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
Cause Nos. 3:16-cv-00417 & 3:16-cv-00442

BRIEF OF *AMICI CURIAE* SANDERSON FARMS, INC., JOHN N. PALMER, SR., JACK REED, JR., WILLIAM A. PERCY, II, TIM C. MEDLEY, SHARPE & WISE, PLLC, KELLY KYLE, HAL CAUDELL, TALAMIEKA BRICE, and AMBER AND JESSICA KIRKENDOLL IN SUPPORT OF APPELLEES

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INTERESTS OF THE AMICI CURIAE

Amici are Mississippi-based businesses, business owners, entrepreneurs, and consumers who opposed enactment of the Mississippi Protecting Freedom of Conscience From Government Discrimination Act ("HB 1523") because it unlawfully discriminates against Mississippi's gay, lesbian, and transgender citizens, serves no legitimate secular purpose, and—as discussed in Section III of this brief—threatens to inflict lasting harm on Mississippi's economy and the amici's business activities. The amici now join the appellees in opposing HB 1523's enforcement because it violates the Establishment Clause of the First Amendment to the United States Constitution.[1] The amici include:

Sanderson Farms, Inc., headquartered in Laurel, Mississippi, is the third largest poultry producer in the nation, with annual sales of more than $2.77 billion. Sanderson Farms was started in Mississippi in 1947 as a small-town farm supply business. Today, the publicly-traded company employs more than 13,000 people across its operations, and it

[1] All parties have consented to the filing of this amici curiae brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici's counsel made a monetary contribution to the preparation or submission of this brief.

also supports more than 800 independently contracted poultry growers. Today it is the only Fortune 1000 company headquartered in the state. Pursuant to Fifth Circuit Rule 26.1.1's corporate disclosure requirements, Sanderson Farm, Inc. states that no other company owns 10% or more of its stock.

John N. Palmer, Sr. is the founder and Chairman of GulfSouth Capital, Inc., a financial services and investment firm based in Jackson, Mississippi. Palmer, a native Mississippian, has been an ambassador, entrepreneur, telecommunications pioneer, and community leader. Palmer formed and led two major telecommunications companies, Mobile Communications Corporation of America (MCCA) and Skytel Communications. From 2001 to 2004, Palmer served as the United States Ambassador to Portugal under President George W. Bush.

Jack Reed, Jr. is the third generation Chairman and President of R. W. Reed Company, a 111 year-old retail establishment headquartered in Tupelo, Mississippi, with stores located in Tupelo, Columbus, and Starkville. Mr. Reed is a past Chairman of the Community Development Foundation—an economic development and chamber of commerce organization for the Tupelo and Lee County, Mississippi region. He has

also served as Chairman of the Mississippi Economic Council, Mississippi's statewide chamber of commerce. Mr. Reed was elected and served as Mayor of Tupelo from 2009-2013.

William A. Percy, II is a retired farmer and native of Greenville, Mississippi who has served on the Board of Directors for three publicly-traded companies listed on the New York Stock Exchange, including Mississippi Chemical Corporation, ChemFirst, and Entergy. Mr. Percy is also the past chairman of Staple Cotton Cooperative Association, past president of the Delta Council, past chairman of the Greenville Municipal Separate School District School Board, and past chairman of the board of Hope Enterprise Corporation.

Tim C. Medley is that managing principal for Medley & Brown, an investment advisory firm in Jackson, Mississippi that manages $600 million for individuals, corporations and foundations. A resident of Jackson for almost fifty years, Tim has been a member of the Jackson Public Schools School Board, a founding member of the Community Foundation of Greater Jackson, a member of the Board of Trustees for Millsaps College, and is on the board of the Sequoia Fund of New York City. Tim and Jean Medley raised three children in Jackson.

Talamieka Brice is a the owner of Brice Media, LLC, an award-winning media and graphic design firm located in Jackson, Mississippi. Ms. Brice and her company assist a wide range of Mississippi businesses in building their brands and increasing their market.

Sharpe & Wise, PLLC is a Jackson, Mississippi law firm owned and operated by the husband and wife team of Robert Wise and Suzanne Sharpe. The firm's practice focuses on governmental relations and utility and construction law. Pursuant to Fifth Circuit Rule 26.1.1's corporate disclosure requirements, Sharpe & Wise, PLLC states that no other company owns 10% or more of its stock.

