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; BRANDIILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, State of Mississippi; JOHN DAVIS, Executive Director of the Mississippi Department of Human Services,

Defendants-Appellants.

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)
Nos. 3:16-cv-00417-CWR-LRA, 3:16-cv-00442-CWR-LRA
(Hon. Carlton Reeves)

BRIEF OF *CSE* PLAINTIFFS-APPELLEES

Roberta A. Kaplan
Joshua D. Kaye
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
rkaplan@paulweiss.com
jkaye@paulweiss.com

Alysson Mills
FISHMAN HAYGOOD, LLP
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5253
amills@fishmanhaygood.com

Dale Carpenter
SMU DEDMAN SCHOOL OF LAW
3315 Daniel Avenue
Dallas, Texas 75205
Telephone: (214) 768-2638
dacarpenter@mail.smu.edu

Attorneys for Plaintiffs-Appellees the Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski

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; BRANDIILYNE MANGUM-DEAR; SUSAN MANGUM; JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, State of Mississippi; JOHN DAVIS, Executive Director of the Mississippi Department of Human Services,

Defendants-Appellants.

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.

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.

1. Campaign for Southern Equality, Plaintiff-Appellee. Campaign for Southern Equality is a North Carolina non-profit corporation with no parent corporation. No publicly held company owns ten percent or more of the Campaign for Southern Equality's stock.

2. Susan Hrostowski, Plaintiff-Appellee.

3. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for Plaintiffs-Appellees the Campaign for Southern Equality and Susan Hrostowski (the "CSE Plaintiffs-Appellees") (Roberta A. Kaplan and Joshua D. Kaye representing).

4. Dale Carpenter, Counsel for the CSE Plaintiffs-Appellees.

5. Fishman Haygood, LLP, Counsel for the CSE Plaintiffs-Appellees (Alysson Mills representing).

6. Rims Barber, Plaintiff-Appellee.

7. Carol Burnett, Plaintiff-Appellee.

8. Joan Bailey, Plaintiff-Appellee.

9. Katherine Elizabeth Day, Plaintiff-Appellee.

10. Anthony Laine Boyette, Plaintiff-Appellee.

11. Don Fortenberry, Plaintiff-Appellee.

12. Susan Glisson, Plaintiff-Appellee.

13. Derrick Johnson, Plaintiff-Appellee.

14. Dorothy C. Triplett, Plaintiff-Appellee.

15. Renick Taylor, Plaintiff-Appellee.

16. Brandiilyne Mangum-Dear, Plaintiff-Appellee.

17. Susan Mangum, Plaintiff-Appellee.

18. Joshua Generation Metropolitan Community Church, Plaintiff-Appellee.

19. McDuff & Byrd, Counsel for Plaintiffs-Appellees Rims Barber, Carol Burnett, Joan Bailey, Katherine Elizabeth Day, Anthony Laine Boyette, Don Fortenberry, Susan Glisson, Derrick Johnson, Dorothy C. Triplett, Renick Taylor, Brandiilyne Mangum-Dear, Susan Mangum, and Joshua Generation Metropolitan Community Church (the "Barber Plaintiffs-Appellees") (Robert B. McDuff, Sibyl C. Bird, and Jacob W. Howard representing).

20. Mississippi Center for Justice, Counsel for the Barber Plaintiffs-Appellees (Beth L. Orlansky, John Jopling, Charles O. Lee, and Reilly Morse representing).

21. Lambda Legal, Counsel for the Barber Plaintiffs-Appellees (Susan Sommer and Elizabeth Littrell representing).

22. Phil Bryant, in his official capacity as the Governor of the State of Mississippi, Defendant-Appellant.

23. John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services, Defendant-Appellant.

24. James Otis Law Group, LLC, Counsel for Defendant-Appellants Phil Bryant and John Davis (Jonathan F. Mitchell and D. John Sauer representing).

25. Alliance Defending Freedom, Counsel for Defendant-Appellants Phil Bryant and John Davis (Kevin H. Theriot representing).

26. Drew L. Snyder, Counsel for Defendant-Appellant Phil Bryant.

27. Office of the Attorney General for the State of Mississippi, Counsel for Defendant-Appellant John Davis (Tommy D. Goodwin, Paul E. Barnes, and Douglas T. Miracle representing).

Respectfully submitted,

/s/ Roberta A. Kaplan
Roberta A. Kaplan

Attorney of Record for Plaintiffs-Appellees
The Campaign for Southern Equality and
The Rev. Dr. Susan Hrostowski

STATEMENT REGARDING ORAL ARGUMENT

This appeal will decide the fate of HB 1523, a law that the district court found violates the Establishment Clause in multiple ways. Given the complexities of Establishment Clause jurisprudence and the fact that HB 1523, if it were to go into effect, has the potential to impact many thousands of Mississippians, Plaintiffs-Appellees respectfully request oral argument pursuant to Fed. R. App. P. 34 and Fifth Circuit Rule 28.2.3.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The First Amendment to the United States Constitution instructs that the "[g]overnment . . . must be neutral in matters of religious theory, doctrine, and practice." *Epperson* v. *Arkansas*, 393 U.S. 97, 103–04 (1968). But there is nothing neutral about HB 1523, the Mississippi statute at issue in this appeal. HB 1523 is legislation the likes of which has not been seen in our republic for the last two hundred years. Unlike permissible religious accommodation laws, HB 1523 explicitly incorporates and actually endorses the following "religious beliefs" that are not espoused by all religions, by all Christian denominations, or even by all Christians in Mississippi: (1) marriage "is or should be recognized as the union of one man and one woman;" (2) "[s]exual relations are properly reserved to such a marriage;" and (3) an individual's "immutable biological sex [is] objectively determined by anatomy and genetics at time of birth." HB 1523 § 2.

HB 1523 goes on to provide adherents of these three religious views with immunity from any possibility of censure for violation of a wide array of generally applicable laws, including laws intended to protect the most vulnerable Mississippians (including foster children and the mentally ill) from harm. HB 1523 further denies any possibility of judicial or administrative redress to anyone harmed by the actions of holders of these

religious beliefs, as long as they acted in a manner based upon or "consistent with" the beliefs. To add insult to injury, HB 1523 even creates a new private right of action allowing holders of the Section 2 Beliefs to sue both the State of Mississippi and any third parties harmed by the believers' conduct for equitable and monetary relief. *Id.* §§ 6, 9(2)(d).

Because HB 1523 is explicitly premised on protecting specific *beliefs*, rather than conduct, it is unprecedented in scope. Although Section 3 of HB 1523 purports to identify illustrative examples of contexts where the Section 2 religious beliefs are supposed to be protected, such as the provision of "marriage-related services, accommodations, facilities or goods" by florists, car-service rentals, or jewelry stores, *see id.* § 3(5), under the plain language of the statute, these circumstances are so broad as to be virtually unbounded—they certainly extend far beyond the "same-sex marriage ceremonies" described by Appellants. (Br. at 5.)

The breadth of HB 1523 is particularly striking when considered in the context of the protections that are already in place to safeguard the scruples of religious people in Mississippi, whatever their views on marriage. Both the First Amendment and Mississippi's Religious Freedom Restoration Act, passed in 2014, Miss. Code Ann. § 11-61-1 ("Mississippi RFRA") fully protect Mississippians' rights to believe what

they choose and to practice their religions accordingly. But unlike HB 1523, they apply neutrally to *all* sincerely-held religious beliefs, not just to three beliefs that happen to be hostile to gay and transgender people and are associated with specific sectarian doctrines. HB 1523 is also absolute in that, unlike standard religious freedom laws such as Mississippi's RFRA, it does not require any consideration of whether there is a substantial burden on an individual's exercise of a sincerely-held religious belief, whether the government has a compelling interest in not providing an exemption, or whether the burden is the least restrictive means of serving that interest.

Faced with the undeniable fact that HB 1523 endorses and extends tangible benefits to the adherents of certain religions and religious beliefs over others, Appellants devote much of their brief to a discussion of conscience-based exemption laws intended to excuse religious persons from performing an abortion or serving in the military. (Br. at 6, 9, 11, 42–49.) HB 1523, however, is not like any of the "conscience" statutes cited by Appellants. HB 1523 constitutes a radical departure from the many valid conscientious objector laws in operation throughout the country that identify some narrow conduct—*e.g.*, "to assist in any aspect of an execution," or "to [perform] combatant training and service in the armed forces"—and then exempt all people who for any reason (religious or otherwise) are opposed to

having to do so. 42 U.S.C. § 300a-7; 50 U.S.C. § 3806(j); Ala. Code § 15-18-82.1(i); Fla. Stat. § 922.105(9). For these reasons, as First Amendment scholar Noah Feldman has concluded: "[t]he Mississippi law is an outlier, a case of religious liberty gone so far that it turns into a religious establishment." Noah Feldman, *Don't Let Mississippi Establish Anti-Gay Religion*, Bloomberg View (June 16, 2016, 12:43 PM), https://www.bloomberg.com/view/articles/2016-06-16/don-t-let-mississippi-establish-anti-gay-religion.

Appellees appreciate that there is a wide diversity of views on marriage and family among people of faith. Indeed, in the order striking down Mississippi's ban on marriages between same-sex couples, *Campaign for S. Equal.* v. *Bryant*, 791 F.3d 625 (5th Cir. 2015), *aff'g* 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014) ("*CSE I*"), this Court noted that "those who adhere to religious doctrines, [will] continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned" and that the First Amendment protects their right to "engage those who disagree with their view in an open and searching debate." *Id.* at 627 (quoting *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015)). Appellees fully embrace and defend that expressive freedom. But while all Americans have the constitutional right to freely exercise their religion, and

Mississippians are further protected by the Mississippi RFRA, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992). HB 1523 is not about protecting Mississippians' ability to practice their religion or to engage in an "open and searching debate" about the merits of marriage equality. HB 1523 instead acts as an unconstitutional religious "gerrymander" by putting its thumb on the scales to give special protections to one side in that religious debate and not the other. *Gillette* v. *United States*, 401 U.S. 437, 452 (1971).

