

No. 16-60477

**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.

Cons w/16-60478

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

***BARBER PLAINTIFFS-APPELLEES' PETITION
FOR REHEARING EN BANC***

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CERTIFICATE OF INTERESTED PARTIES

Rims Barber, et al. v. Governor Phil Bryant, et al., No. 16-60477

**Consolidated with
*Campaign for Southern Equality, et al. v. Phil Bryant, et al., No. 16-60478***

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

2. Susan Hrostowski, Plaintiff-Appellee.

3. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Roberta A. Kaplan and Joshua D. Kaye representing).

4. Dale Carpenter, Counsel for all Plaintiffs-Appellees in Case No. 16-60478.

5. Fishman Haygood, LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Alysson Mills representing).

6. Rims Barber, Plaintiff-Appellee.

7. Carol Burnett, Plaintiff-Appellee.

8. Joan Bailey, Plaintiff-Appellee.
9. Katherine Elizabeth Day, Plaintiff-Appellee.
10. Anthony Laine Boyette, Plaintiff-Appellee.
11. Don Fortenberry, Plaintiff-Appellee.
12. Susan Glisson, Plaintiff-Appellee.
13. Derrick Johnson, Plaintiff-Appellee.
14. Dorothy C. Triplett, Plaintiff-Appellee.
15. Renick Taylor, Plaintiff-Appellee.
16. Brandiilyne Mangum-Dear, Plaintiff-Appellee.
17. Susan Mangum, Plaintiff-Appellee.
18. Joshua Generation Metropolitan Community Church, Plaintiff-

Appellee, is a non-profit religious ministry that is not a publicly held corporation.

19. Lambda Legal Defense and Education Fund, Inc., Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Susan Sommer and Beth Littrell representing), is a 501(c)(3) non-profit organization that is not a publicly held corporation.

20. Mississippi Center for Justice, Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Beth Orlansky representing), is a 501(c)(3) non-profit organization that is not a publicly held corporation.

21. Robert B. McDuff, Counsel for all Plaintiffs-Appellees in Case No. 16-6047.

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

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

24. Judy Moulder, Mississippi Registrar of Vital Records, Defendant in the matter below.

25. Jim Hood, Mississippi Attorney General, Defendant in the matter below.

26. Office of the Mississippi Attorney General, Counsel for all Defendants-Appellants in the matter below (Tommy D. Goodwin representing).

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

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

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

Respectfully submitted,

/s/ Robert B. McDuff

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Rims Barber, et al.*

STATEMENT OF RULE 35(b)
EN BANC CONSIDERATIONS

This case challenges Mississippi’s HB 1523, which bestows exclusive immunity from generally applicable constraints against discrimination on those with three specified religious views—that marriage is only between one man and one woman, that sexual relations are permissible only within such a marriage, and that a person’s sex is immutably determined by anatomy and genetics at the time of birth. It particularly targets lesbian, gay, bisexual, and transgender (“LGBT”) Mississippians for discrimination and stigma. The District Court characterized it as “the State’s attempt to put LGBT citizens back in their place after *Obergefell*.” *Barber v. Bryant*, 193 F. Supp. 3d 677, 708 (S.D. Miss. 2016). The Panel’s reversal of the District Court’s preliminary injunction for lack of standing on the part of the wide array of Plaintiffs raises exceptionally important issues regarding this and other religious exemption bills in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), with Mississippi’s the most extreme.

The Panel’s holding that Plaintiffs lack Establishment Clause standing because the promotion of the favored religious beliefs is contained in a statute rather than in “an encounter with [an] offending item or action” involving “religious displays and exercises,” Op. 6, creates a false distinction with this Court’s decisions in the religious display and exercise cases and conflicts with the holdings of *Catholic League for Religious & Civil Rights v. City & Cty. of San*

Francisco, 624 F.3d 1043 (9th Cir. 2010) (en banc), and *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

The Panel’s holding that the unequal treatment, targeting of disfavored groups, and negative stigma embedded in the bill does not constitute “discriminatory treatment,” Op. 13 (quotations and citation omitted), sufficient to establish Equal Protection standing conflicts with decisions holding that this type of “illegitimate unequal treatment is an injury until itself.” *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n. 2 (5th Cir. 1991).

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STATEMENT OF ISSUES MERITING
EN BANC CONSIDERATION

1. Do Plaintiffs have standing to challenge under the Establishment Clause of the First Amendment a statute providing exclusive legal privileges allowing adherents of specific religious beliefs to discriminate against certain disfavored groups, where the Plaintiffs—who include members of those groups—object to the religious beliefs and are offended by their endorsement by the State but have had no encounter with a physical display of the State’s endorsement beyond the text of the statute itself because there is no physical display?

2. Does the unequal treatment embodied in a statute granting adherents of endorsed religious beliefs exclusive privileges to discriminate against particular disfavored groups establish standing under the Equal Protection Clause of the Fourteenth Amendment for members of the targeted groups and for other non-adherents who object to the adherents’ favored treatment?

3. With respect to the merits, does HB 1523 violate the Establishment Clause by endorsing three favored religious beliefs through a discriminatory preference that grants legal protections only to those who subscribe to the favored beliefs?

4. Does HB 1523 violate the Equal Protection Clause by erecting a scheme of special benefits for a favored class of those who believe that members of the targeted groups are immoral, thereby imposing a disadvantage and stigma upon those targeted groups and by denying equal treatment to non-adherents?

**STATEMENT OF COURSE OF
PROCEEDINGS AND DISPOSITION**

The *Barber* Plaintiffs are twelve Mississippians, including some LGBT individuals, and a Hattiesburg church with many LGBT members, who sued the government Defendants to block HB 1523 from taking effect.

