Nos. 16-60477, 16-60478

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JOHN DAVIS, in his official capacity as Executive Director of the Mississippi Department of Human Services,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Mississippi (Northern Division)
Nos. 3:16-cv-00417-CWR-LRA, 3:16-cv-00442-CWR-LRA
(Hon. Carlton Reeves)

CSE PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in

the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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

2. Susan Hrostowski, Plaintiff-Appellee.

3. Kaplan and Company, LLP, Counsel for Plaintiffs-Appellees, the Campaign for Southern Equality and Susan Hrostowski (the "CSE Plaintiffs-Appellees") (Roberta Kaplan and Rachel Tuchman representing).

4. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for Plaintiffs-Appellees, CSE Plaintiffs-Appellees (Jaren Janghorbani and Joshua D. Kaye representing).

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

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

7. Rims Barber, Plaintiff-Appellee.

8. Carol Burnett, Plaintiff-Appellee.

9. Joan Bailey, Plaintiff-Appellee.

10. Katherine Elizabeth Day, Plaintiff-Appellee.

11. Anthony Laine Boyette, Plaintiff-Appellee.

12. Don Fortenberry, Plaintiff-Appellee.

13. Susan Glisson, Plaintiff-Appellee.

14. Derrick Johnson, Plaintiff-Appellee.

15. Dorothy C. Triplett, Plaintiff-Appellee.

16. Renick Taylor, Plaintiff-Appellee.

17. Brandiilyne Mangum-Dear, Plaintiff-Appellee.

18. Susan Mangum, Plaintiff-Appellee.

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

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

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

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

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

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

25. Jonathan F. Mitchell, Counsel for Defendant-Appellants Phil Bryant and John Davis.

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

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

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

29. Mississippi Department of Human Services, Counsel for Defendant-Appellant John Davis (Mack A. Reeves and Daniel Bradshaw representing).

Respectfully submitted,

/s/ Roberta A. Kaplan
Roberta A. Kaplan

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

STATEMENT REGARDING EN BANC REVIEW

En banc review should be granted both to consider constitutional issues of exceptional importance and to maintain the uniformity of the Court's decisions. This case presents a question of exceptional importance—namely, whether there could ever be an avenue for judicial review of a statute that explicitly endorses particular religious beliefs over others when the endorsement does not involve a visual display, *e.g.*, *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), or a verbal prayer, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000). The panel's decision also conflicts with this Court's decisions in *Murray* v. *City of Austin*, 947 F.2d 147 (5th Cir. 1991), and *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). It is also inconsistent with the decisions of the Fourth Circuit in *International Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted*, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 WL 2722580 (U.S. June 26, 2017), the Tenth Circuit in *Awad* v. *Ziriax*, 670 F.3d 1111 (10th Cir. 2012), and the Ninth Circuit in *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc).

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

1. Do citizens who do not share certain religious beliefs explicitly endorsed by a state statute have standing to challenge the constitutionality of the statute under the Establishment Clause?

2. Do citizens have standing under the Establishment Clause to challenge their exclusion from a government benefit that is given only to those who hold contrary religious beliefs?

STATEMENT OF THE COURSE OF PROCEEDINGS

The Rev. Dr. Susan Hrostowski and the Campaign for Southern Equality (together, the "CSE Plaintiffs") sought a pre-enforcement preliminary injunction of HB 1523 on Establishment Clause grounds only.[1] The district court granted the preliminary injunction, holding that the CSE Plaintiffs (1) had standing because HB 1523 endorsed religious beliefs they do not hold; and (2) were substantially likely to succeed on their claim that HB 1523 violates the Establishment Clause. ROA.16-60478.779, 811. On June 22, 2017, a three-judge panel of this Court reversed, holding that the CSE Plaintiffs do not have standing because they have not shown a sufficient "personal confrontation" with the alleged endorsement of religion contained in HB 1523. *Barber* v. *Bryant*, Nos. 16-60477, 16-60488, slip op. at 8 (5th Cir. June 22, 2017).

[1] The plaintiffs in *Barber* sought a preliminary injunction on both Establishment Clause and Equal Protection grounds. The two cases were consolidated for hearing and argument. ROA.16-60478.202.

STATEMENT OF FACTS

In April 2016, the Mississippi Legislature enacted HB 1523, which explicitly designates the following three "religious beliefs or moral convictions" for special treatment under Mississippi law: (1) "Marriage is or should be recognized as the union of one man and one woman;" (2) "[s]exual relations are properly reserved to such a marriage;" and (3) male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." HB 1523 § 2 (the "Section 2 Beliefs").