The judgment of the district court should be affirmed.

ISSUES PRESENTED

1. Did the district court correctly determine that HB 1523 violates the First Amendment's Establishment Clause?[1]

STATEMENT OF THE CASE

HB 1523

At the heart of HB 1523 is Section 2, which designates the following three religious beliefs or moral convictions that entitle their holders to exclusive legal benefits: (1) "Marriage is or should be recognized as the union of one man and one woman;" (2) "[s]exual relations are

[1] The *CSE* Plaintiffs, unlike the plaintiffs in the *Barber* case with which this case has been consolidated, did not bring an equal protection challenge to HB 1523.

properly reserved to a marriage between one man and one woman;" and (3) male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth." HB 1523 § 2 (together, the "Section 2 Beliefs"). HB 1523 animates the State's preference for those religious beliefs by providing that the "state government" (defined broadly to include state actors as well as private citizens seeking to enforce a right under state or local law) shall not take any "discriminatory action . . . wholly or partially on the basis" that a person acts in a wide array of contexts "based upon or in a manner consistent with" a Section 2 Belief. *Id.* §§ 3, 4, 9(2).

HB 1523 is a far cry from the "exceedingly limited" statute depicted by Appellants. (Br. at 8.) Section 3(5), for example, does not merely allow "private citizens" to "decline to participate in same-sex marriage ceremonies," as Appellants suggest. (Br. at 6.) Instead, it permits individuals and for-profit corporations to refuse to provide a virtually unlimited array of "marriage-related services, accommodations, facilities, or goods" including but not limited to jewelry sales and car-service rentals for a purpose related to the "solemnization, formation, celebration, *or recognition*" of any marriage. HB 1523 §§ 3(5), 9(3) (emphasis added). Thus, a restaurant manager in Jackson, Mississippi who chooses not to

"recognize" the marriage of a lesbian couple, for example, is empowered by Section 3(5) to refuse to seat them together at a table for two on their anniversary, despite Jackson's ordinance prohibiting discrimination on the basis of sexual orientation. Jackson, Miss., Code of Ordinances §§ 86-301–306. Appellants' contention that HB 1523 "does not authorize *any* business to discriminate" in "access to places of public accommodation" (Br. at 8) is simply false.

Likewise, Section 3(3) does not merely allow adoptive and foster parents to "raise their children in accordance with" their beliefs (Br. at 6–7), it prohibits the state from intervening to protect the best interests of gay or transgender children in the care of adults who may hold one or more of the Section 2 Beliefs. HB 1523 §§ 2, 3(3), 8(3); Miss. Code. Ann. §§ 43-15-13, 93-17-11. For example, if a foster parent were to subject a gay or lesbian foster child to corporal punishment or confined isolation for "disobeying" one of the Section 2 Beliefs, the State would be powerless to protect that child.

Similarly, Section 3(4) does not only allow "private citizens" to refuse to provide counseling and psychological treatment on the basis of a Section 2 Belief in clear violation of professional ethical guidelines—it also permits state employees, including public school guidance counselors, to

turn away students who need care. HB 1523 §§ 3(4), 9(3)(a). This provision of HB 1523 is arguably the most alarming since it would allow a school psychologist or guidance counselor to cease therapy with a depressed, suicidal high school student who divulges to the counselor that he thinks he might be gay.

Similarly, Section 3(7) of HB 1523 does not merely protect state employees who "express a [Section 2] belief"—it prohibits supervisors from taking any action whatsoever to attempt to resolve workplace conflict so long as one state employee claims to have been speaking "based upon or in a manner consistent with" a Section 2 Belief. Br. at 7; HB 1523 §§ 3(7), 4(1) (expansively defining "discriminatory action" to include any form of discipline and any material alteration to the terms or conditions of a person's employment).

Contrary to Appellants' assertion (Br. at 7–9, 30), Section 3(8) of HB 1523 does not impose any practical limitation on the right of clerks to recuse themselves from granting marriage licenses to gay and lesbian couples. HB 1523 § 3(8)(a). Although the statute purports to require a clerk seeking recusal to "take all necessary steps" to ensure that the issuance of marriage licenses is not impeded or delayed, it provides no enforcement mechanism, imposes no penalty or consequence for failure to take such

steps, and does not appropriate any funds that may be necessary to hire a new clerk in an office where all the clerks have recused themselves. *Id.*; ROA.16-60478.755 (identifying ambiguities in Section 3(8)(a)).[2]

Perhaps even more surprisingly, Section 2 incorporates the religious belief that straight couples should not have pre-marital sex as a basis for refusing to provide marriage licenses, psychological counseling, or other goods and services. HB 1523 §§ 3(4), 3(5), 3(8). Not only does this obviously have nothing to do with "protect[ing]" the religious liberty of "opponents of same-sex marriage," (Br. at 6), but this means that HB 1523 could arguably be applied to a large number of Mississippians: According to recent statistics compiled by the United States Centers for Disease Control and Prevention, approximately 90% of Americans have sex before marriage. CDC, *National Survey of Family Growth* (July 28, 2015), https://www.cdc.gov/nchs/nsfg/key_statistics/p.htm. Thus, pursuant to HB 1523, a jewelry store clerk could refuse to sell a diamond ring to a newly-engaged straight couple if he believed that the couple had previously had sex. HB 1523 §§ 2(b), 3(5)(b).

---

[2] On May 10, 2016, Plaintiff CSE filed a motion to reopen *CSE I*, seeking discovery concerning clerks who sought to recuse and to amend the district court's permanent injunction. On June 27, 2016, the district court granted CSE's motion to reopen. *Campaign for S. Equal.* v. *Bryant*, No. 3:14-cv-818-CWR-LRA, slip op. at 16 (S.D. Miss. June 27, 2016). Once a preliminary injunction was entered in this case, however, *CSE I* was stayed pending resolution of this appeal.

Finally, HB 1523 authorizes individuals or entities who discriminate in the name of any of the Section 2 Beliefs to obtain an injunction against any private party's effort to obtain relief under anti-discrimination or tort law. *Id.* §§ 4, 5, 6. And not only that—the statute grants holders of the Section 2 Beliefs a private right of action to seek monetary damages from the State or from *victims* of their discrimination who try to seek administrative or judicial relief. *Id.* §§ 6, 9(2)(d) (defining "state government" to include "[a]ny private party or third party suing under or enforcing" a state or municipal law). A prospective plaintiff trying to bring an as-applied challenge to HB 1523 in the future, as Appellants propose (Br. at 37), could thus be sued under HB 1523 for bringing such a lawsuit, could be enjoined, and even ordered to pay damages as a result.

Legislative History

On June 26, 2015, the United States Supreme Court ruled that because gay and lesbian Americans are endowed with "the fundamental right to marry," the Constitution does not permit states to "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S. Ct. at 2604–05. The reaction to *Obergefell* by some in Mississippi was stark. On the very day of the *Obergefell* decision, for example, Speaker of the Mississippi House Philip Gunn

declared that "[t]his decision is in direct conflict with God's design for marriage as set forth in the Bible. . . . I pledge to protect the rights of Christian citizens[.]" Geoff Pender, *Lawmaker: State could stop marriage licenses altogether*, The Clarion-Ledger (June 26, 2015, 4:47 PM), http://www.clarionledger.com/story/politicalledger/2015/06/26/bryant-gay-marriage/29327433/.[3] Several months later, in February 2016, Speaker Gunn introduced HB 1523 in the Mississippi legislature. ROA.16-60478.764.

HB 1523's other legislative sponsors were also very clear about the law's sectarian basis. For example, State Representative Dan Eubanks, a co-sponsor of HB 1523, dramatically declared that HB 1523 "protect[s] . . . what I am willing to die for [and what] I hope you that claim to be Christians are willing to die for and that is your beliefs." ROA.16-60478.1786:18–20. This statement is similar to one made by Defendant Governor Bryant concerning HB 1523: "[I]f it takes crucifixion, we will stand in line before

[3] As the District Court observed, the statements of Mississippi officials in response to *Obergefell* are reminiscent of statements made more than sixty years ago after the Supreme Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954). ROA.16-60478.762–763; *see also* Carolyn Renee Dupont, *Mississippi Praying: Southern White Evangelicals and the Civil Rights Movement, 1945–1970*, at 7 (2013) ("In twenty-first century America, evangelicals have widely come to accept that their Gospel includes a mandate for racial equality. Yet this . . . causes them to forget that their rather immediate forbearers served as serious obstacles to the aspirations of black Americans because they regarded this very principle as profoundly *un*christian." (emphasis in original)).

abandoning our faith and our belief in our Lord and savior, Jesus Christ." Emily Wagster Pettus, *Mississippi governor: 'Secular' world angry at LGBT law*, The Clarion-Ledger (June 1, 2016, 9:48 AM), http://www.clarionledger.com/story/news/politics/2016/05/31/mississippi-governor-secular-world-angry-over-lgbt-law/85208312/.[4]

State Senator Jenifer Branning made it clear that the point of HB 1523 was to endorse religious views *only* about LGBT people. She acknowledged that although there are Mississippians with deeply held religious beliefs regarding gambling, the death penalty, and alcohol, HB 1523 does nothing to protect people who hold those religious beliefs because it is "very specific to same-sex marriage." ROA.16-60478.1812:12–13. In fact, the Mississippi Legislature voted to reject amendments that would have extended HB 1523 to cover other religious beliefs such as opposition to gambling, drinking, or capital punishment. ROA.16-60478.1778:15–1780:25; *see also* ROA.16-60478.1830:23–1834:9; 1812:5–25.