Following extensive submissions and a hearing, District Court Judge Carlton Reeves issued a preliminary injunction on June 30, 2016, shortly before HB 1523 was to take effect. The court held that Plaintiffs demonstrated standing and met their burden for a preliminary injunction based on their Establishment Clause and Equal Protection Clause claims. The court similarly ruled in favor of the two plaintiffs in the consolidated case *CSE v. Bryant*, who asserted only an Establishment Clause claim. *See Barber*, 193 F. Supp. 3d 677.

Although Mississippi's Attorney General declined to appeal, the Governor and the Director of the Department of Human Services did. On June 22, 2017, a Panel of this Court reversed the preliminary injunction without reaching the merits, instead holding that Plaintiffs in both cases failed to demonstrate standing. The

Panel rendered judgement requiring the District Court on remand to dismiss the case for want of jurisdiction. Op. 16.

STATEMENT OF FACTS

Mississippi’s HB 1523 immunizes from generally applicable constraints against discrimination those with three specified religious views—that marriage is only between one man and one woman, that sexual relations are permissible only within such a marriage, and that a person’s sex is immutably determined by anatomy and genetics at the time of birth (“Section 2 Beliefs”). HB 1523 § 2.

Following *Obergefell*, Mississippi’s elected officials made plain their intention to, as the District Court described it, “put LGBT citizens back in their place.” *Barber*, 193 F. Supp. 3d at 708. Governor Bryant asserted that *Obergefell* “‘usurped [states’] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are...certainly out of step with the majority of Mississippians.’” *Id.* at 692. Speaker of the House Gunn proclaimed that *Obergefell* was “‘in direct conflict with God’s design for marriage as set forth in the Bible,’” and the Chair of the House Judiciary B Committee suggested that Mississippi might “stop issuing marriage licenses altogether.” *Id.* (citations omitted). Two justices of the Mississippi Supreme Court claimed that *Obergefell* was “‘[w]orthy only to be disobeyed.’” *Id.* at 693 (citation omitted).

HB 1523 was Mississippi’s official response, passed in the next legislative session. *Id.* Its principal purpose and effect is to “grant[] special rights to citizens who hold” the negative religious or moral convictions about LGBT people endorsed in Section 2 of the law. *Id.* at 688. It provides adherents to its State-endorsed religious beliefs, including businesses and government employees, immunity from sanctions for a range of anti-LGBT discrimination, including in provision of foster care services, § 3(2), (3); psychological or counseling services, § 3(4); marriage-related public accommodations, § 3(5); and public accommodations and health and mental health services for transgender individuals, § 3(4), (6). It also permits state employees to recuse themselves from serving same-sex couples seeking marriage licenses and ceremonies, § 3(8).

Among the individual Plaintiffs are members of all three groups that are the subject of disapproval and condemnation by those who hold the endorsed beliefs, including a married same-sex couple, a gay man engaged to marry, an unmarried person in a long-term relationship, and two transgender individuals. Some are clergy. None adhere to the Section 2 Beliefs.

ARGUMENT

Bestowing exclusive legal privileges on adherents to HB 1523’s specified “sincerely held religious beliefs,” the statute inflicts an Establishment Clause

injury by “send[ing] the...message to...non-adherents [like the Plaintiffs] ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (citation omitted). Yet the Panel held Plaintiffs lacked standing because their injury stems from endorsement of those religious beliefs in a statute rather than in “an encounter with [an] offending item or action” in a “religious display[.]” or “exercise[.]” Op. 6, such as a “personal[.] encounter [with] a religious symbol on [a] public utility bill.” Op. 7, citing *Murray v. City of Austin*, 947 F.2d 147, 150 (5th Cir. 1991).

HB 1523 also inflicts an Equal Protection injury by bestowing legal privileges on those who would discriminate against members of the targeted groups, “stigmatizing members of the disfavored group[s] as ‘innately inferior’ and therefore as less worthy participants in the political community.” *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (citation omitted). And by bestowing privileges only on adherents to the favored beliefs, the statute disfavors those who believe differently and “personally denie[s] [them] equal treatment solely because of their membership in [that] disfavored group.” *Id.* at 740. “[T]he appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class.” *Id.* Despite the stigma and

disfavored treatment built into the statute, the Panel held that this was not sufficient discriminatory treatment to establish Equal Protection standing. Op. 13.

Mississippi's statute is the most extreme of a number of so-called religious freedom statutes passed in the country in response to *Obergefell*, and the Panel's decision raises unresolved issues of exceptional public importance. As the District Court emphasized, civil rights advances historically have been met with "predictable overreaction" and backlash. With HB 1523, "[t]he next chapter of this back-and-forth has begun." 193 F. Supp. 3d at 691.

I. Plaintiffs' Standing To Challenge Mississippi's Notorious Official Endorsement Of Anti-LGBT Religious Beliefs And Discrimination Raises Issues Of Exceptional, Far-Reaching Importance.

HB 1523 is part of an ugly chapter in our nation's history, with numerous variations on religious exemptions targeting LGBT individuals drafted and waiting in the wings in other states around the country.¹ Whether and under what circumstances those targeted by these measures will have standing to seek to block them from taking effect through Establishment Clause and Equal Protection challenges is a pressing issue that inevitably will recur. Guidance from the en banc Fifth Circuit will serve the public interest in greater clarity, shared by LGBT people, those who harbor religious objections to them, and lawmakers alike. The

¹ See, e.g., Susan Miller, *Onslaught of anti-LGBT bills in 2017 has activists 'playing defense,'* USA Today (June 1, 2017), <https://www.usatoday.com/story/news/nation/2017/06/01/onslaught-anti-lgbt-bills-2017/102110520/>.

importance of this case is further underscored by the thirteen amicus briefs on behalf of more than 175 amici, including Fifth Circuit states Texas and Louisiana, filed on both sides of the issue at the Panel stage.