Kelly Kyle and **Hal Caudell** are a long-term committed couple from Jackson, Mississippi. Mr. Kyle practices law at his own law firm, and Mr. Caudell manages temporary service contracts at the Nissan Automotive Manufacturing Plant in Canton, Mississippi.

Amber and Jessica Kirkendoll are a married same-sex couple who live and work in Jackson, Mississippi, where they depend on the ability to fully participate in the local economy without the threat of being denied consumer services for discriminatory reasons.

SUMMARY OF THE ARGUMENT

HB 1523 is Mississippi's impermissible response to the Supreme Court's holding in *Obergefell v. Hodges* that same-sex couples have a right to marry. The response—cast in terms of "religious freedom"—is regrettable, though not unexpected given Mississippi's historical pattern of reactionary governance, traceable from the civil rights era of the 1950s and 1960s to today. HB 1523 not only demeans and discriminates against Mississippi's gay, lesbian and transgender citizens, it stigmatizes the entire state and will cause lasting harm to Mississippi's economy—driving down the state's GDP, deterring business development and expansion, and costing the state jobs. Its many harms are plain.

Equally plain is HB 1523's violation of the Establishment Clause, which prohibits states from favoring one set of religious beliefs over others. HB 1523 violates this command by "protecting" only one set of religious beliefs (held by some Christians) that marriage is only between one man and one woman, gender is determined by your sex at birth, and sexual relations may not be had outside of marriage. The law provides no protections for other sincerely held religious beliefs on these topics. The text of HB 1523, therefore, makes its improper purpose plain.

If there were any doubt, though, the historical context confirms HB 1523's unlawful purpose of endorsing a specific set of religious beliefs. Mississippi has a historical pattern of responding to "disfavored" federal civil rights with laws aimed at nullifying and obstructing those rights. This history of reactionary governance is traceable to the not-so-distant civil rights era of the 1950s and 1960s, during which Mississippi responded to *Brown v. Board of Education* with laws aimed at obstructing its implementation. More recently, the pattern was repeated when Mississippi responded to *Lawrence v. Texas* by enacting laws prohibiting same-sex marriage.

HB 1523 is no exception to this pattern. Any objective observer can see that the law was enacted to defeat *Obergefell*'s recognition of same-sex marriage rights by endorsing only those religious beliefs that oppose same-sex marriage. The law lacks a sincere secular purpose, and any attempt by the state to offer one now would be pretext, particularly given that HB 1523 undermines the state's primary policy goal of growing Mississippi's economy. The law will depress economic growth, discourage entrepreneurship, and damage existing businesses like the amici's.

HB 1523 is unlawful and should be declared so by this Court.

ARGUMENT

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The government must remain neutral in the area of religion; it may not express "legislative favoritism" for a particular religion or religious sect. *Croft v. Perry*, 624 F.3d 157, 166 (5th Cir. 2010). To withstand First Amendment scrutiny, a law must have a secular purpose, and that purpose must be "sincere"—not a sham for favoring a particular set of religious beliefs. *Id.*

Whether HB 1523 has the "predominant purpose of advancing religion"—one that violates the Establishment Clause—is determined by examining the historical context of its enactment. *McCreary County v. ACLU*, 545 U.S. 844, 867-69 (2005). Indeed, "context is critical in assessing neutrality." *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001) (*en banc*). This contextual analysis is an objective one: "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary County*, 545 U.S. at 862.

I. HB 1523 has the predominant purpose of favoring a particular set of beliefs about marriage.

HB 1523 has the predominant and unique purpose of endorsing a particular set of religious beliefs about marriage and sexual relations. Under the law, the state's three favored religious beliefs are as follows: (1) marriage is "the union of one man and one woman;" (2) "[s]exual relations are properly reserved to a marriage between one man and one woman;" and (3) male and female "refer to an individual's immutable biological sex." HB 1523 § 2 ("Section 2 Beliefs"). Other religious beliefs—however sincerely held they might be—are not protected.

