Nos. 16-60477 & 16-60478

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, BRANDILYNE 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.

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.

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, UTAH, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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.

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• The State of Texas • The State of Arkansas • The State of Louisiana • The State of Nebraska • The State of Nevada • The State of Oklahoma • The State of South Carolina • The State of Utah • Paul R. LePage, Governor of Maine	• Ken Paxton, Texas Attorney General • Jeffrey C. Mateer, First Assistant Attorney General • Scott A. Keller, Solicitor General (lead counsel) • J. Campbell Barker, Deputy Solicitor General • Michael P. Murphy, Assistant Solicitor General • Leslie Rutledge, Arkansas Attorney General • Jeff Landry, Louisiana Attorney General • Douglas J. Peterson, Nebraska Attorney General • Adam Paul Laxalt, Nevada Attorney General • E. Scott Pruitt, Oklahoma Attorney General • Alan Wilson, South Carolina Attorney General • Sean D. Reyes, Utah Attorney General

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Statement Regarding Amici Curiae

Amici curiae are the States of Texas, Arkansas, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, Utah, and Paul R. LePage, Governor of Maine. Amici have an interest in protecting the rights of their citizens to express themselves and conduct their lives in accordance with deeply held religious beliefs and moral convictions. That purpose underlies laws, both state and federal, that protect citizens against legal recriminations for adhering to certain conscientious objections. The district court's reasoning, in contrast, threatens the free-expression and religious-exercise rights of citizens and the ability of States to enact legislation to protect their citizens' rights.

Amici are authorized to file this amicus brief under the second sentence of Federal Rule of Appellate Procedure 29(a) because all parties have consented to the filing of this brief. Counsel for Amici authored this brief in whole. No party or any party's counsel authored any part of this brief, and no person or entity, other than Amici, made a monetary contribution for the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

SUMMARY OF THE ARGUMENT

Governments in our Nation have long protected individual rights as a means of furthering "open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Tolerance in "a pluralistic society," of course, "presupposes some mutuality of obligation." *Id.* at 590-91.

The crucial mutuality of tolerance was emphasized by the Supreme Court last year, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Obergefell* held that the Constitution does not allow government to prohibit same-sex marriage. But it simultaneously explained that the free-expression and free-exercise rights of religious adherents who disagree with same-sex marriage must be "given proper protection." *Id.* at 2607. Only by protecting the expressive rights of speakers on both sides of this issue will "an open and searching debate" be assured. *Id.*

In keeping with the Supreme Court's guidance, the State of Mississippi enacted a statute, House Bill 1523 (HB 1523), to protect citizens' rights to express themselves—or not be compelled to express themselves—and to live their lives in accordance with their sincerely held religious beliefs or moral convictions about same-sex marriage. *See infra* Part I.A. States and the federal government have a long history of protecting individual freedom by creating opt-out rights for conscientious objectors to certain conduct. *See infra* Part I.B. And Mississippi enacted this particular law against the backdrop of other governments punishing their citizens for declining to channel their personal expressive activity as those governments commanded. *See infra* Part II.

The district court was therefore fundamentally mistaken in finding that Mississippi's conscientious-objector statute was motivated by animus based on sexual orientation. The law addresses marriage and does not even mention sexual orientation, and it does not impose a class-based disability like the law invalidated in *Romer v. Evans*, 517 U.S. 620 (1996). HB 1523's plain purpose is to protect individual rights to free expression and the free exercise of religion in our pluralistic society—a laudable goal that governments in this Nation have pursued since the Founding.

ARGUMENT

I. HB 1523 Protects Free-Expression and Free-Exercise Rights Just Like Many Other Conscientious-Objector Exemptions; It Does Not Condone Invidious, Irrational Discrimination.

"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 to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Guided by that fixed star, Mississippi enacted the "Protecting Freedom of Conscience from Government Discrimination Act." HB 1523 § 1.

The law prohibits government in Mississippi from discriminating against a person for adhering to their sincerely held religious belief or moral conviction that "[m]arriage is or should be recognized as the union of one man and one woman." HB 1523 § 2(a). Accordingly, HB 1523 prohibits a state or local government in Mississippi from, among other things:

- forcing a pastor to perform a same-sex wedding in violation of his religious convictions, *id.* §§ 3(1)(a), 9(4);
- requiring religious adherents' house of worship to host a same-sex wedding in violation of the adherents' religion, *id.* §§ 3(1)(a), (c), 9;
- punishing foster or adoptive parents for raising their children according to their religion's teachings regarding same-sex marriage, *id.* § 3(3); or
- compelling a person to create expressive works related to a same-sex wedding—such as photography or wedding-cake artistry—in violation of the person's religious beliefs or moral convictions, *id.* § 3(5).

The law also ensures that public employees are free to express their personal convictions regarding same-sex marriage outside the workplace, without fear of punishment by their employer. *Id.* § 3(7). And HB 1523 allows public employees to recuse themselves from issuing marriage licenses if it would violate their sincerely held religious or moral convictions against participating in a same-sex marriage, provided that the person takes "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.* § 3(8)(a).

