No. 16-60477

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Cons w/16-60478

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Mississippi, Northern Division

BRIEF OF *BARBER* PLAINTIFF-APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

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

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

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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

2. Susan Hrostowski, Plaintiff-Appellee.

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

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

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

6. Rims Barber, Plaintiff-Appellee.

7. Carol Burnett, Plaintiff-Appellee.

8. Joan Bailey, Plaintiff-Appellee.

9. Katherine Elizabeth Day, Plaintiff-Appellee.

10. Anthony Laine Boyette, Plaintiff-Appellee.

11. Don Fortenberry, Plaintiff-Appellee.

12. Susan Glisson, Plaintiff-Appellee.

13. Derrick Johnson, Plaintiff-Appellee.

14. Dorothy C. Triplett, Plaintiff-Appellee.

15. Renick Taylor, Plaintiff-Appellee.

16. Brandiilyne Mangum-Dear, Plaintiff-Appellee.

17. Susan Mangum, Plaintiff-Appellee.

18. Joshua Generation Metropolitan Community Church, Plaintiff-Appellee, is a non-profit religious ministry that is not a publicly held corporation.

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

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

21. McDuff & Byrd, Counsel for all Plaintiffs-Appellees in Case No. 16-6047 (Robert B. McDuff , Sibyl C. Byrd and Jacob W. Howard representing).

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

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

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

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

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

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

28. Alliance Defending Freedom, Counsel for Defendants-Appellants Phil Bryant and John Davis (James A. Campbell representing).

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

Respectfully submitted,

/s/ Robert B. McDuff
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STATEMENT REGARDING ORAL ARGUMENT

Given the importance of this case and significant constitutional issues it raises, Plaintiffs respectfully request oral argument.

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INTRODUCTION

Mississippi's HB 1523 provides a scheme of special legal protections available only to those who profess sincerely held religious and moral beliefs against marriage between same-sex spouses, transgender individuals, and unmarried sexual intimacy. It is an unprecedented breach of the separation of church and state, an assault on the equal rights and dignity of the disfavored groups it targets, and a denial of equal treatment to the many who do not share those beliefs. As the District Court correctly concluded, HB 1523 violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court acted within its discretion in granting a preliminary injunction to prevent HB 1523 from taking effect pending review on the merits.

In June 2015, the Supreme Court held in *Obergefell v. Hodges* that constitutional guarantees of equal protection and due process entitle same-sex couples to join in civil marriage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. 2584, 2605 (2015). *Obergefell* is the latest in a string of landmark decisions rejecting historical opposition to the equal rights and dignity of lesbian and gay individuals that commonly has been premised on religious and moral beliefs condemning same-sex couples and their families. *Romer v. Evans* rejected "liberties" of those "who have personal or religious objections to homosexuality" as justification for a state constitutional amendment allowing unequal treatment of gay

people. 517 U.S. 620, 635 (1996). *Lawrence v. Texas* rejected "condemnation…shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family," however much founded on "profound and deep convictions accepted as ethical and moral principles," as a legitimate basis for infringing on gay individuals' fundamental right to engage in sexual intimacy. 539 U.S. 558, 571 (2003). *United States v. Windsor* likewise rejected "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality," as grounds to withhold full federal recognition to marriages of same-sex couples. 133 S. Ct. 2675, 2693 (2013). And most recently, *Obergefell* held that "decent and honorable religious or philosophical premises" deeming "same-sex marriage to be wrong" could not justify states' refusal to recognize same-sex couples' rights of marriage. 135 S. Ct. at 2602.

In the first session after *Obergefell*, the Mississippi Legislature passed HB 1523. Its principal purpose and effect was, as the District Court found, to "grant[] special rights to citizens who hold" negative religious or moral convictions about lesbian, gay, bisexual, and transgender ("LGBT") people. ROA.16-60477.309. The District Court concluded that HB 1523 is an attempt "to put LGBT citizens back in their place after *Obergefell*." ROA.16-60477.343.

Freeing oppressed people from discrimination's burdens has often been met with opposition from those with conflicting religious beliefs. This lesson was learned decades ago, when religious opposition to ending racial segregation, anti-miscegenation restrictions, and legal subordination of women was rejected as a justification for undermining fundamental civil rights guarantees. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (rejecting religious tenets to justify anti-miscegenation laws); *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D. S.C. 1966) (rejecting restaurant owner's claimed "constitutional right to refuse to serve members of the Negro race…upon the ground that to do so would violate his sacred religious beliefs"), *aff'd, modified on other grounds*, 390 U.S. 400 (1968); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1364-65 (9th Cir. 1986) (rejecting justification for withholding health benefits from married female employee that "in any marriage, only the man can be the head of the household").

Just as religious and moral opposition to the equal treatment of others did not excuse discrimination on the basis of race and sex in prior years, and just as it did not excuse discrimination on the basis of sexual orientation in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, neither does it excuse today the discriminatory scheme of special benefits HB 1523 erects solely for those who would discriminate against the groups the law targets.

HB 1523 would endow a privileged group holding government-endorsed religious beliefs with special legal privileges bestowed on no one else, resulting in infliction of unequal treatment and stigma on a subset of condemned Mississippians, Plaintiffs included. As the District Court recognized, the Constitution does not permit Mississippi to do this.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights) and 42 U.S.C. § 1983. This Court has jurisdiction of this appeal from a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Did the District Court abuse its discretion in issuing a preliminary injunction against HB 1523 based on the likelihood that the law violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

HB 1523 was passed in the first session of the Mississippi Legislature held after the Supreme Court's decision in *Obergefell.* The text of Section 2, the heart of HB 1523, provides:

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

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

H.B. 1523, 2016 Leg. Reg. Sess., § 2 (Miss. 2016) ("Section 2 beliefs").

HB 1523 provides a number of special protections exclusively for people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2. *See* HB 1523 §§ 3-8. These protections, which include immunity from certain actions by the State government, are discussed in the Campaign for Southern Equality ("CSE") plaintiffs' brief in this Court.

On June 3, 2016, the *Barber* Plaintiffs—twelve individuals from throughout Mississippi and a Hattiesburg church—filed this challenge to HB 1523 as a violation of the Establishment and Equal Protection Clauses and moved for a preliminary injunction to prevent its enforcement. One week later, the CSE and one individual, Rev. Dr. Susan Hrostowski, filed a separate challenge relying only on the Establishment Clause. The two cases were consolidated for purposes of the preliminary injunction proceeding and remain consolidated in this appeal.

The thirteen Plaintiffs in the *Barber* lawsuit are: (1) The Rev. Dr. Rims Barber, the director of the Mississippi Human Services Coalition and an ordained Presbyterian minister, ROA.16-60477.216-19; (2) The Rev. Carol Burnett, an

ordained Methodist minister who is Director of the Moore Community House in Biloxi and Director of the Mississippi Low-Income Child Care Initiative, ROA.16-60477.207-09, 16-60477.590-603; (3) Joan Bailey, a retired therapist with a practice largely devoted to lesbian women, ROA.16-60477.210-12; (4) Katherine Elizabeth Day, a transgender woman from Jackson who is an artist and activist, ROA.16-60477.220-23; (5) Anthony Laine Boyette, a transgender man from Harrison County, ROA.16-60477.213-15; (6) Rev. Don Fortenberry, an ordained Methodist minister and retired Chaplain of Millsaps College, ROA.16-60477.904-06; (7) Dr. Susan Glisson, formerly Founding Director of the William Winter Institute for Racial Reconciliation at the University of Mississippi, who is an unmarried woman in a long-term romantic relationship with an unmarried man that involves sexual relations, ROA.16-60477.224-27; (8) Derrick Johnson, Executive Director of the Mississippi State Conference of the NAACP, ROA.16-60477.234-37; (9) Dorothy C. Triplett, a retired state and municipal government employee and longtime community and political activist, ROA.16-60477.228-30; (10) Renick Taylor, a political activist and Field Engineer at CBIZ Network Solutions, who is a gay man engaged to marry his male partner in summer 2017, ROA.16-60477.231-33; (11) Brandiilyne Mangum-Dear, Pastor of Joshua Generation Metropolitan Community Church ("JGMCC"), who is a lesbian and has been married to her partner, Susan Mangum, since 2015, ROA.16-60477.238-41; (12) Susan Mangum, Director of

Worship at JGMCC, who is a lesbian and married to Brandiilyne Mangum-Dear, ROA.16-60477.238-41; and (13) the JGMCC, an inclusive ministry that welcomes all people regardless of age, race, sexual orientation, gender identity, or social status and includes a number of members within the three groups targeted by Section 2 of HB 1523. ROA.16-60477.238-41.

