in relationships that include sexual relations (Glisson), and who are transgender (Day and Boyette). Moreover, Plaintiffs Barber, Burnett, Fortenberry, Mangum-Dear, Mangum, and the Joshua Generation Metropolitan Community Church have standing as "religious organizations" (as that phrase is defined in the bill) who are not accorded the purported rights provided by Section 3(1) to "religious organizations" that subscribe to the beliefs and convictions endorsed by H.B. 1523. Similarly, Plaintiff Glisson has standing as a state employee who is not accorded the purported speech rights provided by Section 3(7) of the bill to those who subscribe to the beliefs and convictions endorsed by H.B. 1523.

There is a substantial likelihood that the plaintiffs will prevail on the merits. By setting forth in Section 2 three specific religious beliefs for which certain exclusive protections are provided, H.B. 1523 clearly "conveys a message of endorsement" of those beliefs. *Wallace v. Jaffree,* 472 U.S. 38, 57 n. 42 (1975) (quoting *Lynch v. Donnelly,* 465

[2] As just set forth, injury exists. Moreover, the injury clearly was caused by enactment of H.B. 1523, and the injury will be redressed if the statute is enjoined.

U.S. at 690 (O'Connor, J., concurring)). Moreover, the purpose of the bill is clearly to endorse and promote those specific religious beliefs. Thus, the bill violates the Establishment Clause of the First Amendment. *Wallace,* 472 U.S. at 57; *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In *Awad v. Ziriax*, 670 F.3d at 1126-1129, the Tenth Circuit affirmed the grant of a preliminary injunction and noted that the plaintiff was likely to prevail on the merits in his Establishment Clause challenge to the Oklahoma constitutional referendum to prohibit state courts from considering international law or Shariah law. The Tenth Circuit examined the merits under the analysis employed by the Supreme Court for "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982). Pursuant to *Larson*, such a law is constitutional only if it is "closely fitted to the furtherance of any compelling interest asserted[.]" *Id.* at 255. The Tenth Circuit held that the proposed Oklahoma constitutional amendment was not justified by any compelling state interest (and also that all of the other preliminary injunction factors favored the plaintiff). 670 F.3d at 1129-1132.

While the present case does not involve what *Larson* calls an "explicit and deliberate distinction[] between different religious organizations," it does involve an explicit and deliberate distinction between different religious *beliefs*. There certainly is no compelling interest, or indeed any legitimate interest, that justifies this distinction. Moreover, those different religious beliefs are held by different religious organizations, some of whom, for example, welcome same-sex marriage while others oppose it. At any rate, whether the analysis in this case is more appropriate under *Larson* or under *Lemon*

and subsequent cases, the result is the same: H.B. 1523 violates the Establishment Clause.

Beyond the First Amendment violation, H.B. 1523 also violates the Fourteenth Amendment's Equal Protection Clause. The bill specifically targets and disfavors those who do not subscribe to the beliefs and convictions endorsed in Section 2 of the bill. Further, by endorsing those beliefs and convictions, the bill targets and disfavors same-sex couples who are married or plan to marry, people who are unmarried and in relationships that include sexual relations, and transgender people. By its very language and its endorsement, the bill reflects an animus toward those who are disfavored. Moreover, there is not even a rational basis to justify the distinctions that are drawn in the bill, *see Romer v. Evans,* 517 U.S. 620, 632 (1997), much less the higher scrutiny that is appropriate in light of this targeting.

In *Romer,* the Supreme Court held that the Equal Protection Clause was violated by a Colorado constitutional amendment, known as Amendment 2, that provided the following:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

517 U.S. at 624 (quoting Amendment 2).

The Supreme Court upheld the decision of the Colorado state courts to enjoin Amendment 2 in advance of its implementation. The Supreme Court said that this

targeting of gay and lesbian citizens "imposes a special disability upon those persons alone," adding that "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631. The Court added: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

> [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' *Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973).

Romer, 517 U.S. at 634-35 (emphasis in original). In light of all of these considerations, the Court concluded that Amendment 2 bore no rational relationship to a legitimate governmental interest, and struck it down as a violation of the Equal Protection Clause. *Id*. at 635.[3]

As with Amendment 2 in Colorado, the Supreme Court's analysis in *Romer* demonstrates that H.B. 1523 does not bear a rational relationship to a legitimate

[3] Similarly, in *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985), the Supreme Court held that a city ordinance requiring a special permit to operate a group home for the mentally disabled violated the Equal Protection Clause because it did not bear a rational relationship to a legitimate governmental interest. *Id.* at 446-447, 450. As the Court stated:

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like … [T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

473 U.S. at 448.

governmental objective. H.B. 1523 endorses religious beliefs and moral convictions that demonize same-sex couples who marry or might marry, unmarried people who engage in sexual relations, and transgender people. By granting special immunities against state action to those who hold those beliefs, H.B. 1523 precludes the people in the demonized groups from seeking or obtaining the protection of the State in certain instances, thereby "impos[ing] a special disability upon those persons alone," and "forbidd[ing them] the safeguards that others enjoy or may seek without constraint." 517 U.S. at 631. As with Amendment 2, H.B. 1523 declares that "it shall be more difficult for one group of citizens than for all others to seek aid from the government," which is "itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. And as with Amendment 2, H.B. 1523 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 635. *See also id.* (citation omitted) ("[A] bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").[4]

[4] Part of the Court's opinion in *Romer* focused on the potential repeal by Amendment 2 of existing ordinances and policies that prohibited discrimination against gay and lesbian citizens, and the prohibition in the future on similar laws and policies, as well as the potential withdrawal of the protection of general laws from gay and lesbian citizens. 517 U.S. at 626-30. Similarly, H.B. 1523 threatens, at least in part, to overrule or limit existing – and preclude future – municipal ordinances like those in the City of Jackson prohibiting discrimination on the basis of, among other things, sexual orientation and gender identity (Jackson, Mississippi Code of Ordinances § 86-193 (prohibiting differential treatment by police officers) and § 126-161 (prohibiting discrimination by drivers of vehicles for hire)), and policies like those at the University of Southern Mississippi prohibiting discrimination in employment on the basis of, among other things, sexual orientation, gender identity, and genetic information, and providing an opportunity to file complaints regarding discrimination on the basis of those and other factors. U.S.M. Employee Handbook 22, 117, *available at* https://www.usm.edu/sites/default/files/groups/employment-hr/pdf/employee_handbook_june_2014.pdf. Also, H.B. 1523 may well, in certain situations, deprive members of the targeted groups of the protection of laws prohibiting arbitrary discrimination by administrative agencies and governmental bodies. *See, e.g.,* Mississippi Uniform Rule of Circuit and County Court Practice 5.03 (decisions of administrative agencies may be appealed if they were "arbitrary or capricious"); Miss. Code Ann. § 25-9-132 (decisions of state employee appeals board may be appealed

In addition to imposing special disabilities on the groups targeted by Section 2 of the bill, H.B. 1523 imposes special disabilities on those who subscribe to religious beliefs and moral convictions different from those endorsed in Section 2 of the bill. Safeguards are granted by H.B. 1523 to those who subscribe to the endorsed beliefs and convictions, but not to those who don't. The only way to obtain those safeguards and protections is to convert to the specific religious beliefs and moral convictions that are endorsed by H.B. 1523. For those who do not convert, "it shall be more difficult . . . to seek aid from the government" with respect to certain matters, which is "itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

Accordingly, with respect to the classifications drawn by H.B. 1523 – the targeting of the three groups who are demonized in Section 2 of H.B. 1523, and the distinction between those who subscribe to the endorsed beliefs and those who don't – there is no rational relationship to a legitimate governmental interest. Thus, H.B. 1523 violates the Equal Protection Clause of the Fourteenth Amendment as well as the Establishment Clause of the First Amendment.[5]

H.B. 1523 cannot be justified as a necessary or legitimate means of accommodating religion. In 2014, the State of Mississippi enacted the Mississippi

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if they were "arbitrary or capricious"); Miss. Code Ann. § 37-9-113 (school district employees may appeal final decisions of the school board if they were "arbitrary or capricious"); and Miss. Code Ann. § 11-46-9 (governmental entity may be sued regarding issuance, denial, suspension, or revocation of any privilege, ticket, pass, permit, license, certificate, approval, order, or similar authorization if the action was "of a malicious or arbitrary or capricious nature").

[5] As mentioned earlier, a higher level of scrutiny is appropriate in light of this targeting, but if this Court agrees there is no rational relationship to a legitimate governmental purpose, the question of the proper level of scrutiny need not be addressed.

Religious Freedom Restoration Act (MS RFRA), Miss. Code Ann. § 11-61-1. To the extent government accommodation is required for the religious beliefs that are endorsed and given special protection by Section 2 of H.B. 1523, those beliefs were already sufficiently protected by MS RFRA in a manner which did not specifically endorse and give special status and exclusive protection to certain particular religious beliefs. There has been no indication that the MS RFRA was somehow insufficient to protect legitimate free exercise concerns. The passage of H.B. 1523 in the absence of any indication that it was necessary to protect the free exercise of religion demonstrates that the bill was passed for improper and unconstitutional reasons.

II. ABSENT AN INJUNCTION, THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

"It is well settled that the loss of First Amendment freedoms even for minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). *See also CSE v. Bryant I,* 64 F.Supp.3d 906, 950 (S.D. Miss. 2015) (citation omitted) ("[I]t is well-established that the deprivation 'of constitutional rights constitutes irreparable harm as a matter of law.'"). As explained in the discussion of standing above, H.B. 1523 clearly violates the constitutional rights of the plaintiffs and causes them harm. Among other things, H.B. 1523 conveys an impermissible, state-sponsored message of disapproval and hostility to those who do not share the beliefs and convictions endorsed in Section 2, and to those who are condemned as part of those beliefs, and indicates that their status is

disfavored in the social and political community of their own home state. *See, e.g., CSE v. MDHS,* 2016 WL 1306202, *14 (S.D. Miss. March 31, 2016) (finding irreparable harm from "stigmatic and more practical injuries"). *See also Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1053 (9th Cir. 2010) (holding that the plaintiffs had sufficiently pleaded injury in their Establishment Clause challenge to a city resolution that "conveys a government message of disapproval and hostility toward their religious beliefs" and "'sends a clear message' 'that they are outsiders, not full members of the political community'"). Unless it is enjoined by this Court, H.B. 1523's endorsement and special protection of the narrow religious beliefs and moral convictions set forth in Section 2 of the bill will become the law on July 1, 2016. The harms faced by the plaintiffs and other Mississippians who do not share those favored religious beliefs and moral convictions, and those plaintiffs and other Mississippians whose relationships and identities are condemned by those beliefs and convictions, is imminent and irreparable.

III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF AN INJUNCTION.

No irreparable harm will result from a preliminary injunction to preserve the status quo. It has been nearly a year since the Supreme Court's decision in *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015), and the State seems to have survived just fine. To the extent any free exercise problems arise, the Mississippi RFRA law remains in place. In short, there is no indication that irreparable harm will result from maintaining the status quo. Moreover, as the Tenth Circuit said when upholding a preliminary injunction

against a comparable law: "when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [the plaintiff's] in having his constitutional rights protected." *Awad*, 670 F.3d at 1131.

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132. *See also, CSE v. Bryant I*, 64 F. Supp. 3d at 951 (same). Further, H.B. 1523 is a divisive and controversial statute that has led to economic boycotts of the State. Enjoining it and maintaining the pre-H.B. 1523 status quo will be in the public interest pending a final decision in this case.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the motion for a preliminary injunction should be granted.

June 14, 2016

Respectfully submitted,

s/Robert B. McDuff
ROBERT B. MCDUFF, MSB # 2532
SIBYL C. BYRD, MSB # 100601
JACOB W. HOWARD, MSB #103256
MCDUFF & BYRD
767 North Congress Street
Jackson, MS 39202
(601) 259-8484
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

BETH L. ORLANSKY, MSB # 3938
JOHN JOPLING, MSB # 3316
CHARLES O. LEE, MSB #99416
MISSISSIPPI CENTER FOR JUSTICE

P.O. Box 1023
Jackson, MS 39205-1023
(601) 352-2269
borlansky@mscenterforjustice.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of the Court using the ECF system, which sent notification to all counsel of record.

This the 14th day of June, 2016

s/ Robert B. McDuff
ROBERT B. MCDUFF

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELISABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, AND JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH **PLAINTIFFS**

v. **Civil Action No. 3:16-cv-417-CWR-LRA**

PHIL BRYANT, GOVERNOR OF MISSISSIPPI; JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI; RICHARD BERRY, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; and JUDY MOULDER, MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS **DEFENDANTS**

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OF DEFENDANTS JIM HOOD AND JUDY MOULDER

Jim Hood, Attorney General of Mississippi, and Judy Moulder, Mississippi State Registrar of Vital Records, two of the Defendants herein, respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction:

INTRODUCTION

Plaintiffs have brought this facial challenge to House Bill 1523 of the 2016 Regular Session[1] of the Mississippi Legislature, alleging H.B. 1523 violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Because the law goes into effect on July 1, 2016, Plaintiffs seek an immediate preliminary injunction

[1]Miss. Laws 2016, H.B. 1523 (eff. Jul. 1, 2016).

"prohibiting enforcement of H.B. 1523." Compl. [Doc. 1], at 14.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court dramatically changed the legal and cultural landscape by holding that state bans on same-sex marriage violated a fundamental right to marry protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[2] Only five days later, the Fifth Circuit emphasized that *Obergefell* specifically recognized that the competing Free Exercise rights of those who object to same-sex marriage on moral grounds are protected by the First Amendment, stating that "[h]aving addressed fundamental rights under the Fourteenth Amendment, the [Supreme] Court, importantly, invoked the First Amendment, as well:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

CSE v. Bryant, 791 F.3d 625, 627 (5th Cir. 2015) ("*CSE I*") (quoting *Obergefell*, 135 S. Ct. at 2607)).

> *Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly

[2] "The Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs." *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

> by actors within the jurisdiction of this court. *We express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them.*

CSE I, 791 F.3d at 627 (emphasis added).

By its terms, H.B. 1523 is an accommodation law intended to convey the strongest protection for the "free exercise of religious beliefs and moral convictions" permitted by the state and federal constitutions. H.B. 1523 is about the people of conscience who need the protection of H.B. 1523,[3] and does not "target" Plaintiffs. Protection of free conscience and the Free Exercise of religion are legitimate and compelling governmental interests. H.B. 1523 is constitutional as a reasonable accommodation for the protection of people holding moral and religious beliefs --- even though Plaintiffs disagree with those beliefs and find them "offensive."