Section 3 of the statute then goes on to grant absolute immunity from a laundry list of statutes and regulations to persons who act "based upon or in a manner consistent with" a belief listed in Section 2. *Id*. §§ 3, 4, 9(2). Section 3(3), for example, prohibits Mississippi from intervening to protect the best interests of gay or transgender children in the care of adults who may hold one or more of the Section 2 Beliefs. HB 1523 §§ 2, 3(3), 8(3); Miss. Code. Ann. §§ 43-15-13, 93-17-11. Similarly, Section 3(4) allows "private citizens" and state employees, including public school guidance counselors, to refuse to provide counseling or psychological treatment on the basis of a Section 2 Belief in clear violation of professional

ethical guidelines. HB 1523 §§ 3(4), 9(3)(a); *see also* ROA.16-60478. 1208:19–1209:4.

The bill's lead sponsor, Mississippi House Speaker Philip Gunn, pledged "to protect the rights of Christian citizens" just hours after the Supreme Court's decision in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).[2] And the Mississippi Legislature's public and widely broadcast hearings on the bill were replete with what Appellants concede were "sectarian references" and "invo[cations of] Christian doctrine." ROA.16-60478.1786:18–20, 1808:5–17, 1816:19–1817:5; *see also* ROA.16-60478.32–33, ¶¶ 61–64.

In June 2016, the CSE Plaintiffs brought this action and moved for a preliminary injunction. Plaintiff Rev. Hrostowski, an Episcopal priest, is a married lesbian and the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi. ROA.16-60478.1196:16–21. The membership of the Campaign for Southern Equality ("CSE") includes people who hold a variety of religious faiths and beliefs, but who all share the conviction that the marriages of LGBT people have equal dignity.

[2] Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, CLARION-LEDGER (June 26, 2015, 4:47 PM), http://www.clarionledger.com/story/politicalledger/2015/06/26/bryant-gay-marriage/29327433.

During a two-day preliminary injunction hearing, the CSE Plaintiffs presented unrebutted testimony in support of standing. Rev. Hrostowski, for example, testified that HB 1523 communicates to her that her religious views are disfavored, ROA.16-60478.1222:2–10, because the Section 2 Beliefs are "antithetical" to the "teachings of the Episcopal Church," including the teachings that one should "love your neighbor as yourself" and "respect the dignity of every human being." ROA.16-60478.1205:17–1208:13. She explained that, when HB 1523 passed, "all that fear, all of that insecurity comes back to the old days when you . . . don't know what restaurant you're going to be able to go into without being denied. You don't know if . . . the air conditioner repairman is going to show up at my house and say, I'm not going to fix your air conditioner because you're gay." ROA.16-60478.1209:14–21. Rev. Hrostowski also testified that she had listened to the live broadcast of the debate on HB 1523 and that she had read the bill from "front to back." ROA.16-60478.1201–07, 1213–14.

CSE Member Joce Pritchett, a lifelong Mississippian, testified that, as a result of the publicity concerning HB 1523, LGBT Mississippians "felt like [they] were being pursued, bullied by [their] own government" and that gay men in the Delta were afraid to "go out publicly" together as

couples. ROA.16-60478.1280:11–1281:1. Ms. Pritchett testified that she felt "afraid for [her] kids" and decided to move with her wife and children to Florida when she learned that, shortly after the enactment of HB 1523, her friends' six year-old daughter had been humiliated by her Mississippi public school teacher for having two married moms. ROA.16-60478.1281:19–1283:14.

ARGUMENT

I. The Panel's Decision Raises Constitutional Issues of Exceptional Importance

If there is one principle that indisputably lies at the heart of the Establishment Clause, it is that the government cannot "pass laws which . . . prefer one religion over another." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947). When the government departs from this core principle of neutrality and "endorses a particular religious belief," it causes harm by sending "a message to nonadherents [of the favored religion] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members[.]" *Croft* v. *Perry*, 624 F.3d 157, 169 (5th Cir. 2010) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

Because the very nature of an Establishment Clause violation is speech by the government, when it comes to deciding whether a plaintiff has

plausibly alleged injury for Article III purposes, context matters. This Court has held that, in order to challenge an alleged unconstitutional endorsement under the Establishment Clause, a person must directly and personally encounter or confront the government message of religious endorsement or denigration. *See Moore* v. *Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). And a constitutionally prohibited message can arise in many different contexts. Thus, people who have seen a government message involving a religious display, whether that symbol appears on public property, *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), in a public building, *McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844 (2005), or in tiny print on a City of Austin municipal utility bill, *Murray* v. *City of Austin*, 947 F.2d 147 (5th Cir. 1991), have all been held to have standing to sue.