As set forth in their declarations, Plaintiffs do not subscribe to any of the religious beliefs and moral convictions endorsed in Section 2 and given special protection by HB 1523. Plaintiffs disagree with those beliefs and convictions and are offended by the State's endorsement and special protection of them.

Six of the Plaintiffs are direct targets of Section 2. Plaintiff Taylor is engaged to marry his male partner, and Plaintiffs Mangum and Mangum-Dear are a married lesbian couple. Plaintiff Glisson is in a non-marital relationship that includes sexual relations. And Plaintiffs Day and Boyette are transgender. The existence of each of these Plaintiffs is contrary to the beliefs endorsed by the State in HB 1523.

A preliminary injunction hearing was held on June 23-24, 2016. ROA.16-60477.439-815. The CSE brief in this Court discusses much of the evidence presented at the hearing.

On June 30, 2016, the District Court issued a lengthy opinion granting a preliminary injunction against HB 1523 on both Establishment Clause and equal protection grounds. ROA.16-60477.308-67. Two Defendants, the Governor and the

Executive Director of the Mississippi Department of Human Services, noticed their appeal and requested a stay pending appeal, ROA.16-60477-389, ROA.16-60477.416-12, which first was denied by the District Court and then by this Court. ROA.16-60477.430-35, ROA.16-60477.436-37. The Mississippi Attorney General, who is the State's chief legal officer and who defended the law in the District Court (where he was a Defendant), concluded that the preliminary injunction should not be appealed and declined to join the appeal.[1] The Registrar of Vital Records, the other Defendant in the case, also did not appeal.

SUMMARY OF ARGUMENT

1. Plaintiffs are Mississippi citizens challenging a Mississippi statute that publicly endorses religious beliefs they do not share, provides legal protections exclusively to those who subscribe to those views, and disfavors and condemns specific groups which include some Plaintiffs. They have standing to raise both their First and Fourteenth Amendment Claims.

A. Just as this Court held that a family had Establishment Clause standing to challenge a moment of silence in the children's schoolroom because "we can assume that they or their parents have been offended," *Croft v. Governor of*

[1] *See Verbatim Statement by Attorney General Jim Hood on HB 1523*, Jackson Free Press (July 13, 2016), *available at* http://www.jacksonfreepress.com/weblogs/jackblog/2016/jul/13/statement-attorney-general-jim-hood-hb-1523/ ("Hood Statement") ("After careful review of the law...I have decided not to appeal the Federal Court's injunction in this case against me....[To] fight for an empty bill that dupes one segment of our population into believing it has merit while *discriminating against another* is just plain wrong.") (emphasis added).

Texas, 562 F.3d 735, 746 (5th Cir. 2009), the Plaintiffs here have standing because they are offended by the State's decision to publicly endorse and provide special protection to the Section 2 beliefs. If a statute was passed endorsing the Christian faith as the official religion of a particular state, surely a non-Christian resident could challenge it, just as she could challenge a cross erected by the local government in her community. The Establishment Clause provides that the government "shall make *no law* respecting an establishment of religion." U.S. Const. amend. I. The standing requirements should be no stricter for a constitutional challenge to a law than to a symbol, a prayer, or a moment of silence. HB 1523's injury includes "send[ing] the ancillary message to...non-adherents [like the Plaintiffs] 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (citation omitted).

B. By bestowing legal privileges on those who would discriminate against members of the targeted groups, HB 1523 "stigmatiz[es] members of the[se] disfavored group[s] as 'innately inferior' and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (citations omitted). This provides equal protection standing to the particular Plaintiffs who belong to those groups. Further, by bestowing legal privileges only on those who

subscribe to the favored beliefs, the statute disfavors those who believe differently and "personally denie[s] [them] equal treatment solely because of their membership in [that] disfavored group." *Id.* at 740. This provides standing to all Plaintiffs. "[T]he appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class." *Id.*

In *Heckler* and other equal protection standing cases, "[t]he Supreme Court [has] recognize[d] that illegitimate unequal treatment is an injury unto itself." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n. 2 (5th Cir. 1991). Here, the illegitimate unequal treatment and discriminatory stigma built into HB 1523's special protections for the favored believers are themselves the injuries that provide standing. Moreover, even beyond the cognizable injury Plaintiffs suffer from HB 1523's facial imposition of inequality, those Plaintiffs in the groups targeted by the law face substantial risk of additional stigma and harm if HB 1523 takes effect. There is no need to await implementation of the statute and force someone injured by a favored believer to come forward and sue.

2. Among the reasons the District Court struck down HB 1523 on Establishment Clause grounds was its finding that the statute "was not motivated by any clearly secular purpose." ROA.16-60477.360 n. 43. A statute impermissibly endorses religion in violation of the Establishment Clause if it is not motivated by a secular purpose, but instead promotes religion "by advancement of…particular

religious belief[s]," *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), such as the three beliefs endorsed by HB 1523.

Defendants' claimed secular motive of protecting "conscientious scruples" is implausible in light of their statements that "Mississippi residents already enjoyed HB 1523's protections under the state's Religious Freedom Restoration Act (RFRA)," Appellants' Br. 7, that "[e]ven before HB 1523, it was legal in Mississippi...to decline to participate in same-sex marriages and the other activities mentioned in HB 1523," *id.* at 19, and that they "have no intention to penalize...the persons or entities protected by HB 1523...because no other provision of state law authorizes or requires them to do so." *Id.* at 20.

HB 1523 is like the statute held unconstitutional in *Edwards* in that it erects a "discriminatory preference" by "forbid[ding] [the State] to discriminate against anyone" who subscribes to the three religious beliefs but "fail[ing] to protect those" who do not. *Edwards*, 482 U.S. at 588. As in *Edwards*, this demonstrates that "the primary purpose of [HB 1523] is to endorse a particular religious doctrine." *Id.* at 594. This supports the District Court's finding of no secular purpose, and demonstrates that it was not clearly erroneous.

3. HB 1523 violates the Equal Protection Clause by erecting a scheme of special legal privileges to justify certain forms of discrimination against the three targeted groups, thereby imposing "a disadvantage, a separate status, and so a

stigma" upon those groups. *Windsor*, 133 S. Ct. at 2693. Further, by creating this scheme of special "benefits [for] the favored class" of those who believe that members of the three groups are sinful, the State discriminates against individuals with different beliefs. *Heckler*, 465 U.S. at 740. There is no legitimate governmental interest justifying these forms of discrimination, and no compelling or even rational basis sufficient to uphold them. HB 1523 renders it "more difficult for one group of citizens than for all others to seek aid from the government," which is "itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633. That denial "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 635.

4. The equitable factors favor a preliminary injunction.

ARGUMENT

When reviewing a motion for preliminary injunction, "[t]his court will reverse the district court only upon a showing of abuse of discretion." *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 278 (5th Cir. 1996). Findings of fact should not be set aside unless clearly erroneous. *Janvey v. Alquire*, 647 F.3d 585, 592 (5th Cir. 2011).

I. The District Court Did Not Abuse Its Discretion In Concluding That Plaintiffs Likely Have Standing To Vindicate Their Rights Under The Establishment And Equal Protection Clauses.

The District Court correctly held that on both their claims, Plaintiffs satisfy the elements for 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 Defendants' conduct, and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); ROA.16-60477.325-34.

As a threshold matter, Defendants contend that every Plaintiff must demonstrate standing for the preliminary injunction to be affirmed (Appellants' Br. 15 n.16), and that the Court must analyze separately each Plaintiff's standing to challenge each and every discrete provision of Section 3 of HB 1523 (*id.* at 14-15, 21-31).

Instead, the Supreme Court has made clear that "the presence of" just "one party with standing is sufficient to satisfy" Article III. *Rumsfeld v. Forum for Acad. & Instit'l Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006).[2]

Defendants' severability argument ignores that HB 1523's core constitutional defect lies in *Section 2*, the heart of the law, which defines the three sets of convictions it privileges and, concomitantly, the three classes of people it

[2] *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338, 344 (5th Cir. 2013), relied on by Defendants (Appellants' Br. 15), involved Plaintiffs whose challenge to a statutory age threshold was mooted after their birthdays, nothing like the situation here.

disadvantages. These Section 2 beliefs are expressly incorporated across the board into *every* subsection of Section 3. The provisions of Section 3 are "so intimately connected with and dependent upon" the offending operational provisions of Section 2 as to sink Section 3 in its entirety. *Wilson v. Jones Cty. Bd.of Supervisors*, 342 So.2d 1293, 1296 (Miss. 1977). Plaintiffs thus appropriately bring a facial challenge against HB 1523 because Section 2 renders it intrinsically flawed in any application. *See, e.g., Santa Fe*, 530 U.S. at 314 ("Our Establishment Clause cases involving facial challenges…have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."); *Romer*, 517 U.S. at 635 (facially invalidating on equal protection grounds Colorado's Amendment 2, because "in making a general announcement that gays and lesbians shall not have any particular protections from the law," it "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it").