The Court is confronted here with a *potential* intersection of rights protected by the First and Fourteenth Amendment interests. However, Plaintiffs do not present an Article III case or controversy which is ripe for decision. In contrast to the "open and searching debate" contemplated by *Obergefell*, Plaintiffs here seek to stifle the expression of any belief opposing same-sex marriage. To protect people of conscience and faith who oppose same-sex marriage on

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[3] "Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1. Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. Ante, at 2607. The First Amendment guarantees, however, the freedom to "exercise " religion. Ominously, that is not a word the majority uses. Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . . There is little doubt that these . . . questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." *Obergefell*, 135 S. Ct. at 2625-26 (Roberts, C.J., dissenting).

moral or religious grounds, the Mississippi Legislature enacted H.B. 1523. This Court should reject Plaintiffs' myopic view of H.B. 1523's purposes and effects and hold that H.B. 1523 is an appropriate and necessary accommodation for those who hold moral and religious views that preclude them from participating in or assisting with same-sex marriage. These Defendants therefore respectfully request that the motion for preliminary injunction be denied.

ARGUMENT

To justify the extraordinary relief of a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) substantial threat of an irreparable injury without the relief; (3) threatened injury that outweighs the potential harm to the party enjoined; and (4) that granting the preliminary relief will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs. v. Lakey,* 667 F.3d 570, 574 (5th Cir. 2012). A movant must "clearly establish each of the traditional four preliminary injunction elements." *DSC Commc'n . Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996).

The decision to grant a preliminary injunction is the exception rather than the rule. *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 620 (5th Cir. 1985). The Fifth Circuit has "cautioned repeatedly" that a preliminary injunction is an "extraordinary remedy" to be granted only if the party seeking it has "clearly carried the burden of persuasion" on all four elements. *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005); *see also Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) (preliminary injunction is "an extraordinary *and drastic* remedy") (emphasis added); *see also Lake Charles Diesel, Inc. v. General Motors Corp*., 328 F.3d 192, 203 (5th Cir. 2003) (The "absence of likelihood of success on the merits is sufficient to make the district court's grant of a

preliminary injunction improvident as a matter of law").

I. Plaintiffs Cannot Demonstrate a Substantial Likelihood of Success on the Merits for Injunctive Relief.

A. Plaintiffs Have No Likelihood of Success on the Merits Because H.B. 1523 Is Not Facially Unconstitutional.

Plaintiffs do not, in so many words, specify whether this is a facial challenge or an "as applied" challenge. However, the relief sought by Plaintiffs is total facial invalidation of H.B. 1523. Plaintiffs ask the Court to: "a. [i]ssue a declaratory judgment that H.B. 1523 is unconstitutional; b. Issue a preliminary and permanent injunction prohibiting enforcement of H.B. 1523." Compl. [Doc. 1], at 14. Because Plaintiffs' challenge is facial, they bear a heavy burden to show that H.B. 1523 is unconstitutional in all its applications. As the Supreme Court has instructed,

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450-51 (2008)(internal citations and quotation marks omitted). The relevant question for a court assessing a facial challenge is whether the plaintiffs can demonstrate that the statute is "unconstitutional in all of its applications," or, in other words, whether "no set of circumstances

exists under which the Act would be valid." *Washington State Grange*, 552 U.S. at 449.[4]

Plaintiffs cannot show H.B. 1523 is facially unconstitutional and therefore cannot demonstrate a substantial likelihood of success on the merits for several reasons. For example, the statute on its face provides that "[t]he person recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage ***is not impeded or delayed as a result of any recusal***." H.B. 1523 § 3 (8)(a). (emphasis added). Moreover, the statute states that "[n]othing in this act shall be construed to prevent the state government from providing, either directly or through an individual entity not seeking protection under this act, any benefit or service authorized under the state law." H.B. 1523 § 8(2). Thus, if any couple eligible for marriage applies for a license, they will receive one on the same material terms and conditions as everyone else—that is their license cannot be denied, delayed or impeded.

The hallmark of an equal protection challenge—fundamentally lacking in this case—is that similarly situated persons are treated differently. *See, e.g., Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("The equal protection clause of the fourteenth amendment is essentially a mandate that all persons similarly situated must be treated alike."); *see also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (same). H.B. 1523 mandates that Plaintiffs receive a marriage license and that they not be denied, impeded or delayed in obtaining the license. *See* Section 3, (8)(a) and Section 8(2).

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[4] *See also Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 290 n.5 (5th Cir. 2015); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 n.23 (5th Cir. 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006); *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004). "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also In re IFS Fin. Corp.*, 803 F.3d 195, 208 (5th Cir. 2015).

Second, religious accommodation laws are not facially unconstitutional. In fact, as did the dissenters in *Obergefell*, the Fifth Circuit foreshadowed the need for such laws when it addressed Supreme Court's decision on same-sex marriage. *CSE I*, 791 F.3d at 627. Section (8)(a) accommodates the interests of both same-sex rights under the Fourteenth Amendment (no impediment or delay as a result of any recusal) and the Free Exercise rights of persons with "sincerely held religious beliefs or moral convictions" that same-sex marriage is morally wrong. *See* H.B. 1523, § 2.

Third, H.B. 1523 "shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, *to the maximum extent permitted by the state and federal constitutions.*" H.B. 1523 § 8(1) (emphasis added). Thus, by its terms H.B. 1523 acknowledges the limitations placed on its enforceability.[5]

B. Plaintiffs Have Failed to Establish Standing.

Plaintiffs have failed to establish standing to transform either their First or Fourteenth Amendment claims into an Article III case or controversy, much less shown that they are entitled to extraordinary relief in the form of a preliminary injunction.[6] Each and every "injury" asserted

[5] Whether an invalid or unconstitutional portion of a statute is severable is an issue of state law. *E.g.*, *Virginia v. Hicks*, 539 U.S. 113, 121 (2003). The Mississippi Code contains a general severability provision: "[i]f any chapter, article, section, paragraph, sentence, clause, phrase or any part of the Mississippi Code of 1972 is declared to be unconstitutional or void, or for any reason is declared to be invalid or of no effect, the remaining chapters, articles, sections, paragraphs, sentences, clauses and phrases shall be in no manner affected thereby but shall remain in full force and effect." Miss. Code Ann. § 1-1-31. Section 1-3-7 adds the following: "[u]nless the contrary intent shall clearly appear in the particular act in question, each and every act passed hereafter shall be read and construed as though the provisions of the first paragraph of this section form an integral part thereof, whether expressly set out therein or not." Miss. Code Ann. § 1-3-77.

[6] Based on the allegations in the complaint, Plaintiffs have asserted the following interests relevant to standing: 1. Clergy, Religious Leaders, and Religious Organizations: Rev. Barber, Rev. Burnett, Rev. Fortenberry, Rev. Mangum-Dear, and Director of Worship Mangum, Joshua Generation Metropolitan Community Church; 2. Transgender individuals: Katherine Day and Tony Boyette; 3.

by Plaintiffs is hypothetical, conjectural, or otherwise inadequate to satisfy the injury in fact requirement. Further, even if the injury requirement could be met, Plaintiffs have failed to show any purported injury that is fairly traceable to a particular named Defendant and which would be redressed by injunctive relief against any named Defendant.

A preliminary injunction is never appropriate when the moving parties lack Article III standing. *See, e.g.*, *Prestage Farms, Inc. v. Board of Sup'rs of Noxubee County, Miss*., 205 F.3d 265, 267-68 (5th Cir. 2000), *reh'g en banc denied*, 216 F.3d 1081 (vacating preliminary injunction for lack of standing and remanding for dismissal). All three required Article III standing elements must be met before a Court may even consider awarding any injunctive relief against the defendants. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted); *see also Friends of the Earth, Inc. V. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (recognizing plaintiffs must independently establish standing for each remedy sought).

Further, standing is not a technicality or speed bump on the road to a decision on the merits. Standing doctrine goes directly to the constitutional limits placed on the jurisdiction of the federal courts:

> While Plaintiffs attempt to marginalize this argument as a mere technicality, standing is a threshold matter to the justiciability of claims in federal court under Article III of the Constitution . . . The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit "solely, to decide on the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803), and must " 'refrai[n] from passing upon the constitutionality of an act ... unless obliged to do so in the proper performance of our judicial function, when the

Married Same Sex Couple: Rev. Mangum-Dear and Susan Mangum; 4. Engaged Same-Sex Individual: Renick Taylor; 5. State Employee of the University of Mississippi and Unmarried Individual: Dr. Susan Glisson; and 6. Private Individuals: Joan Bailey, Derrick Johnson, and Dorothy Triplett.

> question is raised by a party whose interests entitle him to raise it.' " *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598, 127 S. Ct. 2553, 168 L.Ed.2d 424 (2007) (some citations and internal quotation marks omitted).

Campaign for Southern Equality v. Mississippi Dept. of Human Servs., --- F. Supp. 3d ---, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016) ("*CSE II*") . Further, "[t]he court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir.2015) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996)).

1. Plaintiffs Have Not Shown Standing for Their Establishment Clause Claims.

The Supreme Court has emphasized that plaintiffs seeking relief under the Establishment Clause must meet the same irreducible, minimal constitutional requirements as in other areas of the law, injury in fact, causation, and redressability. *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 133-34, 143 (2011). However, there are two unique ways in which an Establishment Clause plaintiff may satisfy the injury requirement: (1) economic injury, *i.e*, taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968) and its progeny; and (2) non-economic injuries, such as in *Van Orden v. Perry*, 545 U.S. 677 (2005) (repeated visual confrontation over a six-year period with 6' x 3.5' "monolith" inscribed with text of Ten Commandments and displayed on grounds of Texas state capitol).

***Taxpayer Standing*:** In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court held that generally a plaintiff's status as a taxpayer is inadequate to establish standing. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court carved out a "narrow exception" from that rule, holding that federal taxpayer standing may be enough for an Establishment Clause challenge, but only if there is a sufficient nexus between plaintiff's status as a taxpayer, the expenditure of tax funds,

and the law challenged by the plaintiff. To establish *state* taxpayer standing, a plaintiff must show: a logical link between the plaintiff's taxpayer status and the type of law attacked, and a nexus between the plaintiff's taxpayer status and the precise nature of the alleged infringement. *Winn*, 563 U.S. at 138-39. Pre-*Winn*, the Fifth Circuit had stated: "[i]n order to establish state or municipal taxpayer standing to challenge an Establishment Clause violation, a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995).[7] In other words, a plaintiff has to show that such a claim is "a-good faith pocketbook action," in that the taxpayer has been economically injured because state taxes are being spent specifically to carry out the challenged law --- the mere "incidental expenditure of tax funds" is not enough. *Winn*, 563 U.S. at 138-39 (citing *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952)).

As to taxpayer standing, the interests of the individual Plaintiffs' coincide, but the same deficiencies show that none of the Plaintiffs satisfy the taxpayer injury requirement. Plaintiffs have alleged only that: "[e]ach of the Individual Plaintiffs is a citizen, resident, and taxpayer of the State of Mississippi." Complaint [Doc. 1], at 4, ¶ 17. Plaintiffs have not identified any specific expenditure of state funds in connection with H.B. 1523, and have not alleged any facts to show the required nexus between their status as taxpayers and any portion of H.B. 1523. Nothing suggests that this lawsuit is a "good-faith pocketbook action." H.B. 1523 does not appropriate any funds, nor does it require any expenditures of state tax revenues. "[I]ncidental

[7] *See also Does 1-7 v. Round Rock Ind. Sch. Dist.*, 540 F. Supp. 2d 735, 742-43 (W.D. Tex. 2007) (standing requires evidence that expenditures of tax funds or public employee time must be more than *de minimus* and must be supported by a separate tax, paid by a particular appropriation, or add to the expense of conducting the public entity's business).

expenditure[s]" do not satisfy *Doremus*.[8]

***Non-Economic Injury*:** In proper circumstances, non-economic injuries can be sufficient to confer standing for an Establishment Clause challenge. *See, e.g*, *Van Orden*, 545 U.S. at 682-83 (repeated visual confrontation over a six-year period with 6' x 3.5' Ten Commandments "monolith"). The state-sponsored religious symbol cases relied on by Plaintiffs focus on confrontation with a physical religious symbol: if evidence proves that a plaintiff is repeatedly confronted by a potentially offensive physical religious symbol, that individual may meet the injury requirement. However, the Supreme Court has sharply limited the type of non-economic injury that is sufficient, holding that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is *not* enough to establish standing. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 485-86 (1982). Even if a plaintiff meets the injury requirement, he or she must still also satisfy the traceability and redressability requirements. *Winn*, 563 U.S. at 143 ("Further, respondents cannot satisfy the requirements of causation and redressability.").

The Tenth Circuit case relied on by Plaintiffs, *Awad v. Ziriax*, 670 F.3d 111 (10th Cir. 2012) represents the outer edge of Establishment Clause standing doctrine, and is distinguishable. In *Awad*, the Tenth Circuit held that a Muslim alleging he was injured by a proposed Oklahoma state constitutional amendment (that would have explicitly barred the use of "Sharia law" in state courts) had standing for an Establishment Clause challenge. *Awad*, 670 F.3d at 1122. The Tenth Circuit analogized "the personal and unwelcome contact" the plaintiff

[8] Even if Plaintiffs could somehow establish the required nexus, standing would only be appropriate in connection with the specific portion of H.B. 1523 connected with the expenditure. Standing for a facial challenge to H.B. 1523 would still be lacking.

had with the constitutional amendment to the contact other plaintiffs had in the context of government-sponsored religious symbols. *Id.* However, the plaintiff in *Awad* alleged additional injuries showing he had presented a justiciable claim. *Id.* at 1120 (state court could not probate plaintiff's will which referenced or incorporated Sharia law). Further, in *Awad* an express prohibition on the use of Sharia law, an integral part of the Islamic faith, was contained in the challenged law:

> The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law . . . and if necessary the law of another state of the United States provided the law of the other state *does not include Sharia Law*, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. *Specifically, the courts shall not consider international law or Sharia Law.*

Id. at 1117-18 (emphasis added).

The Tenth Circuit retrenched somewhat and distinguished *Awad* in *COPE v. Kansas State Bd. of Educ*., --- F.3d ---, 2016 WL 1569621 (Apr. 19, 2016), holding that plaintiffs attempting to challenge state educational standards did not have standing. Specifically, the *COPE* plaintiffs alleged that the state had "a non-religious worldview in the guise of science education . . . driven by a covert attempt to guide children to reject religious beliefs," thereby violating the Establishment Clause. The Tenth Circuit distinguished *Awad* and held the *COPE* plaintiffs lacked standing. *Id.* The court emphasized that in *Awad*, the law "targeted the Muslim religion explicitly and interfered with the plaintiff's ability to practice his faith and access legal processes." *Id.* at *2. Further, the *COPE* plaintiffs did not "offer any allegations to support the conclusion that the Standards are a government-sponsored religious symbol." *Id.* (citing *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) ("plaintiffs had standing to

challenge the placement of crosses along public roadsides as government-sponsored religious symbols with which they had personal and unwelcome contact")).