The legislative history also confirms that HB 1523 was intended to go far beyond merely the incidents of marriage ceremonies or celebrations. Senator Branning, for example, explained during floor debate

[4] At the preliminary injunction hearing below, Rev. Hrostowski testified in response as follows: "[W]hen [Governor Bryant] says, *Christians will line up to be crucified for this*, that is . . . in my mind blasphemy. Jesus was crucified as an atonement for human sin, not so that we could oppress one another." ROA.16-60478.1208:10–13.

that she was supporting HB 1523 because she believed it would enable Mississippi College, as a "Baptist college," to fire or deny employment to "homosexual people on their staff." ROA.16-60478.1808:5–17. When asked by Senator Willie Simmons whether refusing to employ gays and lesbians was a form of discrimination, Senator Branning replied, "If this bill is passed, it wouldn't be." ROA.16-60478.1808:14–15.

The Instant Litigation

Plaintiff-Appellee the Campaign for Southern Equality ("CSE") is a non-profit organization "that works across the South to promote 'the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life,'" *CSE I*, 64 F. Supp. 3d at 913. CSE's membership includes LGBT people who live, work, and pay taxes in the State of Mississippi. Members hold a variety of religious faiths and beliefs, but they all share the conviction that the marriages of LGBT people have as much dignity as the marriages of anyone else. CSE has been properly recognized as an institutional plaintiff with standing to sue on behalf of its members in this case, as well as in two prior lawsuits successfully challenging Mississippi's laws banning marriage and adoption for gay couples. ROA.16-60478.781–82; *Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 707–08 (S.D. Miss. 2016); *CSE I*, 64 F. Supp. 3d at 917–18.

Plaintiff the Rev. Dr. Susan Hrostowski, a CSE member who was ordained as an Episcopal priest in 1988, currently serves as the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as associate professor at the School of Social Work of the University of Southern Mississippi. ROA.16-60478.1196:16–21. Rev. Hrostowski grew up in Gulfport and currently lives in Forrest County, Mississippi, with her wife Kathy Garner and their 16-year-old son who plays varsity football for his high school team. ROA.16-60478.1194:14–19. Although Rev. Hrostowski and Ms. Garner had a religious ceremony 23 years ago, they were legally married on June 17, 2014, in an Episcopal wedding at the National Cathedral in Washington, D.C.

The *CSE* Plaintiffs filed suit on June 10, 2016, seeking a declaratory judgment that HB 1523 violates the Establishment Clause, and a preliminary injunction of its enforcement. (The *Barber* Plaintiffs had filed suit a week earlier seeking the same relief, but on both Equal Protection and Establishment Clause grounds.) The two cases were consolidated, the issues were fully briefed, and the parties presented evidence and argument at a joint hearing on June 23 and 24, 2016. The *CSE* Plaintiffs presented testimony from four fact witnesses and two expert witnesses and the *Barber* Plaintiffs

presented testimony from two fact witnesses; Defendants-Appellants did not present any testimony at all.

The *CSE* Plaintiffs' witnesses included Mississippi clergy who testified regarding the effect of the law's enactment on themselves and the faith communities they serve. Rev. Hrostowski, for example, testified that, pursuant to HB 1523, "the State [of Mississippi] wants to hold certain people, that would be gay men, lesbians and transgender people, to be less worthy and have less dignity than other human beings," a message that is "antithetical" to the teachings of Jesus Christ and the Episcopal Church. ROA.16-60478.1205:17–1206:2.

Rev. Hrostowski explained that HB 1523 communicates to her, as a religious person, that she is disfavored by her own state government. ROA.16-60478.1222:2–10. She also testified that while she imposes strict criteria on the couples she agrees to marry as an Episcopal priest, those criteria do *not* involve whether the couple is gay or straight or whether the couple has had pre-marital sex. ROA.16-60478.1202:7–1204:8. Indeed, she explained that, in a letter dated June 3, 2016, the Episcopal Bishop of Mississippi gave permission for all Episcopal clergy in Mississippi to solemnize marriages "for all couples legally entitled to marry," explaining that he came to support marriage equality "after a lot of prayer and

discernment, as well as engagement with Holy Scripture, the traditions of the Church and human reason." *See* ROA.16-60478.1457–1458; *see also* ROA.16-60478.1199:20–1200:13.

Rabbi Jeremy Simons testified that none of the three religious beliefs in HB 1523 are held within Reform Judaism, which is the denomination to which most Jews in Mississippi belong. ROA.16-60478.1172:14–17, 1184:1–11. Rabbi Simons further explained the impact of HB 1523 on him as follows: "On the one hand, it makes me feel very upset that my religion is seen as somehow less legitimate because I cannot identify with the so-called sincerely held religious beliefs. On the other hand, it makes me very angry because I consider myself a religious person with deeply held religious beliefs. And by God, if someone were to hear me say this and assume that I believe anything that is in this statute, that is a tragedy that I have to explain that this is not me and this is not my religion." ROA.16-60478.1185:25–1186:8.

Plaintiffs offered unrebutted expert testimony on HB 1523's status as an "outlier" among religious accommodation statutes nationwide. ROA.16-60478.1120:7–1159:7. Professor Douglas NeJaime testified that HB 1523 is the only statute of its kind to both officially enshrine three specific religious beliefs into state law *and* give religious believers an

automatic exemption from otherwise generally applicable laws or practices. ROA.16-60478.1140:22–1141:7, 1156:24–1163:7.

The *CSE* Plaintiffs also submitted unrebutted expert testimony showing that HB 1523 facially discriminates between religious denominations. Dr. Robert Jones, an expert on the "intersection between religious belief and behavior and affiliation," ROA.16-60478.1293:1–3, testified that there is a "high degree of correlation between religious affiliation and attitudes on same-sex marriage." ROA.16-60478.1300:11–12. Dr. Jones demonstrated that public opinion concerning marriage equality breaks down consistently with respect to denominational affiliation. Thus, for example, Jews, Buddhists, Hindus, and Unitarians strongly favor same-sex marriage, while Baptists and Mormons strongly oppose it by large percentages. ROA.16-60478.1299:18–1302:5. Dr. Jones also testified that only a "very small minority" of Americans holds a non-religious or secular, "moral" objection to marriages between gay and lesbian couples. ROA.16-60478.1308:19–1309:4.

Finally, the *CSE* Plaintiffs' witnesses testified about the substantial burdens that HB 1523 has already imposed and will impose on innocent third parties if it is allowed to go into effect. Rev. Hrostowski's wife, Kathy Garner, the executive director of the AIDS Services Coalition in

Hattiesburg, testified that should providers of counseling or psychological services be able to deny care based on HB 1523, people will "not get tested [for HIV] in the first place" due to the "fear of being turned away, the fear of not being able to be tested, and the fear of being judged." ROA.16-60478.1252:13–18, 1254:4–24, 1258:19–1259:20.

Rev. Hrostowski testified that the psychological counseling provision in HB 1523 violates "several tenets" of the code of ethics for social workers, including that social workers must "treat every person with dignity and worth" and "honor human relationships," and that social workers who "behave[] contrary to that code of ethics" would lose their licenses. ROA.16.60478.1208:19–1209:4; HB 1523 § 3(4). In this regard, CSE member Joce Pritchett testified that she does not "know that I would be here today" if, when she was first coming out as a lesbian after college, her psychologist had stopped her treatment because of a Section 2 Belief. ROA.16-60478.1270:4–19.

Pritchett, who was born in and had spent most of her life in Mississippi, further testified that as a consequence merely of HB 1523's enactment, gay men in northern Mississippi became afraid to go out to dinner together in public. She revealed that she and her wife decided to move with their two children to Florida since they had to "get [their

children] somewhere that's safer to be." ROA.16-60478.1280:18–1281:4, 1283:20–1284:1.

Six days after the hearing, the district court preliminarily enjoined enforcement of HB 1523 on the grounds that it violates both the First and Fourteenth Amendments. The district court concluded that HB 1523 violates the Establishment Clause for three independent reasons. *First*, because HB 1523 "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose," it violates the Establishment Clause. ROA.16-60478.807 n.43 (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985)); *see also Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (requiring all laws to "have a secular legislative purpose"). *Second*, HB 1523 "clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents" and cannot withstand the strict scrutiny that is required. ROA.16-60478.806–808 (quoting *Larson* v. *Valente*, 456 U.S. 228, 246–47 (1982)). Finally, HB 1523 is unconstitutional under *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985) "because its broad religious exemption comes at the expense of other citizens." ROA.16-60478.809.

SUMMARY OF ARGUMENT

Plaintiffs have made a clear showing of standing to bring this Establishment Clause challenge. In the same way that a governmental religious display personally confronts the viewer with a potential (and thus, justiciable) endorsement of religion, HB 1523 personally confronts Plaintiffs by putting the State's imprimatur on religious beliefs that they do not hold. HB 1523 also discriminates against Plaintiffs and creates an impermissible denominational preference by conditioning the availability of government benefits on adherence to Section 2 Beliefs. And, as Mississippi taxpayers, Plaintiffs have standing to challenge the State's direct expenditure of revenues in connection with HB 1523.

HB 1523 violates the Establishment Clause *first* because it has both the purpose and principal effect of endorsing religion by conferring benefits upon holders of the Section 2 Beliefs. *Second*, it singles out specific religious beliefs—which the undisputed evidence has shown are held by some religious denominations and opposed by others—for special treatment. *Third*, in direct contravention of settled doctrine, HB 1523 creates an absolute and unqualified right that can be exercised only by holders of the Section 2 Beliefs and that imposes impermissible third-party burdens on Mississippians who do not hold the Section 2 Beliefs.

