No. 16-60478

In the United States Court of Appeals for the Fifth Circuit

CAMPAIGN FOR SOUTHERN EQUALITY AND SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

PHIL BRYANT, GOVERNOR OF MISSISSIPPI, AND JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division
Case No. 3:16-cv-442-CWR-LRA

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION FOR EXPEDITED CONSIDERATION

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CERTIFICATE OF INTERESTED PERSONS

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

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• Rims Barber • Carol Burnett • Joan Bailey • Katherine Elizabeth Day • Anthony Laine Boyette • Don Fortenberry • Susan Glisson • Derrick Johnson • Dorothy C. Triplett • Renick Taylor • Brandiilyne Mangum-Dear • Susan Mangum • Joshua Generation Metropolitan Community Church • Campaign for Southern Equality • Susan Hrostowski	Robert B. McDuff Sibyl C. Byrd Jacob W. Howard MCDUFF & BYRD Beth L. Orlansky John Jopling Charles O. Lee MISSISSIPPI CENTER FOR JUSTICE Alysson Mills FISHMAN HAYGOOD LLP Roberta A. Kaplan Andrew J. Ehrlich William B. Michael Joshua D. Kaye Jacob H. Hupart Alexia D. Korberg Zachary A. Dietert PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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Governor Phil Bryant, on behalf of the State of Mississippi, respectfully seeks a stay of the preliminary injunction entered against House Bill 1523, also known as the "Protecting Freedom of Conscience from Government Discrimination Act." The governor also requests expedited consideration of this appeal, and moves to consolidate this appeal with *Barber v. Bryant*, No. 16-60477.

The governor's reasons for seeking this relief can be found in the motion filed earlier today in *Barber*, and we incorporate those arguments by reference. The appendix to this motion includes the relevant district-court filings from *Coalition for Southern Equality v. Bryant*, No. 3:16-cv-442-CWR-LRA.

Conclusion

The emergency motion for stay pending appeal and the motion for expedited consideration should be granted. The Court should consolidate this appeal with *Barber v. Bryant*, No. 16-60477.

Respectfully submitted.

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Counsel also certifies that on July 11, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Conference

On July 11, 2016, counsel for the plaintiffs indicated by way of e-mail that they oppose this motion and intend to file a response.

/s/ Jonathan F. Mitchell
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APPENDIX

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A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY and THE REV. DR. SUSAN HROSTOWSKI,

Plaintiffs,

vs.

PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; JOHN DAVIS, in his official capacity as Executive Director of the Mississippi Department of Human Services; and JUDY MOULDER, in her official capacity as Mississippi State Registrar of Vital Records,

Defendants.

CIVIL ACTION NO. 3:16-cv-442 DPJ-FKB

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs the Campaign for Southern Equality and The Rev. Dr. Susan Hrostowski complain and allege:

INTRODUCTION

1. On July 4, 1776, the Second Continental Congress declared the United States of America to be an independent nation, proclaiming that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness," and that governments are instituted "[t]o secure these rights."

2. Almost exactly 240 years later, on July 1, 2016, the State of Mississippi will begin to implement and enforce a state law that could hardly be more inconsistent with those words expressed by our founders and the core principles of liberty and equality that they recognized and acknowledged. That law, known as House Bill 1523 ("HB 1523"), rather than respect that all men (and women) are created equal, declares that certain people—only those who hold particular state-defined religious beliefs—should have special rights and privileges. Even worse, it allows them to exercise those special rights and privileges in derogation of the fundamental equality and dignity of a politically unpopular minority group.

3. Thus, while HB 1523 purports to protect "freedom of conscience," the U.S. Constitution, the Mississippi Constitution, and Mississippi's Religious Freedom Restoration Act already afford robust protections for all Mississippians to believe as they wish and practice their religions accordingly. HB 1523, unlike those provisions, singles out only a few specific, state-selected religious beliefs and grants their holders special

status, granting sweeping religious accommodations regardless of the burden they would impose on others.

4. Specifically, HB 1523 confers benefits exclusively upon those who adhere to at least one of three designated sectarian religious beliefs: (a) that "[m]arriage is or should be recognized as the union of one man and one woman," (b) that "[s]exual relations are properly reserved to such a marriage," and (c) 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" (collectively, the "Preferred Religious Beliefs"). § 2.

5. HB 1523 then goes on to promote and advance those Preferred Religious Beliefs in a wide variety of everyday contexts, including the following:

(a) It authorizes state officials who issue marriage licenses to invoke the Preferred Religious Beliefs to deny service to gay and lesbian couples. § 3(8)(a).

(b) It permits government employees to advocate a Preferred Religious Belief with impunity even while performing their official duties, as long as they can identify any other religious, political, or moral belief—regardless of the content of that other belief—that would have also been permitted. *Id.* at § 3(7).

(c) It forbids the government and even private state-court plaintiffs from taking action against individuals or businesses that invoke the Preferred Religious Beliefs as justification for refusing to provide lesbian, gay, bisexual, and transgender ("LGBT") people a litany

of goods and services, including counseling; fertility services; and commercial products, services, and accommodations "related to the solemnization, formation, celebration, or recognition of any marriage." *See id.* at §§ 3, 4, 9(2), 9(3).

(d) It also permits the imposition of restrictive gender-based policies on employees' or students' attire, grooming, and bathroom or locker room usage, as long as those policies are consistent with the Preferred Religious Beliefs. *Id.* at § 3(6).

(e) Finally, HB 1523 forbids any government or state-court action against a "religious organization"—whether affiliated with a house of worship or not and whether acting as a government contractor or grant recipient or not—from using the Preferred Religious Beliefs as grounds for making discriminatory decisions about whom it employs, rents real estate to, or provides with adoption or foster care services. *See id.* at §§ 3(1)–3(2), 4(1)(c), 9(4).

6. HB 1523's myriad applications all have three things in common: (1) they benefit only those who hold the Preferred Religious Beliefs, not those with any other inconsistent or contradictory religious or other beliefs; (2) they do not require holders of the Preferred Religious Beliefs to demonstrate that their freedom of religion would suffer any substantial or even nontrivial burden; and (3) they shift the entire burden of accommodating the Preferred Religious Beliefs from the believer to others (frequently LGBT people), without regard for the gravity of injury that the burden imposes.

7. But the First Amendment to the United States Constitution, adopted in 1791, provides that "Congress shall make no law respecting an establishment of religion. . . ."[1] The language of Article III, Section 18 of the Mississippi Constitution, enacted in 1890, is even stronger. It provides that "no preference shall be given by law to any religious sect or mode of worship."

8. By identifying particular sectarian religious beliefs for special treatment and imposing a statutory scheme that systematically advances those beliefs at the expense of gay and lesbian Mississippians, HB 1523 makes unequal treatment the law of the land in Mississippi. It is hard to imagine a clearer violation of the Establishment Clause of the First Amendment.[2]

PARTIES

B. Plaintiffs

(i) The Campaign for Southern Equality

9. The Campaign for Southern Equality has been recognized as a proper institutional plaintiff with standing to sue on behalf of its members in two separate lawsuits challenging Mississippi's laws banning marriage between gay couples and adoption by gay couples. *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d 906, 917–18 (S.D. Miss. 2014) ("*CSE I*"), *aff'd*, No. 14-60837, 2015 WL 4032186 (5th Cir. July 1, 2015); *Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, __ F. Supp. 3d __, 2016 WL 1306202, at *11 (S.D. Miss. Mar. 31, 2016) ("*CSE II*"). A court in this district described the Campaign for Southern Equality as "a non-profit advocacy group based in

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[1] The Establishment Clause has been made applicable to the states by the Fourteenth Amendment. *See Everson* v. *Bd. of Educ.*, 330 U.S. 1, 8 (1947).

[2] Plaintiffs anticipate that enforcement of HB 1523 will also present other legal and constitutional grounds for challenging the statute, and expressly reserve the right to file an amended complaint to address additional claims at a later date.

Asheville, North Carolina, that works across the South to promote 'the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life.'" *CSE I*, 64 F. Supp. 3d at 913.

10. The Campaign for Southern Equality was incorporated in 2011 in order to advocate for the full equality of LGBT people in American life and to increase public support for their rights. Based in Asheville, North Carolina, the Campaign for Southern Equality works throughout the South by providing free legal clinics and resources to help LGBT Southerners protect their rights; engaging in litigation to vindicate the rights guaranteed by the Constitution of the United States; and providing organizational support and training to local LGBT leaders. Since 2012, the Campaign for Southern Equality has worked actively with LGBT people across Mississippi. These efforts have included public advocacy promoting marriage equality, town hall events about LGBT equality, and free legal clinics.

11. The Campaign for Southern Equality's membership includes LGBT people who live, work, and pay income taxes in the State of Mississippi. Members hold a variety of religious faiths and moral beliefs, but they share in common the belief that the identities, relationships, and marriages of LGBT people have as much dignity as anyone else's.

