Case Nos. 16-60477 & 16-60478

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, STATE OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants.

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

PHIL BRYANT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSISSIPPI; JOHN DAVIS, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants.

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

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Table of Contents

Table of contents i
Table of authorities iii
I. The plaintiffs misrepresent the scope of HB 1523, and federal courts must defer to the State's construction of HB 1523 1
II. The plaintiffs lack Article III standing 5
A. The claim that HB 1523 injures the plaintiffs by "endorsing" a "religious belief" is meritless 5
B. The plaintiffs' arguments for standing under *Heckler v. Mathews* are meritless 14
C. The CSE plaintiffs' argument for taxpayer standing is meritless 17
D. The Barber plaintiffs' "offense" is not grounds for Article III standing 18
E. The future injuries alleged by the Barber plaintiffs are too speculative to support Article III standing 20
F. The plaintiffs must establish Article III standing to challenge each of the severable provisions in HB 1523 that they seek to enjoin 21
III. The plaintiffs' establishment clause arguments are meritless 22
A. HB 1523 does not "endorse" religion, and it was not enacted for that purpose 22
B. HB 1523 does not establish denominational preferences 28
C. HB 1523 does not violate *Thornton v. Calder* 30
D. The plaintiffs' establishment clause arguments would invalidate every conscience-protection law 34
IV. The plaintiffs' equal protection arguments are meritless 38
A. HB 1523 easily passes rational-basis review 39
B. HB 1523 does not discriminate against a suspect class or burden "fundamental rights" 41
C. The defendants' remaining equal protection arguments are meritless 45
Conclusion 7

Certificate of service.....48
Certificate of electronic compliance.....49
Certificate of compliance.....50

TABLE OF AUTHORITIES

Cases

ACLU of Illinois v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) 13
Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) 17
Arizona v. United States, 132 S. Ct. 2492 (2012) 2
Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 21
Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F.3d 1043 (9th Cir. 2010) (en banc) 12
Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) 18, 20, 21
Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) 41
County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 11, 19
Croft v. Governor of Texas, 562 F.3d 735 (5th Cir. 2009) 19
D.L.S. v. Utah, 374 F.3d 971 (10th Cir. 2004) 20
Doe v. Bolton, 410 U.S. 179 (1973) 1
Doe v. Pryor, 344 F.3d 1282 (11th Cir. 2003) 20
Doe ex rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274 (5th Cir. 1999) 11
Doremus v. Bd. of Educ., 342 U.S. 429 (1952) 18
Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 11
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 30, 32
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 40
Flast v. Cohen, 392 U.S. 83 (1968) 17, 18
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 26
Fox v. Washington, 236 U.S. 273 (1915) 2
Gillette v. United States, 401 U.S. 437 (1971) 29, 32, 33
Hamer v. Musselwhite, 376 F.2d 479 (5th Cir. 1967) 1
Harris v. McRae, 448 U.S. 297 (1980) 7
Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010) 39
Heckler v. Mathews, 465 U.S. 728 (1984) 17
Hein v. Freedom From Religion Foundation Inc., 551 U.S. 587 (2007) 18
Heller v. Doe, 509 U.S. 312 (1993) 39

Holt v. Hobbs, 135 S. Ct. 853 (2015) 3
Johnson v. California, 543 U.S. 499 (2005) 37
Larson v. Valente, 456 U.S. 228 (1982) 29
Lawrence v. Texas, 539 U.S. 558 (2003) 20, 39
Lee v. Weisman, 505 U.S. 577 (1992) 28
Lemon v. Kurtzman, 403 U.S. 602 (1973) 28
Lewis v. Casey, 518 U.S. 343 (1996) 12
Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) 41
Loving v. Virginia, 388 U.S. 1 (1967) 37
Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 19
Lynch v. Donnelly, 465 U.S. 668 (1984) 11, 19
Marsh v. Chambers, 463 U.S. 783 (1983) 28
McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) 11, 24
Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991) 10, 12
Nat'l Rifle Ass'n v. McCraw, 719 F.3d 338 (5th Cir. 2013) 21
Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 37
Peyote Way Church of God, Inc v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) 9, 16
Planned Parenthood of Houston & Se. Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005) 2
Romer v. Evans, 517 U.S. 620 (1996) 40
Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) 26
Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 11
Scarbrough v. Morgan Cty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) 41
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 10, 21
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 19
Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) 38, 41
Steffel v. Thompson, 415 U.S. 452 (1974) 14
Stern v. Tarrant Cty. Hosp. Dist., 778 F.2d 1052 (5th Cir. 1985) (en banc) 39
Tenney v. Brandhove, 341 U.S. 367 (1951) 26

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) 28
United States v. O'Brien, 391 U.S. 367 (1968) 26
United States v. Windsor, 133 S. Ct. 2675 (2013) 45
Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 13, 18, 19–20
Voting for Am., Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013) 1, 2
Walmer v. Dep't of Defense, 52 F.3d 851 (10th Cir. 1995) 41
Warth v. Seldin, 422 U.S. 490 (1975) 21
Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 19
Women's Health Ctr. v. Webster, 871 F.2d 1377, 1382 (8th Cir. 1989) 16

Statutes

42 U.S.C. § 238n 29, 30, 31
Pub. L. 90-40 § 7 31
Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280 31
Conn. Gen. Stat. § 46b-22b(b) (2009) 38
Conn. Gen. Stat. § 46b-35a (2009) 38
D.C. Code § 46-406(c) (2013) 38
Del. Code Ann. tit. 13, § 106(e) (2016) 38
Fla. Stat. § 761.02(3) 4
La. Rev. Stat. § 13:5234(5) 4
Me. Rev. Stat. tit. 19-A, § 655(3) (2012) 38
Miss. Code § 1-3-77 21
Miss. Code Ann. § 11-61-1 5
N.H. Rev. Stat. Ann. § 457:37 (2010) 38
Tex. Civ. Prac. & Remedies Code § 110.001(a)(1) 4

Regulations

45 C.F.R § 147.131 25

Other Authorities

Exodus 20:13 (King James) 7
110 Cong. Rec. 6553 (statement of Sen. Humphrey) 26

Cong. Globe, 38th Cong., 2d Sess. 200 (1865) (statement of Rep. Farnsworth) 26

Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985) 40

Mark Berman, *Pence Defends Indiana Law*, Wash. Post (Mar. 31, 2015), http://wapo.st/2jqPFfu 1

George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004) 36

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PBS NewsHour, *Questions for President Obama* (PBS television broadcast June 1, 2016), http://bit.ly/2iNZWSh 27

James Q. Wilson, *Against Homosexual Marriage*, Commentary (Mar. 1, 1996), http://bit.ly/1m5SK1b.....36

I. THE PLAINTIFFS MISREPRESENT THE SCOPE OF HB 1523, AND FEDERAL COURTS MUST DEFER TO THE STATE'S CONSTRUCTION OF HB 1523

The plaintiffs make false and exaggerated claims about the scope of HB 1523—asserting, for example, that the statute will allow restaurants and taxi-cab drivers to turn away homosexual couples and allow businesses to deny services to any opposite-sex couple that ever had sex before marriage. *See* CSE Br. at 6–7, 9, 56. The plaintiffs' efforts to misrepresent the scope of HB 1523 are understandable; others have successfully used tactics of this sort to derail religious-freedom legislation proposed in other states.[1] Unfortunately for the plaintiffs, their efforts to defame HB 1523 run into a long line of cases requiring federal courts to defer to limiting constructions of statutes adopted by state officials and the lawyers who represent them in court. *See Doe v. Bolton*, 410 U.S. 179, 183 n.5 (1973); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) ("[The state official's] interpretation must be accorded some meaningful weight, as [he] is the official charged with enforcing the statute. We defer to [his] interpretation of how the law is to be enforced, so long as it does not conflict with the statutory text." (citation omitted)); *Hamer v. Musselwhite,* 376 F.2d 479, 481 (5th Cir. 1967) (deferring, in

1. *See, e.g.*, Ralph Ellis & Emmanuella Grinberg, *Georgia Gov. Nathan Deal to Veto 'Religious Liberty' Bill*, CNN (Mar. 28, 2016), http://cnn.it/1URJDnd; Dana Ferguson, *Panel Shelves Bill Protecting Conservative Views on Sex, Marriage*, Argus Leader (Feb. 25, 2016), http://argusne.ws/2irteIw (South Dakota); Mark Berman, *Pence Defends Indiana Law*, Wash. Post (Mar. 31, 2015), http://wapo.st/2jqPFfu.