As explained below, HB 1523 therefore protects the freedom of expression and free exercise of religion of Mississippi citizens. It is not an irrational governmental policy born of invidious animus based on sexual orientation.

A. HB 1523 Protects Free Expression.

When the Supreme Court recognized a constitutional right to same-sex marriage, it simultaneously "emphasized" that:

> 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.

Obergefell, 135 S. Ct. at 2607. The Court also stressed that its ruling should not impede "an open and searching debate" about the issue. *Id.* As this Court has noted, *Obergefell* "importantly[] invoked the First Amendment, as well." *Campaign for S. Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015). In that spirit, HB 1523 was enacted to protect First Amendment rights and ensure that a person will not face government-mandated reprisal for abiding by sincerely held religious or moral convictions about same-sex marriage.

1. The First Amendment secures the "right to speak and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Supreme Court also has long recognized that the speech protection of the First Amendment "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "Conduct" has First Amendment protection when it is "'sufficiently imbued with elements of communication.'" *Id.* (citation omitted); *see, e.g.*, *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) ("The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute 'symbolic speech.'" (citation omitted)).

A "narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). Rather, to qualify for speech protection under the First Amendment, the conduct simply must be "intend[ed] to convey a particularized message" and likely "understood by those who viewed it." *Texas v. Johnson*, 491 U.S. at 404 (citation and quotation marks omitted).

2. A large amount of conduct covered by HB 1523 is expressive activity. Several examples make that clear.

a. Wedding photography, for example, is conduct covered by HB 1523 and long recognized as a form of artistic expression. As far back as 1884, the Supreme Court held that a photograph of Oscar Wilde was "an original work of art" entitled to copyright protection. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884). The Court noted that it reflected the photographer's "original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit." *Id.*

Those same artistic choices are made by wedding photographers today—choosing which scenes and moments to capture, choosing the perspective and lighting that create the desired mood for the exposure, creating ideas for posing subjects and arranging backgrounds, and editing the resulting film or digital exposure. That is why

wedding photographers are selected based on their portfolio of past work and why organizations like the Wedding Photojournalist Association give awards based on artistic merit. *See, e.g.*, Wedding Photojournalist Association, *Photographer of the Year*, http://www.wpja.com/contests/photographer-of-year (2014 Photographer of the Year: "[A] photographer's images are directly tied to their own personal experience . . . . Merely holding a camera does not mean the gods will give you the shot.").

The artistic character of photography helps explain why portrait photographs are exhibited by the National Portrait Gallery in Washington, D.C. *See, e.g.*, National Portrait Gallery, *Daguerreotypes*, http://npg.si.edu/portraits/collection-highlights/daguerreotypes (describing "daguerreotypes" as "the earliest practical form of photography"). Photographic journalism, which is honored by the Pulitzer Prizes in two categories, is yet another example of the expressive nature of photography. *See* The Pulitzer Prizes, http://www.pulitzer.org/prize-winners-by-year/2016 ("Breaking News Photography" and "Feature Photography"). And each year's Oscar awards celebrate the artistic nature of videography—activity closely related to photography and also protected by section 5(a) of HB 1523. *See* Academy of Motion Picture Arts and Sciences, 2016: Cinematography, http://www.oscars.org/oscars/ceremonies/2016.

In short, "[i]t is well recognized that photography is a form of artistic expression, requiring numerous artistic judgments." *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000). Compelled photography is compelled expression—something noxious to free-speech rights.

b. Designing and creating commissioned wedding cakes is also activity protected by the Act. HB 1523 § 3(5)(b). Cake designers engage in elaborate expression, using their artistic talents to create a custom cake reflecting a couple's special bond. In modern culture, cakes are a centerpiece of celebrations, whose "symbolic function can completely overwhelm" the edible nature of the medium in which the cake designer works. Nicola Humble, *Cake: A Global History* 8 (2010).

Nowhere is this truer than at weddings, where the cake is an artistic centerpiece displayed "with the same reverence as a beloved work of art." Kathleen Hackett et al., *Wedding Cakes and Flowers* 12 (2006). Cake designers are thus selected based on their portfolio of work, *id.* at 44, and can be commissioned months in advance to create their "breathtaking centerpieces," *id.* at 47. Unique techniques have even been invented for this "true art form," such as "stenciled or painted sugar flounces and skirting." Food Network, *Kerry Vincent Bio*, http://www.foodnetwork.com/hosts/kerry-vincent/bio.html. Due to the artistry involved with custom wedding cakes, a unity of vision between the artist and couple is important to ensuring "the perfect expression of . . . wedded bliss." *Wedding Cakes and Flowers*, *supra*, at 53. That expression reflects not only the couple's desires but also the artist's creativity.

