No. 16-60477

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Cons w/16-60478

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BARBER PLAINTIFFS-APPELLEES' MOTION TO STAY THE MANDATE PENDING A PETITION FOR CERTIORARI

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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 (Jaren Janghorbani and Joshua D. Kaye representing).

4. Kaplan & Company, LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60478 (Roberta A. Kaplan representing).

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

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

7. Rims Barber, Plaintiff-Appellee.

8. Carol Burnett, Plaintiff-Appellee.

9. Joan Bailey, Plaintiff-Appellee.

10. Katherine Elizabeth Day, Plaintiff-Appellee.

11. Anthony Laine Boyette, Plaintiff-Appellee.

12. Don Fortenberry, Plaintiff-Appellee.

13. Susan Glisson, Plaintiff-Appellee.

14. Derrick Johnson, Plaintiff-Appellee.

15. Dorothy C. Triplett, Plaintiff-Appellee.

16. Renick Taylor, Plaintiff-Appellee.

17. Brandiilyne Mangum-Dear, Plaintiff-Appellee.

18. Susan Mangum, Plaintiff-Appellee.

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

20. 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.

21. 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.

22. Robert B. McDuff, Counsel for all Plaintiffs-Appellees in Case No. 16-60477.

23. Campaign Legal Center, Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Paul M. Smith representing), is a 501(c)(3) non-profit organization that is not a publicly held corporation.

24. Munger, Tolles & Olson LLP, Counsel for all Plaintiffs-Appellees in Case No. 16-60477 (Donald B. Verrilli, Jr. representing).

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

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

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

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

29. Office of the Mississippi Attorney General, Counsel for

all Defendants-Appellants in the matter below (Tommy D. Goodwin representing).

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

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

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

Respectfully submitted,

/s/ Robert B. McDuff
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Attorney of Record for Plaintiffs-Appellees Rims Barber, et al.

INTRODUCTION

Mississippi's HB 1523, signed into law on April 5, 2016 with an effective date originally of July 1, 2016, targets Mississippi same-sex couples, transgender individuals, and unmarried people who engage in sexual relations for disfavored legal treatment. The law was preliminarily enjoined by the district court before it even took effect on the grounds that it violates both the Establishment and Equal Protection Clauses, and that Plaintiffs "are substantially likely to be irreparably harmed" should it be permitted to go into force. *Barber v. Bryant*, 193 F. Supp. 3d 677, 722 (S.D. Miss. 2016), *rev'd on standing grounds*, 660 F.3d 345 (5th Cir. 2017), *pet. for reh'g en banc denied*, No. 16-60478 (5th Cir. Sept. 29, 2017). Although this Court reversed the district court on standing grounds, the law's constitutionality remains a pressing and unresolved question. Moreover, this troubling and unusual statute raises important standing issues, on which the Supreme Court is likely to grant certiorari and reverse. As the dissent from denial of rehearing en banc in this case explained, "By denying standing in the present case, the panel opinion falls into grievous error, unjustifiably creates a split from our sister circuits, and rejects pertinent Supreme Court teachings." *Barber*, slip op. at 12 (Dennis, J., dissenting from denial of rehearing en banc) (Appendix A). Plaintiffs respectfully request that the status quo in Mississippi be

preserved through a stay of the mandate, which will otherwise issue on October 6, 2017,[1] while Plaintiffs seek review of HB 1523 in the U.S. Supreme Court.[2]

Federal Rule of Appellate Procedure 41(d)(2)(A) authorizes a stay of this Court's mandate pending the Supreme Court's determination on a petition for writ of certiorari. The party seeking the stay "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." FED. R. APP. P. 41(d)(2)(A). Specifically, the movant must show a reasonable probability that the Supreme Court will grant certiorari, a significant possibility of reversal of the lower court's decision, and a likelihood of irreparable harm absent a stay. *See Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). Plaintiffs satisfy this standard, warranting stay of the mandate pending the Supreme Court's disposition on the petition for certiorari.

STATEMENT OF CASE AND PROCEEDINGS

In 2015, the Supreme Court ruled that same-sex couples are endowed with "the fundamental right to marry," and that the Constitution requires states to allow them access to "civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015). Following *Obergefell*, HB 1523 was, in the words of the district court, "the State's attempt to put LGBT citizens

[1] *See Barber v. Bryant*, Docket No. 16-60477, entry dated September 29, 2017.
[2] Plaintiffs anticipate filing their petition for certiorari by mid-October.

back in their place." *Barber*, 193 F. Supp. 3d at 708. That law grants special privileges and immunities from adherence to non-discrimination obligations for persons who hold at least one of the following "religious beliefs or moral convictions":

> (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).

