No. 17-547

In the Supreme Court of the United States

RIMS BARBER, ET AL., PETITIONERS

v.

GOVERNOR PHIL BRYANT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

DREW L. SNYDER
Office of Gov. Phil Bryant
P.O. Box 139
Jackson, Mississippi 39205
(601) 359-3150
drew.snyder@governor.ms.gov

JONATHAN F. MITCHELL
Counsel of Record
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1397
jfmitche@stanford.edu

KEVIN H. THERIOT
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
ktheriot@adflegal.org

Counsel for Respondents

QUESTIONS PRESENTED

House Bill 1523 prohibits the State of Mississippi from penalizing or discriminating against individuals and entities that refuse to lend their support to same-sex marriage ceremonies and other activities that violate their religious convictions or secular moral beliefs. The Fifth Circuit held that the plaintiffs lack standing to challenge HB 1523 at this time, because they did not allege or show that they will personally encounter denials of service or discriminatory treatment from anyone.

The plaintiffs contend that anyone who resides in Mississippi and disagrees with the conscientious beliefs protected by HB 1523 has standing to bring an establishment-of-religion claim, so long as they assert that HB 1523 "endorses" a "religion" by shielding conscientious objectors from state-sponsored punishment. They also contend that any homosexual or transgendered person in Mississippi has standing to bring an equal-protection claim, regardless of whether that individual will personally encounter discrimination or unequal treatment on account of HB 1523. The questions presented are:

1. Can a litigant acquire Article III standing to challenge HB 1523 by (a) asserting disagreement with the conscientious beliefs protected by the statute; and (b) accusing the State of "endorsing" a "religion" by protecting the adherents of those beliefs?

2. Can a litigant acquire Article III standing to challenge HB 1523 by observing that members of his group might encounter denials of services, regardless of whether those denials ever occur and regardless of whether those denials involve or affect the litigant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

In the Supreme Court of the United States

No. 17-547

RIMS BARBER, ET AL., PETITIONERS

v.

GOVERNOR PHIL BRYANT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

The petition for certiorari should be denied because there is no circuit split to resolve. The petitioners' efforts to manufacture a circuit conflict are specious, as the Fifth Circuit was careful to distinguish the relevant cases from other courts, and the cases that the petitioners cite conferred Article III standing in scenarios that do not remotely resemble the situation in this case.

There are also grave vehicle problems because the Fifth Circuit never addressed the hotly disputed causation and redressability issues. And the complaints that were filed in the district court failed to plead any facts to establish causation and redressability, as required by the precedent of this Court. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) ("[A]t the pleading stage, the

plaintiff must 'clearly . . . allege facts demonstrating' each element [of standing]." (citation omitted)).

Finally, the petitioners' request for error correction is meritless. HB 1523 imposes no legal obligations on the plaintiffs and threatens no action against them; it merely immunizes *other* people from penalties if they decline to participate in same-sex marriage ceremonies or other activities that they consider immoral. The plaintiffs allege that they are "offended" by the State's decision to protect these individuals, but they have not shown that HB 1523 will cause one of *them* to encounter a denial of services from any person or entity. The plaintiffs may encounter psychological distress over a regime that shields conscientious objectors from state-sponsored retaliation, but their unfulfilled desire to see others punished for following the dictates of their conscience is not a legally cognizable harm. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). The petitioners have no more standing to challenge HB 1523 than an abortion-rights activist who challenges a law that shields doctors from penalties or discrimination for refusing to perform abortions.

A plaintiff *will* have standing to challenge HB 1523 if the law will cause him to encounter a denial of services, or if he can show a "substantial risk" that this might occur. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). But the petitioners made no attempt to establish standing on these grounds. Instead, they propound a more radical theory of standing that would empower anyone to challenge a conscience-protection law

by asserting their disagreement with the law and accusing it of "endorsing" a "religion," regardless of whether the statute actually endorses a religious belief. The Fifth Circuit correctly rejected this theory of standing, and no other court has endorsed it.

STATEMENT OF THE CASE

House Bill 1523 prohibits the government of Mississippi from penalizing or discriminating against those who decline to participate in same-sex marriage ceremonies and other activities that violate their religious convictions or secular moral beliefs. App. 1a–13a (reprinting text of HB 1523). The statute is indistinguishable from conscience-protection laws that prohibit governments from punishing or discriminating against pacifists who refuse to serve in the military,[1] government employees that refuse to participate in executions,[2] Native Americans who ingest peyote during religious ceremonies,[3] and hospitals and health-care workers that refuse to participate in abortions[4] or assisted suicides.[5]

---

1. *See* 50 U.S.C. § 3806(j).
2. *See* 18 U.S.C. § 3597(b).
3. *See* 21 C.F.R. § 1307.31 (1990) (exempting from drug laws those who use peyote "in bona fide religious ceremonies" "of the Native American Church"); Tex. Health & Safety Code § 481.111(a) (same); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (rejecting establishment-of-religion challenges to these exemptions).
4. *See* 42 U.S.C. § 238n.
5. *See* 42 U.S.C. § 18113(a).

Until recently, there was no need for the law to protect the conscientious scruples of those who oppose same-sex marriage. That is because it was unthinkable—until recently—that government officials might coerce private citizens into participating in same-sex marriage ceremonies, or penalize them for their refusal to do so. But state and local governments have been taking action against Christians who decline to participate in these ceremonies on account of their religious beliefs. *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015). And in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Solicitor General refused to rule out the possibility of revoking the tax-exempt status of religious colleges that refuse to recognize same-sex marriages. *See* Oral Argument Transcript, Question 1, *Obergefell v. Hodges*, No. 14-556, at 36–38 (U.S. Apr. 28, 2015).[6]

Mississippi responded to these episodes by enacting HB 1523, which gives the opponents of same-sex marriage the same conscientious-objector protections that federal law confers on the opponents of warfare, abortion, capital punishment, and assisted suicide. *See supra*, at 3 & nn. 1–5. Section 2 of the Act lists three conscientious beliefs protected by the statute: (1) the belief that marriage is between one man and one woman; (2) the be-

6. The Solicitor General did not go so far as to suggest that it is *unconstitutional* for a State to enact laws that shield religious colleges from retaliation of this sort, which is what the petitioners are arguing in this case.

lief that sexual relations should be reserved to a man–woman marriage; and (3) the belief that equates an individual's sex with his "biological sex as objectively determined by anatomy and genetics at time of birth." App. 2a.