12. The Campaign for Southern Equality has previously litigated cases to secure for LGBT Mississippians basic rights and equal dignity guaranteed by the Constitution. First, in *CSE I*, CSE won for gay and lesbian Mississippians the right to marry. 64 F. Supp. 3d at 913, *aff'd*, No. 14-60837, 2015 WL 4032186 (5th Cir. July 1, 2015). Most recently, in *CSE II*, the Court enjoined enforcement of Mississippi Code

section 93-17-3(5), which banned "couples of the same gender" from adopting. 2016 WL 1306202, at *14.

(ii) The Rev. Dr. Susan Hrostowski

13. Plaintiff The Rev. Dr. Susan Hrostowski was ordained as an Episcopal priest in 1988 and is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi. St. Elizabeth's is a small congregation, known in the community for its annual Mardi Gras Pancake suppers, its ministry to local foster children, and its beautiful outdoor chapel. As an Episcopal Priest, Susan helps her congregation and community celebrate life-cycle events from baptisms to funerals. She finds particular joy in joining couples—both gay and straight—in holy matrimony.

14. Susan grew up in Gulfport, Mississippi. She holds a Bachelor's Degree in Psychology from the University of Southern Mississippi, a Master of Divinity from Virginia Theological Seminary, and a Master's of Social Work Degree from USM and a Ph.D. in Social Work from Tulane University. In addition to being the vicar of St. Elizabeth's Episcopal Church, Susan is also an Associate Professor in the School of Social Work at the University of Southern Mississippi. Before coming to St. Elizabeth's, Susan served St. Paul's Episcopal Church in Meridian, MS, a large downtown parish with about 500 members, and Holy Trinity in Fayetteville, NC, also a large congregation.

15. As a Christian who belongs to the Episcopal Church, Susan has many sincerely held religious beliefs, including the belief that the sacred institution of marriage is open to all loving couples. Susan's religious beliefs, like all Episcopalians', are based on the teachings of Jesus Christ. Chief among those teachings are to "seek and serve Christ in all persons, loving your neighbor as yourself" and "strive for justice and peace

among all people, and respect the dignity of every human being." The Baptismal Covenant, Book of Common Prayer 305 (1979).

16. Indeed, in a letter dated June 3, 2016, the Rt. Rev. Brian R. Seage, Bishop of Mississippi, gave permission for congregations and clergy in the Diocese of Mississippi to use specific liturgies to perform marriage "for all couples legally entitled to marry." *See* Ex. A at 1. While recognizing that there remain differing views among Episcopal clergy in the state, the Bishop explained that he arrived at his support for marriage equality "after a lot of prayer and discernment, as well as engagement with Holy Scripture, the traditions of the Church and human reason." *Id.* at 2.

17. Susan has been together with her wife Kathryn (Kathy) Garner as a couple for 26 years. They had a religious ceremony 23 years ago, and were legally married on June 17, 2014 in an Episcopal wedding held at Washington National Cathedral in Washington, D.C. At their wedding, their now-16-year-old son, Hudson, served as their best man. Susan and Kathy are residents of Forrest County, Mississippi, where they live, work, and pay Mississippi state income tax.

18. Susan and Kathy were plaintiffs in *Campaign for Southern Equality* v. *Mississippi Department of Human Services*, No. 3:15cv578-DPJ-FKB, filed September 11, 2015. Together, they fought for Susan's right to adopt their son, Hudson, and become his legal parent alongside Kathy.[3] On March 31, 2016, a court in this district issued a preliminary injunction against the enforcement of Mississippi's ban on adoption by same-sex couples. *CSE II,* 2016 WL 1306202, at *14. With this legal barrier to equality finally lifted, Susan adopted Hudson as her son on May 6, 2016.

[3] *See also* Hudson Garner, *My Day in Court*, Huffington Post (Dec. 22, 2015, 9:39 AM), http://www.huffingtonpost.com/hudson-garner/my-day-in-court_b_8854120.html.

C. Defendants

19. Defendant Phil Bryant is the Governor of the State of Mississippi and is being sued here in his official capacity. Governor Bryant is the chief executive of the State of Mississippi and is responsible for ensuring compliance with state law, including HB 1523, which he signed into law on April 5, 2016.

20. Governor Bryant also bears responsibility for the formulation and administration of the policies of the executive branch, including administrative agency policies. Governor Bryant was and is acting under color of state law at all times relevant to this complaint.

21. Defendant Jim Hood is the Attorney General of the State of Mississippi and is being sued here in his official capacity. Attorney General Hood is the chief law enforcement officer of the State of Mississippi and is responsible for enforcing and ensuring compliance with state law, including HB 1523. Attorney General Hood was and is acting under color of state law at all times relevant to this complaint.

22. Defendant John Davis is the Executive Director of the Mississippi Department of Human Services ("MDHS"), and is being sued here in his official capacity. Mr. Davis is the "chief administrative officer of the [MDHS]," and is charged by state law with the duty of "establish[ing] the organizational structure of the Mississippi Department of Human Services which shall include the creation of any units necessary to implement the duties assigned to the department and consistent with specific requirements of law, including . . . [the] Office of Family and Children's Services," Miss. Code Ann. §§ 43-1-2(2)–(5)(a), which is "responsible for the development, execution and provision of . . . foster care . . . [and] adoption services." Miss. Code Ann. § 43-1-51. As a court in this district so clearly articulated, Mr. Davis is thus in charge of the agency

"statutorily empowered to set policies and participate directly in the adoption process." *CSE II*, 2016 WL 1306202, at *12. Defendant Davis was and is acting under color of state law at all times relevant to this complaint.

23. Defendant Judy Moulder is the Mississippi State Registrar of Vital Records and is being sued here in her official capacity. Under Mississippi law, Ms. Moulder is responsible for "carry[ing] into effect the provisions of law relating to registration of marriage." Miss. Code Ann. § 41-57-43. HB 1523 § 3(8)(a) requires the State Registrar of Vital Records to accept notice and maintain records all state employees and agents who "seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with" the Preferred Religious Beliefs. Defendant Moulder was and is acting under color of state law at all times relevant to this complaint.

24. HB 1523 requires every Defendant in this action to afford special privileges and exemptions to holders of the Preferred Religious Beliefs that are not extended to anyone else.

JURISDICTION AND VENUE

25. This action arises under the Constitution of the United States and the laws of the United States, including 42 U.S.C. § 1983. This Court therefore has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

26. Venue is proper under 28 U.S.C. § 1391 because Defendants Moulder and Davis reside in this district and Defendants Bryant and Hood reside in the State of Mississippi. Venue is also proper because a substantial part of the events giving rise to this action occurred in this district.

27. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

28. This Court has personal jurisdiction over Defendants because they are domiciled in Mississippi.

FACTS

A. The Constitution Prohibits the State of Mississippi from Discriminating Against LGBT Mississippians.

29. There is, unfortunately, a long history of discrimination by Mississippi against its gay and lesbian citizens. "Seven centuries of strong objections to homosexual conduct have resulted in a constellation of State laws that treat gay and lesbian Mississippians as lesser, 'other' people." *CSE I*, 64 F. Supp. 3d at 937. For example, Mississippi law made consensual intimacy between two people of the same sex a crime punishable by 10 years' imprisonment (and indeed, this unconstitutional statute still has not been repealed). Miss. Code Ann. § 97-29-59. Same-sex couples could not marry or adopt children. Schools were required to teach that homosexuality is illegal and that the only appropriate setting for sexual intimacy is a heterosexual marriage. But, one by one, these discriminatory laws have fallen as federal courts from this District Court to the United States Supreme Court have recognized that gays and lesbians have the same right to love, marry, and raise children as any other American. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *CSE I*, 64 F. Supp. 3d at 913; *CSE II*, 2016 WL 1306202, at *14.

30. This judicial recognition of the Constitutional imperative of equality began with *Romer* v. *Evans*, 517 U.S. 620 (1996), in which the Supreme Court

invalidated a Colorado constitutional amendment that barred the state and its municipalities from enacting anti-discrimination laws protecting gays and lesbians. 517 U.S. at 624. The Court held that the law was unconstitutional because it was enacted with the purpose of singling out gays and lesbians for mistreatment: "The amendment [withdrew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbid[] reinstatement of these laws and policies." *Id.* at 627. It thereby "deprive[d] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Id.* at 630.

31. At bottom, the Colorado provision violated the Equal Protection Clause of the Fourteenth Amendment because it classified gays and lesbians "not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635.

32. Applying *Romer*, the Supreme Court in 2003 held that state laws criminalizing intimacy between same-sex couples—such as Mississippi's—violate the Constitution because such laws stigmatize gays and lesbians and "invit[e citizens] to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003). The Court acknowledged that condemnation of gay and lesbian couples' physical intimacy had been "shaped by religious beliefs" that are for many people "profound and deep convictions," but nonetheless concluded that the Constitution did not permit "us[ing] the power of the State to enforce these views on the whole society." *Id.* at 571.