HB 1523 leads the way among the most sweeping and extreme of the anti-LGBT religious exemption laws yet passed in the country. It is notable in providing special, absolute legal protections for specific religious beliefs targeting specific minorities, rather than generally providing all religious beliefs evenhanded exemptions that may be outweighed if the exemptions inflict undue harms.² Even without having taken effect, HB 1523 already has fueled harassment and discrimination against LGBT Mississippians, Plaintiffs included.³ HB 1523 has been the subject of intense scrutiny in the press, with scores of articles published on the controversy it has spawned.⁴ It has been criticized by legal scholars, many of whom agree that it “presents a conflict with First Amendment religious freedom

² See ROA.16-60477.283 n. 2 (compiling state RFRA and related statutes).

³ Kayleigh Skinner, *HB 1523: Reactions to the decision upholding the religious objections law*, Mississippi Today (June 22, 2017), <https://mississippitoday.org/2017/06/22/hb-1523-reactions-to-the-decision-upholding-the-religious-objections-law/> (reporting that following HB 1523’s passage, a truck bearing a swastika parked outside Plaintiff LGBT-affirming church, and in recent weeks KKK distributed fliers through area); see also *Amicus Curiae Brief by Companies Opposed to H.B. 1523*, at 8, Doc. No. 00513811833.

⁴ See, e.g., Larrison Campbell, *It will be legal to refuse service to LGBT people in Mississippi, court rules*, Sun Herald (June 22, 2017), <http://www.sunherald.com/news/state/mississippi/article157578639.html>; Sarah Kaplan, *Mississippi’s Senate just approved a sweeping ‘religious liberty’ bill that critics say is the worst yet for LGBT rights*, Washington Post (Mar. 31, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/mississippis-senate-just-approved-a-sweeping-religious-liberty-bill-that-critics-say-is-the-worst-yet-for-lgbt-rights/?utm_term=.b8e873e62a11.

doctrine by providing for religious exemptions that will meaningfully harm the rights of others, particularly LGBT Mississippians.”⁵ As explained by the District Court, “Mississippi has been subjected to widespread condemnation and an economic boycott as a result of HB 1523’s passage.”⁶ This condemnation has come from many quarters, including businesses from both inside and outside the State.

In effect, a single Panel of this Court has ruled that a District Court Judge sitting in Mississippi overestimated the imminent, concrete, and unconstitutional injuries that will be inflicted on Mississippi Plaintiffs by a law that puts his State’s official imprimatur on a particular set of religious beliefs, stigmatizes Mississippi’s vulnerable LGBT minority, and denies Plaintiffs equal legal treatment.

Respectfully, the Panel *underestimated* these injuries and the standing they confer. Before the courthouse doors are shut to Plaintiffs, and before HB 1523 is permitted to take effect and inflict deeper damage, the full Court sitting en banc should have a say. It is, after all, “incumbent upon the courts to apply standing

⁵ *Memorandum from Public Rights/Private Conscience Project on Mississippi H.B. 1523 & the Establishment Clause to Interested Parties* (Apr. 5, 2016) (on file with Columbia University in the City of New York), at 1; available at https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/memo_regarding_ms_hb1523.pdf; see also, e.g., Ronald J. Krotoszynski, Jr., *Agora, Dignity, and Discrimination: On the Constitutional Shortcomings of “Conscience” Laws that Promote Inequality in the Public Marketplace*, 20 *Lewis & Clark L. Rev.* 1221, 1226-27 (2017).

⁶ See *Barber*, 193 F. Supp. 3d at 723; see also, e.g., Bryan Dewan, *States Turn Their Back On Mississippi Over Its New Discriminatory Law*, ThinkProgress (Apr. 6, 2016), <https://thinkprogress.org/states-turn-their-back-on-mississippi-over-its-new-discriminatory-law-de7a50bcd8eb>.

doctrine neutrally, so that it does not become a vehicle for...disallowing disfavored claimants from even getting their claims considered.” *Catholic League*, 624 F.3d at 1049.

II. En Banc Review Is Warranted To Resolve Plaintiffs’ Standing To Challenge A Statute Endorsing Specific Religious Beliefs And Imposing Discrimination, Issues About Which Other Courts Have Differed With The Panel.

The Panel drew a distinction between injury inflicted from exposure to a religious display or public prayer and that inflicted by the commands of a statute endorsing religious beliefs, including sanctioned discrimination targeting many of the Plaintiffs. The Panel held that the former gives rise to standing while the latter involves insufficient “personal confrontation” for standing. Op. 8. This is a false distinction.

Plaintiffs are Mississippi residents who will be governed by HB 1523. They all read the law and followed the controversy about it, including, for some, following the legislative debates and speaking out against the statute. They do not subscribe to the Section 2 Beliefs, are offended by Mississippi’s public endorsement and special protections for those beliefs, and feel ostracized by their government. ROA.16-60477.207-41, ROA.16-60477.904-06. For Plaintiff Taylor, engaged to marry his same-sex spouse, HB 1523’s religious condemnation of his relationship is as “personal” as it gets. *See* ROA.16.60477.231-33. HB 1523’s public condemnation of transgender Plaintiffs Day and Boyette and greenlighting

of discrimination against them is profoundly “personal” too. *See* ROA.16.60477.213-15, ROA.16.60477.220—23. As the District Court found, HB 1523 “will undeniably impact their lives.” 193 F. Supp. 3d at 701. “Our Nation’s history teaches the uncomfortable lesson that those not on discrimination’s receiving end can all too easily gloss over the ‘badge of inferiority’ inflicted by unequal treatment itself.” *Hassan v. City of New York*, 804 F.3d 277, 291 (3d Cir. 2015), *as amended* (Feb. 2, 2016).

These Plaintiffs are not similarly situated to other Mississippi residents, but rather are direct targets of the discrimination and exclusion HB 1523 licenses, encourages, and enacts. They did not “roam the country in search of governmental wrongdoing.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982). Their government brought wrongdoing to their door with its message of religious condemnation.