HB 1523's protection for wedding-cake designers is not about the sale of mere commodities or mechanistic services. *Cf. Kerry Vincent Bio*, *supra* ("Kerry Vincent's not a cake decorator, unless you call Michelangelo a church painter" (quoting the Portland Oregonian)). Rather, HB 1523 protects expressive conduct akin to sculpting or painting on a cake. And the First Amendment protects the free expression of such

highly refined artistic skills—whether sculpting in clay, painting on a canvas, drawing on paper, or crafting a one-of-a-kind cake. *See, e.g.*, *Hurley*, 515 U.S. at 568-69 ("painting[s] of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll" are covered by the First Amendment regardless of whether they have "a succinctly articulable message"); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (pictures, paintings, drawings, and engravings); *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (tattoos and tattooing); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006) (custom-painted clothing); *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 628 (7th Cir. 1985) (stained-glass windows).

c. Wedding floral design is much like wedding-cake making in its expressive nature. *Wedding Cakes and Flowers*, *supra*, at 153 (noting importance of "the florist's artistry, creativity, and expertise"). Floral arrangements can be like a pointillist painting—spots of color whose overall combination is "perfectly suited" to the mood the artist was commissioned to create. *Id.* at 34. As a floral-art treatise explains, "[a]s in any art, the floral designer embellishes the form with personal interpretation." Norah T. Hunter, *The Art of Floral Design* 30 (2d ed. 2000). "Flower arranging is an art form." *Id.* at x.

3. As highlighted by the expressive nature of the activity covered by HB 1523, this statute serves as a well-justified protection against state-compelled speech. The First Amendment prohibits the government from compelling "one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (*FAIR*). HB 1523 codifies that constitutional right. For example, it bars state and local governments from commanding a

photographer to use his creative talents to create artistic works depicting and celebrating an understanding of marriage contrary to his religious beliefs or personal convictions. HB 1523 § 3(5)(a). The same is true for other forms of artistic expression commissioned for such a celebration.

The First Amendment's protection against compelled speech is not limited to popular or favored viewpoints. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715; *see Barnette*, 319 U.S. at 642 (concluding that "compelling the flag salute and pledge transcends constitutional limitations on [the government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."); *Hurley*, 515 U.S. at 559 (holding that a state mandate that "require[s] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. . . . violates the First Amendment"). By restraining the government from compelling expression, HB 1523 secures Mississippi citizens' constitutional rights to control their expression on a controversial issue without government interference.

* * *

The First Amendment guards against government suppression of both the right to speak and the right not to speak; HB 1523 protects both choices.

B. HB 1523 Protects the Free Exercise of Religion.

In addition to keeping governments from penalizing expressive choices, HB 1523 safeguards citizens' rights to freely exercise their religion. Accommodating religious

convictions in this way is a time-honored, judicially-sanctioned, and rational way for government to preserve individual liberty.

The district court concluded that HB 1523 lacks a rational basis. *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, at *22 (S.D. Miss. June 30, 2016). But that cannot be squared with the Supreme Court's consistent approval of laws that specifically accommodate religious conviction:

> [The Supreme Court] has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987). The Court therefore "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987).

States and the federal government have a long history—since the Founding—of exempting from generally applicable laws those individuals with religiously grounded conscientious objections. HB 1523 carries on that tradition. If the district court's decision stands, the validity of a multitude of similar conscientious-objector laws could be called into question.

For example, States have long provided a religious exemption for oath requirements in court and other official proceedings. Michael W. McConnell, *The Origins*

and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1467-68 (1990) ("By 1789, virtually all of the states had enacted oath exceptions."). Likewise, conscientious-objector exemptions from military service have existed since the Founding era. And the Continental Congress granted an absolute religious exemption from bearing arms during the Revolution, urging objectors to "contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles." *Id.* at 1469. This exemption is noteworthy because it "recognizes the superior claim of religious 'conscience' over civil obligation, even at a time of 'universal calamity,' and leaves the appropriate accommodation to the judgment of the religious objectors." *Id.*

One State in that era even provided exemptions from its marriage law on religious grounds. Rhode Island had laws governing marriage ceremonies but waived them for Jewish residents, due to their religious convictions. *Id.* at 1471 & n.315 (citing An Act Regulating Marriage and Divorce, R.I. Pub. Laws § 7 (1798), reprinted in 2 The First Laws of the State of Rhode Island 481, 483 (John D. Cushing ed., 1983)).

Today, conscientious-objector exemptions like HB 1523 abound in federal and state law. For example:

- Almost all States and the District of Columbia provide religious exemptions from vaccination requirements.[1]

[1] *See, e.g.*, Alaska Admin. Code tit. 4 § 06.055(b)(3); Ark. Code § 6-18-702(d)(4)(A)-(C)(i); Cal. Code Regs. tit. 17 § 6051(b); Colo. Rev. Stat. § 25-4-903(2)(b); Conn. Gen. Stat. § 10-204a(a)(3); Del. Code tit. 14 § 131(a)(6); D.C.