First Amendment challenge to a city ordinance, to "what the city officials say that the ordinance means"). Federal courts must also interpret state statutes to avoid constitutional violations and "doubtful constitutional questions"—so long as the text is fairly susceptible of a narrowing construction. *See Fox v. Washington*, 236 U.S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts." (citation omitted)); *see also Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 341 (5th Cir. 2005); *Voting for Am.*, 732 F.3d at 387. They cannot adopt fanciful constructions of statutory language concocted by litigants who want to make a challenged law seem as sinister as possible.

Almost every statement in the CSE plaintiffs' brief that describes HB 1523 is untrue or misleading in some respect. To begin, HB 1523 does not confer immunity to violate "a wide array of generally applicable laws," CSE Br. at 1, because there are *no* laws in Mississippi—other perhaps than the Jackson anti-discrimination ordinance—that prohibit *any* of the conduct protected by HB 1523. *See* Appellants' Br. 19–20. And the CSE plaintiffs fail to identify any of these "generally applicable laws"—apart from the Jackson anti-discrimination ordinance—that HB 1523 supposedly curtails. Asserting that HB 1523 establishes carve-outs for a "wide array" of laws when HB

1523 alters the scope of zero existing state laws and only one local ordinance is, at best, misleading.

It is also inaccurate to say that HB 1523 "denies any possibility of judicial or administrative redress to anyone harmed by the actions of holders of these religious beliefs, so long as they acted in a manner based upon or 'consistent with' the beliefs." CSE Br. at 1–2. HB 1523 will not protect someone who decides to murder or assault another person because of a belief that marriage is between only a man and a woman, nor will it protect someone who defrauds another person or breaches a contract on account of a section 2 belief.[2] The statute carefully enumerates the situations in which one may act in accordance with a section 2 belief—and the statute is strictly limited to situations in which someone seeks to compel another person to participate in or lend direct assistance to activities that violate their conscience. These circumstances are far from "virtually unbounded."[3]

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2. The Barber plaintiffs' claim that HB 1523 will allow a vendor to breach a contract after discovering that the contract obligates him to provide services for a same-sex wedding is false, and the defendants and the State will not interpret the statute that way. *See* Barber Br. at 28. Section 5 allows persons to "decline to provide" services, not to breach a contractual commitment that they have previously agreed to.

3. The CSE plaintiffs' claim that HB 1523 "protect[s] specific beliefs, rather than conduct" is also false. CSE Br. at 2. The statute shields only the *conduct* described in section 3, so long as that conduct is based upon a section 2 belief. Statutes that protect conduct that is motivated by a conscientious belief are hardly "unprecedented." For example, the Supreme Court recently held that, under the Religious Land Use and Institutionalized Persons Act, "a prisoner's request for an accommodation *must be* sincerely based on a *religious belief* and not some other motivation." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (emphases added). And twenty-one states have enacted legislation modeled on the Federal Religious Freedom Restoration Act. *See* Nat'l Conference of State Legislatures, *State Religious Freedom Restoration Acts* (Oct. 15, 2015), http://bit.ly/1G3LTR7. Florida's statute, like many of these "state RFRAs," defines

The individual accusations in the CSE plaintiffs' parade of horribles are too numerous and too far-fetched for us spend time refuting at the retail level. *See* CSE Br. 6–10. Suffice it to say that the appellants will not, under any circumstance, interpret HB 1523 to shield restaurateurs that refuse to seat homosexual couples; foster parents who inflict child abuse; counselors who fail to take appropriate steps to prevent suicides; boisterous or disruptive state employees; county clerks who fail to recuse themselves in the manner specified by section 3(8); or jewelers who refuse to sell engagement rings to cohabiting couples. And the State declares unequivocally that it will not construe section 3(5) to authorize *any* business to discriminate against homosexuals or transgendered people in employment, housing, or access to places of public accommodation. Section 3(5) protects businesses *only* from being compelled to participate in, or lend direct assistance to, a marriage ceremony between people of the same sex—if (and only if) such participation or direct assistance would violate the owners' religious or moral beliefs. Serving a meal to a couple on a date is not a "marriage-related service" under any reasonable understanding of that term. *See* HB 1523 §§ 3(5)(a), 3(5)(b). Federal courts must defer to limiting constructions of statutes adopted by state officials and the lawyers who represent them in court, *see supra* at 1–2, and that puts the kibosh on the CSE plaintiffs' hysterical construction of the statute.

"Exercise of religion" as an "act or refusal to act that is substantially motivated by a *religious belief*" (emphasis added). Fla. Stat. § 761.02(3) (2016). *See also* La. Stat. Ann. § 13:5234(5) (2016); Tex. Civ. Prac. & Rem. Code § 110.001(a)(1) (2015).

In most respects, HB 1523 is far more narrow than the State's Religious Freedom Restoration Act (RFRA)—which each group of plaintiffs holds out as the paragon of permissible religious-freedom legislation. *See* Miss. Code Ann. § 11-61-1 (2016). Unlike RFRA, HB 1523 protects only a narrow and specifically defined body of conduct, *see* HB 1523 § 3, and it protects that conduct only when it is motivated by one of the three beliefs listed in section 2. HB 1523 does extend slightly beyond the State's RFRA, but only in two narrow respects. First, HB 1523 protects those with *secular* conscientious objections to same-sex marriage, non-marital sexual relations, and transgender behavior. Second, HB 1523 removes the vague exception for "compelling governmental interests," which can chill religious freedom if one fears that a court might subordinate religious liberty to an anti-discrimination law or to some other regulatory measure. *See* Appellants' Br. at 7–8. But the overall scope of HB 1523 is *much* more narrow than the State's RFRA.

II. The Plaintiffs Lack Article III Standing

The plaintiffs offer several theories of standing. None of them holds water.

A. The Claim That HB 1523 Injures The Plaintiffs By "Endorsing" A "Religious Belief" Is Meritless

The CSE plaintiffs try to establish standing by claiming that HB 1523 "endorse[s] a religious belief." CSE Br. at 21–31. In their view, a statute that violates the establishment clause by "endors[ing] a religious belief" inflicts

"injury *per se*" on those who do not subscribe to the endorsed beliefs. The plaintiffs' argument is untenable for multiple independent reasons.

1. The Beliefs Protected By HB 1523 Are Not "Religious" Beliefs

The first problem with the plaintiffs' argument is that the beliefs described in section 2 are not "religious" beliefs. The notion that "[m]arriage is or should be recognized as the union of one man and one woman" is not a religious belief. Neither is the belief that "[s]exual relations are properly reserved to such a marriage," or the belief that "[m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." HB 1523, § 2. These are conscientious beliefs that *some* people happen to hold for religious reasons—but the statute protects *everyone* who holds these beliefs, regardless of whether they hold these beliefs for religious or non-religious reasons.[4]

The law protects many conscientious beliefs that overlap with religious teaching, including the beliefs that warfare is immoral, that capital punishment is wrong, or that abortion is the unjustified taking of human life. *See* Appellants' Br. Apps. B–F. But none of those are "religious" beliefs—even though many people who adhere to those beliefs do so for religious reasons.

4. *See* HB 1523, § 2 ("The sincerely held religious beliefs *or moral convictions* protected by this act are *the belief or conviction that*: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.") (emphases added).

If HB 1523 protected *only* those who have religious reasons for adopting a belief described in section 2, or if HB 1523 protected the belief that "God has ordained marriage as the union of one man and one woman," then the plaintiffs might credibly argue that the statute is accommodating "religious belief" rather than conscientious beliefs. But the simple belief that "[m]arriage is or should be recognized as the union of one man and one woman" is no more "religious" belief than a belief that warfare, abortion, or capital punishment is an unjustified act of violence. Laws against murder are not an endorsement of "religious belief," even though the belief that murder is wrong finds support in almost every religious tradition. *See, e.g.*, *Exodus* 20:13 (King James) ("Thou shalt not kill.").

The plaintiffs' argument is also incompatible with *Harris v. McRae*, 448 U.S. 297 (1980), which emphatically rejected an attempt to equate anti-abortion laws with an endorsement of "religious belief"—even though most anti-abortion sentiment is rooted in religious doctrine. The plaintiffs in *Harris* had argued that the Hyde Amendment violated the establishment clause by "incorporat[ing] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Id.* at 319. The Supreme Court would have none of it:

> [I]t does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws

> prohibiting larceny. *Ibid.* The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion.

Id. So too here. The conscientious beliefs listed in section 2 reflect "traditionalist" values toward human sexuality, just as the Hyde Amendment reflects "traditionalist" values toward abortion. Neither law endorses "religious" beliefs—they protect traditional values that happen to coincide with the teachings of some religions.