33. The next obstacle to full citizenship to fall was the Defense of Marriage Act ("DOMA"), which prohibited the federal government from recognizing the marriages

of lawfully married gay and lesbian couples. *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). Like the sodomy laws invalidated in *Lawrence*, DOMA had been enacted to express "moral disapproval of homosexuality" and to promote "traditional (especially Judeo-Christian) morality." *Id.* at 2693. Like the amendment found unconstitutional in *Romer*, the "avowed purposes and practical effect of [DOMA were] to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples. *Id.* DOMA demeaned the dignity of same-sex couples by "tell[ing] those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition" and rendering their unions "second-class marriages." *Id.* at 2693–94.

34. In 2014, a court in this district affirmed the equal citizenship of gays and lesbians and struck down Mississippi's ban on their ability to marry because it "deprive[d] same-sex couples and their children of equal dignity under the law," relegated gay and lesbian Mississippians to "second-class citizenship," and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *CSE I*, 64 F. Supp. 3d at 913. The court acknowledged that supporters of Mississippi's marriage ban "were simply trying to preserve their view of what a marriage *should* be, whether by religion or tradition," *id.* at 913, but nonetheless recognized that gay and lesbian Mississippians "constitute a quasi-suspect class" and made clear that "the effect of the [Mississippi marriage ban] was (and is) to label same-sex couples as different and lesser, demeaning their sexuality and humiliating their children." *Id.* at 940, 948. "That is something the voters cannot do." *Id.* at 949.

35. While the State's appeal of *CSE I* was pending before the United States Court of Appeals for the Fifth Circuit, on June 26, 2015, the United States Supreme Court

recognized that, like all Americans, gay and lesbian couples are endowed with "the fundamental right to marry" and may not be deprived of that right. *Obergefell*, 135 S. Ct. at 2604–05. The Constitution does not permit states to "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605.

36. Following *Obergefell*, the Fifth Circuit affirmed *CSE I* and ordered that the court "act expeditiously" to enter a permanent injunction against Mississippi's marriage ban. *Campaign for S. Equal.* v. *Bryant*, 791 F.3d 625, 627 (5th Cir. 2015). In so doing, the Court of Appeals took care to highlight *Obergefell's* recognition that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach" the tenets of their faith and "advocate" their beliefs. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2607).

37. The most recent barrier to the full citizenship of gay and lesbian Mississippians fell earlier this year when a court in this district held that Mississippi's law prohibiting gay and lesbian couples from adopting children—the last of its kind in the United States—was unconstitutional. *CSE II*, 2016 WL 1306202. The court issued a preliminary injunction because Mississippi's adoption ban "impose[d] an unconstitutional impediment that has caused [gay and lesbian couples] stigmatic and more practical injuries." *Id.* at *14.

B. HB 1523 Responds to Advances in LGBT Equality by Expressing and Advancing the State of Mississippi's Preferred Religious Beliefs.

38. Mississippians who believe that marriage ought to be between a man and a woman, that physical intimacy should only take place in the context of straight couples' marriages, or that sex is immutable and defined by a person's anatomy at birth, have long had just as much a legal right to practice their religion as anyone else. The series of court

cases extending equal civil rights to gay and lesbian Americans has done nothing to change that; instead it has established only that such religious beliefs cannot be imposed on others through discriminatory government policies and actions.

39. Less than a year after marriage rights were extended to same-sex couples in Mississippi, and not even one week after the state's discriminatory adoption ban was invalidated, the State again afforded special legal status to particular religious beliefs about gay and lesbian people and their relationships. HB 1523 singles out three specific beliefs—(a) that "[m]arriage is or should be recognized as the union of one man and one woman," (b) that "[s]exual relations are properly reserved to" a marriage between one man and one woman, and (c) that male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth," § 2—and expresses the State's endorsement of them by affording their adherents rights that extend beyond the protections federal and state laws provide for those who adhere to any other beliefs.

(i) HB 1523 Is the Product of an Organized Effort to Advance a Religious Agenda at the Expense of LGBT Peoples' Rights.

40. On information and belief, HB 1523 was drafted in large part by the sectarian Christian lobbying organization Alliance Defending Freedom ("ADF"), based in Arizona. *See* Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted out of State*, Mississippi Today, May 17, 2016, https://mississippitoday.org/2016/05/17/mississippis-religious-freedom-law-drafted-out-of-state/. In advertising materials, ADF defines itself as a "Christ-Centered" "ministry" that fights to "keep[] the door open for the Gospel."

41. ADF's sectarian mission includes opposing equal rights for gay and lesbian people. According to their website, a year after *Obergefell* was decided, "redefining marriage" remains one of the organization's key issues: "Alliance Defending Freedom remains committed to promoting the truth that marriage is the lifelong union of one man and one woman." Gregory S. Baylor, ADF Senior Counsel, has described gay and lesbian relationships as "both morally wrong and personally damaging."

42. On information and belief, one of the ways that ADF continues to advance its religious opposition to what it describes as the "redefinition of marriage" is by drafting legislation, such as HB 1523, that attempts to roll back Constitutional protections for gays and lesbians in the name of religious liberty. *See* Ganucheau, *supra* ¶ 40.

43. On information and belief, the American Family Association ("AFA"), a fundamentalist Christian organization that "believes that a culture based on biblical truth best serves the well-being of our nation and our families," also participated in the drafting of HB 1523. *See id.*

44. Like ADF, the AFA strongly opposes equal rights for gays and lesbians on religious grounds. The AFA teaches that "[h]omosexual behavior is sinful and unnatural," that "homosexual lust is highly addictive and difficult to stop," and that all gays and lesbians live in "rebellion against God and His created order."

45. The institutional authors of HB 1523 are committed to inscribing their conception of Christian values into law. Both ADF and the AFA believe that gays and lesbians are not deserving of full citizenship or equal dignity, but rather must be saved from their "sinful and unnatural lifestyles."

46. HB 1523's authorship makes evident that the bill was drafted with the primary purpose of expressing and advancing religious disapproval of LGBT citizens.

(ii) HB 1523 Extends Special Benefits Only to People who Hold Preferred Religious Beliefs.

47. Prior to the enactment of HB 1523, federal and state law equally protected the religious freedom of all Mississippians, including those who oppose gay and lesbian couples' relationships and marriages. The First Amendment to the United States Constitution guarantees that every American can freely exercise religion, no matter what faith tradition or tenets he or she holds sacred. The Mississippi Constitution likewise protects the "free enjoyment of all religious sentiments," again without affording some beliefs greater protection than others. Miss. Const. art. III, § 18. Indeed, the Mississippi Constitution mandates that "no preference shall be given by law to any religious sect or mode of worship." *Id.*

48. The Mississippi Religious Freedom Restoration Act ("RFRA"), Miss. Code Ann. § 11-61-1, further protects the free exercise rights of all Mississippians against government intrusion. Any individual who believes that the government has substantially burdened his or her exercise of religion can sue under RFRA in order to seek an exemption from the allegedly burdensome law or regulation. Miss. Code Ann. § 11-61-1(6). Mississippians can also invoke RFRA as a defense to a government enforcement action. *Id.*

49. In order to prevail under RFRA, a person must demonstrate that the challenged government action imposes a "substantial burden" on his or her free exercise of religion. The individual will be exempted from the governmental requirement unless the state demonstrates that "the application of the burden to the person (i) Is in

furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(6).

50. Critically, the Mississippi RFRA does *not* single out any particular religious belief or creed and privilege it above all others. That, again, would clearly be inconsistent with Article III of the Mississippi Constitution as well as the First Amendment.

51. Thus, prior to the passage of HB 1523, RFRA—like the federal Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5—applied equally to all Mississippians of every faith and creed.

52. HB 1523, however, starkly departs from this tradition and practice by providing additional rights and benefits and by extending well beyond those available under RFRA, but only to individuals or entities that espouse one of three specific beliefs: (a) that "[m]arriage is or should be recognized as the union of one man and one woman," (b) that "[s]exual relations are properly reserved to" a marriage between one man and one woman, or (c) male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." § 2.

53. The Preferred Religious Beliefs are not espoused by all religions or even by all Christian denominations. Some religious organizations, such as the Southern Baptist Convention and the Catholic Church, teach that marriage is limited to opposite-sex couples. Other religious organizations, however, including among others the United Church of Christ, the Presbyterian Church USA, the Episcopal Church of the United States, and the Union for Reform Judaism and the United Synagogue of Conservative

Judaism, solemnize gay and lesbian couples' marriages and regard such marriages as equal to straight couples'. Nonetheless, *all* of these organizations and their members, whatever they believe about marriage, are protected by the First Amendment.

