

No. 17-_____

IN THE
Supreme Court of the United States

CAMPAIGN FOR SOUTHERN EQUALITY;
THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Petitioners,

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,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

JAREN JANGHORBANI

JOSHUA D. KAYE

PAUL, WEISS, RIFKIND,

WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

ALYSSON MILLS

KRISTEN AMOND

FISHMAN HAYGOOD, LLP

201 St. Charles Avenue

Suite 4600

New Orleans, LA 70170

ROBERTA KAPLAN

Counsel of Record

JOSHUA MATZ

RACHEL TUCHMAN*

KYLA MAGUN*

KAPLAN & COMPANY, LLP

350 Fifth Avenue

Suite 7110

New York, NY 10118

(212) 763-0883

rkaplan@kaplanand

company.com

*Not yet admitted to the bar

Counsel for Petitioners

October 30, 2017

QUESTION PRESENTED

The Mississippi statute HB 1523 singles out three specific religious beliefs for promotion and special protection under the law. Petitioners represent and include individuals who do not adhere to these preferred beliefs. Do petitioners have standing to challenge HB 1523 on the grounds that it violates the Establishment Clause?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellees below, are The Reverend Dr. Susan Hrostowski, an Episcopal priest who is a married lesbian and the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, and the Campaign for Southern Equality, whose members hold a variety of religious faiths and beliefs, but all share the religious and moral conviction that the marriages of LGBT people have equal dignity.

Respondents, defendants-appellants below, are Phil Bryant, in his official capacity as Governor of the State of Mississippi, and John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	9
I. The Fifth Circuit Created a Circuit Split on an Important Question of Establishment Clause Standing.....	9
II. The Fifth Circuit’s Standing Analysis is Incorrect	14
III. The Question Presented is One of Exceptional Importance.....	19
IV. This Case Offers an Ideal Vehicle to Resolve the Issue	21
CONCLUSION	22

TABLE OF CONTENTS—Continued

APPENDIX	Page
APPENDIX A: Mississippi House Bill 1523 (2016)	1a
APPENDIX B: MEMORANDUM OPINION AND ORDER, United States District Court for the Southern District of Mississippi (June 30, 2016)	12a
APPENDIX C: OPINION, United States Court of Appeals for the Fifth Circuit (June 22, 2017)	92a
APPENDIX D: ORDER, United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc	113a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>ACLU of Ill. v. City of St. Charles</i> , 794 F.2d 265 (7th Cir. 1986).....	20
<i>Awad v. Ziriox</i> , 670 F.3d 1111 (10th Cir. 2012).....	4, 9, 13, 14
<i>Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet</i> , 512 U.S. 687 (1994).....	3
<i>Catholic League for Religious & Civil Rights v. City of San Francisco</i> , 624 F.3d 1043 (9th Cir. 2010).....	<i>passim</i>
<i>Cty. of Allegheny v. ACLU</i> , 492 U.S. 573 (1989).....	17
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	2
<i>Doe v. Tangipahoa Par. Sch. Bd.</i> , 494 F.3d 494 (5th Cir. 2007).....	17
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	13, 17
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984).....	3, 15
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n</i> , 137 S. Ct. 2290 (June 26, 2017).....	21
<i>McCreary Cty. v. ACLU of Ky.</i> , 545 U.S. 844 (2005).....	2, 17
<i>Moore v. Bryant</i> , 853 F.3d 245 (5th Cir. 2017).....	16

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Moss v. Spartanburg Cty. Sch. Dist. Seven</i> , 683 F.3d 599 (4th Cir. 2012).....	4, 9, 10, 20
<i>Murray v. City of Austin</i> , 947 F.2d 147 (5th Cir. 1991).....	9
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	5
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000).....	3, 15, 17
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963).....	17
<i>Suhre v. Haywood Cty.</i> , 131 F.3d 1083 (4th Cir. 1997).....	10
<i>Town of Greece v. Galloway</i> , 134 S.Ct. 1811 (2014).....	16
<i>Valley Forge Christian College v. Americans United for Separation of Church & State</i> , 454 U.S. 464 (1982).....	11, 19

CONSTITUTION

U.S. Const. art. III.....	9, 15
U.S. Const. amend. I	<i>passim</i>

STATUTES

28 U.S.C. § 1254(l).....	1
Miss. Code Ann. § 11-62-1 <i>et seq.</i> (2016) ("HB 1523")	<i>passim</i>

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
CB Condez, “Mississippi Governor: Christians Would Line Up for Crucifixion Before Abandoning Faith,” CHRISTIAN TIMES (June 2, 2016), http://www.christiantimes.com/article/mississippigovernor-christians-would-line-up-for-crucifixion-before-abandoning-faith/56411.htm	6
Geoff Pender, “Lawmaker: State Could Stop Marriage Licenses Altogether,” CLARION-LEDGER (June 27, 2015), http://www.clarionledger.com/story/politicalledger/2015/06/26/bryant-gay-marriage/29327433	5
Press Release, Governor Phil Bryant, Governor Bryant Issues Statement on Supreme Court Obergefell Decision (June 26, 2015), http://www.governorbryant.ms.gov/Pages/_Governor-Bryant-Issues-Statement-on-Supreme-Court-Obergefell-Decision.aspx	5

PETITION FOR WRIT OF CERTIORARI

Petitioners Campaign for Southern Equality and The Rev. Dr. Susan Hrostowski respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (App. 92a) is published at 860 F.3d 345. The Fifth Circuit's order denying rehearing en banc (App. 113a) is not yet reported. The order of the district court (App. 12a) is published at 193 F. Supp. 3d 667.

JURISDICTION

The Fifth Circuit entered its judgment on June 22, 2017 and denied a timely petition for rehearing en banc on September 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment's Establishment Clause states: "Congress shall make no law respecting an establishment of religion"

The entirety of Mississippi House Bill 1523 ("HB 1523") is attached as App. 1a-11a to this petition. Section 2 of HB 1523 identifies the following "sincerely held religious beliefs or moral convictions" for special protection under Mississippi Law:

- (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.

INTRODUCTION

The United States has a long tradition of religious accommodation. When laws impose burdens on the free exercise of religion, government often provides exemptions out of respect for liberty of conscience. There are, however, settled limits on the accommodation of religion. Under the Establishment Clause, government may not structure accommodations in ways that have the purpose of promoting religious beliefs, endorsing or discriminating against religious beliefs, or shifting unreasonable hardship to other citizens. *See McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860–61 (2005); *Cutter v. Wilkinson*, 544 U.S. 709, 722–24 (2005). While this rule sometimes requires close calls, the unconstitutionality of HB 1523 is not one of them. Despite Respondents' effort to describe it as an ordinary accommodation, HB 1523 is anything but. It is anomalous in scope and structure, and evokes the most fundamental Establishment Clause concerns.

HB 1523 is a statute that singles out three "religious beliefs or moral convictions" for preferred treatment under Mississippi law. Under HB 1523, persons who act in a manner "consistent with" the beliefs that (1) "[m]arriage is or should be recognized as the union of one man and one woman," (2) "[s]exual relations are properly reserved to such marriage," or (3) male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth" are immune from adverse state action

and from personal liability for such conduct in a wide variety of contexts. App. 2a.

HB 1523 is flatly inconsistent with the guarantees of the Establishment Clause of the First Amendment. Although a state may accommodate the rights of religious adherents, the accommodation must be neutral. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703–07 (1994). A state cannot prefer one religious viewpoint over another in deciding whose conduct to shield from regulation. HB 1523 is not a neutral, constitutional accommodation: it singles out certain religious viewpoints for special promotion and protection, affronting the dignity and the rights protected under the Establishment Clause of those with other religious beliefs (including Petitioners). HB 1523 thus sends an unmistakable message to adherents of the three preferred religious beliefs “that they are insiders, favored members of the political community,” and sends a message to non-adherents, like Petitioners, “that they are outsiders, not full members of the political community.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

The Fifth Circuit nevertheless held that Petitioners lacked standing to challenge HB 1523, reasoning that Petitioners had not “personally confronted” HB 1523. App. 103a. The Court of Appeals contrasted Petitioners’ case with those of plaintiffs who have successfully challenged government religious displays. App. 101a–103a. In those cases, the Court of Appeals observed, the plaintiffs had personally confronted the government’s message when they visually encountered a religious symbol. *Id.* But HB 1523, the court wrote, is like a “warehoused monument,” since people “cannot

confront statutory text.” App. 103a. On this basis, the Fifth Circuit held that Petitioners lacked injury-in-fact for their Establishment Clause challenge. App. 105a.

The Fifth Circuit’s decision “falls into grievous error, unjustifiably creates a split from . . . sister circuits, and rejects pertinent Supreme Court teachings.” App. 126a (Dennis, J., dissenting from denial of rehearing en banc). Obviously, a statute is not like a religious display; it does not necessarily send its message visually. Rather, it stigmatizes adherents of disfavored religions simply by virtue of governing their lives through state law. Although the Fifth Circuit concluded that nobody is injured by HB 1523 today, by its own logic, that would change if the Governor were to decide to display its text in big, neon letters on a sign on his lawn in front of the Governor’s mansion. That would be an absurd way to limit standing in a case like this one. Other courts have recognized as much: The Fourth, Ninth, and Tenth Circuits have all held that, under the Establishment Clause, stigmatic harm is sufficient to challenge a law or official policy that governs conduct in one’s own community. See *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012); *Awad v. Ziriax*, 670 F.3d 1111, 1120–24 (10th Cir. 2012); *Catholic League for Religious & Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1050–53 (9th Cir. 2010) (en banc).

This case is important. HB 1523 is not a shield for the faithful so much as a sword against non-adherents. HB 1523’s effect—indeed, its intent—is to stigmatize Mississippians, like Petitioners, who hold religious beliefs contrary to those that Mississippi has decided to promote and protect. This stigma is an injury-in-

fact that gives Petitioners standing to challenge HB 1523 under the Establishment Clause. The Court should grant this petition to correct the Fifth Circuit's error and resolve the clear circuit split it created.

STATEMENT OF THE CASE

After this Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that states must issue marriage licenses to same-sex couples), the decision was met with overt hostility in Mississippi. State leaders characterized the case as an attack on the religious beliefs held by the majority of Mississippians. Governor Phil Bryant complained that the case forced “standards” on states that are “certainly out of step with the majority of Mississippians.” App. 22a. (quoting Press Release, Governor Phil Bryant, Governor Bryant Issues Statement on Supreme Court Obergefell Decision (June 26, 2015), http://www.governorbryant.ms.gov/Pages/_Governor-Bryant-Issues-Statement-on-Supreme-Court-Obergefell-Decision.aspx). Speaker of the Mississippi House, Philip Gunn, pledged “to protect the rights” of Mississippi’s “Christian citizens.” *Id.* (quoting Geoff Pender, “Lawmaker: State Could Stop Marriage Licenses Altogether,” CLARION-LEDGER (June 27, 2015), <http://www.clarionledger.com/story/politcalledger/2015/06/26/bryant-gay-marriage/29327433>).

Speaker Gunn made good on this promise when he introduced HB 1523 in the Mississippi legislature on February 8, 2016. ROA.16-60478.764. After limited debate, HB 1523 was signed by Governor Bryant on April 5, 2016, less than a year after *Obergefell* was decided. The bill immunizes from adverse state action and personal liability persons who act “based upon or in a manner consistent with” the belief that (1) “[m]arriage 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,” or (3) male and female “refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.” App 1a–6a (§§ 2, 3). Under the sections of HB 1523 that follow: school guidance counselors may refuse to counsel a student, App. 3a (§ 3(4)); doctors, notwithstanding professional standards and state regulations, may refuse to treat a patient in certain contexts which include psychological, counseling, and fertility services, *id.*; state employees may refuse to serve same-sex couples seeking marriage licenses and ceremonies, App. 5a (§ 3(8)); and, persons may refuse to provide car-service rentals, sell jewelry or a wedding dress, or provide other marriage-related services, App. 4a (§ 3(5)(b)).

In passing HB 1523, state leaders made no attempt to hide their intent to single out a preferred religious viewpoint for special protection. The Mississippi legislature’s widely broadcasted hearings were replete with “sectarian references” and “invo[cations of] Christian doctrine.” *See, e.g.*, ROA.16-60475.1808:5–17, 1816:19–1817:15; *see also* ROA.16-60478.32–33, ¶¶ 61–64. State Representative Dan Eubanks, a co-sponsor of HB 1523, for example, declared that the law “protect[s] . . . what I am willing to die for and [what] I hope you that claim to be Christians are willing to die for as well and that is your beliefs.” ROA.16-60478.1786:17–20. Governor Bryant, in defending HB 1523 after it was signed, vowed that “if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and savior, Jesus Christ.” App. 49a. (quoting CB Condez, “Mississippi Governor: Christians Would Line Up for Crucifixion Before Abandoning Faith,” CHRISTIAN TIMES (June 2, 2016), <http://www.christiantimes.com/article/mississi>

ppigovernor-christians-would-line-up-for-crucifixionbefore-abandoning-faith/56411.htm).

Although HB 1523 was scheduled to go into effect on July 1, 2016, Petitioners successfully sued to enjoin its enforcement on the ground that it violates the Establishment Clause. At the trial on Petitioners' motion for a preliminary injunction, Joce Pritchett, a member of Petitioner Campaign for Southern Equality, testified that HB 1523 made her family feel "like we were being attacked . . . pursued, bullied by our own government." ROA.16-60478.1280:13–14; ROA.16-60478.1283:20–1284:7. Petitioner Rev. Hrostowski testified that when the Mississippi legislature adopted HB 1523, "all that fear, all of that insecurity [came] back. . . . [Y]ou 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.

The district court found the Petitioners had standing to challenge HB 1523 because "they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State's disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a message that the state government is unwilling to protect them." App. 42a. As the district court explained: "The enactment of HB 1523 is much more than a 'psychological consequence' with which [Petitioners] disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others." *Id.* The district court preliminarily enjoined the statute because Petitioners

were substantially likely to succeed on their claim that HB 1523 violates the Establishment Clause. App. 88a–89a.

On June 22, 2017, a panel of the Fifth Circuit Court of Appeals reversed. The panel did not address HB 1523 on the merits. Instead, the panel limited its discussion to its conclusion that Petitioners lacked standing to challenge HB 1523 because they had not “personally confront[ed]” HB 1523’s alleged endorsement of religion. App. 103a.

Petitioners petitioned for rehearing *en banc*, but the petition was denied with Judge James L. Dennis, joined by Judge James E. Graves, Jr., dissenting. Judge Dennis wrote that the Fifth Circuit opinion “misconstrues and misapplies the Establishment Clause precedent.” App. 117a. Petitioners had standing to sue under the Establishment Clause, he wrote, because “[i]n cases involving challenges to laws or official policies in the plaintiffs’ own communities, the stigmatic harm suffered by non-adherents is sufficient to establish an injury-in-fact.” *Id.* Petitioners’ challenge was not governed by Fifth Circuit precedent requiring a “physical confrontation” because it deals “neither with a religious exercise nor with a religious display.” App. 125a. Rather, it is an “official policy that deems a non-adherent plaintiff an ‘outsider’ in his own community” causing clear stigmatic harm, which is “sufficient to confer standing.” App. 126a. Judge Dennis concluded: “By denying standing in the present case, the panel opinion falls into grievous error, unjustifiably creates a split from our sister circuits, and rejects pertinent Supreme Court teachings.” *Id.*

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT CREATED A CIRCUIT SPLIT ON AN IMPORTANT QUESTION OF ESTABLISHMENT CLAUSE STANDING

The Fifth Circuit held that Petitioners lacked standing under the Establishment Clause because their injury stems from the State's endorsement of certain religious beliefs in a statute rather than in a physical "religious display" that Petitioners encountered visually, such as a "religious symbol on [a] public utility bill." App. 103a (citing *Murray v. City of Austin*, 947 F.2d 147, 150 (5th Cir. 1991)). In other words, according to the Fifth Circuit, Mississippi can write explicit religious endorsement and discrimination into its legal code—which governs the lives of its citizens—but no citizen can challenge this establishment until that statutory text is printed on a postcard and mailed out to citizens of the state.

This rule is utterly divorced from the purposes of Article III standing and the Establishment Clause. Not surprisingly, only the Fifth Circuit takes this restrictive view of when a state-sanctioned legislative or executive pronouncement may inflict Article III injury by communicating religious exclusion and condemnation to adherents of particular religious beliefs. The Fourth, Ninth, and Tenth Circuits, by contrast, have held that a plaintiff can "personally confront" and be injured by such a state-sanctioned message, thereby giving rise to Article III standing. See *Moss*, 683 F.3d 599; *Awad*, 670 F.3d 1111; *Catholic League*, 624 F.3d 1043.

In *Moss*, a Jewish student and her father alleged that a school policy permitting students to receive

transfer credits for their participation in off-campus Christian religious instruction violated the Establishment Clause, even though the student had not sought transfer credits in connection with any off-campus Jewish religious instruction. 683 F.3d at 602–03.¹ The Fourth Circuit held that plaintiffs had standing because such a policy “favoring” Christianity and “disfavoring” other religions, including Judaism, made them feel like “outsiders” in their own community. *Id.* at 607. While the court recognized that “disagreement with a government policy. . . taken alone, is not sufficient to prove spiritual injury” it held that an individual who is “‘spiritual[ly] affront[ed]’ as a result of ‘direct’ and ‘unwelcome’ contact with an alleged religious establishment within their community” has satisfied the standing requirements. *Id.* at 605 (quoting *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086–87 (4th Cir. 1997)). Thus, according to the Fourth Circuit, “[f]eelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context.” *Moss*, 683 F.3d at 607.

The Fifth Circuit’s decision clearly cannot be squared with *Moss*. In *Moss*, the Fourth Circuit recognized that one of the “core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion ‘that they are outsiders. . . .’” *Id.* at 607 (quoting *McCreary Cty. v. ACLU of Ky.*, 545 U.S. at 860). This is exactly what HB 1523 does. Like the school policy in *Moss*, HB 1523

¹ Indeed, the student’s only “confrontation” with the transfer credit policy in *Moss* was the fact that her father had received a promotional letter in the mail describing the Christian course that was available. 683 F.3d at 607.

creates a privileged and preferred set of religious beliefs that receive special treatment and consequently inflicts feelings of “marginalization and exclusion” upon those who do not subscribe to those beliefs, including the Petitioners in this case. Petitioner Rev. Hrostowski directly testified to the fact that HB 1523 communicates to her, as a religious person, that she is disfavored by her own state government. ROA.16-60478.1207:7-1208:13.

In *Catholic League*, a Catholic civil rights organization and two Catholics living in San Francisco challenged an official resolution passed by the San Francisco Board of Supervisors. 624 F.3d at 1047. The plaintiffs alleged that the government resolution—which condemned Cardinal Levada’s directive to the Archdiocese of San Francisco that Catholic adoption agencies should not place children with same-sex couples—violated the Establishment Clause. *Id.* at 1047–48. The Ninth Circuit held that the official city resolution caused plaintiffs “spiritual or psychological harm.” *Id.* at 1050–55. The court referenced a multitude of other contexts in which this Court has treated standing as “sufficient . . . even though nothing was affected but the religious or irreligious sentiments of the plaintiffs” including, for example, the harm inflicted on certain individuals during school-sanctioned prayer at a football game. *Id.* at 1049–50.

The Ninth Circuit acknowledged that this Court’s decision in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982), limits standing in the Establishment Clause context when the psychological consequence at issue is “merely disagreement with the government.” *Catholic League*, 624 F.3d at 1052. But the court explained that this is not the case when “the

psychological consequence [is] exclusion or denigration on a religious basis within the political community.” *Id.* In other words, “government condemnation of one’s own religion or endorsement of another’s in one’s own community” has been found to inflict a “psychological consequence” that is sufficient to confer standing under the Establishment Clause. *Id.* Ultimately, the Ninth Circuit held that by “stigmatiz[ing]” plaintiffs and “leav[ing] them feeling like second-class citizens” the anti-Catholic resolution at issue in *Catholic League* caused real harm and plaintiffs’ injury. *Id.* at 1052–53.