Indeed, during the oral argument before the Panel, Defendants’ counsel was asked whether standing would exist if a board with the words of the statute were posted outside the State capitol building and a Plaintiff came along and read it. Counsel admitted that it would.⁷ But surely standing in a case this important does not turn on whether the Plaintiff sees offending text on a board instead of actually reading the statute codifying the unconstitutional endorsement and discrimination.

⁷ *See* Oral Argument at 29:00, http://www.ca5.uscourts.gov/OralArgRecordings/16/16-60477_4-3-2017.MP3.

Plaintiffs are as “confronted” and injured by HB 1523’s state-endorsed Section 2 Beliefs as were the parents and students in *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996), who had standing to bring a pre-implementation challenge to Mississippi’s school prayer statute; the resident offended by his utility bills and other correspondence bearing the municipal cross insignia in *Murray*, 947 F.2d at 151; and the schoolchildren observing a moment of silence in *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009).

The Panel decision conflicts as well with other circuits’ rulings involving strikingly analogous challenges not to literal confrontation with visible religious symbols or ceremonies but to legislation endorsing religious beliefs. These cases recognized that laws embodying religious condemnation give rise to standing for those who disagree with and are targeted by them, even when there are no tangible religious displays or prayers.

In *Catholic League*, the en banc Ninth Circuit held that two San Francisco Catholic individuals and a Catholic advocacy organization had standing to challenge a non-binding municipal resolution expressly disagreeing with the Catholic Church’s beliefs against adoption by same-sex couples and “urg[ing]” the Cardinal to withdraw a directive on the issue. 624 F.3d at 1047. Unlike HB 1523, which enacts a wide range of affirmative legal protections for those holding Section 2 Beliefs and corresponding disabilities for those it targets, the San

Francisco resolution carried no further legal force. The Court nonetheless concluded that plaintiffs “allege that the stigmatizing resolution leaves them feeling like second-class citizens of the San Francisco political community, and expresses to the citizenry of San Francisco that they are. The cause of the plaintiffs’ injury here is not speculative: it is the resolution itself.” *Id.* at 1052.

Similarly, the Tenth Circuit held in *Awad* that a Muslim plaintiff had pre-enforcement standing to seek a preliminary injunction blocking a referendum to prohibit courts from using international or Sharia law. The Court concluded that “Awad’s allegation—that the proposed state amendment *expressly* condemns his religion and exposes him and other Muslims in Oklahoma to disfavored treatment—suffices to establish the kind of direct injury-in-fact necessary to create Establishment Clause standing.” 670 F.3d at 1123. Beyond this “immediate and concrete condemnation injury,” *id.* at 1125, Awad alleged injury no more tangible and imminent than that someday, after he dies, problems will arise with probating his will. *Id.* at 1119.

With respect to standing to assert an Equal Protection Clause violation, numerous cases have concluded—contrary to the Panel’s ruling—that plaintiffs denied equal treatment by stigmatizing legal barriers satisfy the injury-in-fact standing requirement. Thus in *Heckler*, the Supreme Court held that a man alleging unequal treatment under Social Security rules granting men lesser benefits

than similarly situated women had a cognizable injury. The Court emphasized that the man's standing did not rest on "a substantive right to any particular amount of benefits, [nor] on his ability to obtain increased" benefits. 465 U.S. at 737. And as the Court noted in *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier *need not allege that he would have obtained the benefit but for the barrier in order to establish standing*. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

508 U.S. 656, 666 (1993) (emphasis added).

The Court reaffirmed just several weeks ago that discriminatory classification of a group of people is injury in itself, redressable under the Equal Protection guarantee even if a plaintiff stands to gain no further relief. Quoting *Heckler*, the Court said "we have repeatedly emphasized [that] discrimination itself...perpetuat[es] 'archaic and stereotypic notions' incompatible with" equal protection. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 n. 21 (2017) (quotations and citations omitted).

Adhering to these principles, this Court affirmed standing in *Peyote Way*, recognizing "that illegitimate unequal treatment is an injury unto itself, 'not coextensive with any [injury due to the denial of] substantive rights to the...party

discriminated against.” 922 F.2d at 1214 n. 2 (quoting *Heckler*, 465 U.S. at 739); *see also Tex. Cable & Telecomms. Ass’n v. Hudson*, 265 F. Appx. 210, 218 (5th Cir. 2008) (cable operators had standing to challenge “[d]iscriminatory treatment at the hands of the government,” an injury “recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law”).

In *Hassan*, the Third Circuit likewise explained that “virtually every circuit court has reaffirmed—as has the Supreme Court—that a ‘discriminatory classification is itself a penalty,’ *Saenz v. Roe*, 526 U.S. 489, 505...(1999), and thus qualifies as an actual injury for standing purposes, where a citizen’s right to equal treatment is at stake.” 804 F.3d at 289-90; *see also id.* at 289 n. 1 (gathering cases). The court rejected the argument that “unequal treatment is only injurious when it involves a tangible benefit like college admission or Social Security,” confirming instead that unequal legal treatment causing “stigma[],” “dehumanizing injury,” and “dignitary affront” suffices for standing. *Id.* at 290 (citations omitted).⁸

⁸ *Moore v. Bryant*, 853 F.3d 245 (5th Cir. 2017), denying standing for an equal protection challenge to Mississippi’s Confederate symbol in the State flag, does not speak to the *Barber* Plaintiffs’ standing to challenge a statute expressly targeting them for differential treatment and legal disabilities. Indeed, Judge Reeves ruled in *Moore against* but in *Barber for* the plaintiffs’ standing, seeing distinctions between the cases. *See Moore v. Bryant*, 205 F. Supp. 3d 834 (S.D. Miss. 2016).