- Many States exempt healthcare providers from complying with a patient's healthcare instruction if it would violate the provider's conscience, including "advance directives" that, for example, instruct that life support should be removed if a patient enters a persistent vegetative state.[2]
- Many States exempt healthcare providers from furnishing certain drugs on religious or conscience grounds, such as particular forms of contraceptives.[3]

Code § 38-506(1); Fla. Stat. § 1003.22(5)(a); Ga. Code § 20-2-771(e); Haw. Rev. Stat. § 302A-1156(2); Idaho Code § 39-4802(2); 105 Ill. Comp. Stat. § 5/27-8.1(8); Ind. Code § 20-34-3-2; Iowa Code § 139A.8(4)(a)(2); Kan. Stat. § 65-508(e)(2); Ky. Rev. Stat. § 214.036; La. Stat. § 170.1(C)(1)-(2); Me. Rev. Stat. tit. 20-A § 6355(3); Md. Code, Educ. § 7-403(b)(1); Mass. Gen. Laws ch. 76, § 15; Mo. Rev. Stat. § 167.181(3); Mont. Code § 20-5-405(1); Neb. Rev. Stat. § 79-221(2); Nev. Rev. Stat. § 392.435(1); N.H. Rev. Stat. § 141-C:20-c(II); N.J. Stat. § 18A:61D-3; N.M. Stat. § 24-5-3(2)-(3); N.Y. Pub. Health Law § 2164(9); N.C. Gen. Stat. § 130A-157; N.D. Cent. Code § 23-07-17.1(3); Ohio Rev. Code § 3313.671(B)(4); Okla. Stat. tit. 10, § 413; Or. Rev. Stat. § 433.267(1)(c)(A); 28 Pa. Admin. Code § 23.84; 16 R.I. Gen. Laws § 16-38-2(a); S.C. Code § 44-29-180(D); S.D. Codified Laws § 13-28-7.1(2); Tenn. Code § 37-10-402; Tex. Health & Safety Code § 161.004(d)(1); Utah Code § 53A-11-302(3)(c); Vt. Stat. tit. 18, § 1122(a)(3)(A); Va. Code § 22.1-271.2(C); Wash. Rev. Code § 28A.210.090(1)(b); Wis. Stat. § 252.04(3); Wyo. Stat. § 21-4-309(a).

[2] *See, e.g.*, Alaska Stat. § 13.52.060(e); Ark. Code § 20-6-109(b); Cal. Prob. Code § 4734(a); Del. Code tit. 16, § 2508(e); Haw. Rev. Stat. § 327E-7(e); Me. Rev. Stat. tit. 18-A, § 5-807(e); Miss. Code. § 41-41-215(5); N.H. Rev. Stat. § 137-J:7(d); N.M. Stat. § 24-7A-7(E); N.D. Cent. Code § 23-06.5-09; 20 Pa. Stat. and Cons. Stat. § 5424(a); Tenn. Code § 68-11-1808(c), (d); Utah Code § 75-2a-115(4)(e); Vt. Stat. tit. 18, § 9707(b); W. Va. Code § 16-30-12(b); Wyo. Stat. § 35-22-408(e).

[3] *See, e.g.*, Ariz. Rev. Stat. § 36-2154(B); Ark. Code § 20-16-304(4); 24 Del. Admin. § 2500 -3.0; Colo. Rev. Stat. § 25-6-102(9); Fla. Stat. § 381.0051(5); Ga. Comp. R. & Regs. § 480-5-.03(n); Idaho Code § 18-611; Me. Rev. Stat. tit. 22, § 1903(4); Miss. Code § 41-107-1 to -13; 49 Pa. Code § 27.103; S.D. Codified Laws § 36-11-70; Tenn. Code § 68-34-104(5); North Carolina Board of Pharmacy,

- Almost all States[4] and federal law[5] protect medical providers that refuse to perform abortions for religious reasons.

As the abortion-conscientious-objector example shows, an exemption for an individual based on his religious beliefs or moral convictions is not inconsistent with judicial recognition of another individual's constitutional right. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (recognizing "appropriate protection" where "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure"). As with abortion, so too with same-sex marriage. The Supreme Court in *Obergefell* recognized a constitutional

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Conscience Concerns in Pharmacist Decisions, http://www.ncbop.org/LawsRules/ConscienceClause.pdf.

