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;
JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, State of Mississippi;
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

RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PARTIES

***Rims Barber, et al. v. Governor Phil Bryant, et al.,* No. 16-60477**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

1. Plaintiffs-Appellees
    a. Rims Barber
    b. Carol Burnett
    c. Joan Bailey
    d. Katherine Elizabeth Day
    e. Anthony Laine Boyette
    f. Don Fortenberry
    g. Susan Glisson
    h. Derrick Johnson
    i. Dorothy C. Triplett
    j. Renick Taylor
    k. Brandiilyne Mangum-Dear
    l. Susan Mangum
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3. Defendants-Appellees
    a. Governor Phil Bryant, State of Mississippi
    b. John Davis, Executive Director of the Mississippi Department of Human Services

4. Counsel for Defendants-Appellees
   a. Johnathan F. Mitchell
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5. Defendants in *Barber, et al. v. Bryant et al.*, U.S.D.C. S.D. Miss. Case No. 3:16cv417
   a. Jim Hood, Attorney General of Mississippi
   b. Judy Moulder, Mississippi State Registrar of Vital Records

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7. Plaintiffs-Appellees in related matter *Campaign for Southern Equality, et al., v. Byrant, et al.*, 5th Circuit Case No. 16-60478
   a. Campaign for Southern Equality
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Counsel of Record for Plaintiffs-Appellees

House Bill 1523 provides that "the state government shall not take any discriminatory action" in a variety of contexts against people for actions taken "consistent with" certain specific religious beliefs or moral convictions against gay and lesbian people who are married or may marry, unmarried people engaging in sexual relations, and transgender people. Although *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015) was decided over a year ago, neither the Governor in his motion for stay, nor anyone else during the course of this litigation or the floor debates on the bill, has pointed to a single instance of the state government in Mississippi threatening to take "discriminatory action" against people who hold those beliefs. While the Governor claims that HB 1523 was passed because "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," Gov. Mot. at 3, there is no indication of that happening in Mississippi.

Although the Governor (joined by the Executive Director of MDHS) requests a stay, the legislature itself displayed no sense of urgency about the bill, passing it in April of 2016, but failing to provide, as legislators do with some bills, that it take effect immediately, instead setting July 1 as the date for its implementation.[1] Moreover, even the Governor admits that if the district court's

[1]*Compare* HB 1523, § 11, 2016 Leg. Reg. Sess. (Miss. 2016) ("This act shall take effect and be in force from and after July 1, 2016), *with* HB 107, § 2, 2016 Leg. Reg. Sess. (Miss. 2016) ("This act shall take effect and be in force from and after its passage.").

preliminary injunction remains in place while this appeal is pending, "conscientious objectors" in Mississippi "will remain free under state law to decline to participate in same-sex marriages." Gov. Mot. at 19. The Attorney General of Mississippi, who is the State's chief legal officer and who defended the law in the District Court (where he is a defendant), has concluded upon further review that the preliminary injunction should not be appealed at all.[2]

Thus, Mississippi's officials have not demonstrated or even argued the need for urgent enforcement of this law. This is a highly unusual statute, and the District Court's preliminary injunction simply preserves the status quo while the constitutionality of the statute under the First and Fourteenth Amendments is reviewed further. As part of the traditional four-factor test, one of the key issues in an application for a stay is "whether the applicant will be irreparably injured absent a stay." *Nken v Holder*, 556 U.S. 418, 426 (2009). "[S]imply showing some 'possibility of irreparable injury,' fails to satisfy th[is] factor." *Id.* at 434-35 (internal citation omitted). Given the absence of any showing of irreparable injury to those who, according to the Governor, need to be protected by the statute, and given that Mississippi's officials have made no credible argument about the urgency of enforcing it, there is no need for a stay pending appeal.

[2] *See Verbatim Statement by Attorney General Jim Hood on HB 1523*, Jackson Free Press (July 13, 2016), *available at* http://www.jacksonfreepress.com/weblogs/jackblog/2016/jul/13/statement-attorney-general-jim-hood-hb-1523/ ("After careful review of the law, and the social and fiscal impacts of HB 1523, I have decided not to appeal the Federal Court's injunction in this case against me.").

As discussed in this response, the Governor also has not made "a *strong* showing that he is likely to succeed on the merits," *Nken*, 556 U.S. at 426 (emphasis added), and the other factors likewise favor denial of the stay.