The allegations in the complaint concerning non-economic injury can be distilled down to: by the enactment of H.B. 1523, Plaintiffs have been "confronted" with an endorsement of beliefs or convictions with which they disagree; they have read and are familiar with H.B. 1523, they have been "exposed to the intense controversy" concerning H.B. 1523, they have followed the media coverage; and that they are aware that the law will take effect on July 1, 2016. Compl. [Doc. 1], at 4 ¶ 18. Plaintiffs further allege that they "disagree with those beliefs and convictions [defined in Section 2] and are offended by the State's endorsement and special protection of them." Compl. [Doc. 1], at 5 ¶ 19. Last, Plaintiffs allege that the beliefs in Section 2 convey a state-sponsored message of disapproval and hostility to those who do not share those beliefs and convictions . . . and indicates that their status is disfavored in the social and political community of their own home state . . . . [while] [a]t the same time . . . sends a message to Mississippians who do share those beliefs and convictions that they are favored members of the social and political community." Compl. [Doc. 1], at 5 ¶ 19.

Plaintiffs ask the Court to break new ground and vastly expand the state-sponsored religious symbol cases to include purely psychological discomfort. The state-sponsored religious symbol cases focus on the presence of a physical symbol which by its very appearance identifies a particular religion or sect, *e.g.*, a cross for Christianity, a menorah or Star of David for Judaism, and so forth. H.B. 1523 is not a state-sponsored religious symbol, so the creche/menorah cases relied on by Plaintiffs are inapposite.

In *Valley Forge*, the Supreme Court rejected the premise that "psychological

consequences" of disagreement would meet the injury requirement in an Establishment Clause challenge. In *Awad*, the Tenth Circuit stretched the Establishment Clause standing doctrine to its uttermost limit, but did not base its ruling solely on the "psychological consequences" of the mere existence of an offensive law. Plaintiffs ask this Court to stretch Supreme Court precedents beyond the breaking point, and rule that the mere existence of H.B. 1523 is sufficient to satisfy the injury requirement. The courts have been loath to extend the state-sponsored religious symbol cases to include abstract injuries caused by exposure to an unwelcome religious message:

> Plaintiffs' argument would extend the religious display and prayer cases in a significant and unprecedented manner and eviscerate well-settled standing limitations. Under plaintiffs' theory, every government action that allegedly violates the Establishment Clause could be re-characterized as a governmental message promoting religion. And therefore everyone who becomes aware of the "message" would have standing to sue. The neighbors in *Valley Forge*, the hotel workers at a conference for faith-based organizations in *Hein*, the list goes on—all could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged "message" of religious preference communicated through that action . . . The jurisdictional requirements of Article III are not so manipulable. *They do not allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it on the ground that they are offended by the allegedly unconstitutional "message" communicated by that action.*

In re Navy Chaplaincy, 534 F.3d 756, 764-65 (D.C. Cir. 2008) (emphasis added).

Simply being offended by the existence of a law with which they disagree does not confer standing on Plaintiffs.[9] At most, Plaintiffs have alleged the type of "psychological consequence presumably produced by observation of conduct with which one disagrees" that has been held

[9] Further, Plaintiffs' allegations that they are "targeted" by H.B. 1523 is belied by the text of the law. H.B. 1523 is a limitation on the authority of state government to take adverse action against persons who oppose the beliefs in Section 2 because of a sincerely held religious belief *or moral conviction*. H.B. 1523 does not target Plaintiffs' beliefs simply because it protects people who sincerely hold beliefs concerning the essence of marriage and gender identity that are not shared by Plaintiffs. H.B. 1523 targets for protection those persons most in danger of discrimination, discipline, and adverse action because of their beliefs concerning marriage in the post-*Obergefell* era.

insufficient to establish standing in *Valley Forge* and other cases.

Further, even if any of the Plaintiffs could meet the injury requirement, Plaintiffs have not alleged any facts sufficient to show causation: an injury fairly traceable to any of the named Defendants, or that the requested relief would be likely to redress their alleged injuries:

> As the Supreme Court has often stated, mere personal offense to government action does not give rise to standing to sue. "By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy" from knowing that the Government is following constitutional imperatives, "that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."

In re Naval Chaplaincy, 534 F.3d at 763 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (internal citations omitted)). Plaintiffs cannot establish standing for their Establishment Clause claims, and (as shown in the next section) cannot establish standing for their Equal Protection claims.

2. Plaintiffs Do Not Have Standing for Their Equal Protection Claims.

***Plaintiffs Have Suffered No Injury As a Result of H.B.1523*:** As to injury, federal courts may only adjudicate claims based on "concrete" injuries that are "actual" or "imminent," not merely "conjectural" or "hypothetical." *Lujan,* at 560 (citations omitted). Further, when an injunction is sought against conduct that has not yet occurred, there must be proof that the defendants' alleged unlawful conduct is "likely" to occur. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

In *Clapper v. Amnesty Int'l. USA*, 133 S. Ct. 1138, 1150 (2013) the Court summarized the requisite elements of standing for future injury claims:

> To establish Article III standing, an injury must be concrete, particularized, and

> actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending. Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that [a]llegations of possible future injury are not sufficient.

Id. at 1150 (internal quotation marks and citations omitted).

Indisputably, none of the Plaintiffs allege that they have been denied anything as a result of H.B. 1523, which does not go into effect until July 1, 2016.[10] Rather, Plaintiffs argue that they have standing to bring an Equal Protection Clause challenge under the Fourteenth Amendment because H.B. 1523 "targets" and "disfavors" them as they "do not subscribe to the beliefs and convictions endorsed in Section 2 of the bill." Pl. Memo. [Doc. 14], at 14. Plaintiffs also argue standing based on animus. *Id.*

The Supreme Court has consistently declined to find standing where an injury may occur at some unknown point in the future. *City of Los Angeles*, 461 U.S. at 102-03 ("[a]bstract injury is not enough . . . [and] plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical").[11]

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[10]For an equal protection challenge, standing exists only for those persons who are personally denied equal treatment by the challenged discriminatory conduct. *U.S. v. Hays*, 515 U.S. 737 (1995); *Walker v. City of Mesquite*, 169 F.3d 973, 979 (5th Cir.1999)(citing *Allen*, 468 U.S. at 755 (1984)); *see also Valley Forge Christian College*, 454 U.S. at 489 n.26 (1982)(rejecting proposition that every citizen has standing to challenge every affirmative-action program on the basis of a personal right that government does not deny equal protection).

[11]*See also United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). In *Whitmore*, 495 U.S. 149 at 155, the Court reiterated that the "injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable, as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. (citations omitted).

Moreover, Plaintiffs alleged injuries are tied to the hypothetical future actions of unknown persons not before this Court. H.B. 1523 offers protections for the beliefs and convictions of Mississippians, but only if they seek and assert those protections. It is possible that no one will seek the protection of H.B. 1523 come July 1, 2016, and to assume otherwise is simply conjecture and guesswork.[12] In *Clapper*, the Court reiterated that "[i]n the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id*. at 1150. In *Massachusetts v. E.P.A.*, 549 U.S. 497, 545-46 (2007), the Court said "[we] previously . . . explained that when the existence of an element of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' a party must present facts supporting an assertion that the actor will proceed in such a manner." *Id*. (quoting *Lujan*, 504 U.S. at 562 (citation omitted). Further, Plaintiffs have not shown how any of the requested relief against any of the named Defendants would redress their alleged injuries.

***Plaintiffs Not the Object or Target of H.B. 1523*:** Sensing the weakness of their argument and the hypothetical nature of their claimed injuries, Plaintiffs attempt to bolster their standing argument by suggesting that H.B. 1523 "targets" and "disfavors" them as they "do not subscribe to the beliefs and convictions endorsed

in Section 2 of the bill."[13]

[12] For instance, a government employee may have a "sincerely held religious belief or moral conviction" as defined in Section 2, but for reasons personal to that individual, choose not to recuse himself.

[13] Plaintiffs allege that "H.B. 1523 conveys an impermissible, state sponsored message of disapproval and hostility to those who do not share the beliefs and convictions endorsed in Section 2, and

Plaintiffs' interpretation that they are the "targets" or "objects" of H.B. 1523 finds no support from the plain language of the bill itself. The clear "object" of H.B. 1523 is not Plaintiffs, but persons "with a sincerely held religious belief or moral conviction in Section 2 of this act" --- and the basis of Plaintiffs' claims is that they do not share the same beliefs or convictions. Further, nothing in H.B. 1523 "condemns" anyone. Plaintiffs' argument fails when the proper legal analysis is applied. In *State of W. Virginia v. United States Dep't of Health & Human Servs*., 2015 WL 6673703, at *13 (D.D.C. October 30, 2015), the court discussed the proper analytical framework in assessing when someone is an object of government action in this context:

> In *Lujan*, the Court distinguished "objects" of a government action or inaction, from those entities whose claimed injury 'arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." As to the former – the "objects" – the Court observed, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." By contrast, for a party that is not the object of the challenged conduct, "much more is needed ... [and] causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction." Thus, as HHS correctly observes, *Lujan*'s discussion about a party as the "object" fo a government action related to the causation and redressability elements of standing, and not injury-in-fact.

Id. (emphasis, original internal citations omitted). H.B. 1523 protects the beliefs and convictions of "someone else" other than the Plaintiffs. Accordingly, Plaintiffs are not the "object" of the law and they have no standing to challenge it.[14]

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to those who are condemned as part of those beliefs, and indicates that their status is disfavored in the social and political community of their own home state." *Cf. CSE I*, 2016 WL 1306202, *14 (finding irreparable harm from "stigmatic and more practical injuries")). Pl. Memo. [Doc. 14], at 14.

[14]The Court's decision in *CSE II* does nothing to bolster the Plaintiffs' argument that they are the "target" or "object" of H.B. 1523. The statute at issue in that case provided that: "Adoption by couples of the same gender is prohibited." Miss. Code Section 93-17-3(5). There is no similar statutory language in this case. In fact, just the opposite: H.B. 1523 provides protection for same-sex couples seeking a marriage license as it mandates that "lawful marriages" not be impeded or delayed because of a recusal.

***No Stigmatic Injury*:** Plaintiffs argue that they have suffered a stigmatic injury that would give them standing: "[b]y its very language and its endorsement, the bill reflects an animus toward those who are disfavored." Pl. Memo. [Doc. 14], at 15. While courts have addressed the role of stigma in the context of standing, Plaintiffs theory misses the central holding of these cases: "stigmatic injury. . . requires identification of some concrete interest with respect to which [plaintiff is] personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine." *Allen v. Wright*, 468 U.S. 737, 795 n.22 (1984). Plaintiffs do not identify the discriminatory denial of any governmental benefit which independently satisfies the requirements of standing. They simply contend that the language of H.B. 1523 and the passage and signing of it into law causes them stigmatic injury. Even if the court accepted this theory, only the same-sex couples and transgender individuals could possible assert such a claim --- the other Plaintiffs who support such couples and individuals are simply third parties attempting to assert the rights of others.

The Supreme Court addressed the constitutional insufficiency of stigmatic injury in *Allen* while considering racially discriminatory school tax exemptions. 468 U.S. at 740-41. The Court assumed that the challenged "Government tax exemptions" were the direct "equivalent of Government discrimination" and framed the issue as whether African-American plaintiffs whose children had not been victims of "discriminatory exclusion from the schools whose tax exemptions they challenge" had standing based on race to challenge this overt act of "Government discrimination." *Id*. at 746, 754 n. 20. The Court held that "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government

discriminates on the basis of race" was not a sufficient injury to confer standing. *Id*. at 754.

> [Plaintiffs lack] standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.

Id. at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)).[22]

> Respondents' stigmatic injury through not sufficient for standing in the abstract form in which their complaint asserts it, is judicially cognizable to the extent that respondents *are personally subject to discriminatory treatment*. The point is, the stigmatic injury requires identification of some *concrete interest* with respect to which respondents are personally subject to discriminatory treatment. That interest must *independently satisfy* the causation requirement of standing doctrine.

Id. at 795 n. 22 (citation omitted; emphasis added).

The application of *Allen* to claims of stigmatic injury is familiar in this context.. The Fourth Circuit in *Bostic* applied *Allen* in finding a same-sex couple had standing to challenge Virginia's ban on same-sex marriages. Quoting *Allen*, the Fourth Circuit found that plaintiffs' stigmatic injury supported standing only because plaintiffs had identified "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine." *Bostic v.*

[22] *Allen*'s conclusion that stigmatic injury is not sufficient follows the well-established rule that standing is possessed by persons who are directly injured by the challenged government action and is not handed out in gross to anyone who shares the race or gender of others discriminated against. *Compare Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972) (plaintiff had no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership); *O'Shea,* 414 U.S. at 502 (plaintiffs had no standing to challenge racial discrimination in the administration of their city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices) *with Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 720 (1982) (male plaintiff denied admission because of gender had standing to challenge admission policies).

Schaefer, 760 F.3d 352, 372 (4th Cir. 2014). The plaintiffs were denied tax and adoption benefits afforded married couples of opposite sexes. *Id.* Because the plaintiffs alleged "specific, concrete instances of discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable." *Id.*

In *CSE I*, the Court quoted *Allen's* language directly from *Bostic* in reaching its conclusion that "[s]tigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing injury requirement *if* the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine." *CSE I*, 64 F. Supp. 3d at 917 (emphasis added). The Fourth Circuit's analysis in *Bostic* illustrates the point:

> The Virginia Marriage Laws erect such a barrier, *which prevents* same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage. Second, Schall and Townley allege that they have suffered stigmatic injuries *due to their inability to get married* in Virginia and Virginia's refusal to recognize their California marriage. Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies "*some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment*" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine."

Bostic, 760 F.3d at 372 (emphasis added; internal citations omitted).