This is because HB 1523 was Mississippi's official response to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which declared that states could no longer prohibit same-sex marriages. As the district court found, and as Appellees Campaign for Southern Equality and the Reverend Doctor Susan Hrostowski ("CSE Appellees") have ably demonstrated in their brief, HB 1523 endorses the Section 2 Beliefs because those beliefs are precisely opposed to the right established in *Obergefell*, a decision that Mississippi's political leaders viewed as "overreach of the federal government" in the area of marriage rights. *See Barber v. Bryant*, 2016 WL 3562647, **5-9, 24-31 (S.D. Miss. June 30, 2016). Any objective

observer would draw this conclusion not only from the text of HB 1523, but from the immediate history of its enactment—including public pronouncements by its sponsors and supporters in the Mississippi Legislature. *See id.*

Reasonable observers, the Supreme Court has said, "have reasonable memories," and a reviewing court—standing in the shoes of a reasonable observer—may not "turn a blind eye to the context in which [a] policy arose." *McCreary County*, 545 U.S. at 866. In this case and in this state, the relevant historic context for HB 1523 is not just immediate, but stretches back to a past that is still vividly recalled by many Mississippians. Mississippi has an extensive and infamous history of opposing and obstructing federally recognized civil rights that are disfavored by the state's political establishment of the day. That history is traceable from the civil rights era of the 1950s and 1960s through the modern civil rights era of the 1990s and 2000s.

As traced below, HB 1523 adds a new chapter to this history. In this chapter, the state has endorsed a narrow set of religious beliefs that further an impermissible political aim—denying same-sex couples the full enjoyment of the marriage right established by *Obergefell*.

II. Under the Establishment Clause analysis, the context of HB 1523's enactment includes Mississippi's historical pattern of opposing "disfavored" federal rights.

As reflected in the context of its enactment, HB 1523 is an example of reactionary governance—an official endorsement of specific religious beliefs by Mississippi's political leadership in direct response to a newly established, "disfavored" constitutional right.

As history has shown, such responses are not actually intended to succeed on their legal merits. Rather, they provide a means to delay as long as possible full enjoyment of the "disfavored" right by the minority population it is intended to protect. These official responses also serve political ends. They galvanize public antipathy for—even outrage over—the federal right, which discourages minority groups from seeking the protections to which they are entitled. The state's aim is not a technical victory, but frustration of an already established right.

A. Mississippi established a pattern of official resistance to federally recognized civil rights during the Civil Rights Era of the 1950s and 1960s.

This approach has been taken before in Mississippi. The district court noted the unmistakable parallels between HB 1523's enactment in response to *Obergefell* and Mississippi's earlier response to *Brown v. Board of Education*, 347 U.S. 483 (1954), which ended state-sponsored

segregation of public schools. *Barber*, 2016 WL 3562647 at **5-7 & n.6, n.8, n.9; *id.* at *16 & n.26. Mississippi's official response to *Brown* was immediate and direct defiance. Although *Brown* was the undeniable law of the land, the Mississippi Legislature enacted a statute recommitting the state to the *enforcement* of segregation in public schools and other public facilities. *See Meredith v. Fair*, 298 F.2d 696, 701 n.5 (5th Cir. 1962) (discussing Miss. Code § 4065.3 (1942)).

In addition to enacting the anti-*Brown* statute, Mississippi's elected leaders—from the Governor, to the legislature, to some in the judiciary—publicly rejected the Supreme Court's decision as an unwarranted invasion of state powers and called on Mississippians to disobey it. *See Barber*, 2016 WL 3562647 at **5-7 & n.6, n.8, n.9; *id.* at *16 & n.26. The White Citizens' Council published a handbook (written by a sitting circuit court judge) calling for Mississippians to resist integration and nullify the *Brown* decision by abolishing public schools. *See* Tom P. Brady, Black Monday: Segregation or Amalgmation . . . America Has Its Choice (Ass'n of Citizens' Councils 1955). At the time, Mississippi's political leaders often invoked their religious values as a basis for resisting desegregation. *Barber*, 2016 WL 3562647 at *5 n.8; *see also* Jane Dailey, *Sex,*

Segregation, and the Sacred after Brown, The Journal of American History, Vol. 91, Issue 1, pp.119-44 (2004).[2]

Mississippi's official resistance to the *Brown* decision and individual desegregation efforts also played out in prolonged court battles. Rather than desegregate Mississippi's public schools, state and local officials resisted the implementation of *Brown* for decades, forcing federal courts to intervene by developing and overseeing desegregation plans. *E.g.*, *Anthony v. Marshall County Bd. of Educ.*, 409 F.2d 1287 (5th Cir. 1969); *United States v. Hinds County School Bd.*, 402 F.2d 926 (5th Cir. 1968); *see also* Charles Bolton, The Hardest Deal of All: The Battle Over School Integration in Mississippi, 1870-1980 (University Press of Mississippi 2005).