The Merits

In reviewing a preliminary injunction, "[t]his court will reverse the district court only upon a showing of abuse of discretion." *Ingebretsen v. Jackson Public School District,* 88 F. 3d 274, 278 (5th Cir. 1996). The *Barber* plaintiffs brought challenges under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The District Court held that HB 1523 violates both. In light of the significant constitutional questions that exist with respect to this unusual and unprecedented statute, the Governor has not made a showing --- and certainly not "a *strong* showing" --- that the trial court is likely to be reversed for an abuse of its discretion in granting the preliminary injunction.[3]

The Establishment Clause

In holding that HB 1523 violates the Establishment Clause of the First Amendment, the District Court correctly concluded that it should be analyzed under the principles of *Larson v. Valente*, 456 U.S. 228 (1982). But the Court also

[3] The Governor does not argue the issue of standing, noting that it is "difficult to show in a 20-page brief that the district court erred in a manner grave enough to warrant a stay." Gov. Mot. at 6 n.4. Therefore we do not discuss standing in this response. In the event it is relevant, the issue is discussed in our District Court filings, including the amended memorandum in support of the motion for preliminary injunction (doc. 14), the reply brief in support of that motion (doc. 33), and the response to the motion for stay in the District Court (doc. 53).

noted that HB 1523 would be unconstitutional under the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), inasmuch as it "was not motivated by any clearly secular purpose." *Barber v. Byant,* No. 3:16cv00417-CWR-LRA, Op. (doc. 39) at 53 n.43 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) and citing *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987)). Because the District Court thoroughly discussed the *Larson* analysis, this response focuses on the alternative holding that HB 1523 violates the Establishment Clause under the analysis set forth in cases like *Lemon, Wallace,* and *Edwards.*

"A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general or *by advancement of a particular religious belief.*" *Edwards*, 482 U.S. at 585 (emphasis added, citations omitted). HB 1523 advances the three particular religious beliefs set forth in Section 2 of the bill by providing special protections exclusively for people who hold those beliefs.

According to the Governor, HB 1523 has the secular purpose of accommodating religion rather than endorsing certain beliefs. But simply claiming a secular purpose does not make it so. In *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Supreme Court specifically noted that in its 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).

In *Edwards v. Aguillard*, the Supreme Court rejected the alleged secular purpose of "academic freedom" behind Louisiana's bill regarding the teaching of "creation science" because "[t]he Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life." 482 U.S. at 587. The Court also rejected the additional alleged secular purpose of "fairness." "[T]he 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. The Court concluded that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine," and therefore "the Act furthers religion in violation of the Establishment Clause." 482 U.S. at 594.

As in *Wallace* and *Edwards*, the State's claim of a secular motive in this case --- that HB 1523 was passed to "accommodate" religion --- is implausible

given that Mississippi previously enacted the Mississippi Religious Freedom Restoration Act ("RFRA"), which is specifically designed to accommodate religious beliefs. Mississippi's RFRA, like other RFRAs around the country, does not endorse specific religious beliefs, but instead applies to all "exercise[s] of religion." Miss. Code Ann. § 11-61-1(5)(a). By contrast, HB 1523 is like the statute held unconstitutional in *Edwards* in that it erects a "discriminatory preference" which "forbids [the State] to discriminate against anyone" who subscribes to the three religious beliefs but "fails to protect those" who do not. *Edwards*, 482 U.S. at 588. As in *Edwards,* this demonstrates that "the primary purpose of [HB 1523] is to endorse a particular religious doctrine [or in this case, the three specified religious beliefs]" and therefore "the [law] furthers religion in violation of the Establishment Clause." 482 U.S. at 594. Thus, in addition to the District Court's *Larson* analysis, the Supreme Court's decision in *Edwards* controls this case and required the District Court to issue a preliminary injunction.