[4] *See, e.g.*, Alaska Stat. § 18.16.010(b); Ariz. Rev. Stat. § 36-2154; Ark. Code § 20-16-601; Cal. Health & Safety Code § 123420; Conn. Agencies Regs. § 19-13-D54(f); Del. Code tit. 24, § 1791(a)-(b); Fla. Stat. § 390.0111(8); Ga. Code § 16-12-142; Haw. Rev. Stat. § 453-16(e); Idaho Code § 18-612; 720 Ill. Comp. Stat. § 510/13; Ind. Code § 16-34-1-4; Iowa Code § 146.1; Kan. Stat. § 65-6737; Ky. Rev. Stat. § 311.800(3); La. Stat. § 40:1299.31; Me. Rev. Stat. tit. 22, § 1592; Md. Code, Health-Gen. § 20-214(a)-(b); Mass. Gen. Laws ch. 112, § 12I; Mich. Comp. Laws §§ 333.20181-.20184; Minn. Stat. §§ 145.414, .42; Mo. Rev. Stat. §§ 188.105-.120, 197.032; Mont. Code § 50-20-111; Neb. Rev. Stat. §§ 28-337 to -341; Nev. Rev. Stat. §§ 632.475, 449.191; N.J. Rev. Stat. §§ 2A:65A-1, to -4; N.M. Stat. § 30-5-2; N.Y. Civ. Rights Law § 79-i; N.C. Gen. Stat. § 14-45.1(e)-(f); N.D. Cent. Code § 23-16-14; Ohio Rev. Code § 4731.91; Okla. Stat. tit. 63, § 1-741; Or. Rev. Stat. § 435.475; 43 Pa. Stat. and Cons. Stat. § 955.2; 23 R.I. Gen. Laws § 23-17-11; S.C. Code § 44-41-40; S.D. Codified Laws §§ 34-23A-11 to -13; Tenn. Code §§ 39-15-204 to -205; Tex. Occ. Code §§ 103.001-.004; Utah Code § 76-7-306; Va. Code § 18.2-75; Wash. Rev. Code § 9.02.150; Wis. Stat. § 253.09; Wyo. Stat. § 35-6-105.

[5] *See, e.g.*, 42 U.S.C. §§ 238n, 300a-7(c)(1)(B); Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280; 42 U.S.C. § 18023(b)(4), (c)(2)(A)

right for a couple to enter into a same-sex marriage. But that in no way undermines laws like HB 1523 that protect the free-expression and free-exercise rights of conscientious objectors who cannot in good faith participate in or celebrate such ceremonies.

C. HB 1523 Does Not Address Sexual Orientation or Condone Invidious Discrimination.

The district court concluded that HB 1523's accommodation of religious and moral conviction "condones discrimination" on the basis of sexual orientation. *Barber*, 2016 WL 3562647, at *12. The court also concluded that HB 1523 was motivated by invidious animus based on sexual orientation for singling out certain citizens for unequal treatment under the law. *Id.* at *19. The district court was mistaken.

HB 1523's plain language shows that it aims to shield from state punishment an individual's expressive choices based on religious or moral convictions about same-sex marriage. HB 1523 §§ 2-3. The Supreme Court recognizes that religious adherents' views regarding marriage can be "central to their lives and faiths" and, therefore, have been "long revered." *Obergefell*, 135 S. Ct. at 2607. When a person's expressive choices reflect a belief that "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world," *id.* at 2594,[6] that person is not acting out of irrational "animus," *Romer v. Evans*, 517 U.S. at 632. The long and deep pedigree of this conviction forecloses any

[6] *See also, e.g.*, Sherif Girgis et al., *What Is Marriage?*, 34 Harv. J. L. & Pub. Pol'y 245, 247 (2011) ("the world's major religious traditions have historically understood marriage as a union of man and woman").

suggestion that mere irrational animus, rather than a sincerely held religious belief, underlies the conscientious objections here.

The district court is fundamentally wrong in characterizing HB 1523 as analogous to the Colorado law invalidated in *Romer v. Evans*. *See Barber*, 2016 WL 3562647, at *12. That law in *Romer* was "born of animosity" to homosexuals, the Court concluded, because it had "the peculiar property of imposing a broad and undifferentiated disability on a single named group." 517 U.S. at 632, 634. HB 1523, in contrast, imposes no disability on a single named group, and the statute was born out of a State's desire to grant a conscientious-objector exemption for good-faith religious beliefs and moral convictions—a practice repeatedly employed by States and the federal government since the Founding. The law *prevents* government discrimination—discrimination against religious adherents. *See, e.g.*, HB 1523 § 3(5) ("The state government shall not take any discriminatory action against a person" for declining to participate in a same-sex wedding if it would violate their religious beliefs or moral convictions).

HB 1523 also differs from the law in *Romer* in that it does not "identif[y] persons by a single trait and then den[y] them protection across the board." *Romer*, 517 U.S. at 633. HB 1523 addresses freedom of expression and exercise regarding marriage; it does not even mention sexual orientation. Just as the Supreme Court upheld a parade organizers' exclusion of a group that wished to promote homosexuality in *Hurley*, the First Amendment does not allow the government to compel Mississippi citizens to express views on marriage with which those citizens disagree. HB 1523 thus does not invidiously discriminate on the basis of sexual orientation. Rather, the law creates

a clear statutory prohibition on what is already forbidden under the First Amendment: requiring a person "to alter the expressive content" of their private conduct. *Hurley*, 515 U.S. at 572–73.

II. HB 1523 Was Enacted in the Wake of Notable Examples of Other Governments Punishing their Citizens for Declining to Engage in Expressive Conduct in Violation of Religious and Moral Convictions.