Rather than admit James Meredith as the first black student at the University of Mississippi, Governor Ross Barnett and other officials

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[2] As the district court noted, "[u]sing God as a justification for discrimination is nothing new." *Barber*, 2016 WL 3562647 at *5 n.8. As Professor Dailey chronicles, segregationists of the 1950s and 1960s used religion to promote "two key pedagogical aims" intended to preserve their segregated society: "to make the case for segregation as divine law, and to warn that transgression of this law would inevitably be followed by divine punishment." Dailey at 119-44. At the same time, however, integrationists in Mississippi and across the American South invoked their religious beliefs to oppose segregation. *Id.*

forcibly resisted his enrollment and battled Meredith in federal court. After the state engaged in protracted litigation, including three appeals to the Fifth Circuit, this Court ultimately held the University's admission policies to be unconstitutional—a violation of the principles established in *Brown*—and ordered that Meredith be permitted to enroll. *See Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).

Throughout the multiple hearings, a trial, and several appeals in Meredith's case, state officials never offered a "valid, non-discriminatory reason for the University not accepting Meredith." *Id.* at 361. Instead, as this Court noted, they engaged in "a well-defined pattern of delays and frustration, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders." *Id.*; *see also Meredith v. Fair*, 306 F.2d 374, 378-79 (5th Cir. 1962) (recalling mandate to make injunctive relief more explicit so that it could not be defeated by state officials).

Rather than operate its public swimming pools as integrated facilities, the City of Jackson, Mississippi closed them all. In 1962, a federal district court ordered the City of Jackson to desegregate its five public swimming pools—four of which were maintained exclusively for use by white citizens, with the other serving only black citizens. *Clark v.*

Thompson, 206 F. Supp. 539 (S.D. Miss. 1962). Rather than comply with the order to integrate its public pools, the City of Jackson shut them all down. City leaders then waged a nine-year legal battle—culminating in an appeal to the Supreme Court—to defend their decision to serve no citizens, rather than serve all citizens equally. *See Palmer v. Thompson*, 403 U.S. 217 (1971).

Although a divided Supreme Court affirmed the pool-closure decision on grounds of safety and municipal finance, Justice William O. Douglas, writing in dissent, addressed the larger implications of the City's action: "It has taught Jackson's Negroes a lesson: In Jackson, the price of protest is high." *Id.* at 235 (Douglas, J., dissenting). Other dissenters noted that the "city's official attitude" and the underlying motivation for its actions went beyond a few swimming pools; it was "to maintain Jackson's present separation of the races." *Id.* at 250 (White, J., dissenting) (citing newspaper coverage of the actions of Mayor Thompson and Governor Ross Barnett).

Rather than allow black and white Mississippians to marry each other as required by *Loving v. Virginia*, 388 U.S. 1 (1967), the state's plainly unconstitutional anti-miscegenation law had to be enjoined by a

federal court. When Roger Mills and Berta Linson applied for a marriage license in 1970—becoming the first interracial couple to do so in Mississippi three years after the *Loving* Court struck down all bans on such marriages—their marriage was blocked by state courts. *See* Hayes Johnson, *Millses elated by vote on marriage ban*, Clarion-Ledger (Nov. 15, 1987).[3] A circuit judge in Grenada County enjoined the clerk from issuing a marriage license. *Id.*; *see also* Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and the Law: an American History, pp. 235-36 (Palgrave Macmillan 2002).