Contrary to Appellants' claims, HB 1523 is not a traditional religious accommodation statute. Unlike the statutes cited in Appellants' voluminous appendices, HB 1523 creates an exemption that applies even where a person has not suffered any burden on his or her free exercise of religion, even where the government has a compelling interest in regulating that person's conduct, and even where the least restrictive means have been employed to further that compelling interest. And, unlike HB 1523, not one of the 292 statutes cited by Appellants expressly regulates based upon a specified religious *belief*, rather than conduct.

Finally, HB 1523 is not severable—if Section 2 is invalidated, the entire statute must fall.

ARGUMENT

I. Plaintiffs Have Standing to Challenge HB 1523 Under the Establishment Clause

States violate the Establishment Clause and cause cognizable injury when they endorse a religious belief and cause nonadherents to feel like outsiders within their own political community. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 860–61 (2005); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309–10 (2000); *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989), *abrogated on other grounds by Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014). When a

law or governmental practice sends a message of religious endorsement, those with religious choices or values different from the endorsed belief have suffered a judicially-cognizable stigmatic harm that enables them to be able to challenge the statute or practice under the Establishment Clause in court. In other words, the harm that an unconstitutional endorsement causes is precisely that—stigmatization, marginalization, and exclusion, or, in the words of Justice O'Connor, being made to feel like an "outsider." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Thus, unlike in other constitutional contexts, where stigmatic injury will not necessarily give rise to standing, government endorsement of particular religious beliefs and sects is impermissible precisely because "it sends the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) ("[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."). This rule exists because of the very nature of the harm that the Establishment

Clause was designed to prevent—the improper *establishment* of a religion or religious views. *See Flast* v. *Cohen*, 392 U.S. 83, 101–04 (1968) ("[O]ne of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.").

Although Appellants focus most of their standing arguments on the equal protection claims brought by the *Barber* Plaintiffs (Br. at 11–34), Appellants' argument that "stigma caused by the expressive function of law" does not constitute redressable injury (Br. at 17–18), whatever valence it might have to an equal protection claim, is irrelevant here. *Cf. Moore* v. *Bryant*, --- F. Supp. 3d ----, 2016 WL 4703825, at *14–15 (S.D. Miss. Sept. 8, 2016) (stigmatic injury from Mississippi state flag did not give rise to equal protection claim). Indeed, in the pending appeal of the *Moore* case Governor Bryant explicitly agrees—arguing to this Court that "[s]tanding in an equal protection challenge presents an entirely different analysis" from standing in an Establishment Clause challenge. Appellees' Br. at 57, *Moore* v. *Bryant*, No. 16-60616 (5th Cir. Dec. 5, 2016); *see also id.* at 6 (arguing that Establishment Clause standing doctrine reflects the "fundamental difference in the nature of the rights protected under the Establishment and Equal Protection Clauses.").

A. HB 1523's Endorsement of the Section 2 Beliefs Inflicts Constitutional Injury

The Supreme Court has consistently held that legislation constituting a governmental endorsement of religion inflicts cognizable injury *per se*. *See McCreary County*, 545 U.S. at 870 (holding that governmental display of the Ten Commandments was posted "precisely because of [the Commandments'] sectarian content" and thus violated the Establishment Clause); *Santa Fe*, 530 U.S. at 309–10 (2000) (invalidating school prayer policy for sending message to nonadherents "that they are political outsiders, not full members of the political community"); *see also Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) ("A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause[.]"). As in *Santa Fe Independent School District*, "the mere passage . . . of a policy that has the purpose and perception of government establishment of religion" causes cognizable First Amendment harm. 530 U.S. at 314; *see also County of Allegheny*, 492 U.S. at 593–94 ("The Establishment Clause, at the very least, prohibits government from . . . 'making adherence to a religion relevant in any way to a person's standing in the political community'") (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). For these reasons, plaintiffs in Establishment Clause cases

have been held to have standing "in a wide variety of Establishment Clause cases 'even though nothing was affected but the religious or irreligious sentiments of the plaintiffs.'" ROA.16-60478.776 (quoting *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043, 1049–50 (9th Cir. 2010) (en banc) (collecting cases)).

This Court, too, has recognized that having views that are excluded from an official endorsement of a religious belief or symbol, particularly when accompanied by a direct and personal connection to the government action, creates injury sufficient to confer standing. *See Murray* v. *City of Austin*, 947 F.2d 147, 151–52 (5th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). In *Murray*, for example, this Court held that an Austin resident who regularly used public services, through which he "personally confront[ed]" a Christian cross as part of the City of Austin's insignia on police cars, utility bills, and municipal buildings (among other things) had standing to challenge the use of the cross in the insignia. *Id.* at 149–52. Significantly, the plaintiff in *Murray* did not allege that he altered his routine or was denied any government service as a result of the Austin city insignia; his sole ground for standing was the "non-economic injury" caused by "direct, personal contact" with the insignia. *Id.*

As LGBT citizens of Mississippi, Plaintiffs are forced to confront their own government's endorsement of specific religious doctrines that they find offensive in a way that is arguably far more direct and pernicious than the plaintiff in *Murray*. *See id.* While Appellants ignore the evidence admitted at the two-day preliminary injunction hearing, the witnesses testified that HB 1523 conveyed a message that the State was singling them out and favoring the views of other religious sects above their own. ROA.16-60478.1222:2–10; *see also* ROA.16-60478.1185:3–1186:8 (testimony of Rabbi Jeremy Simons); ROA.16-60478.1207:14–23 (testimony of Rev. Hrostowski); ROA.16-60478.78 ¶¶ 15–21. As Judge Reeves concluded, "[t]he enactment of HB 1523 is much more than a 'psychological consequence' with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others." ROA.16-60478.777. Indeed, unlike in *Murray*, the CSE Plaintiffs here introduced evidence that harm from the enactment of HB 1523 was more than stigmatic—it forced gay men in northern Mississippi to stop going out to dinner together. ROA.16-60478.1280:18–23. Because CSE member Joce Pritchett felt "like we were being attacked . . . pursued, bullied by our own government," HB 1523 constituted the "final straw" that caused Joce Pritchett and her wife, both

lifelong Mississippians, to sell their home, leave their friends and family, and move with their children to Tampa, Florida. ROA.16-60478.1283:20–1284:7.

As this Court pointed out, the actual image of the cross in *Murray* constituted only a relatively small part of the insignia, which also included "a shield formed by three vertical stripes," a "lamp of knowledge," "the silhouette of the State capitol," "a pair of wings," and the words "CITY OF AUSTIN" and "FOUNDED 1839." *Murray*, 947 F.2d at 149; *see also id.* at 159–63 (depictions of the City of Austin insignia). At the risk of repeating a cliché, a picture is worth a thousand words. If the plaintiff in *Murray* had standing to challenge the cross in the City of Austin seal below, then surely Plaintiffs have standing to challenge HB 1523 here:

Id. at 159. Whether the government endorses a religious belief or sect through imagery on its seal or in the pages of its state law, the constitutional harm—in black and white—is the same.

Consistent with these precedents, other circuits have found standing to bring Establishment Clause challenges in similar circumstances. In *Catholic League for Religious and Civil Rights* v. *City and County of San Francisco*, for example, Catholic plaintiffs challenged a nonbinding resolution of San Francisco's Board of Supervisors that condemned Catholic doctrine on the issue of marriage equality. 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc). The *Catholic League* court held that citizens experience a cognizable Establishment Clause harm when state action inflicts a

"psychological consequence" through the "condemnation of one's own religion or endorsement of another's *in one's own community*." *Id.* at 1052 (emphasis added). The resolution at issue caused real harm, "stigmatizing" plaintiffs and leaving them "feeling like second-class citizens of the San Francisco political community," and "express[ing] to the citizenry of San Francisco that they are."[5] *Id.*; *see also ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265, 268–69 (7th Cir. 1986) (plaintiff would have standing to challenge a municipal ordinance declaring an official religion even in the absence of an appropriation of funds).

Appellants' reliance on *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is misplaced. (Br. at 10, 17, 29, 35.) Unlike Plaintiffs here, the *Valley Forge* plaintiffs—residents of the Washington, D.C. area—had no personal nexus to the challenged government action, a land conveyance from the government to a religiously-affiliated college in Pennsylvania. 454 U.S. 464, 468, 487 (1982). Merely learning about a constitutional violation from

[5] While Appellants urge the Court to adopt the reasoning of the dissent in *Catholic League* (Br. at 36), the dissenting judges in that case argued that there was no concrete, redressable injury imposed by a resolution that "does not *do* anything" because it was "entirely non-binding," had "no legal effect," and "alter[ed] no government process, ordinance, or plan." 624 F.3d at 1075–76 (Graber, J., dissenting). HB 1523, by contrast, confers concrete benefits and imposes distinct burdens on Mississippians, including by expressly superseding "any ordinance, rule, regulation, order, opinion, decision, practice or other exercise of the state government's authority." HB 1523 § 8(3).

out-of-state, as in *Valley Forge*, is very different from the enactment of a law in one's own state and in one's own political community, which undeniably affects Plaintiffs' lives. ROA.16-60478.777; *accord Doe* v. *Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001) (en banc) (distinguishing *Valley Forge* as a case in which "plaintiffs had *no* relationship to the government action at issue"). It is the "endorsement and elevation by *their* [own] state government of specific religious beliefs over theirs and all others" that excludes Plaintiffs from the community. ROA.16-60478.777 (emphasis in original). The reason for this distinction is based on common sense—the "practices of our own community may create a larger psychological wound than someplace we are just passing through." *Washegesic* v. *Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994); *see also, e.g.*, *Freedom from Religion Found., Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 480 (3d Cir. 2016); *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 693 (11th Cir. 1987).[6] This is particularly true

[6] Contrary to Appellants' suggestion, *Newdow* v. *Lefevre*, 598 F.3d 638 (9th Cir. 2010), does not establish that Plaintiffs lack standing to challenge H.B. 1523. In *Newdow*, while the plaintiff did not have standing to challenge a statute that recognized "In God We Trust" as the national motto, *id.* at 643 & n. 9, he did have standing to challenge statutes that gave effect to that alleged endorsement by having it printed on coins and currency, creating the plaintiff's "unwelcome contact" with it. *Id*. at 642. HB 1523 is concrete in the same way in that it is not only an enactment by Plaintiffs' own state government declaring a preference for specific religious beliefs, but it gives that declaration the force of law across a broad array of activities that impact the lives of Mississippians.

in a place like Mississippi, where deep-rooted ties to home and family are so important. *See, e.g.*, Eudora Welty, *On Writing* 47 (Random House 2011) ("Feelings are bound up in place . . . ."); William Faulkner, *As I Lay Dying* 81 (1st Vintage Int'l ed. 1990) (1930) ("How often have I lain beneath rain on a strange roof, thinking of home.").