No one has made a showing that Mississippi's RFRA is insufficient to protect the rights of Mississippians, including those who subscribe to the three religious beliefs specified in HB 1523. Indeed, in speaking about the protections contained in HB 1523, the Governor states that "[i]t is likely that Mississippi residents already enjoyed these protections under the state's Religious Freedom

Restoration Act." Gov. Mot. at 4.[4] But even if the State believed there was some threat to religious liberty that required protection beyond the Mississippi RFRA, there is no reason the protection should be provided only to people who hold certain beliefs and not others. The Governor alludes to the *Obergefell* decision when he says that "it was unthinkable --- *until recently* --- that government officials might try to coerce religious organizations or private citizens into participating in same-sex marriage ceremonies." Gov. Mot. at 3 (emphasis added). However, Mississippi officials are not now suddenly trying to coerce unwanted participation in same-sex marriages any more than they are trying to coerce unwanted participation in interfaith marriages or any other type of marriage to which some people might have religious objections.[5]

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[4] Among the reasons Mississippi Attorney General Jim Hood provided for not appealing the preliminary injunction is that "the Mississippi Legislature has already passed the Religious Freedom Restoration Act which protects a person's right to exercise his or her religious beliefs." *Verbatim Statement by Attorney General Jim Hood on HB 1523*.

[5] Contrary to the Governor's claim, Gov. Mot. at 15 n. 6, HB 1523 imposes significant burdens on third parties. Two examples: First, a high school guidance counselor, who otherwise would be required by her principal to help all students, could eject all gay and lesbian students (who might someday want to enter into same-sex marriages) and transgender students who come to her office for counseling, even if those students are being bullied at school or suffering from other difficulties. *See* HB 1523, § 3(4). Second, a social worker for the State would be powerless, or at least perceive he is powerless, to take steps to remove a gay or lesbian or transgender child from foster parents who constantly berate the child, telling the child his or her existence is sinful and immoral, even if the social worker would otherwise recommend removal because the placement is not in the child's best interest. *See* HB 1523, § 3(3). But even if HB 1523 has little or no practical impact, it is still unconstitutional. *See, e.g. Wallace v. Jaffree,* 472 U.S. at 57 n. 45 (even though Alabama school children could already pray during a moment of silence, the 1981 moment of silence statute was unconstitutional because its wording indicated a

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, HB 1523 is the only one whose text provides special legal protection for *specific* religious beliefs.[6] Most, like Mississippi's 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 in scope. For example, a small number of recent enactments provide that ministers and churches may not be required to solemnize marriages or provide related services that violate their sincerely held religious beliefs. *See, e.g,* Fla. Stat. § 761.061; N.C. Stat. § 51-5.5. But none of those statutes identify and protect *specific* religious beliefs in the manner that HB 1523 does. Instead, they apply to *all* religious beliefs.

There is no violation of the Establishment Clause when the government creates a forum where specific religious beliefs can be promoted on the same terms as other beliefs, whether religious or not. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395 (1993) (the creation of an open forum for community use on school property after hours had "a secular purpose," and allowing the presentation of a film series on traditional Christian

religious purpose and because the pre-existing freedom to pray demonstrated the statute was not motivated by the secular purpose of accommodation).

[6] A list of the RFRA and related statutes from states around the country is provided in footnote 2 at page 10 of the reply brief (doc. 33) that we filed in the District Court.

family values as part of that forum posed "no realistic danger that that community would think the school district was endorsing religion or any particular creed"). But opening a forum only to certain religious beliefs --- such as so-called "traditional Christian family values" --- while prohibiting other religious or secular teachings regarding family values, clearly endorses those beliefs in violation of the Establishment Clause. *See, e.g. Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 303 (2000).

HB 1523 is akin to the government opening a school building after hours, but only for programs sponsored by those who subscribe to the religious beliefs that same-sex marriage is sinful and wrong, that sexual relations among unmarried people is sinful and wrong, and that transgender people are sinful and wrong. Creating such an exclusive forum, like holding a high school graduation ceremony where only certain religious messages can be broadcast, violates the Establishment Clause by "send[ing] the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community.'" *Santa Fe Independent School Dist.*, 530 U.S. at 309-310 (quoting *Lynch v. Donnelly*, 465 U.S. 666, 688 (1984) (O'Connor, J., concurring)).

Of course, providing exclusive legal protections for people who hold certain beliefs is somewhat different than providing a government forum exclusively for them. But *Edwards v. Aguillard*, which struck down a statute creating legal

protections exclusively for those who taught creation science, specifically held that this exclusivity constituted a "discriminatory preference" that undermined the State's alleged secular purpose and that this helped to demonstrate an Establishment Clause violation. 482 U.S. at 588.