A. Injury In Fact

1. *Establishment Clause Claim:* Plaintiffs, twelve Mississippi citizens and one Mississippi church, do not subscribe to the religious beliefs endorsed by their State's government in HB 1523 and do not receive the legal protections bestowed on those who do. They are offended by the State's decision to publicly endorse and provide special protections for those beliefs. Among them are

four ministers, a church worker, and a church who do not receive the legal protections accorded to ministers, church workers, and churches holding the endorsed beliefs. They also include members of all three groups that are the subject of disapproval and condemnation by those who hold the endorsed beliefs. If these Plaintiffs do not have standing to challenge HB 1523 pre-enforcement, it is unclear who does.

Defendants say Plaintiffs complain simply about "psychological distress over a regimen that shields conscientious objectors from penalty or punishment." Appellants' Br. 10. Defendants then quote a phrase, frequently quoted out of context, from *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.* to the effect that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not, in itself, sufficient to confer standing. 454 U.S. 464, 485 (1982). Appellants' Br. 17. But Defendants fail to include the full context of the Court's standing discussion:

> We simply cannot see that respondents have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. 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.

454 U.S. at 486-487 (footnotes omitted).

By contrast, Plaintiffs here are Mississippians challenging a Mississippi statute because, through that statute, their State publicly endorses specific religious and moral convictions they do not share, provides legal protections only to those subscribing to those views, and disfavors and condemns specific groups which include some Plaintiffs.

In at least two of the Supreme Court crèche-menorah cases, the plaintiffs were described simply as "residents" of the county and the city in which the religious symbols were displayed. *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chap.*, 492 U.S. 573, 587-88 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984). And in *Croft*, relied on by the court below (ROA.16-60477.329-30), this Court addressed standing in an Establishment Clause challenge to a moment of silence:

> The Crofts have alleged that their children are enrolled in Texas public schools and are required to observe the moment of silence daily....The Crofts' children are definitely present for the moment of silence, and ... we can assume that *they or their parents have been offended*—else they would not be challenging the law. That is enough to establish standing at this [summary judgment] stage of the suit.

562 F.3d at 746 (emphasis added).

Defendants contend that:

> *Croft*...is no help because the schoolchildren involved in that case were *certain* to be exposed to the state pledge of allegiance, and its inclusion of the phrase "one State under God," each day that they attended school. In this case, by contrast, the plaintiffs have offered only speculative and

> conjectural allegations that they *might* encounter a denial of services caused by HB 1523.

Appellants' Br. 34-35 (emphasis in original).[3]

But the challenge to HB 1523 is not simply about "denial of services." Plaintiffs in *Croft* had standing because they were "offended" by what they deemed to be a religious endorsement, just as Plaintiffs are here. And just as Defendants concede that the schoolchildren in that case were exposed to the alleged endorsement they challenged, Plaintiffs here have submitted declarations confirming that they have been exposed to HB 1523, enacted as the law of their State. Each (a) has read the statute, (b) is aware of its contents, (c) has followed the controversy about it, including, for some, following the debates in the legislature, (d) "do[es] not subscribe to any of the religious beliefs and moral convictions that are endorsed in Section 2," (e) "disagree[s] with each of those beliefs and convictions," and (f) is "offended by the State's decision to publicly endorse those beliefs and convictions and provide them special protection." ROA.16-60477.207-41, ROA.16-60477.904-06.

If a statute was passed endorsing the Christian faith as the official religion of a particular state, surely a non-Christian resident of that state offended by that endorsement could challenge it, just as a resident could challenge a crèche erected

[3] Although Defendants claim the issue was exposure to the state pledge of allegiance, *Croft*'s standing discussion related to the "moment of silence." 562 F.3d at 746.

by the local government in the community. And if a state enacted a statute endorsing the Ten Commandments, surely a citizen offended by that endorsement could bring a challenge, just as she could if the Commandments were posted on the wall of her child's classroom. *See Stone v. Graham,* 449 U.S. 39, 42-43 (1980). Indeed, the Establishment Clause reads that the government "shall make *no law* respecting an establishment of religion." U.S. Const. amend. I (emphasis added). Passage of a state *law* endorsing certain religious beliefs raises constitutional concerns at least as significant as those raised by a religious symbol, placard, prayer, or moment of silence. The standing requirements for challenging a law should be no stricter.

The Tenth Circuit applied these principles in affirming a pre-enforcement preliminary injunction in *Awad v. Ziriax*, which held that a Muslim plaintiff had standing to challenge a referendum to amend Oklahoma's constitution to prohibit courts from considering or using international or Shariah law. 670 F.3d 1111 (10th Cir. 2012). The Court held:

> In some respects, Mr. Awad's alleged injuries are similar to those found sufficient to confer standing in our religious symbol Establishment Clause cases. Like the plaintiffs who challenged the highway crosses in *American Atheists* [*v. Davenport,* 637 F.3d 1095 (10th Cir. 2010)], Mr. Awad suffers a form of "personal and unwelcome contact" with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment. As a Muslim and citizen of Oklahoma, Mr. Awad is "directly affected by the law...against which [his] complaints are directed." *See Valley Forge*, 454 U.S. at 487 n. 22 (*quoting Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 224 n. 9…(1963))….[T]hat is enough to confer standing.

Awad, 670 F.3d at 1122. The Tenth Circuit further noted that "Mr. Awad is facing the consequences of a statewide election approving a constitutional measure that would disfavor his religion relative to others." *Id.* at 1123.

Like the plaintiffs in *Croft* enduring a moment of silence which offended them, Plaintiffs here are required to endure an endorsement of religion in the law of their own State to which they object. And like the plaintiff in *Awad*, Plaintiffs here suffer a form of "personal and unwelcome contact" with, and "fac[e] the consequences" of, a statutory enactment that, by providing special protections to the beliefs of others, "disfavor[s]" their own beliefs "relative to others." *Id.* at 1122.

In *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, the Ninth Circuit analogized the plaintiffs in *Valley Forge* to "Protestants in Pasadena suing San Francisco over its anti-Catholic resolution." 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc). The court explained:

> One has to read the whole *Valley Forge* sentence quoted, and not stop at "psychological consequence," to understand it. 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. For example, in the school prayer and football game cases, nothing bad happened to the students except a psychological feeling of being excluded. Likewise in the crèche and Ten Commandments cases, nothing happened to the non-Christians, or to people who disagreed with the Ten Commandments or their religious basis, except psychological consequences....[I]n *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the others, for which

> the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community.

Id.

This is consistent with the Supreme Court's explanation in *Santa Fe*:

> School 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, and an accompanying message to adherents that they are insiders, favored members of the political community."

530 U.S. at 309-10 (citation omitted). The same is true for a statute, in which the "audience" for the ancillary message are not those attending a football game, but the residents of the state governed by the statute. HB 1523 sends the message to Plaintiffs that they are outsiders, and sends it even more specifically to those Plaintiffs who are members of the targeted groups.

Accordingly, the District Court did not abuse its discretion in concluding that standing exists for the Establishment Clause claim.

2. ***Equal Protection Claim:*** "Our Nation's history teaches the uncomfortable lesson that those not on discrimination's receiving end can all too easily gloss over the 'badge of inferiority' inflicted by unequal treatment itself." *Hassan v. City of New York*, 804 F.3d 277, 291 (3d Cir. 2015). With predictable disregard for the people HB 1523 victimizes, Defendants suggest that LGBT and unmarried Mississippians suffer nothing from the law and can do nothing about it

unless they first undergo the added humiliation of having government officials turn their back on them or a business refuse to serve them because they have been branded sinners. *See* Appellants' Br. 16-19, 21-33, 37.

But the harm from unequal treatment goes far beyond the denial of services. The State of Mississippi has erected a scheme of legal privileges exclusively for those who subscribe to "sincerely held religious beliefs and moral convictions" that might lead them to discriminate against same-sex couples who marry or want to marry, unmarried people engaging in sexual relations, and transgender people. This "differentiation demeans" Plaintiffs, "whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. In *Heckler*, the Supreme Court explained:

> [T]he right to equal treatment … is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, 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 non-economic injuries to those persons who are personally denied *equal* treatment solely because of their membership in a disfavored group….[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….

465 U.S. at 739-40 (citations and footnotes omitted).

HB 1523 discriminates against Mississippians in at least two ways. First, by bestowing legal privileges and immunities on those who would discriminate against

members of the targeted groups, the statute "stigmatiz[es] members of the[se] disfavored group[s] as 'innately inferior' and therefore as less worthy participants in the political community." *Id.* at 739. It also makes it "more difficult for" particular "group[s] of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. Plaintiffs include members of each of the three groups HB 1523 disfavors. Second, by bestowing legal privileges only on those who subscribe to the favored beliefs, the statute disfavors those who believe differently and "personally denie[s] [them] equal treatment solely because of their membership in [that] disfavored group." All Plaintiffs belong to that disfavored group. "[T]he appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class." *Id.* at 740.