2. A Law That Accommodates Conscientious Beliefs Is Not An "Endorsement" Of Those Beliefs

Even if the plaintiffs could somehow pass off the beliefs listed in section 2 as "religious" beliefs, there is another insurmountable problem with the plaintiffs' argument: A State does not "endorse" a conscientious belief when it enacts a law to accommodate the adherents of that belief and prevent them from being coerced into violating the dictates of their conscience.

Laws that exempt pacifists from military conscription do not "endorse" pacifism. Laws that excuse death-penalty opponents from participating in executions do not "endorse" the belief that capital punishment is wrong. Laws that allow health-care workers to refuse to participate in abortions do not "endorse" the belief that abortion is immoral. And laws that prevent the opponents of same-sex marriage, non-marital sex, and transgender behavior from being coerced into participating in or directly assisting those activities do not "endorse" the conscientious objections to those behaviors. It is indefensible for the plaintiffs to equate a law that accommodates conscientious

objectors with an "endorsement" of the beliefs held by those objectors. Conscience-protection laws are simply a recognition that certain beliefs are deeply held by some members of the citizenry, and that the individuals who hold those beliefs should not be penalized or punished for following the dictates of their conscience—*regardless* of whether the State agrees with those beliefs or not, and *even when* the State's official policy is contrary to those beliefs.

The plaintiffs cite no authority to support the idea that a religious-accommodation or conscience-protection law "endorses" the beliefs that the statute protects. The only "endorsement" cases that the plaintiffs cite involve government-supported prayers, government-imposed school curriculums, and government-sponsored displays of religious imagery—which have no bearing on whether a statute that accommodates conscientious objectors becomes an "endorsement" of the beliefs held by those individuals. *See* CSE Br. 21–22, 24–29, 35–38. The plaintiffs' "endorsement" argument is also incompatible with *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), which upheld a law that permits the use of peyote in "bona fide religious ceremonies of the Native American Church" without ever suggesting that the government had "endorsed" the beliefs of the Native American beliefs. *Id.* at 1217, 1220. On the plaintiffs' theory of the establishment clause, peyote exemptions are an unconstitutional "endorsement" of Native American religion.

Laws that shield dissident religious practices and conscientious objectors from penalty or punishment signify toleration, not "endorsement." The

plaintiffs' attempt to characterize conscience-protection laws as an "endorsement" of religion should be soundly rejected.

3. The Plaintiffs Have Failed To Allege And Prove A "Direct, Personal Contact" With This Supposed Endorsement Of Religious Belief

Even if the plaintiffs could somehow show that HB 1523 "endorses" a "religious belief" in violation of the establishment clause, they *still* would lack standing because they have no direct and personal contact with this supposed endorsement.

The plaintiffs think they can establish injury-in-fact simply by pointing to legislation that endorses religion—without showing that they will have a direct and personal encounter with the government's supposed endorsement. *See* CSE Br. at 24 ("The Supreme Court has consistently held that legislation constituting a governmental endorsement of religion inflicts cognizable injury *per se*."). That is not the law, and the cases that they cite do not support that claim. Article III requires an injury that is both "concrete and particularized," *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)), and an establishment-clause violation does not inflict a "concrete and particularized" injury unless the plaintiff has a direct and personal encounter with the government's endorsement. *See Murray v. City of Austin*, 947 F.2d 147, 150 (5th Cir. 1991) (holding plaintiff had standing where "he *personally confronts* [a Christian cross in] the insignia in 'many locations around the City,' including the

monthly utility bills he receives at his home" and at work (emphasis added)); *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 283 (5th Cir. 1999) (holding plaintiffs had standing where they did not allege simply "personal injury predicated on having been aware of or having observed conduct with which they disagree," but rather were "compelled by law to attend some of the very BISD schools in which the [offending] Program is implemented"), *aff'd en banc*, 240 F.3d 462 (5th Cir. 2001). If the mere existence of a statute that endorses religion could inflict an Article III injury, then Michael Newdow would have had standing to challenge the federal statute that added the phrase "under God" to the Pledge of Allegiance. *But see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8, 16–18 & n.8 (2004) (holding that Newdow lacked standing to challenge this statute in *any* capacity, either on his own behalf or as his daughter's "next friend").[5]

None of the Supreme Court cases that the plaintiffs cite hold that a statute that endorses religion inflicts Article III injury *per se*. The issue of standing was not even discussed in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), or *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the passages that the plaintiffs quote from those decisions are discussing the merits—not Arti-

5. *Id.* at 8 (noting that Newdow's complaint "seeks a declaration that the 1954 Act's addition of the words 'under God' violated the Establishment . . . Clause[]" and that "[i]t alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as 'next friend'").

cle III standing. For the plaintiffs to suggest that these cases have *anything* to say on the issue of standing is a misrepresentation and a misuse of precedent. *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *see also* Appellants' Br. at 33–34.

The plaintiffs also misrepresent the law of this circuit when they claim that *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), confers standing on anyone who holds "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." CSE Br. at 25. *Murray* conferred standing on a plaintiff who "personally confront[ed]" a Christian cross on a city's insignia in "many locations around the City." 947 F.2d at 150-51, but it never holds or even suggests in dictum that a plaintiff can establish standing simply by alleging that the government has endorsed a religious belief that he disapproves.

Without any binding precedent to support their argument for standing, the plaintiffs fall back on the ninth circuit's ruling in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), which allowed Catholic residents of San Francisco to challenge a non-binding resolution that had disparaged the Catholic Church for opposing homosexual adoption. *Id.* at 1053. But opinions of the ninth circuit do not bind this Court and are relevant only to the extent that they are persuasive, and we explained in our opening brief that *Catholic League* was

wrongly decided and should not be followed. *See* Appellants' Br. at 36. The plaintiffs do not answer this argument, but act as though the mere existence of this non-binding pronouncement is a reason for this Court to follow it. But the plaintiffs must explain *why* this Court should follow the majority opinion in *Catholic League* rather than the dissent. That the dissenting judges were outvoted does not mean that they were wrong.[6]

Finally, the plaintiffs ask this Court to limit *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), to lawsuits brought by out-of-state plaintiffs, and apply a more lenient standing regime when plaintiffs challenge laws enacted by their own State. *See* CSE Br. at 29–31. The plaintiffs do not cite any cases that have distinguished *Valley Forge* in this fashion, and their proposed distinction is nonsensical. *Valley Forge* holds that the mere offense taken at government action that one disapproves is insufficient to confer standing; it makes no difference whether the offending government is nearby or far away. 454 U.S. at 485–86.

4. The Alleged "Endorsement" of Religion in HB 1523 Cannot Be Redressed With Judicial Relief

Even if HB 1523 could be said to "endorse" a "religious belief," and even if this alleged "endorsement" inflicts Article III injury *per se*, the plaintiffs *still* lack standing because this injury cannot be redressed with judicial

6. The plaintiffs misrepresent the seventh circuit's opinion in *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (Posner, J.). The court never held that a municipal ordinance establishing an official religion would establish standing *per se* on any offended non-believer; it simply discussed this as a hypothetical scenario without definitively opining one way or the other. *See id.* at 268–69.

relief. A federal court has no power to erase or remove a statute from the books, and the "endorsement" that appears in HB 1523 will remain no matter what declaratory or injunctive relief this Court provides. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("[A] favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (citation omitted)); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 171 (6th ed. 2009) ("[A] federal court has no authority to excise a law from a state's statute book."). The plaintiffs may derive psychological satisfaction from a federal-court ruling that disapproves HB 1523, but the statute will continue to exist—and so will the State's alleged "endorsement" of religious belief. There is *nothing* a federal court can do to remove an endorsement of religion that appears in a duly enacted law, which is why the plaintiffs must allege an "injury" that extends beyond the mere offense taken at the existence of HB 1523.

B. The Plaintiffs' Arguments for Standing Under *Heckler v. Mathews* Are Meritless

The plaintiffs next try to establish Article III injury by claiming that the defendants have denied them a benefit that HB 1523 extends to others. *See* CSE Br. at 31; Barber Br. at 21–27. The theory is that the defendants, by refusing to discriminate against those who subscribe to the conscientious beliefs described in HB 1523, have "injured" the plaintiffs by allowing them to remain subject to state-sponsored discrimination on account of *their* conscientious beliefs.