Plaintiffs are twelve Mississippians, including LGBT individuals and a Hattiesburg church with many LGBT members, who sued the government Defendants to block HB 1523 from taking effect. Following extensive submissions and a hearing, District Court Judge Carlton Reeves issued a preliminary injunction in *Barber* on June 30, 2016. The Governor and the Director of the Department of Human Services appealed. The Mississippi Attorney General, 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.[3] On June 22, 2017, a Panel of this Court reversed the preliminary injunction on standing grounds, without reaching the merits of Plaintiffs' constitutional claims. *Barber*, 660 F.3d 345. Plaintiffs then filed a

[3] *See Verbatim Statement by Attorney General Jim Hood on HB 1523*, JACKSON FREE PRESS (July 13, 2016), http://www.jacksonfreepress.com/weblogs/jackblog/2016/jul/13/statement-attorney-general-jim-hood-hb-1523/ ("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.").

petition for rehearing en banc, which automatically stayed the Panel's mandate. That petition was denied on September 29, 2017 with two judges dissenting. Appendix A.

ARGUMENT

I. THERE IS A REASONABLE PROBABILITY THAT THE SUPREME COURT WILL GRANT CERTIORARI AND A SIGNIFICANT POSSIBILITY OF REVERSAL.

The unresolved issues raised by Plaintiffs' appeal are of exceptional importance. HB 1523 is among the most prominent, and virulent, of the legislative measures introduced in state houses around the country purporting to grant religious exemptions and immunities for those who object to providing non-discriminatory services and public accommodations to LGBT people.[4] HB 1523 and efforts like it conflict with principles enunciated in *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell*, 135 S. Ct. 2584; and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which dismantled governmentally-approved discrimination against LGBT people.

As explained further in Section II below, HB 1523 confers a broad legal immunity to individuals and businesses who adhere to certain favored beliefs, allowing them to discriminate against LGBT people in a broad range of contexts—from public accommodations to medical care and mental health services. In so doing, HB 1523

[4] *See, e.g.*, Susan Miller, *Onslaught of Anti-LGBT bills in 2017 has Activists 'Playing Defense,'* USA TODAY (June 1, 2017), https://www.usatoday.com/story/news/nation/2017/06/01/onslaught-anti-lgbt-bills-2017/102110520/.

creates a regime of unequal treatment, and stigmatizes those who do not adhere to those beliefs and those who would be the targets of discrimination by adherents.

The Panel held that Plaintiffs lacked Establishment Clause standing because they did not have a "personal confrontation" with HB 1523. *Barber*, 860 F.3d at 353-54. The Panel also held that Plaintiffs lacked Equal Protection standing, *id.* at 357, despite the serious stigmatic harms caused to Plaintiffs by HB 1523's regime of unequal treatment. This ruling is in conflict with the law of other circuits and raises important issues regarding standing that are ripe for Supreme Court review. For the reasons discussed herein, there is a reasonable probability that the Supreme Court will grant certiorari, and a significant possibility that the Court will reverse the Panel's decision.

A. Establishment Clause Standing

The Panel held that Plaintiffs lacked Establishment Clause standing because their injury stems from endorsement of certain religious beliefs in a statute rather than in "an encounter with [an] offending item" in a "religious display and exercise," *Barber*, 860 F.3d at 353, such as a "personal[] encounter[] [with] a religious symbol on [a] public utility bill," *id.* (citing *Murray v. City of Austin*, 947 F.2d 147, 150 (5th Cir. 1991)). Without such a personal confrontation, the Panel claimed, the serious stigmatic harms that Plaintiffs alleged did not constitute an injury-in-fact. But this conclusion directly conflicts with the precedents of other circuits. The issue of whether

an individual has standing to challenge an Establishment Clause endorsement in a statute itself, even if there is no physical display to confront, raises an important question that the Supreme Court is likely to review in this case. Because the Panel's decision is untenable as a matter of law, the Supreme Court likely will reverse.

