**Case Nos. 16-60477, 16-60478**
**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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RIMS BARBER, CAROL BURNETT; JOAN BAILEY; KATHERINE ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY; SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT; RENICK TAYLOR; BRANDILYNE MANGUM-DEAR; SUSAN MANGUEM; 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.*

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CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,
*Plaintiffs – Appellees*

v.

PHIL BRYANT, in his Official Capacity as Governor of the State of Mississippi; JOHN DAVIS, in his Official Capacity as Executive Director of the Mississippi Department of Human Services,
*Defendants – Appellants*

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On appeal from the United States District Court for the Southern District of Mississippi
Cases No. 3:16-cv-417-CWR-LRA (lead case);
3:16-cv-442-CWR-LRA (consolidated)

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**Brief of *Amici Curiae* North Carolina Values Coalition and Liberty, Life, and Law Foundation in Support of Defendants-Appellants and Reversal**

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# CORPORATE DISCLOSURE STATEMENT

*Amici Curiae* North Carolina Values Coalition and Liberty, Life, and Law Foundation each make the following identical disclosures:

1. Corporate Affiliations. The corporation is a tax-exempt, nonprofit organization that has no owners or members. The corporation has no parent corporation, no subsidiaries, and no affiliates. There is no publicly-owned corporation that owns 10% or more of its stock because the corporation does not issue stock.

2. Supplemental Statement of Interested Parties. Pursuant to Fifth Circuit Rules 28.2.1 and 29.2, the undersigned counsel of record certifies that, in addition to the interested parties disclosed in the Appellant's Opening Brief, 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.

AMICI CURIAE IN SUPPORT OF APPELLANTS AND ATTORNEYS

| Amici Curiae | Attorney(s) |
|---|---|
| North Carolina Values Coalition | Deborah J. Dewart |
| Liberty, Life, and Law Foundation | Deborah J. Dewart |

/s/ Deborah J. Dewart
(Signature of counsel)

November 1, 2016
Date

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

*Amici Curiae*, North Carolina Values Coalition and Liberty, Life, and Law Foundation, respectfully urge this Court to reverse the District Court decision.

North Carolina Values Coalition ("NCVC") was established to preserve faith, family, and freedom by working in the arenas of public policy and politics. Liberty, Life, and Law Foundation ("LLLF") exists to defend religious liberty, sanctity of human life, conscience, family, and similar principles. *Amici* have an interest in this case because it implicates issues critical to every state in America.

The parties have consented to the filing of this amicus brief. Counsel for *amici* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

"Today's decision . . . will be used to vilify Americans who are unwilling to assent to the new orthodoxy." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting). Mississippi legislators acted quickly to protect the "[m]any good and decent people [who] oppose same-sex marriage as a tenet of faith." *Id*. at 2625 (Roberts, C.J., dissenting).

The free exercise of religion is not discrimination. *Obergefell* created catastrophic challenges for religious liberty but could not craft the accommodations to preserve that liberty. "[T]his Court is not a legislature." *Id*. at 2611. HB 1523 is neither a license to discriminate nor an unconstitutional endorsement of religion, but a protection for citizens whose views *Obergefell* disparaged. Plaintiffs' views, now stamped with Supreme Court approval, need no further protection—and their disagreement with others is not a legally cognizable injury. In a free society, no one can escape offense.

## ARGUMENT

### I. PLAINTIFFS' ALLEGED INJURIES ARE LEGALLY ILLUSORY.

Plaintiffs allege injuries framed as a right to be free of "discrimination." This places them on a collision course with the religious liberty and conscience rights of ideological opponents. Neither the Establishment Clause nor any other constitutional provision mandates legal relief for their offense.