The problem with this argument is that the plaintiffs have not alleged or shown that the State is discriminating against them on account of the conscientious beliefs that they hold—nor have they alleged that there is *any* possibility that the State might do so in the future. The plaintiffs claim that they subscribe to a belief system contrary to the values protected by HB 1523: That marriage should *not* be defined solely as the union of one man and one woman; that sexual relations outside of that union *are* morally acceptable; and that one's sex is *not* immutable and should *not* be objectively determined by anatomy and genetics at time of birth. But the State of Mississippi is not penalizing or discriminating against any of the plaintiffs on account those beliefs when they engage in the activities described in section 3 of HB 1523.

Any religious organization in Mississippi that solemnizes same-sex marriages or rents its property to unmarried cohabiting couples may do so without any fear of retaliation or discrimination by the State. Foster and adoptive parents who instruct their children that homosexuality and fornication are morally acceptable may likewise do so without any fear that the State will take their children away. And businesses that cheerfully participate in same-sex marriage ceremonies or allow their employees to cross-dress or use restrooms reserved for the opposite sex may do so without any risk of state-sponsored retaliation. To establish standing under *Heckler v. Mathews*, 465 U.S. 728 (1984), the plaintiffs must at the very least show that they have been or will be subjected to the state-sponsored discrimination that the beneficiaries of HB 1523 are protected from. *See Women's Health Ctr. of W. Cty.,*

Inc. v. Webster, 871 F.2d 1377, 1384 (8th Cir. 1989) (holding that an abortion practitioner lacked Article III injury under *Heckler* when challenging a law that prohibits discrimination against people who refuse to participate in abortions, but not those who do participate in abortions, because the plaintiff had not been discriminated against for performing abortions).

The CSE plaintiffs' efforts to analogize this case to *Peyote Way Church of God, Inc v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), are specious. The plaintiff in *Peyote Way* was *criminally prohibited* from ingesting peyote, while the Native American church was given an allowance to use the drug. *Id.* at 1212–13. The plaintiffs in this case, by contrast, do not face *any* state-law prohibition or policy that discriminates against them on account on their conscientious beliefs, so they are not "injured" by the fact that Mississippi has outlawed state-sponsored discrimination against others who hold different conscientious beliefs. The plaintiffs complain that HB 1523 does not give them an *explicit* statutory protection against state-sponsored discrimination, but that is because the plaintiffs do not need that statutory protection, as there is zero risk that any state or local official in Mississippi will punish or discriminate against the plaintiffs when they engage in the activities described in section 3 of HB 1523, and the plaintiffs have not alleged or shown that any such risk exists. *See Women's Health Ctr.*, 871 F.2d at 1384.

Finally, even if the plaintiffs could somehow establish an Article III injury under *Heckler*, the proper remedy is not to enjoin the State from enforcing HB 1523, but to order the defendants to extend HB 1523's protections to the

conscientious beliefs held by the plaintiffs in this case. *See Heckler*, 465 U.S. at 739 n.5 ("[O]rdinarily 'extension, rather than nullification, is the proper course,' [and] the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature.'" (citation omitted)).

C. The CSE Plaintiffs' Argument For Taxpayer Standing Is Meritless

A plaintiff's status as a taxpayer is insufficient to confer Article III standing unless it falls within the "narrow exception" established in *Flast v. Cohen*, 392 U.S. 83 (1968). *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011). To qualify for this exception, a taxpayer must first establish a "'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'" *Id.* at 138 (quoting *Flast*, 392 U.S. at 102). Second, the taxpayer must establish "'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'" *Id.* at 139 (quoting *Flast*, 392 U.S. at 102). The plaintiffs do not even mention this two-pronged test—let alone attempt to show how they satisfy it.

HB 1523 does not appropriate *any* money from the State's treasury, which defeats any "logical link" between the statute and the plaintiffs' status as taxpayers. *See Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 138–39. The only taxpayer expenditures that the plaintiffs can identify is the hypothetical possibility that the State might spend taxpayer money defending lawsuits brought against state officials who violate HB 1523. *See* CSE Br. at 32.

But taxpayers have no standing to challenge money spent on executive actions that are funded by general appropriations. *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007). They also cannot challenge expenditures that are merely "incidental" to the enactment of HB 1523. *See Flast*, 392 U.S. at 102 ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952)). Finally, the plaintiffs' assumption that state officials will violate rather than comply with HB 1523, thereby triggering private lawsuits, is utterly speculative and cannot supply a basis for Article III injury. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147–48 (2013).

D. The Barber Plaintiffs' "Offense" Is Not Grounds For Article III Standing

That the Barber plaintiffs are "offended" by HB 1523 is not a basis for Article III standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982). And their fear that there might not be *anyone* with standing to challenge HB 1523 pre-enforcement is not an argument for standing. *See id.* at 489 ("[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." (citation omitted). Facial pre-enforcement challenges are disfavored in any event, so no court should experience angst

over the possible absence of a suitable pre-enforcement plaintiff. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008).[7]

The plaintiffs suggest that mere "offense" can qualify as Article III injury so long as one resides in the jurisdiction where the alleged establishment-clause violation occurs. *See* Barber Br. at 16 (citing *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984)). But standing was not even discussed in *County of Allegheny* or in *Lynch*, so those cases do not establish *any* precedential holding on the question. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings . . . have no precedential effect."). And *Croft v. Governor of Texas*, 562 F.3d 735 (5th Cir. 2009), does not allow mere "offense" to confer standing; the Court found standing only because the Crofts' children were physically present for the moment of silence and exposed to it at their school. *Id.* at 746. The plaintiffs' attempt to equate their "exposure" to the text of HB 1523 with the Croft children's "exposure" to the moment of silence is unavailing; one could not establish standing to challenge the moment-of-silence statute simply by reading it and taking "offense" at what the statute says. *See* Barber Br. 17. The plaintiffs must allege a personal encounter with the law's *implementation*, not its text. *See Valley*

7. The State did *not* argue that the plaintiffs must wait until they actually encounter a denial of services on account of HB 1523 before they bring suit, as the Barber plaintiffs falsely assert. *See* Barber Br. at 20–21. The plaintiffs may bring suit when an impending injury (such as a denial of services) is "imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 564 (1992).

Forge, 454 U.S. at 485 (requiring plaintiffs to show "personal injury suffered by them *as a consequence* of the alleged constitutional error" (emphasis original)). Otherwise there would be universal standing to challenge any statute with which one disagrees. Homosexuals have no standing to challenge criminal sodomy laws that are never enforced, even though the existence of these law may "offend" and "demean" homosexuals. *See Doe v. Pryor*, 344 F.3d 1282, 1287–88 (11th Cir. 2003); *D.L.S. v. Utah*, 374 F.3d 971, 973–74 (10th Cir. 2004); *see also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (asserting that laws criminalizing consensual homosexual sodomy "demean the[] existence" of homosexuals).

E. The Future Injuries Alleged By The Barber Plaintiffs Are Too Speculative To Support Article III Standing

The Barber plaintiffs predict that they will suffer maltreatment or denial of services on account of HB 1523, *see* Barber Br. at 27–28, but they have failed to allege or show a "substantial risk" that this will actually happen, nor have they shown that the injuries are "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143, 1150 n.5 (2013). A litigant cannot establish Article III standing by speculating about "the unfettered choices made by independent actors not before the court." *Id.* at 1150 n.5 (citation and internal quotation marks omitted). Yet the plaintiffs' theory of standing rests entirely on rank speculation about what other people *might* do. Someone somewhere in Mississippi *might* someday refuse to allow Katherine Day to use the restroom of her choice. *See* Barber Br. at 27–28. Some unknown

employee in the county clerk's office *might* recuse himself if Renick Taylor asks for a marriage license. *See* Barber Br. at 28. That won't suffice to establish Article III injury, and in all events the plaintiffs never pleaded these facts in their complaint, which forecloses their efforts to rely on these hypothetical scenarios now. *See Spokeo,* 136 S. Ct. at 1547; *Clapper*, 133 S. Ct. at 1150 n.5; *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Finally, the plaintiffs' attempt to buttress their case for standing with outside-the-record hearsay is improper. *See* Barber Br. at 29 n.6, 31 n.8; *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) ("Mr. Youngman's status as an aggrieved parent, however, like any other kindred fact showing the existence of a justiciable 'case' or 'controversy' under Article III, must affirmatively appear in the record.").