Contrary to Defendants' claims, these are not "hypothetical," "conjectural," or "speculative" injuries (Appellants' Br. 18), but instead are part of the designation of disfavored groups and the unequal treatment built into HB 1523 that will take effect if the injunction is lifted. This unusual scheme of exclusive legal privileges is unconnected to any legitimate governmental interest and does not satisfy rational basis review, much less heightened scrutiny.

In numerous equal protection cases, the courts have concluded that plaintiffs denied equal treatment by legal barriers erected in their paths, causing stigma or burdens to the possibility of attaining a benefit, satisfy the injury-in-fact standing

requirement. Thus in *Heckler*, the Supreme Court held that a man alleging the injury of unequal treatment under Social Security rules granting men lesser benefits than similarly situated women had a cognizable injury. The Court emphasized that the man's standing did not rest on "a substantive right to any particular amount of benefits, [nor] on his ability to obtain increased" benefits. 465 U.S. at 737. Indeed, under a severability provision in the Social Security rule, by prevailing on his equal protection claim, the benefit he sought could even be lost to men and women alike, leaving plaintiff with no monetary gain. *See id.* at 736, 740.

Following *Heckler*, this Court affirmed that "[t]he Supreme Court recognizes that illegitimate unequal treatment is an injury unto itself." *Peyote Way*, 922 F.2d at 1214 n. 2. The Court quoted the passage above in *Heckler* and described *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), as holding that a "secular magazine may challenge a tax exemption for religious periodicals even if the only remedy available to the Court would be to strike the exemption and subject all periodicals to the tax[.]" 922 F.2d at 1214, n. 2.

Although *Romer* was an appeal from state court, and did not thereby address the same Article III standing issues raised by Defendants here, its discussion of equal protection injury is relevant to the injury requirement for standing purposes. The State law immunities granted by HB 1523 to the favored believers "impose[] a special disability" on the targeted groups, "forbid[] [them] the safeguards that others

may enjoy or may seek without constraint," 517 U.S. at 631, and make it "more difficult for [the targeted groups] to seek aid from the government." *Romer,* 517 U.S. at 633.[4]

In *Hassan,* the Third Circuit explained that "virtually every circuit court has reaffirmed—as has the Supreme Court—that a 'discriminatory classification is itself a penalty,' *Saenz v. Roe,* 526 U.S. 489, 505…(1999), and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." 804 F.3d at 289-90; *see also id.* at 289 n. 1 (gathering cases). The court rejected the argument that "unequal treatment is only injurious when it involves a tangible benefit like college admission or Social Security," confirming instead that unequal legal treatment causing "stigma[]," "'dehumanizing injury,'" and "'dignitary affront'" suffices for standing. *Id.* at 290 (citations omitted).[5]

[4] Because *Romer* is pertinent to the issue of injury, Defendants' criticism of the District Court for discussing *Romer* as part of the standing analysis is misplaced. Appellants' Br. 33-34.

[5] Defendants contend that "hurt feelings and stigma" cannot establish standing, citing inapposite cases like *Allen v. Wright* and *Hollingsworth v. Perry*. Appellants' Br. 18. Neither case addressed standing to challenge laws that by their very enactment classify plaintiffs for unequal and stigmatizing treatment, an injury long recognized to establish standing. Plaintiffs in *Allen* sued to force IRS officials to exercise enforcement discretion against segregated private schools in which plaintiffs had no desire to enroll their children. Although holding that plaintiffs lacked standing to force the IRS to take action, the Court nonetheless reaffirmed that "stigmatizing injury" accords standing to "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct," and cited *Heckler* as an example. 468 U.S. 737, 755 (1984) (citations omitted). *Hollingsworth* involved a challenge to California's anti-gay voter initiative by same-sex couples, who, like Plaintiffs here, unquestionably had standing to bring an equal protection claim against a measure "serv[ing] no purpose 'but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships.'" 133 S. Ct. 2652, 2661 (2013) (citation omitted). *Hollingsworth* simply denied the standing of *intervenors* to appeal the ruling when the government defendants refused to. *Id.* at 2662. Defendants here assert that

In *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. Jacksonville*, the Supreme Court held that plaintiff contractors had standing to challenge a minority set-aside program preventing them from bidding on municipal contracts, even though none had shown they would have won a single contract had they been permitted to bid. 508 U.S. 656, 659 (1993). The Court held:

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

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

Adarand Constructors, Inc. v. Pena further negates Defendants' contentions that Plaintiffs' injuries are insufficiently concrete and imminent, or too speculative, to establish standing. There the Court held that a subcontractor had standing to challenge the unequal treatment under a government incentive plan benefiting "'socially and economically disadvantaged'" bidders for government contracts. 515 U.S. 200, 204 (1995). Approximately *just one* government contract a year was even offered for bid, *id.* at 212, and the plaintiff had not demonstrated that in the absence

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Hollingsworth rejected a claim by the intervenors that they were "'offended'" and "'stigmatized'" by the ruling they were appealing (Appellants' Br. 17), but those words appear nowhere in the Supreme Court's opinion denying standing, further demonstrating that *Hollingsworth* is no support to Defendants.

of the challenged incentive, it would be the winning bidder. *Id.* at 211. The Court nonetheless concluded that these circumstances constituted "'imminent' injury…not too speculative for Article III purposes." *Id.*; *see also, e.g.*, *Quinn v. Millsap,* 491 U.S. 95, 103, n. 8 (1989) (non-property owner plaintiffs had standing to challenge property ownership requirement for membership on government board even though they lacked standing to challenge the requirement "as applied"); *Turner v. Fouche*, 396 U.S. 346, 361–62, n. 23 (1970) (non-property owner plaintiff had standing to challenge property ownership requirement for school board membership without evidence that plaintiff had applied or been rejected); *Texas Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x 210, 218 (5th Cir. 2008) (cable operators had standing to challenge "[d]iscriminatory treatment at the hands of the government," an injury "recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law").

If Mississippi passed a statute that stigmatized African-Americans by providing a scheme of legal privileges to justify certain forms of discrimination by those with "sincerely held religious beliefs or moral convictions" that African-Americans should be segregated from whites, that statute would be struck down as a facial violation of the Equal Protection Clause prior to its implementation. Just as African-American Mississippians would have standing to file a pre-enforcement challenge, Plaintiffs in the groups targeted by HB 1523 have standing here.

Thus, the unequal treatment and discriminatory stigma built into the statute are themselves the injuries that provide standing. There is no need to await implementation of the statute and force someone injured by a favored believer to come forward and sue. There also is no need to prove the potential for additional injuries if the statute were to take effect.

But even if it were necessary to make a further showing about additional injuries, Defendants are wrong that proof of a "certainty" of impending harm is necessarily required. Appellants' Br. 2, 16, 18. "Our cases do not uniformly require plaintiffs to demonstrate that it is *literally certain* that the harms they identify will come about. In some instances, we have found standing based on the '*substantial risk*' that the harm will occur…." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n. 5 (2013) (emphasis added). In *Susan B. Anthony List v. Driehaus*, the Court reinforced that "[a]n allegation of future injury may suffice" not solely if "'certainly impending,'" but, alternatively, simply if "there is a 'substantial risk' that the harm will occur." 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*). Even beyond the cognizable injury they suffer from HB 1523's facial imposition of inequality, Plaintiffs face the substantial risk that HB 1523 will inflict additional stigma and harm were it to take effect.

For example, Plaintiff Katherine Day is a transgender activist from Jackson (ROA.16-60477.20 ¶¶ 1-3), where an "Unlawful Discrimination" ordinance

prohibits discrimination based on gender identity in contexts ranging from employment to housing, access to public accommodations, and riding a bus or taxi. The City is empowered to investigate violations and enforce the Ordinance. ROA.16-60477.254-56. But HB 1523 exempts from portions of Jackson's non-discrimination requirements those with Section 2 beliefs, inevitably exposing a transgender person to such substantial, commonplace risks as being forbidden use of a restroom (HB 1523 § 6) or dressing room (*id.*).