Finally, the Panel decision contradicts the spirit and promise of *Obergefell*, which, as confirmed by the Supreme Court just days ago, “proscribes” the State from imposing “disparate treatment” on same-sex couples exercising their right to marry. *Pavan v. Smith*, No. 16-992, 2017 WL 2722472, *2 (U.S. June 26, 2017). HB 1523 facially denies same-sex couples the right to be treated as other couples. Its exemptions target and impose special disabilities on same-sex but not other couples against whom negative beliefs may be harbored. Under HB 1523, only same-sex couples can be shunted aside by a marriage license clerk, turned away from a restaurant for a marriage-related celebration, or prevented from caring for a foster child. HB 1523 is offensive to the rights of LGBT and other dissenting Mississippians and to the Supreme Court’s command on this burning civil rights issue.

CONCLUSION

For the foregoing reasons, the issues in this exceptionally important case should be heard and resolved by the en banc Court.

Dated: July 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2017, I caused this *Barber* Plaintiffs-Appellees' Petition for Rehearing En Banc to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users representing all parties to the appeal, including: Jonathan F. Mitchell, James Otis Law Group, LLC; Kevin H. Theriot, Alliance Defending Freedom; Drew L. Snyder, Office of Governor Phil Bryant; Tommy D. Goodwin, Office of the Mississippi Attorney General; Daniel Bradshaw, Mississippi Department of Human Services; Roberta A. Kaplan and Joshua D. Kaye, Paul, Weiss, Rifkind, Wharton & Garrison LLP; Dale Carpenter; and Alysson Mills, Fishman Haygood, LLP.

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Dated: July 6, 2017

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/s/ Robert B. McDuff
Robert B. McDuff

Attorney for Plaintiffs-Appellees

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APPENDIX: PANEL OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60477

United States Court of Appeals
Fifth Circuit
FILED
June 22, 2017
Lyle W. Cayce
Clerk

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,

versus

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

Defendants–Appellants.

* * * * *

No. 16-60478

CAMPAIGN FOR SOUTHERN EQUALITY;
THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs–Appellees,

versus

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.

Appeals from the United States District Court
for the Southern District of Mississippi

No. 16-60477

No. 16-60478

Before SMITH, ELROD, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Governor of Mississippi and the Executive Director of the Mississippi Department of Human Services appeal a preliminary injunction. Because the plaintiffs do not have standing, we reverse the injunction and render a judgment of dismissal.

I.

A.

The plaintiffs challenge the constitutionality of a Mississippi statute, HB 1523, under the Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. HB 1523 provides that “[t]he state government shall not take any discriminatory action”¹ against persons who act in accordance with certain beliefs in an enumerated set of circumstances. Section 2 of HB 1523 identifies three “religious beliefs or moral convictions”:

(a) Marriage is or should be recognized as the union of one man and one woman; (b) [s]exual relations are properly reserved to such a marriage; and (c) [m]ale (man) or female (woman) refer[s] to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.

2016 Miss. Law HB 1523 § 2. Those who act in accordance with those beliefs are protected from discriminatory action by the state in the form of adverse tax, benefit, and employment decisions, the imposition of fines, and the denial of occupational licenses. HB 1523 § 4. The statute creates a private right of action for individuals to address any violations of HB 1523 by state officials and permits its use as a defense in private suits over conduct covered by the statute. HB 1523 § 5.

¹ *E.g.*, HB 1523 § 3(1).

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Section 3 defines the set of circumstances in which adverse state action is restricted. Religious organizations are protected when they make decisions regarding employment, housing, the placement of children in foster or adoptive homes, or the solemnization of a marriage based on a belief listed in Section 2. HB 1523 § 3(1)–(2). Parents are protected if they decide to raise their foster or adoptive children in accordance with a belief listed in Section 2. HB 1523 § 3(3). Doctors and mental health counselors cannot be compelled to provide services in contravention of a sincerely held Section 2 belief, provided it does not interfere with “visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.” HB 1523 § 3(4). Businesses that offer wedding-related services are protected if they decline to provide them on the basis of a Section 2 belief. HB 1523 § 3(5).

Section 3 also protects any entity that establishes sex-specific standards for facilities such as locker rooms or restrooms. HB 1523 § 3(6). The state cannot take adverse employment action against a state employee for Section 2-related speech as long as his “speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed” HB 1523 § 3(7). Finally, county clerks and state judges cannot be compelled to license or celebrate marriages that are inconsistent with a sincerely held Section 2 belief, provided that the official gives prior notice and “any legally valid marriage is not impeded or delayed as a result of any recusal.” HB 1523 § 3(8).

B.

The plaintiffs are residents of Mississippi and two organizations who do not share the Section 2 beliefs. The district court discussed the individual

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plaintiffs in three categories: (1) religious leaders who do not agree with the Section 2 beliefs, (2) gay and transgender persons who may be negatively affected by HB 1523, and (3) other persons associated with the Section 3 circumstances who do not share the Section 2 beliefs. The organizational plaintiffs are Joshua Generation Metropolitan Community Church, a religious organization that objects to the Section 2 beliefs, and the Campaign for Southern Equality (“CSE”), whose brief describes it as “a non-profit organization that works across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life” (internal quotation marks omitted).

The plaintiffs filed two suits, later consolidated, against state officials who would have a role in the implementation of HB 1523. Plaintiffs assert they are injured by the “clear message” sent by HB 1523 that the “state government disapproves of and is hostile to same-sex couples, to unmarried people who engage in sexual relations, and to transgender people.” They maintain that that message violates the Establishment Clause because it endorses specific religious beliefs and that it violates the Equal Protection Clause of the Fourteenth Amendment² because it provides different protections for Mississippians based on those beliefs.

The district court issued a preliminary injunction against the implementation of HB 1523. The state defendants appeal.

II.

Article III limits federal courts to deciding only actual “Cases” or “Controversies.” U.S. CONST. art. III, § 2. “As an incident to the elaboration of” the

² The plaintiffs in No. 16-60478—CSE and Susan Hrostowski—do not bring an equal-protection challenge.