The Governor seems to take the position that the Establishment Clause is never violated when a State "extend[s] specific protection to conscientious scruples that have come to the government's attention, and which might be endangered by state action," Gov. Mot. at 10, particularly where those scruples are "under assault by government officials or by the culture," *id.* at 12, while not providing that protection to people who subscribe to different beliefs, *id.* at 10. But even if that is true in some circumstances, it is not always true. If it was, *Edwards* would have been decided differently. Pursuant to the Governor's position in the present case, the State of Louisiana could have provided exclusive protections to the teachers of creationism, and no others, by claiming that creationism "was under assault by . . . the culture." But *Edwards* clearly held that Louisiana's alleged secular purpose of "fairness" was not advanced by a "discriminatory preference" that provided specific legal protection only for teachers of evolution. Instead, the Court concluded that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 588, 594. As is clear from *Edwards,*

discriminatory preferences that favor some religious views over others can be strong evidence of a religious purpose and an endorsement of religion.

The Governor argues that *Gillette v. United States,* 401 U.S. 437 (1971) and various abortion-conscience laws demonstrate that governments may pick and choose among the religious beliefs they seek to protect. But that is not an accurate assessment. In *Gillette,* the Court pointed out that "the objector to all war --- to killing in all war --- has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not." *Id.* at 460. Similarly, the abortion-conscience laws permit health-care workers opposed to abortion to refrain from participating in what they believe is the killing of another. As the Governor stated in his brief, there is no need to include contraception in a statute protecting objectors to abortion "because contraception (unlike abortion) does not involve the intentional destruction of a human fetus." Gov. Mot. at 11. Creating narrow exceptions for those who otherwise might be forced to participate in what they believe is the killing of others in violation of their religious beliefs *does not* mean that governments can parcel out benefits and protections only to those who adhere to certain religions or religious beliefs.

Indeed, the Supreme Court's 1971 holding that the congressional exemption in *Gillette* was justified by a secular purpose, and the existence of the abortion-conscience statutes, do not override or undermine the 1987 holding in *Edwards*

that the Louisiana Creationism Act's "discriminatory preference" demonstrates that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 594. The present case is much closer to *Edwards* than *Gillette,* and the holding in *Edwards* controls here irrespective of how alleged secular purposes regarding other statutes might be evaluated.[7]

Our position is supported by another case cited in the Governor's motion, *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327 (1987). In *Amos,* the Court upheld the exemption for religious employers from the provisions of Title VII of the 1964 Civil Rights Act, as amended. But unlike the Creationism Act in *Edwards* and unlike HB 1523, this protection was not limited to those who followed or taught particular doctrines, but instead was provided to all religious employers. The Court in *Amos* pointed out that "[t]here is ample room under the Establishment Clause for 'benevolent *neutrality* which will permit religious exercise to exist *without sponsorship* and without interference,'" but "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" 483

[7] The Governor's motion claims there are "over 2,000 religious exemptions in federal and state law that protect specific conscientious objections" that "would be swept away under the district court's reasoning." Gov. Mot. at 12-13. But a review of the examples contained in the law review article cited by the Governor demonstrates that this alarmist claim is untrue. Most of the examples are very different from HB 1523. They primarily involve statutes that apply to all religious beliefs and purposes (like the copyright exemption) or apply to all religious organizations espousing their own religious beliefs (like tax exemptions, the Title VII exemption, and the Fair Housing Act exemption). Some of the examples apply to specific activities, like the ritual slaughter of animals, but encompass all religious beliefs relating to that activity. *See generally* Gov. Mot., Append. J

U.S. at 334 (citations omitted, emphasis added). In describing that point, the Court, which employed the *Lemon v. Kurtzman* analysis, noted that "*Lemon's* 'purpose' requirement aims at preventing the relevant government decisionmaker … from *abandoning neutrality* and acting with the intent of *promoting a particular point of view in religious matters*." *Id.* at 335 (emphasis added). Unlike the provision at issue in *Amos*, HB 1523 abandons neutrality and singles out particular religious points of view for special protection.