Mississippi did not enact HB 1523 in a vacuum. The district court could conclude otherwise only by ignoring the "actual, concrete problem of free exercise violations," or corresponding free-speech violations, by governments across the country. *Barber*, 2016 WL 3562647, at *30. Mississippi enacted HB 1523 against the backdrop of other governments in our Nation punishing their own citizens for declining to engage in conduct, including expressive conduct, that would violate their religious and moral convictions regarding same-sex marriage. And that same use of governmental power could be achieved by the largest city in Mississippi—its capital, Jackson—which has an "unlawful discrimination" ordinance prohibiting "differential treatment" on the basis of "sexual orientation." Jackson, Miss., Code §§ 86-301, -302 (2016). As the following examples make clear, Mississippi acted to protect free-expression and free-exercise rights that are under actual threat.

A. Other Governments in Our Nation Have Punished Citizens for Refusing to Engage in Expressive Conduct Regarding Same-Sex Marriage.

Citizens across the Nation have faced government reprisals under state and local sexual-orientation "anti-discrimination" laws for adhering to their religious and moral convictions regarding same-sex marriage and refusing to engage in expression

contrary to those beliefs. As the following examples illustrate, the Mississippi Legislature's concerns for religious liberty and expressive rights in this context were well founded.

1. Arlene's Flowers

The State of Washington fined a floral designer and commanded her to create custom floral arrangements for same-sex weddings, even though such expression violated her religion and was contrary to her desire not to create art celebrating a marriage contrary to her faith. Barronelle Stutzman owns and operates a small flower shop called Arlene's Flowers in Richland, Washington, where she devotes most of her time creating floral arrangements for special occasions, including weddings. Br. of Appellants at 4, *Washington v. Arlene's Flowers, Inc.*, No. 91615-2 (Wash. Oct. 16, 2015) (Stutzman Br.). Stutzman operates her flower shop in accordance with her Christian faith, which dictates that she treat everyone with respect and that she use her artistic talents in floral design consistent with her religious beliefs. *Id.* at 7-9. Stutzman does not discriminate based on sexual orientation and has employed and serves people who identify as gay, lesbian, and bisexual. *Id.* at 9.

Over the years, Stutzman developed a friendship with Rob Ingersoll, a client who is gay, and designed many flower arrangements for him. *Id.* at 10-11; Barronelle Stutzman, Op-Ed, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, Seattle Times, Nov. 9, 2015, http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/. When Ingersoll asked Stutzman to design a special flower arrangement for his same-sex wedding, Stutzman declined on the basis that it would violate her religious conviction to participate in a same-sex wedding

ceremony. Stutzman Br. 12-13. Instead, she helped him find a local flower shop that could design the floral arrangements they wanted. *Id.* at 13.

Rather than respecting Stutzman's religious convictions and her right against compelled expression, in 2013 the Washington Attorney General and Ingersoll sued her for violation of the Washington Law Against Discrimination—which bars discrimination based on sexual orientation, Wash. Rev. Code § 49.60.030 (2009). Stutzman Br. at 13-14. That law, of course, is like the Jackson, Mississippi, ordinance noted above.

The trial court held Stutzman personally liable for violations of state anti-discrimination law, imposed civil penalties, and ordered her to either create flower designs for same-sex weddings in violation of her religious convictions or else cease creating floral arrangements for any wedding. Mem. Decision & Order, *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Benton Cty. Superior Ct. Feb. 18, 2015). The court acknowledged that Stutzman would sell raw materials and pre-made floral arrangements to a couple for their same-sex wedding, but she was prohibited by her religious convictions from creating custom floral art celebrating a same-sex wedding. *Id.* at 6. Nevertheless, the court rejected Stutzman's arguments that forcing her to design custom flower arrangements in violation of her religious faith infringes on expressive and religious rights protected by the First Amendment. *Id.* at 38-43. Stutzman's appeal is pending, and the Washington Supreme Court will hear oral argument on November 15, 2016.

HB 1523 prohibits this sort of punishment for refusing to engage in expression contrary to an individual's religious beliefs and moral convictions regarding same-sex marriage.

2. Elane Photography

Elaine Huguenin operated a small photography business called Elane Photography in Albuquerque, New Mexico. As an artist with a degree in photography, Huguenin captured engagements, weddings, and other events in a photojournalistic style. Pet. for Writ of Cert. at 4, *Elane Photography, LLC v. Willock*, No. 13-585 (Nov. 8, 2013). Huguenin is also a devout Christian, and she ran her business according to the dictates of her faith, refusing to create images that tell a story or convey a message contrary to her religious beliefs. *Id.* at 6. For that reason, she declined requests to create nude maternity photographs and photographs portraying violence. *Id.*

When Huguenin was approached by Vanessa Willock about photographing her same-sex commitment ceremony, Huguenin declined because of her religious conviction that marriage is the union of one man and one woman. *Id.* at 7; *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). Huguenin photographs gay and lesbian clients, *Elane* Cert. Pet. at 7; she declined the commission because the particular message of the ceremony conflicted with her faith, not because of the sexual orientation of the individuals seeking to retain her.