Section 3 of the Act confers protections on those who decline to participate in certain activities on account of those conscientious beliefs. Section 3(1)(a) protects the right of churches and religious organizations to decline to participate in same-sex marriage ceremonies. App. 2a. Section 3(2) protects religious adoption and foster-care agencies from retaliation if they decline to place children with families that do not share their beliefs regarding marriage and sexuality. App. 3a. Section 3(3) protects adoptive and foster parents from penalties if they raise their children in accordance with a section 2 belief. App. 3a. Section 3(4) shields private citizens who decline to provide counseling, fertility services, or sex-change operations on account of a section 2 belief. App. 3a–4a.

Section 3(5) allows individuals and closely held corporations to decline to participate in same-sex marriage ceremonies. App. 4a. Section 3(6) allows entities to establish sex-specific restrooms, locker rooms, and grooming policies. App. 4a–5a. Section 3(7) protects state employees from viewpoint discrimination if they express a belief protected by section 2. App. 5a. And section 3(8) allows state employees to recuse themselves from issuing same-sex marriage licenses—but only if they provide "prior written notice" to their superiors and "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed."

App. 5a–7a. Each provision and application of HB 1523 is severable from the others. *See* Miss. Code § 1-3-77.

HB 1523 is carefully crafted and limited in scope. It does not authorize *any* business to discriminate against homosexuals or transgendered people in employment, housing, or places of public accommodation.[7] It requires state employees who recuse themselves from same-sex marriages to ensure that the licensing of marriages is not "impeded or delayed." App. 7a. And its protections extend only to those who decline, for reasons of religious or secular moral conviction, to lend their support to activities that they consider immoral. Homosexuals and transgendered people will still receive marriage licenses, health care, and wedding-related services—but they will receive them from people who do not have religious or conscientious objections to homosexual or transgender behavior. This regime is no different from laws that shield health-care providers who refuse to participate in abortions: Patients still receive their abortions, but they receive them only from providers who are not conscientiously opposed to the procedure.

A. The Plaintiffs' Lawsuit

In June 2016, the petitioners sued four Mississippi officials and sought an injunction to prevent them from enforcing HB 1523. They filed two separate lawsuits that

---

7. The provisions governing employment and housing discrimination apply only to "religious organizations," which do not include business corporations. *See* HB 1523 § 9(4); *compare id.* § 9(3)(b) *with id.* § 9(3)(c); App. 11a–12a.

the district court consolidated. We will refer to the plaintiffs in the first lawsuit as the "Barber plaintiffs," and those in the second lawsuit as the "CSE plaintiffs."[8]

To establish Article III standing, a plaintiff must show: (1) an injury in fact; that is (2) fairly traceable to the defendant's conduct; and (3) likely to be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The rulings of this Court require a complaint to plead facts that clearly demonstrate that each of these requirements is satisfied. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("[A]t the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of standing].'); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("[P]laintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm."); *Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute").

The *Barber* complaint alleged that the plaintiffs had read HB 1523 and "do not subscribe to" the beliefs listed in section 2. Amended Complaint, *Barber v. Bryant*, No. 3:16-cv-417 ECF No. 35, at ¶ 18–19. It alleged that the plaintiffs would suffer injury because they are "offended" by the State's protection of the section 2 beliefs, and "[t]he endorsement and special protection of those be-

8. CSE stands for Campaign for Southern Equality, the lead plaintiff in that lawsuit.

liefs and convictions conveys a state-sponsored message of disapproval and hostility to those who do not share those beliefs and convictions." *Id.* at ¶ 19. The CSE complaint similarly alleged that HB 1523 "sends a clear message" that the plaintiffs' "religious or secular beliefs are less important and less worthy of protection." Complaint, *Campaign for Southern Equality v. Bryant*, No. 3:16-cv-442 ECF No. 1, at ¶ 58; *see also id.* at ¶ 71 (asserting that HB 1523 "injures Plaintiffs by conveying that their beliefs are inferior to those the State has hand-selected for special treatment").

Neither the *Barber* complaint nor the *CSE* complaint asserted any other injury beyond the plaintiffs' offense at HB 1523 and the supposed "message" that it sends. Amended Complaint, *Barber v. Bryant*, No. 3:16-cv-417 ECF No. 35, at ¶¶ 20–22. They did not, for example, allege that the plaintiffs might encounter a denial of services, nor did they allege that the plaintiffs would personally encounter "disfavor and unequal treatment" from anyone in Mississippi. *Id.* at ¶ 33.

And neither complaint alleged facts explaining how these stigmatic and psychological injuries were traceable to the defendants' conduct. The plaintiffs sued only four defendants—Governor Bryant, Attorney General Hood, John Davis, the Director of Mississippi's Department of Human Services, and Judy Moulder, the Registrar of Vital Records. But the complaints did not assert or show that these individuals had caused the stigmatic and psychological injuries that the plaintiffs alleged. The supposed "endorsement" of section 2 beliefs and "message of disapproval and hostility" appear in the statute itself,

which was enacted by the legislature rather than the named defendants. And HB 1523 is enforced primarily by the state judiciary, which must dismiss anti-discrimination claims brought against those who decline to participate in the activities described in the statute. HB 1523 § 5.

The complaints are equally silent on the issue of redressability. They do not allege facts showing how a judgment against the named defendants will redress the "message" sent by the statute—which will continue to exist as a law even if a federal court grants the declaratory and injunctive relief that the plaintiffs seek. Nor did the complaints explain how a judgment against the named defendants can redress the plaintiffs' alleged injuries when the state judiciary will remain free to enforce HB 1523 in lawsuits between private parties. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997) (constitutional pronouncements of inferior federal courts do not bind the state judiciary).