Like the ordinance in *Catholic League*, HB 1523 not only seeks to elevate particular religious viewpoints but also to disparage alternative religious beliefs. As a result, HB 1523 causes clear “psychological consequences” for those individuals, like Petitioners, with different religious beliefs. Petitioners suffer “psychological consequences” as the result of the words of and intent behind HB 1523, which makes them feel that their religion is “less legitimate.” ROA.16-60478.1185:25–1186:8. Like the plaintiffs in *Catholic League*, the root of Petitioners’ injury is “not speculative,” but is the meaning communicated by the words of the statute and the clear, public statements of the intent behind it. *Id.* at 1052.

In a footnote, the Fifth Circuit conceded that an ordinance condemning Catholic beliefs *could* be challenged. App. 106a, n.9 (citing *Catholic League*, 624 F.3d at 1052). However, the panel asserts that HB 1523 is different because its “religious effects” are “ancillary.” *Id.* This distinction cannot be taken seriously. The Fifth Circuit squarely held that only a personal, physical confrontation confers Establishment Clause standing. Nothing in its reasoning could

possibly justify or explain a carve-out for laws with “non-ancillary” stigmatizing effects. Respectfully, it appears as though the Fifth Circuit included this footnote for the sole purpose of evading the appearance of a circuit split. Apart from that footnote, applying the Fifth Circuit’s reasoning here to the facts in *Catholic League* would unquestionably compel a different outcome. On their face, these decisions are irreconcilable.

The “ancillary”/“non-ancillary” theory—which otherwise has no basis in precedent—does not distinguish this case from *Catholic League* in any event. Here, as there, the challenged statute has open and notorious “religious effects” that operate directly on non-adherents. While HB 1523 is not phrased as an outright condemnation of Petitioners’ beliefs, it excludes and disparages them—and is widely understood to do so—while simultaneously elevating the religious beliefs it endorses to an exalted status in the state. To suggest that HB 1523’s stigmatizing effects are only “ancillary” is to miss the fundamental point of the law. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”).

The Fifth Circuit also split from the Tenth Circuit’s decision in *Awad*. 670 F.3d 1111. In *Awad*, the court considered a Muslim citizen’s challenge to a state constitutional amendment, proposed by the Oklahoma Legislature and approved by voters, which forbade Oklahoma courts from considering or using Sharia law. *Id.* at 1117–18. The court found that *Awad* suffered harm that “stems from a . . . directive of exclusion and disfavored treatment of a particular

religious legal tradition.” *Id.* at 1123. The court emphasized that by “impos[ing] a constitutional command,” the amendment was “more than a message”; the amendment exposed Awad to “disfavored treatment” which “suffices to establish the kind of direct injury-in-fact necessary to create Establishment Clause standing.” *Id.* No other basis for standing was required. *Id.*

Like the constitutional amendment in *Awad*, HB 1523 is a state directive that exposes Petitioners to “disfavored treatment” on the basis of their religious beliefs. Under *Awad*, the Tenth Circuit found that such a state-approved “command” was in itself sufficient to establish injury. The record demonstrates that Petitioners’ exposure to HB 1523 results in similar harm. *See. e.g.*, ROA.16-60478.1280:11–1281:4. By legally sanctioning differential treatment on the basis of religious belief, HB 1523 also subjects Petitioners to “condemn[ation] of [their] religious faith and exposes [them] to disfavored treatment.” *Id.* at 1122.

The Fifth Circuit attempted to distinguish *Awad* because Awad also alleged that implementation of the amendment would impact him directly by preventing the Oklahoma court from probating his will. App. 106a. However, the Tenth Circuit did not rely on this injury-in-fact when making its standing decision. The court found 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 on its own to establish the kind of direct injury-in-fact necessary to create Establishment Clause standing.” *Awad*, 670 F.3d at 1123. As a result, an alternate form of standing was not required.

II. THE FIFTH CIRCUIT'S STANDING ANALYSIS IS INCORRECT

The Fifth Circuit's conclusion that no Petitioner has shown Article III injury is inconsistent with the settled rule that government-inflicted disparagement and exclusion are injuries under the Establishment Clause. This Court has repeatedly made clear that when the government coerces, stigmatizes, or discriminates against nonadherents of particular beliefs, it violates the Establishment Clause. There are many ways a government can create such stigma.

One of the most obvious ways a government can create such a stigma is by passing a discriminatory law or policy that favors a particular religion or religious practice while disparaging others. This Court has previously found such policies unconstitutional. In *Santa Fe Independent School District v. Doe*, a school's policy permitting student-initiated prayer at a school football game was held to be unconstitutional. 530 U.S. at 316. In its analysis, this Court remarked that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community. . . .'" *Id.* at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1994) (O'Connor, J., concurring)). The Court found that the state's "mere passage . . . of a policy that has the purpose and perception of government establishment of religion" causes cognizable harm under the Establishment Clause. *Santa Fe*, 530 U.S. at 314. Ultimately, because the "simple enactment" of a policy permitting such prayer violated the Constitution, the Court found

that it “need not wait for the inevitable to confirm and magnify the constitutional injury.” *Id.* at 316.

HB 1523, through its preference of particular religious values, is a paradigmatic example of a law that stigmatizes nonadherents simply through its enactment. Like the school’s policy in *Santa Fe*, it sends a clear message to Petitioners, who do not adhere to the beliefs protected under HB 1523, that they are outsiders in their political community. It is evident through both the text of the statute and the legislative intent behind it, that HB 1523 had the purpose of establishing a preferred religion and “denigrat[ing] nonbelievers or religious minorities,” which this Court has found is problematic in the Establishment Cause context. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (explaining that the analysis for prayer at a town meeting that was found to be constitutional would be different if “the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities”).

The Fifth Circuit was also incorrect in finding that this case conflicts with the Court’s requirement that, in order to challenge an alleged unconstitutional endorsement under the Establishment Clause, a person must directly and personally encounter or confront the government’s message of religious endorsement or denigration. *See* App. 104a–105a; *see also Moore v. Bryant*, 853 F.3d 245, 249–50 (5th Cir. 2017). In making such a finding, the Fifth Circuit relied on its own precedent that a government act only creates stigma if it is physically presented in a monument or written out and distributed. App. 103a.

But this Court has held that a constitutionally prohibited message can arise in many different contexts. As a matter of circumstance, Establishment

Clause cases have often arisen in two specific contexts: religious displays and school or public prayer. *See, e.g., Santa Fe*, 530 U.S. at 294–301; *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 579–89 (1989). People who have seen a government message involving a religious display, whether that symbol appears on public property, *Cty. of Allegheny*, 492 U.S. at 581–89 or in a public building, *McCreary Cty.*, 545 U.S. at 850–51, have been held to have standing to sue. Similarly people who have challenged school prayer at a football game, *Santa Fe*, 530 U.S. at 294, a religious invocation at a graduation, *Lee v. Weisman*, 505 U.S. at 581–87, or bible reading at a public school, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 203–05 (1963), have been held to have standing. In each of these circumstances, the court has found standing based on the fact that state action has indicated a religious preference that injured plaintiffs.

The Fifth Circuit has become accustomed to a specific vision of what it means to directly and personally confront a government message. App. 105a (relying on *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc), to find that standing requires proof of exposure); *see also Tangipahoa Par. Sch. Bd.*, 494 F.3d at 497 (finding that people who actually hear an impromptu religious invocation in a government setting have standing to sue but those with only “mere abstract knowledge that invocations were said” do not). However, as other Courts of Appeal have recognized, the fact that this Court’s decisions have been limited by context does not mean that citizens cannot directly and personally encounter or confront a government message of religious endorsement or denigration in the context of a statute as well. *See, e.g., Catholic League*, 624 F.3d at 1050 (finding that a city ordinance inflicted “spiritual or psycho-

logical harm” just like cases involving displays on government land). In fact, the differences between prayer invocations and displays as compared to statutes only strengthen Petitioners’ arguments for standing.

There is no more powerful vehicle for state speech than through its laws; laws are overarching, binding, and imposed on all citizens. Citizens are generally expected to know and respect the law of the land. Statutes, unlike displays or prayers, cannot be hidden or avoided in order to limit an individual’s “personal confrontation.” All Mississippi residents are bound by the laws enacted by the state; there is no “hiding” from HB 1523. The inability to “hide” is only magnified by the Internet, which transmitted the statutory text, the legislators’ statements in support of it, and even the Governor’s vow to be crucified for it directly and instantaneously into the homes of Mississippi constituents. Thus, the fact that a law exists evokes the presumption that the state’s citizens are aware of its message.

When it comes to HB 1523, there can be no legitimate question about the message that the Mississippi government is sending and no question that Mississippi citizens have confronted that message. In ruling that Petitioners did not personally confront the objective message being conveyed by Mississippi through HB 1523, the Fifth Circuit failed to take into account the context of everyday reality in Mississippi. Furthermore, the Fifth Circuit ignored the considerable evidence in the record that people like Rev. Hrostowski and Joce Pritchett have confronted HB 1523’s unmistakable message that they, their families, and their religions are now officially outsiders in their own state and community. *See,*

e.g., ROA.16-60478.1207:8–1208:13, 1209:14–1210:24, 1213:24–1214:1, 1280:9–1281:4.

Undoubtedly, standing to challenge such laws on the basis of stigmatic consequences is not unlimited; it is only permitted in circumstances when plaintiffs are directly impacted by the law. In *Valley Forge*, this Court held that 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. 454 U.S. at 486–87. The Court in *Valley Forge* found that the only psychological consequence the D.C. plaintiffs suffered was by “observation of conduct with which one disagrees.” *Id.* at 485.

Valley Forge stands for the basic requirement that plaintiffs be directly impacted by the government act in question. By comparing the injuries of the *Valley Forge* plaintiffs to the injuries of Petitioners, the Fifth Circuit overlooked the key fact that HB 1523 labels Petitioners themselves as lesser citizens in their *own* community. While Petitioners are directly impacted by HB 1523, a law in their own state that targets religious values and identity, the plaintiffs in *Valley Forge* were observers of a constitutional violation in another jurisdiction. Here, Petitioners are not simply observers.

III. THE QUESTION PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE

HB 1523 is a new and highly controversial approach to religious accommodation that is without precedent in any other state. This approach raises unique and serious Establishment Clause problems.

HB 1523 unconstitutionally singles out specific religious viewpoints for protection while other reli-

gious viewpoints on the same issues remain unprotected. Three other features of the bill then exacerbate this constitutional violation. First, the law is categorical—it does not allow for consideration of other government or private interests that might be burdened by accommodating the enumerated beliefs. Second, it is exempt from Mississippi’s own Religious Freedom Restoration Act. App. 11a (§ 10). Finally, the bill covers speech or conduct that is “consistent with” the enumerated beliefs—it does not require that a burden on religion actually exist.

By failing to find that Petitioners had standing to challenge HB 1523, the Fifth Circuit necessarily passed upon and rejected the significant merits issues of the challenge, namely whether the Establishment Clause permits this type of endorsement. *See Moss*, 683 F. 3d at 607 (finding “[f]eelings of marginalization and exclusion are cognizable forms of injury” under the Establishment Clause and then considering the underlying claim). If the panel’s decision stands, 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. 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 or mandate Southern Baptist morning prayer at schools. 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).

The Court's grant of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017) further elevates the importance of the standing question raised by Petitioners in this case. In *Masterpiece*, the Court will consider whether, under the Free Speech or Free Exercise clauses, the state can permissibly compel business owners to create expression that violates their religious beliefs. Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop* (No. 16-111). Regardless of the outcome in *Masterpiece*, laws like HB 1523 are likely to continue to be used, maybe even more so, to permit the elevation of particular religious beliefs and ensure protection for a host of discriminatory actions.

For these reasons, the practical consequences of the Fifth Circuit's ruling on Establishment Clause standing are significant. The Court should grant review to resolve this important and pressing issue.

IV. THIS CASE OFFERS AN IDEAL VEHICLE TO RESOLVE THE ISSUE

This case is the ideal circumstance to resolve the issue of whether the stigmatic harm resulting from a state statute is sufficient injury-in-fact to confer standing for a claim under the Establishment Clause. The case presents no issues that would prevent the Court from adjudicating the question presented. Ultimately, this case affords the Court a uniquely appropriate vehicle through which to address a question of national importance on which there is a clear circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAREN JANGHORBANI

JOSHUA D. KAYE

PAUL, WEISS, RIFKIND,

WHARTON & GARRISON LLP

1285 Avenue of the Americas

New York, NY 10019

ALYSSON MILLS

KRISTEN AMOND

FISHMAN HAYGOOD, LLP

201 St. Charles Avenue

Suite 4600

New Orleans, LA 70170

ROBERTA KAPLAN

Counsel of Record

JOSHUA MATZ

RACHEL TUCHMAN*

KYLA MAGUN*

KAPLAN & COMPANY, LLP

350 Fifth Avenue

Suite 7110

New York, NY 10118

(212) 763-0883

rkaplan@kaplanand

company.com

*Not yet admitted to the bar

Counsel for Petitioners

October 30, 2017

APPENDIX

1a

APPENDIX A

MISSISSIPPI LEGISLATURE
2016 Regular Session

To: Judiciary B

By: Representatives Gunn, Arnold, Bounds, Carpenter,
Gipson, Shirley, Boyd, Eubanks

House Bill 1523

(As Sent to Governor)

AN ACT TO CREATE THE “PROTECTING FREEDOM OF CONSCIENCE FROM GOVERNMENT DISCRIMINATION ACT”; TO PROVIDE CERTAIN PROTECTIONS REGARDING A SINCERELY HELD RELIGIOUS BELIEF OR MORAL CONVICTION FOR PERSONS, RELIGIOUS ORGANIZATIONS AND PRIVATE ASSOCIATIONS; TO DEFINE A DISCRIMINATORY ACTION FOR PURPOSES OF THIS ACT; TO PROVIDE THAT A PERSON MAY ASSERT A VIOLATION OF THIS ACT AS A CLAIM AGAINST THE GOVERNMENT; TO PROVIDE CERTAIN REMEDIES; TO REQUIRE A PERSON BRINGING A CLAIM UNDER THIS ACT TO DO SO NOT LATER THAN TWO YEARS AFTER THE DISCRIMINATORY ACTION WAS TAKEN; TO PROVIDE CERTAIN DEFINITIONS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. This act shall be known and may be cited as the “Protecting Freedom of Conscience from Government Discrimination Act.”

SECTION 2. The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that:

2a

(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.

SECTION 3. (1) The state government shall not take any discriminatory action against a religious organization wholly or partially on the basis that such organization:

(a) Solemnizes or declines to solemnize any marriage, or provides or declines to provide services, accommodations, facilities, goods or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act;

(b) Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act; or

(c) Makes any decision concerning the sale, rental, occupancy of, or terms and conditions of occupying a dwelling or other housing under its control, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(2) The state government shall not take any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(3) The state government shall not take any discriminatory action against a person who the state grants custody of a foster or adoptive child, or who seeks from the state custody of a foster or adoptive child, wholly or partially on the basis that the person guides, instructs or raises a child, or intends to guide, instruct, or raise a child based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(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 or declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. This subsection (4) shall not be construed to allow any person to deny 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.

(5) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person has provided or

declined to provide the following services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act:

(a) Photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services; or

(b) Floral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods.

(6) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

(7) The state government shall not take any discriminatory action against a state employee wholly or partially on the basis that such employee lawfully speaks or engages in expressive conduct based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act, so long as:

(a) If the employee's speech or expressive conduct occurs in the workplace, that 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; or

(b) If the employee's speech or expressive conduct occurs outside the workplace, that speech or expressive conduct is in the employee's personal capacity and outside the course of performing work duties.

(8) (a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal.

(b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the Administrative Office of Courts,

6a

and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The Administrative Office of Courts shall take all necessary steps to ensure that the performance or solemnization of any legally valid marriage is not impeded or delayed as a result of any recusal.

SECTION 4. (1) As used in this act, discriminatory action includes any action taken by the state government to:

(a) Alter in any way the tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, revoke, or otherwise make unavailable an exemption from taxation of any person referred to in Section 3 of this act;

(b) Disallow, deny or otherwise make unavailable a deduction for state tax purposes of any charitable contribution made to or by such person;

(c) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any state grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, or other similar benefit from or to such person;

(d) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any entitlement or benefit under a state benefit program from or to such person;

(e) Impose, levy or assess a monetary fine, fee, penalty or injunction;

(f) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any license, certification,

accreditation, custody award or agreement, diploma, grade, recognition, or other similar benefit, position, or status from or to any person; or

(g) Refuse to hire or promote, force to resign, fire, demote, sanction, discipline, materially alter the terms or conditions of employment, or retaliate or take other adverse employment action against a person employed or commissioned by the state government.

(2) The state government shall consider accredited, licensed or certified any person that would otherwise be accredited, licensed or certified, respectively, for any purposes under state law but for a determination against such person wholly or partially on the basis that the person believes, speaks or acts in accordance with a sincerely held religious belief or moral conviction described in Section 2 of this act.

SECTION 5. (1) A person may assert a violation of this act as a claim against the state government in any judicial or administrative proceeding or as defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party.

(2) An action under this act may be commenced, and relief may be granted, in a court of the state without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(3) Violations of this act which are properly governed by Chapter 46, Title 11, Mississippi Code of 1972, shall be brought in accordance with that chapter.

SECTION 6. An aggrieved person must first seek injunctive relief to prevent or remedy a violation of this act or the effects of a violation of this act. If injunctive relief is granted by the court and the injunction is thereafter violated, then and only then may the aggrieved party, subject to the limitations of liability set forth in Section 11-46-15, seek the following:

- (a) Compensatory damages for pecuniary and nonpecuniary losses;
- (b) Reasonable attorneys' fees and costs; and
- (c) Any other appropriate relief, except that only declaratory relief and injunctive relief shall be available against a private person not acting under color of state law upon a successful assertion of a claim or defense under this act.

SECTION 7. A person must bring an action to assert a claim under this act not later than two (2) years after the date that the person knew or should have known that a discriminatory action was taken against that person.

SECTION 8. (1) This act shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the state and federal constitutions.

(2) The protection of free exercise of religious beliefs and moral convictions afforded by this act are in addition to the protections provided under federal law, state law, and the state and federal constitutions. Nothing in this act shall be construed to preempt or repeal any state or local law that is equally or more protective of free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to

narrow the meaning or application of any state or local law protecting free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to prevent the state government from providing, either directly or through an individual or entity not seeking protection under this act, any benefit or service authorized under state law.

(3) This act applies to, and in cases of conflict supersedes, each statute of the state that impinges upon the free exercise of religious beliefs and moral convictions protected by this act, unless a conflicting statute is expressly made exempt from the application of this act. This act also applies to, and in cases of conflict supersedes, any ordinance, rule, regulation, order, opinion, decision, practice or other exercise of the state government's authority that impinges upon the free exercise of religious beliefs or moral convictions protected by this act.

SECTION 9. As used in Sections 1 through 9 of this act, the following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(1) "State benefit program" means any program administered or funded by the state, or by any agent on behalf of the state, providing cash, payments, grants, contracts, loans or in-kind assistance.

(2) "State government" means:

(a) The State of Mississippi or a political subdivision of the state;

(b) Any agency of the state or of a political subdivision of the state, including a department, bureau, board, commission, council, court or public institution of higher education;

10a

- (c) Any person acting under color of state law; and
 - (d) Any private party or third party suing under or enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state.
- (3) "Person" means:
- (a) A natural person, in his or her individual capacity, regardless of religious affiliation or lack thereof, or in his or her capacity as a member, officer, owner, volunteer, employee, manager, religious leader, clergy or minister of any entity described in this section;
 - (b) A religious organization;
 - (c) A sole proprietorship, or closely held company, partnership, association, organization, firm, corporation, cooperative, trust, society or other closely held entity operating with a sincerely held religious belief or moral conviction described in this act; or
 - (d) Cooperatives, ventures or enterprises comprised of two (2) or more individuals or entities described in this subsection.
- (4) "Religious organization" means:
- (a) A house of worship, including, but not limited to, churches, synagogues, shrines, mosques and temples;
 - (b) A religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; and
 - (c) An officer, owner, employee, manager, religious leader, clergy or minister of an entity or organization described in this subsection (4).