Yet the Governor persists in his argument and contends that some "conscientious scruples may not need statutory protection because they are not under assault by government officials or the culture," Gov. Mot. at 12, implying that those who believe marriage should only be between a man and a woman are "under assault by government officials or the culture." But this is an absurd claim to victimhood. As already mentioned, there is no evidence that the State of Mississippi, against whose actions HB 1523 provides special protections, is waging an "assault" on the people whose views are given special protection under HB 1523. Indeed, until the federal courts struck down the relevant statutes, Mississippi law prohibited gay and lesbian couples from marrying and adopting. Clearly, the political power in Mississippi remains by and large with the opponents of same-sex marriage. The issuance of federal court decisions upholding the federal constitutional rights of same-sex couples does not mean "the culture" is

waging an "assault" on those who disagree with the decisions, and certainly not an "assault" that requires special statutory legal protections that are not available to those who believe differently.

This claim to victimhood echoes a theme the defendants presented in the District Court, where they tried to justify HB 1523 by contending that "*Obergefell* dramatically tilted the playing field against conscientious objectors to same-sex marriage." Memo. (doc. 30) at 30 n. 31; Joinder (doc. 31). But this is like saying that *Brown v. Board of Education,* 347 U.S. 483 (1954) tilted the playing field against segregationists. The decision in *Brown*, and the decision years later in *Loving v. Virginia,* 388 U.S. 1 (1967), did not justify a statute that provided special legal protection to those who professed religious beliefs that black people should not be allowed to go to school with white people or marry white people. If such a statute were passed today, surely it would be struck down as unconstitutional.

HB 1523 is no different, and the District Court properly held that the plaintiffs will likely succeed in their challenge to it. Federal court decisions recognizing the right of *equal treatment* --- like *Brown, Loving,* and *Obergefell* --- do not justify a statute giving special rights to those who oppose that equal treatment. Obviously, people are still entitled to their own religious beliefs, but they are not entitled to the endorsement of those beliefs by the State and the provision of special legal privileges that are not available to others.

Fortunately, the virulent reactions of many people to *Brown v. Board* in 1954 and *Loving v. Virginia* in 1967 have diminished over time, and it is hard to fathom a legislature providing special legal protections to those with religious beliefs that the races should be segregated or that black and white people should not be allowed to marry each other. Attitudes toward same-sex marriage are also changing, and there may come a time when most Mississippians will be embarrassed by HB 1523. In the meantime, the special privileges it accords to people holding religious beliefs against same-sex marriage, sex outside of marriage, and transgender people are just as unconstitutional as granting special privileges to people with religious beliefs against black and white people going to school together and marrying each other.

For all of these reasons, the Governor has not made "a strong showing" that he is likely to prevail on the Establishment Clause claim.

The Equal Protection Clause

Like this case, the Supreme Court's decision in *Corporation of Presiding Bishop v. Amos* involved both Establishment Clause and Equal Protection issues. With respect to the Equal Protection Clause, the Court noted that "[t]he proper inquiry is whether [the legislature] has chosen a rational classification to further a

legitimate end." 483 U.S. at 339.[8] In that case, the Court said the legitimate end was exempting and protecting "all activities of religious employers." *Id.* As pointed out earlier in this response, the protection there was granted to *all* religious employers. The government thereby did not "abandon[] neutrality" or "promot[e] a particular point of view in religious matters." *Id.* at 335.

The Governor claims that the legitimate end served by HB 1523 is "[p]rotecting the State's citizens from being forced or pressured to act in a way that violates their deeply held religious or moral beliefs." Gov. Mot. at 6-7. The Mississippi RFRA statute of 2014 may have rationally advanced that legitimate end, but HB 1523 clearly does not. First, it does not protect "the State's citizens." What protection it provides goes only to some of the state's citizens --- specifically those who subscribe to the three beliefs endorsed by the statute. As for the rest of the citizens who do not subscribe to those beliefs, they are essentially told "that they are outsiders, not full members of the political community." *Santa Fe Independent School Dist.*, 530 U.S. at 309-310 (citation omitted). They are denied "the right to equal treatment" and are stigmatized as "less worthy participants in

[8] Because it targets fundamentally protected rights and vulnerable minority groups, HB 1523 should be subjected to heightened scrutiny. The law takes particularly virulent aim at the protected fundamental rights of same-sex couples, whose constitutional right to marry was affirmed in *Obergefell*, and of individuals exercising the protected liberty to engage in sexual relations outside of marriage. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). It also singles out transgender individuals for discrimination based on their sex, triggering heightened scrutiny on that basis as well. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317, 1320 (11th Cir. 2011). However, the law fails even under a rational basis test.

the political community." *Heckler v. Matthews,* 465 U.S. 728, 739-740 (1984). This outright discrimination in favor of those who hold these particular religious beliefs, and against those who hold others, is a completely irrational way of furthering the State's alleged goal of "protecting the State's citizens." And the discrimination is even more pronounced for those who are condemned as sinners according to the religious beliefs that are given special protection under HB 1523: gays and lesbians who are married or want to marry, unmarried people who engage in sexual relations, and transgender people.