54. HB 1523 identifies and singles out three Preferred Religious Beliefs as more important and more deserving of protection than all other beliefs.

55. Under HB 1523, people who hold the Preferred Religious Beliefs do not need to follow the procedures established by RFRA in order to receive a religious accommodation exempting them from a burdensome governmental action. Instead, the State has chosen to make it *easier* for people who hold the Preferred Religious Beliefs to receive an accommodation than for people who hold any other sincerely held religious belief:

(a) Unlike RFRA, which provides relief from a "substantial burden" on religious exercise, HB 1523 prohibits the government, including all Defendants, from imposing even the smallest and most insubstantial burden on people who hold one of the Preferred Religious Beliefs. § 4(1).

(b) Unlike RFRA, which does not provide an exemption from a law or regulation that is narrowly tailored to a compelling government interest, HB 1523 purports to provide an absolute exemption from even the most narrowly tailored law, even when that law is essential to the most compelling government interest. § 3.

56. Thus, HB 1523 affords *far* greater benefits and protections to people who hold the Preferred Religious Beliefs than are available to all other Mississippians.

57. Plaintiff The Rev. Dr. Susan Hrostowski does not hold any of the Preferred Religious Beliefs. As a devout Episcopalian and an ordained Episcopal priest, she has other sincerely held religious beliefs, including the belief that the sacred institution of marriage must be open to all loving couples, the belief in the sacred teaching, "love your neighbor as yourself," and the belief in the vital importance of joining together in Christian prayer. If the State substantially burdens her exercise of any of these sincerely held religious beliefs, Susan could bring a lawsuit under RFRA to vindicate her rights, but that vindication will be much more burdensome than it would be for someone who holds one of the Preferred Religious Beliefs and can take advantage of HB 1523.

58. HB 1523 sends a clear message to Susan and the other Plaintiffs that their religious or secular beliefs are less important and less worthy of protection than the Preferred Religious Beliefs.

59. This singling out of three particular religious beliefs for special treatment obviously cannot be explained by any secular purpose. To the contrary, it expresses government support for religion over non-religion and for the beliefs of some sects over others. *See Wallace* v. *Jaffree*, 472 U.S. 38, 59–61 (1985). Such "legislative favoritism" violates the "clearest command of the Establishment Clause": "that one religious denomination cannot be officially preferred over another." *Croft* v. *Perry*, 624 F.3d 157, 165–66 (5th Cir. 2010) (quoting *Larson* v. *Valente*, 456 U.S. 228, 244 (1982)).

(iii) HB 1523 Was Enacted for the Purpose of Advancing Preferred Religious Beliefs.

60. HB 1523's sponsors and supporters have made clear that the bill's purpose is to extend benefits to only those who hold particular religious beliefs to promote and advance those beliefs and the sects that adhere to them, but no others.

61. State Representative Dan Eubanks, a co-sponsor of HB 1523, stated during floor debate that the bill was intended to protect "Christians" like him. Referring to same-sex relationships, Representative Eubanks said: "It's very clear what God says. Go back and look at your Bible. He calls sin, 'sin.'" Referring to his fellow Christians, Representative Eubanks said: "This [bill] is about aligning our right to worship, to speak, to do with our faith. And our faith is pretty clear." Representative Eubanks closed by saying that HB 1523 "protects what I am willing to die for—and what I hope you who claim to be Christians are willing to die for—which is your beliefs." Statement of Rep. Dan Eubanks, February 19, 2016.[4]

62. State Senator Jenifer Branning stated during floor debate that, under HB 1523, it would not be discrimination for Mississippi College as a "Baptist college" to deny employment to all LGBT people. Senator Branning also acknowledged that although there are Mississippians with deeply held religious beliefs regarding gambling, the death penalty, and alcohol, HB 1523 does nothing to protect people who hold those religious beliefs because it is "very specific to same-sex marriage." Statement of Sen. Jenifer Branning, March 30, 2016.

[4] A video transcript of the legislative debate regarding HB 1523 is available at http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016. All of the statements in the following paragraphs have been transcribed from these videos.

63. State Senator Angela Burks Hill stated during floor debate that HB 1523 "is about protecting against discrimination from somebody who has personally held religious beliefs that want to exercise that religion not just in their church on Sunday but throughout their daily life." Statement of Sen. Angela Burks Hill, March 30, 2016. Adherents of non-Christian faiths generally do not attend churches and often worship on days other than Sunday.

64. State Senator Chris McDaniel stated during floor debate that under HB 1523, "now the state can't force a Christian, or whomever, to violate" their religious beliefs. Statement of Sen. Chris McDaniel, March 30, 2016.

65. In a blog post on his campaign website, State Representative Dana Criswell stated that HB 1523 is opposed by "those who oppose basic [C]hristian values." Dana Criswell, *Rep. Dana Criswell – At Your Capitol, Week of March 28*, Dana Criswell for Mississippi (Apr. 2, 2016), http://www.danacriswellformississippi.com/rep_dana_criswell_at_your_capitol_week_of_march_28. In other words, HB 1523 was intended to inscribe certain Christian values into law.

66. State Representative Andy Gipson, a co-sponsor of HB 1523, stated in a Facebook post that HB 1523 was supported by "[m]ore than 270 pastors," religious leaders including the Rev. Franklin Graham, and churches and church organizations including the Southern Baptist Convention, Bethany Christian Services, the Catholic Dioceses of Mississippi, the National Hispanic Christian Leadership Conference, the United Pentecostal Church, and the American Association of Christian Schools. All of the religious organizations cited by Rep. Gipson in support of HB 1523 are Christian organizations.

67. The Family Research Council, a conservative Christian ministry whose self-proclaimed "mission is to advance faith, family and freedom in public policy and the culture from a Christian worldview," recently presented Governor Phil Bryant with an award for having signed HB 1523 into law. Governor Bryant accepted the award at a convention on May 26, 2016, where Family Research Council president Tony Perkins introduced him to the audience of conservative Christian ministers by remarking, "You are not the only ministers that God has called . . . God has also called ministers to government." Leah Jessen, *'We Will Never Be Silent': Mississippi Governor Receives Religious Freedom Award*, The Daily Signal (May 27, 2016), http://dailysignal.com/2016/05/27/we-will-never-be-silent-mississippi-governor-receives-religious-freedom-award/. Governor Bryant explained to the audience that "the secular, progressive world" was angry with him for signing HB 1523. "They don't know that Christians have been persecuted throughout the ages," Bryant said. "They don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and savior, Jesus Christ." Emily Wagster Pettus, *Mississippi Governor: 'Secular' World Angry at LGBT Law*, The Clarion-Ledger (June 1, 2016, 9:48 AM), http://www.clarionledger.com/story/news/politics/2016/05/31/mississippi-governor-secular-world-angry-over-lgbt-law/85208312/.

68. Lieutenant Governor Tate Reeves, who supported the passage of HB 1523, stated on an earlier occasion that Mississippi needed to enact laws protecting religious freedom because the "United States is a Christian nation, and nowhere is that reflected more than in Mississippi." Travis Gettys, *Mississippi Tackles Perceived Christian Oppression With 'Religious Freedom' Bill*, Raw Story (Feb. 3, 2014, 12:10 PM),

http://www.rawstory.com/2014/02/mississippi-tackles-perceived-christian-oppression-with-religious-freedom-bill/.

69. And if it were not plain enough from the language of HB 1523, which ADF helped draft, the President and CEO of ADF, Alan Sears, made ADF's mission of advancing its particular conservative brand of Christianity crystal clear when he acknowledged and condemned Christian denominations that disagree with the Preferred Religious Beliefs: "Unfortunately, just as some in the church have shown a total lack of grace, the theologically liberal church has gone the other direction and totally capitulated on the issue without ever dealing with the sin and sorrow. Rather than helping those engaging in forbidden behaviors to turn from their sin by pointing to Christ, the theologically liberal church is providing 'spiritual' cover that enables their actions and the terribly destructive results." Alan Sears and Craig Osten, The Homosexual Agenda 130 (2013)

70. It is clear from the text and effect of the bill as well as the above-cited statements of its sponsors and supporters that the actual purpose of HB 1523 is the endorsement of religion and, specifically, of those Christian denominations that oppose marriage by gay and lesbian couples. HB 1523 was enacted "for the sole purpose of expressing the State's endorsement of" the Preferred Religious Beliefs. *Wallace*, 742 U.S. at 60. By endorsing the Preferred Religious Beliefs, HB 1523 flagrantly ignores the "mandate [of] governmental neutrality between religion and religion, and between religion and nonreligion." *M.B. ex rel. Bedi* v. *Rankin Cnty. Sch. Dist.*, No. 3:13cv241-CWR-FKB, 2015 WL 5023115, at *12 (S.D. Miss. July 10, 2015) (quoting *McCreary Cnty.* v. *Am. Civil Liberties Union*, 545 U.S. 844 (2005)).