11a

(5) "Adoption or foster care" or "adoption or foster care service" means social services provided to or on behalf of children, including:

- (a) Assisting abused or neglected children;
 - (b) Teaching children and parents occupational, homemaking and other domestic skills;
 - (c) Promoting foster parenting;
 - (d) Providing foster homes, residential care, group homes or temporary group shelters for children;
 - (e) Recruiting foster parents;
 - (f) Placing children in foster homes;
 - (g) Licensing foster homes;
 - (h) Promoting adoption or recruiting adoptive parents;
 - (i) Assisting adoptions or supporting adoptive families;
 - (j) Performing or assisting home studies;
 - (k) Assisting kinship guardianships or kinship caregivers;
 - (l) Providing family preservation services;
 - (m) Providing family support services; and
 - (n) Providing temporary family reunification services.
- SECTION 10. The provisions of Sections 1 through 9 of this act shall be excluded from the application of Section 11-61-1.

SECTION 11. This act shall take effect and be in force from and after July 1, 2016.

APPENDIX B

UNITED STATES DISTRICT COURT, S.D.
MISSISSIPPI, NORTHERN DIVISION.

CAUSE NO. 3:16-CV-417-CWRLRA,
CAUSE NO. 3:16 CV-442-CWR-LRA

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

Plaintiffs

v.

PHIL BRYANT, GOVERNOR; JIM HOOD, ATTORNEY
GENERAL; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE
MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; AND
JUDY MOULDER, STATE REGISTRAR OF VITAL RECORDS,

Defendants

Signed 06/30/2016

Robert B. McDuff, Jacob W. Howard, Sibyl C. Byrd,
McDuff & Byrd, Beth L. Orlansky, Charles O. Lee,
Jackson, MS, John C. Jopling, Joseph Reilly Morse,
Biloxi, MS, for Plaintiffs.

Tommy D. Goodwin, Paul E. Barnes, Mississippi Attorney General's Office, Jackson, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

Carlton W. Reeves, UNITED STATES DISTRICT JUDGE

The plaintiffs filed these suits to enjoin a new state law, "House Bill 1523," before it goes into effect on July 1, 2016. They contend that the law violates the First and Fourteenth Amendments to the United States Constitution. The Attorney General's Office has entered its appearance to defend HB 1523. The parties briefed the relevant issues and presented evidence and argument at a joint hearing on June 23 and 24, 2016.

The United States Supreme Court has spoken clearly on the constitutional principles at stake. Under the Establishment Clause of the First Amendment, a state "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (citation omitted). Under the Equal Protection Clause of the Fourteenth Amendment, meanwhile, a state may not deprive lesbian and gay citizens of "the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, 517 U.S. 620, 630, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

HB 1523 grants special rights to citizens who hold one of three “sincerely held religious beliefs or moral convictions” reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells “nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quotation marks and citation omitted). And the Equal Protection Clause is violated by HB 1523’s authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.

“It is not within our constitutional tradition to enact laws of this sort.” *Romer*, 517 U.S. at 633, 116 S.Ct. 1620. The plaintiffs’ motions are granted and HB 1523 is preliminarily enjoined.

I. The Parties

A. Plaintiffs

The plaintiffs in this matter are 13 individuals and two organizations—Joshua Generation Metropolitan Community Church (JGMCC) and the Campaign for Southern Equality (CSE).

All of the individual plaintiffs are residents, citizens, and taxpayers of Mississippi who disagree with

the beliefs protected by HB 1523. They fall into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects.

The first group includes Rev. Dr. Rims Barber, Rev. Carol Burnett, Rev. Don Fortenberry, Brandiilyne Mangum-Dear, Susan Mangum, and Rev. Dr. Susan Hrostowski. Rev. Dr. Barber is an ordained minister in the Presbyterian church. Rev. Burnett is an ordained United Methodist minister. Rev. Fortenberry is an ordained United Methodist minister and the retired chaplain of Millsaps College. Mangum-Dear is the pastor at JGMCC, while Mangum is the director of worship at that church. Rev. Dr. Hrostowski is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as an employee of the University of Southern Mississippi.

Katherine Elizabeth Day, Anthony (Tony) Laine Boyette, Dr. Susan Glisson, and Renick Taylor comprise the second group of plaintiffs.¹ Day is a transgender woman; Boyette is a transgender man. Dr. Glisson, an employee of the University of Mississippi, is unmarried and in a longterm sexual romantic relationship with an unmarried man. Taylor is a gay man who is engaged to his male partner. The couple plans to marry in the summer of 2017.

The third group of individual plaintiffs includes Joan Bailey, Derrick Johnson, and Dorothy Triplett.

¹ Mangum-Dear, Mangum, and Rev. Dr. Hrostowski also fall into this group.

Bailey is a retired therapist whose practice was primarily devoted to lesbians. Johnson is the Executive Director of the Mississippi State Conference of the NAACP, and Triplett is a retired government employee and a longtime activist.

JGMCC is a ministry in Forrest County, Mississippi, whose members fall into all three categories. It “welcomes all people regardless of age, race, sexual orientation, gender identity, or social status.” Docket No. 1, ¶ 16, in Cause No. 3:16-CV-417 [hereinafter *Barber*]. In particular, the church sponsors “a community service ministry that promotes LGBT+ equality.” *Id.* Approximately 90% of its members in Forrest County identify as LGBT. Transcript of Hearing on Motion for Preliminary Injunction at 168, *Barber v. Bryant*, No. 3:16-CV-417 (S.D. Miss. June 23, 2016) [hereinafter *Tr. of June 23*]. There are over 400 Metropolitan Community Churches worldwide. *Id.*

CSE is a non-profit organization that works “across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life.” Docket No. 2-2, at 2, in Cause No. 3:16-CV-442 [hereinafter *CSE IV*]. It is based in North Carolina but has worked in Mississippi since 2012. *Id.* CSE claims to advocate for Mississippians in all three categories of plaintiffs. *Id.* at 4.

B. Defendants

Governor Phil Bryant is sued in his official capacity as the chief executive of the State of Mississippi. State law charges him with the responsibility to “see that the laws are faithfully executed.” Miss. Code Ann. § 7-1-5(c).

Attorney General Jim Hood is also sued in his official capacity. Among his powers and duties, he is

required to “intervene and argue the constitutionality of any statute when notified of a challenge.” *Id.* § 7 5-1; see *In the Interest of R.G.*, 632 So.2d 953, 955 (Miss.1994).

John Davis is the Executive Director of the Mississippi Department of Human Services. Under Mississippi Code § 43-1-2(5), he is tasked with implementing state laws protecting children. One of the offices under his purview, the Division of Family and Children’s Services, is “responsible for the development, execution and provisions of services” regarding foster care, adoption, licensure, and other social services. Miss. Code Ann. § 43-1-51.²

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for “carry[ing] into effect the provisions of law relating to registration of marriages.” *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523 § 3(8)(a).

II. Factual and Procedural History

A. Same-Sex Marriage

Because HB 1523 is a direct response to the Supreme Court’s 2015 same-sex marriage ruling, it is necessary to discuss the background of that ruling.

² During the 2016 legislative session, Mississippi’s lawmakers created the Department of Child Protective Services, a stand-alone agency independent of the Department of Human Services. See 2016 Miss. Laws, SB 2179. The new department was created upon passage, but the bill allows a transition period of up to two years. *Id.*

This country had long debated whether lesbian and gay couples could join the institution of civil marriage. See, e.g., Andrew Sullivan, *Here Comes the Groom*, *The New Republic*, Aug. 27, 1989. The debate played itself out on the local, state, and national levels via constitutional amendments, legislative enactments, ballot initiatives, and propositions.

In its most optimistic retelling, “[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views.” *Obergefell v. Hodges*, — U.S. —, 135 S.Ct. 2584, 2627, 192 L.Ed.2d 609 (2015) (Scalia, J., dissenting). *But see* David Carter, *Stonewall: The Riots that Sparked the Gay Revolution* 109-10, 183-84 (2004) (describing the 1966 Compton’s Cafeteria riots by transgender citizens in San Francisco, and the famous 1969 Stonewall riots in New York City). Less charitably, but also true, is the reality that every time lesbian and gay citizens moved one step closer to legal equality, voters and their representatives passed new laws to preserve the status quo.

In the 1990s, for example, Hawaii’s same-sex marriage lawsuit inspired the federal Defense of Marriage Act (DOMA) and a wave of state-level “mini-DOMAs.” *Campaign for Southern Equality v. Bryant*, 64 F.Supp.3d 906, 915 (S.D.Miss. 2014) [hereinafter *CSE I*]. Mississippi’s politicians joined the movement by issuing an executive order and passing a law banning same-sex marriage. *Id.* It was not until 2013 that DOMA was struck down in part. *United States v. Windsor*, — U.S. —, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). Mississippi’s mini-DOMA lasted until 2015. *CSE I*, 64 F.Supp.3d at 906.

In the early 2000s, *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, cases that found in

favor of lesbian and gay privacy and marriage rights, respectively, resulted in a wave of state constitutional amendments banning same-sex marriage. *CSE I*, 64 F.Supp.3d at 915. Mississippians approved such a constitutional amendment by the largest margin in the nation. *Id.*; see Michael Foust, ‘*Gay Marriage*’ a Loser: Amendments Pass in all 11 States, Baptist Press, Nov. 3, 2004.

The lawfulness of same-sex marriage was finally resolved in 2015. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage “on the same terms and conditions as opposite-sex couples.” 135 S.Ct. at 2605. The decision applies to every governmental agency and agent in the country. “The majority of the United States Supreme Court dictates the law of the land, and lower courts are bound to follow it.” *Campaign for Southern Equality v. Mississippi Dep’t of Human Servs.*, 175 F.Supp.3d 691, 710, 2016 WL 1306202, at *14 (S.D.Miss. Mar. 31, 2016) [hereinafter *CSE III*].

Many celebrated the ruling as overdue. Others felt like change was happening too quickly.³ And some citizens were concerned enough to advocate new laws “to insulate state officials from legal risk if they do not obey the decision based on a religious objection.”⁴ Lyle

³ It is fair to say that same-sex marriage rights went “from unthinkable to the law of the land in just a couple of decades.” Nate Silver, *Change Doesn’t Usually Come This Fast*, FiveThirtyEight, June 26, 2015.

⁴ Sadly, this was predicted years ago. In 1999, four members of Congress expressed concern that religious freedom legislation “would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, lesbians

Denniston, *A Plea to Resist the Court on Same-Sex Marriage*, SCOTUSblog, July 9, 2015.

The Supreme Court's decision *had* taken pains to reaffirm religious rights. Its commitment to the free exercise of religion is important and must be quoted in full.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Obergefell, 135 S.Ct. at 2607.

“As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to

and gays.” H.R. Rep. No. 106-219, at 41 (1999), *available at* 1999 WL 462644.

voice their personal objections—this, too, is an essential part of the conversation but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals” Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015). *Obergefell*’s author, Justice Kennedy, had also reaffirmed this principle in *Burwell v. Hobby Lobby Stores*. “[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests.” — U.S. —, 134 S.Ct. 2751, 2786–87, 189 L.Ed.2d 675 (2014) (Kennedy, J., concurring).

In the immediate wake of *Obergefell*, the Fifth Circuit issued a published opinion declaring that “*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court.” *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir.2015) [hereinafter *CSE II*]. The court issued the mandate forthwith. *Id.*

A few hours later, with this mandate in hand, this Court issued a Permanent Injunction and a Final Judgment enjoining enforcement of Mississippi’s statutory and constitutional same-sex marriage ban. The Attorney General’s Office soon advised Circuit Clerks to issue marriage licenses “to same-sex couples on the same terms and conditions accorded to couples of the opposite sex.” *In re Steve Womack*, 2015 WL 4920123, at *1 (Miss. A.G. July 17, 2015).

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable

overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to HB 1523. The next chapter of this back-and-forth has begun.

B. House Bill 1523

Mississippi's highest elected officials were displeased with *Obergefell*. Governor Bryant stated that *Obergefell* “usurped [states’] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians.”⁵ Governor Phil Bryant, *Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, June 26, 2015.⁶

⁵ Governor Bryant’s statement is only partially true. While states have mostly been permitted to regulate marriage within their borders, the Supreme Court has stepped in to ensure that “self-governance” complies with equal protection. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (“Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State’s citizens of liberty without due process of law.”).

⁶ The Governor’s remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* “represents an unwarranted invasion of the rights and powers of the states.” Charles C. Bolton, William F. Winter and the New Mississippi: A Biography 97 (2013). In 1962, before a joint session of the Mississippi Legislature—and to a “hero’s reception”—Governor Ross Barnett was lauded for invoking states’ rights during the battle to integrate the University of Mississippi. Charles W. Eagles, *The Price of Defiance: James Meredith and*

Legislative leaders felt similarly. Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an “overreach of the federal government.” Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, The Clarion-Ledger, June 26, 2015.⁷ Speaker of the House Philip Gunn said *Obergefell* was “in direct conflict with God’s design for marriage as set forth in the Bible. The threat of this decision to religious liberty is very clear.” *Id.*⁸ Representative Andy Gipson, Chairman of

the Integration of Ole Miss 290-91 (2009) [hereinafter Price of Defiance].

⁷ The State has objected to the Court’s use of newspaper articles. In an Establishment Clause challenge, however, a District Court errs when it takes “insufficient account of the context in which the statute was enacted and the reasons for its passage.” *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010). The Fifth Circuit agrees: “context is critical in assessing neutrality” in this area of the law. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir.2001).

⁸ Using God as a justification for discrimination is nothing new. It was Governor Barnett who proclaimed that “[t]he Good Lord was the original segregationist. He made us white, and he intended that we stay that way.” Price of Defiance at 282. Warping the image of God was not reserved to Mississippi politicians. In testimony before Congress during the debate on the Civil Rights Act of 1964, a Maryland businessman testified before a Senate committee that “God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth.” Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways”*, 95 B.U. L. Rev. 891, 917 (2015). He continued, “Christ himself never lived an integrated life, and . . . when he chose His close associates, they were all white. This doesn’t mean that He didn’t love all His creatures, but it does indicate that He didn’t think we had to have all this togetherness in order to go to heaven.” *Id.*

the House Judiciary B Committee, pledged to study whether Mississippi should stop issuing marriage licenses altogether. *Id.*⁹

The angst was not limited to the executive and legislative branches. Two Justices of the Mississippi Supreme Court also expressed their disgust with *Obergefell*. In 2014, a lesbian had petitioned that body for the right to divorce her wife in a Mississippi court. *Czekala–Chatham v. State ex rel. Hood*, 195 So.3d 187, 2015 WL 10985118 (Miss. Nov. 5, 2015). While her case was pending, the U.S. Supreme Court handed-down *Obergefell*. Although a majority of the Mississippi Supreme Court concluded that *Obergefell* resolved her case in her favor, Justices Dickinson and Coleman argued that the *Obergefell* Court had legislated from the bench and overstepped its authority. *Id.* at *3 (Dickinson, J., dissenting). They opined that “state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation,” and claimed “a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than . . . an exercise in judicial will.” *Id.* at *4, *6.¹⁰

⁹ The suggestion was (again) familiar. A few months after the Supreme Court’s decision in *Brown*, Mississippians—those who were permitted to vote, that is—“voted two to one approving a constitutional amendment abolishing the state schools system if it integrated.” Dennis J. Mitchell, *A New History of Mississippi* 404 (2014).

¹⁰ *But see James v. City of Boise, Idaho*, — U.S. —, 136 S.Ct. 685, 686, 193 L.Ed.2d 694 (2016) (per curiam) (“The Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law. The state court erred in concluding otherwise.”).

Obergefell was “[w]orthy only to be disobeyed,” they said. *Id.* at *5.

Mississippi’s legislators formally responded to *Obergefell* in the next legislative session.¹¹ Speaker Gunn drafted and introduced HB 1523, the “Protecting Freedom of Conscience from Government Discrimination Act.”¹² The bill overwhelmingly passed both chambers, and the Governor signed it into law on April 5, 2016. It goes into effect on July 1.

HB 1523’s meaning is contested. A layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts. Arielle Dreher, *Hundreds Rally to Repeal HB 1523, State Faces Deadline Today Before Lawsuit*, Jackson Free Press, May 2, 2016 (quoting Chad Griffin, President of the Human Rights Campaign, as saying, “it’s sweeping and allows almost any individual or organization to justify discrimination

¹¹ This had happened before in the religious liberty context. In 1994, “[o]n a wave of public sentiment and indignation over the treatment of a Principal . . . who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here.” *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir.1996). The statute was unconstitutional. *Id.*

¹² “After the Supreme Court decision in *Obergefell* (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay marriage and the right to gay marriage created by the decision,’ [Speaker] Gunn said.” Adam Ganucheau, *Mississippi’s ‘Religious Freedom’ Law Drafted Out of State*, Mississippi Today, May 17, 2016. One commentator concluded that “HB 1523 was hatched” after the issuance of this Court’s Permanent Injunction. Sid Salter, *Constitutional Ship has Sailed on Same-Sex Marriage*, The Clarion-Ledger, May 8, 2016. “Clearly, House Bill 1523 seeks to work around the federal *Obergefell* decision at the state level.” *Id.*

against LGBT people, against single mothers and against unwed couples.”). Someone else reading the same article might conclude that HB 1523 simply “reinforces” the First Amendment. *Id.* (quoting Speaker Gunn as saying the gay community “can do the same things that they could before”). So any discussion should begin with the plain text of the bill.

HB 1523 enumerates three “sincerely held religious beliefs or moral convictions” entitled to special legal protection. They are,

- (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.

HB 1523 § 2. These will be referred to as the “§ 2” beliefs.

The bill then says that the State of Mississippi will not “discriminate” against persons who act pursuant to a § 2 belief. *Id.* §§ 3-4.¹³ For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State “discrimination.”

“Discrimination” is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and

¹³ HB 1523 § 9(2)-(3) defines “State government” to include private persons, corporations, and other legal entities.

so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other enumerated things, for your § 2 beliefs. *Id.*¹⁴ An organization or person who acts on a § 2 belief is essentially immune from State punishment.¹⁵

The Governor’s signing statement recognized that consequences under federal law are unchanged. States “lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.” *Haywood v. Drown*, 556 U.S. 729, 736, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009).

Parts of the law provide fodder for both its opponents and its proponents. One section of HB 1523 guarantees that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief. *Id.* § 3. There is nothing new or controversial about that section. Religious organizations already have that right under the Free Exercise Clause of the First Amendment.

Citizens also enjoy substantial religious rights under existing state law. The Mississippi Constitution ensures that “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred,” and “no preference shall be given by law to

¹⁴ This is more expansive than other antidiscrimination laws, such as Title VII or Title IX.

¹⁵ The broad immunity provision may violate the Mississippi Constitution, which provides that “every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” Miss. Const. § 24.

any religious sect or mode of worship.”¹⁶ Miss. Const., § 18. In addition, a 2014 law called the “Mississippi Religious Freedom Restoration Act” (RFRA) states that the government “may substantially burden a person’s exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest.” Miss. Code Ann. § 11 61-1(5)(b) (emphasis added). HB 1523 does not change either of these laws.¹⁷

We return to HB 1523. Several parts of the bill are unclear. One says the State will not take action against foster or adoptive parents who intend to raise a foster or adoptive child in accordance with § 2 beliefs. HB 1523 § 3(3). It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian.

Another section discusses a professional’s right to refuse to participate in “psychological, counseling, or fertility services” because of a § 2 belief. *Id.* § 3(4). But

¹⁶ Despite the inclusive language just quoted, § 18 of the Mississippi Constitution then says that “[t]he rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school.”