Renick Taylor is in a romantic and sexual relationship with his same-sex partner; they plan to wed this summer. ROA.16-60477.231-32. HB 1523 § 8(a) imposes on Taylor the substantial risk that government servants at the office where they apply for their marriage license, condemning them as immoral sinners, will refuse service to them in a degrading hand-off to other staff. And if vendors with whom Taylor has contracted for the wedding celebration arrive to see a same-sex couple, under § 3(5) they can refuse—even at the very last moment—to provide the contracted services. Under § 5(1), the vendor can then invoke HB 1523 as a defense to a claim for breach of contract. Moreover, since under § 2(a) Taylor's impending marriage can be denied recognition, under § 2(b) the couple's sexual relations in turn

can be deemed extra-marital, compounding the stigma and discrimination to which Taylor is exposed.[6]

Other Plaintiffs too fall into the specific groups targeted by HB 1523, and are subject to the same stigma, as well as enhanced risk of discrimination in their day-to-day to lives. These include transgender Plaintiff Anthony Boyette (ROA.16-60477.213); Hattiesburg spouses Brandiilyne Magnum-Dear and Susan Mangum—doubly targeted under Section 2 both for denial of recognition of their 2015 marriage and condemnation for engaging in a sexual relationship purportedly outside of marriage (ROA.16-60477.238, 16-60477.295); and Dr. Susan Glisson from Oxford, who is in a long-term non-marital sexual relationship (ROA. 16-60477.224-25, 16-60477.294).[7]

[6] Sadly, the probability such discrimination would befall a Plaintiff far exceeds the minimal probabilities of the anticipated harms supporting standing in cases like *Adarand.* According to a recent survey of LGBT Mississippians, nearly half have experienced harassment in public establishments. *See* Human Rights Campaign Mississippi, *Human Rights Campaign Unveils Results of Largest LGBT Survey in Mississippi History* 2, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Mississippi_Messaging_7.14.pdf.

[7] Hattiesburg and Oxford enacted policies rejecting discrimination on the basis of sexual orientation, gender identity and expression, and marital status, among other protected categories. City of Hattiesburg, *Adopt a Resolution Affirming City of Hattiesburg's Commitment to Diversity*, 2014-0930 (Feb. 18, 2014), https://hattiesburg.legistar.com/LegislationDetail.aspx?ID=1660030&GUID=8F269FB4-1F9A-4411-B169-0B463B004E1E&Options=&Search=; City of Oxford, *Resolution Affirming the City of Oxford's Commitment to Diversity* (Minute Book No. 65) (Mar. 4, 2014), http://www.oxfordms.net/documents/boards/boa/packets/march2014/20140304-06.pdf. Under HB 1523, Plaintiffs lose protections these policies could offer if, for example, a municipal employee with a Section 2 belief refuses them service.

As Defendants' *Amicus* States assert, "Mississippi did not enact HB 1523 in a vacuum." Br. for States of Texas, *et al.* ("States Br."), at 17, Doc. 00513744771. Rather, it was enacted "'against the backdrop" of numerous examples across the country of business owners "declining to engage in conduct"—that is, declining to provide equal services to same-sex couples—based on their "religious and moral convictions regarding same-sex marriage." *Id*. The *Amicus* States point out that, as in many other jurisdictions, denial of equal services to same-sex couples runs contrary to the law in "the largest city in Mississippi—its capital, Jackson—which has an 'unlawful discrimination' ordinance prohibiting 'differential treatment' on the basis of 'sexual orientation.'" *Id*.

Accordingly, the *Amicus* States observe, HB 1523 clearly responds to the "concrete," "actual threat" of a situation arising in which a business owner denies services to a same-sex couple. *Id*. This common-sense acknowledgment by the *Amicus* States belies Defendants' claim that a denial of service is "extremely unlikely." Appellants' Br. 37. *See Susan B. Anthony List*, 134 S. Ct. at 2341-45 (finding cognizable "real risk of complaints" being filed against plaintiffs by unknown future political opponents under statute allowing private parties to bring election complaints which previously had been invoked in similar circumstances).

The risk of such ill-treatment carries severe costs for Plaintiffs.[8] Contrary to Defendants' claim (Appellants' Br. 37), they should not have to await further blows before they can challenge this law. The Supreme Court in *Obergefell* sought to end the "dignitary wounds" and the "pain and humiliation" inflicted on lesbians and gay men by state action fueling discrimination against them. 135 S. Ct. at 633. The District Court did not abuse its discretion in holding that Plaintiffs likely have standing to challenge Mississippi's endorsement and re-imposition of those harms.

B. Causation And Redressability

For the reasons explained by the District Court, Plaintiffs also satisfy the causation and redressability requirements. ROA.16-60477.332-38.

Regardless of how third parties may treat Plaintiffs, they are directly injured by HB 1523's endorsement of religious beliefs to which they do not subscribe and imposition of harmful unequal treatment. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Plaintiffs' injuries are caused by the State government, "specifically…by the Governor who signed HB 1523…into law—and will at minimum be enforced by officials like Davis," ROA.16-60477.333, as well

[8] *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L. J. 2516, 2577-78 (2015) (compiling accounts of the devastation experienced by the same-sex couples denied services in the cases cited by the *Amicus* States).

as by the Governor who is "personally required" to enforce the law's prohibition on adverse consequences against State employees. ROA.16-0477.336-37. Indeed, the Governor and Davis are required by HB 1523 to show favoritism to those holding the endorsed beliefs and are prohibited from taking actions that would violate the privileges and immunities bestowed by the statute. Enjoining HB 1523 eliminates the State's endorsement of the Section 2 beliefs and imposition of unequal treatment, redressing injuries inflicted by the law, and releases Defendants and other State employees to do their jobs without being constrained by the mandatory favoritism built into the statute. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982); *Heckler*, 465 U.S. at 740.

II. The District Court Did Not Abuse Its Discretion In Concluding That Plaintiffs Demonstrated A Likelihood Of Success On Their Establishment Clause Claim.

In finding a likelihood of success on the First Amendment Establishment Clause claim, the District Court correctly held that HB 1523 is unconstitutional under the principles of *Larson*. But the court also noted that HB 1523 would be unconstitutional under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because it "was not motivated by any clearly secular purpose." ROA.16-60477.360 n. 43 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), citing *Edwards*, 482 U.S. at 592). The District Court thoroughly discussed the *Larson* analysis, ROA.16-60477.354-62, as do the *CSE* plaintiffs in their brief. Plaintiffs here focus on the

alternative holding that HB 1523 violates the standard set forth in *Lemon*, *Wallace*, and *Edwards.*

The District Court relied on the first prong of the three-pronged *Lemon* test, which specifies that "the legislature must have adopted the law with a secular purpose" in order for it to be constitutional. *Edwards*, 482 U.S. at 583. "State action violates the Establishment Clause if it fails to satisfy any of [the three] prongs." *Id.*

Defendants fail even to address the District Court's finding that HB 1523 was not motivated by a secular purpose, much less demonstrate that it was clearly erroneous. They fail to mention *Wallace* or *Edwards*, even though the reasoning of those cases is directly relevant to HB 1523. As *Edwards* explains, "[a] governmental intention to promote religion...may be evidenced by promotion of religion in general or *by advancement of a particular religious belief.*" 482 U.S. at 585 (emphasis added, citations omitted). HB 1523 impermissibly advances the three particular religious beliefs set forth in Section 2 by providing special protections exclusively for people who hold those beliefs.

Defendants suggest that HB 1523 was passed to protect certain "conscientious scruples" that are "under assault by government officials or by the culture." Appellants' Br. 44. But simply claiming a secular purpose does not make it so. In *McCreary Cty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Supreme Court noted that in its earlier decision in *Wallace*, "the Court declined to credit

Alabama's stated secular rationale of 'accommodation' for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray." *Id.* at 864 (citing *Wallace*, 472 U.S. at 57 n. 45).

In *Edwards*, the Court rejected the alleged secular purpose of "academic freedom" behind Louisiana's bill regarding the teaching of "creation science" because "[t]he Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life." 482 U.S. at 587. The Court also rejected the additional alleged secular purpose of "fairness." "[T]he goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution" given that "[t]he Act forbids school boards to discriminate against anyone who 'chooses to be a creation-scientist' or to teach 'creationism,' but fails to protect those who choose to teach evolution or any other non-creation science theory, or who refuse to teach creation science." *Id.* at 588. The Court concluded that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine," and therefore "the Act furthers religion in violation of the Establishment Clause." *Id.* at 594.

As in *Wallace* and *Edwards*, the State's claim of a secular motive in this case is implausible given that Mississippi previously enacted its RFRA, which is designed

to protect and accommodate religious beliefs. Defendants concede that "[i]t is likely that Mississippi residents already enjoyed HB 1523's protections under the state's" RFRA. Appellants' Br. 7.[9] The Defendants also claim that "[e]ven before HB 1523, it was legal in Mississippi for individuals, businesses, and religious organizations to decline to participate in same-sex marriages and the other activities mentioned in HB 1523." *Id.* at 19. They further state that they "have no intention to penalize…the persons or entities protected by HB 1523…because no other provision of state law authorizes or requires them to do so." *Id.* at 20. The absence of a threat to the rights of those who subscribe to the Section 2 beliefs supports the District Court's finding that there was no secular purpose behind HB 1523, and demonstrates that the statute is simply an endorsement of the favored religious beliefs.