(iv) HB 1523 Ensures Ongoing State Endorsement and Advancement of the Preferred Religious Beliefs.

71. HB 1523's enactment itself injures Plaintiffs by conveying that their beliefs are inferior to those the State has hand-selected for special treatment under the law. But the State's endorsement of the Preferred Religious Beliefs is not limited to the bill's enactment. To the contrary, HB 1523 establishes a statutory scheme that ensures government-sponsored actors will continue to advance and promote the Preferred Religious Beliefs for as long as the statute is in effect.

72. HB 1523 prohibits state and local governments from taking any action against a government employee for "speak[ing] or engag[ing] in expressive conduct based upon or in a manner consistent with" any of the Preferred Religious Beliefs. HB 1523 § 3(7). Government employees are authorized to express the Preferred Religious Beliefs even "in the workplace," so long as the "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." *Id.*

73. In effect, HB 1523 arguably grants all state and local government employees the right to advocate the controversial and sectarian Preferred Religious Beliefs in *every* workplace situation where they would be permitted to express *any* moral belief at all. If a public school teacher or counselor, a government office manager, a doctor in a public hospital, or a garbage collector would be permitted to tell students, patients, employees, or customers that it is wrong to steal or is appropriate to treat others with kindness, HB 1523 may ensure that they can also, *while on the job as government agents*, proclaim that marriage or physical intimacy by gay or lesbian people will result in eternal damnation.

74. This sweeping right to advocate religious viewpoints with impunity while on the clock as a government employee is extended only with regard to expressions that are "consistent with" the Preferred Religious Beliefs, and not to any other beliefs. And HB 1523 appears to protect the ability to promote the Preferred Religious Beliefs regardless of the impact that promotion may have on members of the public, who are likely to rightly perceive such messages as being endorsed by the government on whose behalf an employee is working.

75. These scenarios are hardly far-fetched or unlikely hypotheticals. Indeed, HB 1523 is already having its intended effect. Just weeks after the law was enacted, a Mississippi public school teacher accepted her government's invitation to promote a Preferred Religious Belief at the expense of LGBT Mississippians and their family members by verbally assaulting her six-year old student for being the daughter of lesbian parents. According to the girl's mothers, the teacher told their daughter that "her parents weren't really married because a marriage can only be between a man and a woman." The teacher then proceeded to humiliate the little girl by polling the other children in the class to show that they all had both a mother and a father and demonstrate that her parents were different. Such humiliation was precisely the "demean[ing]" conduct that the Supreme Court cited as an impetus for striking down the so-called Defense of Marriage Act. *See Windsor*, 133 S. Ct. at 2695. Yet HB 1523 purports to grants state actors the right to engage in it, so long as doing so is consistent with the Preferred Religious Beliefs.

76. Were it not for the State's clear statement through the enactment of HB 1523 that Mississippians can and should advocate the Preferred Religious Beliefs at the

expense of their gay and lesbian neighbors, this teacher likely would not have felt comfortable asserting her sectarian religious belief to humiliate a child that the State placed in her care. Once HB 1523 goes into effect, it is likely that neither the parents nor the school district will have *any* recourse against the teacher. Students and their parents will reasonably—and correctly—conclude that the State of Mississippi endorses the teacher's exclusionary and humiliating sectarian message.

77. HB 1523 also permits government officials who authorize marriage licenses to refuse service to a gay or lesbian couple based on any of the Preferred Religious Beliefs, and requires the State Registrar of Vital Records to maintain records of all such "recusals." § 3(8)(a). This scheme uses state resources and offices to convey to gay and lesbian Mississippians that the State holds adherence to the Preferred Religious Beliefs in higher regard than adherence to any other views, and indeed, than their own fundamental right to marry.

78. HB 1523 arguably further extends its "protection" of certain discriminatory actions by adherents of the Preferred Religious Beliefs to government contractors and grant recipients, *see* § 4(1)(c), and to a wide array of private entities, including individuals, closely held companies, and "religious" entities—"regardless of whether [they are] affiliated with a church or other house of worship," §§ 9(3), 9(4). This broad scope, combined with the array of situations in which HB 1523's religious accommodation can be invoked ensures that Plaintiffs will be subject to near-constant risk of unwelcome and injurious contact with state-endorsed religious expression in their day-to-day lives as Mississippi residents.

C. HB 1523 Accommodates Preferred Religious Beliefs by Burdening LGBT Mississippians and Undermining Their Constitutional Rights.

79. Across a wide variety of contexts, HB 1523 purports to grant certain individuals who hold one of the Preferred Religious Beliefs an absolute and unqualified exemption from consequences that they might otherwise face for discriminatory actions against gay and lesbian Mississippians. There is no balancing test to determine the extent to which a religious accommodation is necessary or how much harm it might impose on others. Instead, the statute invariably grants the accommodation and shifts the burden of that accommodation from the person who holds a Preferred Religious Belief to others around him.

80. The burdens resulting from HB 1523's religious accommodation are significant, and the statute systematically places them on the shoulders of LGBT people, even in situations where they are vulnerable and in need of legal protection. This accommodation scheme violates the First Amendment, which "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 710 (1985) (quoting *Otten* v. *Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). HB 1523's "unyielding weighting" in favor of people who hold the Preferred Religious Beliefs has the primary and impermissible effect of advancing religion. *Id.*

(i) HB 1523 Targets Gays and Lesbians to Bear the Burden of Religious Accommodations.

81. That HB 1523 systematically places the burden of its religious accommodation squarely on the shoulders of gays and lesbians is no accident. To the contrary, HB 1523—which was enacted less than a year after the Supreme Court invalidated Mississippi's ban on gay and lesbian couples' ability to marry and less than

one week after a court in this district enjoined Mississippi's ban on their ability to adopt children—intentionally promotes the Preferred Religious Beliefs at the expense of gays and lesbians. State Senator Jennifer Branning, a proponent of HB 1523 who met with the bill's drafters, describes HB 1523 as "balancing legislation" to the Supreme Court's *Obergefell* decision. Statement of Sen. Jenifer Branning, March 30, 2016.

82. Senator Branning's floor statements confirm that the primary purpose of HB 1523 is to encourage and enable anti-gay discrimination in furtherance of the Preferred Religious Beliefs. Senator Branning stated that the bill would permit Mississippi College to not "employ homosexual people on their staff." When asked by Senator Willie Simmons whether refusing to employ gays and lesbians was a form of discrimination, Senator Branning replied, "If this bill is passed, it would not be." Statement of Sen. Jenifer Branning, March 30, 2016.

83. This astonishing statement—that discrimination against gay and lesbian Mississippians can be transformed into non-discrimination by legislative fiat—demeans the very personhood of gay people and clearly demonstrates the legislature's intent to create a religious accommodation that returns gay and lesbian Mississippians to second-class citizenship. Ironically, Mississippi achieved this demeaning and discriminatory objective by enacting a bill the very title of which purports to protect *against* discrimination. *See* HB 1523 § 1 ("This act shall be known and may be cited as the 'Protecting Freedom of Conscience from Government Discrimination Act.'"). But just as the so-called "Defense of Marriage Act" was actually "contrive[d] to deprive some couples married under the laws of their State, but not other couples, of both rights and

responsibilities," so too is the "principal purpose [of HB 1523] to impose inequality." *Windsor*, 133 S. Ct. at 2694.

84. Like the legislature that passed HB 1523, Governor Bryant and Mississippi's senior United States Senator Thad Cochran also reacted negatively to *Obergefell*. On the day that the Supreme Court decided *Obergefell*, Governor Bryant responded that "a federal court has usurped that right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians." *See Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, Governor Phil Bryant (June 26, 2015), http://www.governorbryant.com/governor-bryant-issues-statement-on-supreme-court-obergefell-decision/.

85. Senator Cochran, suggesting that legislation would be needed in response to *Obergefell*, declared, "The Supreme Court decision does not and cannot change the firmly held faith of most Mississippians. I believe marriage is defined as the union of one man and one woman. The court's decision raises questions about the protection of religious liberties and First Amendment rights, which the Congress may have to address. It is important that this ruling does not result in individuals, businesses, and religious-oriented schools and organizations being penalized by the government for their belief in the traditional definition of marriage." *See Cochran Statement on Supreme Court Ruling on Same-Sex Marriage*, Thad Cochran: United States Senator for Mississippi (June 26, 2015), http://www.cochran.senate.gov/public/index.cfm/2015/6/cochran-statement-on-supreme-court-ruling-on-same-sex-marriage.

(ii) HB 1523's Religious Accommodation Erodes the Protections of Federal, State, and Local Anti-Discrimination Laws.

86. LGBT Mississippians are protected from discrimination by federal laws including Title VII, Title IX, and § 1983. 42 U.S.C. § 2000e, *et seq*. ("Title VII"); 20 U.S.C. § 1681, *et seq*. ("Title IX"); 42 U.S.C. § 1983 ("§ 1983").