¹⁷ Mississippi’s RFRA is also part of the political back-and-forth on LGBT rights. “State-based RFRA were passed to preemptively provide religious exemptions to people in advance of a Supreme Court ruling on gay marriage, [Professor Doug] NeJaime said.” Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, *The Atlantic*, Sept. 23, 2015. Mississippi’s RFRA fits this timeline perfectly. In summer 2013, the Supreme Court’s ruling in *United States v. Windsor* foreshadowed an imminent victory for same-sex marriage. A few months later, Mississippi’s elected officials enacted the State RFRA.

some professions' ethical rules prohibit "engag[ing] in discrimination against prospective or current clients . . . based on . . . gender, gender identity, sexual orientation, [and] marital/partnership status," to name a few categories. American Counseling Association, Code of Ethics § C.5 (2014). Under HB 1523, though, a public university's faculty must confer a degree upon, and the State must license, a person who refuses to abide by her chosen profession's Code of Ethics.¹⁸

Section 3(8)(a) of the law, in contrast, is crystal clear. It says that a government employee with authority to issue marriage licenses may recuse herself from that duty if it would violate one of her § 2 beliefs. HB 1523 § 3(8)(a). The employee must provide prior written notice to the State Registrar of Vital Records and be prepared to "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* The State's attorneys agree that this section "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages." Docket No. 41, at 6, in Cause No. 3:14 CV-818.

The significance of this section is in the eye of the beholder. The plaintiffs argue that it facilitates discrimination against LGBT Mississippians by encouraging clerks to opt-out of serving same-sex couples.

¹⁸ Relatedly, in other states, citizens have successfully sued so-called "gay conversion" therapists for consumer fraud and professional malpractice. See Olga Khazan, *The End of Gay Conversion Therapy*, *The Atlantic*, June 26, 2015. HB 1523 § 4 would bar a Mississippi court from enforcing such a verdict.

HB 1523’s defenders respond that the bill protects *against* discrimination by ensuring that clerks do not have to violate their religious beliefs. When Senator Jenifer Branning shepherded the bill through the Senate floor debate, she argued that the legislation actually *lifts* a burden imposed by *Obergefell*.¹⁹ H.B. 1523, Debate on the Floor of the Mississippi Senate, at 7:02 (Mar. 31, 2016) (statement of Sen. Jenifer Branning) [hereinafter Senate Floor Debate]. In her view, HB 1523 is “balancing” legislation allowing those who oppose same-sex marriage to continue to perform their jobs with a “clear conscience,” while protecting the rights of same-sex couples to receive a marriage license from another clerk. *Id.* at 26:55, 32:27.²⁰

C. These Suits

On June 3, 2016, Rev. Dr. Barber, Rev. Burnett, Bailey, Day, Boyette, Rev. Fortenberry, Dr. Glisson, Johnson, Triplett, Taylor, Mangum-Dear, Mangum,

¹⁹ Mississippi does not have formal legislative history; however, the Mississippi College School of Law’s Legislative History Project archives the floor debate for bills that pass. The HB 1523 videos are available at <http://law.mc.edu/legislature/billdetails.php?id=4621&session=2016>. Unofficial transcripts were also introduced into evidence. See Docket No. 33-14, in *CSE IV*.

²⁰ These arguments are apparently increasingly common. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2560-61 (2015) (arguing that proponents of traditional morality “now emphasize different justifications for excluding same-sex couples from marriage—for example, that marriage is about biological procreation or that preserving ‘traditional marriage’ protects religious liberty. At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.”).

and JGMCC filed the first suit encompassed by this Order. *See* Docket No. 1, in *Barber*. They asserted Establishment and Equal Protection claims against Governor Bryant, General Hood, Executive Director Davis, and Registrar Moulder. *Id.* They requested a declaratory judgment that HB 1523 is unconstitutional on its face, as well as preliminary and permanent injunctive relief enjoining its enforcement.

CSE and Rev. Dr. Hrostowski sued the same defendants on June 10, 2016. *See* Docket No. 1, in *CSE IV*. They asserted an Establishment Clause claim and sought the same relief as the *Barber* plaintiffs. *Id.*

The various plaintiffs conferred and moved to consolidate. The State was prepared to argue *Barber*, but objected to consolidation to avoid an abbreviated briefing schedule and a hearing in *CSE IV*. *See* Docket No. 22, in *Barber*. During a status conference, the Court heard the parties' positions and granted the State its requested response deadline. The Court also delayed the motion hearing—which was converted into a joint hearing—by two days. The State renewed its objection to the consolidated hearing and was overruled. These reasons follow.

The State essentially argued that there were too many HB 1523-related lawsuits there are four—to fully prepare for a hearing in *CSE IV*. It entered into the record a Mississippi Today article in which General Hood said, “I and over half of our lawyers in the Civil Litigation Division are working overtime and weekends attempting to prepare for the hearings.” Docket No. 22-2, in *Barber*. General Hood added that budget cuts prevented him from hiring an expert to prepare “for the highly specialized area of the law seldom litigated in Mississippi—the Establishment Clause.” *Id.* (ellipses omitted).

The first hurdle for the State is the substantial overlap in subject matter between *Barber* and *CSE IV*. The similar briefing suggests that little additional work was required to defend *CSE IV*. *Barber*, in fact, has a greater number of substantive claims than *CSE IV*. Having prepared for the more comprehensive hearing, it is difficult for the State to object to the narrower one.

The second, more significant problem with the State's argument is the utter predictability of these lawsuits. The media started reporting the likelihood of litigation on April 5, the day the Governor signed HB 1523 into law. *See, e.g.,* Arielle Dreher, '*Total Infringement: Governor Signs HB 1523 Over Protests of Business Leaders, Citizens*', Jackson Free Press, Apr. 5, 2016 ("You will see several lawsuits filed before it becomes law if the governor signs it," one attorney said); Caray Grace, '*Local Residents and City Leaders React to House Bill 1523*', WLOX, Apr. 5, 2016 ("the lawyers were already starting to draft up lawsuits so that as soon as he signed it, they could start filing them," said [Molly] Kester.').

General Hood apparently knew these lawsuits were coming as early as April 5, when he said he would make "case-by-case" decisions on whether to defend the lawsuits, and warned that the bill doesn't override federal or constitutional rights. *Legal Pressure May Be Ahead for Mississippi Law Denying Service to Gays*, Chicago Tribune, Apr. 5, 2016.

The media even telegraphed the exact Establishment Clause arguments the plaintiffs eventually asserted. In early April, the press reported that 10 law professors from across the country released a memorandum outlining several ways in which HB 1523 violates the Establishment Clause. *See* Sierra Mannie, *Will*

Mississippi's "Religious Freedom" Act Impact Children in Public and Private Schools?, The Hechinger Report, Apr. 8, 2016. In May, Jackson attorney Will Manuel, a partner at Bradley LLP, said, “[b]y only endorsing certain religious thought, I believe it is in violation of the Establishment Clause of the First Amendment which prohibits government from establishing or only protecting one religion. That should be a fairly clear cut constitutional challenge.” Ted Carter, *Feds Unlikely to Ignore Mississippi's HB1523*, *Lawyers Say*, Mississippi Business Journal, May 26, 2016; *see also* Arielle Dreher, *HB 1523: Bad for the Business Sector*, Jackson Free Press, June 8, 2016 (noting other legal concerns).

Perhaps the State’s best argument against a hearing in *CSE IV* was that it would be unprepared to cross-examine religion experts because it did not have time to find its own expert.²¹ Its objection fell flat when its attorneys filed the article in which General Hood said that *budget cuts* caused the lack of expert assistance.²² If budget cuts explain the State’s lack of expert assistance, no extension of time could have helped it prepare for a hearing.

For these reasons, the hearings were consolidated. Now, having considered the evidence and heard oral argument, the motions for preliminary injunction have been consolidated into this Order. The cases remain

²¹ The Court has sought to understand what kind and amount of evidence would show a forbidden religious preference. In this case, it finds the plain language of HB 1523 and basic knowledge of local religious beliefs to be sufficient. Today’s outcome is informed by but does not turn on the expert testimony heard in *CSE IV*.

²² It also weakens the State’s objection to the Court’s use of newspaper articles.

their separate identities pending further motion practice.

That brings us to the State's initial legal arguments.

III. Threshold Questions

A. Standing

The State first challenges the plaintiffs' capacity to bring these suits.

The United States Constitution limits the jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (quotation marks and citation omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

As the party seeking to invoke this Court's jurisdiction, the plaintiffs must demonstrate all three elements of standing: (1) an injury in fact that is concrete and particularized as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In a standing analysis, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501–02, 95 S.Ct.

2197, 45 L.Ed.2d 343 (1975). Standing is not handed out in gross. *CSE III*, 175 F.Supp.3d at 698–99, 2016 WL 1306202, at *2. A case with multiple plaintiffs can move forward as long as one plaintiff has standing as to each claim. *CSE I*, 64 F.Supp.3d at 916.

1. Injury in Fact

To establish an injury in fact, the plaintiffs must show “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (quotation marks and citation omitted). An injury is particularized if it “affect[s] the plaintiff in a personal and individual way.” *Id.* at 560 n. 1, 112 S.Ct. 2130. An injury is concrete when it is “real, not abstract.” *Spokeo, Inc. v. Robins*, — U.S. —, 136 S.Ct. 1540, 1556, 194 L.Ed.2d 635 (2016) (quotation marks and citation omitted). Intangible injuries can satisfy the concreteness requirement. *Id.* at 9. A plaintiff must demonstrate “that he has sustained or is immediately in danger of sustaining some direct injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (quotation marks and citations omitted).

a. Equal Protection Injuries

The *Barber* plaintiffs in category two—*i.e.*, the LGBT plaintiffs and Dr. Glisson—allege that HB 1523 violates their rights under the Equal Protection Clause of the Fourteenth Amendment.²³ Claims under the

²³ In discussing the Equal Protection claim, references to LGBT citizens should also be read to include unmarried-but-sexually-active citizens. The latter group may have been a collateral consequence of HB 1523.

Equal Protection Clause can include both tangible and intangible injuries. As noted in *Heckler v. Matthews*,

discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. 728, 739–40, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (quotation marks and citation omitted). “Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing’s injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine.” *CSE I*, 64 F.Supp.3d at 917 (quotation marks and citation omitted).

The State first challenges standing on the basis that the plaintiffs’ injuries are speculative and not imminent, arguing that the plaintiffs have not alleged the denial of any right or benefit as a result of HB 1523. It points to *Clapper v. Amnesty International, USA*, which held that “[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.” — U.S. —, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (quotation marks and citation omitted).

This language, however, supports that the plaintiffs *do* have imminent injuries. If it goes into effect on July 1, plaintiffs say, HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses.

The plaintiffs also say that HB 1523 will limit the protections LGBT persons currently have under state, county, city, and public school anti-discrimination policies. In the City of Jackson, for example, a municipal ordinance provides protection from discrimination on the basis of religion, sexual orientation, and gender identity, among other characteristics. Docket No. 32-17, in *Barber*. This ordinance protects several of the plaintiffs. *Id.* The plaintiffs then point to University of Southern Mississippi's (USM) anti-discrimination policy, which guarantees equal access to "educational, programmatic and employment opportunities without regard to" religion, sexual orientation, or gender identity. Docket No. 32-18, in *Barber*. If HB 1523 goes into effect, USM's policy cannot be fully enforced. USM employees who invoke a § 2 belief will enjoy enhanced protection to decline to serve others on the basis of sexual orientation, and USM will not be able to discipline those employees who violate its internal anti-discrimination policy.²⁴

In this context, the imminent injury to the plaintiffs, other LGBT persons, and unmarried persons is exactly the same as the injury recognized by the Supreme

²⁴ Imagine that two USM students, who are a gay couple, walk into the cafeteria but are refused service because of the worker's religious views. Could that employee be disciplined for refusing service? It is not clear what remedy they would have to remove the sting of humiliation.

Court in *Romer*. In striking down an amendment to Colorado’s constitution, the Court found that:

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions Not confined to the private sphere, Amendment 2 also operates to repeal and forbid laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

517 U.S. at 629, 116 S.Ct. 1620.

A closer analogue is difficult to imagine. As in *Romer*, HB 1523 “withdraws from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others, specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies.” *Id.* at 627, 116 S.Ct. 1620. If individuals had standing to file *Romer* before Amendment 2 went into effect, these plaintiffs may certainly do the same.

The State’s argument overlooks the fundamental injurious nature of HB 1523 the establishment of a broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status. This type of differential treatment is the hallmark of what is prohibited by the Fourteenth Amendment. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) (“The [Equal Protection] Clause announces a fundamental principle: the

State must govern impartially.”). To put it plainly, the plaintiffs’ injuries are “certainly impending” today, and without Court intervention, the plaintiffs will suffer actual injuries. *Clapper*, 133 S.Ct. at 1147.

The State then argues that the plaintiffs lack standing because they are not the “objects” of HB 1523. The argument comes from *Lujan*’s statement that “standing depends considerably upon whether the plaintiff is himself an object of the” government’s action or inaction at issue. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The true objects of the law, the State claims, are those persons who want to freely exercise a § 2 belief. Docket No. 30, at 18, in *Barber*.

The Court is not persuaded. A robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens. At oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*, stating, “after *Obergefell*, citizens who hold the beliefs that are protected by 1523 were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*.” Transcript of Hearing on Motion for Preliminary Injunction at 324, *Barber v. Bryant*, No. 3:16-CV-417 (S.D. Miss. June 24, 2016) [hereinafter Tr. of June 24].

It is therefore difficult to accept the State’s implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer. *See Romer*, 517 U.S. at 626, 116 S.Ct. 1620.

Members of the LGBT community and persons like Dr. Glisson will suffer a concrete and particular injury as a result of HB 1523. Part of the injury is stigmatic, *see CSE I*, 64 F.Supp.3d at 917, but that stigmatic

injury is linked to the tangible rights that will be taken away on July 1, including the tangible rights *Obergefell* extended. There are almost endless explanations for how HB 1523 condones discrimination against the LGBT community, but in its simplest terms it denies LGBT citizens equal protection under the law. Thus, those plaintiffs who are members of the LGBT community, as well as Dr. Glisson, have demonstrated an injury in fact sufficient to bring their Equal Protection claim.

b. Establishment Clause Injuries

All plaintiffs have asserted Establishment Clause claims.

In Establishment Clause actions, the injury in fact requirement may vary from other types of cases. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 194 (5th Cir.2006). “The concept of injury for standing purposes is particularly elusive in Establishment Clause cases.” *Id.*

Plaintiffs can demonstrate “standing based on the direct harm of what is claimed to be an establishment of religion” or “on the ground that they have incurred a cost or been denied a benefit on account of their religion.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129–30, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011). Courts also recognize that taxpayers have standing to challenge direct government expenditures that violate the Establishment Clause. *Id.* at 138–39, 131 S.Ct. 1436; *see Flast*, 392 U.S. at 106, 88 S.Ct. 1942. The Supreme Court has found standing in a wide variety of Establishment Clause cases “even though nothing was affected but the religious or irreligious sentiments of the plaintiffs.” *Catholic League for Religious & Civil Rights v. City & Cnty. of San*

Francisco, 624 F.3d 1043, 1049–50 (9th Cir.2010) (en banc) (collecting cases).

In *Croft v. Governor of Texas*, the Fifth Circuit concluded that a citizen had standing to challenge a public school’s daily moment of silence because his children were enrolled in the school and were required to observe the moment of silence. 562 F.3d 735, 746 (5th Cir.2009) [hereinafter *Croft I*]. This injury was sufficient because the plaintiff and his family demonstrated that they were exposed to and injured by the mandatory moment of silence. *Id.* at 746–47.²⁵

In our case, the State contends that the plaintiffs’ alleged non-economic injuries are insufficiently particular and concrete. It cites *Valley Forge Christian College v. Americans United for Separation of Church and State*, which found that:

[the plaintiffs] fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though that disagreement is phrased in constitutional terms.

454 U.S. 464, 485–86, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

In *Valley Forge*, an organization and four of its employees who lived in the Washington D.C. area

²⁵ The Fifth Circuit distinguished *Croft* from *Doe v. Tangipahoa Parish School Board*, where it had declined to find standing in a case challenging prayers at school board meetings because the plaintiffs had never attended a school board meeting.

challenged the constitutionality of a land conveyance from a government agency to a religious-affiliated education program in Pennsylvania. *Id.* at 468–69, 102 S.Ct. 752. The plaintiffs had learned of the land conveyance from a press release. *Id.* at 469, 102 S.Ct. 752. They merely observed the alleged constitutional violation from out-of-state.

The facts in the present case are quite different. Here, the plaintiffs are 13 individuals who reside in Mississippi, a Mississippi church, and an advocacy organization with members in Mississippi. The plaintiffs may have become aware of HB 1523 from news, friends, or social media, but regardless of how they learned of the legislation, it is set to become the law of *their state* on July 1. It will undeniably impact their lives. The enactment of HB 1523 is much more than a “psychological consequence” with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others.

A more applicable case is *Catholic League*. There, the plaintiffs included a Catholic civil rights organization and devout Catholics who lived in San Francisco. 624 F.3d at 1048. They sued over a municipal resolution that expressly denounced Catholicism and the Catholic Church’s beliefs on same-sex couples. *Id.* at 1047. The appellate court found that they had standing to bring such a case against their local government.

Similarly, today’s individual plaintiffs have attested that they are citizens and residents of Mississippi, they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State’s disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a

message that the state government is unwilling to protect them. *See, e.g.*, Docket Nos. 32-2; 32-3; 32-5 (all in *Barber*).

Plaintiff Taylor, for example, is “a sixth-generation Mississippian” and “former Navy combat veteran.” Docket No. 32-8, in *Barber*. He is also a gay man engaged to be married next year. *Id.* Taylor thinks HB 1523 is hostile toward his religious values and targets LGBT persons. *Id.*

Dr. Glisson describes herself as “a member of the Southern Baptist Church cofounded by my grandparents” who has “studied and reflected upon my faith choice almost all my life.” Docket No. 32-6, in *Barber*. “I am convinced that the heart of the Gospel is unconditional love. To condemn the presence of God in another human being, especially using faith claims or scripture to do so, is wrong and violates all of the tenets of my Christian faith.” *Id.*

Dorothy Triplett explained her religious objections in detail. “I am a Christian, and nowhere in scripture does Jesus the Christ condemn homosexuality,” she said. Docket No. 32-9, in *Barber*. “He instructed us to love our neighbors as ourselves. In St. Paul’s Letter to the Galatians 3:28: New Revised Standard Version (NRSV): ‘There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.’” *Id.*

Based on their allegations and testimony, each individual plaintiff has adequately alleged cognizable injuries under the Establishment Clause. The “sufficiently concrete injur[ies]” here are the psychological consequences stemming from the plaintiffs’ “exclusion or denigration on a religious basis within the political

community.” *Catholic League*, 624 F.3d at 1052; see *Awad*, 670 F.3d at 1123.

Their injuries are also imminent. HB 1523 is set to become law on July 1. “There is no need for [the plaintiffs] to wait for actual implementation of the statute and actual violations of [their] rights under the First Amendment where the statute” violates the Establishment Clause. *Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 278 (5th Cir.1996).

2. Causation

The State next argues that the plaintiffs have not shown that their injuries have a causal connection to the defendants’ conduct. It cites *Southern Christian Leadership Conference v. Supreme Court of Louisiana* for the proposition that an injury cannot be the result of a third party’s independent action, and instead must be traceable to the named parties. 252 F.3d 781, 788 (5th Cir.2001). The contention here is that any injuries will be caused by third parties—like a clerk who refuses to promptly issue a marriage license to a same-sex couple—and therefore that the plaintiffs should sue those third parties.

The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. See *Santa Fe*, 530 U.S. at 302, 120 S.Ct. 2266; *Awad v. Ziriox*, 754 F.Supp.2d 1298, 1304 (W.D.Okla.2010). Regardless of any third-party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs’ injuries are therefore caused by the State—and specifically caused by the Governor who signed HB 1523 bill into law—and will at a minimum be enforced by officials like Davis and Moulder.