F. The Plaintiffs Must Establish Article III Standing To Challenge Each Of The Severable Provisions In HB 1523 That They Seek To Enjoin

HB 1523's provisions are severable from each other. *See* Miss. Code § 1-3-77 (2016). That means the plaintiffs must establish Article III standing for *each* discrete provision that they seek to enjoin.[8] The Barber plaintiffs think that they can disregard severability by asserting that "HB 1523's core consti-

8. The Barber plaintiffs falsely claim that we argued that "every Plaintiff must demonstrate standing for the preliminary injunction to be affirmed." Barber Br. at 13. We said nothing of the sort; our opening brief said only that a plaintiff who *transparently* lacks Article III standing must be dismissed from the case and cannot free-ride off another litigant's standing. *See* Appellants' Br. at 15 n.16; *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013).

tutional defect lies in Section 2"—and then observing that the provisions in section 3 incorporate the beliefs listed in section 2 by reference rather than repeatedly listing out those beliefs in each discrete provision of section 3. The plaintiffs' argument is nonsensical. Section 2 cannot violate the Constitution; it simply lists three conscientious beliefs and does not impose legal obligations on anyone. The only purpose that section 2 serves is to provide a shorthand reference for the remaining provisions in HB 1523, so that the statute need not delineate the protected beliefs over and over again whenever a provision establishes a new legal obligation. That does not make the separate provisions of *section 3*—which *do* impose legal obligations—nonseverable from each other, and it does not give the plaintiffs standing to challenge section 3(2)'s foster-care provisions when none of the plaintiffs in this case have *anything* to do with foster care.

III. The Plaintiffs' Establishment Clause Arguments Are Meritless

HB 1523 easily passes muster the establishment clause, and the plaintiffs' constitutional attacks against HB 1523 fare no better than the district court's.

A. HB 1523 Does Not "Endorse" Religion, And It Was Not Enacted For That Purpose

The CSE plaintiffs first contend that HB 1523 is an unconstitutional "endorsement" of religion. *See* CSE Br. at 35–38; *see also* Barber Br. at 35–36

(making a similar argument). The plaintiffs' "endorsement" argument fails for three independent reasons.

First, as we have already explained, the beliefs protected by HB 1523 are not "religious" beliefs; they are conscientious beliefs that some people happen to hold for religious reasons. *See supra* at 6–8.[9] The CSE plaintiffs eventually acknowledge in a footnote that HB 1523 protects those who subscribe to the section 2 beliefs on *secular* as well as religious grounds. *See* CSE Br. 35 n.9. But they claim that the Court can disregard this fact because one of their expert witnesses opined that only 17% of religiously unaffiliated people nationwide oppose same-sex marriage, *see id.*, ROA.16-60478.1308–09,[10] and in all events the law benefits "devout Christians," something that the plaintiffs apparently regard as a constitutionally impermissible purpose even when the law protects secular conscientious objectors on equal terms. *See* CSE Br. 35. So on this view a conscience-protection law becomes unconstitutional once the percentage of secular Americans who subscribe that conscientious belief falls below 17% (or some other arbitrary threshold), but only when the con-

9. The State incorporates by reference its earlier discussion of this issue on pages 6–8, *supra*, which decisively refutes the plaintiffs' claim that HB 1523 "single[s] out religious *beliefs* for special treatment." CSE Br. 36 (emphasis original).

10. *See also* ROA.16-60478.1308:19–1309:4 ("Q: Dr. Jones . . . how would you characterize the percentage of Americans who are religiously unaffiliated who hold the moral conviction as opposed to a religious belief that gay and lesbian couples should not be permitted to marry? A: . . . 17 percent oppose same-sex marriage."). Neither the plaintiffs nor their experts ever bothered to explain how this nationwide polling data reveals anything about the relationship between religious belief and attitudes toward same-sex marriage *in Mississippi*, a State that (one might think) is not entirely representative of the nation at large on these matters.

science-protection law primarily benefits "devout Christians" or members of other religious sects.

There are many problems with this approach to the establishment clause. To begin, a Court cannot simply dismiss the protections that HB 1523 explicitly confers on *secular* conscientious objectors—and then insist that HB 1523 was enacted for "purpose" of endorsing religion—by observing that "only" 17% of religiously unaffiliated Americans nationwide oppose same-sex marriage. Many conscientious beliefs protected by American law (such as opposition to warfare and abortion) are likewise held by low percentages of secular Americans, and are found primarily among adherents to specific Christian denominations. But it does not follow that all abortion-related conscience laws were enacted for the purpose of "endorsing" religion, and it does not allow courts to fob off the protections conferred on *secular* abortion opponents as "merely secondary to a religious objective." CSE Br. at 35 n.9 (quoting *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005)).

And how is a court supposed to decide when the percentage of secular conscientious objectors is "too small" to defeat a claim of unconstitutional religious endorsement? Do the plaintiffs think that HB 1523 would have had a constitutionally permissible purpose if 25% of religiously unaffiliated Americans opposed same-sex marriage? Or 30%? What if religious acceptance of same-sex marriage grows and causes the percentage of religiously affiliated Americans who oppose same-sex marriage to sink to a level that approaches or equals the percentages that appear among secular Americans? Could Mis-

sissippi then reenact HB 1523 and acquit itself of charges that it acted for the "purpose" of endorsing religion?

The second problem with the plaintiffs' "endorsement" argument is another point that we have explained elsewhere: A State does not "endorse" a conscientious belief (or even a religious belief) by enacting a statute that shields conscientious objectors from punishment or discrimination by the State. *See supra* at 8–10.[11] Laws that exempt the use of sacramental wine from underage-drinking prohibitions are not an "endorsement" of transubstantiation. The Obama Administration did not "endorse" anti-contraception beliefs when it exempted churches from its contraception mandate. *See* 45 C.F.R. § 147.131(a)–(c). Laws that accommodate conscientious objectors and shield them from state-sponsored punishment or discrimination signify tolerance—not endorsement—of the protected conscientious or religious beliefs.

The plaintiffs try to get around this problem by rummaging through the legislative history and pointing to statements from legislators that contain "sectarian references," CSE Br. at 37—as if a law becomes an unconstitutional "endorsement" of religion if anyone who voted for it makes a sectarian reference during floor debates. Yet the Supreme Court has made clear that courts are not to strike down laws based on the motivations of individual legislators, because "[w]hat motivates one legislator to make a speech about

11. The State incorporates by reference its earlier discussion of this issue on pages 8–10, *supra*.

a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810) (noting a court of law "cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (It is "not consonant with our scheme of government for a court to inquire into the motives of legislators."); *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("[A]n isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body.").

And in all events, it is common and perfectly constitutional for individual lawmakers to invoke Christian doctrine as a reason for supporting a law. Senator Hubert Humphrey, when speaking in support of the Civil Rights Act of 1964, proclaimed that equal rights on account of race "is no more than what was preached by the prophets, and by Christ himself." *See* 110 Cong. Rec. 6553 (1964) (statement of Sen. Humphrey). Numerous legislators in the Reconstruction Congress invoked the Bible when explaining their support for the Reconstruction amendments and civil-rights legislation.[12] Even Presi-

12. *See, e.g.*, Cong. Globe, 38th Cong., 2d Sess. 200 (1865) (statement of Rep. Farnsworth during debates over the Thirteenth Amendment) ("When at the creation [God] gave man dominion over things animate and inanimate, He established property. Nowhere [in the Bible] do you read that He gave man dominion over another man."); *see also* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1131–33 (1994).

dent Barack Obama—when publicly defending his Administration's transgender-restroom edicts—explicitly invoked the Golden Rule, "my reading of scripture," and "my Christian belief."[13] We do not think the plaintiffs will assert that the President's overtly sectarian utterances make his transgender policies into an establishment-clause violation, or prove that they were enacted for the "purpose" of endorsing religion. No different result should obtain here.

The plaintiffs also argue that HB 1523 *must* have been enacted for the purpose of endorsing religion because (according the plaintiffs) HB 1523 "provides no additional protection for religious liberty" beyond what the State's Religious Freedom Act already required. CSE Br. at 37; *see also* Barber Br. at 34–35 (making a similar argument). That is demonstrably false. As the State explained in its opening brief, HB 1523 removes the "chilling effect" that arises from RFRA's vague and amorphous "compelling governmental interest" standard. Appellants' Br. at 7–8.[14] It also protects those

13. *See PBS NewsHour*, *Questions for President Obama* (PBS television broadcast June 1, 2016), http://bit.ly/2iNZWSh ("[I]f you're at a public school, the question is, how do we just make sure that, uh, children are treated with kindness. That's all. And you know, my reading of scripture tells me that that Golden Rule is pretty high up there in terms of my Christian belief. That doesn't mean somebody else has to interpret it the same way. It does mean as president of the United States, those are the values that I think are important.").