It has long been recognized that government endorsement of a religious belief violates the Constitution. *See Watson v. Jones*, 80 U.S. 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."). Such an endorsement "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." *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 309–10 (2000) (citations omitted).

HB 1523 endorses three particular religious beliefs, and confers broad legal privileges and immunities to adherents—and *only* to adherents—of those beliefs. This special solicitude denigrates Plaintiffs' contrary religious views, conveying to Plaintiffs "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-10. As the Fourth, Ninth, and Tenth Circuits have each held, in conflict with this Circuit, stigmatic injury of this nature is sufficient for standing purposes. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 583 (4th Cir. 2017) (en banc) (recognizing "distinct" injury that Executive Order banning

immigration from certain Muslim-majority countries "sends a state-sanctioned message condemning [plaintiff's] religion and causing him to feel excluded and marginalized in his community"); *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) ("[Plaintiffs] allege that the stigmatizing resolution leaves them feeling like second-class citizens of the San Francisco political community, and expresses to the citizenry of San Francisco that they are. The cause of the plaintiffs' injury here is not speculative: it is the resolution itself."); *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) ("Like the plaintiffs who challenged the highway crosses in *American Atheists*, 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. . . . [T]hat is enough to confer standing.").

The Panel's claim that, unlike a monument or a religious symbol on a utility bill, one "cannot confront statutory text," *Barber*, 860 F.3d at 353-54, erects an illusory distinction. The Panel offered no explanation as to why an official state statute enshrining a set of favored religious beliefs—and providing special legal privileges and immunities solely to adherents of those beliefs—would create an injury any less direct or concrete than a monument in a public park. *Cf. Catholic League*, 624 F.3d at 1050 n.20 ("A symbol such as a crèche on the city hall lawn is ambiguous. . . . The resolution at issue, like a symbol, conveys a message, but unlike a symbol, the message

is unambiguous."). And the Panel's reasoning, taken to its logical conclusion, would dictate that *no one* could ever have standing to challenge the statutory establishment of a state religion—a clearly absurd result.

The Panel attempted to distinguish *Catholic League* on the grounds that "HB 1523 is not a specific condemnation of an identified religion." *Barber*, 860 F.3d at 355 n.9. But, like the Panel's requirement of a personal confrontation, this is a distinction without a difference. Plaintiffs are no less stigmatized by the State's disparagement of their religious beliefs simply because HB 1523 does not specifically identify the religious denominations subscribing to those beliefs. The Panel also attempted to distinguish *Awad* on the grounds that the plaintiff in that case "had alleged that the amendment would prevent the Oklahoma courts from probating his will." *Id.* at 355. But the *Awad* court stated explicitly that although the challenged law prohibited the plaintiff "from relying on his religion's legal precepts in Oklahoma courts," this injury was "beyond the personal and unwelcome contact that suffices for standing with religious symbols." *Awad*, 670 F.3d at 1122-23.

The Panel's holding that Plaintiffs cannot demonstrate the requisite injury-in-fact because they were not "personally confronted" by HB 1523 is irreconcilable with the law of other circuits—the paradigmatic circumstance in which the Supreme Court is likely to grant certiorari. There is a reasonable probability that the Supreme Court

will grant certiorari on this question, and a significant possibility that the Court will reverse the Panel's decision.

B. Equal Protection Standing

The Panel likewise held that Plaintiffs lacked Equal Protection standing, characterizing their injuries as purely stigmatic. *Barber*, 860 F.3d at 357. Plaintiffs, according to the Panel, had not alleged discriminatory *treatment* under the yet-to-take-effect-law, and so their stigmatic injury did not constitute an injury-in-fact. *See id.* at 356–57. But this view fundamentally misapprehends Plaintiffs' claims and the applicable law. It also creates yet another inter-circuit conflict, making certiorari that much more likely.

HB 1523 creates a regime of unequal treatment. The purpose and effect of the law is to single out LGBT people and leave them with no recourse when they are denied medical care, psychological counseling, and other important services. It indiscriminately strips away from a disfavored minority all protections against discrimination, on every level of state government, across a broad range of contexts. *See* Section II *infra*. HB 1523 is unequal treatment in the most literal sense. This stems from the special privileges and immunities that HB 1523 provides solely to adherents of the favored beliefs, at the expense of non-adherents and LGBT Mississippians.