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case-or-controversy requirement, “[we have] always required that a litigant have ‘standing’ to challenge the action sought to be adjudicated in the lawsuit.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The Judicial Branch may not “accept for adjudication claims of constitutional violation . . . where the claimant has not suffered cognizable injury.” *Id.* at 474.

“[T]he irreducible constitutional minimum of standing contains three elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]” *Id.* (internal quotation marks and citations omitted). “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Id.* (internal quotation marks and citations omitted). “Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (internal quotation marks and citation omitted).

Plaintiffs always have the burden to establish standing. *Id.* “Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of litigation.” *Id.* Because a preliminary injunction “may only be awarded upon a clear showing that the plaintiff is entitled to such relief,” the plaintiffs must make a “clear showing” that they have standing to maintain the preliminary injunction.³ None of these

³ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Townley v. Miller*,

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plaintiffs has clearly shown an injury-in-fact, so none has standing. It follows that “[w]e do not—indeed, we may not—reach the merits of the parties’ [constitutional] arguments.” *Hotze v. Burwell*, 784 F.3d 984, 991 (5th Cir. 2015).

III.

A.

The Establishment Clause is no exception to the requirement of standing. *Valley Forge*, 454 U.S. at 484. “It is not enough simply to argue that there has been some violation of the Establishment Clause; [the plaintiffs] must allege a personal violation of rights.” *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009). The plaintiffs claim they have suffered a stigmatic injury from the statute’s endorsement of the Section 2 beliefs. That stigma can be a cognizable Establishment Clause injury, but even such stigmatic injury must be concrete and particularized. *See, e.g., Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991).

“[T]he concept of injury for standing purposes is particularly elusive in Establishment Clause cases,” but we are not without guidance. *Id.* (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). In cases involving religious displays and exercises, we have required an encounter with the offending item or action to confer standing. *See id.*; *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc) (addressing religious invocations). But these religious display and exercise cases represent the outer limits of where we can find these otherwise elusive Establishment Clause injuries.⁴ Where a statute or government policy is at issue, the policy must

722 F.3d 1128, 1133 (9th Cir. 2013) (“At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing.”).

⁴ *See Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*,

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have some concrete applicability to the plaintiff. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001). Taxpayers have standing for the limited purpose of challenging a direct spending program that implicates the restrictions of the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968).

The plaintiffs analogize their purported stigmatic injury to the injuries in the religious-display and religious-exercise cases. Here, however, there is not a similar item or event to “encounter.” That does not excuse the plaintiffs from showing an injury in fact that is *both* “concrete *and* particularized.”⁵ To determine whether they have made such a showing, we must examine their alleged injury in light of our caselaw. Because the challengers have failed to provide sufficient evidence of an injury-in-fact from HB 1523 under any of the aforementioned categories, they have not made a clear showing of standing.

B.

A plaintiff has standing to challenge a religious display where his stigmatic injury results from a “personal[] confront[ation]” with the display. *See Murray*, 947 F.2d at 150–51. For comparison, the caselaw offers some examples of such a confrontation. There is standing where a plaintiff personally encounters a religious symbol on his public utility bill. *Id.* at 150. Personally

534 F.3d 756, 764–65 (D.C. Cir. 2008) (“When plaintiffs are not themselves affected by a government action except through their abstract offense at the message allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases.” (emphasis omitted)).

⁵ *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). The religious-display and religious-exercise cases are also an imperfect analogy because HB 1523 covers those who hold a Section 2 belief on either a religious or a secular basis, and beliefs are not defined in reference to any particular religious denomination. HB 1523 § 2 (“The sincerely held religious beliefs or moral conviction protected by this act are . . .”).

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encountering a religious message on the currency a plaintiff regularly handles is also sufficient.⁶ But once that display is removed from view, standing dissipates because there is no longer an injury. *See Staley v. Harris Cty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc). The personal confrontation must also occur in the course of a plaintiff's regular activities; it cannot be manufactured for the purpose of litigation. *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001).

The plaintiffs maintain that the stigmatic injury caused by Section 2 is analogous to the injury-in-fact in the religious-display cases. But they make no clear showing of a personal confrontation with Section 2: The beliefs listed in that section exist only in the statute itself.

Just as an individual cannot “personally confront” a warehoused monument, he cannot confront statutory text. *See Staley*, 485 F.3d at 309. Allowing standing on that basis would be indistinguishable from allowing standing based on a “generalized interest of all citizens in” the government's complying with the Establishment Clause without an injury-in-fact. *See Valley Forge*, 454 U.S. at 483. That, we know, “cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.” *Id.* The religious-display cases do not provide a basis for standing to challenge the endorsement of beliefs that exist only in the text of a statute.⁷

⁶ *Newdow v. Lefevre*, 598 F.3d 638, 642–43 (9th Cir. 2010) (finding standing for the plaintiff to challenge the placement of the national motto “In God We Trust” on the currency).

⁷ “To be sure, we recognize that plaintiffs’ creative analogy to the religious display and prayer cases has some surface logic. But the implications of plaintiffs’ theory for standing doctrine are quite radical: Plaintiffs seek to use the religious display and prayer cases to wedge open the courthouse doors to a wide range of plaintiffs alleging Establishment Clause violations who were previously barred by bedrock standing requirements—requirements that

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C.