#### A. In A Free Society, No One Can Escape Offense Or Avoid Exposure To Opposing Views.

The district court describes Plaintiffs as "residents, citizens, and taxpayers of Mississippi who disagree with the beliefs protected by HB 1523." *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120, *4 (S.D. Miss. 2016). But there is no absolute right to avoid offense:

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

*Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). Exposure to unwelcome ideas is essential to liberty."One price of living in a free society is toleration of those who intentionally or unintentionally offend others." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

Establishment Clause standing may be imprecise, but mere disagreement does not invalidate an accommodation of religion. HB 1523 rightly guards against veto power to quash conscientious objections:

> Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 780 (1995)).

*Elk Grove v. Newdow,* 542 U.S. at 35 (O'Connor, J., concurring).

### B. The Religion Clauses Form A Shield Protecting Religion From Government Intrusion—Not A Sword To Wield Against Persons Who Disagree With The Prevailing Secular Orthodoxy.

HB 1523 is not a *preference* that violates the Establishment Clause (*Barber*, *79), but *protection* for citizens whose views *Obergefell* trashed. The government may accommodate religion—indeed, the First Amendment prohibits callous

disregard. The Religion Clauses are complementary. Both guard religion from government interference. It frustrates that purpose to brandish the Establishment Clause as a sword. Plaintiffs' attack on HB 1523, if successful, leaves others vulnerable to coercion and penalties. Plaintiffs are free to pursue their own rights but not to deny others equivalent freedom.

Some of the Plaintiffs are clergy whose "religious values cause them to believe that same-sex couples may marry in a Christian ceremony blessed by God." *Barber*, *81. The district court presumes their views are unprotected because HB 1523 specifies beliefs "protected by this act." *Id.*, *80. But Plaintiffs' beliefs are enshrined in Supreme Court precedent. HB 1523 ensures equal protection for others, comparable to the conscience protections enacted for health care professionals opposed to abortion. Those laws do not render pro-choice views unprotected—that position, like Plaintiffs' views after *Obergefell*, is entrenched in legal precedent.

## II. THIS CASE IS ABOUT PROTECTING LIBERTY OF CONSCIENCE—NOT SANCTIONING DISCRIMINATION.

Citizens who live according to conscience are not engaged in arbitrary, invidious, irrational discrimination. Neither is a state that protects their right to do so. The district court distorts the nature of discrimination.

"Conscience is the essence of a moral person's identity.... Liberty of conscience was the foundation for Madison's and Jefferson's and other Framers'

views underlying the First Amendment's religion clauses." *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of Petition for Rehearing En Banc). The heart of this case is not discrimination, but liberty of conscience—traditionally respected by American law. It would be hazardous to allow antidiscrimination principles to crush dissent and thus breed a nation of persons lacking *conscience*.

The district court adopts Plaintiffs' argument that HB 1523 facilitates *arbitrary* discrimination:

- "HB 1523 will subject [plaintiffs] to a wide range of arbitrary denials of service . . . ." *Barber*, *34.
- "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.*, *65.
- "[Plaintiffs] 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." *Id.*, *44-45.

The district court credits "discrimination itself, by perpetuating archaic and stereotypic notions" as a sufficient legal injury. *Id.*, *32-33, quoting *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984). But the court fails to appreciate the conscience rights at stake. When a citizen cannot in good conscience participate in

a morally objectionable event—e.g., a ceremony for two persons of the same sex—that is not tantamount to the "archaic and stereotypic notions" that stigmatized African Americans in past decades.

### A. The Religiously Motivated Conduct HB 1523 Protects Is Not Arbitrary Discrimination.

Antidiscrimination policies have ancient roots but now cover more places and protected categories. "The Equal Protection Clause is no longer limited to racial classifications." *Barber*, *52. "Sexual orientation is a relatively recent addition." *Id*., *54, citing *Romer v. Evans*, 517 U.S. 620, 635 (1996). But this expansion accelerates conflicts with the First Amendment. The law in *Hurley* grew out of the common law principle that innkeepers and other common carriers could not refuse service without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But Massachusetts broadened the scope. *Id*. at 571-572. The same trend emerged in *Dale*. Traditional "places" moved beyond inns and trains to private business and even membership associations—increasing the potential collision with the First Amendment. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Criteria were added—criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, political ideology. *Id.* at 656 n. 2.