The Panel viewed the imposition of this stigmatizing legal barrier as no injury whatsoever. But this view is out of step with Supreme Court standing doctrine. As the

Court has explained, "[t]he '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." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Plaintiffs do not need to wait until they are denied services—such as potentially life-saving mental health treatment—to adequately allege an injury-in-fact. The regime of unequal treatment created by HB 1523 is injury enough.

Under well-established Supreme Court precedent, discriminatory classifications are themselves an adequate injury for standing purposes. *See Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) ("[A]s 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." (citations omitted)).

The Panel's decision also conflicts with the Third Circuit's recent ruling in *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015), where Muslim plaintiffs were held to have standing to challenge a government surveillance program aimed at Muslim individuals and institutions, even though the individual plaintiffs did not allege that they themselves necessarily would be surveilled. *See id.* at 289-90. As the

Third Circuit noted, "virtually every circuit court has reaffirmed—as has the Supreme Court—that a discriminatory classification is itself a penalty, and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." *Id.* (citations omitted). Thus, there is a reasonable probability that the Supreme Court will grant certiorari on this question, and a significant possibility that the Court will reverse the Panel's decision.

II. PLAINTIFFS ARE LIKELY TO BE IRREPARABLY HARMED ABSENT A STAY.

"An irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be especially difficult to calculate." *Heil Trailer Int'l Co. v. Kula,* 542 F. App'x 329, 335 (5th Cir. 2013). As the District Court correctly observed, enforcement of this controversial and divisive law would violate Plaintiffs' constitutional rights—a per se irreparable harm. Moreover, enforcement would fuel and immunize discrimination against Plaintiffs and LGBT citizens in Mississippi and subject them to substantial dignitary and psychological harms. No amount of money could compensate Plaintiffs for these injuries. By contrast, a stay would pose no significant hardship to the State.

A. Plaintiffs would be irreparably harmed absent a stay because HB 1523 violates Plaintiffs' constitutional rights.

"Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law," *De Leon v. Perry,* 975 F. Supp.

2d 632, 663 (W.D. Tex. 2014). This Court has frequently found injunctive relief to be the appropriate remedy when constitutional rights are imperiled. *See, e.g.*, *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) ("We have repeatedly held . . . that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.").

The District Court correctly held that "the plaintiffs are substantially likely to succeed on their claim that HB 1523 violates the First and Fourteenth Amendments." *Barber*, 193 F. Supp. 3d at 722. The Panel's opinion did not cast doubt on this determination. The Panel, which reversed on standing grounds alone, never addressed the District Court's constitutional holding. *See Barber*, 860 F.3d at 352.

As the District Court observed, "HB 1523 constitutes an official preference for certain religious tenets," *Barber*, 193 F. Supp. 3d at 716, and has as its "very essence" the "deprivation of equal protection of the laws," *id.* at 711. These constitutional defects "mandate[] a finding of irreparable injury." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981).

B. Plaintiffs would be irreparably harmed because enforcement of HB 1523 would fuel and immunize discrimination against Plaintiffs.

HB 1523's scheme of special privileges and immunities exclusively for the favored believers who would discriminate against LGBT citizens is both encouragement and license to discriminate. It establishes "a broad-based system by

which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status." *Barber*, 193 F. Supp. 3d at 699; *see also* HB 1523 § 8 (providing that HB 1523 shall be broadly construed). This discrimination involves public accommodations for same-sex couples trying to marry as well as special conditions on obtaining the marriage license itself. HB 1523 § 3(5)(b), § 3(8), and § 3(7). And if a same-sex couple decides to have children, they can be turned away from the fertility clinic, § 3(4), and the adoption agency too, § 3(3).

The harm threatened by § 3(4), which authorizes providers of psychological and counseling services to refuse treatment to LGBT people, is particularly grave. According to the Centers for Disease Control and Prevention, nearly one-third of gay, lesbian, and bisexual youth attempted suicide in 2014. *See LGBT Youth*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated June 21, 2017), https://www.cdc.gov/lgbthealth/youth.htm. In a study by the Williams Institute, over forty percent of transgender adults surveyed reported having made a suicide attempt. *See* ANN P. HAAS ET AL., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 2 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf. Studies show that heightened rates of depression and suicidality among LGBT people are attributable in great measure to discrimination and social stigma. *See, e.g.*, Joanna Almeida, *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination*

Based on Sexual Orientation, 38 J. YOUTH ADOLESCENCE 1001, 1001 (2009) (finding that "perceived discrimination accounted for increased depressive symptomatology among LGBT males and females, and accounted for an elevated risk of self-harm and suicidal ideation among LGBT males"); Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, 58 J. HOMOSEXUALITY 10, 22 (2011). Having a therapist tell, under color of HB 1523, a vulnerable, potentially suicidal individual reaching out for help that the therapist considers the patient to be an immoral sinner could result in tragedy.