In contrast, Plaintiffs cannot satisfy standing in this case because the fact that a government employee in a Clerk's office might recuse does not itself provide or deny a concrete government benefit to Plaintiffs: H.B. 1523 requires issuance of a marriage license to legally eligible couples without impediment or delay. Failure to issue a license because applicants were a same-sex couple could be a sufficient injury for injunctive relief. *See Davis* 123 F. Supp. 3d at 935. However, the decision in a Clerk's office as to which individual might issue the license is

not such an injury.[23]

Plaintiffs' alleged stigmatic injury based on the message they believe is being conveyed by H.B. 1523 by itself is insufficient to establish standing. That alleged stigma, without more, is insufficient to confer standing is further supported by the well-established prohibition on the litigation of generalized grievances.[24] The Supreme Court has said that a "generalized grievance" is a harm "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Moreover, "[p]rudential principles are judicial rules of self-restraint, founded upon the recognition that the political branches of government are generally better suited to resolving disputes involving matters of broad public significance." *Apache Bend Apartments, Ltd.*, 987 F.2d 1174, 1176 (5th Cir. 1993) (en banc) (citing *Lujan*, 504 U.S. at 560).

"The judicial power to adjudicate constitutional questions is reserved for those instances in which it is necessary for the vindication of individual rights." *Id.* *Allen's* holding that "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is not an "injury judicially cognizable" requires dismissal of this matter. 468 U.S. at 754. In sum, Plaintiffs' claim of stigmatic injury does not comport with the principles articulated *Allen*, and applied by later courts, and therefore does not give them standing to challenge H.B. 1523.

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[23] In Kentucky, in the case styled *April Miller, et al. v. Kim Davis*, In the U.S. District Court for the Eastern Dist. of Kentucky, Northern Division; No. 15-44-DLB, when a local clerk refused to issue marriage licenses to same-sex couples, the remedy approved by the district court was for the clerk to step aside and allow her deputy clerks to issue any same-sex marriage licenses. *See* Order Denying Motion to Enforce as Moot (Feb. 9, 2016) [Doc. 161]. Plaintiffs effectively argue here that H.B. 1523, by providing the same result through a recusal mechanism, causes them to suffer a stigmatic injury.

[24] "The prudential principle barring adjudication of 'generalized grievances' is closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." *Apache Bend Apartments*, 987 F.2d at 1176.

***No Causal Connection Between Alleged Injury and Defendants*:** As to causation, even assuming *arguendo* the existence of a cognizable injury, there is no causal connection between the Plaintiffs' alleged injuries and any of the named Defendants' alleged possible conduct. *Lujan*, 504 U.S. at 560. An injury "must be traceable to the defendant and not the result of the independent action of a third party." *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001)(citing *Lujan,* 504 U.S. at 60-61). "In other words, the case or controversy limitation of Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results in the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42. Notably, none of the potential actors by whom Plaintiffs might allegedly be harmed in the future are named as Defendants in this action.

No causal connection exists between the Plaintiffs' claimed future injury and anything the Plaintiffs could credibly claim the named Defendants will do in the future. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001). The Plaintiffs' putative future injury is simply not "fairly ... trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court,'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)) (alterations in original), and, therefore, fails the causation prong required for Article III standing.

***Plaintiffs Have Failed to Show Their Injuries Are Likely to Be Redressed by the Requested Relief*:** As for the third and final standing element, awarding the Plaintiffs' requested preliminary relief against the defendants would not redress their claimed future injury. *Lujan*, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be

redressed by a favorable decision.") (quoting *Simon*, 426 U.S. at 38, 43); The Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminarily enjoins the named Defendants today.

3. The Sole Plaintiff Asserting a Free Speech Claim Has Failed to Establish Standing.

Only one Plaintiff, Dr. Susan Glisson, has asserted a claim based on the Free Speech Clause. Dr. Glisson has failed to show any of the three irreducible minimum requirements for standing: injury, causation, and redressability. Dr. Glisson alleges she has "standing as a state employee who is not accorded the purported speech rights provided by Section 3(7) of the bill to those who subscribe to the beliefs and convictions endorsed by H.B. 1523." Pl. Memo. [Doc. 14], at 13. First, Section (3)(7) only acknowledges that state employees who hold the beliefs described in Section 2 of H.B. 1523 are entitled to same free speech rights as other employees, including those who disagree with those beliefs, "so long as,"

> (a) If the employee's speech or expressive conduct occurs in the workplace, that speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed; or
>
> (b) If the employee's speech or expressive conduct occurs outside the workplace, that speech or expressive conduct is in the employee's personal capacity and outside the course of performing work duties.

H.B. 1523 § 7(3).

Second, to find that Dr. Glisson had standing for this claim, would require the Court to make numerous assumptions about events that are totally speculative and unlikely to ever come to pass. Effectively, Dr. Glisson asks the Court to assume that a situation is likely to occur where a person expressing negative beliefs about same-sex marriage (or unmarried sex) would not be

subjected to discipline, but Dr. Glisson would be subject to discipline because she is not protected by H.B. 1523. Such an injury would require a highly speculative chain of events like the following to occur at some unknown future point in time: (1) expressing religious, political, or moral beliefs or convictions is permitted by the policies and practices in Dr. Glisson's specific workplace; (2) Dr. Glisson expresses beliefs in the workplace favoring same-sex marriage; (3) one of Dr. Glisson's co-workers expresses beliefs opposing same sex marriage on moral or religious grounds; (4) both Dr. Glisson and her co-worker are reprimanded for their expressive conduct; (4) letters of reprimand are placed in the personnel files of both Dr. Glisson and her co-worker; (5) the co-worker asserts she cannot be disciplined in this fashion because of her rights under H.B. 1523, such that: (6) the co-worker's letter of reprimand is removed from her file, while (7) the letter of reprimand remains in Dr. Glisson's file.

At best, the type of injury Dr. Glisson would have to show to establish Article III standing for her free speech claim is, at the present time, wholly hypothetical, conjectural, and theoretical. Therefore, Dr. Glisson has failed to prove an injury in fact for purposes of standing. Further, if such a chain of events did occur, none of the named Defendants would have anything to do with the alleged injury, which could not likely be redressed by relief against any of them. The Governor, the Attorney General, the head of MDHS, and the State Registrar have nothing to do with discipline for employees at the University of Mississippi.[25]

C. Plaintiffs Have Failed to Show Likelihood of Success on the Merits of Their Establishment Clause Claims.

Under binding Supreme Court and Fifth Circuit precedent, the distinction between facial

[25] The vague, ambiguous, and incomplete allegations regarding standing in connection with the purported Free Speech claim make it impossible to analyze the merits.

and as applied challenges under the Establishment Clause is crucial:

> Because a distinction exists between facial and as-applied Establishment Clause challenges, we must consider where the plaintiffs' claims belong. The Supreme Court has recently explained that where the "plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of th[o]se plaintiffs," the plaintiffs must "satisfy our standards for a facial challenge to the extent of that reach" . . . To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which either the language of the pledge or the requirement that children recite the pledge in classrooms is constitutional. If the plaintiffs successfully show either provision to be unconstitutional in every application, then that provision will be struck down as invalid.

Croft v. Perry, 624 F.3d 157, 163-64 (5th Cir. 2010). Plaintiffs have not and cannot meet the extremely high burden of proof for facial invalidation of H.B. 1523, that there is no set of circumstances under which H.B. 1523, or any portion of it, in any of its possible applications, is constitutional.

The Supreme Court has used three primary tests in Establishment Clause challenges: (1) the *Lemon* test; (2) the coercion test; and (3) the endorsement test. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, (5th Cir. 2001). The Fifth Circuit has summarized the three tests as follows:

> First, the three-part inquiry of *Lemon v. Kurtzman* asks (1) whether the purpose of the practice is not secular; (2) whether the program's primary effect advances or inhibits religion; and (3) whether the program fosters an excessive government entanglement with religion. The second test, the "coercion" test, measures whether the government has directed a formal religious exercise in such a way as to oblige the participation of objectors. The final test, the "endorsement" test, prohibits the government from conveying or attempting to convey a message that religion is preferred over non-religion.

Id. Although the *Lemon* test has been much-criticized, a majority of the Supreme Court has never expressly rejected or overruled *Lemon*.[26, 27] H.B. 1523 is constitutional under both of those

[26] Justice Scalia famously likened *Lemon* to

> [a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . .

tests as a reasonable accommodation of moral convictions and religious beliefs.

1. H.B. 1523 Does Not Discriminate Against Particular Religions or Religious Groups; Therefore, *Larson v. Valente* and *Awad v. Ziriax* are Inapposite.

Plaintiffs assert that their Establishment Clause challenge to H.B. 1523 should be analyzed pursuant to the test that was applied by the Supreme Court in *Larson v. Valente*, 456 U.S. 228 (1982) and the Tenth Circuit in *Awad v. Ziriax*. Memo. at 14. Under that test, a law will be deemed to violate the Establishment Clause unless it is "closely fitted to the furtherance" of a "compelling interest." *Larson*, 456 U.S. at 255. However, as the Plaintiffs concede, those cases involved laws that made "explicit and deliberate distinctions between different religious organizations[.]" *Id.* at 456 U.S. at 246 n.23; Memo. at 14. Nonetheless, Plaintiffs contend that this Court should apply *Larson*'s strict scrutiny analysis (instead of the *Lemon* test) in determining whether H.B. 1523 runs afoul of the Establishment Clause because H.B. 1523 makes an "explicit and deliberate distinction between different religious *beliefs*." Memo. at 14 (emphasis in original). This argument should be rejected. *Larson* merely stands for the uncontroversial proposition that the Establishment Clause prohibits states from enacting laws which grant preferential treatment to particular religions or religious denominations over others. It does not require the application of strict scrutiny to laws like H.B. 1523 which do not

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> . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely.

Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. Davis L. Rev. 645, 647 (1999) (*quoting Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (citations omitted)).

[27] The coercion test has no relevance to H.B. 1523, as the law does not direct a formal religious exercise in any way, much less in a way that "oblige[s]" the participation of Plaintiffs.

discriminate against certain religions or religious denominations, but rather provide accommodations to certain types of religious beliefs irrespective of religious affiliation.

In *Larson*, the Supreme Court faced the issue of whether "a Minnesota statute, imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers, discriminate[d] against such organizations in violation of the Establishment Clause[.]" 456 U.S. at 230. The Court held that the statute violated the "clearest command of the Establishment Clause" – "that one religious denomination cannot be officially preferred over another." *Id.* at 244. In so holding, the Court emphasized that the statute's legislative history "demonstrate[d] that the provision was drafted with the explicit intention of including particular religious denominations and excluding others."[28] *Id.* at 254. Because the law "grant[ed] a denominational preference," the Court concluded that its "precedents demand[ed] that [it] treat the law as suspect and . . . apply strict scrutiny[.]" *Id.* at 246. Moreover, the Court determined that "application of the *Lemon* tests was not necessary" because *Lemon* is "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions." *Id.* at 252 (emphasis in original; footnote omitted).

Larson's holding is limited to cases involving laws that explicitly discriminate against certain religions or religious groups.[29] Indeed, since *Larson* was decided, the Supreme Court has

[28] The Court noted that language in an early draft of the bill was deleted "for the sole purpose of exempting" a Roman Catholic Archdiocese "from the provisions of the Act." *Larson*, 456 U.S. at 254.

[29] *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"); *id.* at 688 (O'Connor, J., concurring) (explaining that *Larson* strict scrutiny is only appropriate when a "statute or practice . . . plainly embodies an intentional discrimination among religions"); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 Mont. L. Rev. 19, 50-51 (1993) ("Subsequent cases . . . have limited *Larson*'s strict scrutiny test to statutes which single out and discriminate against certain religious denominations and have not applied the *Larson* test to laws which merely

never relied upon *Larson*'s strict scrutiny test to invalidate a statute under the Establishment Clause. Instead, the Supreme Court has applied the *Lemon* test, or at times the Coercion or Endorsement test. Therefore, *Larson* occupies a relatively obscure position in the Court's Establishment Clause jurisprudence. *See* Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. City L. Rev. 53, 107 (2005) ("[T]he *Larson* doctrine probably merits the obscurity it has long received.").

Moreover, *Larson* itself makes clear that it does not apply to statutes which provide protections to certain religious beliefs, but do not discriminate among religions. The petitioners in *Larson* argued that the Minnesota law was similar to the federal statute upheld in *Gillette v. United States*, 401 U.S. 437 (1971). *See Larson*, 456 U.S. at 246 n.23. The *Gillette* Court held that a federal statute which granted draft exemptions to any person who "by reason of religious training and belief," was "conscientiously opposed to participation in war in any form" did not violate the Establishment Clause, even though it did not provide an exemption to persons who objected on religious grounds to participating in a particular war. 401 U.S. at 441. The Court rested its holding on the fact that the statute "on its face, simply [did] not discriminate on the basis of religious affiliation." *Id.* at 450. To the contrary, it "focused on individual conscientious belief, not on sectarian affiliation." *Id.* at 454. Moreover, the Court concluded that the distinction drawn by the law was supported by neutral and secular justifications. *See id.* at 454-60.

In *Larson*, the Court found *Gillette* to be "readily distinguishable" because under the federal statute, "conscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic"; whereas the Minnesota law "focuse[d] precisely and solely upon

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accommodate religious practices.").

religious organizations." *Larson*, 456 U.S. at 246 n.23. H.B. 1523, like the law at issue in *Gillette*, does not discriminate on the basis of religious affiliation; its purpose is to accommodate certain conscientious beliefs, not any particular religion or religious group. Any person who holds the beliefs described by H.B. 1523 may invoke the statute's protections, regardless of the religion they practice or the religious denomination to which they belong.[30] Plaintiffs' reliance on *Larson* is therefore misplaced.

2. H.B. 1523 is a Constitutional Accommodation of Religion and Freedom of Conscience.

When a law like H.B. 1523 amounts to a permissive accommodation of freedom of conscience and religion which "fits within the corridor between the Religion Clauses, application of the *Lemon* test may not even be necessary. *See Cutter v. Wilkinson*, 544 U.S. 709, 716 & n.6, 720 (2005) (bypassing *Lemon* and deciding case on other grounds). Whether all of the prongs of Lemon are applicable or not, "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

Religious accommodation laws are not facially unconstitutional.[31] *See, e.g.*, *Hankins v. Lyght*, 441 F.3d 96, 105-06 (2d Cir. 2006) (Federal RFRA unconstitutional as applied to state

[30] To the extent H.B. 1523 affects religious organizations, the focus is still on the individual conscientious beliefs described in Section 2, not sectarian affiliation. Because it protects freedom of conscience, H.B. 1523 is like the conscientious objector statute in *Gillette* rather than the statute providing financial support of favored religious organizations in *Larson*. Further, only Sections 3(1) and 3(2) of H.B. 1523 apply to religious organizations. Last, all of the alleged burdens hypothesized by Plaintiffs in this regard are illusory.