In addition, in similar cases under the Establishment and Equal Protection Clauses, the Supreme Court has found a state's governor to be a proper defendant for the causal connection requirement of standing. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); *Romer*, 517 U.S. at 620, 116 S.Ct. 1620.

Accordingly, the plaintiffs have demonstrated that there is a causal connection between their injuries and the defendants' conduct.

3. Redressability

The final prong of standing requires the plaintiffs to demonstrate that a favorable judicial decision will redress their grievances. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The State argues that "Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminary enjoins the named Defendants today." Docket No. 30, at 24, in *Barber*. It fails to support this claim with any further argument or facts.

"[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740, 104 S.Ct. 1387 (quotation marks and citation omitted). "By declaring the [statute] unconstitutional, the official act of the government becomes null and void." *Catholic League*, 624 F.3d at 1053.

Here, the harm done by HB 1523 would be halted if the statute is enjoined. Nothing in the plaintiffs' briefs, oral argument, or testimony indicates that they expect a favorable ruling to change the hearts and minds of Mississippians opposed to same-sex marriage, transgender equality, or sex before marriage. They

simply ask the Court to enjoin the enforcement of a state law that both permits arbitrary discrimination based on those characteristics and endorses the majority's favored religious beliefs. That is squarely within the Court's ability. *See Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012).

“Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned.” *Catholic League*, 624 F.3d at 1053.

The Court concludes that the individual plaintiffs have standing to bring these claims.

4. Associational Standing

In some instances, organizations may bring suit on behalf of their members. To establish associational standing, the organization must show that: (1) its members would have standing to sue on their own behalf; (2) the interests it seeks to safeguard are germane to the organization's purpose; and (3) neither the claim asserted nor the requested relief necessitate the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

JGMCC seeks associational standing as a church with many LGBT members and a community service ministry that promotes LGBT+ equality. Because members of the church have standing to bring suit on their own behalf—at least two of its members are individual plaintiffs—the first element of associational standing is satisfied. Ensuring that its members are not discriminated against on the basis of sexual orientation, gender identity, or religion is undoubtedly germane

to its purpose. And JGMCC's facial challenge does not require the participation of individual members. JGMCC has associational standing.

The same is true for CSE. That organization also has a member participating in this lawsuit, is aligned with the arguments and relief sought in this suit, and need not have additional members to assert its particular cause of action. It has associational standing. *Accord CSE I*, 64 F.Supp.3d at 918; *CSE III*, 175 F.Supp.3d at 707–08, 2016 WL 1306202, at *11.

B. *Ex Parte Young*

The next issue is whether these defendants are properly named in this suit.

1. Legal Standard

Under the Eleventh Amendment, citizens cannot sue a state in federal court. U.S. Const. amend. XI; see *Hutto v. Finney*, 437 U.S. 678, 699, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). In *Ex parte Young*, however, the Supreme Court carved out a narrow exception to this rule. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The resulting *Ex parte Young* “fiction” holds that “because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment.” *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir.2001) (en banc). When a plaintiff sues a state official in his official capacity for constitutional violations, the plaintiff is not filing suit against the individual, but instead the official's office, and can proceed with the constitutional claims. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

The *Ex parte Young* fiction requires that the state officer have “some connection with the enforcement of the act” or be “specially charged with the duty to enforce the statute,” and also that the official indicate a willingness to enforce it. *Ex parte Young*, 209 U.S. at 157, 158, 28 S.Ct. 441. The officer’s authority to enforce the act does not have to be found in the challenged statute itself; it is sufficient if it falls within the official’s general duties to enforce related state laws.

“In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Maryland, Inc. v. Public Service Comm’n of Maryland*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quotation marks, citation, and brackets omitted).

2. Discussion

All four defendants—the Governor, the Attorney General, the Executive Director of the Department of Human Services, and the Registrar of Vital Records—are state officials sued in their official capacities. These suits are effectively brought against their various offices. All four defendants also have a connection to the enforcement of HB 1523.

Although Governor Bryant is the chief executive of the State, *Ex parte Young* does not permit a suit against a governor solely on the theory that he is “charged with the execution of all of its laws.” *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441. A more specific causal connection is required. *Id.* That connection is satisfied here. The Governor is the manager and supervisor of his staff, so he is personally required to

enforce HB 1523's terms prohibiting adverse action against any of his employees who exercise a § 2 belief. Since the Governor has also indicated his willingness to enforce HB 1523 to the full extent of his authority, he is a proper defendant. *See* CB Condez, *Mississippi Governor: Christians Would Line up for Crucifixion Before Abandoning Faith*, *The Christian Times*, June 2, 2016 (“[HB 1523’s critics] don’t know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and Savior Jesus Christ,’ [Governor Bryant] said.”).²⁶

In Establishment and Equal Protection Clause cases in particular, governors are often properly included as named defendants. *See Romer*, 517 U.S. at 620, 116 S.Ct. 1620 (Gov. Roy Romer); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (Gov. Edwin W. Edwards); *Wallace*, 472 U.S. at 38, 105 S.Ct. 2479 (Gov. George C. Wallace); *Croft v. Perry*, 624 F.3d 157 (5th Cir.2010) (Gov. Rick Perry, as the sole defendant) [hereinafter *Croft II*]; *Croft I*, 562 F.3d at 735 (same).

General Hood is the state’s chief law enforcement officer, but his general duty to represent the state in litigation is inadequate to invoke the *Ex parte Young* exception. Like the Governor, though, HB 1523 prohibits General Hood from taking any action against one of his employees who acts in accordance with a § 2

²⁶ The Governor’s remarks are reminiscent of what Circuit Judge Tom P. Brady, later Mississippi Supreme Court Justice Brady, warned in his infamous Black Monday Speech. Judge Brady called on others to disobey *Brown v. Board of Education* by saying, “We have, through our forefathers, died before for our sacred principles. We can, if necessary, die again.” Stephen J. Whitfield, *A Death in the Delta: The Story of Emmett Till* 10 (1988).

belief. The Attorney General's Office employs hundreds of people across Mississippi, so he may very well be confronted with an HB 1523 issue.

Executive Director Davis, until authority is formally transferred to the new Department of Child Protective Services, is responsible for administering a variety of social programs. *See* Miss. Code Ann. § 43-1-51. HB 1523 has at least two sections that fall under his purview. *See* HB 1523 § 3(2)-(3). Under HB 1523, for example, DHS cannot take action against a foster or adoptive parent who violates DHS policies based on a § 2 belief. Davis's attorneys have given every impression that he will fully enforce his duties under HB 1523.

As discussed above, Registrar Moulder is responsible for executing state laws concerning registration of marriages. *See* Miss. Code Ann. § 51-57-43. HB 1523 adds a new responsibility to her existing obligations: she must record the recusal of any circuit clerk who refuses to issue a marriage license because of a § 2 belief. HB 1523 § 3(8)(a). Thus, she has a connection with HB 1523's enforcement. Her counsel has also indicated her intent to comply with her new duties.

Lastly, the plaintiffs' requested relief also satisfies the Eleventh Amendment and *Ex parte Young*. In both cases, they have requested declaratory and prospective injunctive relief that would enjoin the enforcement of HB 1523 and prevent state officials from acting contrary to well-established precedent. Courts frequently grant this type of relief against state officials in constitutional litigation. *See, e.g., Romer*, 517 U.S. at 620, 116 S.Ct. 1620; *Wallace*, 472 U.S. at 38, 105 S.Ct. 2479.

Accordingly, the *Ex parte Young* exception to the Eleventh Amendment applies and these suits may proceed to seek declaratory and injunctive relief against these defendants.

IV. Motion for Preliminary Injunction

A. Legal Standard

To receive a preliminary injunction, the movant must show “(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest.” *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir.2012) (citation omitted). “Each of these factors presents a mixed question of fact and law.” *Id.* (citation omitted).

“A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four . . . prerequisites.” *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985).

“The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court’s ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always.” *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974).

B. Substantial Likelihood of Success on the Merits

The movant’s likelihood of success is determined by substantive law. *Valley v. Rapides Parish Sch. Bd.*,

118 F.3d 1047, 1051 (5th Cir.1997). “To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [HB 1523] is constitutional. If the plaintiffs successfully show [it] to be unconstitutional in every application, then that provision will be struck down as invalid.” *Croft II*, 624 F.3d at 164.

1. The Equal Protection Clause

Under the Fourteenth Amendment, a state may not “deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction equal protection of the laws.” U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of this Amendment means that “all persons similarly circumstanced shall be treated alike.” *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citation omitted). The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves concerning personhood and citizenship rights enumerated in the Civil Rights Act of 1866.²⁷

The Equal Protection Clause is no longer limited to racial classifications. That is not because racial discrimination and racial inequality have ceased to exist.

²⁷ United States Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. “This abolishes all class legislation in the States and does away with the injustice subjecting one caste of persons to a code not applicable to another,” he said. “It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man . . . the equal protection of law?” Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

Rather, as discrimination against groups becomes more prominent and understood, we turn to the Equal Protection clause to attempt to level the playing field. Compare *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1872) (denying women equal protection of the laws) with *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (recognizing that women are entitled to equal protection of the laws). “A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *Virginia*, 518 U.S. at 557, 116 S.Ct. 2264; see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) (“The Equal Protection Clause ... has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”). One hundred and fifty years after its passage, the Fourteenth Amendment remains necessary to ensure that all Americans receive equal protection of the laws.

Sexual orientation is a relatively recent addition to the equal protection canon. In 1996, the Supreme Court made it clear that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause. See *Romer*, 517 U.S. at 635, 116 S.Ct. 1620. Seven years later, the Court held that the Constitution protects LGBT adults from government intrusion into their private relationships. See *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

“After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual

orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause.” *Gill v. Devlin*, 867 F.Supp.2d 849, 856 (N.D.Tex.2012). Now, *Obergefell* makes clear that LGBT citizens have “equal dignity in the eyes of the law. The Constitution grants them that right.”135 S.Ct. at 2608.

a. Animus

“The Constitution’s guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group.” *Windsor*, 133 S.Ct. at 2693 (citation omitted). Laws motivated by “an improper animus” toward such a group require special scrutiny. *Id.*

When examining animus arguments, courts look at “the design, purpose, and effect” of the challenged laws. *Id.* at 2689; *see also Romer*, 517 U.S. at 627–28, 116 S.Ct. 1620. The *Windsor* Court, for example, considered DOMA’s title, one House Report from the bill’s legislative history, and the law’s “operation in practice.” *Windsor*, 133 S.Ct. at 2693–94. From these it found that DOMA has a “principal purpose . . . to impose inequality,” places same-sex couples in second-tier relationships, “demeans the couple, whose moral and sexual choices the Constitution protects,” and “humiliates tens of thousand of children now being raised by same-sex couples.” *Id.* at 2694. The Court concluded that “the history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence.” *Id.* at 2693.

Animus was also a critical part of the Court’s analysis in *Romer*, where plaintiffs brought a pre-

enforcement facial challenge to Amendment 2 of the Colorado Constitution. 517 U.S. at 623, 116 S.Ct. 1620. “[T]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from [anti-discrimination] ordinances that had been passed in various Colorado municipalities.” *Id.* Voters approved Amendment 2 to invalidate those ordinances and preclude “all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on the homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” *Id.* at 620, 116 S.Ct. 1620. In striking down Amendment 2 as an unconstitutional act of majority animus against a minority group, the Supreme Court wrote that “[a] state cannot so deem a class of persons a stranger to its laws.” *Id.* at 635, 116 S.Ct. 1620.

The State argues that the plaintiffs have failed to show that the motivation behind the passage of HB 1523 was driven by “animus,” “irrational prejudice,” or “desire to harm” anyone. Docket No. 30, at 36, in *Barber*. Certainly, discerning the actual motivation behind a bill can be treacherous. But *Romer* and *Windsor* are instructive. This Court need only apply *Romer* and *Windsor* to ascertain that the design, purpose, and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law.

1. Design and Purpose

The State says the primary motivating factor behind HB 1523 was to address the denigration and disfavor religious persons felt in the wake of *Obergefell*. Tr. of June 24 at 324, 327. The sponsors of the bill presented

it to their respective chambers as post-*Obergefell* legislation.²⁸ A number of news articles confirmed the same.²⁹

HB 1523's title, the "Protecting Freedom of Conscience from Government Discrimination Act," obviously implies that the purpose of the legislation was to halt governmental discrimination.

The legislative debate fleshes out the intended meaning of that title. Senator Willie Simmons asked whether the government was discriminating against religious citizens. Senate Floor Debate at 28:44. Senator Branning responded, "it potentially could." *Id.* at 28:44. Later, though, she wholeheartedly agreed with one of her colleagues that the government does

²⁸ Representative Gipson said HB 1523 would merely "add an additional layer of protection that currently does not exist in the post-*Obergefell*" world. H.B. 1523, Debate on the Floor of the Mississippi House of Representatives, at 6:24 (Feb. 19, 2016) (statement of Rep. Andy Gipson). Senator Branning introduced HB 1523 as "post-*Obergefell* balancing legislation . . . presenting a solution to the crossroads we find ourselves in today as a result of *Obergefell v. Hodges*." Senate Floor Debate at 2:16, 32:20. She later added that although Mississippians may have religious beliefs against gambling, the death penalty, alcohol, and payday loan interest rates, HB 1523 is "very specific to same-sex marriage." *Id.* at 37:20.

²⁹ As Speaker Gunn said shortly after the decision was handed down, "I don't care what the Supreme Court says. Marriage will always be between one man and one woman in holy matrimony." Emily Wagster Pettus, *House Speaker Protested by Flag Supporters at Neshoba*, Hattiesburg American, July 30, 2015. Representative Andy Gipson agreed. "What the Supreme Court's decision does not and cannot change is the firmly held conviction of faith of myself and most Mississippians. We still believe that marriage is defined by God as the union of one man and one woman." Pender, *supra*. Representative Gipson is correct: the Supreme Court cannot change his beliefs, nor does it intend to.

not want to protect people of faith, and that it is time for people of faith to say, ‘enough is enough.’ *Id.* at 50:30. She agreed that the bill would ensure that LGBT citizens would not be able to sue a baker, florist, or other business for declining to serve them. *Id.* at 53:36. She agreed that the intent of the bill was to “level the playing field,” ensure that certain groups had equal rights but not “special rights,” and not “reverse discriminate against people.” *Id.* at 54:15 (quoting Sen. Filingane).

The Senate debate also revealed another purpose of HB 1523. Senator Simmons asked if a Baptist college’s refusal to employ lesbian and gay citizens was a form of discrimination. *Id.* at 31:29. Senator Branning responded, “if this bill passed, it would not be.” *Id.* at 31:29.

The title, text, and history of HB 1523 indicate that the bill was the State’s attempt to put LGBT citizens back in their place after *Obergefell*. The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were “put in a solitary class with respect to transactions and relations in both the private and governmental spheres” to symbolize their second-class status. *Romer*, 517 U.S. at 627, 116 S.Ct. 1620. As in *Romer*, *Windsor*, and *Obergefell*, this “status-based enactment” deprived LGBT citizens of equal treatment and equal dignity under the law. *Romer*, 517 U.S. at 635, 116 S.Ct. 1620.

2. Effect

Next up is the impact HB 1523 will have on LGBT Mississippians. Although the bill is far-reaching and could have consequences in many areas of daily life,

Romer suggests that this Court should devote attention to HB 1523's effect on existing anti-discrimination laws and policies. The Court turns to that narrow issue now.

As a state law, HB 1523 would preempt, or invalidate, all city, county, and public school ordinances and policies that prohibit discrimination on the basis of sexual orientation or gender identity. See HB 1523 § 8(2)-(3). The same was true in *Romer*.

The plaintiffs submitted two policies that HB 1523 would invalidate in part: the City of Jackson's recent anti-discrimination ordinance and USM's anti-discrimination policy. Docket Nos. 32-17 and 32-18, in *Barber*. Both protect citizens from sexual orientation and gender identity discrimination in a variety of contexts.

HB 1523 would have a chilling effect on Jacksonians and members of the USM community who seek the protection of their anti-discrimination policies. If HB 1523 goes into effect, neither the City of Jackson nor USM could discipline or take adverse action against anyone who violated their policies on the basis of a § 2 belief.

The State attempts to distance HB 1523 from Amendment 2 in *Romer* by arguing that HB 1523 does not "expressly prohibit[] any law meant to protect gay or lesbian citizens from discrimination." Docket No. 30, at 40, in *Barber*. Sentences later, though, the State identifies the problem with its argument: "H.B. 1523 would invalidate local ordinances only to the extent those ordinances do not provide the same level of protection for religious freedom and free exercise as provided by H.B. 1523." *Id.* at 41. But no other local ordinance or policy purports to do what HB 1523 does.

The State has not pointed to any existing anti-discrimination ordinance or policy that would survive HB 1523's preemptive reach.

In a last-gasp attempt to distinguish HB 1523 from Amendment 2, the State then contends that HB 1523 "is actually strikingly similar" to Jackson and USM's policies because they all prohibit discrimination on the basis of religion. *Id.* at 40-41. The argument ignores the critical difference: Jackson and USM's anti-discrimination policies provide equal protection regardless of religion, sexual orientation, or gender identity. HB 1523 draws a stark line, with LGBT and unmarried-but-sexually-active citizens on one side, and everyone else on the other.

As in *Romer* and *Windsor*, the effect of HB 1523 would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.

b. Scrutiny

This brings the Court to whether the government has a legitimate basis for HB 1523. While most laws classify and make distinctions, all laws do not violate equal protection. *Romer*, 517 U.S. at 631, 116 S.Ct. 1620. The Supreme Court has attempted to reconcile this dilemma by holding that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* (citation omitted).

"When social or economic legislation is at issue, the Equal Protection Clause allows States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living*

Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citation omitted). “But we would not be faithful to our obligations under the Fourteenth Amendment if we apply so deferential a standard to every classification. . . . Thus we have treated as presumptively invidious those classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right.” *Plyler*, 457 U.S. at 216–17, 102 S.Ct. 2382.

Neither the Supreme Court nor the Fifth Circuit “has recognized sexual orientation as a suspect classification or protected group; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims.”³⁰ *Johnson v. Johnson*, 385 F.3d 503, 530–31 (5th Cir. 2004) (citation and brackets omitted). “Rational basis review places the burden of persuasion on the party challenging a law, who must disprove every conceivable basis which might support it.” *Windsor v. United States*, 699

³⁰ In *CSE I*, this Court discussed the doctrinal instability on the proper standard of review. 64 F.Supp.3d at 928. “The circuit courts of appeal are divided on which level of review to apply to sexual orientation classifications. In the Second Circuit, homosexuals compose a quasi-suspect class that is subject to heightened scrutiny. In this circuit, sexual orientation classifications are subject to rational basis review.” *Id.* (quotation marks, citations, and brackets omitted). Then as now, the Court questions whether sexual orientation should be afforded rational basis review. *Id.* (“If this court had the authority, it would apply intermediate scrutiny to government sexual orientation classifications.”). *Obergefell* did not resolve the dispute. When Judge Jordan examined *Obergefell* earlier this year, however, he concluded that “the [Supreme] Court applied something greater than rational-basis review.” *CSE III*, 175 F.Supp.3d at 710, 2016 WL 1306202, at *13. As this Court is bound by Fifth Circuit precedent, it will consider HB 1523 under rational basis review.

F.3d 169, 180 (2d Cir.2012) (quotation marks and citations omitted). “So the party urging the absence of any rational basis takes up a heavy load.” *Id.* This means the government usually prevails.

Even under this generous standard, HB 1523 fails. The State contends that HB 1523 furthers its “legitimate governmental interest in protecting religious beliefs and expression and preventing citizens from being forced to act against those beliefs by their government.” Docket No. 30, at 37-38, in *Barber*. This is a legitimate governmental interest, but not one with any rational relationship to HB 1523.