Similarly alarming is § 3(3), a sweeping provision that could allow foster and adoptive parents to subject their children to traumatizing conversion therapy, perhaps impairing the State's ability to intervene. Conversion therapy "refer[s] to counseling and psychotherapy aimed at eliminating or suppressing homosexuality. The most important fact about these 'therapies' is that they are based on a view of homosexuality that has been rejected by all the major mental health professions." *Just the Facts About Sexual Orientation and Youth*, AM. PSYCHOL. ASS'N, http://www.apa.org/pi/lgbt/resources/just-the-facts.aspx (last visited Oct. 2, 2017). According to the American Psychiatric Association, "[t]he potential risks of reparative therapy are great," and include "depression, anxiety and self-destructive behavior." *Id.* For this reason, many states have enacted laws outlawing conversion therapy altogether. *See Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT,

http://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Oct. 2, 2017). Courts have upheld such laws in light of the overwhelming evidence that conversion therapy is both ineffective and dangerous. *See, e.g.*, *King v. Governor of the State of N.J.*, 767 F.3d 216, 238 (3d Cir. 2014) ("The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of [conversion therapy], expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric Association, and the Pan American Health Organization have warned of the 'great' or 'serious' health risks accompanying [conversion therapy], including depression, anxiety, self-destructive behavior, and suicidality."). But HB 1523 could be invoked by those who wish to inflict this dangerous and widely debunked "therapy" on children in their care.

As the District Court acknowledged, "[t]here is an almost endless parade of horribles that could accompany the implementation of HB 1523. . . . HB 1523's broad language 'identifies persons by a single trait and then denies them protection across the board.'" *Barber*, 193 F. Supp. 3d at 711 n.32 (quoting *Romer*, 517 U.S. at 633).

C. Plaintiffs would be irreparably harmed absent a stay because HB 1523 subjects Plaintiffs to substantial dignitary and other psychological harms.

HB 1523 also works a grave dignitary harm. The refusal to serve LGBT people "reflects a widely understood message about a contested sexual norm"—a message

that the person who is refused service will "immediately comprehend." Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2578 (2015). In the context of a broadly applicable law like HB 1523, refusals to serve "are asserted across a range of settings," which "intensif[ies] the stigmatization." *See id.* The message of moral disapproval conveyed by a refusal to serve is harmful in itself, but the message's "reiteration by a mass movement amplifies its power to demean." *Id.* This message is particularly amplified by HB 1523's endorsement of religious beliefs against marriages of same-sex couples and transgender people and by the law's grant of privileges and immunities to favored believers who choose to discriminate.

In this way, HB 1523's effects are not limited to the denial of goods and services. The larger effect of the law (indeed, a core purpose) is to facilitate an enduring, state-sanctioned message of moral disapproval—a message striking at the dignity and equal worth of LGBT people. A dignitary injury of this nature constitutes irreparable harm. "Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in *Romer*, *Lawrence*, *Windsor*, *CSE I*[*Campaign for S. Equality v. Bryant*, 64 F. Supp. 3d 906 (S.D. Miss. 2014)], *Obergefell*, and *CSE III* [*Campaign for S. Equality v. Bryant*, 791 F.3d 625 (5th Cir. 2015)]." *Barber*, 193 F. Supp. 3d at 711.

D. Issuance of a stay would pose no significant hardship to the State.

While enforcement of HB 1523 would immediately cause irreparable harm to Plaintiffs and other Mississippians, a stay would pose no significant hardship to the State. First, staying the mandate would simply maintain the status quo until the Supreme Court decides whether to take up the important issues presented by Plaintiffs' appeal. As this Court has recognized in denying the Governor's motion for a stay of the preliminary injunction pending appeal, "the maintenance of the status quo is an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Dayton Bd. Of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978)).