87. LGBT Mississippians are also protected from discrimination and harassment by state and local laws and public university equal opportunity policies.

88. The University of Southern Mississippi's employee handbook states that equal employment opportunities will be provided "without regard to . . . sex, sexual orientation . . . gender identity, genetic information," and permits any "University of Southern Mississippi employee, student, applicant for admission or employment, or other participant in the University's programs or activities" to file a complaint with the University's Office of Affirmative Action/Equal Employment Opportunity if they believe they have been unlawfully discriminated against, including on the basis of sex, sexual orientation, gender identity, and genetic information. *Univ. of S. Miss. Employee Handbook* 22, 117 (June 2014), *available at* https://www.usm.edu/sites/default/files/groups/employment-hr/pdf/employee_handbook_june_2014.pdf.

89. People who live in or travel to Jackson, Mississippi are protected by a local ordinance that forbids drivers of vehicles for hire, such as taxis and limousines, from refusing "to accept a passenger" solely on the basis of the passenger's "sexual orientation." Jackson, Mississippi Code of Ordinance § 126-161.

90. All LGBT Mississippians are protected by the professional ethics rules governing the conduct of physicians, physician assistants, counselors, psychotherapists, family therapists, and social workers. State boards of licensure have the regulatory

and/or statutory authority to discipline medical and mental health providers who violate professional codes of ethics by, for example, "discriminat[ing] against prospective or current clients . . . based on . . . gender identity [or] sexual orientation[.]" 2014 ACA Code of Ethics, Rule C.5, *available at* https://www.counseling.org/resources/aca-code-of-ethics.pdf.

91. HB 1523 purports to accommodate the Preferred Religious Beliefs at the expense of limiting these and other pre-existing protections in three ways.

92. ***First***, by its own terms HB 1523's religious accommodation is intended to supersede any state or local law or government regulation that "impinges upon the free exercise of" the three Preferred Religious Beliefs. § 8(3). And while HB 1523 does allow for the possibility of a future state statute being "expressly made exempt" from its application, it does not contain any such provision with regard to any other exercise of the state government's authority. *Id.* The statute thus effectively purports to supersede not only every current conflicting state or local law, but also every *future* "ordinance, rule, regulation, order, opinion, decision, practice or other exercise" of authority by the state or any of its political subdivisions.

93. ***Second***, HB 1523's broad prohibition on the "state government" taking "discriminatory action" against individuals and businesses who avail themselves of the accommodation by denying services on the basis of any of the three Preferred Religious Beliefs hinders state and local governments' enforcement of existing anti-discrimination protections.

94. For example, HB 1523 bans government officials from taking nearly any action—including withholding, denying or changing the conditions of a license or

certification, *see* § 3(4)(1)(f)—against someone who "declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services based upon" any of the three Preferred Religious Beliefs. § 3(4). This could prevent state boards of licensure from disciplining a health care professional who violated professional ethics by refusing to provide care to a gay or lesbian person.

95. Section 3(5) of HB 1523 similarly prohibits the "state government" from taking "discriminatory action" against someone who has "declined to provide" any of a wide assortment of "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage," if the refusal is based upon or done "in a manner consistent with" one of the three Preferred Religious Beliefs. § 3(5).

96. Section 3(5) can be interpreted to bar municipalities like Jackson, Mississippi from enforcing laws aimed at prohibiting discrimination against gay and lesbian couples by allowing and encouraging providers of various accommodations, goods, and services to discriminate against gay and lesbian Mississippians. For example, a local Jackson ordinance prohibits a limousine driver from discriminating against a gay or lesbian couple traveling to or from their wedding. Now, HB 1523 purports to prohibit the state or any of its political subdivisions from taking action against that limousine driver should he refuse to provide the "marriage-related services" of driving a couple to and from their wedding, or for that matter any other event "related to the solemnization,

formation, celebration, or recognition" of their marriage or any other gay or lesbian couple's marriage.

97. Because HB 1523 permits someone who discriminates against LGBT people based on the Preferred Religious Beliefs to seek injunctive relief that prevents or "remedies" any resulting adverse governmental action, the bill effectively ties the hands of government agencies or officials who would otherwise enforce anti-discrimination protections. § 6.

98. ***Third***, HB 1523 imposes a meaningful burden on LGBT Mississippians who attempt to vindicate their civil rights by defining "state government" to include not only government agencies and employees, but also 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." § 9(2). Individuals or entities who discriminate in the name of any of the Preferred Religious Beliefs can obtain an injunction against any private party's effort to obtain relief under an anti-discrimination law, and may even be able to seek "compensatory damages" and attorneys' fees and costs from a private plaintiff who continues to pursue relief despite entry of an injunction under HB 1523. § 6. Accordingly, private *victims* of discrimination could be held liable for the "harm" their complaint causes the person who claims that HB 1523's religious accommodation entitled him to discriminate against them.

99. Moreover, HB 1523 bars state judges and courts from imposing a "fine, fee, penalty, or injunction" against individuals claiming HB 1523's religious exemption—a provision that presumably purports to prohibit them from deciding even

federal law claims against individuals who claim their actions were consistent with adherence to the Preferred Religious Beliefs. § 4(1)(e).

(iii) HB 1523's Religious Accommodation Systematically Imposes Substantial Burdens and Injuries on Gay and Lesbian Mississippians.

100. HB 1523 creates an arguably unqualified religious accommodation and impermissibly and systematically imposes the resulting burden on gay and lesbian Mississippians, even when doing so impinges on their most fundamental rights. Even the "list of governmental rights, benefits, and responsibilities" that the Supreme Court recognized in *Obergefell* as part and parcel of the fundamental right to marry are not shielded from the reach of an accommodation for the Preferred Religious Beliefs. HB 1523's religious accommodation seriously impedes the ability of gay and lesbian couples and individuals to fully participate in the legal and social order.

101. ***First***, HB 1523's religious accommodation unduly burdens the issuance of marriage licenses to gay and lesbian couples. Section 3(8) permits anyone "employed or acting on behalf of the state government who has authority to authorize or license marriages" to "seek recusal from authorizing or licensing lawful marriages" based upon any of the three Preferred Religious Beliefs.

102. As Plaintiff Campaign for Southern Equality has argued in a pending motion for injunctive relief in a related case, the law provides no enforcement mechanism for ensuring that the fundamental right to marry is not unduly impeded, delayed, or otherwise burdened. Mot. to Reopen J., File Suppl. Pleading, and Modify the Permanent Inj., *Campaign for S. Equal.* v. *Bryant*, No. 3:14-cv-818 (S.D. Miss. May 10, 2016), ECF No. 39. Under HB 1523, every clerk and deputy clerk in a county could recuse himself or herself such that no state employees will be available to issue marriage licenses to

same-sex couples. And by its terms, the law does not permit a court or any other state agency to remedy the situation by altering the terms or conditions of employment for any state employee. Moreover, HB 1523 does not even acknowledge, much less attempt to address, the humiliation and stigmatic harm that gay and lesbian Mississippians endure when they are informed that an agent of the State refuse to provide them service because of their sexual orientation.

103. ***Second***, HB 1523's religious accommodation makes it harder for gay and lesbian couples to celebrate marriage—before, during, and after their weddings. Section 3(5) permits a person or business claiming the Preferred Religious Beliefs who provides "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage" to deny services to LGBT Mississippians with impunity. These goods and services include, but are not limited to, "photography," "videography," "printing," "publishing," "floral arrangements," "dress making," baking, "assembly-hall" rentals, "car-service rentals," and "jewelry sales and services." *Id.*

104. The statute is worded so expansively that it could apply to not just wedding-related businesses but also almost any business that serves gay or lesbian married couples. For example, a restaurant could refuse to seat a married lesbian couple like Susan and Kathy at a table for two if it viewed the couple's dinner date as a "celebration" of their marriage. A hotel could refuse to let them stay in a room together. Even a furniture store could turn Susan and Kathy away with impunity if it fears that supplying home furnishings relates to the "formation" or "recognition" of their marriage. Every time this religious accommodation is invoked, Susan will suffer the tangible and

dignitary harm that arises from being turned away because of someone else's religious views about her sexual orientation.

105. ***Third***, HB 1523's religious accommodation creates barriers to raising children. Despite the district court's recent holding in *CSE II* that there is *no* constitutionally permissible basis for preventing same-sex couples from adopting and raising children, *CSE II*, 2016 WL 1306202, at *13–14, § 3(2) permits adoption and foster care agencies who invoke any of the Preferred Religious Beliefs to refuse to place children with same-sex parents. Accordingly, the burden of a decision by a Christian adoption service—arguably even one receiving state funding—to turn away gays and lesbians would fall on would-be parents and on the children who are denied loving homes. HB 1523 also creates a similarly unrestricted ability for holders of the Preferred Religious Beliefs to deny fertility-related services to a gay or lesbian couple.