14. The Barber plaintiffs falsely say that we "conceded that the religious freedom of Mississippians is adequately protected independent of H.B. 1523." Barber Br. at 56. Our opening brief said exactly the opposite: That RFRA was *insufficient* to protect those who fear (for good reason) that a court might rule that antidiscrimination norms qualify as "compelling governmental interests" that override the right of religious freedom. *See* Appellants' Br. at 7–8; 19–20.

who oppose same-sex marriage and transgender behavior for *secular* reasons, and it limits the scope of current and future anti-discrimination ordinances that would force religious or secular conscientious objectors to participate in same-sex weddings, sex-change operations, or other activities that violate their deeply held beliefs.

There is a third and final problem with the plaintiffs' "endorsement" argument: "Endorsement" is not "establishment." Neither the text of the establishment clause nor the court-created "*Lemon* test"—which the Supreme Court applies sporadically and disregards in cases where it sees fit to do so[15]—purports to condemn laws that "endorse" religion or that were enacted for that purpose. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). And the notion that government violates the establishment clause whenever it "endorses" religion is utterly incompatible with long-settled practices such as the Pledge of Allegiance and the appearance of "In God We Trust" on currency.

B. HB 1523 Does Not Establish Denominational Preferences

The CSE plaintiffs' claim that HB 1523 establishes a "denominational preference" is frivolous. *See* CSE Br. at 38–46. The plaintiffs correctly observe that some religious denominations agree with the beliefs listed in section 2, and that other denominations do not. *See* Response at 40. But that

15. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee v. Weisman*, 505 U.S. 577 (1992); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

does not cause a State to violate the establishment clause whenever it accommodates a conscientious scruple that is not universally embraced by every religious denomination in the United States. Religious denominations disagree over every contested political and social issue, including abortion, capital punishment, contraception, oath-taking, sterilization, and warfare. Yet it has long been settled that laws may confer specific and absolute protections on those who oppose those activities, even though religious denominations disagree over these and many other issues. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971); 42 U.S.C. § 238n.

The plaintiffs' argument would make *every* conscience-protection law into a "denominational preference" subject to strict scrutiny—yet they cannot cite a single case that has applied strict scrutiny to a conscience-protection law or that has characterized such laws as "denominational preferences." The plaintiffs falsely analogize this case to *Larson v. Valente*, 456 U.S. 228 (1982), which disapproved a charitable-reporting law that exempted "religious organizations"—but only if those "religious organizations" received more than half of their total contributions from members or affiliated organizations. *Id.* at 231–32. HB 1523, by contrast, protects *everyone* who opposes same-sex marriage, non-marital sexual relations, or transgender behavior, regardless of the "religious organization" to which they belong, and regardless of whether they even subscribe to religious beliefs. There is no discrimination whatsoever in this statute between religious denominations.

C. HB 1523 Does Not Violate *Thornton v. Calder*

The plaintiffs think that because the Supreme Court *once* struck down a statute that provided an absolute accommodation for religious believers, this somehow makes *all* statutes that provide *any* type of absolute protection for conscientious scruples into an unconstitutional "establishment of religion"—at least whenever they impose "significant burdens" on third parties. *See* CSE Br. at 46–47. This is a non sequitur for many reasons.

First, the statute in *Thornton* protected only those employees who refused to work on their Sabbath for *religious* reasons. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (noting that the statute "confers its benefit on an explicitly religious basis. Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing." (citation and internal quotation marks omitted)).[16] HB 1523, by contrast, protects anyone who adheres to the beliefs listed in section 2—regardless of whether those beliefs are rooted in religious or secular convictions. So HB 1523 cannot be an establishment of *religion*; it is (at worst) an establishment of a *belief* that some people might hold for religious reasons and that others hold for secular reasons. That is no more an establishment of "religion" than a statute that protects secular or religious health-care workers from being compelled to assist in abortions. *See* 42 U.S.C. § 238n (2016).

16. The text of the challenged statute provided: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." *See Thornton*, 472 U.S. at 706 (quoting Conn. Gen. Stat. § 53-303e(b) (1985)).

Second, it is perfectly constitutional to give religious or conscientious objectors an absolute shield from *state* penalties or discrimination. There are many examples of such laws—and all of them are constitutional. The Coates and Weldon Amendments confer absolute protections on health-care entities that refuse to provide abortions or abortion referrals, shielding them from any "discrimination" from federal, state, or local governments. *See* 42 U.S.C. § 238n(a) (2016); Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280 (2016). And the Selective Service Act of 1967 provided an absolute exemption from military conscription to those who were "conscientiously opposed to participation in war in any form." *See* Pub. L. 90-40, § 7, 81 Stat. 100, 104 (1964).

The problem in *Thornton* was that the Connecticut statute went beyond shielding Sabbath observers from punishment or discrimination *by the State*. It shielded Sabbath observers from discipline or dismissal by their *private employers*—a regime that compelled these employers to bend over backward and accommodate their employees' religious practices without any regard for how disruptive those accommodations might be for the employer's business. If Connecticut's law had simply shielded Sabbath observers (or other conscientious objectors) from punishment or discrimination *by the State*, then there would have been no establishment-clause problem, even if the statutory protections were phrased in absolute terms. But when a State commands a *private employer* to order his business around the religious practices of his employees—without any regard for the employer's religious be-

liefs or business needs—then establishment-clause problems can arise. So if HB 1523 prohibited a private bakery from disciplining or dismissing an insubordinate employee who refuses to bake a cake for a same-sex wedding, then there might be an establishment-clause problem akin to the situation in *Thornton*. Similar problems might arise if a statute compelled private employers to allow Native American employees to smoke peyote while on the job. But there is nothing wrong with a statute that confers an absolute immunity from *state* punishment or discrimination upon those who use peyote for religious reasons, or upon those who refuse to participate in abortions, warfare, capital punishment, Sabbath labor, or same-sex weddings.[17]

Third, the plaintiffs' argument that the establishment clause forbids "absolute" conscientious accommodations that impose "significant burdens" on third parties runs headlong into *Gillette*—which upheld a statute that: (1) conferred "absolute" military-draft exemptions on pacifists, and (2) imposed "significant burdens" on the non-pacifists who were conscripted in their place. *See Gillette v. United States*, 401 U.S. 437, 449 (1971); *see also* Appellants Br. 49–50. The plaintiffs address *Gillette* only in a footnote, and claim (rather confusingly) that the statute in *Gillette* "did not provide a broad

17. The CSE plaintiffs falsely tell this Court that we "argue[d] that [*Estate of Thornton v.*] *Caldor* is no longer good law." CSE Br. at 48. One will search our opening brief in vain for any statement or suggestion that *Thornton* is no longer good law; indeed, *Thornton* is not discussed or even mentioned in the pages of our brief that the plaintiff cite—or anywhere else in our opening brief. Candid advocacy requires a litigant to accurately portray the arguments advanced by his opponent. *Thornton* remains good law, but it is inapplicable to this case for the reasons provided above.

absolute and unqualified right." CSE Br. at 51 n.14. It is hard to understand what the plaintiffs mean by this. The statutory protection for pacifists was most assuredly "absolute" and "unqualified." It said:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Gillette, 401 U.S. at 441 (quoting Military Selective Service Act of 1967, § 6(j)). Under no circumstance may a religious pacifist be subjected to military conscription: not for "compelling governmental interests," not for really important wars, not even when the government runs out of non-pacifists to conscript. How can the plaintiffs possibly deny that this statute creates an "absolute and unqualified right"?[18] And the plaintiffs do not even attempt to deny that these (absolute) draft exemptions imposed "significant burdens" on third parties. See Appellants' Br. at 49–50.

Finally, HB 1523 will not cause the "burdens" on third parties that the plaintiffs allege because state law already permits discrimination based on sexual orientation, and the State's Religious Freedom Restoration Act already trumps local laws that compel citizens to act in a manner contrary to their faith. *See* Motion to Stay at 18–19. HB 1523 *might* embolden new secular conscientious objectors and religious objectors who were chilled by the

18. Perhaps the plaintiffs are trying to distinguish a "*broad* absolute and unqualified right" (CSE Br. at 51) from a "*non-broad* absolute and unqualified right"?

vagueness in RFRA's "compelling governmental interest" test, but any effects that HB 1523 might have at the margins are entirely speculative.

D. The Plaintiffs' Establishment Clause Arguments Would Invalidate Every Conscience-Protection Law

The CSE plaintiffs refuse to admit or concede the constitutionality of the conscience-protection laws listed in Appendices B through F of our opening brief. Instead, they claim that every one of those laws is "clearly distinguishable" from HB 1523. CSE Br. at 53. But their description of HB 1523 vis-à-vis these other conscience-protection laws is simply false.