The Supreme Court “has long recognized that the government may accommodate religious practices without violating the Establishment Clause.” *Cutter v. Wilkinson*, 544 U.S. 709, 713, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (citations and ellipses omitted). The First Amendment, the Mississippi Constitution, and Mississippi’s RFRA all protect Mississippi’s citizens’ religious exercise—and in a broader way than HB 1523. Mississippi’s RFRA in particular states that the government “may substantially burden a person’s exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest.” Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). Its plain language provides substantial protection from governmental discrimination on the basis of religious exercise.

Mississippi’s RFRA grants *all* people the right to seek relief from governmental interference in their religious exercise, not just those who hold certain beliefs. This critical distinction between RFRA and HB 1523 cannot be overlooked.

Although states are permitted to have more than one law intended to further the same legitimate interest, HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.

The State then claims that HB 1523 “is about the people of conscience who need the protection of H.B. 1523, and does not ‘target’ Plaintiffs.”³¹ Docket No. 30, at 3, in *Barber*. The argument is unsupported by the record. It is also inconceivable that a discriminatory law can stand merely because creative legislative drafting limited the number of times it mentioned the targeted group. The Court cannot imagine upholding a statute that favored men simply because the statute did not mention women.

The State next focuses on marriage licenses. It contends that because HB 1523 does not allow the denial, delay, or impediment of marriage licenses, that licenses are issued on the same terms as opposite-sex couples. Thus, the State argues, there is no differential treatment that would constitute a violation of the Equal Protection Clause. *Id.* at 6. The only way a same-sex couple could be treated differently, it says, is if the issuance of their marriage license was “*impeded or delayed as a result of any recusal.*” *Id.*

³¹ Rather than protect its citizens from “government discrimination,” HB 1523 could actually subject more citizens to federal civil rights lawsuits. Persons feeling emboldened by HB 1523 may not understand that the law provides immunity only from State sanctions.

To the contrary, the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment. “A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Romer*, 517 U.S. at 633, 116 S.Ct. 1620. There cannot be one set of employees to serve the preferred couples and another who is ‘willing’ to serve LGBT citizens with a “clear conscience,” as Senator Branning put it. Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in *Romer*, *Lawrence*, *Windsor*, *CSE I*, *Obergefell*, and *CSE II*.

On this point, it is important to note that HB 1523’s supposed protection against any delayed service applies only to marriage licenses and some health care issues. Tr. of June 24 at 339. The other areas of permissible discrimination—counseling, fertility services, etc.—do not place any duty on the recusing individual to ensure that LGBT citizens receive services.³²

The State is correct that no one can predict how many LGBT citizens may be denied service under HB 1523. But it cannot be disputed that the broad language of the bill “identifies persons by a single trait and then denies them protection across the board.” *Romer*, 517 U.S. at 633, 116 S.Ct. 1620. Thus, the State cannot prevail on its argument that HB 1523’s

³² There is an almost endless parade of horrors that could accompany the implementation of HB 1523. Although the Court cannot imagine every resulting factual scenario, HB 1523’s broad language “identifies persons by a single trait and then denies them protection across the board.” *Romer*, 517 U.S. at 633, 116 S.Ct. 1620.

plain language does not create a separate system designed to diminish the rights of LGBT citizens.

The deprivation of equal protection of the laws is HB 1523's very essence. *See Windsor*, 133 S.Ct. at 2693. It violates the Fourteenth Amendment.

2. The Establishment Clause

a. General Principles

The First Amendment begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I.

"The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Supreme Court has "struggled" to chart a path respecting both of them. *Id.* It is a thankless task. Part of the difficulty lies in the fact that each Clause is "cast in absolute terms" and would "clash with the other" if taken to its logical conclusion. *Id.* at 668–69, 90 S.Ct. 1409; *see also Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

The Supreme Court has repeatedly rejected the notion that *states* may establish religion because the text of the Establishment Clause only references *Congress*. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). In truth, "[t]he very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead

extended [the] prohibition to state support for religion in general.” *McCreary Cnty.*, 545 U.S. at 878, 125 S.Ct. 2722 (quotation marks and citation omitted).

Another popular misconception holds that the Establishment Clause is in error since the Constitution does not contain the phrase “separation of Church and State.” Adherents of this belief have read the text correctly but missed its meaning. “There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.” *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

Nor was the Establishment Clause forced upon the sovereign states by an overreaching federal government. Far from being a federal mandate, the Clause “was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.” *McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 215–16, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring).

In any event, the Supreme Court has emphasized that “there is room for play in the joints” between the two Clauses. *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (quotation marks and citation omitted). It has sought to “chart a course that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” *Walz*, 397 U.S. at 672, 90 S.Ct. 1409.

b. Historical Context

America as a whole is “a rich mosaic of religious faiths.” *Town of Greece, N.Y. v. Galloway*, — U.S. —, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014)

(Kagan, J., dissenting). Here, 80% of Mississippians identify as Christians.³³ Tr. of June 24 at 250.

Given the pervasiveness of Christianity here, some Mississippians might consider it fitting to have explicitly Christian laws and policies. They also might think that the Establishment Clause is a technicality that lets atheists and members of minority religions thwart their majority (Christian) rule.³⁴

The public may be surprised to know the true origins of the Establishment Clause. As chronicled by the Supreme Court, history reveals that the Clause was not originally intended to protect atheists and members of minority faiths. It was written to protect Christians from other Christians. *See Wallace*, 472 U.S. at 52 & n. 36, 105 S.Ct. 2479. Only *later* were other faith groups protected.

The story behind this begins with the colonists.³⁵ “It is a matter of history that [the] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.” *Engel v. Vitale*, 370 U.S. 421, 425, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). For decades at a time in 16th- and 17th-century England, Christian sects

³³ A full 30% of Mississippians are white evangelical Christians. Tr. of June 24 at 250.

³⁴ The feeling is understandable. Headlines trumpet perceived anti-Christian conduct, inflaming passions. *See, e.g.*, Kate Royals, *Brandon Band Reportedly Not Allowed to Perform Christian Hymn*, *The Clarion-Ledger*, Aug. 22, 2015. But, of course, “[t]he First Amendment is not a majority rule.” *Town of Greece*, 134 S.Ct. at 1822.

³⁵ “History provides enlightenment; it appraises courts of the subtleties and complexities of problems before them.” *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir.1983).

fought each other to control the Book of Common Prayer, in order to amend it and advance their particular beliefs. *Id.* at 425–27, 82 S.Ct. 1261. The fighting was disruptive and deadly. *Id.* at 426, 82 S.Ct. 1261. Those in power occasionally executed their opponents. *Id.* at 427 n. 8, 82 S.Ct. 1261. Some of the persecuted fled to America. *Id.* at 425, 82 S.Ct. 1261.

The Puritans, for example, were originally a religious minority in England that “rejected the power of the civil government to prescribe ecclesiastical rules.” C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 Tex. Wesleyan L. Rev. 291, 309 (2005). They specifically opposed the monarch’s “requirement that clergy wear particular vestments while celebrating the liturgy.” *Id.* at 308 n.94 (quotation marks and citation omitted). Today it is *inconceivable* that the *government* could require clergy to wear particular clothing.³⁶ But the Puritans were disparaged for their opposition and other beliefs. *Id.* at 309. Thousands left.

³⁶ In seeing the Establishment Clause as a sword wielded against the majority, we forget that the Establishment Clause is actually a shield protecting religion from governmental meddling. Who wants the government dictating their priest, rabbi, or imam’s clothing? It’s difficult to imagine a greater violation of American law and custom. *See, e.g., McCollum*, 333 U.S. at 232, 68 S.Ct. 461 (“If no-where else, in the relation between Church and State, ‘good fences make good neighbors.’”) (Frankfurter, J., concurring); *Engel*, 370 U.S. at 430, 82 S.Ct. 1261 (“the people’s religions must not be subjected to the pressures of government”); *Engel*, 370 U.S. at 431, 82 S.Ct. 1261 (“[The Establishment Clause’s] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”); *see also Lee v. Weisman*, 505 U.S. 577, 589–90, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

In the New World, several colonies established their particular Christian beliefs as their official religion. *Engel*, 370 U.S. at 427–28, 82 S.Ct. 1261; *see also McCollum*, 333 U.S. at 214, 68 S.Ct. 461 (Frankfurter, J., concurring). That again proved unsatisfactory.

For one, state-established religion was perceived as a *British* custom—not something independent, revolutionary Americans would want to retain. *Engel*, 370 U.S. at 427–28, 82 S.Ct. 1261. Baptists especially “chafed under any form of establishment.” *Larson v. Valente*, 456 U.S. 228, 244 & n.19, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). They argued that if the British had no right to tax Americans, then it was also unjust for them to be taxed to support an official religion they denied. *Id.*

And then there was the division-of-power problem. In Virginia, the established Episcopal Church became a minority when the Presbyterians, Lutherans, Quakers, and Baptists banded together “into an effective political force.” *Engel*, 370 U.S. at 428, 82 S.Ct. 1261. Faced with the prospect of losing power, James Madison and Thomas Jefferson persuaded the Virginia Assembly to pass its famous “Virginia Bill for Religious Liberty.” *Everson*, 330 U.S. at 12, 67 S.Ct. 504.³⁷

By the time the Constitution was adopted, therefore, there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some

³⁷ “Madison’s vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference.” *Larson*, 456 U.S. at 245, 102 S.Ct. 1673.

of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the . . . Government would be used to control, support or influence the kinds of prayer the American people can say that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Engel, 370 U.S. at 429–30, 82 S.Ct. 1261; see *Lee v. Weisman*, 505 U.S. 577, 591–92, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (“in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce”).

This history involved disputes between Christians. Americans were weary of the British and then Colonial back-and-forth between Catholics and Protestants, Episcopalians and Presbyterians, and so on. It was better to have a neutral government than to constantly struggle for power—or live under the yoke of a rival sect for decades at a time.

“[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.” *Town of Greece*, 134 S.Ct. at 1819 (quotation marks and citation omitted). The essential insight from history is that the First Amendment was originally enacted to prohibit a state from creating second-class Christians. And while the law has expanded to protect

persons of other faiths, or no faith at all, the core principle of government neutrality between religious sects has remained constant through the centuries.^{38, 39}

³⁸ In 1833, Justice Joseph Story wrote that “[t]he real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects.” *Wallace*, 472 U.S. at 52 n.36, 105 S.Ct. 2479 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1877, at 594 (1851)). (Despite the 1851 date, the *Commentaries* were first published in 1833.)

In 1870, “Judge Alphonso Taft, father of the revered Chief Justice, . . . stated the ideal of our people as to religious freedom as one of ‘absolute equality before the law, of all religious opinions and sects.’” *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214–15, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

In 1871, the Court found that American “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728, 20 L.Ed. 666 (1871).

In 1890, the Court held that the First Amendment was intended “to prohibit legislation for the support of any religious tenets.” *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637 (1890), *abrogated by Romer*, 517 U.S. at 620, 116 S.Ct. 1620.

In 1952, the Court wrote that Americans “sponsor an attitude on the part of government that shows no partiality to any one group. . . . The government must be neutral when it comes to competition between sects.” *Zorach*, 343 U.S. at 313–14, 72 S.Ct. 679.

In 1968, the Court held that a state could not “aid, foster, or promote one religion *or religious theory* against another,” and that the First Amendment “forbids . . . the preference of a religious doctrine.” *Epperson*, 393 U.S. at 104, 106, 89 S.Ct. 266 (emphasis added). That case in particular concluded that Arkansas and Mississippi’s “anti-evolution” statutes violated the Establishment Clause by giving preference to “a particular interpretation of the Book of Genesis by a particular religious group.” *Id.* at 101, 103 & n. 11., 89 S.Ct. 266

In 1971, the Court found that “as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.” *Gillette v. United States*, 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (upholding religious exemption law where “no particular sectarian affiliation or theological position is required.”).

In 1982, the Court wrote that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244, 102 S.Ct. 1673.

In 1985, Justice Sandra Day O’Connor wrote that the Establishment Clause “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” *Wallace*, 472 U.S. at 70, 105 S.Ct. 2479 (O’Connor, J., concurring).

In 1987, the Court invalidated a Louisiana law giving “preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator.” *Edwards*, 482 U.S. at 593, 107 S.Ct. 2573.

In 1989, the Court said it had “come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization.” *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), *abrogated by Town of Greece*, 134 S.Ct. at 1811. “Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed.” *Id.* at 605, 109 S.Ct. 3086.

Also in 1989, the Court wrote that it was “settled jurisprudence that the Establishment Clause prohibits government from . . . [placing] an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (quotation marks and citations omitted).

In 1992, the Court held that “the central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored.” *Lee*, 505 U.S. at 590, 112 S.Ct. 2649.

In 1994, the Court reaffirmed that “proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (quotation marks and citations omitted). *Kiryas Joel* struck down a New York statute that delegated state authority “to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.” *Id.*

In 1995, the Court held that the Establishment Clause is satisfied “when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

In 2005, the Court wrote that there is “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.” *McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722 (quotation marks, citations, and ellipses omitted).

In 2010, the Court justified a cross on public property in part by noting that its placement “was not an attempt to set the *imprimatur* of the state on a particular creed.” *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010).

All in all, “[i]t is firmly established that the government violates the establishment clause if it discriminates among religious groups.” Erwin Chemerinsky, *Constitutional Law* § 12.2.2 (5th ed. 2015).

c. HB 1523

The question now is whether, in light of history and precedent, HB 1523 violates the Establishment Clause. The Court concludes that it does in at least two ways.

i. HB 1523 Establishes Preferred Religious Beliefs

First, HB 1523 establishes an official preference for certain religious beliefs over others.

Under applicable precedent “when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions” or “differentiate[s] among sects.” *Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (citation omitted).

“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766

³⁹ The Arkansas law struck down in *Epperson* was adapted from a Tennessee law that had already been repealed. One commenter had this to say about the Tennessee law:

Much wonder has been expressed both in this country and in Europe as to the factors which made such legislation possible. These factors were three in number: (1) an aggressive campaign by a militant minority of religious zealots of the “Fundamentalist” faith; (2) lack of knowledge of modern scientific and religious thought in the rural districts which control Tennessee politically; (3) political cowardice and demagoguery.

William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 Yale L.J. 191 (1925).

(1980). In an Establishment Clause challenge, though, a court must also take consider “the context in which the statute was enacted and the reasons for its passage.” *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir.2001)

Section 2 of HB 1523 begins, “[t]he sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: . . .” HB 1523 § 2. It then enumerates three beliefs entitled to protection. In the remainder of the bill, every protection from discrimination is explicitly tied to the § 2 beliefs.

On its face, HB 1523 constitutes an official preference for certain religious tenets. If three specific beliefs are “protected by this act,” it follows that every other religious belief a citizen holds is *not* protected by the act. Christian Mississippians with religious beliefs contrary to § 2 become second-class Christians. Their exclusion from HB 1523 sends a message “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” *McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722. The same is true for members of other faith groups who do not subscribe to the § 2 beliefs.

The State suggests that the bill is neutral because it does not name a denomination. The argument is foreclosed by *Larson*, which struck down a Minnesota statute that had made “explicit and deliberate distinctions between different religious organizations” without identifying any denomination by name. 456 U.S. at 246 n. 23, 102 S.Ct. 1673.

For Reverends Barber, Burnett, Fortenberry, and Hrostowski (who are Presbyterian, United Methodist,

United Methodist, and Episcopalian, respectively), their religious values cause them to believe that same-sex couples may marry in a Christian ceremony blessed by God. They also believe that same-sex couples may consummate that marriage as any other. As Rev. Dr. Hrostowski testified, “sex is a gift from God, and it is precious and wonderful and should be treated as such,” but § 2’s definition of sex is “incomplete because now holy matrimony is available to again both straight and gay couples.” Tr. of June 23 at 126.

The Reverends, however, are not entitled to any of the protections of HB 1523. The bill instead shows the State’s favor for the exact *opposite* beliefs by giving special privileges to citizens who hold § 2 beliefs. In so doing the State indicates that the Reverends hold disfavored, minority beliefs, while citizens who hold § 2 beliefs are preferred members of the majority entitled to a broad array of special legal immunities. See *McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722.⁴⁰

The First Amendment prohibits states from putting their thumb on the scales in this way. Laws must make religious rights and protections available “on an equal basis to both the Quaker and the Roman Catholic.” *Larson*, 456 U.S. at 245, 246 n. 23, 102 S.Ct. 1673.

⁴⁰ One of the more unique conflicts between religious belief and § 2 was elicited during Rabbi Jeremy Simons’ testimony. He explained that as early as 1800 years ago, Judaism recognized “four distinct genders that are possible, male, female, then a category called tumtum, which is someone whose gender is essentially ambiguous, unable to be ascertained and then androge-nous, someone who displays both sex characteristics.” Tr. of June 23 at 105. Rabbi Simons said that rabbis in that era “truly struggle[d] with it, in what to do in these cases where it is ambiguous. But what you don’t see is them condemning the child or saying that this child cannot be a part of the community or is any less human or holy than anyone else.” *Id.*

“[L]egislators—and voter—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”*Id.* at 245, 246 n. 23., 102 S.Ct. 1673 But HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.⁴¹

⁴¹ See Southern Baptist Convention, Position Statements (“We affirm God’s plan for marriage and sexual intimacy—one man, and one woman, for life. Homosexuality is not a ‘valid alternative lifestyle.’”); Unitarian Universalist Association, Marriage Equality (“UU congregations and clergy have long recognized and celebrated same-sex marriages within our faith tradition.”); U.S. Conference of Catholic Bishops, Issues and Action, Same Sex Unions, Background on Supreme Court Marriage Cases (“The USCCB supports upholding the right of states to maintain and recognize the true meaning of marriage in law as the union of one man and one woman.”); Docket No. 2 1, at 11-13, in *CSE IV* (letter from the Bishop of The Episcopal Church in Mississippi permitting same-sex religious marriage as of June 3, 2016); Tr. of June 23 at 97-110 (expert testimony on views of same-sex marriage and transgender persons among Jewish denominations); Seth Lipsky, *U.S. Gay Marriage Ruling Puts Orthodox Jews on Collision Course With American Law*, Haaretz, June 28, 2015; see generally Docket No. 2-2, at 7, in *CSE IV* (resolution of the United Church of Christ supporting same-sex religious marriage); Brief for President of the House of Deputies of the Episcopal Church, et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574); Brief for Major Religious Organizations as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574). To be clear, Rabbi Simons’ testimony indicated that the term “Orthodox” encompasses a variety of different sects of Judaism, some of which may permit same-sex marriage. Tr. of June 23 at 108-09. Most Jews in Mississippi belong to the Reform denomination and support same-sex marriage, he said. *Id.* at 96.

Some Jewish and Muslim citizens may sincerely believe that their faith prevents them from participating in, recognizing, or aiding an interfaith marriage. See, e.g., Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 Ind. L.J. 743, 755-56 (2009) (relaying that under “classical Shari’a regulations: a Muslim man may marry a Christian or Jewish woman but no other unbeliever; a Muslim woman may not marry a non-Muslim under any circumstances. . . . Some Muslim clerics . . . have discouraged interfaith unions altogether.”); Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 Women’s Rts. L. Rep. 479, 520 (2009) (“Interfaith marriage is not simply prohibited by Judaism; it is also not recognized (if performed elsewhere) due to its categorization as an inherently meaningless act. . . . Although Israeli law does not allow interfaith marriages regardless of the sex of the Jewish partner, Israeli culture[] disproportionately scorns Jewish women who cohabit with or marry non-Jewish men.”). Why should a clerk with such a religious belief not be allowed to recuse from issuing a marriage license to an interfaith couple, while her coworkers have the full protections of HB 1523?

The State argues that there is no religious preference because some members of *all* religious traditions are opposed to same-sex marriage. That is, because some Unitarians, some Episcopalians, and some Reform Jews oppose same-sex marriage, HB 1523 is neutral between religious sects. See Docket No. 38-2, at 2, in *Barber*.