106. The Supreme Court explained in *Obergefell* that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." 135 S. Ct. at 2599. And yet the decision to raise a child—one of the most "profound choices" a couple can make—is entirely disregarded when HB 1523's religious exemption is invoked, regardless of the extent to which facilitating an adoption would actually burden anyone's exercise of religion.

107. ***Fourth***, HB 1523's religious accommodation burdens gay and lesbian couples' ability to keep their relationships and families strong by erecting obstacles to accessing essential health services. Section 3(4) permits healthcare professionals and staff who subscribe to any of the Preferred Religious Beliefs to use those beliefs as

justification to refuse marriage counseling or other psychological or counseling services to a gay or lesbian patient, or to the child of a gay or lesbian couple.

108. ***Finally,*** HB 1523 accommodates an individual's adherence to the Preferred Religious Beliefs even where doing so requires the believers' employees, students, or customers to comply with his or her religious views on appropriate attire, grooming, or facilities for individuals of each sex. § 3(6). A manager with the sincerely held religious belief that women should not wear pants or should not have their knees, elbows, or hair uncovered could force all female employees to conform to a restrictive religious dress code, as long as the policy is "based upon" or "consistent with" any of the Preferred Religious Beliefs. No matter how slightly an individual's religious exercise might be burdened and how severely others may be harmed, HB 1523 impermissibly directs the resulting burden away from those who ascribe to any Preferred Religious Belief and onto others around him.

FIRST CAUSE OF ACTION

First and Fourteenth Amendments to the United States Constitution

109. Plaintiffs incorporate by reference paragraphs 1 through 108, *supra*, as if set forth fully herein.

110. Plaintiffs set forth this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

111. The First Amendment to the United States Constitution, as incorporated against the States through the Fourteenth Amendment to the United States Constitution, prohibits the State of Mississippi from enacting or enforcing any "law respecting an establishment of religion." U.S. Const. amend. I.

112. Plaintiffs live in and pay taxes in Mississippi. HB 1523 provides for the direct expenditure of Plaintiffs' tax dollars in multiple ways, including in the form of "[c]ompensatory damages" and "attorneys' fees and costs" to certain holders of Preferred Religious Beliefs who bring a successful action under the statute against the state or any of its political subdivisions, agencies, or institutions. § 6. It also provides for the direct expenditure of tax dollars to fund advocacy of the Preferred Religious Beliefs by prohibiting the government from withholding, reducing, or materially altering the terms or conditions of "any state grant, contract, subcontract, cooperative agreement, guarantee, loan scholarship, or other similar benefit" or the employment of any individual on the basis of advocacy of the Preferred Religious views, even when this advocacy is funded by taxpayer dollars. In addition, HB 1523 requires the direct expenditure of taxpayer funds to maintain a system that requires the State Registrar of Vital Records to keep records of officials who refuse to serve gay and lesbian people due to adherence to Preferred Religious Beliefs and requires State officials "to take all necessary steps"—regardless of cost to the State—to facilitate this selective religious accommodation without delaying or impeding the issuance of any legally valid license. These expenditures of taxpayer revenues are integral to HB 1523's overall statutory scheme.

113. Plaintiffs have been injured by the unjust and unequal treatment prescribed by HB 1523. Plaintiffs The Rev. Dr. Susan Hrostowski and some of Campaign for Southern Equality's members have been injured by the exclusion of their deeply held religious beliefs from the Preferred Religious Beliefs. All Plaintiffs, whether religious or not, have been injured by the statute's deliberate extension of benefits only to a subset of favored Christian sects and denominations. This injury is traceable to the enactment and

enforcement of HB 1523 and can be remedied by the injunction of the law's unjust and unequal benefits. *See Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991).

114. HB 1523 violates the Establishment Clause in at least three ways. By singling out specific religious beliefs for approbation, HB 1523 makes clear that its *purpose* is the endorsement and advancement of religion. And by requiring that religious accommodations be granted even when such accommodations would impermissibly burden innocent third parties, HB 1523 has the *effect* of impermissibly advancing religion. Finally, by conferring benefits only upon holders of the Preferred Religious Beliefs, HB 1523 impermissibly discriminates between religious sects on the basis of religious doctrine.

DECLARATORY AND INJUNCTIVE RELIEF

28 U.S.C. §§ 2201 and 2202; Federal Rules of Civil Procedure 57 and 65

115. Plaintiffs incorporate by reference paragraphs 1 through 114, *supra*, as if set forth fully herein.

116. This case presents an actual controversy because Defendants' present and ongoing denial of Plaintiffs' constitutional rights subjects them to serious and immediate harms, warranting the issuance of a declaratory judgment.

117. Plaintiffs seek an injunction to protect their constitutional rights and avoid the injuries described in this complaint. A favorable decision enjoining Defendants would redress and prevent irreparable injuries to Plaintiffs identified herein, for which Plaintiffs have no adequate remedy at law.

118. The State of Mississippi will incur no or little burden in halting the implementation of HB 1523's convoluted discriminatory regime, whereas the hardship for Plaintiffs of being denied equal treatment is severe. The balance of hardships weighs strongly in favor of Plaintiffs.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court enter an order:

119. Declaring that House Bill 1523 violates the Establishment Clause of the First Amendment to the United States Constitution, as incorporated against the States through the Fourteenth Amendment to the United States Constitution;

120. Preliminarily and permanently enjoining the enforcement and application of House Bill 1523;

121. Awarding Plaintiffs their reasonable costs, expenses, and attorneys' fees pursuant to 42 U.S.C. § 1988; and

122. Granting such other relief as the Court may deem just, equitable, and proper.

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B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY and THE REV. DR. SUSAN HROSTOWSKI,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CIVIL ACTION NO. 3:16-cv-442-DPJ-FKB**
PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; JOHN DAVIS, in his official capacity as Executive Director of the Mississippi Department of Human Services; and JUDY MOULDER, in her official capacity as Mississippi State Registrar of Vital Records,	§	
	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs the Campaign for Southern Equality and The Rev. Dr. Susan Hrostowski submit this Memorandum of Law in support of their Motion for a Preliminary Injunction in this action challenging the constitutionality of HB 1523 under the First Amendment's Establishment Clause.

PRELIMINARY STATEMENT

In 1776, the founders of our nation declared that "all men are created equal" and that they are "endowed" with "certain unalienable rights," including "life, liberty, and the pursuit of happiness." Declaration of Independence, U.S. 1776. Three years later, shortly after he had been elected Governor of Virginia, Thomas Jefferson introduced "An Act for establishing religious Freedom" in the Virginia legislature. That statute, which was not passed until 1786 cited the "imperious presumption of legislators and rulers . . . who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on other[s]." Thomas Jefferson, Virginia Statute for Religious Freedom (1785); cited with approval in *Reynolds* v. *United States*, 98 U.S. 145, 162 (1878). It also noted that "[o]ur civil rights have no dependence on our religious opinions . . . ." *Id.* That Virginia statute was then used by James Madison as the model for the First Amendment to the United States Constitution, which states in pertinent part that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

Almost 240 years after the Declaration of Independence, on July 1 of this year, the State of Mississippi intends to enforce a law that could hardly be more inconsistent with these core principles of our nation. That law, HB 1523, declares that certain Mississippians—namely, only those who hold specified "religious beliefs or moral convictions"—should have

special rights and privileges, including the right to discriminate against and undermine the dignity of their fellow LGBT citizens. HB 1523 actually uses those words—"religious belief or moral conviction"—and provides that three such sectarian beliefs, which are held by some, but certainly not by all religious persons, are to be given special protection: (1) that marriage should only be between a man and a woman; (2) that sexual relations should be saved for marriage; or (3) that a person's gender must be the same as the sex they were assigned at birth.

Although its authors named HB 1523 the "Protecting Freedom of Conscience from Government Discrimination Act," the law is intended to accomplish exactly the opposite. Shielded by HB 1523, both private citizens and state officers in Mississippi will be entitled, even encouraged, to deny the dignity of LGBT Mississippians by refusing to provide them with marriage licenses, adoption and fertility services, access to health care, and public accommodation in restaurants, hotels, wedding halls, and more. In other words, rather than "protecting" anyone "*from discrimination*," HB 1523 is actually a license *to discriminate*, without any consideration of the burden imposed on the believer, the societal interest in the equality of all Mississippians, or even whether the "religious belief" is simply a pretext for hatred and bigotry.

For these reasons, it is hard to imagine a clearer violation of the First Amendment than HB 1523. "[O]ur constitutional tradition, from the Declaration of Independence . . . down to the present day, has . . . ruled *out of order* government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (emphasis added). In other words, "the separation of church and state is,

fundamentally, about equality, about the idea that no religion will be set up as *the* religion of our nation." Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 12 (2008). By conferring benefits exclusively on adherents of only certain religious beliefs, HB 1523 is, as Justice Scalia explained, "out of order"—it clearly and unambiguously violates the Establishment Clause of the First Amendment to the United States Constitution. And because "[i]t is emphatically the province and duty of the [federal courts] to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), this Court can and should enjoin the enforcement of HB 1523 here.