For standing, the religious-exercise cases require the same type of personal confrontation. “Standing to challenge invocations as violating the Establishment Clause” cannot be based “solely on injury arising from mere abstract knowledge that invocations were said.” *Tangipahoa Par.*, 494 F.3d at 497. There must be “proof in the record that [the plaintiffs] were exposed to, and may thus claim to have been injured by, invocations given at” the relevant event. *Id.*

At oral argument, the plaintiffs asserted that *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), a religious-exercise case, was the strongest authority supporting their claim that a stigmatic injury is sufficient for Establishment Clause standing.⁸ In *Santa Fe*, *id.* at 309–10, 314, the Court used broad language to describe the injury non-adherents may suffer from witnessing a prayer at a school football game and the ability of the plaintiffs to bring a facial challenge to that policy. But *Santa Fe* does not address the standing of the instant plaintiffs, and its broad language does not eliminate the injury-in-fact requirement. In fact, we are bound by *Tangipahoa Parish*, 494 F.3d at 497, to require proof of a personal confrontation with the religious exercise. Neither the religious-exercise cases generally, nor *Santa Fe* specifically, provides support for these plaintiffs’ standing.

D.

Alternatively, the plaintiffs could establish injury-in-fact by clearly

are essential to preserving the separation of powers and limited judicial role mandated by the Constitution.” *In re Navy Chaplaincy*, 534 F.3d at 765.

⁸ At oral argument, the challengers also pointed to *Bowen v. Kendrick*, 487 U.S. 589, 600–01 (1988). But the only discussion of standing there is in regard to *Flast* taxpayer standing; here, the brief cites only the section of *Kendrick* on facial challenges. *Id.* at 600–01, 618.

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showing they are injured by a legal effect of HB 1523. *See Littlefield*, 268 F.3d at 294 n.31. Instead, they rely solely on Section 2’s alleged endorsement of specific beliefs. Standing is not available to just any resident of a jurisdiction to challenge a government message without a corresponding action about a particular belief outside the context of a religious display or exercise. *See In re Navy Chaplaincy*, 534 F.3d at 765.

In *Littlefield*, the plaintiffs challenged a public school district’s uniform policy on, *inter alia*, Establishment Clause grounds. They contended that the policy’s opt-out for those with religious objections to the dress code impermissibly “favor[ed] certain organized religions” *Littlefield*, 268 F.3d at 294 n.31. Their “direct exposure to the policy satisfie[d] the ‘intangible injury’ requirement to bring an Establishment Clause challenge.” *Id.* Unlike the instant plaintiffs, the *Littlefield* plaintiffs were required to conform to the dress code unless they fit the criteria of the opt-out. But HB 1523 does nothing to compel the behavior of these plaintiffs; it only restricts the actions of state government officials.

The decisions in *Awad v. Zirax*, 670 F.3d 1111, 1120–24 (10th Cir. 2012), and *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 583 (4th Cir. 2017), are similarly unavailing. The plaintiff in *Awad* had standing to challenge an amendment to the Oklahoma Constitution that forbade state courts from considering Sharia law. *Awad*, 670 F.3d at 1123–24. But he had alleged that the amendment would prevent the Oklahoma courts from probating his will. *Id.* at 1119. The plaintiff in *International Refugee* alleged that his wife, who had an approved visa application, was barred by an Executive Order from entering the United States, thus “prolong[ing] their separation.” *Int’l Refugee*, 857 F.3d at 583. Those are the sort of concrete injuries-in-fact that

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the plaintiffs have not alleged in this case.⁹

It is true that HB 1523 protects Section 2 beliefs by restricting the ability of state officials to take action against those who act in a Section 3 circumstance in accordance with those beliefs. But there is no evidence in the record of an injury-in-fact under this theory. The plaintiffs' affidavits only allege offense at the message Section 2 sends, and they confirmed at oral argument that they are relying on that purported stigmatic injury for standing. Because they have claimed no Establishment Clause injury from Section 3, we do not decide whether there could be standing on that basis. The plaintiffs have not clearly shown injury-in-fact.

E.

The CSE plaintiffs also claim to have *taxpayer* standing under *Flast*. “[T]o establish taxpayer standing to challenge the constitutionality of a state statute on the basis of the Establishment Clause, a party must show that ‘tax revenues are expended on the disputed practice.’”¹⁰ A plaintiff must make “the showing of a direct expenditure of income tax revenues on the allegedly unconstitutional program.”¹¹ *Flast* only permitted taxpayer standing to challenge programs enacted under the Taxing and Spending Clause that involved more

⁹ The Ninth Circuit found standing for a group of Catholic San Francisco residents to challenge a non-binding resolution by the Board of Supervisors condemning their beliefs regarding adoption. *See Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1052–53 (9th Cir. 2010) (en banc). But that case is distinguishable on its own terms as a “direct attack and disparagement of their religion” “[u]nlike” other standing cases in which the religious effects were ancillary. *Id.* at 1050 n.26. Because HB 1523 is not a specific condemnation of an identified religion challenged by its adherents, the standing analysis in *Catholic League* is inapposite.

¹⁰ *Henderson v. Stalder*, 287 F.3d 374, 380–81 (5th Cir. 2002) (quoting *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995)).

¹¹ *Id.* at 381 n.7 (citing *Flast*, 392 U.S. at 88).

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than “an incidental expenditure of tax funds in the administration of an essentially regulatory statute.” *See Flast*, 392 U.S. at 102. The Court considered that test consistent with its test for state taxpayer standing on federal questions.¹² The applicability of *Flast* to state taxpayers’ federal constitutional claims was affirmed in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 138 (2011).¹³

HB 1523 does not fall within *Flast*’s “narrow exception’ to ‘the general rule against taxpayer standing.’”¹⁴ The only spending HB 1523 authorizes is compensatory damages and attorneys’ fees against state officials who engage in prohibited discriminatory conduct. Those hypothetical expenditures that may arise from lawsuits against state officials are “incidental” to the overall statutory scheme. *See Flast*, 392 U.S. at 102. The expenditures do not resemble the kind of direct spending program that, if enacted by Congress, would be based on the taxing and spending power. The plaintiffs do not have taxpayer standing to challenge HB 1523.

IV.

A.