The Mississippi Supreme Court refused to lift the injunction, forcing the Millses to sue in federal court for the right to marry in Mississippi. Wallenstein at 236; *see also* Phyl Newbeck, Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving, pp. 197-205 (Southern Illinois University Press 2004). The United States District Court for the Southern District of Mississippi (Cox, J.) ultimately ordered the clerk to issue the marriage

[3] This article is preserved by the Mississippi Department of Archives and History as part of a suggested lesson plan on miscegenation laws: www.mdah.ms.gov/new/wp-content/uploads/2014/08/Miscegenation-Law.pdf (vis. Dec. 18, 2016).

license. *Id.*; Bob Cromie, *Love Prevails in the Ole South*, Chicago Tribune (Aug. 5, 1970).[4] Mississippi did not formally repeal its constitutional ban on interracial marriages until 1987—twenty years after the *Loving* Court had declared such marriages protected by the federal constitution. *Id.* Even then, 48% of Mississippians opposed the change. *Id.*

Discussing why so many Mississippians would vote to retain a plainly discriminatory anti-miscegenation provision, Professor John Quincy Adams of Millsaps College offered this explanation: "Even though the clause is unconstitutional, such a personal thing as marriage strikes close to home." *Mississippi Repeals Ban on Interracial Marriage by Slim Margin*, The Associated Press (Nov. 4, 1987).[5]

B. Mississippi repeated its pattern of official resistance to federal recognition of rights protecting gay and lesbian citizens in the 1990s and 2000s.

Proving the point that "marriage strikes close to home" in Mississippi, the state's elected leaders renewed a pattern of official

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[4] Rims Barber, the lead plaintiff in *Barber v. Bryant*, performed the Millses' marriage ceremony. *See* Hayes Johnson, *Millses elated by vote on marriage ban*, Clarion-Ledger (Nov. 15, 1987).

[5] This article is available through the Associated Press Archive, at www.apnewsarchive.com/1987/Mississippi-Repeals-Ban-on-Interracial-Marriage-By-Slim-Margin/id-c052f0cc0f1de2768820b38c789132a0.

resistance when the issue of gay marriage became a prominent civil rights issue in the 1990s and 2000s. In the case of HB 1523, the state has adopted a new strategy of attempting to defeat a federal civil right by officially endorsing a set of religious beliefs opposed to that right.

As the district court's exhaustive historical analysis in its order striking down Mississippi's ban on same-sex marriage lays bare, Mississippi's institutionalized opposition to "homosexual conduct" and same-sex marriage is longstanding. *Barber v. Bryant*, 64 F. Supp. 3d 906, 930-37 (S.D. Miss. 2014). The opposition to gay rights, which can be traced to the 1960s, began with community shaming and harassment of gay Mississippians, morphed into state-sanctioned harassment and discrimination by public institutions (such as local law enforcement, state agencies, and state universities), before ultimately becoming "official" state policy in statutes, judicial opinions, and the Mississippi constitution. *Id.* Indeed, Mississippi's official policy of discrimination against gay, lesbian, and transgender citizens remains so ingrained today that state law requires that all public school children be taught that homosexuality and sexual relations outside of marriage are illegal. *Id.* at 936 (citing Miss. Code § 37-13-171(e)).

Two legislative enactments in this history of discrimination reflect the same pattern that appears in Mississippi's earlier civil rights history—a targeted response through legislation to judicial recognition of constitutional protections for gay, lesbian, and transgender citizens.

In 1997, the Mississippi Legislature enacted an express prohibition on same-sex marriages. Miss. Code. § 93-1-1. The ban was a response to the Hawaii Supreme Court's recognition that same sex couples might have a constitutionally-protected right to marry. *See Barber*, 64 F. Supp. 3d at 914-15 (discussing *Baehr v. Lewin*, 852 P.2d 44 (Ha. 1993), and Miss. Code. § 93-1-1). Mississippi's newly minted gay-marriage ban declared that "[a]ny marriage between persons of the same gender is prohibited and null and void from the beginning." Miss. Code. § 93-1-1.