Moreover, for purposes of standing, the denominational preference in HB 1523 is analogous to the preference in *Peyote Way Church of God, Inc.* v. *Thornburgh*, in which this Court found that plaintiffs who were excluded from a sect-discriminatory religious accommodation could challenge it under the Establishment Clause. 922 F.2d 1210, 1214 n.2 (5th Cir. 1991). In *Peyote Way*, an exemption from federal drug regulations which applied to one church but not to another constituted the type of unequal treatment that rose to the level of "injury unto itself," which could be redressed by a mandate of equal treatment. *Id.* (citing *Heckler* v. *Mathews*, 465 U.S. 728, 739 (1984)). In other words, Plaintiffs "may demonstrate standing on the ground that they have . . . been denied a benefit on account of their religion." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 130 (2011).

Finally, as Mississippi taxpayers, Plaintiffs also have standing under the Supreme Court's Establishment Clause state taxpayer standing

doctrine, which "requires only income taxpayer status and a showing of direct expenditure of income tax revenues on the allegedly unconstitutional program." *Henderson* v. *Stalder*, 287 F.3d 374, 381 n.7 (5th Cir. 2002) (citing *Flast*, 392 U.S. at 88); *see also Doe ex rel. Doe* v. *Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 & n.22 (5th Cir. 1999), *rev'd on other grounds*, 240 F.3d 462 (5th Cir. 2001) (en banc); *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). Unlike the statute in *Henderson*, which made it clear that public funds would not be expended, 287 F.3d at 381, HB 1523 will *require* the expenditure of taxpayer funds, creating a new private right of action against the State of Mississippi and authorizing the award of "[c]ompensatory damages" and "attorneys' fees and costs" from the state treasury. HB 1523 § 6(a)–(b). While Appellants may argue that such expenditures have not yet occurred, the language of HB 1523 makes it a near certainty that such costs will, in fact, be incurred if HB 1523 goes into effect. *See Henderson*, 287 F.3d at 380–81 (assessing how "income tax dollars *would be used*" to determine taxpayer standing to bring a pre-enforcement Establishment Clause challenge to a newly enacted statute (emphasis added)); *see also Van Zandt* v. *Thompson*, 649 F. Supp. 583, 587–88 (N.D. Ill. 1986) (finding taxpayer standing to challenge legislative

enactment for which "state expenditures inevitably will be necessary"), *rev'd on other grounds*, 839 F.2d 1215 (7th Cir. 1988).

B. Plaintiffs Have Standing to Bring a Facial Challenge

Establishment Clause standing does not turn on the likelihood of Plaintiffs encountering a denial of services under each of HB 1523's sections, as Appellants contend. (Br. at 35.) The courts in this Circuit generally do not consider severability in determining whether a party has standing. *Nat'l Fed'n of the Blind of Tex., Inc.* v. *Abbott*, 647 F.3d 202, 211 (5th Cir. 2011) ("[T]he normal rule is that severability comes into play only when a constitutional judgment on the merits has already proven unavoidable and has already been rendered." (internal quotation marks omitted)).

Thus, even if this Court were to conclude that Plaintiffs lack standing to challenge one or more provisions of HB 1523, Plaintiffs would still have standing to assert that the invalidity of Section 2 is fatal to the entire statute.[7] Nor, as Appellants suggest (Br. at 37–38), is Plaintiffs' standing insufficiently clear to support the award of a pre-enforcement

[7] Any potential permissible application of HB 1523 only to churches and ministers who decline to solemnize the weddings of gay and lesbian couples, which would obviously be constitutionally permissible (not to mention redundant in light of the First Amendment and the Mississippi RFRA), would be "irrelevant [to the standing inquiry] . . . because [it would] not involve actual applications of the statute." *See City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2451 (2015).

preliminary injunction. In *Awad* v. *Ziriax*, a Muslim plaintiff was awarded a preliminary injunction to prevent the certification of election results in which Oklahoma voters approved a constitutional amendment prohibiting state courts from considering or using Sharia law. 670 F.3d 1111, 1118–19 (10th Cir. 2012). Even though the amendment had not yet taken effect, the Tenth Circuit found that the plaintiff had suffered "the kind of direct injury-in-fact necessary to create Establishment Clause standing," because the amendment "exposes him and other Muslims in Oklahoma to disfavored treatment." *Id.* at 1123. Just as the plaintiff in *Awad* was exposed to the impending enforcement of a change in state law, Plaintiffs were harmed based on the enactment of HB 1523 here.[8]

[8] Appellants do not dispute that Governor Bryant is a proper defendant under *Ex Parte Young* because he has particular duties to enforce HB 1523 and has demonstrated his willingness to fulfill those duties. ROA.16-60478.782–785. Governor Bryant signed HB 1523 into law and has "demonstrated [his] willingness to enforce" it; he therefore has the "requisite connection" to the statute to overcome Eleventh Amendment immunity. *See ACLU of La.* v. *Blanco*, 523 F. Supp. 2d 476, 480–82 (E.D. La. 2007) (holding Louisiana governor who signed bill that appropriated state funds to religious organizations had "requisite connection" to the statute and signature showed willingness to enforce statute). Indeed, governors are often named as defendants in Establishment Clause challenges. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 581 n.1 (1987) (challenge to Louisiana creationism law brought against Louisiana governor); *Wallace* v. *Jaffree*, 472 U.S. 38 43 (1985) (challenge to school "moment of silence" law brought against Alabama governor); *Croft* v. *Governor of Tex.*, 562 F.3d 735 , 737–38 (5th Cir. 2009) (challenge to school "moment of silence" law brought against Texas governor).

II. HB 1523 Violates the Establishment Clause

A. HB 1523 Was Enacted with the Impermissible Purpose of Endorsing Religion

A statute "runs afoul of the Establishment Clause when it endorses a particular religious belief, because '[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community." *Croft* v. *Perry*, 624 F.3d 157, 169 (5th Cir. 2010) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring)). Moreover, "[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious view of all citizens.'" *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005) (citation omitted). HB 1523 clearly violates these time-tested principles because it was enacted with the explicit, ostensible and predominant purpose of not only endorsing the Section 2 Beliefs, but conferring benefits upon "devout Christians" and others who hold the Section 2 Beliefs.[9] (Br. at 5.)

[9] Pursuant to the testimony of Dr. Robert Jones (*see supra* at 17, above), HB 1523's reference to "moral convictions" is of no moment since they would be "merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864. As the district court noted, "the State cannot simultaneously contend that HB 1523 is a reasonable accommodation of religious exercise and that it protects only moral beliefs. If HB 1523 was passed to encourage exclusively moral values, it was not passed to further the free exercise of religion." ROA.16-60478.806.

"To ascertain whether [a] statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring); *see also McCreary County*, 545 U.S. at 862–63. Here, the text of HB 1523 alone should end the inquiry—the statute unambiguously endorses the three Section 2 Beliefs, which it elevates above all other religious beliefs held by Mississippians. *See Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (invalidating accommodation law because it "effectively endorse[d] religious belief"); *Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987) (invalidating statute with the "primary purpose" of "advanc[ing] a particular religious belief"). It is thus unique among religious accommodation statutes, which generally do not single out specific religious *beliefs* for special treatment.

In considering the purpose animating HB 1523 this Court also may not "turn a blind eye to the context in which [the statute] arose." *McCreary County*, 545 U.S. at 866. As discussed at pages 10–13, above, the legislative history admitted into evidence shows that HB 1523 was enacted with the express purpose of declaring official governmental support for the

Section 2 Beliefs and promoting those beliefs over all others. *See Doe* v. *Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 294 (5th Cir. 2001) (considering "legislators' contemporaneous statements" in determining that a statute was enacted with the impermissible purpose of advancing religion). Legislators speaking in support of the bill made clear sectarian references: HB 1523 was enacted to protect the beliefs of those who "claim to be Christians" above all other beliefs. ROA.16-60478.1786:17–20. And they affirmatively chose to limit the protections of HB 1523 to the Section 2 Beliefs, excluding all others. ROA.16-60478.1778:19–1780:12; *see also* ROA.16-60478.1806:23–1807:18. All of the evidence submitted below, including statements from Mississippians willing to "die" for their anti-gay Christian beliefs (*see supra* at 11), dramatically confirms this point.