As a matter of historical precedent, Establishment Clause cases have often arisen in two specific circumstances: religious displays and school or public prayer. *See, e.g.*, *Allegheny*, 492 U.S. at 579–89; *Doe* v. *Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 498–99 (5th Cir. 2007) (en banc). But citizens can directly and personally encounter or confront a government message of religious endorsement or denigration in the context of a statute as well. In fact, the differences between prayer invocations and displays as

compared to statutes only strengthen the CSE Plaintiffs' arguments for standing here.

First, statutes, unlike displays or prayers, cannot be hidden in order to limit an individual's "personal confrontation." A statute like HB 1523 "speaks" to the broadest possible audience: the citizens of Mississippi whose rights and responsibilities are fixed by state law, given that "every one is presumed to know the law of the land." *Edwards* v. *United States*, 334 F.2d 360, 366 (5th Cir. 1964) (quoting *Blumenthal* v. *United States*, 88 F.2d 522, 530 (8th Cir. 1937)). This is only magnified today by social media, which transmits not only the statutory text, but also the legislators' statements in support of the law directly and instantaneously into the homes of their constituents, including the CSE Plaintiffs here.

Second, because all Mississippi residents are bound by the laws passed by the Legislature, there is no "hiding" from the law. In fact, unlike statues or prayers, statutes like HB 1523 communicate government messages of endorsement in a uniquely compelling way—they have real-life consequences. And when it comes to HB 1523, there can be no legitimate question about the message the Mississippi government is sending. In ruling that the CSE Plaintiffs did not personally confront the objective message being conveyed by Mississippi through HB 1523, the panel failed to take

into account the context of everyday reality in Mississippi, ignoring the considerable evidence in the record that people like Rev. Hrostowski and Joce Pritchett personally and directly confronted HB 1523's unmistakable message that they, their families, and their own religion were now officially outsiders in their own home state. *See, e.g.*, ROA.16-60478.1207:8–1208:13, 1209:14–1210:24, 1213:24–1214:1, 1225:12–14, 1280:9–1281:4.

For these reasons, the practical consequences of the panel's limitation on Establishment Clause standing are significant. If the panel's decision is permitted to stand, state and local governments will be free to violate the Establishment Clause by officially declaring certain religions or religious beliefs to be favored without any meaningful opportunity for judicial review. Thus, under the logic of the panel's decision, a law proclaiming the official religion of Mississippi to be the Southern Baptist faith would be effectively immune from constitutional challenge—unless Mississippi decided to display the text of the statute on a granite monument outside the State Capitol in Jackson. Yet such a law would communicate a message of unconstitutional endorsement far more powerfully than any prayer or religious display possibly could. *See ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265, 268–69 (7th Cir. 1986).

II. The Panel's Opinion Threatens the Uniformity of the Court's Decisions

A. The Panel's Decision Conflicts with the Court's Previous Opinions on Establishment Clause Standing

In *Tangipahoa*, this Court held that, while people who actually hear an impromptu religious invocation in a government setting have standing to sue, those with only "abstract knowledge that invocations were said" do not have standing. *Doe* v. *Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc). Relying heavily on *Tangipahoa*, the panel here held that a citizen can never "personally confront" a statute because, unlike a nativity scene or school prayer meeting, it is hidden from view in a statute book. *Barber* v. *Bryant*, Nos. 16-60477, 16-60488, slip op. at 8 (5th Cir. June 22, 2017). But when a government body adopts a formal prayer policy, the policy itself—and not just the invocations delivered thereunder—functions as an impermissible endorsement of religion, and standing to challenge the policy extends beyond the immediate audience of any one invocation. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314–16 (2000). As the Supreme Court made clear in rejecting logic similar to that expressed by the panel here: "This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to

attend a school event. But the Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded' and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion." *Id.* at 313–14 (internal citation omitted). HB 1523 is much more like the formal prayer policy subject to a successful pre-enforcement challenge in *Santa Fe* than the informal pattern or practice in *Tangipahoa*.