B. The District Court's Preliminary Injunction

On June 30, 2016, the district court issued a preliminary injunction that prohibited the four defendants from enforcing HB 1523. Pet. App. 114a.[9]

---

9. The district court's injunction did not block HB 1523 from taking effect, as the petitioners suggest. Pet. 12 ("On October 9, 2017, the Fifth Circuit issued the mandate . . . , allowing HB 1523 to take effect."). The preliminary injunction merely prevented the four named defendants (and those acting in concert with them) from enforcing HB 1523. The preliminary injunction does *nothing* to prevent private litigants from asserting HB

(continued…)

The district court held that the plaintiffs had standing to bring an establishment-of-religion claim.[10] It identified the plaintiffs' injury as the stigmatic and psychological harms arising from the statute's "message" and its alleged "endorsement" of religious beliefs opposed by the plaintiffs. Pet. App. 65a–67a. The district court also held that these injuries were "caused by the State—and specifically caused by the Governor who signed HB 1523 bill into law." Pet. App. 68a. And it held that these stigmatic and psychological injuries would be redressed by declaratory and injunctive relief. Pet. App. 69a. ("[T]he harm done by HB 1523 would be halted if the statute is enjoined."). The district court did not appear to recognize that the state judiciary would remain free to enforce HB 1523 in private lawsuits even if the named defendants were enjoined from enforcing it. Nor did the district court acknowledge that HB 1523 would continue to exist as a law of the State—and would continue sending the "message" of alleged "endorsement" that the plaintiffs complain of.

1523 as a defense, and it does not prevent the state judiciary or other federal district courts from enforcing HB 1523. *See Arizonans for Official English*, 520 U.S. at 58 n.11; *id.* at 66 n.21; *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (district-court rulings do not bind other district-court judges).

10. The petitioners and the district court call this an "Establishment Clause claim," but that is a misnomer. The text of the Establishment Clause does not apply to the States, and the court rulings that forbid States to establish a religion are interpretations of the Fourteenth Amendment. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1266 (2010).

The district court also held that the plaintiffs had standing to bring an equal-protection claim. It held that the plaintiffs were injured because "HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses." Pet. App. 60a. The district court did not, however, cite any allegations or evidence showing that the plaintiffs would actually encounter denials of service. And it did not explain how these denials of service would be caused by the defendants or by HB 1523. Even before HB 1523, it was legal in Mississippi for individuals and entities to decline to participate in same-sex marriage ceremonies and other activities mentioned in HB 1523—and it would have remained legal if HB 1523 had never been enacted.[11]

After ruling that the plaintiffs had standing, the district court went on to hold HB 1523 unconstitutional. Pet. App. 75a–87a, 97a–110a.

C. The Fifth Circuit's Ruling

The Fifth Circuit reversed solely on the ground that the plaintiffs had failed to show injury in fact. Pet. App. 6a–7a ("None of these plaintiffs has clearly shown injury-in-fact, so none has standing."). The Fifth Circuit did not

---

11. The only *possible* exception is for businesses in Jackson, who are subject to a local ordinance that prohibits discrimination on account of sexual orientation and gender identity. But Jackson's anti-discrimination law must yield to the state's Religious Freedom Restoration Act, which protects those who oppose homosexual or transgender behavior on religious grounds. *See* Miss. Code § 11-61-1 (2014).

rule on causation or redressability, and did not reach the merits of the constitutional claims. *Id.*

The Fifth Circuit acknowledged that a plaintiff who personally confronts a religious display or a public prayer will suffer injury in fact. Pet. App. 7a, 10a–11a; *cf. Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). But it rejected the argument that a litigant suffers Article III injury by confronting or encountering the text of HB 1523. The Fifth Circuit claimed that none of the cases cited by the plaintiffs had held or suggested that a statute that endorses religion can inflict Article III injury on those who read it. Pet. App. 10a. The Fifth Circuit also expressed concern that the plaintiffs' theory of standing would allow them to vindicate the "'generalized interest of all citizens'" in ensuring obedience to the Constitution. Pet. App. 10a. Finally, the Fifth Circuit noted that those who encounter the text of HB 1523 have not encountered a *religious* display. Pet. App. 8a n.5 ("The religious-display and religious-exercise cases are . . . an imperfect analogy because HB 1523 covers those who hold a Section 2 belief on either a religious or a secular basis, and beliefs are not defined in reference to any particular religious denomination.").

The Fifth Circuit also denied standing because the plaintiffs had failed to allege or show that they would personally encounter discriminatory treatment or denials of service. Pet. App. 15a–18a. The Fifth Circuit acknowledged that HB 1523 might preempt anti-discrimination policies of municipalities or state universities. Pet. App. 17a. But it found this insufficient to confer standing, because none of the plaintiffs had alleged or

shown that they would encounter discrimination in the absence of these anti-discrimination measures. Pet. App. 17a–18a.

Finally, the Fifth Circuit distinguished cases from other courts that had conferred standing in different situations. Pet. App. 12a–13a & n.9.

D. The Fifth Circuit Denies Rehearing En Banc

The plaintiffs unsuccessfully sought rehearing en banc. Pet. App. 21a. Of the 14 judges who considered the petition, only two (Dennis and Graves) voted for rehearing; the remaining 12 voted to deny rehearing and leave the panel opinion in place. *Id.*

Judge Dennis argued that standing should exist whenever the "enactment" or "adoption" of a law "tend[s] to make the plaintiffs feel marginalized or excluded in their own community." Pet. App. 32a. But he did not explain how the named defendants could have caused an injury of this sort, which comes from the enactment rather than the enforcement of HB 1523. Nor did Judge Dennis explain how a judgment against the named defendants could redress such an injury when HB 1523 would continue to exist as a statute and the state judiciary would remain free to enforce it.

RESPONSE TO THE PETITIONERS' STATEMENT

The petitioners begin by quoting extensively from *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as if to suggest that *Obergefell* undermines the constitutionality of HB 1523 or buttresses the petitioners' case for Article III standing. Pet. 3–4. *Obergefell* has no bearing whatso-

ever on the Article III standing questions in the petition. The petitioners' standing (or lack of standing) to challenge HB 1523 would be no different if same-sex marriage had been adopted by the legislature rather than imposed by the courts. Indeed, the standing analysis would remain the same even if same-sex marriage were illegal and HB 1523 had been enacted to protect those who decline to participate in same-sex commitment ceremonies. The petitioners' *standing* to challenge HB 1523 has nothing to do with whether this Court thinks that same-sex marriage is a constitutional right. *Roe v. Wade*, 410 U.S. 113 (1973), did not suddenly give abortion-rights activists standing to challenge laws that shield health-care workers from penalties for refusing to participate in abortions.

If the petitioners are trying to suggest that HB 1523 was enacted to subvert the holding (or "promise") of *Obergefell*, Pet. 3–5, it is quite clear that *Obergefell* did not rule on whether States may protect private citizens and individual state employees from penalties if they refuse to lend their support to same-sex marriage. The only questions presented in *Obergefell* involved whether a State must *license* and *recognize* same-sex marriages. *See Obergefell*, 135 S. Ct. at 2607 ("The Constitution . . . does not permit *the State to bar same-sex couples from marriage* on the same terms as accorded to couples of the opposite sex." (emphasis added)). In answering "yes" to these questions, the Court did not hold or imply that efforts to shield *private citizens* or *individual government employees* from punishment for refusing to involve themselves in same-sex marriage are no longer constitu-

tionally permissible. Again, an analogy to *Roe* is instructive: *Roe*'s prohibition on state interference in the abortion decision does nothing to undermine the constitutionality of laws that shield doctors and health-care workers from retaliation for refusing to participate in abortions.

If anything, *Obergefell* suggests that the Constitution might *require* protections that appear in HB 1523:

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. at 2607. It is important not to place too much weight on this passage, as it conspicuously omits any mention of the right to "exercise" one's religion. *See id.* at 2625 (Roberts, C.J., dissenting). But it is incredible to suggest that an opinion that gestures toward the idea of constitutionally *mandated* protections for same-sex-marriage dissidents would simultaneously establish a constitutional *prohibition* on the protections in HB 1523.

The petitioners also include statements from Mississippi officeholders, Pet. 4–5, although they never bother

to explain how these statements have any bearing on Article III standing or the certworthiness of the case. But we think it appropriate to note that Governor Bryant's belief that *Obergefell* "usurped" states' rights—and Lieutenant Governor Reeves's description of *Obergefell* as an "overreach of the federal government"—are sentiments held by millions of thoughtful Americans, including the four *Obergefell* dissenters and constitutional scholars from across the political spectrum, some of whom support same-sex marriage as a matter of policy.[12] Those statements do not signify anything about the governor or lieutenant governor's beliefs about same-sex marriage, or the extent to which the law should protect dissidents from compelled participation in marriage ceremonies. Representative Gunn's statements have more of a religious tinge and clearly signify opposition to same-sex marriage as a policy matter, but *Obergefell* does say that "those who adhere to religious doctrines"—which include public officials such as Representative Gunn—"may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." 135 S. Ct. at 2607.

Public officials have a constitutional right to criticize *Obergefell* and same-sex marriage, and the petitioners' attempt to use these statements as a litigation weapon is not consistent with a regime committed to "uninhibited,

---

12. *See* Richard A. Epstein, *Hard Questions on Same-Sex Marriage*, Defining Ideas (June 29, 2015), http://hvr.co/2zTxFWE; Michael McConnell, *The Constitution and Same-Sex Marriage*, Wall St. J. (Mar. 21, 2013), http://on.wsj.com/2hngjGa.

robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Unless the petitioners are prepared to concede that their case for standing or certiorari would be *weaker* if Mississippi officials had not publicly criticized *Obergefell*—and we doubt that the petitioners believe this—then one can only wonder what purpose is served by including these statements in the petition. If the petitioners are hoping that a justice might be inclined to grant certiorari *because* Mississippi officials had the temerity to criticize *Obergefell*, then they have an exceedingly cynical view of this Court.

ARGUMENT

I. THE CLAIMS OF A CIRCUIT SPLIT ARE FALSE

To establish a circuit split, the petitioners must show either that: (1) The case below would have been decided differently in another circuit; or (2) A case from another circuit would have been decided differently in the court below. The petitioners cannot make either showing. The Fifth Circuit carefully distinguished the relevant rulings from other circuits. Pet. App. 12a–13a & n.9. And the rulings from other circuits that conferred standing did so in scenarios that do not remotely resemble the situation in this case.

A. There Is No Circuit Split On The Petitioners' Standing To Bring An Establishment-Of-Religion Claim

The petitioners claim that the denial of standing on their establishment-of-religion claim "conflicts with" rul-

ings from the Ninth, Tenth, and Fourth Circuits. Pet. 13. Each of these asserted conflicts is spurious.

1. There Is No Conflict Between The Fifth And Ninth Circuits

The petitioners claim that the decision below conflicts with *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), which allowed Catholic residents of San Francisco to challenge a resolution from the Board of Supervisors that denounced the Catholic Church's opposition to homosexual adoption as "hateful and discriminatory," "insulting and callous," and "insensitiv[e] and ignoran[t]." *Id.* at 1053. The Ninth Circuit held that the plaintiffs had suffered Article III injury because "San Francisco directly disparages [their] religious beliefs through its resolution." *Id.*

The Fifth Circuit, however, distinguished the situation in *Catholic League*, thereby avoiding any need to opine on whether *Catholic League* was correctly decided:

> [*Catholic League*] case is distinguishable on its own terms as a "direct attack and disparagement of their religion" "[u]nlike" other standing cases in which the religious effects were ancillary. [624 F.3d] at 1050 n.26. Because HB 1523 is not a specific condemnation of an identified religion challenged by its adherents, the standing analysis in *Catholic League* is inapposite.

Pet. App. 13a n.9.

The petitioners acknowledge that the Fifth Circuit distinguished *Catholic League*, Pet. 15, but they insist that it created a circuit split because the opinion in *Catholic League* includes the following passage:

> 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.

Catholic League, 624 F.3d at 1052 (emphasis added). The petitioners seize on this italicized language as evidence that the Ninth Circuit would allow litigants to challenge statutes that *either condemn or endorse* a religion—merely by asserting stigmatic or psychological injuries of the sort that the petitioners allege here. Pet. 15–16. This does not come close to establishing a circuit split.

First, the remainder of the opinion in *Catholic League* makes clear that its holding is limited to statutes or resolutions that *condemn* religious beliefs. It framed the issue as "whether adherents to a religion have standing to challenge an official *condemnation* by their government of their religious views, and official urging by their government that their local religious representative defy their church." 624 F.3d at 1048–49. And it distinguished the cases cited by the dissent as cases that did not involve "a government *condemnation* of a particular church or religion." *Id.* at 1050 n.26. The suggestion that there might *also* be standing had the resolution *en-*

dorsed a religion is the purest of dictum—a rumination on a factual scenario not before the court.

Second, and more importantly, the Ninth Circuit held in *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), that an atheist *lacked* standing to challenge a statute that enshrined "In God We Trust" as the national motto. *Id.* at 643; 36 U.S.C. § 302 ("'In God we trust' is the national motto."). This statute endorses theism at the expense of atheism, yet the Ninth Circuit found this insufficient to confer standing on atheists who assert "stigmatic injury" and claim that the statute turns them into "political outsiders." *See* 598 F.3d at 643 ("Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing."). The dissent in *Catholic League* relied on *Newdow*, *see* 624 F.3d at 1068–69, 1077–78 (Graber, J., dissenting), but the majority distinguished *Newdow* by observing that the plaintiffs in *Catholic League* had challenged "a local ordinance *condemning* the church and religious views of some of the municipality's residents." *Id.* at 1050 n.26. When *Catholic League* is read alongside *Newdow*, the law of the Ninth Circuit is in lockstep with the Fifth Circuit's holding: Feelings of stigma or outsider status caused by a statute are insufficient to establish Article III injury—except when challenging a statute that explicitly condemns the plaintiff's religious beliefs.

Third, and most importantly, even if *Newdow* had never been decided and the law of the Ninth Circuit allowed litigants to challenge statutes that endorse a reli-

gion, that *still* would not establish a circuit split because HB 1523 does not "endorse" a "religion." If one ignores *Newdow* and gives the broadest possible construction to the dictum in *Catholic League*, the *most* that can be said is that the Ninth Circuit would allow litigants to rely on stigmatic or psychological injuries when challenging a statute that *actually endorses* a religion. It is not enough for a plaintiff simply to *assert* that a statute endorses a religion; otherwise litigants would have universal standing to challenge any statute simply by claiming that it "endorses" a "religion," even if the statute does no such thing.

HB 1523 does not "endorse" the beliefs in section 2. No law "endorses" the beliefs of conscientious objectors when it allows those individuals to follow the dictates of their conscience without fear of state-sponsored penalties or retaliation. Laws that exempt pacifists from military conscription do not "endorse" pacifism.[13] Laws that excuse death-penalty opponents from participating in executions do not "endorse" the belief that capital punishment is wrong.[14] Laws that allow health-care workers to refuse to participate in abortions do not "endorse" the belief that abortion is immoral.[15] Laws that shield members of the Native American church from punishment when they ingest peyote are not an "endorsement" of Native American religion.[16]

---

13. *See* 50 U.S.C. § 3806(j).
14. *See* 18 U.S.C. § 3597(b).
15. *See* 42 U.S.C. § 238n.
16. *See* 21 C.F.R. § 1307.31 (1990).

It is untenable for the petitioners to argue (as they have done throughout this litigation) that a State "endorses" the beliefs of conscientious objectors when it enacts a law that shields those individuals from punishment or discriminatory treatment. And the petitioners cite no authority from the Ninth Circuit (or anywhere else) to support the notion that a religious-accommodation or conscience-protection law such as HB 1523 "endorses" the beliefs that it protects. Laws of this sort are simply a recognition that individuals who adhere to certain conscientious beliefs should not be penalized or persecuted for following the dictates of their conscience—*regardless* of whether the State agrees with those beliefs, and *even when* the State's official policy is contrary to those beliefs. Laws that shield dissident religious practices and conscientious objectors from punishment or discriminatory treatment signify toleration, not "endorsement."

And even if one believes that HB 1523 "endorses" the beliefs in section 2, the plaintiffs would *still* lack Article III injury in the Ninth Circuit because the statute does not endorse a *religion*. The notion that "[m]arriage is or should be recognized as the union of one man and one woman" is not a religious belief. Neither is the belief that "[s]exual relations are properly reserved to such a marriage," or the belief that "[m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." HB 1523, § 2. These are beliefs that *some* people hold for religious reasons—but the statute protects *everyone* who adheres to those beliefs, regardless of

whether they do so for religious or non-religious reasons. Pet. App. 8a n.5.

The law protects many conscientious beliefs that overlap with religious teaching, including the beliefs that warfare is immoral, that capital punishment is wrong, or that abortion is the unjustified taking of human life. None of those are "religious" beliefs—even though many people believe them for religious reasons. *See Harris v. McRae*, 448 U.S. 297, 319 (1980) (rejecting efforts to equate anti-abortion legislation with an endorsement of "religious belief").

2. There Is No Conflict Between The Fifth And Tenth Circuits

The petitioners claim that the decision below conflicts with *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), but the Fifth Circuit carefully distinguished this ruling. Pet. App. 12a. The plaintiff in *Awad* had challenged a state constitutional amendment that prohibited Oklahoma courts from considering Sharia law, and he alleged that it would prevent the state courts from probating his will. 670 F.3d at 1119, 1120. That unquestionably qualifies as a concrete and particularized injury of the sort that the plaintiffs have failed to allege here.

The petitioners insist that the Tenth Circuit did not rely in any way on the injury to the plaintiff's will, and that the stigmatic and psychological injuries alleged by the plaintiff were sufficient to support standing. Pet. 16–17. That is a misrepresentation of the Tenth Circuit's opinion.

Awad begins its discussion of standing by observing that:

> Mr. Awad claims that the amendment threatens to injure him in several ways, such as condemning his Muslim faith, inhibiting the practice of Islam, disabling a court from probating his will (which contains references to Sharia law), and limiting the relief he and other Muslims can obtain from Oklahoma state courts.

670 F.3d at 1120. Of these four alleged injuries, only the first ("condemning his Muslim faith") is a stigmatic or psychological injury of the sort that the petitioners allege here.

Later in the opinion, the Court writes:

> Mr. Awad alleges that the amendment threatens him with noneconomic injuries. 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,* 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, 102 S. Ct. 752 (quoting *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 224 n. 9d 844 (1963)). As further spelled out below, *that is enough to confer standing.*

670 F.3d at 1122 (emphasis added). The petitioners claim that this italicized passage refers *only* to the stigmatic and psychological injury inflicted by the amendment's supposed condemnation of Islam, and excludes each of the remaining injuries that the plaintiff asserted, including the alleged injury to his will. That is not a defensible interpretation of this passage. It refers to *all* of the "injuries"—plural—that Mr. Awad alleged, including those that "directly affected" him. The plaintiff was "directly affected" by the alleged injury to his will, and by the alleged injuries apart from the amendment's supposed condemnation of Islam.

Even if the petitioners' representation of *Awad* were accurate, that *still* would not establish circuit split because nothing in *Awad* suggests that a statute like HB 1523 would inflict Article III injury. Mr. Awad alleged that the state constitutional amendment *condemned* his Muslim faith. Even if one assumes that this stigmatic injury supports standing in the Tenth Circuit, that does not help the petitioners because HB 1523 does not condemn the faith of anyone.

3. There Is No Conflict Between The Fifth And Fourth Circuits

Moss v. Spartanburg County School District Seven, 683 F.3d 599, 607 (4th Cir. 2012), does not hold that "feelings of marginalization or exclusion" are sufficient to support Article III standing. The court made clear that the plaintiffs had suffered *additional* injuries beyond mere stigmatic or psychological harms. They had been confronted with an unwelcome promotional letter that was sent to them through the mail, and they had

"changed their conduct in adverse ways" in response to the school district's policy. *Id.* at 607. All of these injuries, taken together, led *Moss* to conclude that the plaintiffs had suffered injury in fact. *Id.*

International Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017), likewise does not hold that the mere allegation of "feelings of marginalization or exclusion" can support standing. The opinion makes clear that Doe #1's injury consisted *both* of the fact that President Trump's travel ban had barred his wife from the United States, *in addition to* his alleged "feelings of marginalization and exclusion." *See* 857 F.3d at 583–85; *id.* at 585 ("*In light of these two injuries*, we find that Doe #1 has had 'personal contact with the alleged establishment of religion.'" (emphasis added)). The opinion never suggests that mere stigmatic injury can support standing, and it does not hold that every Muslim residing in the United States has standing to challenge the travel ban on the ground that it makes them feel excluded and marginalized.

B. There Is No Circuit Split On Whether The Petitioners Have Standing To Bring An Equal-Protection Claim

There is no conflict between the decision below and *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015). The complaint in *Hassan* alleged that a Muslim surveillance program had induced the plaintiffs to alter their worship and religious activities out of fear that they might be watched. *Id.* at 287–88. It alleged that the surveillance program had hurt the organizational plaintiffs' recruitment and caused mosque attendance to decline.

Id. at 288. It alleged that the surveillance program had scared away customers from the plaintiffs' businesses. *Id.* It alleged that the NYPD had posted photographs and addresses of two of the plaintiffs' homes on the Internet, causing their values to decline. *Id.* The petitioners do not allege that HB 1523 inflicts any injuries of this sort.

Hassan also makes clear that these concrete, personal, and tangible injuries were necessary to support standing. It distinguished a case cited by the defendants by observing that the "[p]laintiffs here, by contrast, allege that the discriminatory manner by which the Program is administered itself causes them *direct, ongoing, and immediate* harm." *Id.* at 292 (emphasis added). *Hassan* does not hold that Article III allows litigants to challenge any law that might subject some unidentified person who shares a character trait with the plaintiffs to discriminatory treatment at some point in the future.

The petitioners' reliance on *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004), is equally unavailing. The plaintiffs in *Rose* were *actually subjected* to discriminatory treatment because they were unable to obtain a specialty license plate praising abortion rights, at a time when their State was handing out "Choose Life" plates to anti-abortion drivers. The petitioners in this case have not experienced discriminatory treatment at the hands of anyone, and they have not alleged that they will encounter discriminatory treatment at any point in the future. *If* one of the petitioners had alleged and shown that he *would* be denied services or subjected to discrimination, or if he had alleged and

shown a "substantial risk" that this might happen, then that petitioner would have "injury in fact" just as the plaintiffs in *Rose* did. The petitioners have not made this showing, so there is no conflict with *Rose*.

II. THE PETITION HAS GRAVE VEHICLE PROBLEMS

Even if the petitioners had identified a circuit split (and they come nowhere close to doing so), this is an exceedingly poor vehicle for addressing the questions presented.

The most serious problem is that the Fifth Circuit never addressed causation and redressability; it relied *solely* on the plaintiffs' failure to show injury in fact. Pet. App. 6a–7a. Yet the petitioners want this Court to decide the *entire* Article III standing question, including the causation and redressability components that the Fifth Circuit never considered or discussed. Pet. i. Normally this Court gives lower courts an opportunity to weigh in before ruling on a disputed constitutional question. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view"). The petitioners do not offer any reasons or arguments for departing from that approach.

The problem becomes more acute when one reads the complaints filed in the district court. This Court has repeatedly held that a plaintiff must plead facts that clearly demonstrate *each* requirement of Article III standing. *See Spokeo,* 136 S. Ct. at 1547; *Clapper*, 568 U.S. at 414 n.5; *Warth*, 422 U.S. at 518; *see also supra*, at 7. Yet the *Barber* and *CSE* complaints say nary a word about causation or redressability, and they are entirely bereft of

the factual allegations needed to establish those elements under the precedent of this Court.[17] The petitioners have not asked this Court to overrule the relevant passages in *Spokeo*, *Clapper*, and *Warth*, so it is not apparent how this Court could rule in the petitioners' favor *even if* they could persuade this Court that they have suffered injury in fact.

The petitioners have also failed to present an argument for *how* they could establish causation and redressability—even if one overlooks their failure to provide the required factual allegations in their complaints. The stigmatic and psychological injuries that they allege are products of the statute's *enactment*, not its *enforcement*. As we understand the petitioners' argument, they would suffer injury even if no state official ever took steps to enforce HB 1523, and even if no resident of Mississippi ever invoked the statute's protections. The mere *existence* of the statute is what injures the petitioners by sending a "message" that they find stigmatizing; that is why the petitioners insist that they need not show any additional injury beyond the unpleasant feelings that result from their knowledge of the statute. Pet. 15–23.

The problem is that none of the defendants (with the possible exception of the governor) played any role in *enacting* HB 1523, so the stigmatic and psychological injuries are not traceable to the conduct of those individuals. And even if the petitioners could get past this prob-

---

17. *See* Amended Complaint, *Barber v. Bryant*, No. 3:16-cv-417 ECF No. 35; Complaint, *Campaign for Southern Equality v. Bryant*, No. 3:16-cv-442 ECF No. 1; *see also supra*, at 7–9.

lem, they cannot establish *redressability* because federal courts do not have the ability to veto or formally revoke a statute. *See* Richard H. Fallon Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* 181 (7th ed. 2015) ("[A] federal court has no authority to excise a law from a state's statute book."). HB 1523 will continue to exist even if the plaintiffs secure declaratory and injunctive relief against the defendants—and HB 1523 will continue sending its supposedly injurious "message." The plaintiffs also need to explain how a judgment from a lower federal court against the named defendants will redress their stigmatic and psychological injuries when the state judiciary will not be bound by that judgment and will remain free to enforce HB 1523. *See Arizonans for Official English*, 520 U.S. at 66 n.21. The possibility that the Supreme Court might grant certiorari to affirm the lower court's judgment—thereby binding the state's judiciary—seems far too speculative to support Article III standing. *See Lujan*, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)).

None of this was considered or addressed by the Fifth Circuit, because it ruled solely on injury in fact and avoided the need to wade into the causation-and-redressability morass. But *all* of it would be need to be resolved by this Court—without any benefit of a circuit court's analysis—if it chooses to grant certiorari on the questions presented. Of course, this Court might be able to escape a ruling on causation and redressability if it copies the approach of the Fifth Circuit and affirms sole-

ly on the injury-in-fact issue. The petitioners, however, want this Court to rule on all three components of Article III standing—yet their petition gives this Court no inkling of how difficult and complex the causation-and-redressability issues are.

This objection could also be placed into the "needs more percolation" category. The petitioners want this Court to rule on an Article III standing question, yet the lower-court cases that they cite (and the ruling below) contain no discussion or analysis of the State's arguments against causation and redressability. It would be prudent to wait for at least one court (and preferably more) to weigh in on these issues before this Court decides to tackle them.

III. THE FIFTH CIRCUIT CORRECTLY REJECTED THE PETITIONERS' ARGUMENTS FOR STANDING

The petitioners also complain that the Fifth Circuit erred by rejecting their arguments for standing. Pet. 18–23, 25–28. Normally this Court does not grant certiorari to correct alleged errors of this sort, and the petitioners do not contend that the alleged error is so blatant as to warrant summary reversal. But even if this Court were inclined to take on an error-correction case, it should not take this one because the Fifth Circuit's judgment is unassailable.

A. The Petitioners Lack Standing To Bring An Establishment-Of-Religion Claim

The petitioners' theory of standing for their establishment-of-religion claim is premised on their insistence

that HB 1523 "endorses" a "religion." Pet. 18–20. That is transparently false, as we have previously explained. *See supra*, at 20–23. HB 1523 does not "endorse" the beliefs of conscientious objectors by shielding them from state-sponsored retaliation or punishment. *See supra* at 21–22. And even if it did, HB 1523 does not endorse *religion* because it protects *everyone* who adheres to a section 2 belief, regardless of whether they hold those beliefs for religious or secular reasons. *See supra* at 22–23; Pet. App. 8a n.5.

The petitioners are also wrong to assert that the mere existence of a statute—or the "message" communicated by a statute—can inflict Article III injury. Statutes that criminalize homosexual conduct communicate a "message" far more stigmatizing and injurious than anything in HB 1523. Yet homosexuals cannot challenge these laws merely by asserting a stigmatic or psychological injury; they must wait for someone to enforce (or threaten to enforce) the statute in a manner that affects them in a concrete and particularized way. *See Doe v. Pryor*, 344 F.3d 1282, 1287–88 (11th Cir. 2003); *D.L.S. v. Utah*, 374 F.3d 971, 974 (10th Cir. 2004); *see also Poe v. Ullman*, 367 U.S. 497 (1961).

The same principle applies to establishment-of-religion claims. There is no standing to challenge the existence of a statute that establishes "In God We Trust" as the national motto. *See Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010). But there may be Article III standing to challenge *executive* action that places this motto on U.S. currency, so long as the litigant handles U.S. currency and is personally confronted with the unwelcome

message. *Id.* at 642. Indeed, it is impossible for a court to redress an injury inflicted by the mere *existence* of a statute, because the courts have no power to veto or formally revoke a duly enacted law. But the courts are fully equipped to remedy executive actions that implement a purportedly unconstitutional statute.

Finally, the petitioners are wrong to say that the Fifth Circuit would allow someone "to challenge HB 1523 if the State publicly displayed the law's text on a billboard outside the state capitol." Pet. 22. A plaintiff who confronts this hypothetical display would have standing in the Fifth Circuit to challenge the legality of the *display*; he would not have standing to challenge HB 1523 or its enforcement. The only relief that this hypothetical plaintiff could seek would be an injunction against the display and a declaratory judgment pronouncing the display unlawful.[18] He could not challenge the *enforcement* of HB 1523 absent a showing that the enforcement would injure him personally.

The petitioners complain that the ruling below would prevent someone from challenging a hypothetical statute announcing Christianity as the State's official religion. Pet. 3, 22. That is not an argument for standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("[T]he assumption that if respondents have no standing

18. The plaintiff would lose on the merits; there is nothing unconstitutional about displaying the text of a statute, and the suggestion that the State would be "endorsing" a "religion" by displaying HB 1523 is groundless.

to sue, no one would have standing, is not a reason to find standing."). The petitioners also ignore the fact that a litigant will have standing to sue the instant the executive takes *any* step to implement this hypothetical statute. No one has standing to challenge the statute that enshrines "In God We Trust" as the national motto either. *See Newdow*, 598 F.3d at 643. But litigants can sue as soon as the executive uses the motto in a manner that personally affects them. *Id.* at 642.

B. The Petitioners Lack Standing To Bring An Equal-Protection Claim

The petitioners lack standing to bring an equal-protection claim because they have not alleged or shown that they will encounter discrimination. The petitioners correctly observe that a litigant who *actually encounters* discriminatory treatment has suffered Article III injury. Pet. 26 (citing *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984), and *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). But one will search the petition (and the complaints) in vain for any assertion that the petitioners will experience unequal treatment at the hands of *anyone*.

The petitioners complain that HB 1523 will leave them without recourse *if* they are denied services. Pet. 26. But that does not inflict Article III injury unless the petitioners allege and show that they *will* be denied services—or that they face a "substantial risk" of encountering a denial. They cannot rely on the hypothetical possibility that they *might* be denied services at some point by some unidentified person in the future. *See*

Lujan, 504 U.S. at 560 (injury must be "actual or imminent, not 'conjectural' or 'hypothetical' ").

The plaintiffs also complain that HB 1523 partially preempts Jackson's anti-discrimination ordinance and disables localities from enacting anti-discrimination measures that would coerce participation in same-sex marriage ceremonies. Pet. 27. This, too, is insufficient to confer standing unless the plaintiffs show that they will be *injured* by the preemptive effects of HB 1523. The plaintiffs try to analogize this case to *Romer v. Evans*, 517 U.S. 620 (1996), but *Romer* has nothing to say on Article III standing because the petitioners had sought review of a *state* court decision that enjoined them from enforcing Amendment 2.[19] In all events, the test for standing in a *Romer* situation is exactly the same as it is here: A plaintiff will have Article III standing to challenge Colorado's Amendment 2 *if* he shows that Amendment 2 will cause him to encounter discriminatory treatment—or if he shows a "substantial risk" of encountering such discrimination. It is not enough simply to be a homosexual who resides somewhere in Colorado.[20]

---

19. The petitioners in *Romer* had standing under *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989), so there was no need for the original plaintiffs to establish Article III standing.

20. The petitioners' claim that *Romer*'s "description of the equal-protection violation effectively defines the injury for standing purposes" is false and unsupported by authority. Pet. 27. Homosexuals do not automatically acquire Article III standing to challenge a law that violates *Romer*'s interpretation of the Equal Protection Clause.

IV. THE PETITIONERS' REMAINING ARGUMENTS FOR CERTIORARI ARE MERITLESS

The petitioners claim that the standing issues present "important and recurring questions" because other States are on the verge of enacting conscience-protection laws similar to HB 1523. Pet. 3, 29–32 & n.5. The factual premise of this argument seems very doubtful. No other State has enacted a law such as HB 1523, and efforts to enact these laws in other States have bogged down in response to threatened boycotts and ferocious lobbying campaigns from business corporations. *See* Richard A. Epstein, *The War Against Religious Liberty*, Defining Ideas (Apr. 7, 2015), http://hvr.co/2zCnSDd.[21] The suggestion that this dynamic will suddenly change if the Court denies certiorari strikes us as fanciful.

And if the States are indeed about to unleash a flood of new conscience-protection measures, as the petitioners suggest, that is all the more reason to wait until additional courts weigh in on the Article III standing issues—especially on the causation and redressability components that the Fifth Circuit (and the petition in this case) entirely ignored.

The grant of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, also counsels in favor of waiting. If *Masterpiece* holds that the Constitution mandates some or all of HB 1523's pro-

21. The petitioners cite conscience-protection bills that were *introduced*; none of them have been enacted. Pet. 29–30 n.5.

tections, then this could dramatically reshape the standing analysis. It is not apparent how a litigant can suffer injury from a statute (or the severable provisions of a statute) that confer protections that the Constitution independently requires.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

DREW L. SNYDER
Office of Gov. Phil Bryant
P.O. Box 139
Jackson, Mississippi 39205
(601) 359-3150
drew.snyder@governor.ms.gov

JONATHAN F. MITCHELL
Counsel of Record
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1397
jfmitche@stanford.edu

KEVIN H. THERIOT
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
ktheriot@adflegal.org

November 13, 2017

APPENDIX

HOUSE BILL NO. 1523
(As Sent to Governor)

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

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

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

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

(a) Marriage is or should be recognized as the union of one man and one woman;

(b) Sexual relations are properly reserved to such a marriage; and

(c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

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

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

(b) Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organi-

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

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

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

(4) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or de-

clines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. This subsection (4) shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.

(5) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person has provided or declined to provide the following services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this Act:

> (a) Photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services; or
>
> (b) Floral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods.

(6) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards

or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

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

(a) If the employee's speech or expressive conduct occurs in the workplace, that speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed; or

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

(8)

(a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a

manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal.

(b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the Administrative Office of Courts, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The Administrative Office of Courts shall take all necessary steps to ensure that the performance or solemnization of any legally

valid marriage is not impeded or delayed as a result of any recusal.

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

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

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

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

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

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

(f) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any license, certification, accreditation, custody award or agreement, diploma, grade, recognition, or other similar benefit, position, or status from or to any person; or

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

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

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

(2) An action under this act may be commenced, and relief may be granted, in a court of the state without re-

gard to whether the person commencing the action has sought or exhausted available administrative remedies.

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

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

(a) Compensatory damages for pecuniary and nonpecuniary losses;

(b) Reasonable attorneys' fees and costs; and

(c) Any other appropriate relief, except that only declaratory relief and injunctive relief shall be available against a private person not acting under color of state law upon a successful assertion of a claim or defense under this act.

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

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

(2) The protection of free exercise of religious beliefs and moral convictions afforded by this act are in addition

to the protections provided under federal law, state law, and the state and federal constitutions. Nothing in this act shall be construed to preempt or repeal any state or local law that is equally or more protective of free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to narrow the meaning or application of any state or local law protecting free exercise of religious beliefs or moral convictions. Nothing in this act shall be construed to prevent the state government from providing, either directly or through an individual or entity not seeking protection under this act, any benefit or service authorized under state law.

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

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

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

(2) "State government" means:

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

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

(c) Any person acting under color of state law; and

(d) Any private party or third party suing under or enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state.

(3) "Person" means:

(a) A natural person, in his or her individual capacity, regardless of religious affiliation or lack thereof, or in his or her capacity as a member, officer, owner, volunteer, employee, manager, religious leader, clergy or minister of any entity described in this section;

(b) A religious organization;

(c) A sole proprietorship, or closely held company, partnership, association, organization, firm, corporation, cooperative, trust, society or other closely held entity operating with a sincerely held religious belief or moral conviction described in this act; or

(d) Cooperatives, ventures or enterprises comprised of two (2) or more individuals or entities described in this subsection.

(4) "Religious organization" means:

(a) A house of worship, including, but not limited to, churches, synagogues, shrines, mosques and temples;

(b) A religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; and

(c) An officer, owner, employee, manager, religious leader, clergy or minister of an entity or organization described in this subsection (4).

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

(a) Assisting abused or neglected children;

(b) Teaching children and parents occupational, homemaking and other domestic skills;

(c) Promoting foster parenting;

(d) Providing foster homes, residential care, group homes or temporary group shelters for children;

(e) Recruiting foster parents;

(f) Placing children in foster homes;

(g) Licensing foster homes;

(h) Promoting adoption or recruiting adoptive parents;

(i) Assisting adoptions or supporting adoptive families;

(j) Performing or assisting home studies;

(k) Assisting kinship guardianships or kinship caregivers;

(l) Providing family preservation services;

(m) Providing family support services; and

(n) Providing temporary family reunification services.

Section 10. The provisions of Sections 1 through 9 of this act shall be excluded from the application of Section 11-61-1.

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