Appellants nevertheless assert that HB 1523 was enacted for the permissible purpose of "protecting religious liberty." (Br. at 38.) But given the fact that, before HB 1523 was enacted, Mississippians' free exercise rights were already protected by the Mississippi RFRA, there is simply no basis in the record to support this claim. *See supra* at 2–3. Indeed, to the extent that HB 1523 provides no additional protection for religious liberty, as Appellants appear to argue (Br. at 11–20), the only conceivable purpose for enacting the statute was to express the government's endorsement of the

three Section 2 Beliefs above all others. But if that was the point of HB 1523—a form of pure governmental endorsement of some religions over others—then there can be no question that it violates the Establishment Clause. This case is thus directly analogous to *Wallace* v. *Jaffree*, in which the Supreme Court invalidated an amendment adding the words "or voluntary prayer" to Alabama's moment of silence statute because the amendment had no effect other than "to characterize prayer as a favored practice." 472 U.S. 38, 57–61, 57 n.45 (1985); *see also Croft* v. *Governor of Tex.*, 562 F.3d 735, 746–47 (5th Cir. 2009) (holding that where the "purpose of protecting religious freedom was already accomplished by [an] earlier statute," the subsequent law could not have been enacted for this purpose).

B. HB 1523 Unconstitutionally Discriminates Between Religious Denominations

HB 1523 also violates "the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson* v. *Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947)); *see also id.* at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") "Neutrality is a ubiquitous theme in Establishment Clause decisions spanning more than half a century. . . . The state may not

favor one religion over another. It also may not take a position on contested theological propositions." Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 Pepp. L. Rev. 1115, 1117, 1121 (2013) [hereinafter *Religious Neutrality*]; *see also, e.g.*, *Epperson* v. *Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). As the district court put it, "the core principle of government neutrality between religious sects has remained constant through the centuries." ROA.16-60478.800.

While "[i]n commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice," *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994), laws that "burden or favor selected religious denominations" are subject to strict scrutiny and must be invalidated unless they are closely fitted to a compelling government interest. *Larson*, 456 U.S. at 246, 255; ROA.16-60478.806–807; *see also Cutter* v. *Wilkinson*, 544 U.S. 709, 723–24 (2005) (upholding a religious accommodation statute that "does not differentiate among bona fide faiths" and "confers no privileged status on any particular religious sect").

By singling out the three Section 2 Beliefs for special treatment, HB 1523 clearly has the effect of favoring certain selected religious denominations over others. Br. at 47; ROA.16-60478.803–805. The district court did not abuse its discretion in crediting the undisputed testimony of Rev. Hrostowski regarding the teachings of the Episcopal Church, ROA.16-60478.1198:20–1201:6; *see also* ROA.16-60478.1457–1460; or the unrebutted testimony of Rabbi Jeremy Simons regarding the teachings of Reform Judaism, ROA.16-60478.1173:16–1184:11; *see also* ROA.16-60478.1474–1491. Nor did the court abuse its discretion by crediting the unrebutted expert testimony of Dr. Robert Jones that there is a "high degree of correlation between religious affiliation and attitudes on same-sex marriage." ROA.16-60478.1300:11–12.

In other words, Section 2 really does reflect sectarian distinctions—most Episcopalians share their Church's belief in the sanctity of marriages between same-sex couples, while most Baptists share their Church's Section 2 Belief that marriage "is or should be recognized as the union of one man and one woman." *See* ROA.16-60478.1302:19–1303:23. As the district court observed, "HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples."

ROA.16-60478.803–804. HB 1523 thus "single[s] out a particular class of [religious observers] for favorable treatment and thereby ha[s] the effect of implicitly endorsing a particular religious belief." *See Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 n.11 (1987).

Appellants' contention that religious accommodations are immune from *Larson*'s anti-discrimination principle lacks merit. (*See* Br. at 48–49.) *Larson* itself involved a challenge to a religious accommodation—an exemption from a generally applicable charitable-reporting requirement. 456 U.S. at 231–32. As the Supreme Court has explained, "accommodation is not a principle without limits," and "whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored." *Kiryas Joel*, 512 U.S. at 706–07 (citations omitted); *see also Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 16–17 (1989) (holding that religious exemptions must "not have the purpose or effect of sponsoring certain religious tenets").

Moreover, contrary to Appellants' suggestion (Br. at 47), a statute need not expressly identify a particular denomination for preferential treatment to run afoul of the Establishment Clause. Instead, "government unconstitutionally endorses religion whenever it appears to 'take a position on questions of religious belief,'" as HB 1523 does with regard to the

Section 2 Beliefs. *Ingebretsen ex rel. Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (quoting *County of Allegheny* v. *ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (citations omitted)). In *Larson* itself, the unconstitutional statute drew distinctions without identifying any denomination by name, and was struck down even though it did not "establish" a specific "religion." 456 U.S. at 232 n.3, 246 & n.23.

Appellants' argument that adherents of the Section 2 Beliefs "can be found in *every* faith tradition and religious denomination" (Br. at 47) is misguided.[10] Even if Appellants could cite evidence in the record supporting this assertion, they do not identify a single authority supporting their argument that a law is only sect-discriminatory under *Larson* if it affects 100% of a denomination's adherents. *See Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("Intrafaith differences . . .

[10] The government also cannot take sides on a matter of religious debate within a denomination, as HB 1523 surely does. *See Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (holding that "the judicial process is singular ill equipped to resolve" "[i]ntrafaith differences"); *see also Engel* v. *Vitale*, 370 U.S. 421, 430–31 (1962). The Barber plaintiffs presented the testimony of Methodist minister Carol Burnett, who testified that marriage equality "is a topic that is being hotly debated in the [Methodist] church right now." ROA.16-60478.1235:8–19; *see also* ROA.16-60478.805–806.

are not uncommon among followers of a particular creed.").[11] Under Appellants' theory, laws favoring the teaching of "creation science" or "intelligent design" and disfavoring the teaching of evolution could not be sect-discriminatory because such laws would favor more than one religious denomination. Yet, the Supreme Court has found such laws to have the impermissible effect of favoring certain denominations over others. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578 (1987).[12] As the district court noted, "[e]very group has its iconoclasts. The larger the group, the more likely it will have someone who believes the sun revolves around the Earth, a doctor who thinks smoking unproblematic, or a Unitarian opposed to same-sex religious marriage." ROA.16-60478.805.

Under *Larson*, a law that establishes a denominational preference is subject to strict scrutiny. *Amos*, 483 U.S. at 339 ("*Larson*

---

[11] Indeed, Dr. Jones testified that in his opinion as an expert on polling, "anything that runs like seven in ten or more is generally overwhelming support. Never have I seen unanimous on a public opinion research survey." ROA.16-60478.1316:2–6. Here, the evidence introduced through Dr. Jones indicated that 67 percent of white Evangelical Protestants (which include Southern Baptists) oppose same-sex marriage. ROA.16-60478.1299:25–1300:1, 1301:20–1302:3.

[12] This Court's decision in *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) is not inconsistent since in *Thornburgh*, this Court held that the classification at issue was not religious or sectarian but rather "political," because of the government's recognition of a "quasi-sovereign" "tribal Native American organization," *id.* at 1217, as well as the unique status of Native American tribes under federal law, which "precludes the degree of separation of church and state ordinarily required by the First Amendment." *Id.*; *cf. United States* v. *Bryant*, 136 S. Ct. 1954, 1962 (2016); *Rupert* v. *Dir., U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 35 (1st Cir. 1992).

indicates that laws discriminating *among* religions are subject to strict scrutiny[.]"). The applicable test, of course, is familiar—a law fails strict scrutiny unless the government can show that "it is justified by a compelling governmental interest . . . [and] is closely fitted to further that interest." *Larson*, 456 U.S. at 247 (citations omitted).

Here, Appellants do not identify *any* compelling interest served by HB 1523. Even if this Court were to accept Appellants' contention that HB 1523 was enacted with the compelling interest of advancing "religious liberty,"[13] HB 1523 cannot survive strict scrutiny because there is no compelling government interest that HB 1523 "is closely fitted to further." *Id.*; *see also Barghout* v. *Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1349 (4th Cir. 1995) (Luttig, J., concurring) (finding that facially sect-discriminatory ordinance was not "closely fitted" because the claimed governmental interest "could be accomplished through a provision . . . [that

[13] No court has ever recognized a compelling governmental interest simply in "protecting religious liberty" no matter the context in which it is asserted and for good reason: if the bare interest in promoting the exercise of religion were sufficient to withstand strict scrutiny, every law endorsing a particular religion would pass constitutional muster and *Larson* would be a nullity. *See Wallace* v. *Jaffree*, 472 U.S. 38, 82 (O'Connor, J,. concurring) ("[J]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause" because "[a]ny statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights."); *cf. Schempp*, 374 U.S. at 225–26 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.").

does not] single[] out for protection the dietary rules of Orthodox Judaism"). As Appellants concede (Br. at 7–8), Mississippi's RFRA *already* protects the religious liberty of Mississippians against government intrusion without discriminating between religious denominations. *See* ROA.16-60478.1072. In sharp contrast to Mississippi's RFRA, HB 1523, by specifying three religious beliefs and providing virtually absolute protection for their adherents, "sweeps far more broadly than is necessary to further" the purported compelling governmental interest, potentially extending to conduct that has nothing to do with the exercise of religion and which may not even be motivated by an individual's personal religious practices. *See Knowles* v. *City of Waco*, 462 F.3d 430, 435 (5th Cir. 2006) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)). In other words, "[t]he State has not identified a purpose behind HB 1523 'that was not fully served by' prior laws." ROA.16-60478.808 (citing *Wallace*, 472 U.S. at 59).

Even if this Court were to conclude that HB 1523 is facially neutral, it still must be invalidated under the Establishment Clause because it has a disparate impact among religions by creating "religious gerrymander," and there is no "neutral, secular basis for the lines government has drawn." *Gillette* v. *United States*, 401 U.S. 437, 452 (1971). In other words, "[c]itizens may make whatever religious arguments they like in favor of a

law, so long as the law that is ultimately passed is justifiable in nonreligious terms. Because government may not take a position on religious truth, a law that can only be justified in religious terms is invalid." Koppelman, *Religious Neutrality*, at 1136.