In 2004, the Mississippi Legislature responded to *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that states cannot outlaw consensual sodomy, by proposing an amendment to the Mississippi Constitution that would permanently prohibit gay marriage. *See Barber*, 64 F. Supp. 3d at 915-16 (discussing *Lawrence* and Miss. Const. art. 14, § 263A). The 2004 amendment, which was passed by over two-thirds of both houses of the Mississippi Legislature and adopted with the

overwhelming support of Mississippi voters,[6] prohibited gays and lesbians from marrying. To stave off any "overreach" after the *Lawrence* decision, the Mississippi constitution now defined a Mississippi marriage as "only between a man and a woman" and declared same-sex marriages granted by other states to be "void and unenforceable under the laws of this State." Miss. Const. art. 14, § 263A. The constitutional amendment removed any question that the state's official "public policy" was one of opposing and prohibiting same-sex marriages. Miss. Atty. Gen'l Op. 2012-00411, 2012 WL 6128480 (Oct. 12, 2012).

Mississippi's constitutional amendment did more than simply deny marriage licenses to same sex couples. It became a vehicle for official discrimination in anything touching on same-sex marriages. Since its adoption in 2004, Mississippi's constitutional ban on same-sex marriage has been cited to preclude a state employee from enrolling her same-gender spouse and the child of her same-gender spouse in the state health insurance program,[7] to permit a judicial officer to refuse to solemnize a

[6] The amendment was supported by 86% of all Mississippians who cast a vote in the election. Mississippi Official & Statistical Register, 2004-2008, pp. 668-69 (Miss. Sec. of State 2005).

[7] Miss. Atty. Gen'l Op. 2013-00504, 2013 WL 7020577 (Dec. 20, 2013).

marriage—which had already been licensed by the circuit clerk—based on his belief that "both parties appear to be biological females,"[8] to prohibit same-sex marriages at state-owned wedding venues,[9] and even to prohibit the use of state property for unofficial celebration of a wedding at which no "marriage" would be performed.[10] Maintaining the state policy against same-sex marriage was so important that the Attorney General advised state officials not to take any action that could be "construed" as deviating from that policy:

> The actions of elected and other officials, in the absence of express legislative public policy, are looked to by the courts to determine public policy. As the head of the Department, the Commissioner would be the principal decision maker in determining whether allowing activities that could be construed as direct attempts to violate the public policy should or should not be allowed on State property.

Miss. Atty. Gen'l Op. 2012-00411, 2012 WL 6128480 (Oct. 12, 2012).

Also in 2004, shortly after Mississippi's constitutional ban on gay marriage was proposed by the Legislature and while voters were considering it in the run up to the November election, the Mississippi

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[8] Miss. Atty. Gen'l Op. 2014-00010, 2014 WL 5350499 (Sept. 18, 2014).

[9] Miss. Atty. Gen'l Op. 2009-00510, 2009 WL 3332580 (Sept. 25, 2009).

[10] Miss. Atty. Gen'l Op. 2012-00411, 2012 WL 6128480 (Oct. 12, 2012).

Supreme Court addressed the issue of gay marriage in a case alleging that a state judge had violated the Canons of Judicial Conduct. *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004). In *Wilkerson*, the supreme court refused to sanction a trial court judge who, in response to the enactment of a California law granting gay partners a right to sue as spouses, had publicly stated his opposition to gay marriage and declared that "gays and lesbians should be put in some type mental institute instead of having a law like this passed for them." *Id.* at 1010.

Though the Mississippi Supreme Court did not endorse the sentiment that homosexuals were mentally ill, the court treated the trial court judge's statements as within the mainstream of political discourse on the issue of gay rights. *Id.* at 1011-12. The court also noted that the judge, a Christian, had "framed and supported his opinion and statements with his personal religious beliefs" and that, in the court's view, "[t]here are millions of citizens who believe [the judge's] religious views are exactly correct." *Id.* at 1013-14.

History was repeating itself. Just as they had in the 1950s and 1960s when the equal rights of black citizens were at stake, Mississippi's

leaders engaged in a pattern of official resistance to federal recognition of the rights of gay and lesbian citizens in the 1990s and 2000s.

III. HB 1523—Mississippi's official response to *Obergefell*—endorses a specific set of religious beliefs for the purpose of defeating federal same-sex marriage rights.

In this historical light, it is easy to see that HB 1523 is another patchwork in Mississippi's pattern of official resistance to the constitutional rights of a minority group. The law is not a sincere effort to protect religious beliefs; it is an effort to obstruct and delay the full enjoyment of federally guaranteed marriage rights by Mississippi's gay and lesbian citizens. Just as black Mississippians had sought equal access to public institutions, the *Obergefell* plaintiffs asked only for "equal dignity in the eyes of the law." 135 S. Ct. at 2608. And just as Mississippi's political establishment had once resisted the rights announced in *Brown* and *Lawrence*, Mississippi's political establishment believed that an official response to *Obergefell* was necessary.