Second, the State has demonstrated no need for swift implementation of its law. Indeed, HB 1523 was signed into law on April 5, 2016, yet the Legislature provided that it would not take effect until nearly two months later. *See* HB 1523 § 11. Moreover, the State has represented to this Court that individuals, businesses, and religious organizations can freely refuse to serve LGBT people under the State's Religious Freedom Restoration Act (RFRA), notwithstanding the enactment of HB 1523. Appellants' Br. at 19, 22, *Barber v. Bryant*, No. 16-60477 (5th Cir. Oct. 26, 2016). From the State's perspective, a stay should have little practical effect. The State attempted to thread the needle by claiming that the State's RFRA is less protective of those with Section 2 beliefs than HB 1523, since RFRA has an exception for "compelling governmental interests." *Id.* at 7–8. But this argument only supports a

stay. If the true purpose of HB 1523 is to override the compelling interests of state and local governments in preventing discrimination against vulnerable LGBT Mississippians, then there is all the more reason to maintain the status quo until the Supreme Court has made a determination on Plaintiffs' petition for a writ of certiorari.

Finally, the State has twice been denied a stay of the District Court's preliminary injunction. *See Barber v. Bryant*, Nos. 3:16-CV-417-CWR-LRA, 3:16-CV-442-CWR-LRA, 2016 WL 4096726 (S.D. Miss. Aug. 1, 2016); *Barber*, 833 F.3d 510. The State's arguments regarding the need for immediate enforcement of HB 1523 were not persuasive then and would be no more persuasive now.

CONCLUSION

For these reasons, the Court should stay its mandate pending the Supreme Court's disposition on Plaintiffs' writ of certiorari.

Dated: October 3, 2017

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CERTIFICATE OF CONFERENCE

Pursuant to Fifth Circuit Rule 27.4, Plaintiffs-Appellees have contacted or attempted to contact all parties regarding this motion. Defendants-Appellants have stated that they intend to oppose this motion. The *CSE* Plaintiffs-Appellees have not stated their intended position.

October 3, 2017

/s/ Robert B. McDuff
Robert B. McDuff

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2017, I caused this *Barber* Plaintiffs-Appellees' Motion to Stay the Mandate Pending a Petition for Certiorari to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users representing all parties to the appeal, including: Jonathan F. Mitchell, James Otis Law Group, LLC; Kevin H. Theriot, Alliance Defending Freedom; Drew L. Snyder, Office of Governor Phil Bryant; Tommy D. Goodwin, Office of the Mississippi Attorney General; Daniel Bradshaw, Mississippi Department of Human Services; Roberta A. Kaplan, Kaplan & Company, LLP; Jaren Janghorbani and Joshua D. Kaye, Paul, Weiss, Rifkind, Wharton & Garrison LLP; Dale Carpenter; and Alysson Mills, Fishman Haygood, LLP.

/s/ Robert B. McDuff
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Attorney for Plaintiffs-Appellees

Dated: October 3, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 27 AND RULE 32

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 27(d)(2) because this brief contains 4,249 words, excluding the parts of the document exempted by FED R. APP. P. 27(a)(2)(B) and FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED R. APP. P. 32(a)(5) and the type style requirements of FED R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, version 2013 in 14 point size and Times New Roman font.

/s/ Robert B. McDuff
Robert B. McDuff

Attorney for Plaintiffs-Appellees

Dated: October 3, 2017

Appendix A – Denial of Petition for Rehearing En Banc and Dissenting Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
September 29, 2017

Lyle W. Cayce
Clerk

No. 16-60477

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

Plaintiffs–Appellees,

versus

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

Defendants–Appellants.

* * * * * * * * *

No. 16-60478

CAMPAIGN FOR SOUTHERN EQUALITY;
THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs–Appellees,

versus

PHIL BRYANT,
in His Official Capacity as Governor of the State of Mississippi;
JOHN DAVIS, in His Official Capacity as
Executive Director of the Mississippi Department of Human Services,

Defendants–Appellants.