Further, comparing HB 1523 to a monument that has been removed from display and hidden from view in a warehouse, as the panel did, *Barber*, slip op. at 8, is inconsistent with this Court's precedents. While a monument that is removed from display ceases to communicate a message as soon as it is removed, *Staley* v. *Harris Cty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc), a statute, like HB 1523, communicates an ongoing message to the citizens of Mississippi from the moment of its enactment unless and until it is permanently enjoined or repealed. There is no action—short of enjoinder or repeal—that could be taken to "remove" HB 1523 from display and prevent its message of endorsement from personally confronting the CSE Plaintiffs each and every day.

To the extent that the panel's decision stands for the proposition that a plaintiff can never "personally confront" a statute in the same way that she confronts oratory, displays, or other forms of government speech, this holding is inconsistent with a decision of this Court issued just days before oral argument, where the Court observed that an "Establishment Clause injury can occur when a person encounters the Government's endorsement of religion." *Moore* v. *Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (citation omitted). The panel in *Moore* took pains to clarify that the stigmatic harm that arises from "exposure to a discriminatory message" could be enough to assert standing under the Establishment Clause, even though it was not sufficient under the Equal Protection Clause in that case. *Id*. at 249–50.

The panel's decision also cannot fairly be reconciled with this Court's prior decision in *Murray*, where this Court held that the plaintiff had standing to challenge the cross in the City of Austin seal displayed on police cars and utility bills. *Murray* v. *City of Austin*, 947 F.2d 147, 151–52 (5th Cir. 1991). In *Murray*, the actual image of the cross at issue constituted only a relatively small part of the City of Austin's insignia, which also included "a shield formed by three vertical stripes," "a lamp of knowledge," "the silhouette of the State capitol," "a pair of wings," and the words "CITY OF

AUSTIN" and "FOUNDED 1839." *Id.* at 149; *see also id.* at 159–63 (depictions of the City of Austin insignia):

Yet the Court in *Murray* held that the plaintiff in that case had standing under the Establishment Clause because he "personally confront[ed] the insignia" that offended him. *Id.* at 150. Like the plaintiff in *Murray*, the CSE Plaintiffs, who likewise confronted HB 1523 through multiple mediums, have standing to challenge HB 1523 here.

B. The Panel's Decision Conflicts with *Peyote Way*

Although the panel addressed taxpayer standing, *Barber* v. *Bryant*, Nos. 16-60477, 16-60488, slip op. at 11–12 (5th Cir. June 22, 2017),[3] it did not address the CSE Plaintiffs' independent assertion that they

[3] The CSE Plaintiffs are not seeking rehearing en banc of the aspect of the panel's opinion concerning taxpayer standing.

have standing because they were denied a benefit on the basis of their religion. *Id.* at 6–12; *see* ROA.16-60478.50–51, ¶ 113.

Appellants concede that HB 1523 confers a benefit on holders of the Section 2 Beliefs—it "removes [a] chilling effect on religious freedom by clarifying that the State's residents may follow" the Section 2 Beliefs "without *any* fear of lawsuits or reprisal from the State." Appellants' Br. at 8. And they do not dispute that HB 1523 denies this same benefit to the CSE Plaintiffs, who do not hold any of the Section 2 Beliefs. For example, Section 3(7) permits state employees to speak or engage in expressive conduct based upon a Section 2 Belief at work or after hours without any fear of reprisal. Rev. Hrostowski, as a professor of social work at the University of Southern Mississippi, is denied these protections—unlike her colleagues who hold the Section 2 Beliefs, Rev. Hrostowski could be fired for speaking or acting in accordance with her sincerely held religious beliefs in response to a comment or question from a homophobic student. ROA.16-60478.18–19 ¶ 15, 31 ¶ 57, 36–37 ¶¶ 73–74, 50–51 ¶¶ 113–14.

Rev. Hrostowski and the other CSE Plaintiffs thus have standing to challenge HB 1523 under *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). In *Peyote Way*, plaintiffs challenged an exemption from generally applicable federal drug regulations

that was afforded only to a rival church, excluding plaintiffs' church by omission. *Id.* at 1212–13. This Court held that "illegitimate unequal treatment is an injury unto itself," and that the plaintiffs had standing to challenge their exclusion from the exemption under the Establishment Clause. *Id.* at 1214 n.2; *see Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 130 (2011); *Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 8 (1989); *Doe* v. *Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 467 (5th Cir. 2001); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, No. 15-577, 2017 WL 2722410, at *8–9 (U.S. June 26, 2017) ("A law . . . may not discriminate against some or all religious beliefs," and government may not condition the availability of a benefit on the recipient's willingness to surrender or change his sincerely held religious beliefs (quoting *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993))).