HB 1523 was enacted in 2016, at the first convening of the Mississippi Legislature after *Obergefell*. As discussed above, HB 1523 plainly favors a specific set of enumerated religious beliefs held by some Christians about marriage, sexual relations, and gender roles and, as a

result, disfavors all other religious beliefs. Not only does HB 1523 favor a specific set of religious beliefs held by *some* Christians, it serves no secular purpose at all—much less a "sincere" secular purpose. It is "a statute in search of a secular purpose." *May v. Cooperman*, 572 F. Supp. 1561, 1573 (D.N.J. 1983) (discussing a law enacted for religious purposes and later defended on pretextual secular grounds); *see also Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (rejecting a statute's "avowed secular purpose" as pretext for religious motivations).

HB 1523's proponents and supporters can muster no legitimate secular purpose for the law. The law is not necessary to protect religious freedom in a neutral way. Mississippi already has a Religious Freedom Restoration Act ("Mississippi RFRA"), recently enacted in 2014, that protects citizens from government acts that would substantially burden their sincerely held religious beliefs. Miss. Code 11-61-1. If the state's purpose in adopting HB 1523 is to act as a neutral protector of *all* sincerely held religious beliefs, then HB 1523 is entirely superfluous. The Mississippi RFRA already does this job.

Remarkably, HB 1523 not only lacks any secular purpose; it is contrary to the Governor's and Legislature's primary (secular) policy of

growing Mississippi's economy and creating jobs for Mississippians.[11] HB 1523 could inflict a staggering amount of damage to Mississippi's economy—shrinking Mississippi's GDP, discouraging entrepreneurship, destroying jobs, and crippling Mississippi's tourism industry.

A recent study commissioned by the Texas Association of Business confirms the economic havoc that may be wrought by laws like HB 1523. *See* Texas Association of Business, The Economic Impact of Discriminatory Legislation on the State of Texas (Dec. 2016) (the "TAB Study").[12] The TAB Study concluded that a similar "religious freedom" law under consideration by the Texas Legislature could seriously harm the Texas economy, leading to losses in Texas's GDP ranging from approximately $1 billion to $8.5 billion and a loss of as many as 185,000 jobs. The TAB Study analyzes the experiences of other states that have

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[11] The Governor's 2016 State of the State Address, his annual report to the Mississippi Legislature, focused predominantly on responding to Mississippi's slow revenue growth, stimulating the state economy, and creating jobs for Mississippians. *See* Geoff Pender, Bryant's State of the State address (text of speech), Clarion-Ledger (Jan. 27, 2016), available at http://www.clarionledger.com/story/news/politics/2016/01/26/bryant-state-address/79365108/.

[12] Available at http://www.keeptxopen.org/wp-content/uploads/2016/12/KTOB-Economic-Study.pdf.

proposed or adopted similar laws, and bases its conclusions on economic data available from those states. *Id.*

There is reason to believe that Mississippi will experience similar economic losses if HB 1523 is enacted. Indeed, the TAB Study cites the economic fallout already being experienced in Mississippi as a result of HB 1523. *Id.* at 17. At the time of its enactment, Mississippi's leading business lobbies—the Mississippi Economic Council (the "MEC") (Mississippi's statewide chamber of commerce) and the Mississippi Manufacturers Association (the "MMA")—predicted that Mississippi's economy would be hit hard by fallout from HB 1523. Both the MEC and MMA, not to mention countless individual businesses and employers, publicly opposed the passage of HB 1523. *See* Ted Carter, *Manufacturers Assoc. latest to oppose state's anti-gay bill*, Mississippi Business Journal (Mar. 31, 2016).[13]

In fact, the economic fallout in Mississippi was immediate—particularly for the state's tourism and entertainment industry, one of the industries that the TAB Study identified as most vulnerable to the

[13] Available at http://msbusiness.com/2016/03/bill-allowing-service-refusal-to-same-sex-couples-heads-to-governor/.