The Barber plaintiffs claim standing under the Equal Protection Clause. The three elements of Article III standing are the same under any clause of the Constitution, but the analysis “often turns on the nature and source of the

¹² *Flast*, 392 U.S. at 102 (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434–35 (1952)). In *Doremus*, 342 U.S. at 434–35, the Court held that there was no taxpayer standing under the Establishment Clause to challenge a state statute requiring daily readings from the Old Testament in public schools because it was “not a direct dollars-and-cents injury.”

¹³ The Court in *Arizona Christian*, 563 U.S. at 142–43, applied *Flast* in holding that a tax credit that benefited religious schools was not a state expenditure, so the taxpayers did not have standing to challenge it under the Establishment Clause.

¹⁴ *Id.* at 138 (quoting *Kendrick*, 487 U.S. at 618).

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claim asserted.” *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). The “Equal Protection and Establishment Clause cases call for different injury-in-fact analyses” because “the injuries protected against under the Clauses are different.” *Id.* “[E]xposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case.” *Id.*

In *Moore*, we rejected a claim that the inclusion of the Confederate battle flag on the Mississippi state flag conferred standing under the Equal Protection Clause, reasoning that the plaintiff had not alleged any unequal treatment. *Id.* at 248. “[W]hen plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment.” *Id.* at 251 (citing *Allen v. Wright*, 468 U.S. 737, 755 (1984)). This allegation is required regardless of how “personally and deeply [the plaintiffs] feel [] the impact of” the state’s message. *Id.*¹⁵

Future injuries can provide the basis for standing, but they “must be *certainly impending* to constitute injury in fact,” and “[a]llegations of *possible* future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting another source). An injury that is based on a “speculative chain of possibilities” does not confer Article III standing. *Id.* at 1150; *see also Allen*, 468 U.S. at 756–59. Such allegations also must be contained in the record. *See, e.g., Tangipahoa Par.*, 494 F.3d at 499.

The Barber plaintiffs claim that their stigmatic injury arises from the

¹⁵ The recent decision in *Sessions v. Morales-Santana*, No. 15-1191, 2017 U.S. LEXIS 3724 (U.S. June 12, 2017), does not alter this requirement. Morales-Santana raised an allegation of disparate treatment regarding the legal ability of his father “to pass citizenship to his son” *Id.* at *3. Third-party standing enabled him to bring that claim on his father’s behalf as a means of avoiding removal. *Id.* at *15–16.

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statute’s “bestowing legal privileges and immunities on those who would discriminate against members of the targeted groups” But their affidavits only claim offense at the “clear message” of disapproval that is being sent by the state. In *Moore*, 853 F.3d at 251, this court has already foreclosed that argument for Equal Protection Clause standing. The affidavits contain no statement that any of the plaintiffs plans to engage in a course of conduct in Mississippi that is identified in Section 3.

Plaintiff Rennick Taylor comes the closest by stating his intention to marry, but that alone is insufficient. He does not allege that he was seeking wedding-related services from a business that would deny him or that he was seeking a marriage license or solemnization from a clerk or judge who would refuse to be involved in such a ceremony, or even that he intended to get married in Mississippi. Without more, we are left to speculate as to the injuries he and the other plaintiffs might suffer. That we cannot do. *See Clapper*, 133 S. Ct. at 1147. On this record, the plaintiffs are in no better position to claim Equal Protection standing than was the plaintiff in *Moore*.

B.

The Barber plaintiffs assert that some of the individual plaintiffs have Equal Protection standing because they live in a jurisdiction, or work for a state university, that has an anti-discrimination policy that is preempted by HB 1523 to the extent the relevant action is covered by Sections 2 and 3. The cities of Jackson, Hattiesburg, and Oxford and the University of Southern Mississippi have such policies.

The Barber challengers analogize the partial preemption of the local anti-discrimination policies to the Colorado constitutional amendment struck down on equal-protection grounds in *Romer v. Evans*, 517 U.S. 620, 623–24

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(1996). That amendment “prohibit[ed] all legislative, executive, or judicial action at any level of state or local government designed to protect” individuals on the basis of sexual orientation. *Id.* at 624. The Court held this violated the Equal Protection Clause because “[i]t identifies persons by a single trait and then denies them protection across the board.” *Id.* at 633. HB 1523 is similar to the Colorado amendment in that it restricts the availability of anti-discrimination remedies, but it does so only in a defined set of circumstances.

The Court did not address standing in *Evans*, and we are not bound to find standing in a similar circumstance in the absence of such a holding. *See Tangipahoa Par.*, 494 F.3d at 498. Even assuming there was standing in *Evans*, its reasoning does not extend to HB 1523, because its limited scope does not provide the same certainty that any member of an affected group will suffer an injury. HB 1523 preempts the local anti-discrimination policies only in the circumstances enumerated in Section 3. At a minimum, the challengers would have to allege plans to engage in Section 3-related conduct in Mississippi for which they would be subject to a denial of service and would be stripped of a preexisting remedy for that denial.¹⁶ The failure of the Barber plaintiffs to assert anything more than a general stigmatic injury dooms their claim to standing under this theory as well.

V.

“The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is . . . restricted to litigants who can show ‘injury in fact’ resulting from the action which they seek to have the court adjudicate.” *Valley Forge*, 454 U.S. at 473. Under this current record,

¹⁶ We do not speculate on whether, even with those allegations, the injury would be too attenuated to satisfy the standing requirements. *See Amnesty Int’l*, 133 S. Ct. at 1150.

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the plaintiffs have not shown an injury-in-fact caused by HB 1523 that would empower the district court or this court to rule on its constitutionality. We do not foreclose the possibility that a future plaintiff may be able to show clear injury-in-fact that satisfies the “irreducible constitutional minimum of standing,” *Defenders of Wildlife*, 504 U.S. at 560, but the federal courts must withhold judgment unless and until that plaintiff comes forward.

The preliminary injunction is REVERSED, and a judgment of dismissal for want of jurisdiction is RENDERED.