In *Gillette*, the government's decision to limit draft exemptions to pacifists who object to all war "serve[d] a number of valid purposes," and was "justified by substantial government interests" rooted in concern for the unique context of the military, as well as the safety and effectiveness of our Armed Forces. 401 U.S. at 452–53. As Judge Reeves explained, "the conscientious objector statute [in *Gillette*] helped save military lives by ensuring that soldiers would not be deserted in the field by a pacifist who put down his arms in the heat of battle. Allowing conscientious objectors was a win-win: good for soldiers and good for conscientious objectors." ROA.16-60478.1072 n.4 (citing *Gillette*, 401 U.S. at 453). Here, however, HB 1523 fails under *Gillette* because there is no neutral, secular purpose served by protecting people who believe the marriages of gay people are immoral, while excluding those who hold contrary religious views.

C. HB 1523 Unconstitutionally Provides an Absolute and Unqualified Exemption to Holders of the Section 2 Beliefs

While Appellants assert that "the Supreme Court has never held or even suggested that the establishment clause forbids religious

accommodations that impose costs or burdens on third parties" (Br. at 50), Appellants ignore the Supreme Court's decision in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709–10 (1985), which invalidated an absolute religious accommodation because it was "absolute and unqualified" and because it imposed "significant burdens" on third parties.

Again, Appellants do not take issue with Judge Reeves's factual finding that HB 1523, if permitted to go into effect, would impose "significant burdens" on Mississippians who do not hold the Section 2 Beliefs, including LGBT citizens. *See* ROA.16-60478.773–774, 776, 810; *see also* ROA.16-60478.1259:15–20 (testimony of Kathy Garner expressing concern that if HB 1523 goes into effect, individuals will not be tested for HIV). Nor do they dispute the district court's finding that HB 1523 would confer an "absolute right" on persons who act in accordance with a Section 2 Belief, rendering them "essentially immune from State punishment." ROA.16-60478.766, 810. Indeed, Appellants concede that HB 1523 is designed to protect religious beliefs at the expense of *all* government interests, no matter how compelling they may be. Br. at 7–8; *cf.* Miss. Code Ann. § 11-61-1(5)(b).

In order to make this absolutely plain, Section 10 expressly provides that HB 1523 is excluded from Mississippi's RFRA. Thus, even if

the application of HB 1523 against a particular person (a government employee or private plaintiff ordered to pay money damages, for example) would substantially burden his or her free exercise rights, a court is still obligated to apply HB 1523 no matter what. This unremitting privileging of the Section 2 Beliefs above all other values and interests—including the free exercise rights of those who hold other religious beliefs—creates the "absolute and unqualified right" forbidden in *Caldor*. It is also yet another way in which HB 1523 discriminates against denominations that do not hold the Section 2 Beliefs.

Because they cannot dispute that HB 1523 imposes precisely the kind of impermissible "unyielding weighting in favor of [Section 2 Believers] over all other interests" at issue in *Caldor*, 472 U.S. at 710, Appellants instead argue that *Caldor* is no longer good law. (Br. at 49–50.) But that argument is also baseless. In its unanimous decision upholding the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, against an Establishment Clause challenge, the Supreme Court reaffirmed *Caldor* and held that a religious accommodation "must be measured so that it does not override other significant interests." *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005); *see also id.* at 720 (noting that RLUIPA "take[s] adequate account of the burdens a requested

accommodation may impose on nonbeneficiaries"); *Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring in the judgment) ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment."); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 n.11 (1987) (citing *Caldor* and holding that religious accommodations violate the Establishment Clause when they place "unacceptable burden[s]" on third parties and provide "no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation"); *Tex. Monthly*, 489 U.S. at 14; *United States* v. *Lee*, 455 U.S. 252, 261 (1982); *Turpen* v. *Mo.-Kan.-Tex. R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

To the extent that Appellants claim that all religious accommodation statutes are valid *per se*, such an argument is foreclosed by controlling authority: "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette*, 401 U.S. at 461; *see also Kiryas Joel*, 512 U.S. at 706 ("[A]ccommodation is not a principle without limits[.]"); *Amos*, 483 U.S. at 334–35 ("At some point, accommodation may devolve into an unlawful fostering of religion[.]" (internal quotation marks omitted)). Indeed, the practical consequences of a

reversal of the decision below are well worth considering—if HB 1523 is deemed by this Court to be constitutional, then Mississippi legislators will surely lobby for the same kind of absolute immunity from complying with generally applicable laws for other religious beliefs, including, for example, that women should not work outside the home or couples should not get divorced. *See* ROA.16-60478.1827:20–25. We respectfully submit that that kind of overt sectarian activity in a legislature is exactly what the framers designed the Establishment Clause to prevent. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 411 (2002) ("The Framers agreed that liberty of conscience was to be respected, and they further agreed that a preferential establishment was always undesirable because it violated liberty of conscience.").

The recent case of *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014), is fully consistent with these principles. In *Hobby Lobby*, the Supreme Court, "found that the religious accommodation in question would have 'precisely zero' effect on women seeking contraceptive coverage, and emphasized that corporations do not 'have free rein to take steps that impose disadvantages on others.'" ROA.16-60478.810 (citing *Hobby Lobby*, 134 S. Ct. at 2760). Thus, the Court in *Hobby Lobby* based its decision on the bedrock principle that courts must

consider both the "detrimental effect on . . . third part[ies]" and the onerousness of the free exercise burden in assessing a religious accommodation. *Hobby Lobby*,134 S. Ct. at 2781 n.37 (citing *Caldor*); *see also id.* at 2786 (Kennedy, J., concurring) (noting that an accommodation was warranted in part because there was an "existing, recognized, workable, and already-implemented framework to provide [contraceptive] coverage" without the challenged mandate).

Although Appellants argue that the case of *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987) is inconsistent with *Caldor*, it is not.[14] Not only did the Supreme Court in *Amos* cite *Caldor* with approval and distinguish it on its facts, the *Amos* Court upheld a narrow, common-sense statute that exempts churches and other religious organizations of any faith or creed from the general requirement that employers not discriminate on the basis of religion. *Id.* at 329–30, 337 & n.15. Such an exemption is not just permitted, but in many cases is actually required by the religion clauses of the First Amendment, which prohibit "government interference with an internal

[14] *Gillette* is also consistent with *Caldor*. The conscription statute at issue in *Gillette* did not provide a broad absolute and unqualified right and imposed burdens that were "justified by substantial government interests." 401 U.S. at 445, 456–58, 462. HB 1523 is much more like the law at issue in *Caldor*, which provided a broad automatic exemption that imposed substantial—not incidental—burdens that were not justified by any compelling government interest. 472 U.S. at 709–10.

church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 707 (2012); *see also Kedroff* v. *St. Nicholas Cathedral of Rus. Orthodox Church in N. Am.*, 344 U.S. 94, 107, 119–20 (1952); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012); *McClure* v. *Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972). In the limited context of government regulation of churches, the paramount religious liberty interest may justify third-party burdens that would be impermissible in other settings. *See Amos*, 483 U.S. at 348–49 (O'Connor, J., concurring) ("Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion."). Thus, a Lutheran church has a Free Exercise interest in hiring Lutheran employees, while a barbershop most likely does not. But, with the partial exception of Sections 3(1) and 3(2),[15] HB 1523

[15] Section 9(4) of HB 1523 defines "religious organization" expansively to include not just houses of worship, but also for-profit religious corporations and their owners.

sweeps far more broadly. It is much more like the exemption at issue in *Caldor*, which applied to all employers, than the exemption in *Amos*.[16]

D. HB 1523 Is Not Like the Narrow Conscience-Clause Provisions Cited by Appellants

Appellants devote much of their brief to a discussion not of HB 1523, but of other laws concerning abortion, military service, and vaccination. (*See* Br. at 6, 9, 11, 42–49.) Those laws, which are not at issue in this case, are clearly distinguishable from HB 1523 in ways that actually highlight HB 1523's constitutional infirmities.

First, unlike the laws that Appellants cite, HB 1523 legislates according to religious *belief*. The 292 statutes in Appellants' appendices apply equally to everyone with a religious or other opposition to, for example, performing an abortion[17] or participating in capital punishment,[18] regardless of the particular reason for their opposition. For example, a person could object to participating in an execution because of a religious opposition to all killing, a religious opposition to capital punishment

---

[16] Amicus the Christian Legal Society's proposed distinction between "religious exemptions" and "religious preferences" is not only nonsensical, but is not supported by any controlling or persuasive authority. CLS Br. at 13–15. The statute at issue in *Caldor* could easily be conceptualized as a "religious exemption" because government created the burden on plaintiff's free exercise by repealing the Sunday closing accommodation statute.

[17] *See, e.g.*, 42 U.S.C. § 300a-7(b)(1); Fla. Stat. § 390.0111(8); R.I. Gen. Laws § 23-17-11.

[18] *See, e.g.*, Ala. Code § 15-18-82.1(i); Fla. Stat. § 922.105(9).

specifically, a belief that capital punishment may only be imposed by an ecclesiastical tribunal, or for some other reason entirely. The statutes that Appellants cite protect individuals who hold *any* of these beliefs. HB 1523, by contrast, is limited to people who hold or act consistently with the three Section 2 Beliefs to which the State of Mississippi affords special protection. But, as the district court observed, "[i]t is not within our tradition to respect one clerk's religious objection to issuing a same-sex marriage license, but refuse another clerk's religious objection to issuing a marriage license to a formerly-divorced person. The government is not in a position to referee the validity of Leviticus 18:22 ('Thou shalt not lie with mankind, as with womankind: it is abomination.') versus Leviticus 21:14 ('A widow, or a divorced woman, or profane, or an harlot, these shall he not take.')." ROA.16-60478.808. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987); *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); *Ingebretsen*, 88 F.3d at 280; *see also Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (invalidating statute limiting public office to those who believe in God because it had the impermissible effect of "forc[ing] a person to profess a belief or disbelief").