[31] Plaintiffs argue that Mississippi's Religious Freedom Restoration Act ("RFRA") sufficiently protects the interests protected in H.B. 1523. Plaintiffs' challenge to the constitutionality of H.B. 1523 must be considered on its own merits rather than whether the state RFRA protects free exercise, such that no further accommodation of free exercise by H.B. 1523 is necessary, as *Obergefell* dramatically tilted the playing field against conscientious objectors to same-sex marriage *after* the state RFRA was enacted.

law, but constitutional as applied to federal law). H.B. 1523 accommodates the beliefs of those in favor of same-sex marriages under the Fourteenth Amendment (no impediment or delay as a result of any recusal) and for those persons with "sincerely held religious beliefs or moral convictions" against same-sex marriage recognized under the First Amendment. *See* H.B. 1523, § 2. Thus, under *Obergefell* and *Campaign for Southern Equality*, H.B. 1523 provides a constitutionally permissible accommodation for both the same-sex marriage rights of couples protected by the Fourteenth Amendment and the Free Exercise rights of objectors protected by the First Amendment.

Similar statutory accommodations are well-established regarding religious beliefs and the performance of certain public functions. For example, the federal freedom of conscience laws known as "The Church Amendments," which were enacted shortly after *Roe v. Wade*, protect public health care workers who disagree with abortion on moral or religious grounds and therefore do not want to participate in performing abortions. The Church Amendments do not permit the government "to require --- (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(a).

The similar moral issues raised by the *Roe v. Wade* and *Obergefell* decisions, which each abandoned long held traditional moral views related to abortion and same-sex marriage, make the freedom of conscience laws in the abortion context particularly analogous to H.B. 1523.

In *Harris v. McRae*, 448 U.S. 297, 319 (1980), the plaintiffs challenged the Hyde Amendment, which significantly limited federal funding for abortions, under the Establishment

Clause: "[i]t is the appellees' view that the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." The Supreme Court rejected the premise that because the opposition of abortion on moral grounds mirrors the beliefs of the Roman Catholic Church, the Hyde Amendment violated the Establishment Clause:

> Although neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another . . . it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions. *That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.* The Hyde Amendment is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.
> (internal quotation marks and citations omitted).

Harris, 448 U.S. at 319-20 (emphasis added). Similarly, a state would not violate the Establishment Clause by criminalizing murder, despite sectarian religious beliefs in accord with the intent of the criminal statute.

> A statute that ostensibly promotes a secular interest often has an incidental or evan a primary effect of helping or hindering a sectarian belief. Chaos would ensue is every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing.

Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring).

In *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 830 (D.C. Cir. 2006), the court stated that "Congress, since 1996 has forbidden 'discrimination' against an individual who 'refuses . . . to perform . . . abortions, or to provide

referrals for . . . abortions.'" *Id.* (citing Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 515, 110 Stat. 1321, 1321-224 (codified at 42 U.S.C. § 238n(a)(1), (c)(2)). The court found that ". . . the 1996 provision hasn't given rise to the parade of horribles that plaintiff hypothesizes—not even a single horrible." *Id.* Thus, similar accommodations are certainly not new.

H.B. 1523 does not favor any particular religion, and the beliefs stated in the Act are not necessarily religious in nature: a non-religious person might well believe all of those things, such that the beliefs can be either secular or religious. H.B. 1523 protects freedom of conscience, regardless of whether beliefs are secular- or religious-based. Thus, H.B. 1523 has a secular purpose. Acknowledging religion, or protecting the free exercise thereof, does not automatically invalidate a law based on the Establishment Clause. *Cutter*, 544 U.S. at 720; *Amos*, 483 U.S. at 334.

The primary effect of H.B. 1523 is not to advance religion. The primary effect of H.B. 1523 is to protect freedom of conscience and prohibit discrimination by the State government against those who hold moral or religious beliefs protected by the First Amendment that are at odds with the Fourteenth Amendment marriage rights formally acknowledged in *Obergefell.* Furthermore, H.B. 1523 does not excessively entangle the State in a religious controversy or improperly promote religion over non-religion in a way that might fail the endorsement test. The controversy over the morality of same-sex marriage transcends the religious/secular distinction. H.B. 1523 seeks to protect those whose beliefs concerning same-sex marriage may, post-*Obergefell*, reasonably be expected to be marginalized by same-sex marriage supporters.[32] The

[32] "Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important

beliefs in favor of same-sex marriage espoused by Plaintiffs do not need similar protection. Nothing bars Plaintiffs' right to express their beliefs that same-sex marriage is morally right. The answer to speech with which one disagrees "is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 649 (1927) (Brandeis, J., concurring).

For example, currently clerks, ministers, cake-makers, and church organists who moonlight playing music at weddings, who sincerely believe that same-sex marriage is right can simply go about their business, and their religious beliefs or moral convictions are not impacted one iota. There is not one word in H.B. 1523 that changes that.[33]

On the other hand, if a clerk, a minister, a cake-maker, or a church organist sincerely believes that same-sex marriage is wrong, for either moral or religious reasons, *that person does need protection* to avoid being compelled to assist with or participate in activities related to marriages which violate their beliefs. Apparently, in Plaintiffs' view, accommodation of the

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consequences. *It will be used to vilify Americans who are unwilling to assent to the new orthodoxy.* In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. *The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.* Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. *I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools*." *Obergefell*, 135 S. Ct. at 2642-43 (Alito, J., dissenting) (internal cross-references omitted) (emphasis added).

[33] In a related sense, this is why Plaintiffs' Establishment Clause claims fail even when masquerading as an Equal Protection claim. *See* Compl. [Doc. 1], at 13 ¶ 38. The touchstone of equal protection is that similarly situated persons must be treated alike, without arbitrary or irrational distinctions. Plaintiffs are not similarly situated to those holding beliefs protected by H.B. 1523, as the beliefs of same-sex couples and advocates were, in *Obergefell*, officially sanctioned by the Supreme Court. H.B. 1523 rationally protects those who need protection, rather than those who have no such need.

beliefs of those who disagree with Plaintiffs' beliefs about marriage is either unnecessary or inappropriate.

Based on Plaintiffs' arguments, the clerk, the minister, the cake-maker, or church organist who disagrees with same-sex marriage on moral grounds has to make an all-or-nothing decision: either perform those services in connection with all marriages, despite the violation of their own sincerely held moral or religious beliefs, or do not perform those services in connection with any wedding. In effect, Plaintiffs say they will be stigmatized by the fact that people holding moral or religious beliefs with which Plaintiffs disagree, should not only be permitted to hold such beliefs, but live by them. The Free Exercise Clause of the First Amendment protects the rights of conscientious objectors to the morality of same-sex marriage to do just that. Similarly, H.B. 1523 is a constitutional accommodation of religious freedom and freedom of conscience.

D. Plaintiffs Have Failed to Show Likelihood of Success on the Merits of Their Equal Protection Claims.

1. No Evidence That H.B. 1523 Is The Result of "Animus."

Plaintiffs allege that H.B. 1523 violates the Equal Protection Clause of the Fourteenth Amendment because it "reflects an animus toward those who are disfavored," citing *Romer v. Evans*, 517 U.S. 620, (1997). Pl. Memo. [Doc. 14], at 1. On a few occasions, the Supreme Court has invalidated laws subject to traditional equal protection rational basis review when the legislation is "inexplicable by anything but animus toward a class it affects." *Romer*, 571 U.S. at 632. The Court's animus doctrine has variously been applied to laws solely "born of animosity toward the class of persons affected," *id*. at 634, based entirely on an "irrational prejudice" *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985), or enacted out of a "bare

congressional desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). The test is not whether anyone might subjectively believe the law was driven by some "animus," "irrational prejudice," or "desire to harm" anyone. Rather, the doctrine attempts to distill the actual motivation behind a challenged law, and justifies invalidating the law if hostility toward a particular group was the only motivation for it.

The Supreme Court has identified two ways a law signals that its exclusive motivation is impermissible animus. One, where the law imposes a broad and novel deprivation of rights upon a disfavored group, such as in *Romer,* and two, where the law falls outside of the historical authority of the lawmaking sovereign to eliminate privileges a group might be entitled to otherwise, such as in *Windsor.*

Despite Plaintiffs' pleas that the Court treat this as an "apples to apples" comparison, H.B. 1523 is nothing like the Colorado constitutional amendment in *Romer*. The Colorado law at issue there eliminated a wide rage of previously existing legal rights by imposing a "sweeping and comprehensive . . . change in legal status," *Romer*, 571 U.S. at 627, and a "broad and undifferentiated disability on a single named group," *id*. at 632, and identifying and denying persons established protections "across the board," *id*. at 633, and did so in a manner "unprecedented in our jurisprudence" since it was "not within our constitutional tradition to enact laws of this sort." *Id*.[34]

By contrast, H.B. 1523 does not deny the Plaintiffs any right or privilege under the law, but seeks to protect the freedom of religious expression and conscience of persons who share the sincerely held religious beliefs or moral convictions identified in the bill. As set forth *supra* in

[34]The law in *Romer* expressly forbade any unit of state government, (i.e.,State, County or Municipal) from giving gay and lesbian citizens any anti-discrimination protection whatsoever.

the discussion regarding standing, Plaintiffs are not the "object" or "target" of H.B. 1523 and their subjective belief that they are is insufficient to show that the bill was "born of animosity." Further, there is also nothing unusual about a law seeking to protect religious freedoms and expression. *See supra* pp. 31-33. Thus, similar accommodations for religious beliefs and convictions are not new.

In short, this is an "apples to oranges" comparison and the Plaintiffs cannot show that H.B. 1523 was enacted due to "animus" in violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Rational Basis for Enactment of H.B. 1523.

H.B. 1523 does not implicate a suspect class or interfere with a fundamental right, and therefore, is only subject to review under the familiar rational basis test which simply asks whether a law bears a rational relation to some legitimate governmental end. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Rational basis review is the most deferential constitutional standard, requiring the Court only to identify a plausible reason for a law rather than second guessing enactments by litigating the facts undergirding their passage. *Id*. at 320. The inquiry must remain guided by deference to legislative decision-making, and the Court must accord the law a strong presumption of validity. *Id*. at 319-20. Furthermore, a State has no obligation to produce evidence to sustain the rationality of a statutory classification. *Id* at 319-320. ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

H.B. 1523 is intended to right of citizens to hold the religious beliefs and moral convictions identified in Section 2 of the law. States have a legitimate governmental interest in

protecting religious beliefs and expression and preventing citizens from being forced to act against those beliefs by their government. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972) ("Such an accommodation reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.") (internal quotations omitted).

Some of the examples of the protections afforded by H.B. 1523 are as follows:

A. H.B. 1523 allows clerks, who believe that marriage should be between a man and woman, to recuse themselves from having to issue a marriage license to a same-sex couple while also mandating that there be no impediment or delay in the clerk's office issuing the license. By doing so, H.B. 1523 accommodates and protects the religious beliefs or moral convictions of the citizen, while also complying with the Court's mandate in Obergefell.[35]

B. H.B. 1523 protects citizens who decline to provide wedding-related services based on a religious belief or moral conviction. This could include a professional wedding planner who objects to same-sex marriage based on one of the beliefs or convictions outlined in Section 2 of the law. Without the protection afforded by H.B. 1523, wedding planners would be forced to plan weddings for any and all couples that request their services, same-sex, opposite sex or transgender, or abandon their profession and stop planning weddings altogether.

[35]H.B. 1523 also allows persons authorized to conduct weddings to recuse, but again, requires that the marriage not be impeded or delayed as a result of any recusal.

C. H.B. 1523 protects counselors who decline to provide counseling services based on a religious belief or moral conviction listed in Section 2 of the law. Without it, counselors could be forced to counsel someone, regardless of whether that person or that person's behaviors or beliefs conflicted with the counselor's beliefs or convictions. The only alternative would be for the counselor to abandon their profession and stop counseling completely.

D. H.B. 1523 protects religious organizations from being forced to allow or take part in activities which conflict with the organizations beliefs or convictions. Without it, a church could be forced to allow a same-sex or transgender couple to marry in their sanctuary despite the church's objections.

In summary, H.B. 1523 could not be more different than the law in *Romer* - a law that overnight stripped away *all* civil rights protections from gays and lesbians in Colorado. H.B. 1523 is simply a religious accommodation bill and does not "disfavor" anyone despite Plaintiffs' subjective belief to the contrary. H.B. 1523 clearly meets the rational basis standard as it bears "a rational relation to some legitimate end" and must be upheld as constitutional. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).[36]

3. Plaintiffs Not Similarly Situated to Persons Protected Under H.B. 1523.

As a prerequisite to bringing an equal protection claim, Plaintiffs must prove that

[36] By contrast, in *Romer* the Supreme Court rejected the State of Colorado's rational basis argument based on freedom of association and the need for protecting landlords and employers, given that the law imposed "a broad and undifferentiated disability on a single named group" and "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.

similarly situated individuals were treated differently. See *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir.1999). In short, Plaintiffs must prove that (1) they are similarly situated to the persons protected by H.B. 1523, and (2) they will be treated differently than the persons protected by H.B. 1523. *See Beeler v. Rounsavall*, 328 F.3d 813, 816-817 (5th Cir. 2003). Plaintiffs have failed to meet this burden. Plaintiffs refer to certain specific portions of H.B. 1523, but do not explain how particular plaintiffs are similarly situated to those protected by H.B. 1523 such that any "classification" drawn thereby would be arbitrary or irrational. *See* Compl. [Doc. 1], at 9-11. Further, Plaintiffs do not demonstrate the prospect of imminent injury in any of the scenarios in which those provisions would apply.

4. H.B. 1523 Does Not Prohibit Laws Providing Discrimination Protection.

Plaintiffs argue that H.B. 1523 is unconstitutional because it will repeal existing laws and ordinances that prohibit discrimination, just like the law in *Romer*. Plaintiffs cite as an example, a newly passed ordinance in the City of Jackson, Mississippi, that prohibits various forms of discrimination, including, but not limited to, discrimination based on a person's sexual orientation and gender identity. See Jackson, Mississippi Code of Ordinances §86-227, Civil Rights Declared.

Plaintiffs cannot demonstrate that H.B. 1523 will result in the repeal of anti-discrimination laws/ordinances, leading to a denial of equal protection under the law. First, the constitutional amendment in *Romer* expressly prohibited any law meant to protect gay or lesbian citizens from discrimination in Colorado. No such prohibition targeting a specific group exists in H.B. 1523. Second, a review of Jackson's anti-discrimination ordinance shows that it is actually strikingly similar to H.B. 1523 in its recognition that religious beliefs and organizations must be

protected as Section 86-228 exempts religious corporations, associations, or societies from the anti-discrimination ordinance. Further, H.B. 1523 would invalidate local ordinances only to the extent those ordinances do not provide the same level of protection for religious freedom and free exercise as provided by H.B. 1523.