These additions generate confusion. Many decisions require selection criteria. "Discrimination" is not necessarily arbitrary. Employers "discriminate"

when selecting employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, protection is reasonable—but many distinctions do not constitute "discrimination."

Antidiscrimination policies attempt to eliminate bias. *Hurley*, 515 U.S. at 578. But that objective does not grant the government carte blanche to "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id*. at 578-579. Antidiscrimination laws originated with morally neutral characteristics unrelated to character or behavior. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 402-403 (1994). Civil rights legislation was passed to eradicate America's long history of racial discrimination. But sexual orientation is defined with reference to behavior that many religious traditions cannot endorse. *Id*. at 403-405. As "equal protection" expands, so does the potential to employ antidiscrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Advocates "appear to feel no hesitation in using government power to force recalcitrant believers to change their evil ways"—squeezing out religious liberty. Michael W. McConnell,

*"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187-188 (1993).

LGBT advocates have labored to achieve cultural acceptability. Duncan, *Who Wants to Stop the Church*, 69 Notre Dame L. Rev. at 397. New laws symbolically declare same-sex intimacy acceptable, but also marginalize religious practice and doctrine. *Id*. at 397-398. Powerful religious voices have shaped sexual morality for centuries, and these views "are not trivial concerns but profound and deep convictions accepted as ethical and moral principles." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

The district court fails to comprehend the potential encroachment on religious liberty—as revealed in its discussion of how the law would operate. But seen against the backdrop of common law and the First Amendment, HB 1523 does not facilitate *arbitrary* discrimination.

**1. Foster or adoptive parents - HB 1523 § 3(3)** protects persons "who intend to raise a foster or adoptive child in accordance with § 2 beliefs." *Barber*, *23. "It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian." *Id*. But must the prospective parents sacrifice their core convictions in order to participate in child care? If so, some couples would never qualify. It is conceivable that placements could accommodate

both the child's and parents' faith, and that parents could provide compassionate care without sacrificing their beliefs.

**2. Professional counseling - HB 1523 § 3(4)** permits counselors to decline services in accordance with their faith. The court notes a conflict with American Counseling Association, Code of Ethics § C.5 (2014). HB 1523 would require the state to license a person "who refuses to abide by her chosen profession's Code of Ethics." *Barber*, *23-24. But as the Sixth Circuit cautioned: "Tolerance is a two-way street. Otherwise, the [code] mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). The district court's approach would unconstitutionally exclude many persons from the counseling profession. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971).

**3. Wedding services**. "[T]he bill would ensure that LGBT citizens would not be able to sue a baker, florist, or other business for declining to serve them." *Barber*, *57. This misleading statement glosses over the context. People have faced heavy fines and even been driven out of business—not for excluding all LGBT clients but refusal to participate in a particular event that would require them to violate conscience. The court cites no case where any person has demanded the right to refuse *all* LGBT customers. If this shoe were on the other foot, would an LGBT business owner be required to create artwork endorsing heterosexual marriage?

**4. Religious organizations**. The district court says "[t]here is nothing new or controversial" about HB 1523's guarantee "that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief." *Barber*, *21. Later, citing Senate debate about HB 1523, the court complains that "a Baptist college's refusal to employ lesbian and gay citizens" would not be discrimination. *Id. at* *59. Religious organizations absolutely have the right to select those who carry out their mission. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (affirming autonomy of religious organizations). But even religious entities are at risk today,[1] and Mississippi may ensure their protection.

**5. Pre-emption of other nondiscrimination policies**. The district court alleges that HB 1523, like the law struck down in *Romer*:

> "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."

*Barber*, *36, quoting *Romer*, 517 U.S. at 627. The court agrees with Plaintiffs that a state university could not enforce its anti-discrimination policy that guarantees "equal access to educational, programmatic and employment opportunities."