The plaintiffs first claim that HB 1523 "legislates according to religious *belief*," while the conscience-protection laws in our appendices "apply equally to everyone with a religious or other opposition to . . . abortion or . . . capital punishment, regardless of the particular reason for their opposition." CSE Br. at 53; *see also id.* at 3–4. That is patently untrue. HB 1523, like the abortion and capital-punishment statutes, protects *everyone* with conscientious objections to same-sex marriage, non-marital sexual relations, and transgender behavior—regardless of whether those objections are rooted in religious or secular belief. One need only read the statute to dispose of this attempted "distinction" between HB 1523 and the myriad of conscience-protection laws that state and federal governments have enacted.

The plaintiffs' next move is to claim that the other conscience-protection laws "provide narrowly-crafted exemptions from engaging in *specific conduct*." CSE Br. at 54; *see also id.* at 3–4. So does HB 1523. It protects people

from being compelled to perform the "specific conduct" enumerated in sections 3(1)–(8). And some of HB 1523's protections relate to the provision of medical care,[19] *see* HB 1523 § 3(4), so the plaintiffs' attempt to distinguish the abortion statutes by relying on "characteristics unique to medicine" falls flat. CSE Br. at 55.

The Barber plaintiffs, by contrast, appear to acknowledge the constitutionality of laws that specifically protect the conscientious scruples of pacifists and abortion opponents. *See* Barber Br. at 39. But they argue that *those* types of conscience-protection laws are constitutionally permissible because they extend only to those who "might be obligated to participate in what they believe is the killing of others." *Id.* Those with conscientious objections to practices that fall short of killing other human beings—such as swearing oaths, sterilizations, or same-sex marriages—are constitutionally forbidden to seek specific statutory protections and must repair to the vague balancing tests that appear in RFRA-like statutes. The Barber plaintiffs do not cite any authority to support this arbitrary distinction that they have concocted. And there is nothing in the text of the establishment clause—or in *any* decision of the Supreme Court—that suggests such a distinction. If the State has "es-

19. *See* HB 1523 § 3(4) ("The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of *treatments, counseling, or surgeries* related to sex reassignment or gender identity transitioning . . . based upon a sincerely held religious belief or moral conviction described in Section 2 of this act.") (emphasis added).

tablished" a "religion" by enshrining the specific statutory protections for the conscientious scruples listed in HB 1523, then Congress has also "established" a "religion" by enacting specific and absolute statutory protections for pacifists and abortion opponents. There is no exception in the establishment clause (or in the Supreme Court's case law) that would allow government to establish a religion in order to protect those with conscientious objections to warfare, abortion, or capital punishment, but not to protect those with conscientious objections to swearing oaths, sterilizations, or same-sex marriage.

Finally, the Barber plaintiffs' efforts to analogize HB 1523 to a law that shields racists who decline to participate in interracial marriages has nothing to do with the establishment clause; the plaintiffs' hypothetical statute would implicate the equal-protection clause and not the first amendment. *See* Barber Br. at 41. But the plaintiffs' attempt to equate opposition to same-sex marriage with racism is not only an insult to the millions of Americans who oppose same-sex marriage—including those who have offered thoughtful and scholarly arguments for this position[20]—it also directly contradicts the

20. *See, e.g.,* Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* (2012); James Q. Wilson, *Against Homosexual Marriage*, Commentary (Mar. 1, 1996), http://bit.ly/1m5SK1b; George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004). The psychologist Jonathan Haidt has explained how conservatives and liberals differ in their conceptions of morality—which largely explains their divergent views on the same-sex marriage issue. *See, e.g.*, Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize*, 20 Soc. Just. Res. 98, 100–01 (2007) ("[O]n the issue of gay marriage it is crucial that liberals understand the conservative view of social institutions. Conservatives generally believe . . . that human beings need structure

Supreme Court's opinions in *Obergefell* and *Loving*. *Obergefell* states unequivocally that opposition to same-sex marriage rests on "decent" and "honorable" premises, while *Loving* described anti-miscegenation laws as an odious attempt to preserve white supremacy. *Compare Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."), *and id.* at 2594 ("This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."), *with Loving v. Virginia*, 388 U.S. 1, 11 (1967) (denouncing anti-miscegenation laws as "measures designed to maintain White Supremacy"). So until a future Supreme Court issues an opinion that equates opposition to same-sex marriage with racism, neither lower courts nor litigants may equate the two.

The plaintiffs are equally wrong to suggest that the State's defense of HB 1523 would allow the State to enact a law that exempts segregationists from participating in interracial weddings. *See* Barber Br. at 41 ("HB 1523 is no different from such a hypothetical law."). Laws that contain explicit racial classifications are subject to strict scrutiny, not rational-basis review, and the plaintiffs' hypothetical statute could not survive that demanding standard.

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and constraint to flourish, and that social institutions provide these benefits. . . . These are not crazy ideas."); Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. Personality & Soc. Psychol. 1029 (2009).

See, e.g., *Johnson v. California*, 543 U.S. 499 (2005). Any law that seeks to protect conscientious scruples must be phrased in race-neutral terms. Indeed, many states *have* enacted laws that shield clergy, churches, and religious organizations from compelled participation in interracial marriages—but they do not confer these protections with race-specific language. Instead, they protect these entities from participating in *any* marriage that violates their religious beliefs[21]—and some statutes go further and allow them to decline to participate in any marriage regardless of their reasons.[22] All of these statutes are constitutional because they do not contain racial classifications or race-specific language. HB 1523 is constitutional for the same reason.

IV. The Plaintiffs' Equal Protection Arguments Are Meritless

The Barber plaintiffs' equal-protection claim must be rejected because HB 1523 has a rational basis and does not discriminate against a suspect class. Nothing in the plaintiffs' brief undermines either of these conclusions.

21. *See, e.g.*, Conn. Gen. Stat. § 46b-22b(b) (2009); Conn. Gen. Stat. § 46b-35a (2009); Me. Rev. Stat. Ann. tit. 19-A, § 655(3) (2012); N.H. Rev. Stat. Ann. § 457:37 (2010).

22. *See* Del. Code Ann. tit. 13, § 106(e) (2016) ("[N]othing in this section shall be construed to require any individual, including any clergyperson or minister of any religion, authorized to solemnize a marriage to solemnize any marriage, and no such authorized individual who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal."); D.C. Code § 46-406(c) (2013) ("No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage.").

A. HB 1523 Easily Passes Rational-Basis Review

The plaintiffs claim that HB 1523 fails rational-basis review, but they do not understand what rational-basis review is. Rational-basis review is the most deferential standard imaginable,[23] and it compels courts to uphold a law so long as it is *possible to imagine* that the law does *something* to advance a legitimate objective. *See Stern v. Tarrant Cty. Hosp. Dist.*, 778 F.2d 1052, 1054 (5th Cir. 1985) (en banc) ("We reaffirm today the settled constitutional rule that state agencies may pursue legitimate purposes by any means having a conceivable rational relationship to those purposes."). The plaintiffs do not deny that HB 1523 advances the cause of religious and conscientious freedom; that confesses that HB 1523 survives rational-basis review.[24]

It does not matter that HB 1523 protects only some and not all conscientious scruples. *See* Barber Br. at 53 (complaining that HB 1523 protects only "a select group's religious and moral objections"); *id.* at 54–55 (complaining that HB 1523 fails to protect conscientious scruples other than those enumerated in section 2). Rational-basis scrutiny does not require a precise fit

23. *See Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) ("It is hard to imagine a more deferential standard than rational basis.").

24. Perhaps aware that HB 1523 cannot possibly fail rational-basis review as defined by the Supreme Court, the plaintiffs suggest that the Court should apply a "more searching form of rational-basis review"—whatever that means. Barber Br. at 50–51 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). There is no such thing as "more searching" rational-basis review; there is only one rational-basis standard, and courts have no authority to depart from that standard when they encounter a law that they dislike but that survives rational-basis review as defined repeatedly by the Supreme Court. Justice O'Connor's sole concurrence in *Lawrence* is not law and does not authorize courts to concoct a modified-rational-basis-review standard for an ill-defined subset of cases.

between means and ends, and a state may enact under-inclusive or over-inclusive conscience-protection laws. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010) ("[R]ational basis review allows legislatures to act incrementally and to pass laws that are over (and under) inclusive . . . ."). And it is untenable to claim that HB 1523 violates the equal-protection clause because it "promot[es] majoritarian interests and the expense of a disfavored minority." Barber Br. at 53. *Every* law promotes majoritarian interests, and does so at the expense of some "disfavored minority." *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 719 (1985) ("Minorities are *supposed* to lose in a democratic system—even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong in ignoring their just complaints.").