II. PLAINTIFFS CANNOT SHOW A SUBSTANTIAL THREAT OF IRREPARABLE INJURY.

Plaintiffs have not alleged, much less proved, that any of them has suffered a cognizable injury in fact sufficient to establish standing. Since Plaintiffs have not even shown the existence of any actionable injury, Plaintiffs have also failed to meet their burden to show a substantial threat of *irreparable* injury.

III. THE BALANCE OF HARMS FAVORS DEFENDANTS.

Plaintiffs' request for a preliminary injunction in this case must be considered in a substantially different light from the preliminary injunctions sought and obtained in *CSE I* (same-sex marriage) and *CSE II* (same-sex adoption). In each of those cases, the Plaintiffs were directly and explicitly barred from enjoying rights and privileges that opposite-sex couples enjoyed. Here, Plaintiffs do not stand to suffer any irreparable injury at all.

Nothing in H.B. 1523 bars Plaintiffs from exercising their rights. Same-sex couples may enjoy the rights and benefits of marriage, including the adoption of children, just as eligible opposite-sex couples --- both before and after July 1, 2016. Nothing in H.B. 1523 changes that in any way, or purports to. H.B. 1523 specifically protects the right to marry, requiring that a clerk recusing himself or herself from issuing a marriage license: "shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or

delayed as a result of any recusal." H.B. 1523 § 3(8)(a). H.B. 1523 places a parallel obligation on the Administrative Office of Courts in the event of a judge's recusal from performing a same-sex marriage: [t]he Administrative Office of Courts shall take all necessary steps to ensure that the performance or solemnization of any legally valid marriage is not impeded or delayed as a result of any recusal." H.B. 1523 § 3(8)(b). Thus, the marriage rights of same-sex couples will remain fully protected, even after July 1.

Further, the Court must balance the potential harm to Plaintiffs based on the alleged Establishment Clause violation with the potential harm to those public officials and others who are conscientious objectors concerning the morality of same-sex marriage (whose Free Exercise rights will continue to be subject to potential harm) if H.B. 1523 is enjoined. Because any potential irreparable harm to Plaintiffs is *de minimus*, and because there are competing fundamental rights protected by the Free Exercise Clause, the balance of harms here favors Defendants, or is neutral.

IV. GRANTING THE INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.

Plaintiffs rely on the tried and true principle that "it is always in the public interest to prevent the violation of a party's constitutional rights." Pl. Memo. [Doc.14], at 21. However, the public interest would not be served unless any potential violation of, or chilling effect on, the Free Exercise rights of conscientious objectors is avoided. At this juncture, in the absence of any actual, imminent, or direct harm to Plaintiffs, the public interest factor favors permitting H.B. 1523 to go into effect on July 1, 2016. If any of the conjectural injuries or scenarios suggested by Plaintiffs' Complaint were actually to come to pass, an injured person could seek relief for an

actual injury at that time, rather than a hypothetical injury based on supposition such as those described in the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

JIM HOOD, MISSISSIPPI ATTORNEY GENERAL,

JUDY MOULDER, MISSISSIPPI STATE REGISTRAR,

Defendants

BY: *s/Paul Barnes*
PAUL BARNES, MSB # 99107
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, MS 39205
Telephone No. (601)359-4072
Facsimile: 601-359-2003
pbarn@ago.state.ms.us

CERTIFICATE OF SERVICE

This is to certify that on this day I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

Robert B. McDuff
Sibyl C. Byrd
Jacob W. Howard
MCDUFF & BYRD
767 North Congress Street
Jackson, MS 39202
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

Beth L. Orlansky
John Jopling
Charles O. Lee
MISSISSIPPI CENTER FOR JUSTICE
P.O. Box 1023
Jackson, MS 39205-1023
borlansky@mscenterforjustice.org

THIS the 17th day of June, 2016.

s/Paul E. Barnes
Paul Barnes

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, and JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs,

v. **Civil Action No. 3:16-cv-417-CWR-LRA**

PHIL BRYANT, GOVERNOR OF MISSISSIPPI; JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; and JUDY MOULDER, MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

This reply is submitted in support of the motion for a preliminary injunction to enjoin enforcement of House Bill 1523 of the 2016 Session of the Mississippi Legislature.

I. THE PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

Standing Regarding the Establishment Clause

The Plaintiffs include twelve individuals – all residents, citizens, and taxpayers of Mississippi – and one Mississippi church. None of the Plaintiffs subscribe to the religious beliefs and moral convictions endorsed by their State's government in H.B. 1523. Instead, the Plaintiffs disagree with those beliefs and convictions and are offended by them.

Because they do not agree with those beliefs, the Plaintiffs do not receive the special legal protection bestowed upon those who hold the beliefs. The Plaintiffs include members of all three of the groups that are the subject of disapproval by those who hold the beliefs and convictions endorsed by the State in H.B. 1523: (1) same-sex couples who are or plan to be married, (2) unmarried people who have sexual relations, (3) transgender people. The Plaintiffs include one state employee who does not receive the legal protection accorded to state employees who hold those beliefs. Moreover, the Plaintiffs include four ministers, a church worker, and a church who do not receive the legal protection accorded to ministers, church workers, and churches who share those beliefs. If these plaintiffs do not have standing to challenge H.B. 1523 pre-enforcement, it is unclear who does.

While acknowledging that non-economic injuries can be sufficient to confer standing, the Defendants rely on the phrase, often quoted out of context, from *Valley Forge Christian College v. Americans United for Separation of Church & State* that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not, by itself, sufficient to confer standing. 454 U.S. 464, 485 (1982). Doc. 30 at 11. But the Defendants fail to point out the context in which that statement was made. As the Supreme Court stated in that case:

> We simply cannot see that respondents have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.

454 U.S. at 486-487 (footnotes omitted, emphasis in original).

By contrast, the Plaintiffs here are Mississippi citizens challenging a Mississippi statute on the ground that, through that statute, their State government publicly endorses certain religious beliefs and moral convictions which they do not share, provides legal protections to those who subscribe to those views but not to those who don't, and disfavors and condemns certain groups to which some of the Plaintiffs belong. In our amended memorandum, doc 14 at 11-12, where we pointed out that the crèche-menorah cases were brought by residents of the towns where they were displayed, we quoted *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009) to the effect that parents whose children observe a state-imposed moment of silence and are "offended" by it have standing to challenge it. Further, we argued that citizens who observe their State's endorsement in a statute of a religious belief which offends them have just as much standing as those who observe a crèche or a moment of silence.

The Defendants never respond to *Croft* or its holding that being "offended" by an endorsement which a plaintiff observes in her own school district is sufficient to grant standing. And while they argue that the "state-sponsored religious symbol" cases "are inapposite," doc. 30 at 13, that is simply not correct. If a statute was passed endorsing the Christian faith as the official religion of a particular state, surely a non-Christian resident of that state who was offended by that endorsement could challenge it just as he could challenge a crèche or a cross erected by the local government in his community. And if a state enacted a statute endorsing the Ten Commandments, surely a citizen who was offended by that endorsement could bring a challenge just as she could if the

Commandments were on the wall of her child's classroom. *See, Stone v. Graham*, 449 U.S. 39, 42 (1980). Indeed, the language of the Establishment Clause reads: "Congress shall make *no law* respecting an establishment of religion." (Emphasis added.) Given the incorporation of the First Amendment and its application to the states through the Fourteenth Amendment, the passage of a state *law* endorsing certain religious beliefs raises constitutional concerns as much as a state-sponsored religious symbol, and standing requirements should be no more strict when challenging a law than they are when a symbol, a placard, a prayer, or a moment of silence is at issue.

Nevertheless, the Defendants attempt to distinguish *Awad v. Ziriax,* 670 F.3d 1111 (10th Cir. 2012), by pointing out that in addition to analogizing the "personal and unwelcome contact" the plaintiff had with the constitutional amendment to the contact plaintiffs in other cases had with religious symbols, the Tenth Circuit mentioned that the plaintiff alleged he could not probate his will. Doc. 30 at 12, *citing* 670 F.3d at 1120. But that additional allegation by the *Awad* plaintiff does not undermine the analogy. Moreover, the Plaintiffs in the present case are disfavored by the creation of legal protections exclusively for those who subscribed to the endorsed beliefs, and therefore H.B. 1523 disfavors their religious beliefs just as the Oklahoma constitutional amendment "would disfavor [Mr. Awad's] religion relative to others." 670 F.3d at 1123. And while Defendants here claim that *Awad* "represents the outer edge of Establishment Clause standing doctrine," doc. 30 at 11, it actually seems to be right in the center given that it applies the standing analysis in the symbol cases to the core of the Establishment Clause

language that government "shall make *no law*" endorsing religion. At any rate, whether on the outer edge or in the middle, the reasoning of the *Awad* case applies here.[1]

The Defendants quote *In Re Navy Chaplaincy* for the proposition that the religious display and prayer cases should not be extended so that "anyone who becomes aware of a government action that allegedly violates the Establishment Clause [can] sue over it on the ground that they are offended by the allegedly unconstitutional 'message' communicated by that action." Doc. 30 at 14, *quoting*, 534 F.3d 756, 764-765 (D.C. Cir. 2008). But the Plaintiffs are not just "anyone who becomes aware of government action that allegedly violates the Establishment Clause." They are Mississippians suing over a Mississippi law that endorses religious beliefs that they do not share and that creates special legal protections only for those who share the beliefs.

The Ninth Circuit explained it well in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc). There the Court analogized the plaintiffs in the Supreme Court's *Valley Forge* case to "Protestants in Pasadena suing San Francisco over its anti-Catholic resolution." *Id.* at 1052. The Ninth Circuit went on to say:

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[1] The Defendants claim that the Tenth Circuit "retrenched somewhat" from the *Awad* decision in *COPE v. Kansas State Bd. of Educ.*, --- F.3d ---, 2016 WL 1569621 (10th Cir. Apr. 19, 2016). But a review of the *COPE* decision makes it clear that while the Court properly distinguished *COPE* from *Awad*, there was no retrenchment from *Awad's* holding and reasoning. In *COPE*, plaintiffs alleged that optional science curriculum guidelines improperly discriminated against religion by advocating the teaching of scientific explanations for the origin of life. 2016 WL 1569621 at *2. The Tenth Circuit held that the guidelines did not "intend to promote a non-religious worldview," both because they were silent with respect to religion and because school districts were permitted to "delve deeper into the limitations of the scientific method or to teach alternative origins theories." *Id.* at *3. Here, by contrast, HB 1523 expressly promotes specific religious beliefs and provides absolute protections to people who hold those beliefs.

> One has to read the whole Valley Forge sentence quoted, and not stop at 'psychological consequence,' to understand it. A 'psychological consequence' does not suffice as concrete harm where it is produced merely by 'observation of conduct with which one disagrees.' But it does constitute concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community. For example, in the school prayer and football game cases, nothing bad happened to the students except a psychological feeling of being excluded. Likewise in the crèche and Ten Commandments cases, nothing happened to the non-Christians, or to people who disagreed with the Ten Commandments or their religious basis, except psychological consequences. What distinguishes the cases is that in Valley Forge, the psychological consequence was merely disagreement with the government, but in the others, for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community.

Id.

The Ninth Circuit's analysis is consistent with the Supreme Court's explanation of the Establishment Clause injury that flowed from school-sponsored religious speech in *Santa Fe Independent School Dist. v. Doe*:

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch [v. Donnelly]*, 465 U.S. [666], at 688 [(1984)] (O'CONNOR, J., concurring).

530 U.S. 290, 309-310 (2000). The same is true for a statute, in which the "audience" for the ancillary message are not those attending a football game, but the residents of the state who are governed by the statute.

As mentioned in our memorandum supporting the motion, doc. 14 at 13 n. 2, the Governor and the legislature caused these injuries by enacting and signing H.B. 1523. The Defendants' responsibilities with respect to the statute are outlined in the complaint, and

clearly a favorable decision will redress the injury by enjoining the statute. Although the Defendants attempt to address these factors in their brief, doc. 30 at 23-24, they provide no coherent explanation to the contrary. Clearly the Plaintiffs have standing here.

Standing Regarding the Equal Protection Clause

The Defendants claim that "none of the Plaintiffs allege that they have been denied anything as a result of H.B. 1523." Doc. 30 at 16. But what they claim is the right to equal treatment. As the Supreme Court made clear in *Heckler v. Matthews*, when discussing standing to bring an equal protection claim, a plaintiff is not required to demonstrate that he was denied some pre-existing benefit. Instead, as the Court said:

> [T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982), can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. Accordingly, as Justice Brandeis explained, when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

Heckler v. Matthews, 465 U.S. 728, 739-740 (1984) (footnotes omitted). Contrary to the contention of the Defendants, these are not speculative "injuries . . . tied to the hypothetical future actions of unknown person," doc. 30 at 17, but instead are part of the designation of disfavored groups and the unequal treatment built into H.B. 1523 that will take effect if it is not enjoined.

Heckler's equal protection language about "stigmatizing members of the disfavored group" as "less worthy participants in the political community" mirrors the language (quoted earlier) about the injury stemming from Establishment Clause violations contained in *Santa Fe Independent School Dist. v. Doe*: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community.'" 530 U.S. at 309-310, *quoting Lynch*, 465 U.S., at 688 (O'Connor, J., concurring). Thus, the factors that confer Establishment Clause standing on the Plaintiffs also confer it for purposes of the Equal Protection Clause.

Nevertheless, according to the Defendants, the Plaintiffs are not the "objects" of H.B. 1523, and therefore have no standing. Doc. 30 at 18. But the terminology about "objects" comes from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992), and the Court made it clear in that discussion that it was talking about causation and redressability. As noted at the end of the discussion earlier in this brief about Establishment Clause standing, causation and redressability are clearly present here.

Beyond that, the Defendants' contention seems to be that because H.B. 1523 provides certain protections to those who subscribe to the endorsed beliefs, those people are the only "objects" of the law and the only ones with standing. But that is like saying that men are the only objects of a law providing benefits exclusively to men, and therefore women cannot challenge it. Of course they can, and of course the Plaintiffs can challenge H.B. 1523 here.