[1] *See*, e.g., *Fort Des Moines Church of Christ v. Iowa*, Case 4:16-cv-00403-SMR-CFB (S. D. Iowa), filed July 4, 2016. The Iowa Civil Rights Commission interpreted Iowa Code § 216.7 (public accommodations) so as to thwart the ability of churches to operate *and preach* according to their core doctrines concerning marriage and sexuality. *See* http://www.adfmedia.org/News/PRDetail/10017.

*Barber*, *34. Its hypothetical example reveals the extent to which it misconstrues the law's conscience protections—a factor not relevant in *Romer*:

> 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.

*Id.* at *35 n. 24. In Washington State, florist Barronelle Stutzman served a gay customer for years but declined to participate in his same-sex wedding.[2] Colorado cake shop owner Jack Phillips politely declined to create a custom wedding cake for a same-sex ceremony but offered to sell the customers any other baked goods.[3] These individuals now face draconian penalties—not for "arbitrary discrimination," but for declining to use their creative talents to actively participate in one event. These situations are not analogous to refusing cafeteria service.

### B. Liberty Of Conscience Is Deeply Ingrained In American History And Law.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens by word or act their faith therein*.

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[2] *See* http://adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman (*State of Washington v. Arlene's Flowers*). The case is on appeal to the Washington Supreme Court.

[3] https://adflegal.org/detailspages/press-release-details/colorado-cake-artist-asks-us-supreme-court-to-protect-his-freedom-of-expression (*Masterpiece Cake Shop v. Colorado Civil Rights Commission*). The Colorado Supreme Court denied review, and a Petition is now pending before the U.S. Supreme Court.

*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 642 (1943) (emphasis added). Without explicit legal protection, many citizens are "force[d]...by word or act" to express their faith in the LGBT rights movement.

> [T]he 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 2642-2643 (2015) (Alito, J., dissenting) (emphasis added). "Rights of conscience" are now in grave jeopardy—contrary to American history, tradition, and law. *Obergefell* unleashed an assault on conscience, contrary to the Framers' intent that religion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901). Conscience is inextricably linked to religious duty—"a duty towards the Creator." *Id*. The Framers were convinced that all persons are "endowed by their Creator with certain inalienable rights" (Declaration of Independence). HB 1523 allows traditional marriage supporters to fulfill their religious duties according to conscience. Plaintiffs need no additional protection. Their views coincide with current law and they are not compelled to violate any religious duty.

The district court criticizes the State's contention that HB 1523 accommodates religion *and* moral beliefs, but admits that "religious beliefs are inextricably intertwined with moral values." *Barber*, *88. Religion, morality, and conscience are typically bound together like superglue. Indeed, most state constitutions define religious liberty in terms of conscience.[4]

The conscience protections required after *Obergefell* are indisputably comparable to those provided for health care professionals after *Roe v. Wade*, 410 U.S. 113 (1973). The district court misconstrues the analogy: "If doctors can opt-out of all abortions, the apples-to-apples comparison would let clerks opt-out of issuing all marriage licenses." *Barber*, *92. The correct "apple" is not *all* marriages, but only non-traditional marriages. Abortion per se is a morally objectionable procedure that many equate with murder. Marriage is an honorable institution with deep religious significance—its redefinition is what offends core religious teachings.

[4] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

### C. Conscience Protection Prevents Discrimination Against Religion.

Courts have a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Religious citizens should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety. "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947).

Plaintiffs claim that HB 1523 "facilitates discrimination against LGBT Mississippians," while supporters say it "protects *against* discrimination." *Barber*, *25. The court confuses religious motivation with arbitrary discrimination: "[T]he design, purpose, and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law." *Id.* at *56. The court charges legislators with animus, "a bare [legislative] desire to harm a politically unpopular group." *Id*. at *54, citing *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted).