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

No. 16-60477
cons. w/ 16-60478

ON PETITION FOR REHEARING EN BANC

(Opinion 860 F.3d 345, Jun. 22, 2017)

Before SMITH, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

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

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

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

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

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

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

MISS. LAWS 2016, HB 1523 § 2.[1]

The plaintiffs are Mississippi residents and organizations who do not hold these beliefs or who hold religious beliefs contrary to these beliefs.[2] The plaintiffs allege that HB 1523 is an unconstitutional state endorsement of religious beliefs because it sends a message to non-adherents to those beliefs "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members

[1] HB 1523 grants adherents to these beliefs immunity from sanctions for a range of anti-LGBT discrimination including withholding foster care services, § 3(2); psychological or counseling services, §3(4); marriage-related public accommodations, §3(5); and public accommodations and health and mental health services for transgender individuals, §3(4), (6). It also permits state employees to recuse themselves from serving same-sex couples seeking marriage licenses and ceremonies. § 3(8).

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

of the political community." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (cleaned up).

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

Critically, this case does not involve a challenge to a religious display or religious exercise—that is, a particular religious practice—endorsed by a government actor. In cases involving challenges to religious exercises or displays, courts have generally required some sort of physical exposure to the challenged object or conduct. Instead, the plaintiffs in this case challenge a law of their state. In cases involving challenges to laws or official policies in the plaintiffs' own communities, the stigmatic harm suffered by non-adherents is sufficient to establish an injury-in-fact. Because the plaintiffs in this case have alleged such a stigmatic harm, the panel opinion's dismissal of this case is in error and should have been reversed by the court en banc.

I

For purposes of an Establishment Clause claim, "plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion." *Establishment Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011). Such "direct harm" can, of course, include tangible and economic injuries. But because injury can be "particularly elusive" in this context, *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir.

1991), "the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer," *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001) (cleaned up). Thus, "our rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable." *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 505 (5th Cir. 2007) (cleaned up).

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court held that "school sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 309–10 (cleaned up). In that case, current and former students of a high school challenged the school's policy that permitted prayer initiated and led by a student at football games. *Id.* at 294. The school district contended that the plaintiffs' facial challenge to the policy was premature because, at the time the case was pending before the Supreme Court, no religious invocation had been made under the latest version of the school's policy. *See id.* at 313. Rejecting this argument, the Court observed:

> This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and that we guard against other different, yet equally important, constitutional injuries. *One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion.*

Id. at 313–14 (cleaned up) (emphasis added).

The panel opinion in this case states, "the Court [in *Santa Fe*] used broad language to describe the injury non-adherents may suffer from witnessing a prayer at a school football game." *Barber*, 860 F.3d at 354. This assertion is plainly incorrect; the Court in *Santa Fe* described the injury the non-adherent plaintiffs in that case actually suffered from the "mere passage by the [school d]istrict of a policy that has the purpose and perception of government establishment of religion." 530 U.S. at 314. The panel opinion further states, "*Santa Fe* does not address the standing of the instant plaintiffs." *Barber*, 860 F.3d at 354. While it is true that the Court in *Santa Fe* was not responding to a challenge to the plaintiffs' standing per se, its explication of the relevant constitutional injuries against which the Establishment Clause guards is highly relevant to the question of what constitutes injury-in-fact for standing purposes in an Establishment Clause case. *See Littlefield*, 268 F.3d at 294 n.31 ("The standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer." (Cleaned up)). It is also highly instructive that the Court did not perceive any standing problem under the circumstances of *Santa Fe*, which are similar to the facts of the instant case. *See Murray*, 947 F.2d at 151 (ruling that plaintiff has alleged sufficient injury to confer standing and stating, "In so ruling, we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases").

The plaintiffs allege that Mississippi's enactment of HB 1523 endorses religious beliefs that they do not hold and thereby conveys a message that they "are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe*, 530 U.S. at 309–10. Relying on the Supreme Court's opinion in *Valley Forge Christian College v. Americans*

United for Separation of Church & State, Inc. 454 U.S. 464, 483 (1982), the panel opinion states that "[a]llowing standing on [this] basis would be indistinguishable from allowing standing based on a 'generalized interest of all citizens in' the government's complying with the Establishment Clause without an injury-in-fact." *Barber* 860 F.3d at 354. That is simply not so. In *Valley Forge*, a group of plaintiffs dedicated to the separation of church and state sought to challenge the transfer of federal property to a religious educational institution. 454 U.S. at 468–69. None of the plaintiffs lived in or even near Pennsylvania, where the property at issue was located. *Id.* at 486–87. The Court held that the plaintiffs did not have standing, stating, "Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

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

more than an abstract interest" where they are "part of [the relevant community]").