The Establishment Clause Merits

According to the Defendants, H.B. 1523 is an accommodation of religion and of freedom of conscience, and therefore has a secular purpose. But as the Supreme Court explained in *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005):

> *Lemon* said that government action must have 'a secular ... purpose,' 403 U.S., at 612, and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and *not merely secondary to a religious objective*.

Id. at 864 (emphasis added). The Court in *McCreary County* specifically noted that in the Supreme Court's earlier decision in *Wallace v. Jaffree*, "the Court declined to credit Alabama's stated secular rationale of 'accommodation' for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray." 545 U.S. at 864, *citing Wallace*, 472 U.S. at 57 n.45.

Similarly, the claim of a secular motive in "accommodat[ing]" religion is implausible given that Mississippi had already passed in 2014 its own Mississippi Religious Freedom Restoration Act (Miss. Code Ann. § 11-61-1) which is specifically designed to accommodate religious beliefs. The Mississippi RFRA, like other RFRA's around the country, does not endorse specific religious beliefs, but instead applies to all "exercise[s] of religion." By contrast, H.B. 1523 singles out only certain specific religious beliefs, which suggests that the purpose of passing 1523 was to endorse those three, specific beliefs and that any purpose of accommodation was at most (in the words of *McCreary County*) "merely secondary to a religious objective."

Indeed, while a large number of RFRAs and related statutes purporting to provide accommodation for religious beliefs have been passed around the country since the 1990s, H.B. 1523 is *the only one* whose text sets forth specific religious beliefs that it endorses and for which it provides special legal protection. Most, like Mississippi's earlier 2014 RFRA, require that any burden on a person's exercise of religion be justified by a compelling governmental interest and be the least restrictive means of furthering that interest. *See* Miss. Code Ann. § 11-61-1(5). Some statutes are more particularized. For example, a small number of recent enactments provide that ministers and churches may not be required to solemnize marriages and provide related services that violate their sincerely held religious beliefs. *See* Laws of Florida, Chapter 2016-50 (approved by the Governor 3/10/16; to take effect as Fl. Stat. § 761.061 on 7/1/16), *available at* http://laws.flrules.org/2016/50; N.C. Stat. § 51-5.5; UT ST §§ 63-20-201, 63-20-301. But none of the texts of those statutes, or any others, identify any *specific* religious beliefs in the manner that H.B. 1523 does.[2]

The Defendants cite the so-called "Church Amendment" regarding recipients of federal health care funds, but it is important to note that this particular federal statute

[2] The RFRA and related statutes in the various states as of the present date include the following: Ala. Const. Art. I, §3.01; Ariz. Rev. Stat. §41-1493.01; Ark. Code § 16-123-401 *et seq.*; Conn. Gen. Stat. §52-571b; Fla. Stat. §761.01, *et seq.*; Fla. Stat. § 761.061 (effective 7/1/16); Idaho Code §73-402; Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*; Ind. Code Ann. § 34-13-9-0.7, *et seq.*; Kan. Stat. §60-5301, *et seq.*; Ky. Rev. Stat. §446.350; La. Rev. Stat. §13:5231, *et seq.*; Miss. Code §11-61-1; Mich. Comp. Laws §§ 722.124e, 722.124f, 710.23g, 400.5a; Mo. Rev. Stat. §1.302; N.M. Stat. §28-22-1, *et seq.*; N.C. Stat. § 51-5.5; Okla. Stat. tit. 51, §251, *et seq.*; Pa. Stat. tit. 71, §2403; R.I. Gen. Laws §42-80.1-1, *et seq.*; S.C. Code §1-32-10, *et seq.*; Tenn. Code §4-1-407; 2015 Tenn. S.B. 1556 (Adopted April 27, 2016); Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*; UT ST § 63-20-101 *et seq.;* Va. Code §57-2.02.

protects both people who decline to participate in abortions and those who choose to participate. In particular, 42 U.S.C. § 300-7(c) (1) provides:

> (1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act (42 U.S.C. 201 et seq.), the Community Mental Health Centers Act (42 U.S.C. 2689 et seq.), or the Developmental Disabilities Services and Facilities Construction Act (42 U.S.C. 6000 et seq.) after June 18, 1973, may –
>
> > (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
> >
> > (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

By contrast, H.B. 1523 plays favorites, endorsing and providing protection for only those people who hold the preferred religious beliefs.

The alleged secular purpose of H.B. 1523 is akin to the alleged secular purpose of "fairness" put forward in *Edwards v. Aguilard*, 482 U.S. 578 (1987) in an effort to justify Louisiana's bill requiring the teaching of "creation science." As the Supreme Court explained, "the goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution," given that "[t]he Act forbids school boards to discriminate against anyone who 'chooses to be a creation-scientist' or to teach 'creationism,' but fails to protect those who choose to teach

evolution or any other non-creation science theory, or who refuse to teach creation science." *Id.* at 588.

Thus, H.B. 1523 is extreme and unusual both in the specificity of the three religious beliefs and moral convictions that it endorses and also in the biased manner in which it provides special legal protections only for those who adhere to those beliefs. This demonstrates that it is not a justifiable secular accommodation at all, but is, at best, "secondary to a religious objective." *McCreary County*, 545 U.S. at 864. These circumstances, as well as the text of the statute and the legislative debate excerpts included in the Plaintiffs' pleadings in *C.S.E. v. Bryant*, No. 3:16cv442-CRW-LRA (which is being consolidated with the present case for purposes of the preliminary injunction hearing), clearly demonstrate that "the government's actual purpose is to endorse . . . religion." *Wallace v. Jaffree*, 472 U.S. 38, 57 n. 41 (1975) (*quoting*, *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring)).

As the Fifth Circuit has stated, "Government unconstitutionally endorses religion whenever it appears to 'take a position on questions of religious belief,' or makes 'adherence to a religion relevant in any way to a person's standing in the political community,'" *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 280 (5th Cir. 1996) (citations omitted). Clearly the State has done so through H.B. 1523. And whether this was the "government's actual purpose," or whether the bill in effect "conveys a message of endorsement," *Wallace*, 472 U.S. at 57 n. 41 (*quoting*, 465 U.S. at 690 (O'Connor, J., concurring)), or both, the statute is invalid.

The Equal Protection Clause Merits

Part of the Defendants' response regarding the Equal Protection claim is that H.B. 1523 is not as comprehensive as the Colorado amendment struck down in *Romer v. Evans,* 517 U.S. 620 (1997). Doc. 30 at 36, 40-41. Be that as it may, *Romer* is controlling in three ways. First, it demonstrates that the different treatment imposed upon different groups in H.B. 1523 is irrational (and certainly does not meet the heightened scrutiny that should be imposed). Second, it demonstrates that treatment is born of animus. Third, although H.B. 1523 is not as comprehensive as the Colorado amendment, it nevertheless "imposes a special disability" upon the disfavored groups and "forbids the safeguards that others enjoy and may seek without constraint." 517 U.S. at 631.

The Defendants argue that the bill has a rational relationship to a legitimate governmental objective of protecting the "right of citizens to hold the religious beliefs and moral convictions identified in Section 2 of the law." But there is no threat to the right of citizens to hold those beliefs. Moreover, as explained earlier in this brief, the Mississippi RFRA already protects citizens against burdens on their religious beliefs imposed by the state government. The First Amendment and Mississippi's Constitution also protect the rights of religious expression and freedom of conscience of all people. H.B. 1523 goes far beyond those protections – and far beyond any other state statute – by providing certain exclusive legal privileges only to those who share the State's endorsed beliefs, by denying them to those who don't, and by targeting the three groups who are disfavored by those who subscribe to the endorsed beliefs. There is no rational basis for these distinctions. *See, City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 448 (1985)

("mere negative attitudes . . . are not permissible bases for treating a home differently from apartment houses, multiple dwellings, and the like.").

The Defendants also contend there is no evidence that H.B. 1523 is the result of animus. Doc. 30 at 35. But as explained earlier, H.B. 1523 is unprecedented among all of the RFRAs and other purported accommodation bills. While it is different in some respects from the Colorado constitutional amendment in *Romer,* H.B.1523 is similar in the sense that its extreme and unprecedented nature shows that is one of the "laws . . . [that] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer,* 517 U.S. at 634-635.

According to Defendants, H.B.1523 is different from the Colorado amendment in *Romer* because 1523 is not as broad. Doc. 30 at 40-41. Nevertheless, H.B. 1523 will, for example, preclude and repeal certain aspects of the City of Jackson's new anti-discrimination ordinance (§ 86-227 of Jackson, Mississippi Code of Ordinances, contained in Plaintiff's supplement to the motion for preliminary injunction, doc. 32-17). That ordinance protects the people of Jackson against discrimination based on a number of characteristics, including sexual orientation and gender identity, in a wide variety of contexts, including but not limited to employment, public accommodations, and housing. However, H.B. 1523 will, among other things, prohibit enforcement of the anti-housing discrimination provisions in the Jackson ordinance with respect to religious organizations who own property and rent it to the public but choose to exclude gay couples and transgender people (see Section 3(1)(c) of H.B. 1523), will prohibit enforcement of the public accommodations provisions with respect to the goods and services identified in

Section 3(5) of 1523, and will prohibit enforcement of the employment and public accommodations provisions with respect to "sex specific" standards regarding dress, grooming, and bathrooms identified in Section 3(6) of 1523.

The Defendants claim that the Jackson ordinance is "actually strikingly similar to H.B. 1523 in its recognition that religious beliefs and organizations must be protected as [it] exempts religious corporations, associations, and societies from the anti-discrimination ordinance." Doc. 30 at 41. But that is not quite accurate. The ordinance does not exempt religious organizations entirely, but only to the extent the organization "employs an individual of a particular religion to perform work connected with the performance of religious activities." See § 86-228(1).

Independent of the comparison between the breadth of the Colorado constitutional amendment in *Romer* and the breadth of H.B. 1523, the holding of *Romer* is applicable because H.B. 1523 precludes people in the targeted groups from obtaining the protection of the State in certain instances, thus "impos[ing] a special disability upon those persons alone," "forbid[ing them] the safeguards that others enjoy or may seek without constraint," and declaring that "it shall be more difficult for one group of citizens than for all others to seek aid from the government." 517 U.S. at 631, 633. It also precludes those who do not subscribe to the endorsed beliefs from sharing the legal safeguards granted to those who do, All of this is, as the Court explained in *Romer*, "itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

II. THE OTHER FACTORS WEIGH IN FAVOR OF A PRELIMINARY INJUNCTION.

The Defendants only argument about irreparable injury is that because no plaintiff has standing, none can have an irreparable injury. Doc. 30 at 41. But as discussed earlier, they do have standing.

According to the Defendants, the "conscientious objectors" will suffer harm. Doc. 30 at 42. But as mentioned previously, the Mississippi RFRA remains in place, as do the First Amendment and the free speech and religion clauses of the Mississippi Constitution.

Regarding the public interest, the harm from H.B. 1523 does not flow, as the Defendants suggest, from conjectural scenarios, but instead from the implementation of a law that violates the First and Fourteenth amendments. The public interest favors an injunction in order to prevent this constitutional violation. Moreover, as demonstrated by the supplement to our preliminary injunction motion, H.B. 1523 has and will continue to have an adverse economic impact in Mississippi, but that could be mitigated by an injunction.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the motion for a preliminary injunction should be granted.

June 21, 2016

Respectfully submitted,

s/Robert B. McDuff
ROBERT B. MCDUFF, MSB # 2532
SIBYL C. BYRD, MSB # 100601
JACOB W. HOWARD, MSB #103256
MCDUFF & BYRD
767 North Congress Street
Jackson, MS 39202
(601) 259-8484
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

REILLY MORSE, MSB # 3505
BETH L. ORLANSKY, MSB # 3938
JOHN JOPLING, MSB # 3316
CHARLES O. LEE, MSB #99416
MISSISSIPPI CENTER FOR JUSTICE
P.O. Box 1023
Jackson, MS 39205-1023
(601) 352-2269
borlansky@mscenterforjustice.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of the Court using the ECF system, which sent notification to all counsel who have entered their appearance in this matter.

This the 21st day of June, 2016.

s/ Robert B. McDuff
ROBERT B. MCDUFF

G

Church Amendments, 42 U.S.C. § 300a-7

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service
Subchapter VIII. Population Research and Voluntary Family Planning Programs

§ 300a-7. Sterilization or abortion

(a) Omitted

(b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions

The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C.A. § 6000 et seq.] by any individual or entity does not authorize any court or any public official or other public authority to require--

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to--

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c) Discrimination prohibition

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C.A. § 6000 et seq.] after June 18, 1973, may--

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may--

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(e) Prohibition on entities receiving Federal grant, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds

No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C.A. § 15001 et seq.] may deny admission or otherwise discriminate against any

applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

H

Public Health Service Act, 42 U.S.C. § 238n

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service
Subchapter I. Administration and Miscellaneous Provisions
Part B. Miscellaneous Provisions

§ 238n. Abortion-related discrimination in governmental activities regarding training and licensing of physicians

(a) In general

The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that--

(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

(3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(b) Accreditation of postgraduate physician training programs

(1) In general

In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standards [FN1] that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.

(2) Rules of construction

(A) In general

With respect to subclauses (I) and (II) of section 292d(a)(2)(B)(i) of this title (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection.

(B) Exceptions

This section shall not--

(i) prevent any health care entity from voluntarily electing to be trained, to train, or to arrange for training in the performance of, to perform, or to make referrals for induced abortions; or

(ii) prevent an accrediting agency or a Federal, State or local government from establishing standards of medical competency applicable only to those individuals who have voluntarily elected to perform abortions.

(c) Definitions

For purposes of this section:

(1) The term “financial assistance”, with respect to a government program, includes governmental payments provided as reimbursement for carrying out health-related activities.

(2) The term “health care entity” includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.

(3) The term “postgraduate physician training program” includes a residency training program.

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Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat 3034

United States Public Laws
111th Congress – First Session
PL 111-117, December 16, 2009, 123 Stat 3034
Consolidated Appropriations Act, 2009

. . .

TITLE V
GENERAL PROVISIONS

. . .

SEC. 508.
. . .

(d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

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Courts interested in circumventing the *Smith* decision, therefore, appear to have ample means to do so. In fact, several courts of appeals have done just that in cases arising after *Smith*. In *Ferguson v. Commissioner*,[210] for example, the court did not even cite *Smith* in upholding a free exercise claim against a requirement that those in a federal tax court swear or affirm before testifying.[211] In another example, *Salvation Army v. Department of Community Affairs*,[212] the court remanded a free exercise claim specifically to allow the claimants to raise a "hybrid" claim involving freedom of association.[213] Thus, for courts intent on granting a free exercise exemption, *Smith* may not be as big an obstacle as it appears.