Current events and court victories reveal that LGBT advocates are no longer "politically unpopular" or powerless. On the contrary, LGBT rights increasingly encroach on the rights of others to live according to conscience. Many citizens cannot sanction *Obergefell's* redefinition of marriage without sacrificing their core

convictions. *Obergefell* promotes discrimination by effectively squeezing these persons out of full participation in civic life. HB 1523 crafts legal protection for conscientious objector claims—claims "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). Many successful Free Exercise cases involve *conscientious objectors*—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *Barnette,* 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (education).

Antidiscrimination principles were never intended to eviscerate First Amendment rights. Although the law may proscribe refusal to conduct business with an entire group based on animosity or stereotypes, the First Amendment demands that courts consider religious motivation. In several unemployment cases, the Supreme Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). The district court exhibits hostility toward religion by equating the conduct of traditional marriage

proponents with unlawful "discrimination." It is not "arbitrary" discrimination to decline participation in morally objectionable activities.

## III. MISSISSIPPI'S ACCOMMODATION IS NECESSARY TO PROTECT THE CONSCIENCE RIGHTS OF CITIZENS WHO HOLD TRADITIONAL VIEWS ABOUT MARRIAGE AND SEXUALITY.

Conscience is a fundamental American freedom. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

*United States v. Seeger*, 380 U.S. 163, 170 (1965). No government should crush the conscience of its citizens. But that is exactly what the district court opinion would do if not reversed.

### A. The Government Has Already Endorsed Plaintiffs' Viewpoint In The Marriage Debate.

According to the district court, HB 1523 grants "special privileges" indicating that "[Plaintiffs] hold disfavored, minority beliefs, while citizens who hold § 2 beliefs are preferred members of the majority." *Barber*, *82. "The First

Amendment prohibits states from putting their thumb on the scales in this way." *Id*. Allegedly the State is "tipping the scales toward some believers and away from others." *Id*., *87.

But *Obergefell* already "tipped the scales." The Supreme Court put its "thumb on the scales" but did not—indeed, *could* not—lift a finger to relieve the burdens it placed on religious liberty:

> Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court . . . . Today's decision . . . creates serious questions about religious liberty . . . . 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 . . . create any such accommodations.

*Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). As the State noted at oral argument, "after *Obergefell*, citizens who hold [§ 2 beliefs] were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*." *Barber*, *37. The district court obscures their precarious legal position. Mississippi is protecting these citizens, not endorsing their views.

Marriage has deep religious significance. When the Supreme Court "tipped the scales" on this sensitive *religious* matter, Justice Thomas warned of "potentially ruinous consequences for religious liberty," which is more than merely teaching religious principles:

> Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

*Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting).

As the district court correctly observes, "the framers long ago decided that the government should stay out of those battles"—internal disputes over religious doctrine—"for the benefit of both sides." *Barber*, *86. True, but the government marched onto the battlefield and declared victory for Plaintiffs' side, leaving opposing views vulnerable to a myriad of punitive measures.

Under the court's reasoning, *any* marriage law "discriminate[s] among religions." The state's position will inevitably coincide with some religious views and collide with others. *Obergefell* itself—which the court trumpets as the "law of the land" (*Barber*, *10)— discriminates against those who cannot endorse its new definition. Moreover, "[i]nnumerable civil regulations enforce conduct which harmonizes with religious canons" without violating the Establishment Clause. *McGowan v. Maryland*, 336 U.S. 420, 462 (1961) (Frankfurter, J., concurring).

This case underscores the collision between religious liberty and LGBT rights. Antidiscrimination rights, whether statutory or derived from equal protection principles, increasingly conflict with free exercise. *See* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 27, 29 (2001). When the D.C. Circuit addressed

the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also forbids government from dictating the answers." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987). But in *Obergefell*, the government dictated the answer to one of the most morally controversial issues ever debated in America. The district court fails to grapple with *Obergefell's* assault on religious liberty. Instead, it unleashes its fury on Mississippi's attempt to accommodate those whose views were squashed and accuses the State of "favor[ing] certain doctrines." *Barber*, *85.

Perhaps even more disturbing is the court's thinly veiled animosity toward those HB 1523 protects:

> 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.