The CSE Plaintiffs are also like the plaintiffs in *Littlefield*, who this Court held had standing to challenge their exclusion from a religious exemption from a school dress code. *Littlefield* v. *Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001). The panel here incorrectly held that *Littlefield* does not control because HB 1523, unlike the dress code, does not compel Plaintiffs' behavior. *Barber* v. *Bryant*, Nos. 16-60477, 16-60488, slip op. at 10 (5th Cir. June 22, 2017). But the panel's analogy is

backward. HB 1523 is an exemption from generally applicable laws, just like the opt-out in *Littlefield* was an exemption from a generally applicable dress code. By making the exemption unequally available to some people but not to Plaintiffs on the basis of religion, HB 1523 injures Plaintiffs and "satisfies the 'intangible injury' requirement to bring an Establishment Clause challenge." *Littlefield*, 268 F.3d at 294 n.31.

III. The Panel's Analysis Conflicts with Decisions of Other Circuits and the United States Supreme Court

The panel's decision also conflicts with decisions of the Fourth, Ninth, and Tenth Circuits, which have held that a plaintiff can "personally confront" a legislative or executive pronouncement endorsing or denigrating religion, giving rise to standing. *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir. 2017) [hereinafter *IRAP*] (en banc), *cert. granted*, Nos. 16-1436 (16A1190), 16-1540 (16A1191), 2017 WL 2722580 (U.S. June 26, 2017); *Awad* v. *Ziriax*, 670 F.3d 1111 (10th Cir. 2012); *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc).

In *IRAP*, the Fourth Circuit recognized that an impermissibly non-neutral state message regarding the Muslim religion causes a distinct and judicially cognizable injury. *IRAP*, 857 F.3d at 583–85 (recognizing that plaintiff alleged "two distinct injuries," including the sending of a

"state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his community"). In *Catholic League*, the Ninth Circuit held that citizens experience a cognizable Establishment Clause harm when state action inflicts a "psychological consequence" through the "condemnation of one's own religion or endorsement of another's in one's own community." 624 F.3d at 1052. The anti-Catholic resolution at issue in that case caused real harm, "stigmatiz[ing]" plaintiffs and "leav[ing] them feeling like second-class citizens." *Id*. And in *Awad*, the Tenth Circuit similarly held that the challenged constitutional amendment about sharia law, like HB 1523, conveyed "more than a message," because, like HB 1523, it potentially exposed the plaintiff to "disfavored treatment" on the basis of his religious beliefs. 670 F.3d at 1123.

The panel's decision here is also inconsistent with Supreme Court precedent holding that legislation constituting a government endorsement of religion inflicts cognizable injury *per se*. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309–10 (2000) (invalidating school prayer policy for sending message to nonadherents "that they are outsiders, not full members of the political community" (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring))); *Ass'n of Data*

Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150, 154 (1970) ("A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause[.]"). As in *Santa Fe*, "the mere passage [. . .] of a policy that has the purpose and perception of government establishment of religion" causes cognizable First Amendment harm. 530 U.S. at 314; *see also id.* at 316 ("[T]he simple enactment of this policy . . . was a constitutional violation.").

Finally, this case is distinguishable from *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464 (1982), cited by the panel in its decision. *Barber* v. *Bryant*, Nos. 16-60477, 16-60488, slip op. at 5, 6, 8, 15 (5th Cir. June 22, 2017). There, plaintiffs—residents of Washington, D.C.—had no personal nexus whatsoever to the challenged government action, a land conveyance to a religiously affiliated college in Pennsylvania. *Valley Forge*, 454 U.S. at 487. Merely learning about a constitutional violation from out-of-state, as in *Valley Forge*, is very different from the enactment of a law that stamped the CSE Plaintiffs as outsiders in their own community. ROA.16-60478.777; *accord Doe* v. *Beaumont Indep. Sch. Dist*., 240 F.3d 462, 466 (5th Cir. 2001) (en banc) (characterizing *Valley Forge* as a case in which "plaintiffs had no relationship to the government action at issue").

CONCLUSION

For all of the foregoing reasons, the CSE Plaintiffs request en banc review.

Respectfully submitted,

Dated: July 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of July, 2017, I filed the foregoing brief with the Court's CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record. I also certify that I served the following persons via overnight mail:

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 23(a)(7)(B)(iii).

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Date: July 6, 2017

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