Although Willock found another photographer to capture the ceremony (and at a lower cost), *id.*, Willock filed a complaint against Elane Photography with the New

Mexico Human Rights Commission for discrimination based on sexual orientation, alleging a violation of the New Mexico Human Rights Act, *Willock*, 309 P.3d at 60.

In 2008, the Commission found Elane Photography in violation of Section 28-1-7(F) of the New Mexico Human Rights Act for discrimination on the basis of sexual orientation. *Id.* The case eventually reached the New Mexico Supreme Court, which held that Elane Photography violated the Act by declining to create photographs of the ceremony that would violate Huguenin's religious beliefs. The New Mexico Supreme Court rejected Huguenin's First Amendment arguments, even though the court recognized that the Act compels her to provide "artistic and creative work" that she could not support on religious grounds. *Id.* at 66.

In his special concurrence, Justice Bosson acknowledged that Huguenin and her husband "are compelled by law to compromise the very religious beliefs that inspire their lives." *Id.* at 79. That imposition was permissible, in Justice Bosson's view, as "the price of citizenship." *Id.* at 80. HB 1523 spares Mississippi citizens from paying such a "price" for their expression and exercise rights.

3. Masterpiece Cakeshop

Jack Phillips, a cake artist that owns Masterpiece Cakeshop in Colorado, is a devout Christian and declines commissions that violate the tenets of his faith. In 2012, Phillips declined to design and create a cake for a same-sex wedding based on his religious conviction about marriage. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276-77 (Colo. App. 2015). Although the same-sex couple obtained a cake at another

bakery, they filed a complaint against Phillips for violating the Colorado Anti-Discrimination Act (CADA), which forbids discrimination based on, among other things, sexual orientation. *Id.*

The Colorado Civil Rights Commission rejected Phillips' arguments that his decision was protected by the First Amendment, found him in violation of CADA, and ordered Phillips to "(1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial." *Id.* One member of the Commission compared religious adherents to slave owners and Nazis: "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust," and "it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Pet. for Writ of Cert. at 29, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (July 22, 2016) (Masterpiece Cert. Pet.) (quoting transcript of hearing).

The court of appeals upheld the Commission's decision and rejected Phillips' First Amendment arguments. *Craig*, 370 P.3d at 276. The court conceded that "First Amendment speech protections may be implicated" in the creation of a wedding cake, but held that a wedding cake is not inherently expressive. *Id.* at 288. The Colorado Supreme Court declined the appeal, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), and a

petition for a writ of certiorari is now pending in the United States Supreme Court. Masterpiece Cert. Pet., No. 16-111.

The Colorado Civil Rights Commission also applies a double-standard. It has declined to punish three secular bakeries that refused to create cakes with Bible verses against homosexuality. *See Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 24, 2015), http://perma.cc/5K6D-VV8U; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), http://perma.cc/JN4U-NE6V. Although CADA forbids discrimination based on a person's creed, the Commission concluded that the bakeries' refusal to make the cakes was not based on the prospective customer's creed, but because the bakers found the message offensive. *See id.* The Commission did not try to explain how refusing to create and decorate a cake out of opposition to a customer's religious message is not discrimination on the basis of the customer's creed.

4. Sweetcakes by Melissa

Melissa and Aaron Klein, owners of Sweetcakes by Melissa in Portland, Oregon, were fined $135,000 by the State of Oregon for declining to design and create a custom wedding cake for a same-sex wedding because it would violate the Kleins' religious beliefs. *See* Final Order at 42, *In re Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus., July 2, 2015), https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf. The State summarily rejected the Kleins' argument that application of the Oregon

anti-discrimination law violates their First Amendment free-expression and free-exercise rights. *Id.* at 29-32. Besides the large fines, the State also required the Kleins to "cease and desist" from declining to create cakes for same-sex weddings, despite their religious convictions, and ordered them to stop publicly communicating that their religious convictions prevent them from creating wedding cakes for same-sex weddings. *Id.* at 42-43. Because of the penalties, the Kleins were forced to close their store. *See id.* at 24.

5. The Hitching Post Wedding Chapel

Donald and Evelyn Knapp are ordained Christian ministers who operated the Hitching Post Wedding Chapel in Coeur d'Alene, Idaho, according to the dictates of their religion. *Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118, 1120-22 (D. Idaho 2016). The Knapps have never allowed same-sex weddings or commitment ceremonies in their Chapel on the basis that doing so would violate the Knapps' religious beliefs. *Id.* at 1122.