Second, as described earlier, there is absolutely no allegation or indication that the State of Mississippi (whose actions are restricted by the provisions of HB 1523) is (to quote the Governor's motion) "forc[ing] or pressur[ing]" anyone, including adherents to the three beliefs "to act in a way that violates their deeply held religious or moral beliefs." Gov. Mot. at 6-7. Thus, HB 1523's discriminatory preference for those beliefs is not a rational means of achieving a legitimate governmental objective, particularly given the protections that already exist for all religious beliefs pursuant to Mississippi's RFRA.

The Supreme Court's analysis in *Romer v. Evans,* 517 U.S. 620, 634 (1996) demonstrates that HB 1523, like Colorado's Amendment 2 in that case, does not bear a rational relationship to a legitimate governmental objective. Although in some respects HB 1523 is not as broad as Amendment 2, the reasoning is much the

same. HB 1523 singles out for special legal protection the religious beliefs and moral convictions that same-sex couples who marry or might marry are sinful and immoral, that unmarried people who engage in sexual relations are sinful and immoral, and that transgender people are sinful and immoral. By granting special immunities against state action to those who hold those beliefs, HB 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, HB 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, HB 1523 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 635.[9] *See also id.* (citation

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[9] Similarly, in *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 446-447, 450 (1985), the Supreme Court held that a city ordinance requiring a special permit to operate a group home for the mentally disabled did not bear a rational relationship to a legitimate governmental interest. 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 … [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).

omitted) ("[A] bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").[10]

In addition to imposing special disabilities on the groups targeted by Section 2 of the bill, HB 1523 imposes special disabilities on those who subscribe to religious beliefs and moral convictions different from those endorsed in Section 2. Special protections are granted by HB 1523 to those who hold the endorsed beliefs and convictions, but not to those who do not. The only way to obtain those special protections is to convert to the specific religious beliefs and moral convictions that are endorsed by HB 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.

According to the Governor, "[l]aws 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.'" Gov. Mot. at 8 (quoting *Romer v. Evans,* 517 U.S. at 634). That might be true for laws, or at least some laws, that protect everyone's religious freedom. But laws which advance only the freedom of some and not others certainly can evince a "bare desire to harm a

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473 U.S. at 448.

[10] Another reason that Attorney General Jim Hood elected not to appeal the preliminary injunction is because he believes that to "fight for an empty bill that dupes one segment of our population into believe it has merit while *discriminating against another* is just plain wrong." *Verbatim Statement by Attorney General Jim Hood on HB 1523* (emphasis added).

politically unpopular group," particularly if the protected beliefs are composed of claims that the activities of politically unpopular groups are sinful.

To return to an example from the prior section of this response: If the legislature adopted a law providing special protection to segregationists with sincerely held religious beliefs and moral convictions that black people should be kept separate from whites, and provided that in certain situations, these segregationists could not be punished by the State for discriminating against black people as long as they did so "consistent with their sincerely held religious beliefs or moral convictions," that law quite rightly would be deemed to evince a "bare desire to harm" black people, to reflect animus toward black people, and to "impose[] a special disability" upon black people. Just as that law would deny the equal protection of the laws, so does HB 1523. The Governor has not made a "strong showing" that he will prevail on the Equal Protection Claim.

Equitable Factors

As discussed in the introduction, the Governor has demonstrated no irreparable harm to the State or the people who are accorded special protections by HB 1523. By contrast, the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury" in an Establishment Clause case, and thus "the public interest [is] not disserved by an injunction" in such a case. *Ingebretsen,* 88 F.3d at 280.

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Respectfully submitted,

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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 25th day of July, 2016.

s/ Robert B. McDuff
ROBERT B. MCDUFF