negative financial impacts of so-called "religious freedom" legislation. *See* TAB Study at 1. In the wake of HB 1523's enactment, concerts and other live performances were cancelled,[14] movie productions were halted,[15] other states and cities banned official travel to Mississippi,[16] and one of the state's signature events for showcasing its culture and tourism industry—the Mississippi Picnic in Central Park (New York)—was scrapped.[17]

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[14] Mary Perez, *Bryan Adams backs out of Biloxi show over HB 1523*, The Sun Herald (April 11, 2016), available at www.sunherald.com/news/local/counties/harrison-county/article71135007.html; Bracey Harris, *HB 1523 sends entertainment biz into damage control mode*, The Clarion-Ledger (April 15, 2016), available at www.clarionledger.com/story/news/2016/04/11/law-sends-entertainment-biz-into-damage-control-mode/82890062/; Bracey Harris, *Tracy Morgan cancels Miss. show in protest of HB 1523*, The Clarion-Ledger (April 19, 2016), available at www.clarionledger.com/story/entertainment/2016/04/19/tracy-morgan-cancels-miss-show-protest-hb-1523/83238276/.

[15] Hadas Brown, Sharon Stone abandons Mississippi movie plans over new law, WAPT News (April 13, 2016), available at www.wapt.com/article/sharon-stone-abandons-mississippi-movie-plans-over-new-law/2097793.

[16] Camila Domonoske, States, Cities Limit Official Travel to Mississippi Over 'Religious Freedom' Law, NPR (April 7, 2016), available at http://www.npr.org/sections/thetwo-way/2016/04/07/473352129/states-cities-limit-official-travel-to-mississippi-over-religious-freedom-law.

[17] Kate Royals, Mississippi in New York picnic cancelled over anti-LGBT law, The Clarion-Ledger (April 15, 2016), available at http://www.clarionledger.com/story/news/2016/04/12/mississippi-picnic-canceled/82947774/.

These are among the immediately quantifiable economic effects of HB 1523, which of course do not account for the societal and individual harms of demeaning and stigmatizing Mississippi's gay, lesbian, and transgender citizens by denying them "equal dignity in the eyes of the law." *Obergefell*, 135 S. Ct. at 2608. The long term economic effects of HB 1523, while harder to quantify, will surely damage the state's economic progress. An editorial penned shortly after HB 1523 became law noted that these "silent harms" may cause the most economic pain:

> The greater harm [of HB 1523] is expressed silently. What's beyond measure is a company that discretely strikes Mississippi from its expansion list. There will be no record when a top-notch math teacher in Kentucky or Texas or Michigan scans past any opening in Mississippi while looking for her first job. There will be no tally of high school, college, medical school graduates who no longer consider Mississippi a place they wish to remain.

Charlie Mitchell, *New law does nothing but hurt state*, The Clarion-Ledger (April 15, 2016).[18]

Mr. Mitchell is right: HB 1523 does nothing but hurt Mississippi. The law has no legitimate secular purpose, and whatever purpose the

[18] Available at http://www.clarionledger.com/story/opinion/columnists/2016/04/12/charlie-mitchell-new-law-does-nothing-but-hurt-mississippi/82911832/.

state might think up now is a sham for the Legislature's religiously-motivated decision to confer favored status on one set of Christian beliefs about marriage and gender roles. No avowed purpose can save HB 1523 from scrutiny under the Establishment Clause. *Stone*, 449 U.S. at 41-42.

Professor Adams was also right: Such a personal thing as marriage strikes close to home. Mississippi has a demonstrated pattern of striking back when the federal government's recognition of "disfavored" rights affects institutions that the state's political establishment intend to preserve. The pattern is pursued not with hope of victory, but to delay and frustrate the full enjoyment of those the rights. HB 1523 exemplifies this reactionary—and unconstitutional—approach to governing.

CONCLUSION

The district court's decision should be affirmed. HB 1523 should be declared unconstitutional and permanently enjoined.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,145 words excluding the parts of the brief exempted by Fed. R. App. P. 32(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 Century Schoolbook font size 14.

THIS the 23rd day of December 2016.

s/ Michael J. Bentley
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2016, I filed the foregoing with the Clerk of the Court via CM/ECF, which will deliver electronic copies to all counsel of record in this appeal.

Respectfully submitted,

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