In 2013, the City of Coeur d'Alene enacted an ordinance making it unlawful to "deny to or to discriminate against any person because of sexual orientation and/or gender identity/expression the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement." *Id.* After the Ninth Circuit held that Idaho state law could not limit marriage to opposite-sex couples, the Knapps temporarily closed the wedding chapel out of fear of an enforcement action under the city's anti-discrimination ordinance. *Id.* at 1125. The City confirmed that the Knapps would be in violation of the ordinance if they operated the Hitching Post as a for-profit business and declined

to perform same-sex weddings on equal terms with opposite-sex weddings. *Id.* at 1125-26. Only if the Knapps converted the wedding chapel into a non-profit religious corporation would they be exempt from the ordinance. *Id.*

HB 1523 guards against such coercion. It forbids the government from forcing ordained clergy to host or perform same-sex wedding ceremonies that violate their religious convictions. HB 1523 § 3(1).

6. Brush & Nib Studio

Joanna Duka and Breanna Koski own Brush & Nib Studio, a small stationary company in Phoenix, Arizona that specializes in crafting custom hand-painted, hand-lettered wedding invitations and other cards and paper goods. Order, *Brush & Nib Studio, LC v. City of Phoenix*, No. CV 2016-052251 (Superior Ct. Maricopa Cty., Sept. 16, 2016). Duka and Koski are Christians and operate their business according to their religious convictions, which require them to decline custom art services for a same-sex wedding. *Id.* at 2. But they will sell pre-made items for same-sex weddings. *Id.* This distinction vividly highlights their objection to being compelled to engage in custom expression celebrating a same-sex wedding.

The owners also desire to post their business purpose and religious views on their website, which would explain their religious conviction that marriage is reserved to a union of one man and one woman and their inability to create custom art for same-sex ceremonies. *Id.* They cannot do so, however, because the City of Phoenix has outlawed denying (or expressing intent to deny) goods or services in a place of public accommodation like Brush & Nib based on sexual orientation, and the City

interprets that ban to cover expressive decisions regarding same-sex weddings. *Id.* at 4, 6-7.

Duka and Koski's attempt to preliminarily enjoin this ordinance was rejected. Despite the communicative nature of their custom wedding invitations, the state trial court concluded that the ordinance does not infringe Duka and Koski's free-expression rights and that "[n]othing about the ordinance has prevented the Plaintiffs from participating in the customs of their religious beliefs or has burdened the practice of their religion in any way." *Id.* at 15. The court ruled that compelling expression contrary to religious beliefs is not even "an incidental burden on their exercise of religion." *Id.* at 14.

HB 1523 would have prevented this infringement of these artists' First Amendment rights by prohibiting enforcement of the City's ordinance. *See* HB 1523 § 3(5).

B. The City of Jackson's Ordinance Threatens Free-Expression and Free-Exercise Rights.

By ordinance, the City of Jackson, Mississippi forbids discrimination on the basis of sexual orientation. Jackson, Miss., Code § 86-227 (2016). This is the same type of ordinance used by other governments, in the cases discussed above, to punish their citizens for refusing to engage in expression contrary to their religious or moral convictions about same-sex marriage. And the City of Jackson defines the ordinance's sweep very broadly: "any act, policy or practice that, regardless of intent, has the effect of subjecting any person to differential treatment" due to, among other things, that person's "real or perceived" sexual orientation. *Id.* § 86-226. Noncompliance is punished by severe and ongoing fines. *Id.* § 86-230.

Alarming consequences flow from a sweeping interpretation of this ordinance. In the Catholic Church, marriage is a holy sacrament and a wedding is an act of worship. *See, e.g.* Catechism of the Catholic Church, Nos. 1660, 1663, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm. Nevertheless, a Catholic priest who performs traditional marriage ceremonies would face the choice of performing same-sex weddings in violation of his faith or risk the City's retaliation and substantial legal fees to defend the lawfulness of his choices. His parish might also face reprisal by the City for declining to allow a same-sex wedding in the church facilities. Likewise, the floral designer, the wedding-cake artisan, and the photographer could be punished—and face financial ruin—for refusing to engage in expression contrary to their religious or moral convictions.

The City of Jackson's ordinance illustrates why HB 1523 is needed to safeguard the free-expression and free-exercise rights of Mississippi citizens. Perhaps a court would correctly recognize a First Amendment defense to an enforcement action against a priest, floral designer, wedding-cake artisan, or photographer with a conscientious objection to celebrating a same-sex marriage. But clear statutory protection is invaluable in removing any uncertainty or chilling of First Amendment rights, and Legislatures routinely act to remove uncertainty about the law. As the district court recognized, "[i]f HB 1523 goes into effect, . . . the City of Jackson . . . could [not] discipline or take adverse action against anyone who violated [the ordinance] on the basis of" a belief that marriage should be reserved for opposite-sex unions. *Barber*, 2016 WL 3562647, at *21.

At its core, HB 1523 is a conscientious-objector law. It prevents government from compelling speech, and it protects individual rights in our pluralistic society. That is precisely why the district court's injunction should be vacated.

Conclusion

The Court should hold that HB 1523 is constitutional and vacate the district court's preliminary injunction.

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