Every group has its iconoclasts. The larger the group, the more likely it will have someone who believes the

sun revolves around the Earth, a doctor who thinks smoking unproblematic, or a Unitarian opposed to same-sex religious marriage. But most people in a group share most of that group’s beliefs. That is the point of being in a *group*. And in the HB 1523 context, the State has favored certain *doctrines*, regardless of how many individuals deviate from official doctrine on an issue.⁴²

The State’s *we-prefer-some-members-of-all-religions* argument also fails to understand another function of the Establishment Clause. “Intrafaith differences . . . are not uncommon among followers of a particular creed,” the Supreme Court once wrote, in its typical understated fashion. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715–16, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); see *Holt v. Hobbs*, — U.S. —, 135 S.Ct. 853, 862, 190 L.Ed.2d 747 (2015). It is precisely because those internal disputes are common—and contentious—that the framers long ago decided that the government should stay out of those battles, for the benefit of both sides. See, e.g., Sarah McCammon, *Conservative Christians Grapple With Whether ‘Religious Freedom’ Includes Muslims*, National Public Radio, June 29, 2016 (describing one ongoing internal debate).

⁴² The Supreme Court has rejected this kind of sophistry: “the Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses.” *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). Courts are expected to look beyond superficial explanations. *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam); see *Edwards v. Aguillard*, 482 U.S. 578, 585–86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (invalidating Louisiana statute under the Establishment Clause although the statute’s “stated purpose” was “to protect academic freedom”).

Rev. Burnett's testimony illustrates the problem nicely. She said her church, the United Methodist Church, opposes same-sex religious marriage but is in the process of reconsidering its position. Tr. of June 23 at 158. Rev. Burnett objected to what she perceived as the State of Mississippi's attempt to weigh in on that doctrinal debate via HB 1523. *Id.* at 159.

Governor Bryant is also a member of the United Methodist Church. See David Brandt, *Mississippi Church a Window into National Gay Rights Debate*, Assoc. Press, Apr. 12, 2016. There are same-sex couples in his congregation. *Id.*

HB 1523 violates the Establishment Clause because it chooses sides in this internal debate. In so doing it says persons like Gov. Bryant are favored and persons like Rev. Burnett are disfavored. So the fact that some members of all religions oppose same-sex marriage does not mean the State is being neutral. It means the State is inserting itself into any number of intrafaith doctrinal disputes, tipping the scales toward some believers and away from others. That is something it cannot do. "[T]he people's religions must not be subjected to the pressures of government." *Engel*, 370 U.S. at 430, 82 S.Ct. 1261.

The State then argues that HB 1523 is defensible as supporting moral values, not religious beliefs. As the testimony in this case showed, however, religious beliefs are inextricably intertwined with moral values. Plus, the Free Exercise Clause only protects "beliefs rooted in *religion*." *Thomas*, 450 U.S. at 713, 101 S.Ct. 1425 (citations omitted and emphasis added). So the State cannot simultaneously contend that HB 1523 is a reasonable accommodation of religious exercise and that it protects only moral beliefs. If HB 1523 was

passed to encourage exclusively moral values, it was not passed to further the free exercise of religion.

Because § 2 “clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents,” the law must be treated as “suspect” and subject to strict scrutiny. *Larson*, 456 U.S. at 246–47, 102 S.Ct. 1673. That means § 2 “must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest.” *Id.* The *Lemon* test need not be applied. *Id.* at 252, 102 S.Ct. 1673 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)); see also *Hernandez*, 490 U.S. at 695, 109 S.Ct. 2136; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).⁴³

“For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy. [The government] must identify an actual concrete problem—mere speculation of harm does not constitute a compelling state interest.” *Awad*, 670 F.3d at 1129 (quotation marks, citations, and brackets omitted).

As mentioned, the State says HB 1523 is justified by a compelling government interest in accommodating

⁴³ The Court need not consider the bill’s “secular purpose.” See *Doe*, 240 F.3d at 468; Chemerinsky § 12.2.2 (noting similarities between neutrality analysis and elements of the *Lemon* test). If it did, however, it would conclude that HB 1523 “was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose,” for the reasons listed in *Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. See also *Edwards*, 482 U.S. at 592, 107 S.Ct. 2573.

the free exercise of religion. The underlying premise of this interest is that members of some religious sects believe that any act which brings them into contact with same-sex marriage or same-sex relationships makes the believer complicit in the same-sex couples' sin, in violation of the believer's own exercise of religion. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2522-23 & n.23 (2015). The idea is that baking a cake for a same-sex wedding "makes a baker complicit in a same-sex relationship to which he objects." *Id.* at 2519.

The problem is that the State has not identified any actual, concrete problem of free exercise violations. Its defense speaks in generalities, but "Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad*, 670 F.3d at 1130 (collecting cases). Mississippi has run into the same hurdle Oklahoma did in *Awad*: its attorneys have not identified "even a single instance" where *Obergefell* has led to a free exercise problem in Mississippi. *Id.*

In this case, moreover, it is difficult to see the compelling government interest in favoring three enumerated religious beliefs over others. "[T]he goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference" for one set of beliefs. *Edwards*, 482 U.S. at 588, 107 S.Ct. 2573. It is not within our tradition to respect one clerk's religious objection to issuing a same-sex marriage license, but refuse another clerk's religious objection to issuing a marriage license to a formerly-divorced person. The government is not in a position to referee the validity of Leviticus 18:22

(“Thou shalt not lie with mankind, as with woman-kind: it is abomination.”) versus Leviticus 21:14 (“A widow, or a divorced woman, or profane, or an harlot, these shall he not take.”).^{44, 45}

Even if HB 1523 had encouraged the free exercise of *all* religions, it does not actually contribute anything toward that interest. Again, as discussed above, a clerk with a religious objection to same-sex marriage may invoke existing constitutional and statutory defenses without HB 1523. *E.g.*, *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 140, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). The State has not identified a purpose behind HB 1523 “that was not fully served by” prior laws. *Wallace*, 472 U.S. at 59, 105 S.Ct. 2479.

Finally, the State claims that HB 1523 is akin to a federal statute permitting persons to opt-out of performing abortions. The comparison is inapt. For one, that statute is neutral to the extent it prohibits retaliation against doctors who decline to provide abortions as well as doctors who choose to provide abortions. *See* 42 U.S.C. § 300a-7(c)-(e). HB 1523 is not so even-handed. Tr. of June 24 at 327.

It is true that part of the abortion statute permits individuals or entities to opt-out of performing all

⁴⁴ All quotes from and citations to the Bible are drawn from the King James Version.

⁴⁵ We do not single out religious beliefs in this way. No state law explicitly allows persons to decline to serve a payday lender based on a religious belief that payday lending violates Deuteronomy 23:19. No state law explicitly allows recusals because of a belief that wearing “a garment mingled of linen and wool[]” is forbidden. *Leviticus* 19:19. If a marriage license was withheld for “foolish talking” or “jesting,” *see* Ephesians 5:4, we would undoubtedly have many fewer marriages.

abortions. *Id.* § 300a-7(b). That still is not analogous to HB 1523. If doctors can opt-out of all abortions, the apples-to-apples comparison would let clerks opt-out of issuing all marriage licenses. A clerk who transfers from the marriage licensing division to the court filings division, for example, would be honoring her religious beliefs by declining to be involved in a same-sex marriage, but would not be picking and choosing which persons to serve.

The Court now turns to why that kind of selective service is unlawful.

ii. HB 1523's Accommodations Injure Other Citizens

HB 1523 also violates the First Amendment because its broad religious exemption comes at the expense of other citizens.

Supreme Court precedent has repeatedly upheld “legislative exemptions [for religion] that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (collecting cases). A religious accommodation which does no harm to others is much more likely to survive a legal challenge than one which does.

Estate of Thornton v. Caldor is a good example of this principle at work. In that case, a Connecticut statute gave workers an “absolute right not to work on their chosen Sabbath.” 472 U.S. 703, 704–05, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985). Donald Thornton invoked the statute and chose not to work on Sundays. The resulting conflict with his employer led Thornton to quit. Litigation ensued.

The Supreme Court invalidated the Connecticut law. The statute violated the Establishment Clause by requiring that “religious concerns automatically control over all secular interests at the workplace.” *Id.* at 709, 105 S.Ct. 2914. The statute did not take into account “the imposition of significant burdens on other employees required to work in place of the Sabbath observers.” *Id.* at 710, 105 S.Ct. 2914. “Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute,” the Court found, and it was wrong to make them “take a back seat to the Sabbath observer.” *Id.* at 710 n. 9, 105 S.Ct. 2914. Because “[t]he statute has a primary effect that impermissibly advances a particular religious practice,” it violated the First Amendment. *Id.* at 710, 105 S.Ct. 2914.

HB 1523 fails this standard. The bill gives persons with § 2 beliefs an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service. Like *Caldor*, it contains “no exception [for] when honoring the dictates of [religious] observers would cause the employer substantial economic burdens or when the employer’s compliance would require the imposition of significant burdens on other employees required to work in place of the [religious] observers.” *Caldor*, 472 U.S. at 709–10, 105 S.Ct. 2914.

Burwell v. Hobby Lobby confirms this ‘do no harm’ principle. In that case, the Court relieved three closely-held corporations from federal contraceptive regulations which substantially burdened the corporate owners’ religious beliefs. 134 S.Ct. at 2759. At first blush that sounds analogous to HB 1523: if the corporate owners could opt-out of the federal regulation, why can’t clerks opt-out of serving same-sex

couples? The difference is that the *Hobby Lobby* Court found that the religious accommodation in question would have “precisely zero” effect on women seeking contraceptive coverage, and emphasized that corporations do not “have free rein to take steps that impose disadvantages on others.” *Id.* at 2760 (quotations marks, citation, and ellipses omitted). The critical lesson is that religious accommodations must be considered in the context of their impact on others. *See also Bullock*, 489 U.S. at 14, 109 S.Ct. 890 (striking down Texas law requiring nonreligious periodicals to subsidize religious periodicals).

Unlike *Hobby Lobby*, HB 1523 disadvantages recruiting employees’ coworkers and results in LGBT citizens being personally and immediately confronted with a denial of service. The bill cannot withstand the *Caldor* line of cases. As Judge Learned Hand once said, “[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.” *Caldor*, 472 U.S. at 710, 105 S.Ct. 2914 (quotation marks, citation, and ellipses omitted).

For these reasons, the plaintiffs are substantially likely to succeed on their claim that HB 1523 violates the First and Fourteenth Amendments.^{46,47}

C. Irreparable Harm

The plaintiffs are then required to demonstrate “a substantial threat of irreparable harm if the injunction is not granted.” *Opulent Life Church*, 697 F.3d at 288. They must show “a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir.1986). “An injury is irreparable only if it cannot be undone through monetary remedies.” *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981) (citation omitted).

The plaintiffs have sufficiently shown that HB 1523 represents an imminent and “substantial threat to [their] First Amendment rights. Loss of First Amendment freedoms, even for minimal periods of time,

⁴⁶ A point of clarification is in order. The Establishment Clause claim brought by all of the plaintiffs is substantially likely to succeed in declaring § 2 of the bill unconstitutional. The *Barber* plaintiffs’ Equal Protection Clause claim is also substantially likely to secure that result as to § 2, but may in fact enjoin the entire bill, as in *Romer*. The question is moot at this juncture because an injunction as to § 2 renders every other section inoperable as a matter of law. The result is that the HB 1523 is entirely “immobilized.” *Shelby Cnty., Ala. v. Holder*, — U.S. —, 133 S.Ct. 2612, 2632 n. 1, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting)

⁴⁷ In Establishment Clause cases, a finding of substantial likelihood of success on the merits has led the Fifth Circuit to suggest that the final three factors of preliminary injunctive relief require only cursory review. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir.1993). Nevertheless, the Court will proceed to the conclusion of the formal legal analysis.

constitute irreparable injury.” *Ingebretsen*, 88 F.3d at 280 (citations omitted). This applies with equal force to the Equal Protection claim, since the plaintiffs are substantially likely to be irreparably harmed by the unequal treatment HB 1523 sets out for them. *CSE I*, 64 F.Supp.3d at 950.

As a result, this element is satisfied. *Accord Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir.1993).

D. Balance of Hardships

Here, the plaintiffs must show that the injuries they will suffer if HB 1523 goes into effect outweigh any harm that an injunction may do to the State. If a court has found irreparable harm, a party opposing injunctive relief will “need to present powerful evidence of harm to its interests” to prevent the scales from weighing in the movant’s favor. *Opulent Life Church*, 697 F.3d at 297. On the other hand, “the injunction usually will be refused if the balance tips in favor of defendant.” 11A Charles A. Wright et al., *Fed. Prac. & Proc.* § 2948.2 (3d ed.).

The State contends that granting an injunction will result in the “irreparable harm of denying the public interest in the enforcement of its laws.” Docket No. 28, at 34, in *CSE IV* (quotation marks and citation omitted). This argument will be taken up with the public interest factor.

The State also says that enjoining HB 1523 would impose a hardship on conscientious objectors who are presently being denied the free exercise of their religion. Even setting aside the State’s lack of support for this contention, the Fifth Circuit has not looked favorably upon this argument in similar Establishment Clause litigation. An injunction that enjoins HB 1523

will preserve the status quo, so it “would not affect [citizens’] existing rights to the free exercise of religion and free speech. Therefore, [citizens] continue to have exactly the same constitutional right to pray as they had before the statute was enjoined.” *Ingebretsen*, 88 F.3d at 280. Since *Ingebretsen* was decided, moreover, Mississippi has exacted its own RFRA to provide additional protection to religious Mississippians.

The Court concludes that the plaintiffs’ constitutional injuries outweigh any injury the State suffers from an injunction that preserves the status quo.

E. Public Interest

Lastly, the plaintiffs must show that a preliminary injunction will not disserve the public interest. “Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue.” *Wright et al.* § 2948.4.

The State argues that the public interest is served by enforcing its democratically adopted laws. The government certainly has a powerful interest in enforcing its laws. That interest, though, yields when a particular law violates the Constitution. In such situations “the public interest is not disserved by an injunction preventing its implementation.” *Opulent Life Church*, 697 F.3d at 298 (citations omitted); *accord Ingebretsen*, 88 F.3d at 280.

In this case, it is also relevant that Mississippi has been subjected to widespread condemnation and an economic boycott as a result of HB 1523’s passage. *See*, Docket Nos. 32-11 (letter to Mississippi’s leaders from nearly 80 CEOs urging HB 1523’s repeal as “bad for our employees and bad for business”); 32-12 (statement of Mississippi Manufacturers Association oppos-

ing HB 1523); 32-13 (statement of Mississippi Economic Council opposing HB 1523); 32-19 (newspaper article indicating opposition to HB 1523 from nearly every Mayor on the Mississippi Gulf Coast); 32-20 (statement of the Gulf Coast Business Council describing “the growing list of negative impacts” of HB 1523 on the State economy), all in *Barber*; see also Sherry Lucas, *MS Theater Groups Worry About HB 1523 Fallout*, *The Clarion-Ledger*, June 13, 2016 (reporting that copyright holders are presently prohibiting Mississippians from performing *West Side Story*, *Footloose*, *Wicked*, *Godspell*, and *Pippin*). The public interest is served by bringing this boycott to an end.

F. Other Considerations

The plaintiffs have made other First Amendment arguments and noted a preemption theory concerning 42 U.S.C. § 1983. In light of the substantive claims addressed above, and appreciating “the haste that is often necessary” in preliminary injunction proceedings, the Court declines to take up those other theories of relief at this time. *Monumental Task Comm., Inc v. Foux*, 157 F.Supp.3d 573, 582, 2016 WL 311822, at *3 (E.D.La. Jan. 26, 2016).

V. Conclusion

Religious freedom was one of the building blocks of this great nation, and after the nation was torn apart, the guarantee of equal protection under law was used to stitch it back together. But HB 1523 does not honor that tradition of religion freedom, nor does it respect the equal dignity of all of Mississippi’s citizens. It must be enjoined.

The motions are granted.

91a

IT IS HEREBY ORDERED that the defendants; their officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with the defendants or their officers, agents, servants, employees, or attorneys; are hereby preliminarily enjoined from enacting or enforcing HB 1523.

SO ORDERED, this the 30th day of June, 2016.

92a

APPENDIX C

860 F.3d 345

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 16-60477, No. 16-60478

RIMS BARBER; CAROL BURNETT; JOAN BAILEY;
KATHERINE ELIZABETH DAY; ANTHONY LAINE
BOYETTE; DON FORTENBERRY; SUSAN GLISSON;
DERRICK JOHNSON; DOROTHY C. TRIPLET;
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.

Appeals from the United States District Court
for the Southern District of Mississippi,
Carlton W. Reeves, U.S. District Judge

Filed June 22, 2017

Attorneys and Law Firms

Robert Bruce McDuff, Esq., Sibyl C. Byrd, Esq., Jacob Wayne Howard, Esq., McDuff & Byrd, Jackson, MS, Elizabeth Littrell, Lambda Legal Education & Defense Fund, Atlanta, GA, Beth Levine Orlansky, Mississippi Center for Justice, Jackson, MS, Susan L. Sommer, Lambda Legal Defense & Education Fund, Incorporated, New York, NY, for Plaintiffs–Appellees.

Jonathan F. Mitchell, Dean John Sauer, James Otis Law Group, L.L.C., Saint Louis, MO, James Andrew Campbell, Kevin Hayden Theriot, Alliance Defending Freedom, Scottsdale, AZ, Drew Landon Snyder, Office of the Governor for the State of Mississippi, Jackson, MS, Daniel Bradshaw, Mississippi Department of Human Services Executive Director’s Office, Jackson, MS, Tommy Darrell Goodwin, Esq., Assistant Attorney General, Office of the Attorney General for the State of Mississippi, Jackson, MS, for Defendants–Appellants.

Kimberlee Wood Colby, Christian Legal Society, Springfield, VA, for Christian Legal Society, National Association of Evangelicals, Amici Curiae.

Diego Armando Soto, Esq., Southern Poverty Law Center, Immigrant Justice Project, Montgomery, AL,

for LGBT Youth in Mississippi and their Parents, Teachers, and Counselors, Amicus Curiae.

Scott A. Keller, Solicitor, Office of the Solicitor General for the State of Texas, Austin, TX, for State of Texas, State of Arkansas, State of Louisiana, State of Nebraska, State of Nevada, State of Oklahoma, State of South Carolina, State of Utah, Paul R. LePage, Governor of Maine, Amici Curiae.

Deborah Jane Dewart, Attorney, Swansboro, NC, for North Carolina Values Coalition and Liberty, Life, and Law Foundation, Amici Curiae.

John Allen Eidsmoe, Senior Counsel, Foundation for Moral Law, Montgomery, AL, Foundation for Moral Law, Amicus Curiae.

James William Manuel, Esq., Michael James Bentley, Esq., Bradley Arant Boult Cummings, L.L.P., Jackson, MS, for Sanderson Farms, Incorporated, John N. Palmer, Sr., Jack Reed, Jr., William A. Percy, II, Tim C. Medley, Sharpe & Wise, P.L.L.C., Kelly Kyle, Hal Caudell, Talamieka Brice, Amber Kirkendoll, Jessica Kirkendoll, Amici Curiae.

Joshua Adam Matz, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, L.L.P., Washington, DC, for Caroline Mala Corbin, Ira C. Lupu, Micah J. Schwartzman, Richard C. Schragger, Elizabeth Sepper, Nelson Tebbe, Robert Tuttle, Amici Curiae.

James H.R. Windels, Esq., Davis, Polk & Wardwell, L.L.P., New York, NY, for Gay Men's Health Crisis, Incorporated, Aids Services Coalition, Grace House, Incorporated, My Brother's Keeper, Incorporated, Amici Curiae.