*Barber*, *70. The Establishment Clause is not a technicality, but the other side of a "coin" that guards religious liberty and conscience in a diverse society.

### B. Mississippi May Accommodate Religion Without Violating The Establishment Clause.

Plaintiffs are offended by Mississippi's accommodation of their ideological opponents. The district court transforms accommodation into prohibited "endorsement"—as if it were unconstitutional to promote the very values the Constitution protects. This defies logic and "bristles with hostility." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting). The First Amendment itself endorses religion. Accommodation is not state preference for the underlying religious doctrine.

**1**. **Accommodation is not so rigid that the state may only accommodate religion to lift a burden on free exercise**. Religious liberty is a high prized constitutional mandate the government may promote through accommodation even when not required by the Free Exercise Clause. HB 1523 accommodates time-honored views shared by many in Mississippi and throughout the nation.

It is questionable whether promotion of religion should ever condemn a government act. Accommodation-of-religion cases would not survive this purpose inquiry. But accommodation has made America "a Nation of unparalleled pluralism and religious tolerance." *Salazar v. Buono,* 559 U.S. 700, 723 (2010) (Alito, J., concurring). The government exercises "benevolent neutrality" by accommodating religion: *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483* U.S. 327, 338 (1987) (religious employers

exempt from religious discrimination law); *Walz v. Tax Comm'n,* 397 U.S. 664, 673 (1970) (church property tax exemption); *Zorach v. Clauson,* 343 U.S. 306, 308 (1952) (time off-campus for religious instruction). Coerced acceptance of marriage redefinition implies the government is not neutral but hostile toward religion and determined to eliminate views it deems obsolete. The district court opinion "bristles with hostility" by equating traditional marriage views with believing the sun revolves around the earth or denying the health risks of smoking. *Barber*, *85-86. The goal of avoiding government endorsement does not require penalizing certain viewpoints or refusing them equal protection.

**2. The state may accommodate religion either to lift a burden or to facilitate free exercise**. The district court's key citations are not accommodation cases. All involved express condemnation and/or burdening religion. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (constitutional amendment prohibited use of Sharia law); *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-50 (9th Cir. 2010) (city resolution disparaged Catholic position on homosexuality); *Larson v. Valente*, 456 U.S. 228, 230 (1982) (requirements imposed only on religious organizations soliciting over 50% of their funds from nonmembers). These cases exemplify prohibited hostility not the benevolent neutrality present here. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward

any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Accommodation is not an endorsement of the views accommodated or condemnation of views beyond its scope.

*Catholic League* supports accommodation. The Ninth Circuit endorsed the city's stated purpose—"to foster equal treatment" of gays and lesbians. *Catholic League*, 624 F.3d at 1055. "San Francisco is entitled to take that position and express it even though Catholics may disagree as a matter of religious faith." *Id*. Under that rationale, Mississippi may "foster equal treatment" of people who hold §2 beliefs "even though [Plaintiffs] may disagree as a matter of religious faith."

The district court admits that accommodation does not violate the Establishment Clause. *Barber*, *64, citing *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005). But the court complains about HB 1523's scope as compared to Mississippi's RFRA, which "grants *all* people the right to seek relief from governmental interference in their religious exercise, not just those who hold certain beliefs." *Barber*, *65. But Plaintiffs' views are cemented in legal precedent, while opposing views remain at risk. Although "government has no legitimate role . . . in judging the religious beliefs of the people—either by praise or denunciation" (*Catholic League*, 624 F.3d at 1054)—the state may promote First Amendment values by protecting persons whose beliefs have been sidelined by the culture and courts. Plaintiffs' psychological discomfort pales in comparison to the express

condemnation in *Awad* and *Catholic League*. *Awad*, 670 F.3d at 1123 ("proposed state amendment *expressly* condemns [plaintiff's] religion"); *Catholic League*, 624 F.3d at 1053 (city resolution directly disparaged religious beliefs as "hateful and discriminatory," "insulting and callous"). Those who hold § 2 beliefs will be directly affected by laws and policies that disparage their core beliefs.