Mississippi's RFRA, like other RFRAs around the country, does not endorse specific religious beliefs, but instead applies to all "exercise[s] of religion." Miss. Code Ann. § 11-61-1(5)(a). By contrast, HB 1523 is like the statute held unconstitutional in *Edwards* in that it erects a "'discriminatory preference'" by "forbid[ding] [the State] to discriminate against anyone" who subscribes to the three religious beliefs but "fail[ing] to protect those" who do not. *Edwards*, 482 U.S. at 588 (citation omitted). As in *Edwards*, this demonstrates that "the primary purpose

[9] Among Mississippi Attorney General Hood's reasons for not appealing the preliminary injunction is that "the Mississippi Legislature has already passed [RFRA] which protects a person's right to exercise his or her religious beliefs." Hood Statement, *supra* n. 1.

of [HB 1523] is to endorse a particular religious doctrine"—in this case, the specified Section 2 beliefs—and therefore "the [law] furthers religion in violation of the Establishment Clause." *Id.* at 594.

Even if the State believed there was some threat to religious liberty that required protection beyond the Mississippi RFRA, there is no legitimate reason the protection should be provided only to those who hold certain beliefs but not to others. Defendants suggest there is a "need" for HB 1523 because of the *Obergefell* decision, saying that "it was unthinkable—*until recently*—that government officials might try to coerce religious organizations or private citizens into participating in same-sex marriage ceremonies, or penalize them for their refusal to do so." Appellants' Br. 5 (emphasis added). However, Mississippi officials are not now suddenly trying to coerce unwanted participation in same-sex marriages any more than they are trying to coerce unwanted participation in interfaith marriages or any other type of marriage to which some people might have religious objections.

While a large number of RFRAs and related statutes purporting to accommodate religious beliefs have been enacted around the country in recent years, HB 1523 is the only one whose text provides special legal protection for *specific* religious beliefs. The rest apply to *all* religious beliefs.[10]

[10] *See* ROA.16-60477.283 n. 2 (compiling state RFRAs and related statutes).

As a general matter, the Establishment Clause is not violated when the government creates a forum where specific religious beliefs can be promoted on the same terms as other beliefs, whether religious or not. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). But opening a forum only to certain religious beliefs clearly endorses those beliefs in violation of the Establishment Clause. *See, e.g.*, *Santa Fe*, 530 U.S. at 303. HB 1523 is akin to the government opening a school building after hours, but only for programs sponsored by those who subscribe to the endorsed religious beliefs. Creating such an exclusive forum, like holding a high school graduation ceremony where only certain religious messages can be broadcast, violates the Establishment Clause by "send[ing] the ancillary message to . . . nonadherents 'that they are outsiders, not full members of the political community.'" *Id.* at 309 (citation omitted).

Defendants suggest that the Establishment Clause is never violated when a state "extend[s] specific protection to conscientious scruples that have come to the government's attention, and which might be endangered by state action," while not providing that protection to people who subscribe to different beliefs. Appellants' Br. 42. This is particularly the case, according to Defendants, when those scruples are "under assault by government officials or by the culture." *Id.* at 44. But the State of Mississippi, against whose actions HB 1523 provides special protections, is not waging an "assault" on the people whose views are given special protection under

HB 1523. Indeed, until the federal courts struck down the relevant statutes, Mississippi law prohibited gay and lesbian couples from marrying and adopting. The political power in Mississippi remains by and large with the opponents of the right of same-sex couples to marry. The Supreme Court's decision in *Obergefell* that lesbian and gay Americans are entitled under the Constitution to equal rights and dignity under the law, including the right to marry, does not mean "the culture" is waging an "assault" on those who disagree with the decision, and certainly not an "assault" that requires special statutory legal protections unavailable to those who believe differently.

Moreover, even if there are some situations where a State can "extend specific protection to conscientious scruples that have come to the government's attention, and which might be endangered by state action," while not providing that protection to people who subscribe to different beliefs, Appellants' Br. 42, that is not universally true. If it was, *Edwards* would have been decided differently. Under Defendants' reasoning, the State of Louisiana could have provided exclusive protections to the teachers of creationism, and no others, by claiming that creationism "was under assault by...the culture." But *Edwards* clearly held that Louisiana's alleged secular purpose of "'fairness'" was not advanced by a "discriminatory preference" that provided specific legal protection only for teachers of creationism. Instead, the Court concluded that "the primary purpose of the

Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 588, 594. As is clear from *Edwards*, discriminatory preferences that favor some religious views over others can be strong evidence of a religious purpose and an endorsement of religion.

Defendants wrongly argue that *Gillette v. United States*, 401 U.S. 437 (1971), and various abortion-conscience laws demonstrate that governments may pick and choose among the religious beliefs they seek to protect. Appellants' Br. 42-49. In *Gillette*, the Court pointed out that "the objector to all war—to killing in all war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not." *Id.* at 460. Similarly, the abortion-conscience laws permit health-care workers opposed to abortion to refrain from participating in what they believe is the taking of a human life, and are mitigated by statutory guarantees of life-saving medical care. *See*, *e.g.*, 42 U.S.C. § 1395dd(b). Creating exceptions for those who otherwise might be obligated to participate in what they believe is the killing of others in violation of their religious beliefs *does not* mean that governments can parcel out benefits and protections only to those who adhere to certain religions or religious beliefs. Nor does it mean that the government can carve out exceptions for performing abortions based on the identity of the individuals seeking treatment, allowing health-care workers to deny services based, for example, on the race or nationality of the patient.

Neither *Gillette*'s 1971 holding nor the existence of abortion-conscience statutes overrides or undermines *Edwards*' 1987 holding that the Creationism Act's "discriminatory preference" demonstrates that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 588, 594. The present case is much closer to *Edwards* than *Gillette*, and the holding in *Edwards* controls here irrespective of how alleged secular purposes regarding other statutes might be evaluated.[11]

In *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), a case cited by Defendants, the Court upheld the exemption for religious employers from the provisions of Title VII of the 1964 Civil Rights Act, as amended. But unlike the Creationism Act in *Edwards* and unlike HB 1523, the Title VII protection was not limited to those who followed or taught particular doctrines, but instead was provided to all religious employers. The Court in *Amos* pointed out that "[t]here is ample room under the Establishment Clause for 'benevolent *neutrality* which will permit religious exercise to exist *without sponsorship* and without interference,'" but

[11] Defendants claim there are "more than 2,000 religious exemptions in federal and state law that protect specific conscientious objections" that "would be swept away under the district court's reasoning." Appellants' Br. 45, *citing* James Ryan, Note, Smith *and the Religious Freedom Restoration Act, An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-50 (1992). But review of the examples contained in that law review note demonstrates that this alarmist claim is untrue. Most are very different from HB 1523. They primarily involve statutes that apply to *all* religious beliefs and purposes (like the copyright exemption), and many apply specifically to religious organizations espousing their own religious beliefs (like tax exemptions, the Title VII exemption, and the Fair Housing Act exemption). Some examples apply to a specific activity, like the ritual slaughter of animals, but encompass all religious beliefs relating to that activity.

"[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" 483 U.S. at 334-35 (emphasis added). Employing the *Lemon* analysis, the Court further noted that "*Lemon's* 'purpose' requirement aims at preventing the relevant government decisionmaker … from *abandoning neutrality* and acting with the intent of *promoting a particular point of view in religious matters.*" *Id.* at 335 (emphasis added). Unlike the provision at issue in *Amos*, HB 1523 abandons neutrality and singles out particular religious points of view for special protection.

It is worth noting that Defendants' claim that religious objectors are the victims of an "assault by government officials or by the culture" after *Obergefell* was similar to claims made by many in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* ROA.16-60477.36 nn. 6, 9. But the decision in *Brown*, and the decision years later in *Loving*, 388 U.S. 1, would not have justified a statute that provided special legal protection to those who professed religious beliefs that black people should not be allowed to go to school with white people or marry white people. If such a statute were passed today, surely it would be struck down as unconstitutional.

HB 1523 is no different, and the District Court properly held that Plaintiffs will likely succeed in their challenge to it. Federal court decisions recognizing the right of *equal treatment*—like *Brown*, *Loving*, and *Obergefell*—do not justify a statute giving special rights to those who oppose that equal treatment. People are

still entitled to their own religious beliefs, but they are not entitled to official endorsement of those beliefs by the State and provision of special legal privileges unavailable to others.