Jeffrey Samuel Trachtman, Kramer Levin Naftalis & Frankel, L.L.P., New York, NY, for Bishop of the

Episcopal Diocese of Mississippi, General Synod of the United Church of Christ, Reconstructionist Rabbinical Association, Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, Union for Reform Judaism, Unitarian Universalist Association, United Synagogue of Conservative Judaism, Covenant Network of Presbyterians, Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns, Methodist Federation for Social Action, More Light Presbyterians, Muslims for Progressive Values, Open and Affirming Coalition of the United Church of Christ, Reconciling Ministries Network, Reconcilingworks: Lutherans for Full Participation, Religious Institute, Incorporated, Amici Curiae.

Andrew O'Connor, Ropes & Gray, L.L.P. Boston, MA, for GLBTQ Legal Advocates & Defenders, National Center for Lesbian Rights, American Civil Liberties Union, Amici Curiae.

Charles C. Lifland, Esq., Justine M. Daniels, O'Melveny & Myers, L.L.P., Los Angeles, CA, for American International Group, Incorporated, Belhaven Residential, L.L.C., Bloomberg, L.P., Byrne and Associates, P.L.L.C., Chism and Company, Incorporated, Choice Hotels International, Incorporated, CVS Health Corporation, David Neil McCarty Law Firm, P.L.L.C., First Natchez Radio Group, Incorporated, Front Porch Fodder Publishing, L.L.C., Glassdoor, Incorporated, International Business Machines Corporation, Levi Strauss & Company, Mantle, L.L.C., Molpus Woodlands Group, Ocean Springs Seafood Market, Incorporated, Paracosm Entertainment, L.L.C., Pfizer, Incorporated, Pritchett Engineering & Planning, L.L.C., Replacements, Limited, T Enterprises, Incorporated, Mitchell Gold Company, Doing Business as Mitchell Gold + Bob

Williams, ‘Sip Magazine, L.L.C., Two Rivers Realty, L.L.C., Amici Curiae.

Nicole Erica Schiavo, Hogan Lovells US, L.L.P., New York, NY, for Anti-Defamation League, Americans United for Separation of Church and State, Bend the Arc, Central Conference of American Rabbis, Hadassah, Interfaith Alliance, National Council of Jewish Women, People for the United Way Foundation, T’ruah: the Rabbinic Call for Human Rights, Women of Reform Judaism, Women’s League for Conservative Judaism, Interfaith Alliance, Hindu American Foundation, Amici Curiae George Andrew Lundberg, Latham & Watkins, L.L.P., Los Angeles, CA, for E. Tendayi Achiume, Katherine R. Allen, Nadav Antebi-Gruska, Emily A. Arnold, M.V. Lee Badgett, Amici Curiae.

Before SMITH, ELROD, and HAYNES, Circuit Judges.

Opinion

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.

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

¹ *E.g.*, HB 1523 § 3(1).

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 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 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, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The Judicial

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

Branch may not “accept for adjudication claims of constitutional violation . . . where the claimant has not suffered cognizable injury.” *Id.* at 474, 102 S.Ct. 752.

“[T]he irreducible constitutional minimum of standing contains three elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (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, 112 S.Ct. 2130 (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 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, 102 S.Ct. 752. “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).

³ *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (“At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing.”).

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 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, 88 S.Ct. 1942, 20 L.Ed.2d 947 (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

⁴ *See Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 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*, — U.S. —, 136 S.Ct. 1540, 1548, 194 L.Ed.2d 635 (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 . . .”).

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 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 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

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).

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, 102 S.Ct. 752. 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

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, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), a religious-exercise case, was the strongest authority supporting their claim that a stigmatic injury is sufficient for

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 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.

Establishment Clause standing.⁸ In *Santa Fe, id.* at 309–10, 314, 120 S.Ct. 2266, 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 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

⁸ At oral argument, the challengers also pointed to *Bowen v. Kendrick*, 487 U.S. 589, 600–01, 108 S.Ct. 2562, 101 L.Ed.2d 520 (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, 108 S.Ct. 2562.

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. Ziriox*, 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 the plaintiffs have not alleged in this case.⁹

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

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 than “an incidental expenditure of tax funds in the administration of an essentially regulatory statute.” *See Flast*, 392 U.S. at 102, 88 S.Ct. 1942. The Court considered that test consistent with its test

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, 88 S.Ct. 1942).

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, 131 S.Ct. 1436, 179 L.Ed.2d 523 (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, 88 S.Ct. 1942. 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.

¹² *Flast*, 392 U.S. at 102, 88 S.Ct. 1942 (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434–35, 72 S.Ct. 394, 96 L.Ed. 475 (1952)). In *Doremus*, 342 U.S. at 434–35, 72 S.Ct. 394, 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, 131 S.Ct. 1436, 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, 131 S.Ct. 1436 (quoting *Kendrick*, 487 U.S. at 618, 108 S.Ct. 2562).

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 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, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). This allegation is required regardless of how “personally and deeply [the plaintiffs] feel[] the impact of” the state’s message. *Id.*¹⁵

¹⁵ The recent decision in *Sessions v. Morales–Santana*, No. 15-1191, — U.S. —, 137 S.Ct. 1678, 198 L.Ed.2d 150, 2017 WL 2507339 (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 —, 137 S.Ct. 1678. Third-party standing enabled him to bring that claim on his father’s behalf as a means of avoiding removal. *Id.* at —, 137 S.Ct. 1678.

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*, 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (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, 104 S.Ct. 3315. 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 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, 116 S.Ct. 1620, 134 L.Ed.2d 855 (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, 116 S.Ct. 1620. 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, 116 S.Ct. 1620. 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, 102 S.Ct. 752. Under this current record, 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, 112 S.Ct. 2130, 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.

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.

113a

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: September 29, 2017]

No. 16-60477

RIMS BARBER; CAROL BURNETT; JOAN BAILEY;
KATHERINE ELIZABETH DAY; ANTHONY LAINE
BOYETTE; DON FORTENBERRY; SUSAN GLISSON;
DERRICK JOHNSON; DOROTHY C. TRIPLET;
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.

* * *

114a

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

ON PETITION FOR REHEARING EN BANC
(Opinion 860 F.3d 345, Jun. 22, 2017)

Before SMITH, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the petitions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The court having been polled at the request of a member of the court, and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petitions for rehearing en banc are DENIED.

115a

In the poll, 2 judges vote in favor of rehearing en banc, and 12 vote against. Voting in favor are Judges Dennis and Graves. Voting against are Chief Judge Stewart and Judges Jolly, Jones, Smith, Clement, Prado, Owen, Elrod, Southwick, Haynes, Higginson, and Costa.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

JAMES L. DENNIS, Circuit Judge, joined by GRAVES, Circuit Judge, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's refusal to consider en banc the important standing issue in this case. In my view, the panel opinion committed serious error in concluding that the plaintiffs lack standing to bring suit under the Establishment Clause. The plaintiffs argue that HB 1523, a Mississippi statute, violates the Establishment Clause—they allege that it endorses and favors certain religious beliefs because it grants special privileges and immunities to persons who sincerely hold at least one of the following “religious beliefs or moral convictions”:

(a) [m]arriage 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.

MISS. LAWS 2016, HB 1523 § 2.¹

The plaintiffs are Mississippi residents and organizations who do not hold these beliefs or who hold

¹ HB 1523 grants adherents to these beliefs immunity from sanctions for a range of anti-LGBT discrimination including withholding foster care services, § 3(2); 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).

religious beliefs contrary to these beliefs.² The plaintiffs allege that HB 1523 is an unconstitutional state endorsement of religious beliefs because it sends a message to non-adherents to those beliefs “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.” *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (cleaned up).

The panel opinion, *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017), concludes that all of the plaintiffs lack standing to bring any challenge to HB 1523. *Id.* at 350–51. Respectfully, the panel opinion is wrong; the plaintiffs have standing to challenge HB 1523 under Supreme Court and Courts of Appeals precedents. The panel opinion misconstrues and misapplies the Establishment Clause precedent, and, as explained below, its analysis creates a conflict between our circuit and our sister circuits on the issue of Establishment Clause standing.

Critically, this case does not involve a challenge to a religious display or religious exercise—that is, a particular religious practice—endorsed by a government actor. In cases involving challenges to religious exercises or displays, courts have generally required some sort of physical exposure to the challenged object or conduct. Instead, the plaintiffs in this case challenge a law of their state. In cases involving challenges to laws or official policies in the plaintiffs’ own communities, the stigmatic harm suffered by non-adherents is sufficient to establish an injury-in-fact.

² Among these plaintiffs are gay and transgender individuals, same-sex married couples, and an unmarried individual in a relationship that includes sexual relations.

Because the plaintiffs in this case have alleged such a stigmatic harm, the panel opinion’s dismissal of this case is in error and should have been reversed by the court en banc.

I

For purposes of an Establishment Clause claim, “plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion.” *Establishment Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011). Such “direct harm” can, of course, include tangible and economic injuries. But because injury can be “particularly elusive” in this context, *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991), “the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer,” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001) (cleaned up). Thus, “our rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.” *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 505 (5th Cir. 2007) (cleaned up).

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court held that “school sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents 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.” *Id.* at 309–10 (cleaned up). In that case, current and former students of a high school challenged the school’s policy that permitted prayer initiated and led by a student at football games. *Id.* at 294. The school

district contended that the plaintiffs' facial challenge to the policy was premature because, at the time the case was pending before the Supreme Court, no religious invocation had been made under the latest version of the school's policy. *See id.* at 313. Rejecting this argument, the Court observed:

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 (cleaned up) (emphasis added).

The panel opinion in this case states, “the Court [in *Santa Fe*] used broad language to describe the injury non-adherents may suffer from witnessing a prayer at a school football game.” *Barber*, 860 F.3d at 354. This assertion is plainly incorrect; the Court in *Santa Fe* described the injury the non-adherent plaintiffs in that case actually suffered from the “mere passage by the [school d]istrict of a policy that has the purpose and perception of government establishment of religion.” 530 U.S. at 314. The panel opinion further states, “*Santa Fe* does not address the standing of the instant plaintiffs.” *Barber*, 860 F.3d at 354. While it is true that the Court in *Santa Fe* was not responding to a challenge to the plaintiffs' standing per se, its

explication of the relevant constitutional injuries against which the Establishment Clause guards is highly relevant to the question of what constitutes injury-in-fact for standing purposes in an Establishment Clause case. *See Littlefield*, 268 F.3d at 294 n.31 (“The standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer.” (Cleaned up)). It is also highly instructive that the Court did not perceive any standing problem under the circumstances of *Santa Fe*, which are similar to the facts of the instant case. *See Murray*, 947 F.2d at 151 (ruling that plaintiff has alleged sufficient injury to confer standing and stating, “In so ruling, we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases”).

The plaintiffs allege that Mississippi’s enactment of HB 1523 endorses religious beliefs that they do not hold and thereby conveys a message that they “are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Santa Fe*, 530 U.S. at 309–10. Relying on the Supreme Court’s opinion in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 483 (1982), the panel opinion states that “[a]llowing standing on [this] 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.” *Barber* 860 F.3d at 354. That is simply not so. In *Valley Forge*, a group of plaintiffs dedicated to the separation of church and state sought to challenge the transfer of federal property to a religious educational institution. 454 U.S. at 468–69. None of the plaintiffs lived in or even

near Pennsylvania, where the property at issue was located. *Id.* at 486–87. The Court held that the plaintiffs did not have standing, stating, “Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.” *Id.* at 487.

The plaintiffs in the present case are citizens of Mississippi and are subject to its laws; to allow standing here would not give an improper venue to “generalized disagreement with activities in a place in which [they] have no connection.” *Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 478 (3d Cir. 2016) (citing *Valley Forge*, 454 U.S. at 482– 83); *see also, e.g., Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc) (a “psychological consequence” constitutes concrete harm where it is “produced by government condemnation of one’s own religion or endorsement of another’s *in one’s own community*” (emphasis added)); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) (practices in one’s “own community may create a larger psychological wound than some place we are just passing through”); *Saladin v. City of Milledgeville*, 812 F.2d 687, 693 (11th Cir. 1987) (plaintiffs “have more than an abstract interest” where they are “part of [the relevant community]”).

The plaintiffs’ allegations are thus sufficient to establish their standing to bring a challenge under the Establishment Clause. This conclusion is consistent with the holdings of at least two of our sister circuits, which have recognized that stigmatic harm caused by government policies or regulations to individuals within their own political community is sufficient to

establish standing for purposes of the Establishment Clause. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 583 (4th Cir. 2017) (en banc) (“IRAP”); *Catholic League*, 624 F.3d at 1052.

In *Catholic League*, the Ninth Circuit, sitting en banc, determined that a group of Catholic San Francisco residents had standing to challenge a non-binding resolution by the Board of Supervisors that condemned their beliefs regarding adoptions by same-sex couples. 624 F.3d at 1046–48. The court explained:

At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. Had a Protestant in Pasadena brought this suit, he would not have had standing. Catholics in San Francisco, on the other hand, have sufficient interest, so that well-established standing doctrine entitles them to litigate whether an anti-Catholic resolution violates the Establishment Clause. . . . Standing is not about who wins the lawsuit; it is about who is allowed to have their case heard in court. It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government’s preferment of other religious views.

Id. at 1048 (cleaned up).

The panel opinion states, “Because HB 1523 is not a specific condemnation of an identified religion

challenged by its adherents, the standing analysis in *Catholic League* is inapposite.” *Barber*, 860 F.3d at 355 n.9. However, this reading of *Catholic League* elides that case’s central observation:

A psychological consequence does not suffice as concrete harm where it is produced merely by observation of conduct with which one disagrees. But it does constitute concrete harm where the psychological consequence is produced by government condemnation of one’s own religion *or endorsement of another’s in one’s own community*.

624 F.3d at 1052 (cleaned up) (emphasis added). The Ninth Circuit’s recognition of the concrete injury a plaintiff suffers as a result of his government’s endorsement of another religion is further illustrated in that court’s statement that “[w]ere the result otherwise . . . a resolution declaring Catholicism to be the official religion of the municipality would be effectively unchallengeable.” *Id.* at 1048.

In *IRAP*, the Fourth Circuit, sitting en banc, found that a Muslim lawful permanent resident of the United States had standing to challenge an Executive Order banning immigration from certain Muslim-majority countries. 857 F.3d at 572–75, 583. The panel opinion here states that *IRAP* is distinguishable because the Executive Order at issue in that case would have barred the plaintiff’s wife from entering the country and thereby prolonged their separation. *Barber*, 860 F.3d at 355. But while the Fourth Circuit did recognize this effect as an injury sufficient to support standing, it also recognized as a “distinct” injury the fact that the Executive Order “sends a state-sanctioned message condemning his religion and causing him to feel excluded and marginalized in his

community.” *IRAP*, 857 F.3d at 583. This stigmatic harm, the court found, also showed sufficient “personal contact” with the alleged establishment of religion to bring suit. *Id.* The court noted, “This harm is consistent with the ‘[f]eelings of marginalization and exclusion’ injury we recognized in *Moss* [*v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012)].” *IRAP*, 857 F.3d at 585.

In *Moss*, the Fourth Circuit held that a non-Christian family had standing to challenge a public school’s policy of conferring academic credit for off-campus religious instruction from a Christian school. 683 F.3d at 607. The court stated that “because the [family members] are not Christians, the School District’s alleged Christian favoritism made them feel like ‘outsiders’ in their own community.” *Id.* Notably, the court concluded:

Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion “that they are *outsiders*, not full members of the political community.”

Id. (quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005)).

II

Until the panel opinion in this case, our court’s precedent was not in conflict with these holdings. The panel opinion discusses a number of cases involving religious exercises and displays and argues that those cases either involved or required a “personal

confrontation”—a physical exposure in all those cases—that the panel opinion does not find in the instant case. See *Barber*, 860 F.3d at 353–54 (discussing *Murray*, 947 F.2d 147 (religious symbol in city insignia); *Staley v. Harris Cty.*, 485 F.3d 305 (5th Cir. 2007) (en banc) (addressing mootness in context of removal of religious monument, which was relief sought by plaintiff); *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) (practice of religious invocations)). But these cases are not on point because this case deals neither with a religious exercise nor with a religious display. Instead, the plaintiffs challenge a state statute, similar to the school districts’ policies in *Santa Fe* and *Moss*, the Board of Supervisors’ resolution in *Catholic League*, and the executive order in *IRAP*. A physical confrontation is not required in such a case—the stigmatic harm that flows from the enactment of the law or the adoption of the policy tending to make the plaintiffs feel marginalized or excluded in their own community is sufficient.

In attempting to establish that stigmatic harm is not sufficient to create standing even in cases involving challenges to official policy or law, the panel opinion cites *Littlefield v. Forney Independent School District*, 268 F.3d 275, 294 n.31 (5th Cir. 2001), for the proposition that “[w]here a statute or government policy is at issue, the policy must have some concrete applicability to the plaintiff.” *Barber*, 860 F.3d at 353. But *Littlefield* does not stand for this proposition. In *Littlefield*, public school students and their families argued that the opt-out procedures for the school district’s mandatory uniform policy favored certain established religions at the expense of others and thus violated the Establishment Clause. 268 F.3d at 282. Finding that the *Littlefield* plaintiffs had standing,

this court observed that the plaintiffs’ “direct exposure to the [opt-out] policy satisfies the ‘intangible injury’ requirement to bring an Establishment Clause challenge.” *Id.* at 294 n.31. However, the *Littlefield* court in no way suggested that such “direct exposure” to the policy was *required* to establish standing—the panel opinion conflates necessity with sufficiency. Moreover, as the plaintiffs note in their petition for rehearing, 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. The panel opinion does not explain how the plaintiffs’ exposure to HB 1523 is any less “direct” than the *Littlefield* plaintiffs’ exposure to the opt-out policy.

* * *

The First Amendment “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (cleaned up). The courts in *Catholic League*, *IRAP*, and *Moss* recognized, consistent with the Supreme Court’s explication of core Establishment Clause principles in *Santa Fe*, that the stigmatic harm that flows from the enactment of a law or adoption of official policy that deems a non-adherent plaintiff an “outsider” in his own community is sufficient to confer standing. By denying standing in the present case, the panel opinion falls into grievous error, unjustifiably creates a split from our sister circuits, and rejects pertinent Supreme Court teachings. To reference what the Ninth Circuit in *Catholic League* recognized, under the panel opinion’s holding, a law “declaring [Episcopalianism] to be the official religion of [Mississippi] would be effectively unchallengeable.” 624 F.3d at 1048. The panel opinion’s holding will thus

deny citizens a forum in which to challenge “the evils against which the Establishment Clause was designed to protect.” *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

Because I believe that this court has abdicated its mandate to decide the substantive claims raised by the plaintiffs, I respectfully dissent from the denial of rehearing en banc.

128a

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 29, 2017

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW:

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

Enclosed is an order on Petitions for Rehearing
entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Joseph M. Armato
Joseph M. Armato, Deputy Clerk

Mr. Michael James Bentley
Mr. Daniel Bradshaw
Ms. Sibyl Byrd
Ms. Kimberlee Wood Colby
Ms. Justine M. Daniels
Ms. Deborah Jane Dewart
Mr. John Allen Eidsmoe
Mr. Roy Theodore Englert Jr.
Mr. Tommy Darrell Goodwin
Mr. Jacob Wayne Howard
Ms. Jaren Elizabeth Janghorbani

Mr. Arthur S. Johnston III
Ms. Roberta Ann Kaplan
Mr. Richard Brian Katskee
Mr. Joshua David Kaye
Mr. Scott A. Keller
Mr. Charles C. Lifland
Ms. Elizabeth Littrell
Mr. George Andrew Lundberg
Mr. James William Manuel
Mr. Robert Bruce McDuff
Ms. Alysson Leigh Mills
Mr. Jonathan F. Mitchell
Ms. Kim Nemirow
Mr. Andrew O'Connor
Mrs. Beth Levine Orlansky
Mr. Mack Austin Reeves
Ms. Nicole Erica Schiavo
Mr. Drew Landon Snyder
Ms. Susan L. Sommer
Mr. Diego Armando Soto
Mr. Kevin Hayden Theriot
Mr. Jeffrey Samuel Trachtman
Mr. James H.R. Windels