Second, the other statutes cited by Appellants provide narrowly-crafted exemptions from engaging in *specific conduct* (Br. at 48), and thus reflect fact-specific legislative balancing of the magnitude and

likelihood of both the potential free exercise burden and potential third-party harms. An exemption from participating in capital punishment, for example, balances a significant free exercise burden (causing someone to take a life in violation of his or her religious beliefs) against minimal third-party harms (condemned prisoners do not have an interest in the particular identity of their executioner). Abortion exemptions implicate similar concerns and are mitigated by statutory guarantees of life-saving medical care. *See, e.g.*, 42 U.S.C. § 1395dd(b)–(c) (requiring hospitals to provide emergency medical care); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 Ind. L.J. 703, 731, 733 (2014) ("[T]he importance of conscience derives from characteristics unique to medicine . . . [R]emoving conscience from the medical enterprise could negatively affect patients.")

HB 1523, by contrast, is untethered from any particular factual circumstance and authorizes absolute and unqualified exemptions from a virtually unlimited number of generally applicable laws and policies across a wide array of contexts. HB 1523 is thus much more analogous—at least in terms of the scope of the conduct protected—to RLUIPA and Mississippi's RFRA than to the narrow religious exemption laws cited by Appellants, and must satisfy the Supreme Court's Establishment Clause test for broad religious accommodations. As a unanimous Supreme Court explained in

Cutter v. *Wilkinson*, sweeping accommodation laws like RLUIPA, Mississippi's RFRA, and HB 1523 "devolve into an unlawful fostering of religion" when they are not addressed at alleviating "burdens on private religious exercise," fail to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," or are not "administered neutrally among different faiths." *See* 544 U.S. at 714, 720 (internal quotations omitted).

RLUIPA and Mississippi's RFRA both satisfy this test by neutrally providing for judicial balancing of interests and harms. HB 1523 fails it by creating an impermissible automatic exemption for three religious beliefs that applies no matter how minor the free exercise burden or how major the government interest at stake. To give an example, HB 1523 permits a taxi driver to leave gay newlyweds returning from their honeymoon late at night stranded at the Jackson train station no matter how slight a burden on his free exercise it would have been simply to drive them home in his car, despite the existence of an ordinance specifically intended to prohibit this type of discrimination. *See* HB 1523 § 3(5)(b); Jackson, Miss., Code of Ordinances § 126-161. In other words, serving in the armed forces during war or placing one's hand upon a Bible to swear an oath are very different from everyday acts like renting a car, serving dinner, or

selling a bouquet of flowers. *See, e.g.*, HB 1523 § 3(5). There is a big difference between a pacifist refusing to go to war and a pacifist refusing to sell a hamburger to a soldier in uniform. As Judge Reeves explained: "HB 1523 is different. Allowing people to opt-out of serving LGBT citizens comes at the expense of LGBT citizens. The objector and only the objector 'wins,' while her employer, her colleagues, and the persons discriminated against have to deal with the consequences of her decision." ROA.16-60478.1072 n.4.[19]

III. HB 1523 Is Facially Unconstitutional Under the Establishment Clause and Should Be Enjoined in Its Entirety

Finally, even if this Court concludes that some portion of HB 1523 withstands Plaintiffs' challenge, it still must affirm the district court's injunction because HB 1523 is not severable.[20]

---

[19] Although a number of the statutes cited by Appellants permit religious objectors who are subject to an adverse employment action to sue their employer for reinstatement and restitution, *see, e.g.*, Neb. Rev. Stat. Ann. §§ 28-340, 28-341; Okla. Stat. tit. 63 § 1-728f, none of these laws goes as far as HB 1523, which authorizes suit against *any* private citizen who attempts to vindicate his or her civil rights under local or state law. HB 1523 §§ 6, 9(2)(d). For example, if a foster child is abused by a person holding a Section 2 Belief and complains to a state agency about this mistreatment, HB 1523 allows the foster parent to sue both the agency *and the child*. *Id.* § 9(2)(d) (defining "state government" to include any person "suing under *or enforcing* a law, ordinance, rule or regulation" (emphasis added)).

[20] In addition to their likelihood of success on the merits, Plaintiffs have satisfied the remaining prongs of the preliminary injunction inquiry. First, the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." ROA.16-60478.812 (quoting *Ingebretsen ex rel. Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996)). Second, Appellants have not suffered

In Mississippi, a valid provision of an otherwise invalid statute may survive if a court concludes that the legislature would have otherwise enacted that provision standing alone. *Wilson* v. *Jones Cty. Bd. of Supervisors*, 342 So. 2d 1293, 1296 (Miss. 1977); *see also, e.g.*, *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 234 (1932); *Stewart* v. *Waller*, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (finding that because statute reflected "a comprehensive, interrelated scheme for aldermanic elections," and severing invalid sections would leave statute "incomplete and unworkable," "our holding of unconstitutionality must necessarily extend to [the statute] in its entirety"). The existence of Mississippi's general severability statute does not mean HB 1523 is severable *per se*. *See United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968) (noting "whatever relevance such an explicit [general severability] clause might have in creating a presumption of severability . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause" (internal citations omitted)). As the Mississippi Supreme Court has explained:

---

any harm from the district court's preliminary injunction. The injunction, by preserving the status quo, does not affect Mississippians' "existing rights to the free exercise of religion and free speech." ROA.16-60478.813 (quoting *Ingebretsen*, 88 F.3d at 280). Third and finally, "injunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012) (quoting *Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 859 (7th Cir. 2006)).

> It is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so *intimately connected with and dependent upon each other* as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect it would not have enacted the residue independently.

Wilson, 342 So. 2d at 1296 (emphasis added).

Section 2 of HB 1523 obviously infects every other clause and provision of the statute. In other words, the provisions of HB 1523 "are so intimately connected with and dependent upon each other" that the Legislature clearly intended to enact them as a whole and would not have enacted the rest of HB 1523 without Section 2. *Id.* Every subsection of Section 3, for example, incorporates Section 2 by reference and would thus be incomprehensible if Section 2 were to be invalidated. *See, e.g.*, HB 1523 § 3(3) ("The state government shall not take any discriminatory action against a person who the state grants custody of a foster or adoptive child . . . wholly or partially on the basis that the person guides, instructs or raises a child . . . *based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.*").[21] Section 2 is not only the heart of HB 1523, it is its connective tissue as well.

[21] The legislative history of HB 1523 provides further evidence that the Mississippi Legislature would not have enacted HB 1523 without Section 2. *See supra* at 10–13. During debate, legislators expressly affirmed that HB 1523 was intended only to

This comports with long-settled doctrine favoring facial challenges in the Establishment Clause context. Courts often hold that facial challenges under the Establishment Clause are appropriate because of the nature of the harm that results when the government endorses specific religious beliefs, improperly engages in sect-based discrimination, or entangles itself in religion. *See, e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314 (2000) ("Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."); *Bowen* v. *Kendrick*, 487 U.S. 589, 600 (1988) (noting that the Supreme Court has repeatedly considered facial challenges under the Establishment Clause to statutes that had not yet been implemented at the time of suit); *Ingebretsen*, 88 F.3d at 278 (rejecting Mississippi's argument that plaintiff lacked standing to challenge school prayer policy that had not yet been implemented because plaintiff did not need to "wait for . . . actual violations of his rights under the First Amendment where the statute 'makes inappropriate government involvement in religious affairs inevitable'" (quoting *Karen B.* v. *Treen*, 653 F.2d 897, 902 (5th Cir. 1981))).

---

address the Section 2 Beliefs, and rejected amendments to expand the religious beliefs protected by the statute.

CONCLUSION

For all of the forgoing reasons, the District Court's decision should be affirmed.

Respectfully submitted,

Dated: December 16, 2016

**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

By: /s/ Roberta A. Kaplan
Roberta A. Kaplan
Lead Counsel
Joshua D. Kaye
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
rkaplan@paulweiss.com
jkaye@paulweiss.com

FISHMAN HAYGOOD, LLP

Alysson Mills
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Tel: (504) 586-5253
amills@fishmanhaygood.com

SMU DEDMAN SCHOOL OF LAW

Dale Carpenter
3315 Daniel Avenue
Dallas, Texas 75205
Tel: (214) 768-2638
dacarpenter@mail.smu.edu

Attorneys for Plaintiffs-Appellees The Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of December, 2016, I filed the foregoing brief with the Court's CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record. I also certify that I served the following persons via overnight mail:

Jonathan F. Mitchell, Esq.
D. John Sauer, Esq.
James Otis Law Group, LLC
Suite 214
12977 N. 40 Drive
St. Louis, MO 63141

Tommy D. Goodwin, Esq.
Office of the Attorney General for the State of Mississippi
550 High Street, Walter Sillers Building
Jackson, MS 39201

Drew L. Snyder, Esq.
Office of Governor Phil Bryant
P.O. Box 139
Jackson, MS 39205

Kevin H. Theriot, Esq.
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Mack Austin Reeves, Esq.
Mississippi Department of Human Services
P.O. Box 352
Jackson, MS 39205

/s/ Roberta A. Kaplan

Counsel for Plaintiffs-Appellees the Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,805 words, excluding the parts of the brief exempted by Fed. R. App. P. 23(a)(7)(B)(iii).

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 Word in 14-point Times New Roman font.

Date: December 16, 2016

/s/ Roberta A. Kaplan

Counsel for Plaintiffs-Appellees the Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, on this 16th day of December, 2016: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Roberta A. Kaplan

Counsel for Plaintiffs-Appellees the Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski