No. 17-547

In the Supreme Court of the United States

RIMS BARBER, ET AL.,

Petitioners,

V.

GOVERNOR PHIL BRYANT, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

A. This Court Should Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Establishment Clause Challenge..... 2

B. This Court Should Also Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Equal Protection Clause Challenge..... 8

C. Respondents' Remaining Arguments Against Certiorari Lack Merit. 11

TABLE OF AUTHORITIES

FEDERAL CASES

Awad v. Ziriax,
670 F.3d 1111 (10th Cir. 2012) 5

Catholic League for Religious and Civil Rights v. City of San Francisco,
624 F.3d 1043 (9th Cir. 2010) (en banc)..... 2, 3, 4, 12

Cutter v. Wilkinson,
544 U.S. 709 (2005) 5

Doe v. Pryor,
344 F.3d 1282 (11th Cir. 2003) 7

Hassan v. City of New York,
804 F.3d 277 (3d Cir. 2015)..... 8

Heckler v. Mathews,
465 U.S. 728 (1984) 9, 10, 12

Locke v. Davey,
540 U.S. 712 (2004) 9

Lynch v. Donnelly,
465 U.S. 668 (1984) 5

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,
137 S. Ct. 2290 (June 26, 2017) 12

McCreary Cnty. v. ACLU of Ky.,
545 U.S. 844 (2005) 5

Moss v. Spartanburg Cnty. Sch. Dist. Seven,
683 F.3d 599 (4th Cir. 2012) 6

Newdow v. Lefevre,
598 F.3d 638 (9th Cir. 2010) 4, 7

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 1, 2

Planned Parenthood of S.C. Inc. v. Rose,
361 F.3d 786 (4th Cir. 2004) 9

Romer v. Evans,
517 U.S. 620 (1996) 10

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 2, 6, 7, 8

Warth v. Seldin,
422 U.S. 490 (1975) 10

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In enacting HB 1523 in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Mississippi placed its official imprimatur on religious beliefs or moral convictions opposing marriage of same-sex couples, transgender individuals, and sexual relations outside of a male-female marriage. HB 1523 provides sweeping legal immunity to government officials and private parties who, acting on the state-sanctioned beliefs, deny lesbian, gay, bisexual, and transgender (LGBT) individuals goods and services ranging from psychological counseling and fertility services to wedding venues to marriage licenses. Confronted with HB 1523's clearly religious purpose and its undeniable relegation of LGBT individuals to disfavored status, the district court concluded that "[t]he title, text, and history of HB 1523 indicate that the bill was the

State's attempt to put LGBT citizens back in their place after *Obergefell*." Pet. App. 81a.

The Fifth Circuit's holding that petitioners lack standing to challenge HB 1523 plainly warrants review. The decision conflicts with decisions of other courts of appeals, and respondents' attempts to distinguish those decisions lack merit. Respondents' defense of the merits is even weaker. Respondents fail even to acknowledge this Court's holding in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), that a state "message to . . . nonadherents that they are outsiders, not full members of the political community" constitutes Establishment Clause injury. Respondents do not deny, moreover, that under the Fifth Circuit's reasoning, no one would have standing to challenge a law declaring Christianity or any other faith to be the official state religion. And respondents' only rejoinder to petitioners' equal-protection arguments is to mischaracterize petitioners' theories of injury. Finally, respondents do not refute petitioners' showing that the decision below will pave the way for widespread enactment of similar religious-objection laws targeting LGBT people. The petition for a writ of certiorari should be granted.

A. This Court Should Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Establishment Clause Challenge.

1. The Fifth Circuit's holding that petitioners lack Establishment Clause standing conflicts with decisions of several other circuits. Respondents' arguments to the contrary (Opp. 18-26) are unpersuasive.

a. In *Catholic League for Religious and Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc), the Ninth Circuit held that Catholic San Francisco residents had suffered concrete injury from an anti-Catholic resolution because they were "members of the community who have had contact with the resolution and have suffered spiritual harm as a result." Petitioners here have suffered precisely the same injury.

Respondents first echo (Opp. 18-19) the Fifth Circuit's attempt to distinguish *Catholic League* on the ground that the ordinance there disparaged, rather than endorsed, particular religious beliefs. Pet. App. 13a n.9. As Judge Dennis argued in dissenting from the denial of rehearing en banc in this case, however, that "elides [*Catholic League*'s] central observation," *id*. at 30a—namely, that the "psychological consequence . . . produced by government condemnation of one's own religion *or endorsement of another's in one's own community*" constitutes injury in fact. 624 F.3d at 1052. Respondents argue that the italicized language is dicta, but it was in fact crucial to the court's reasoning. The court reasoned from Ninth Circuit and Supreme Court precedent holding that the "psychological" harm inflicted by a monument *endorsing* religious beliefs is "a sufficiently concrete injury." *Id*. at 1052. Because it would be "difficult" to "distinguish[]" those decisions, the court held that the plaintiffs had suffered the very same psychological injury from the disparaging ordinance. *Id*. at 1051. Thus, although the ordinance disparaged a particular religion, the court's holding necessarily rested on the premise that psychological harm arising from government endorsement of religion would be sufficient to establish injury in fact. And because the court recognized that the ordinance inflicted an identical

injury as would a monument, *Catholic League* squarely conflicts with the decision below.

Respondents next observe (Opp. 20) that *Catholic League* distinguished *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010). *Newdow* held that the plaintiff lacked standing to challenge a statute making "In God We Trust" the national motto, largely because the plaintiff had conceded the point. *Id*. at 643 n.9. *Catholic League* distinguished *Newdow* in part on the ground that it did not "involve[] a government condemnation of a particular church," but also emphasized that the statute involved only "vague and general religiosity." 624 F.3d at 1050 n.26. Read together with *Catholic League*'s reliance on endorsement decisions, it is clear that the court distinguished *Newdow* because that statute was not sufficiently endorsing to inflict a concrete injury—not because the statute did not disparage a particular religion.

Finally, respondents contend (Opp. 20-22) that HB 1523 does not endorse religion, likening the statute to conscientious-objector laws. HB 1523 bears no resemblance to those laws. Conscientious-objector statutes further free-exercise principles without offending the Establishment Clause: they exempt individuals from government compulsion in narrow situations in which free-exercise concerns are particularly weighty, and in which granting exemptions does not impinge on others' rights to practice their religion or to be free from established religion. HB 1523, by contrast, authorizes those who hold specific religious beliefs to discriminate against specified members of minority groups who do not conform to those beliefs—thus crossing from permissible accommodation to impermissible endorsement. As this Court has explained, religious-accommodation laws "devolve into

an unlawful fostering of religion" when they are not tailored to alleviating "burdens on private religious exercise," or when they fail to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 714, 720 (2005). That is an apt description of HB 1523.[1]

b. Respondents are equally wrong in contending (Opp. 23-25) that the decision below does not conflict with *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Respondents argue that *Awad* found injury based on the plaintiff's allegation that the challenged constitutional amendment disapproving of Sharia law could prevent courts from probating his will. To the contrary, the court characterized the psychological harm inflicted by the amendment as "similar to" the psychological harm that constitutes injury in fact in religious-display cases: the plaintiff "suffer[ed] a form of personal and unwelcome contact with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment," and "that is enough to confer standing." *Id*. at 1122. The court then observed that the plaintiff also alleged injuries "beyond" what "suffices for standing" in religious-display cases. *Id*. But the court's reasoning concerning spiritual harm, and its recognition that the injury inflicted by religious displays is indistinguishable

[1] Respondents also contend (Opp. 22-23) that HB 1523 does not endorse religion because it encompasses moral beliefs. The addition of the word "moral" does not "negate[] any message of endorsement." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). It is also "merely secondary" to the State's "religious objective." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

from the injury inflicted by an enactment, squarely conflict with the decision below.

c. Finally, in *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), the Fourth Circuit held, contrary to the decision below, that a Jewish student's "feelings of marginalization and exclusion" resulting from pro-Christian school policies that did not directly affect her are themselves "cognizable forms of injury, particularly in the Establishment Clause context." *Id*. at 607. Although respondents observe (Opp. 25-26) that the plaintiff had also suffered other injuries, the court clearly held that feelings of exclusion were themselves sufficient to establish injury in fact. 683 F.3d at 607.

2. Respondents' attempts to defend the Fifth Circuit's decision are equally meritless.

Remarkably, respondents nowhere address this Court's holding in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 314 (2000), that in the context of challenges to state enactments, the Establishment Clause protects against injury caused by "the mere passage by the [government] of a policy that has the purpose and perception of government establishment of religion." State "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id*. at 309–10 (internal quotation marks omitted).

That reasoning refutes respondents' assertion (Opp. 32) that petitioners "cannot challenge [HB 1523] merely by asserting a stigmatic or psychologi-

cal injury."[2] Under *Santa Fe*'s understanding of the Establishment Clause, petitioners have suffered injury in fact. They are Mississippi citizens who must live and work in the State knowing that their government endorses religious beliefs condemning their lives and relationships, and that it permits government officials and private parties to discriminate against them. It would be hard to conceive of any more powerful and stark message that petitioners are "outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309–10.

In that respect, HB 1523 is indistinguishable from a state law declaring Christianity or any other faith to be the official state religion. Under the Fifth Circuit's reasoning, no one would have standing to challenge that unconstitutional endorsement of religion, absent some physical manifestation of that law. Respondents have no response to that point, protesting only that "[t]hat is not an argument for standing." Opp. 33.[3] To the contrary: it is a compelling argument for standing. A statute adopting a particular religion as the official state religion (or, as here, immunizing the actions of adherents of the official religion) falls within the core prohibition of the Establishment Clause. That the Fifth Circuit's decision would deny standing to challenge that law demonstrates the indefensibility of its reasoning.

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[2] The decisions on which respondents rely (Opp. 32) concerning sodomy statutes found injury lacking because the statutes in question had already been invalidated. *See, e.g.*, *Doe v. Pryor*, 344 F.3d 1282 (11th Cir. 2003).

[3] Respondents note that under *Newdow, supra*, no one would have standing to challenge the federal statute making "In God We Trust" the national motto. For the reasons explained above, the statute in *Newdow* is not analogous to HB 1523.

Respondents' remaining arguments lack merit. Respondents' contention that HB 1523 does not endorse particular religious beliefs is wrong for the reasons stated above. And although respondents correctly observe (Opp. 33) that petitioners would have standing to challenge executive actions implementing HB 1523, that does not suggest that the injury inflicted by the statute itself is not sufficient to support standing in its own right. *See Santa Fe*, 530 U.S. at 314 (plaintiff need not wait until school policy endorsing religion gave rise to religious compulsion).

B. This Court Should Also Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Equal Protection Clause Challenge.

1. The Fifth Circuit held that petitioners lack equal-protection standing because HB 1523 conveys a "discriminatory message" but does not subject petitioners to disparate treatment. Pet. App. 15a-16a. That holding conflicts with decisions of other courts of appeals. Pet. 24-25. Respondents' arguments to the contrary (Opp. 26–28) are unavailing.

a. The Third Circuit held in *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015), that a surveillance program directed only at Muslims inflicted an injury on the plaintiffs because "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.* at 289–90 (internal quotation marks and citation omitted). Although respondents argue that the plaintiffs alleged several injuries beyond differential treatment, the Third Circuit did not rely on those injuries, instead stating that "'[t]he indignity of being singled

out for special burdens on the basis of one's religious calling' is enough to get in the courthouse door." *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting)). HB 1523 inflicts the same injury by "singl[ing] out" LGBT individuals for "special burdens" not shared by other Mississippi citizens. *Id.*

b. The Fourth Circuit held in *Planned Parenthood of South Carolina Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004), that the plaintiffs had suffered injury from the discriminatory treatment imposed by a state law offering only pro-life license plates. Applying equal-protection principles to the plaintiffs' First Amendment claim, the court held that "[d]iscriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes." Contrary to respondents' argument (Opp. 27), the court rejected the plaintiffs' other theories of injury and relied solely on the statute's differential treatment of pro-life and pro-choice positions. 361 F.3d at 790.

2. Respondents' defense of the Fifth Circuit's decision on equal-protection standing lacks merit.

Respondents first mischaracterize petitioners' contention that HB 1523 subjects them to discriminatory treatment as "rely[ing] on the hypothetical possibility that they *might* be denied services" pursuant to HB 1523. Opp. 34. Not so. Petitioners assert that HB 1523 *itself* creates a favored class and empowers its members to deny with impunity a range of services to members of another, disfavored, class. *See Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). That unequal regime "stigmatiz[es] members of the disfavored group as innately inferior and therefore as less worthy

participants in the political community." *Id.* (internal quotation marks omitted). Petitioners' injury therefore does not depend on any eventual denials of service by adherents of the privileged beliefs.

Petitioners have also suffered injury arising from HB 1523's partial preemption of existing and prospective local anti-discrimination policies. Pet. 27-28. Respondents' contention (Opp. 35) that petitioners have not been "*injured* by the preemptive effects of HB 1523" flies in the face of *Romer v. Evans*, 517 U.S. 620 (1996). *Romer* establishes that the Colorado amendment inflicted injury by relegating the targeted individuals to second-class legal status:

> Sweeping and comprehensive is the change in legal status effected by this law . . . . Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

517 U.S. at 627.

Because the purpose of the injury-in-fact analysis is to determine whether the plaintiff has suffered a concrete injury protected by the substantive right the plaintiff invokes, standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); Pet. App. 27a (Dennis, J., dissenting from denial of rehearing en banc). *Romer* establishes that the Equal Protection Clause protects against the "special" legal "disability" described above. 517 U.S. at 631. Petitioners' allegation that HB 1523 imposes that

very same disability on the class it targets is unquestionably sufficient to show injury in fact.

C. Respondents' Remaining Arguments Against Certiorari Lack Merit.

1. Respondents contend (Opp. 28) that the fact that the Fifth Circuit did not address causation and redressability is a "most serious" vehicle problem. To the contrary, that is not a vehicle problem, much less a serious one. Although the questions presented would fairly include causation and redressability (Pet. i), this Court is free to decide only the injury-in-fact issue—and, if it reverses, to remand for consideration of causation and redressability. Respondents do not suggest otherwise.

Respondents also argue that petitioners cannot show causation and redressability. That argument is easily refuted. Petitioners' injuries are directly traceable to HB 1523's existence: the exclusion suffered by petitioners arises directly from the statute, which enshrines as Mississippi's official policy religious beliefs disapproving of petitioners. And petitioners' disparate-treatment injury is traceable to HB 1523's creation of an unequal legal regime and its preemption of existing local anti-discrimination protections. Petitioners' injuries will be redressed by a declaration of HB 1523's unconstitutionality and an injunction against enforcement.[4] That relief redresses the Establishment Clause injury because it repudiates the statute's message. "[D]eclaring the [statute] unconstitutional [renders] the official act of the government . . . null and void," and "communicate[s]

[4] Contrary to respondents' assertion, petitioners alleged causation and redressability in their complaint. Docket entry No. 35, No. 3:16-cv-417, at ¶¶ 23-24, 34-35 (S.D. Miss.).

to the people of the plaintiffs' community that their government is constitutionally prohibited from" endorsing favored religious beliefs.[5] *Catholic League*, 624 F.3d at 1053. The requested relief also redresses the equal-protection injury because it effectively withdraws the benefits that HB 1523 confers on adherents of the favored beliefs. *Heckler*, 465 U.S. at 740.

2. Respondents next argue (Opp. 36) that, despite widespread state attempts to enact similar statutes (Pet. 29), the question presented is unlikely to recur because "threatened boycotts" have forestalled enactments in other states. The only evidence respondents cite is a 2015 article—which obviously does not address the numerous bills introduced in 2016 and 2017 (Pet. 29-30). If the decision below is allowed to stand, similar statutes are likely to proliferate. The showing necessary to demonstrate standing to challenge such statutes is a pressing and likely recurring question

3. Finally, respondents provide no support for their assertion (Opp. 36-37) that *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017), weighs against certiorari. As the petition explained (Pet. 30-32), *Masterpiece Cakeshop* will not resolve the standing question presented here. A decision against the baker could spur enactment of laws like HB 1523. A decision in the baker's favor is unlikely to curtail enactment of laws that, like HB 1523, immunize denials of service

[5] Respondents' observation (Opp. 30) that federal courts do not excise state laws from the books proves too much. If that prevented redressability, no plaintiff would ever have standing to challenge the constitutionality of a state statute in federal court.

on *non-expressive* grounds—and, for that reason, will not "reshape the standing analysis" (Opp. 37) applicable to such statutes.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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