Fortunately, the virulent reactions of many people to *Brown* and *Loving* in years past have diminished over time. Attitudes toward same-sex relationships are also changing, and there may come a time when most Mississippians will be embarrassed by HB 1523. In the meantime, the special privileges it accords to people holding religious beliefs against same-sex marriages, non-marital sex, and transgender people are just as unconstitutional as granting special privileges to people with religious beliefs against black and white people attending school together and marrying one other.

III. The District Court Did Not Abuse Its Discretion In Concluding That Plaintiffs Demonstrated A Likelihood Of Success On Their Equal Protection Claim.

HB 1523 violates the Equal Protection Clause of the Fourteenth Amendment in at least two ways. First, by erecting a scheme of special legal privileges to justify certain forms of discrimination against (a) gay, lesbian, and bisexual people who are married to or plan to marry a same-sex spouse, (b) unmarried people who engage in sexual relations, and (c) transgender people, Mississippi imposes "a disadvantage, a separate status, and so a stigma" upon those groups. *Windsor*, 133 S. Ct. at 2693. Second, by erecting a scheme of special "benefits [for] the favored class," *Heckler*,

465 U.S. at 740, of those who believe that members of the three groups are sinful, the State discriminates against individuals with different beliefs. There is no legitimate governmental interest justifying these two forms of discrimination, and no compelling or even rational reason sufficient to uphold them.

A. HB 1523 Denies Equal Protection To The Three Targeted Groups.

By choosing to provide special legal protections exclusively to those opposed to the freedom of same-sex couples to marry, unmarried people who engage in sexual relations, and transgender people, Mississippi has enacted "a law having the purpose and effect of disapproval" of those groups. *Windsor*, 133 S. Ct. at 2693. Based on either of two modes of analysis applied by the Supreme Court to classifications of this sort, HB 1523 denies equal protection to the groups singled out for ill-treatment under Section 2, without advancing any sufficient, government justification.

Under the first mode of analysis, employed by the Supreme Court in *Windsor*, the explicit tiers of scrutiny can be bypassed in cases involving "'[d]iscriminations of an unusual character," signaling that the law is motivated by "an improper animus or purpose." *Id.* at 2692-93 (quoting *Romer*, 517 U.S. at 633). Such laws require "'careful consideration,'" *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633), to determine whether they are "obnoxious" to the equal protection guarantee.

Windsor, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 623). The second mode of analysis employs the traditional tiers of scrutiny.

1. HB 1523 Is A Discrimination Of An Unusual Character Motivated By An Improper Animus And Justified By No Legitimate Purpose.

HB 1523's exclusive protections based on religious and moral disapproval of targeted groups is not only unusual, it is *unique*. No other religious exemption statutes designed to protect religious and moral convictions have singled out for exclusive legal protection only particular favored beliefs. *See* Section II *supra.* Instead, those statutes have applied to all religious beliefs and moral convictions. Further, HB 1523 is the only statute of its kind in Mississippi of which Plaintiffs are aware bestowing special legal protections to justify certain forms of discrimination against specific groups of people. Many people have held strong beliefs against inter-denominational and other types of marriages, but no statute was passed providing those beliefs with special legal protections. Like the federal statute struck down in *Windsor*, the extraordinary legal protections provided by HB 1523 to opponents of marriage by same-sex couples sends a message "that [those] marriage[s are] less worthy than the marriages of others." *Windsor*, 133 S. Ct. at 2696. As the District Court held, this is precisely the type of aberrant law, with a design, purpose, and effect to impose inequality on discrete minorities, which the Supreme Court has held violates equal protection. ROA.16-60478.79.

This is even more apparent given that when HB 1523 was enacted, Mississippi already had in place its RFRA, a facially evenhanded law requiring the balancing of claims for religious exemptions, based on *any* sincerely held religious belief without singling out specific groups for special targeting, against countervailing government interests. *See* Miss. Code Ann. § 11-61-1. In enacting its RFRA in 2014, the Mississippi legislature concluded that its "compelling interest test…is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* at § 11-61-1(2)(e).

Defendants and their *amici* implausibly assert that HB 1523 serves a purely benign purpose, one that in no way targets or harms particular groups. According to Defendants, the law's sole function is "[p]rotecting the State's citizens from being forced or pressured to act in a way that violates their deeply held religious or moral beliefs." *See* Appellants' Br. 38; *see also* States Br. 16 (claiming that HB 1523 "does not invidiously discriminate on the basis of sexual orientation."). But HB 1523 does not "protect[] the State's citizens"—in reality it protects only the subset of citizens who subscribe to the privileged beliefs, while injuring vulnerable minorities. *See Obergefell*, 135 S. Ct. at 2602 (laws limiting marriage to male-female couples, though not using words "lesbian" or "gay," discriminated against lesbians and gay men).

Moreover, Defendants concede there is no threat to those who hold those privileged beliefs. Appellants' Br. 7, 19-20. No legitimate purpose underlies this statute, demonstrating that the District Court was justified (and not clearly erroneous) in finding that "[a] robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens." *See* ROA.16-60477.328; *id.* at 16-60477.347. As the Supreme Court has emphasized, such 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). Like the federal statute at issue in *Windsor*, HB 1523 "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those [who are targeted] in personhood and dignity." 133 S. Ct. at 2696.

2. HB 1523 Triggers Heightened Equal Protection Scrutiny, While Failing To Meet Any Level Of Review.

a. Heightened Scrutiny Applies.

HB 1523 also fails a conventional equal protection inquiry by drawing classifications that disadvantage historically marginalized groups and by burdening fundamental rights without even a legitimate and rational justification, much less the compelling government interest necessary to pass muster.

The statute discriminates against lesbian, gay, and bisexual individuals, *i.e.*, those who form the same-sex unions provoking religious and moral disapproval given the force of law under Section 2(a). This discrimination warrants heightened

scrutiny, which provides an enhanced measure of protection in circumstances, like those here, where there is a particular danger that a government-imposed legal classification results from impermissible disapproval. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). Even before *Obergefell*, courts increasingly recognized that heightened scrutiny was the appropriate level of review for sexual orientation classifications.[12] *Obergefell* warrants it now.[13]

While *Obergefell* did not specifically rule on the standard of scrutiny for sexual orientation discrimination, the opinion recognized that such classifications satisfy all four hallmarks the Court has considered in evaluating whether a classification warrants suspect or quasi-suspect status.[14] First, the Court recognized the long history of discrimination against gay people in this country. *Obergefell*, 135 S. Ct. at 2596-97. Second, the Court concluded that a same-sex sexual orientation does not impair an individual's ability to contribute to society and is instead "a normal expression of human sexuality." *Id.* at 2596. Third, the Court

[12] *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012), *aff'd* 133 S. Ct. 2675 (2013).

[13] In *Johnson v. Johnson*, this Court observed that, as of that time, "[n]either the Supreme Court nor this court ha[d] recognized sexual orientation as a suspect classification." 385 F.3d 503, 532 (5th Cir. 2004). But that does not foreclose doing so now, particularly given *Windsor*, *Obergefell*, and rulings in many other courts. *See* ROA.16-60477.346 n. 30.

[14] These considerations are listed in the Second Circuit's opinion in *Windsor*, which noted that two—immutability and political powerlessness—have not been required by the Supreme Court to confer heightened scrutiny. 699 F.3d at 181.

found that sexual orientation is "immutable." *Id.* at 2594, 2596. And fourth, with respect to political powerlessness, the Court noted many of the recent political setbacks suffered by gay people as they sought legal respect for their relationships and families, *id.* at 2596-97, 2606, and the importance of relieving them of "the vicissitudes of political controversy" and placing their basic rights "beyond the reach of majorities." *Id.* at 2606 (quotation omitted)). *Obergefell*'s findings confirm that heightened scrutiny applies.

Section 2(c)'s classification of those whose sex differs from the sex assigned them at birth—i.e., transgender people—likewise must be subjected to heightened scrutiny. As other circuits have held, discrimination against transgender individuals constitutes discrimination on the basis of sex. *See Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000).