The plaintiffs' allegations are thus sufficient to establish their standing to bring a challenge under the Establishment Clause. This conclusion is consistent with the holdings of at least two of our sister circuits, which have recognized that stigmatic harm caused by government policies or regulations to individuals within their own political community is sufficient to establish standing for purposes of the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 583 (4th Cir. 2017) (en banc) ("IRAP"); *Catholic League*, 624 F.3d at 1052.

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

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

Id. at 1048 (cleaned up).

The panel opinion states, "Because HB 1523 is not a specific condemnation of an identified religion challenged by its adherents, the standing analysis in *Catholic League* is inapposite." *Barber*, 860 F.3d at 355 n.9. However, this reading of *Catholic League* elides that case's central observation:

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

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

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

the alleged establishment of religion to bring suit. *Id.* The court noted, "This harm is consistent with the '[f]eelings of marginalization and exclusion' injury we recognized in *Moss* [*v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012)]." *IRAP*, 857 F.3d at 585.

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

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

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

II

Until the panel opinion in this case, our court's precedent was not in conflict with these holdings. The panel opinion discusses a number of cases involving religious exercises and displays and argues that those cases either involved or required a "personal confrontation"—a physical exposure in all those cases—that the panel opinion does not find in the instant case. *See Barber*, 860 F.3d at 353–54 (discussing *Murray*, 947 F.2d 147 (religious symbol in city insignia); *Staley v. Harris Cty.*, 485 F.3d 305 (5th Cir. 2007) (en banc) (addressing mootness in context of removal of religious monument, which was relief sought by plaintiff); *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) (practice of religious invocations)). But these cases are not on point because this case deals neither with a religious exercise nor with a

religious display. Instead, the plaintiffs challenge a state statute, similar to the school districts' policies in *Santa Fe* and *Moss*, the Board of Supervisors' resolution in *Catholic League*, and the executive order in *IRAP*. A physical confrontation is not required in such a case—the stigmatic harm that flows from the enactment of the law or the adoption of the policy tending to make the plaintiffs feel marginalized or excluded in their own community is sufficient.

In attempting to establish that stigmatic harm is not sufficient to create standing even in cases involving challenges to official policy or law, the panel opinion cites *Littlefield v. Forney Independent School District*, 268 F.3d 275, 294 n.31 (5th Cir. 2001), for the proposition that "[w]here a statute or government policy is at issue, the policy must have some concrete applicability to the plaintiff." *Barber*, 860 F.3d at 353. But *Littlefield* does not stand for this proposition. In *Littlefield*, public school students and their families argued that the opt-out procedures for the school district's mandatory uniform policy favored certain established religions at the expense of others and thus violated the Establishment Clause. 268 F.3d at 282. Finding that the *Littlefield* plaintiffs had standing, this court observed that the plaintiffs' "direct exposure to the [opt-out] policy satisfies the 'intangible injury' requirement to bring an Establishment Clause challenge." *Id.* at 294 n.31. However, the *Littlefield* court in no way suggested that such "direct exposure" to the policy was *required* to establish standing—the panel opinion conflates necessity with sufficiency. Moreover, as the plaintiffs note in their petition for rehearing, HB 1523 is an exemption from generally applicable laws, just like the opt-out in *Littlefield* was an exemption from a generally applicable dress code. The panel opinion does not explain how the plaintiffs' exposure to HB 1523 is any less "direct" than the *Littlefield* plaintiffs' exposure to the opt-out policy.

**

The First Amendment "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (cleaned up). The courts in *Catholic League*, *IRAP*, and *Moss* recognized, consistent with the Supreme Court's explication of core Establishment Clause principles in *Santa Fe*, that the stigmatic harm that flows from the enactment of a law or adoption of official policy that deems a non-adherent plaintiff an "outsider" in his own community is sufficient to confer standing. By denying standing in the present case, the panel opinion falls into grievous error, unjustifiably creates a split from our sister circuits, and rejects pertinent Supreme Court teachings. To reference what the Ninth Circuit in *Catholic League* recognized, under the panel opinion's holding, a law "declaring [Episcopalianism] to be the official religion of [Mississippi] would be effectively unchallengeable." 624 F.3d at 1048. The panel opinion's holding will thus deny citizens a forum in which to challenge "the evils against which the Establishment Clause was designed to protect." *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

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