2. *Focus on the Legislature*

Because few courts evidence such an intention, however, those interested in protecting their religious liberty should turn their attention to the legislature. There exists much evidence to suggest that legislatures will be receptive to their claims. Indeed, a search through all the existing statutes, both state and federal, reveals that the terms "religion" or "religious" appear over 14,000 times.[214] Religious exemptions, in turn, exist in over 2,000 statutes.[215] Although the probative value of these numbers is obviously limited,

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(1988)); see also Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (rejecting argument that *Smith* is limited to criminal statutes).

[210] 921 F.2d 588 (5th Cir. 1991).

[211] Id. at 591. The court instead cited *Yoder* for the proposition that " 'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' " Id. at 589 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[212] 919 F.2d 183, 190 (3d Cir. 1990).

[213] Id. Another court iguored *Smith* altogether. In South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203 (6th Cir. 1990), cert. denied, 111 S. Ct. 754 (1991), the court never even mentioned the case. It applied a compelling interest test in rejecting a church's challenge to a state requirement that it pay premiums into a public workers' compensation program on behalf of its employees. Id.

[214] This number represents the results of a LEXIS search using the term "religio!" (LEXIS, Codes library, AllCde file). Obviously, not every mention of "religion" or "religious" involved an exemption, or a prohibition of discrimination. The number is nonetheless included because it is somewhat staggering to consider how often legislatures focus on, or at least mention, religion, for whatever reason.

[215] This number represents the results of another LEXIS search (Codes Library, AllCde file, search terms: "religio! w/20 exempt! or except!"). The actual number of code sections retrieved was 2,523; it has been discounted to account for the coincidental occurrence of the terms religion and exemption when a religious exemption was not granted. Whether discounting 500 sections is accurate is open to question, as every section was not studied. A quick review, however, suggested that one in five sections contained coincidental occurrences of these terms.

a closer look at federal statutes and those of four states[216] suggests that the political process has been fairly protective of religious freedom.

In the United States Code, for example, exemptions exist in food inspection laws for the ritual slaughter of animals, and for the preparation of food in accordance with religious practices.[217] The tax laws contain numerous exemptions for religious groups[218] and allow deductions for contributions to religious organizations.[219] Federal copyright laws contain an exemption for materials that are to be used for religious purposes.[220] Antidiscrimination laws, including Title VII,[221] the Fair Housing Act,[222] and the Aid to the Disabled Act,[223] contain exemptions for religious organizations. Ministers are automatically exempt from compulsory military training and service.[224] Aliens seeking asylum can do so on the grounds that they will suffer religious persecution if returned to their home countries[225] and gambling laws contain an exemption for religious organizations.[226] Those in the military may wear religious apparel while wearing their uniforms, subject to limitations imposed by the Secretary of Defense.[227] And last, but certainly not least for purposes of this Note, federal drug laws contain an exemption for the religious use of peyote by members of the Native American Church.[228]

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216 Those states are Alabama, Minnesota, California, and Connecticut. They were chosen with an eye toward assembling a group that represented states of different sizes and in different parts of the country.

217 7 U.S.C. §§ 1902, 1906 (1988).

218 See, e.g., 26 U.S.C. § 501(c)(3) (1988) (exempting religious organizations from federal income tax); id. § 1402(g) (exempting self-employed religious workers from payment of social security tax if they object to receiving benefits of private and public insurance).

219 Id. § 508(d).

220 17 U.S.C. § 110(3)-(4) (1988).

221 42 U.S.C. § 2000e-1 (1988). See E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (the provisions of Title VII do not apply to the church-minister relationship), cert. denied, 456 U.S. 905 (1982).

222 42 U.S.C. § 3607 (1988) (religious groups may give preference to prospective tenants of the same religion).

223 Id. § 12187 (religious organizations not required to comply with provisions of the act).

224 50 U.S.C. app. § 456(g)(1) (1988).

225 8 U.S.C. § 1158 (1988).

226 18 U.S.C. § 1955(e) (1988).

227 10 U.S.C. § 774 (1988). Goldman v. Weinberger, 475 U.S. 503 (1986), illustrates that the limitations imposed by the Secretary are normally upheld by the courts. In *Goldman*, the Court upheld a military dress regulation that forbade the wearing of yarmulkes. Id.; see also Sherwood v. Brown, 619 F.2d 47 (9th Cir. 1980) (rejecting free exercise challenge to navy regulation that forbade wearing of turban).

228 21 C.F.R. § 1307.31 (1991) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.").

At the same time that religious organizations are exempted from several antidiscrimination laws, numerous statutes prohibit other organizations from discriminating on the basis of religion. Although these statutes are based on equal protection grounds, rather than on free exercise grounds, they illustrate the protection granted to religion by legislatures. An example of such statutes is the provision prohibiting the selection of civil service employees on the basis of religion.[229] Further, federally assisted institutions of higher education are forbidden to discriminate on the basis of religion,[230] whereas the same type of institutions run by religious groups are free to discriminate on the basis of sex, if their religion so dictates.[231] Title VII prohibits employers and labor organizations from discriminating on the basis of religion, and requires both groups to reasonably accommodate workers' religious practices.[232] Organizations receiving federal money under the National and Community Services Act are prohibited from engaging in religious discrimination.[233] Finally, Organizations receiving federal assistance under the Public Works Act are forbidden to practice religious discrimination.[234]

The legislatures of the four states studied were equally beneficent toward religious adherents, although the number and type of exemptions did vary from state to state. All four states exempt churches and religious organizations from a wide array of tax obligations; from property taxes[235] to franchise taxes[236] to sales taxes on church restaurants and dining rooms.[237] All four also allow tax deductions for contributions to religious organizations.[238] All four exempt from militia service ordained ministers and divinity students as well as those who object to such service on religious grounds.[239] In some states, children whose parents object to their being taught certain subjects are excused from those classes.[240] And children whose parents object to their being immunized may also be excused from

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229 5 U.S.C. § 3302 (1988).

230 20 U.S.C. § 1142 (1988).

231 Id. § 1681(a)(3).

232 42 U.S.C. §§ 2000e-2(a)(1), -2(c)(1), 2000e(j) (1988).

233 Id. § 12635(c).

234 Id. § 6727.

235 Ala. Code § 40-9-1 (1990); Cal. Rev. & Tax. Code § 207 (Deering 1991); Conn. Gen. Stat. § 12-66 (1990); Minn. Stat. § 317A.909 (1991).

236 See, e.g., Ala. Code § 10-2A-226 (1990).

237 See, e.g., id. § 40-12-151.

238 See, e.g., Cal. Rev. & Tax. Code §§ 24357, 24359 (Deering 1991).

239 See, e.g., Ala. Code § 31-2-6 (1990); Cal. Mil. & Vet. Code § 125 (Deering 1991).

240 See, e.g., Ala. Code § 16-41-6 (1990) (children who object on religious grounds exempt from learning about certain diseases and symptoms, and from drug abuse education); Cal. Educ. Code § 51240 (Deering 1991) (exempting children who object on religious grounds from health, family life, and sex education classes).

such obligations.[241] Religious schools, in turn, receive various exemptions and protections, ranging from an exemption from antidiscrimination laws[242] to an exemption from registration and approval requirements.[243]

All four states also have various antidiscrimination laws that forbid discrimination on the basis of religion in such contexts as public employment[244] and educational benefits.[245] Gambling regulations in two of the states contain exemptions for religious organizations.[246] Two states also exempt religious organizations from solicitation regulations and reporting requirements.[247] Religious corporations, in each of the states, are free from many state corporate rules and regulations.[248] Employees in two of the states are excused from physical examination requirements if they object to such exams for religious reasons.[249] Child care facilities and preschools that are run by religious organizations are free, in one state, from licensing requirements and other state regulations.[250]

Finally, each of the states grants some unique exemptions to religious groups. Alabama, for example, exempts church buses from state inspection requirements,[251] and exempts income earned by foreign missionaries from its income tax laws.[252] California allows religious exemptions from mandated autopsies (to be claimed by members of the decedent's family),[253] and provides various exemptions from health[254] and insurance regulations[255] to those who rely on prayer for healing. Connecticut allows churches and reli-

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241 See, e.g., Ala. Code § 16-30-3 (1990).

242 Cal. Educ. Code § 221 (Deering 1991).

243 Minn. Stat. § 136A.657 (1991).

244 See, e.g., Cal. Lab. Code § 1735 (Deering 1991); Conn. Gen. Stat. 7-419 (1990); Minn. Stat. § 363.03 (1991).

245 See, e.g., Cal. Educ. Code § 69535 (Deering 1991) (Cal Grant Program education awards cannot be based on religion).

246 Ala. Code § 34-6-15 (1990); Cal. Bus. & Prof. Code § 19556 (Deering 1991).

247 Conn. Gen. Stat. § 21a-190d (1990); Cal. Welf. & Inst. Code § 148.3 (Deering 1991).

248 See, e.g., Minn. Stat. § 307.01, 307.09 (1990); Cal. Rev. & Tax. Code § 23737 (Deering 1991) (exempting religious corporations from corporate tax).

249 Cal. Gov't Code § 19261 (Deering 1991); Conn. Gen. Stat. 31-40b (1990).

250 Ala. Code § 38-7-3 (1990).

251 Id. § 37-3-4(a)(9) (1990).

252 Id. § 40-18-2.1 (1990).

253 Cal. Gov't Code § 27491.43 (Deering 1991).

254 See, e.g., Cal. Health & Safety Code §§ 3199, 3286 (Deering 1991) (exempting employees who rely on prayer for healing from various physical testing and treatment regulations); Cal. Welf. & Inst. Code § 7104 (Deering 1991) (exempting detainees in state mental or psychiatric institutions, who rely on prayer for healing, from forced treatment).

255 See, e.g., Cal. Ins. Code § 10494.2 (Deering 1991) (exempting employees of religious organizations from public insurance coverage); Cal. Unemp. Ins. Code § 2902 (exempts religious organizations who rely on prayer for healing from having to contribute to state disability fund).

gious organizations to ignore the state prohibition on Sunday work,[256] and allows religious groups to show movies without obtaining a license.[257] And Minnesota allows an exemption from its prohibition against corporate farming for farms run by religious groups;[258] exempts the religious use of peyote from its drug laws;[259] and exempts funeral directors who belong to religious organizations that object to embalming from the requirement of obtaining an embalming license.[260]

The exemptions mentioned are not exhaustive of those contained in the federal and state statutes, nor are they meant to be. They are included only to provide a sense of the degree to which religion and religious practices are accommodated and protected by legislatures. Although these protections vary somewhat from state to state, the statutory exemptions nonetheless serve to contrast the treatment of religious practice in the legislatures to that in the courts. In numerical terms, at least at the federal level (state court decisions were not studied), it is clear that religious groups have received significantly more exemptions from legislatures than they have from federal courts.

The results of this brief survey of federal and state statutes, though illuminating, are not very surprising. That legislatures are helpful to "majority" religions[261] is generally recognized and rarely questioned. Indeed, the very

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256 Conn. Gen. Stat § 53-302a (1990).

257 Id. § 29-117.

258 Minn. Stat. § 500.24 (1991).

259 Id. § 152.02.

260 Id. § 149.02.

261 The term "majority" appears in quotations because, although the distinction between majority and minority religions is made regularly in academic literature, it is difficult to discern precisely which religion or religions comprise the majority. A recent Gallup Poll revealed that 56% of those surveyed consider themselves Protestant, while 25% consider themselves Catholic, 2% Jewish, 6% "other" (a group that includes Eastern Orthodox, Mormons, and Muslims), and 11% expressed no preference or affiliation. George W. Cornell, Religious Affiliation Declining, Wash. Post, Oct. 26, 1991, at B6. Protestants alone, or together with Catholics, are normally considered the "majority" religion or religions, but this characterization—although numerically correct—overlooks the different denominations within these groups. Southern Baptists, Fundamentalists, Evangelicals, and Methodists are all Protestants, for example, but harbor different religious and, at times, political beliefs. If one views religious groups in terms of denominations, there is simply no numerical majority religion. See Yearbook of American & Canadian Churches 1987 (Constant H. Jaquet, Jr. ed., 1987) (listing 128 distinct religious bodies and 345,961 churches in the United States). Although defining the term "majority" more precisely is beyond the scope of this Note, and as used here "majority" religion will connote those religions generally considered within the mainstream of American society (i.e., Protestants and Catholics), it should at least be recognized that this is an inherently inaccurate term as applied to religious groups. There is simply no religious majority, for example, akin to the white majority.

existence of so many Establishment Clause cases[262] suggests that legislatures tend, at least in the eyes of plaintiffs, to be too helpful to (majority) religious groups. If such religious groups are forced to rely on the political process rather than the courts for protection, therefore, one would expect their success in that process to continue.[263]

3. *Minority Religions*

Many argue, however, that religious minorities would suffer if left to rely solely on the political process. As Professor McConnell asserts:

> In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice.[264]

That minorities of any kind fare worse in the political arena than majorities almost goes without saying. Even Justice Scalia, writing for the *Smith* majority, recognized "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[265] Thus, religious minorities have the most to lose by the decision in *Smith*, the argument continues, for they apparently lost in that case the protection of the one institution—the courts—upon which they could rely.[266]

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[262] Cases arising under this clause involve challenges to government aid, support, or accommodation of religious practices or religious groups. See, e.g., Everson v. Board of Educ., 330 U.S. 1 (1947) (aid to parents of children attending private religious school to cover costs of busing). For a general discussion of cases arising under the Establishment Clause, see Nat Stern, State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court, 57 U. Cinn. L. Rev. 1175, 1181-83, 1194-96 (1989), and articles cited therein.

[263] It is interesting in this regard to consider Representative Solarz' statement that our nation has always accommodated religion, citing as an example "the use of wine in religious ceremonies during Prohibition." Hearings, supra note 17, at 19. His clear implication is that the Court historically has been responsible for such accommodations, and that they are now in jeopardy as a result of *Smith*. Yet the exemption for sacramental wine during Prohibition was created by Congress, not the Court. See National Prohibition Act, 2 U.S.C. §§ 11-40 (1919), repealed by Liquor Law Repeal and Enforcement Act, ch. 740, § 1, 49 Stat. 872, 872 (1935).

[264] McConnell, supra note 15, at 1136.

[265] *Smith*, 494 U.S. at 890.

[266] McConnell, supra note 15, at 1136 ("The courts offer a forum in which the particular infringements of small religions can be brought to the attention of the authorities and (assuming the judges perform their duties impartially) be given the same sort of hearing that more prominent religions already receive from the political process.").