Such sex-based discrimination triggers *at least* intermediate scrutiny. *Glenn*, 663 F.3d at 1321.[15] But strict scrutiny is even more fitting, given the extreme levels of hatred and violence to which transgender people historically have been, and to

[15] Section 2(a)'s discrimination on the basis of one's sex in relation to the sex of one's spouse is a classification based on sex as well as sexual orientation, and for this reason too is subject at least to intermediate scrutiny. *See, e.g., Latta v. Otter*, 771 F.3d 456, 481-84 (9th Cir. 2014) (Berzon, J., concurring, collecting authorities).

this day are, subjected. *See Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); *Brocksmith v. United States*, 99 A.3d 690, 698 n. 8 (D.C. 2014). Furthermore, "there is obviously no relationship between transgender status and the ability to contribute to society." *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Ed.*, No. 2:16-CV-524, 2016 WL 5372349, at *16 (S.D. Ohio Sept. 26, 2016). Transgender people also have "immutable [and] distinguishing characteristics," and, "a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings,…are a politically powerless minority group." *Id.*

Unmarried adults engaging in sexual intimacy also are subject to a heightened potential for discrimination, particularly single mothers. Moreover, unmarried same-sex couples engaged in sexual intimacy are, like married same-sex couples, subject to the pervasive discrimination described in *Obergefell.*

HB 1523's burdening of fundamental constitutional rights is yet another basis for heightened equal protection scrutiny. *Obergefell* affirmed that marriage and its benefits must be protected for same-sex couples "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. And *Lawrence* and other cases affirmed the fundamental right of unmarried adults to engage in consensual sexual intimacy without government condemnation or penalty. *See, e.g.*, *Lawrence*, 539 U.S. at 567; *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972).

No legitimate governmental interest justifies the special protections that HB 1523 creates for those who would discriminate against the targeted groups. Defendants cannot satisfy their burden under strict or intermediate scrutiny to demonstrate that HB 1523 advances a sufficiently compelling or important government interest and is narrowly tailored to advance such an objective.[16]

b. HB 1523 Fails Rational Basis Review.

HB 1523 cannot pass even rational basis review. Rational review requires that a classification both serve a legitimate government interest and do so rationally. "[E]ven in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

Recognizing that improper objectives can underlie laws disadvantaging unpopular groups, particularly where important personal interests are affected, the Supreme Court has been cautious, including under rational review, about approving

[16] Defendants make no effort to shoulder their burden under heightened scrutiny, and even attempt to defend HB 1523 on the ground that religious objectors discriminating against the targeted groups "fear" they could not satisfy RFRA's "compelling government interest" standard. Appellants' Br. 8.

such measures. In such cases, the Court has applied "a more searching form of rational basis review." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). Thus, *Romer* facially enjoined a state constitutional amendment precluding anti-discrimination enactments protecting lesbian and gay individuals because it "lacks a rational relationship to legitimate state interests." 517 U.S. at 632. *Cleburne* nullified on rational basis review a zoning scheme whose purpose was to exclude those with mental disabilities but not others posing potentially similar community challenges. 473 U.S. at 448-50. And *U.S. Dep't of Agriculture v. Moreno* struck down a public benefits exclusion disadvantaging those living in nontraditional households. 413 U.S. 528, 534 (1973).

The Court's reasoning in *Romer* demonstrates that HB 1523, like Colorado's Amendment 2 in that case, does not bear even a rational relationship to a legitimate governmental objective. By granting special immunities against State action to those who hold Section 2 beliefs, HB 1523 precludes members of the groups it demonizes from seeking or obtaining the protection of the State in an array of ways, thereby "impos[ing] a special disability upon those persons alone," and "forbidd[ing them] the safeguards that others enjoy or may seek without constraint." 517 U.S. at 631. Similarly, Amendment 2 would have nullified local ordinances and policies in Denver and elsewhere prohibiting discrimination on the basis of sexual orientation. *Id.* at 626-27. Jackson has a similar ordinance that would be partially preempted by

HB 1523. And if HB 1523 goes into effect, it will discourage local governments from adopting anti-discrimination ordinances and policies and will partially preempt any that do come. *See* ROA.16-60477.888-89.[17]

As with Amendment 2, HB 1523 renders it "more difficult for one group of citizens than for all others to seek aid from the government," which is "itself a denial of equal protection of the laws in the most literal sense." 517 U.S. at 633. And as with Amendment 2, HB 1523 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 635. But, as the Supreme Court has repeatedly held, "a bare...desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

The Supreme Court has struck down laws where the lack of nexus between asserted policy objective and means employed further undercuts the law's legitimacy. Thus, in *Cleburne*, the Court rejected policy interests that were legitimate in the abstract for a zoning ordinance excluding a group home for people with mental disabilities because other group living arrangements posing the same concerns were exempted. 473 U.S. at 447, 449-50. And in *Eisenstadt*, the Court

[17] H.B. 1523 also would deprive members of the targeted groups the full protection of laws prohibiting arbitrary discrimination by administrative agencies and governmental bodies. *See, e.g.*, Miss. Unif. Rules of Circuit & Cty. Court Practice, 5.03 *Scope of Appeals from Administrative Agencies*; Miss. Code Ann. §§ 11-46-9, 25-9-132, 37-9-113.

discounted a purported government interest in deterring "illicit sexual relations" because it denied only unmarried, but not married, persons access to contraceptives. 405 U.S. at 449.

HB 1523 suffers from the same flaw. It offers protections only to a select group's religious and moral objections about LGBT and unmarried individuals. It does not provide protection to those who may have strong religious and moral convictions against interracial marriage, interfaith marriage, marriage after divorce, or women's role in married and civic life. While Plaintiffs certainly do not urge heaping *more* inequality and infringements of liberties on themselves or others in Mississippi, HB 1523's "purported justifications…ma[k]e no sense in light of how" "other groups similarly situated in relevant respects" are treated. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n. 4 (2001). By promoting majoritarian interests at the expense of a disfavored minority, HB 1523 defies basic equality norms protected by the guarantee of equal protection:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

To the extent the select "moral convictions" protected by HB 1523 are considered distinct from "religious beliefs," the Supreme Court has rejected bald moral disapproval as a legitimate justification to single out a group for legal disfavor, and has done so explicitly in the context of laws disadvantaging those who are LGBT and whose sexual and family relationships defy what once were considered "traditional" values. As Justice O'Connor explained in *Lawrence*:

> Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause….Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.*, at 633….

Lawrence, 539 U.S. at 582-83 (concurring) (internal citations omitted); *see also id.* at 571, 577-78; *Windsor*, 133 S. Ct. at 2693-94.

B. By Providing Special Legal Protections Exclusively To Those Subscribing To The Endorsed Beliefs, HB 1523 Denies Equal Protection To Those Subscribing To Different Beliefs.

By erecting a scheme of special legal protections solely for those holding the endorsed beliefs, HB 1523 discriminates against Plaintiffs based on their religious beliefs and moral convictions, the very rights HB 1523 so solicitously purports to

respect, albeit only for *some* Mississippians. This is yet another basis on which this law violates the Equal Protection Clause. HB 1523 thus imposes special disabilities not only on the Section 2 targeted groups, but also on those who ascribe to religious and moral beliefs different from those the law endorses. The exclusive way to obtain HB 1523's protections for what Defendants describe as "freedom of conscience" is to convert to the specific religious and moral beliefs the law effectively endorses. *See* ROA.16-60477.356-58.

Like this case, *Amos* involved both Establishment Clause and equal protection claims. With respect to the Equal Protection Clause, the Court noted that "[t]he proper inquiry is whether [the legislature] has chosen a rational classification to further a legitimate end." 483 U.S. at 339. In that case, the legitimate end was exempting and protecting "all activities of religious employers" alike, without singling out only those employers whose religious views were approved by the government. *Id.* The government thereby did not "abandon[] neutrality" or "promot[e] a particular point of view in religious matters." *Id.* at 335.

HB 1523 abandons neutrality without any legitimate, rational basis. It violates "the right to equal treatment," and the appropriate remedy is "withdrawal of benefits from the favored class." *Heckler*, 465 U.S. at 739-40.

IV. The Harm From Imposition of An Unconstitutional Statute Outweighs Any Purported Injury To The State, Particularly In Light Of Defendants' Concession That The Religious Freedom Of Mississippians Is Already Protected.

The enforcement of an unconstitutional statute causes irreparable harm, and the public interest is served by an injunction against that enforcement. *Ingebretsen*, 88 F.3d at 280. The Defendants have conceded that the religious freedom of Mississippians is adequately protected independent of H.B. 1523. Appellants' Br. 7, 19-20. Thus, there is no harm to the State or to the public interest flowing from this preliminary injunction.

CONCLUSION

The District Court did not abuse its discretion in granting the preliminary injunction. That holding should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2016, I caused this Brief of Plaintiffs-Appellees *Rims Barber, et al.*, to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing toall counsel who have entered their appearance in this matter, including: Jonathan F. Mitchell and D. John Sauer, John Otis Law Group, LLC; Kevin H. Theriot, Alliance Defending Freedom; Drew L. Snyder, Office of Governor Phil Bryant; Tommy D. Goodwin, Office of the Mississippi Attorney General; Roberta A. Kaplan and Joshua D. Kaye, Paul, Weiss, Rifkind, Wharton & Garrison LLP; Dale Carpenter; and Alysson Mills, Fishman Haygood, LLP.

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Dated: The 16th day of December, 2016.

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