**3. *Obergefell* created a religious liberty crisis of national proportions**. HB1523 parallels the proposed First Amendment Defense Act, but that law would only protect against *federal* government action. Congressional findings include:

> (4) Protecting religious freedom from Government intrusion is a Government interest of the highest order. Legislatively enacted measures advance this interest by remedying, deterring, and preventing Government interference with religious exercise in a way that complements the protections mandated by the First Amendment.[5]

The district court objects to HB1523's alleged "denominational preferences" and concludes it must be justified by an "actual concrete problem" (*Barber*, *89) "in Mississippi" (*id*., *90). Mississippi legislators need not bury their heads in the sand until citizens are hit with the staggering penalties leveled against others across the country. As FADA's Congressional findings explain, *preventing* government interference with religion is an "interest of the highest order."

**4. The Supreme Court is not a legislature and could not carve out express protections**. The task of accommodation fell to state legislators.

[5] https://www.gpo.gov/fdsys/pkg/BILLS-114hr2802ih/pdf/BILLS-114hr2802ih.pdf.

Accordingly, Mississippi passed HB 1523. The district court is wrong to imply that conscience protections enacted in response to *Obergefell* are anything other than permissible accommodation:

> It is . . . 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.

*Barber*, *37. *Obergefell's* "pains to reaffirm religious rights" (*Barber*, *11) ring hollow in the face of legal obstacles now faced by traditional marriage supporters. And the district court would only protect *speech*—not *action*, the essence of "free *exercise*."

> "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: Speaking Its Name*, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015).

*Barber*, *12. This frightening proposal to eradicate religious liberty cites Justice Kennedy for support:

> "[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."

*Id.*, quoting *Burwell v. Hobby Lobby* Stores, 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring). HB 1523 does not "restrict[] or demean[]" Plaintiffs for

their views, but Plaintiffs' lawsuit seeks to "unduly restrict other persons" in protecting their interests in liberty of conscience.

### C. The State's Accommodation Has No Coercive Impact On Plaintiffs—But Without Express Protection Others Will Face Compulsion To Violate Conscience.

Plaintiffs do not face "[t]he coercion that was a hallmark of historical establishments...coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting). HB 1523 does not compel Plaintiffs to violate their beliefs or support a cause. But there are growing threats to persons who cannot in good conscience support *Obergefell*. It is these citizens—not Plaintiffs and those who share their views—who face coercion.

The district court surveys Establishment Clause history but strains the facts of this case. HB 1523 does not place "the power, prestige, and financial support of government behind a particular religious belief." *Engel v. Vitale,* 370 U.S. 421, 431 (1962). The law merely prohibits the government from penalizing persons who hold §2 beliefs. Plaintiffs face no coercion, unlike the public school children required to observe a daily moment of silence in *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009). *Barber*, *38-39. HB 1523 hardly "sends a message that the state government is unwilling to protect [Plaintiffs]" (*Barber*, *41) because

Plaintiffs' views are stamped with judicial approval. Unlike *Catholic League*, the state has not "expressly denounced" Plaintiffs' viewpoint. *Barber*, *41. Plaintiffs and the court read messages into HB 1523 that are simply not there.

The right of same-sex couples to obtain marriage licenses does not include a corollary right to draft unwilling accomplices, nor does it justify coerced participation. HB 1523 tracks the constitutional protection against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. The government has no power to force support for a particular viewpoint. *Hurley*, 515 U.S. at 575. Secular ideologies crush religious liberty when they employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Michael W. McConnell, *"God is Dead and We have Killed Him!*, 1993 BYU L. Rev. at 186-188. *Obergefell*'s fall-out grates against the Constitution, effectively banning conscientious objectors from full participation in society.

In the abortion context, no court has struck down conscience protection because it disparages the views of abortion advocates. *Roe v. Wade* left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973). Absent similar protection, *Obergefell* easily compels private citizens to facilitate a morally objectionable agenda. In this collision of rights, both sides are entitled to liberty of conscience.