Finally, the plaintiffs' attempt to equate HB 1523 with the situation in *Romer v. Evans*, 517 U.S. 620 (1996), is absurd. *Romer* concluded that Amendment 2 was "inexplicable by anything but animus" toward homosexuals. *Id.* at 632. HB 1523, by contrast, serves the obvious and legitimate purpose of protecting the conscientious scruples of the citizenry—an interest that even the district court acknowledged as legitimate. *See* ROA.16-60478.793. A law cannot be invalidated on rational-basis review so long as it is *possible to imagine* a legitimate purpose for the statute—and it is *easy* to im-

agine a rational and legitimate basis for HB 1523. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.").

B. HB 1523 Does Not Discriminate Against A Suspect Class Or Burden "Fundamental Rights"

Neither the Supreme Court nor this Court has ever held that homosexuals qualify as a "suspect class," and the overwhelming weight of appellate authority rejects the idea. *See Cook v. Gates*, 528 F.3d 42, 62 (1st Cir. 2008); *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 561 (6th Cir. 2006); *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *Walmer v. Dep't of Defense,* 52 F.3d 851, 854 (10th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994). And for good reason: homosexuals cannot qualify as a "suspect class" because homosexuals are not politically powerless, and sexual orientation is not an "immutable" trait akin to race.

Homosexuals have enormous political clout, especially in the Democratic Party, and their political power has been growing and continues to grow. To give just one example of homosexuals' political influence, former Attorney General Eric Holder and numerous state attorneys general recently took the extraordinary step of refusing to defend duly enacted laws that define marriage as the union of one man and one woman—even though attorneys general have traditionally defended *all* duly enacted laws, even those with which they disagree, unless no reasonable legal argument can be made in their de-

fense. The marriage laws clearly did not meet *that* standard; four out of nine Supreme Court justices thought the laws were constitutional, which means that a reasonable legal argument *could* have been made in their defense. Instead, Attorney General Holder and the like-minded state AGs departed from longstanding practice and refused to defend these laws because they faced strong political incentives do so.

To give another example, witness the conniptions invoked when Indiana enacted a religious-freedom law that would have protected devout Christians from being compelled to participate in same-sex marriage ceremonies. *See* Richard A. Epstein, *The War Against Religious Liberty*, Hoover Inst., http://hvr.co/1NWrwEI (last visited October 26, 2016). Business leaders and politicians threatened the State with boycotts and pressured the State's leaders to remove any protections that these devout believers could have asserted against local anti-discrimination laws. For a court to hold that homosexuals are "politically powerless" after these episodes would be farcical. The far more plausible candidate for "political powerlessness" would be the devout Christian mom-and-pop-shop owners who are being bullied by ideologues in the political and business worlds. *See id.* ("[T]he relentless pressure of state civil rights commissions makes these small religious businesses a "discrete and insular" minority . . . . It is this loss of tolerance, this self-righteous indignation, this vilification of a vulnerable religious minority that makes this recent chorus of incivility so disgraceful."); *see also* Brief for the State of Texas, et al., as amicus curiae.

The plaintiffs are also wrong to describe sexual orientation as an "immutable" characteristic akin to one's race. *See* Barber Br. at 48. Professor Lisa Diamond's book, *Sexual Fluidity: Understanding Women's Love and Desire* (Harvard University Press 2009), argues that women exhibit a large degree of sexual plasticity or fluidity, characterized by non-exclusivity, inconsistency, and change in reported sexual identity and in sexual behaviors. Professor Diamond also provides evidence of longitudinal change and self-reports that are inconsistent with an "immutable" orientation. Across six longitudinal studies, she notes that 75 percent of women who identified as lesbian, bisexual, or unlabeled changed their self-reported identity (at least once) within six years of having first coming out. *See* Lisa Diamond, Address at the Society for Personality and Social Psychology Sexuality Pre-Conference: I Was Wrong! Men Are Pretty Darn Sexually Fluid, Too (Feb. 13, 2014). That means that there is at least *some* malleability in sexual orientation, especially among women. Calling sexual orientation "immutable" is hyperbole, and the plaintiffs are out of their depth by proclaiming sexual orientation to be "immutable" without any citation or analysis of relevant scientific literature.[25]

25. *Obergefell* did not hold or find that sexual orientation is "immutable," as the plaintiffs claim. *See* Barber Br. at 48. *Obergefell* erroneously characterized an amicus brief filed by the American Psychological Association as saying that "psychiatrists and others recognize[] that sexual orientation is . . . immutable." 135 S. Ct. at 2584. The amicus brief filed by the American Psychological Association says no such thing; it never once asserts that sexual orientation is "immutable"—and the brief explicitly acknowledges that significant numbers of homosexuals (5% of male homosexuals and 16% of lesbians) reported that they had felt "a fair amount" or "a great deal" of choice about their sexual orientation. *See* APA Amicus Br. at 8–9. And in all events, lack of "choice" over one's sexual orientation is not evidence of "immutability"; sexual orientation

Of course, HB 1523 protects more than just opposition to homosexual behavior, and the statutory provisions are severable. *See* Appellants' Br. at 14–15. So even if the plaintiffs could persuade this court that homosexuals qualify as a "suspect class," that does not nothing to undercut the statute's protection of those who oppose non-marital sex and transgender behavior. The plaintiffs do not explain how transgender status can be "immutable" when it is preceded by a "transition" from a previous sex or from a previous gender identity. And the plaintiffs' half-hearted attempt to make unmarried but sexually active heterosexuals into a "discrete and insular minority" is not credible. *See* Barber Br. at 49. As the CSE plaintiffs point out, nearly 90% of Americans have sex before marriage, *see* CSE Br. at 9, and the Barber plaintiffs cite no authority from any court that has extended "suspect class" status to this category of people.

The plaintiffs also try to get to heightened scrutiny by arguing that HB 1523 burdens the "fundamental right" to marry, but this argument is equally unavailing. Barber Br. at 49. HB 1523 does not affect anyone's right to marry a spouse of his or her choosing; it simply protects others from being forced to affirm conduct that violates their conscientious beliefs. No one has a "fundamental right" to force an unwilling participant to attend or provide services at his or her wedding.

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can be fluid or malleable even if one is not consciously directing or choosing those changes, and even if one feels that they have little or no choice over the changes that are occurring.

C. The Defendants' Remaining Equal Protection Arguments Are Meritless

The plaintiffs claim that even if HB 1523 has a rational basis, and even if it fails to qualify for heightened scrutiny, it can *still* be enjoined if it is "unusual," motivated by "improper animus," and justified by "no legitimate purpose." Barber Br. at 44. The plaintiffs claim to have divined this avant-garde equal-protection standard from *United States v. Windsor*, 133 S. Ct. 2675 (2013), although the opinion in *Windsor* gives no indication that it is inaugurating a new era in equal-protection jurisprudence that empowers courts to nullify laws that clearly satisfy rational-basis review yet cannot be said to implicate a "suspect class" or a "fundamental right." In either event, the plaintiffs' attacks on HB 1523 are meritless.

There is nothing "unusual" about a statute that confers specific and absolute protections on conscientious beliefs. The plaintiffs' claim that no other statute has singled out "particular favored beliefs" for protection is refuted by the *hundreds* of conscience-protection statutes that appear in the appendices of our opening brief. *See* Appellants' Br. Apps. B–F. The plaintiffs are also wrong to suggest that HB 1523 is the "only" statute that permits "discrimination against specific groups of people." Barber Br. 44. Statutes that protect the conscientious scruples of abortion opponents allow health-care workers to discriminate against patients seeking abortions. Then the plaintiffs repeat the tired refrain that the State's RFRA "already" protected religious freedom, *id.* at 45, but as we have explained, the State's RFRA was

not adequate to protect those who felt chilled by the vagueness in the "compelling governmental interest" test, and it gave no protection to those with secular conscientious objections to same-sex marriage. The plaintiffs falsely claim that the State "concede[d] there is no threat" to those protected by HB 1523; we made no such concession, and the anti-discrimination ordinance in Jackson and the possibility that other localities might enact similar laws in the future are more than sufficient to show that HB 1523 serves the goal of protecting religious and conscientious freedom.

Conclusion

The preliminary injunction should be vacated.

Respectfully submitted.

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Certificate of Electronic Compliance

Counsel also certifies that on January 13, 2017, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

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No. 16-60477 Rims Barber, et al v. Phil Bryant
USDC No. 3:16-CV-417
USDC No. 3:16-CV-442

Dear Mr. Mitchell,

The following pertains to your brief electronically filed on January 13, 2017.

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