Many view sexual intimacy outside the marital union of one man and one woman as a grave moral wrong. Concerned citizens across the nation have enacted[6] or proposed[7] laws similar to HB 1523, to protect conscience and religious liberty. These laws are evidence that Americans remain profoundly troubled and deeply divided. *Obergefell* did not settle the matter. Sexuality continues to generate heated controversy. But LGBT rights do not trump the inalienable First Amendment rights others. Religious liberty should not be dismantled to coerce support for the LGBT cause.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. The Supreme Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

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[6] *See, e.g.,* N.C. Gen. Stat. § 51-5.5 (*see Ansley v. Warren*, 1:16-cv-00054-MOC-DLH, 2016 U.S. Dist. LEXIS 128081 (W.D. N.C. Sept. 20, 2016) (holding that plaintiffs lack standing; appeal pending, Fourth Cir. Case No. 16-2082); Utah Code Ann. §63G-20-101, et. seq. ("Religious Protections in Relation to Marriage, Family, or Sexuality").

[7] *See, e.g.,* Georgia Free Exercise Protection Act, 2015 Bill Text GA H.B. 757; (*see* http://www.legis.ga.gov/Legislation/20152016/161054.pdf; House and Senate passed but Governor vetoed); Illinois Religious Freedom Defense Act, 2015 Bill Text IL S.B. 2164 (*see* http://www.ilga.gov/legislation/99/SB/PDF/09900SB2164lv.pdf); Missouri (SB 39), proposing to add Mo. Const. Art. I, § 36; Virginia (HB 773), proposing to add Va. Code § 57-2.03.

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

*Girouard v. United States*, 328 U.S. at 68. We dare not sacrifice these priceless American freedoms on the altar of enhanced sexual rights.

### D. Ironically, The District Court's Approach Weakens Constitutional Protection For Everyone—Including Plaintiffs.

Antidiscrimination laws and policies attempt to build a fairer society—a worthy goal. But the means to achieve it may threaten civil liberties. Bernstein, *Defending the First Amendment*, 82 N.C. L. Rev. at 228. Punishing expression because it offends certain groups leads to serious injustice.

Minority groups have improved their status dramatically only because the Constitution guarantees free expression and facilitates advocacy of new ideas. Bernstein, *Defending the First Amendment*, 82 N.C. L. Rev. at 232. But no group can demand for itself what it denies to others. Otherwise, all Americans will suffer. Aggressive antidiscrimination policies lead to censorship and backfire on the very persons the policies were meant to protect. If Americans want to preserve their constitutional liberties, they must "develop thicker skin" and tolerate a variety of expression—even some blatant discrimination. *Id*. at 245. Instead, there is a

growing trend to provide legal remedies under the rubric of discrimination, "perversely encouraging more people to be hypersensitive and easily outraged." *Id*. at 245. If Americans pursue equality by sacrificing civil liberties, eventually they will have neither liberty nor equality. *Id*. at 246. As one commentator have expressed it: "[G]ay radicals would be both naive and wrong if they believed that gay equality trumps the rights of everybody else." Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 How. L.J. 513, 546 (1997); *see also* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2473 (1997).

The Constitution protects expression whether popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976); *Gay Lib. v. University of Missouri*, 558 F.2d 848, 856 (8th Cir. 1977). Justice Black said it well:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."*Communist Party v. SACB*, 367 U.S. 1, 137 (dissenting opinion) (1961).

*Healy v. James*, 408 U.S. 169, 187-188 (1972). The liberty of all Americans will suffer irreparable harm if newly manufactured rights are allowed to stifle freedom of religion and conscience. Antidiscrimination principles should never be applied in a discriminatory, unequal manner that squelches dissenting voices.

## CONCLUSION

This Court should reverse the district court decision.

Dated: November 1, 2016

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it brief contains **6,989** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word in 14-point Times New Roman.

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## CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on November 1, 2016, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

I further certify that (1) the 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.

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