FACTUAL BACKGROUND

While a fuller recitation of the relevant facts is set forth in Plaintiffs' Complaint, Dkt. No. 1, we discuss below certain of the key facts relevant to this motion seeking preliminary injunctive relief.

Events Leading Up to the Passage of HB 1523

In 2014, this Court affirmed the equal citizenship of gay men and lesbians by striking down Mississippi's ban on their ability to marry because it "deprive[d] same-sex couples and their children of equal dignity under the law," relegated gay and lesbian Mississippians to "second-class citizenship," and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014) ("*CSE I*"). The Court in *CSE I* acknowledged that while supporters of Mississippi's marriage ban "were simply trying to preserve their view of what a marriage *should* be, whether by religion or tradition," *id.* at 913, the clear intent and import of the Mississippi marriage ban "was (and is) to label same-sex couples as different and lesser, demeaning their sexuality and humiliating their children." *Id.* at 948. "That is something the voters cannot do." *Id.* at 949.

While the State's appeal of *CSE I* was pending before the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court, on June 26, 2015, recognized that, like all Americans, gay and lesbian Americans are endowed with "the fundamental right to marry" and cannot be deprived of that right. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2604–05 (2015). The Supreme Court concluded that the United States Constitution does not permit states to "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605.

As other Mississippi politicians had in decades past, Mississippi's Governor Phil Bryant and Mississippi's senior Senator Thad Cochran reacted negatively to the Supreme Court's ruling in *Obergefell*.[1] On the day that the Supreme Court decided *Obergefell*, for example, Governor Bryant issued the following public statement: "a federal court has usurped that right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians." *See Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, Governor Phil Bryant (June 26, 2015), http://www.governorbryant.com/governor-bryant-issues-statement-on-supreme-court-obergefell-decision/. Senator Cochran, in turn, anticipating legislative action in response to *Obergefell* that would ultimately culminate in HB 1523, declared that "The Supreme Court decision does not

[1] The statements of Defendant Bryant and Senator Cochran cited above are reminiscent of statements made by Mississippi officials after the United States Supreme Court decided *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). "U.S. Senator James Eastland of Mississippi, for example, upon learning of the ruling [in *Brown*], immediately issued a written statement affirming that "[t]he South will not abide by nor obey this legislative decision by a political court." Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 Tul. L. Rev. 2207, 2212 (2004). Moreover, following *Brown*, national associations of Southern Baptists, Methodists, and Presbyterians endorsed the ruling and issued statements opposing segregation. Mississippi churches revolted and threatened to break with their national governing bodies. *See* Carolyn Renee Dupont, *Mississippi Praying: Southern White Evangelicals and the Civil Rights Movement, 1945-1970* 63–65 (2013). Thus, for example, "Reverend R. L. McLaurin of Oakland Heights Presbyterian Church in Meridian defended segregation as the will of God: 'I am opposed to and think that the recent Supreme Court decision is in violation and contradiction to the Scripture teachings on segregation.'" *Id.* at 74.

and cannot change the firmly held faith of most Mississippians. I believe marriage is defined as the union of one man and one woman. The court's decision raises questions about the protection of religious liberties and First Amendment rights, which the Congress may have to address. It is important that this ruling does not result in individuals, businesses, and religious-oriented schools and organizations being penalized by the government for their belief in the traditional definition of marriage." *See Cochran Statement on Supreme Court Ruling on Same-Sex Marriage*, Thad Cochran: United States Senator for Mississippi (June 26, 2015), http://www.cochran.senate.gov/public/index.cfm/2015/6/cochran-statement-on-supreme-court-ruling-on-same-sex-marriage.

Structure and Impact of HB 1523

Less than a year after marriage rights were extended to same-sex couples in Mississippi as a result of *CSE I* and *Obergefell*, and not even one week after the state's discriminatory adoption ban was invalidated by Judge Jordan, *Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, __ F. Supp. 3d __, 2016 WL 1306202, at *11 (S.D. Miss. Mar. 31, 2016) (*"CSE II"*), the State of Mississippi again sought to authorize and even promote discrimination against LGBT people and their families, this time by affording special legal status to persons who hold certain sincerely held "religious beliefs or moral convictions" pursuant to HB 1523. More specifically, HB 1523 confers exclusive benefits upon Mississippians who adhere to one or more of the following three statutorily designated religious beliefs: (a) that "[m]arriage is or should be recognized as the union of one man and one woman," (b) that "[s]exual relations are properly reserved to a marriage between one man and one woman," or (c) that male and female "refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth" *Id.* § 2 (together, the "Preferred Religious Beliefs").

These Preferred Religious Beliefs are not espoused by all religions, by all Christian denominations, or even by all Christians in Mississippi. Some religious organizations, such as the Southern Baptist Convention and the Catholic Church, teach that marriage is properly limited to straight couples. But other sects, based on their religious belief that every human being is created in the divine image and "from the Biblical injunction that it is 'not good' for a person to be alone," among others, have affirmed that gay men and lesbians have inherent and equal dignity. Jan Urbach, *A Conservative Rabbi's Case for Marriage Equality*, Wash. Post, Mar. 18, 2013, https://www.washingtonpost.com/national/on-faith/a-conservative-rabbis-case-for-marriage-equality/2013/03/18/45d04ac4-8fe9-11e2-9cfd-36d6c9b5d7ad_story.html. In some traditions, such as the Episcopal Church, this affirmation has led to the ordination of gay and lesbian clergy, such as Plaintiff The Rev. Dr. Susan Hrostowski. In others, it has led to various forms of religious affirmation of the marriages of gay and lesbian couples and their families, including solemnizing gay and lesbian couples' marriages. Indeed, in a letter dated June 3, 2016, the Rt. Rev. Brian R. Seage, The Episcopal Bishop of Mississippi, gave permission for congregations and clergy in the Diocese of Mississippi to use specific liturgies to perform marriage "for all couples legally entitled to marry." Compl. Ex. A at 1. While recognizing that there remain differing views among Episcopal clergy in the Diocese, Bishop Seage explained that he arrived at his support for marriage equality "after a lot of prayer and discernment, as well as engagement with Holy Scripture, the traditions of the Church and human reason." *Id.* at 2.[2]

[2] As a broad coalition of religious leaders explained in an amicus brief filed with the Supreme Court in *Obergefell*: "Faiths embracing same-sex couples—both theologically and with respect to the distinct issue of equality under civil law—participate in the mainstream of American religious observance. They include Mainline Protestant denominations such as the United Church of Christ, the Episcopal Church, and the Presbyterian Church; the Unitarian Universalist Church, portions of the Religious Society of Friends (Quakers); and Judaism's Reform, Reconstructionist, and Conservative movements. Millions of religious individuals from other faiths also embrace and celebrate same-sex couples, including members of many other Mainline and Evangelical Protestant denominations, Roman Catholics, Mormons, Orthodox Jews, and Muslims." Brief of President of the House of

By singling out these three sectarian Preferred Religious Beliefs for special treatment and affording their adherents rights beyond the federal and state protections for any other belief, HB 1523 expresses the State's clear and unequivocal endorsement of the Preferred Religious Beliefs above all others. HB 1523 creates special privileges for adherents of the Preferred Religious Beliefs in a wide variety of everyday contexts. For example, it authorizes state officials who issue marriage licenses to invoke the Preferred Religious Beliefs to deny service to gay and lesbian couples. § 3(8)(a). It forbids the government and even private state-court plaintiffs from taking action against individuals or businesses that invoke the Preferred Religious Beliefs as justification for refusing to provide LGBT people with a litany of goods and services, including counseling, fertility services, and commercial products, services, and accommodations "related to the solemnization, formation, celebration, or recognition of any marriage." *See id.* at §§ 3, 4, 9(2), 9(3). HB 1523 also permits the imposition of restrictive gender-based policies on employees' or students' attire, grooming, and bathroom or locker room usage, so long as those policies are consistent with the Preferred Religious Beliefs. *Id.* at § 3(6). It further forbids any government or state-court action against a "religious organization"—whether affiliated with a house of worship or not and whether acting as a government contractor or grant recipient or not—for using the Preferred Religious Beliefs as grounds for making discriminatory decisions about whom it employs, rents real estate to, or provides with adoption or foster care services. *See id.* at §§ 3(1)–3(2), 4(1)(c), 9(4).

In addition, HB 1523 imposes a meaningful burden on LGBT Mississippians who attempt to vindicate their civil rights by defining "state government" to include not only government agencies and employees, but also any "private party or third party suing under or

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Deputies of the Episcopal Church, et al. as Amici Curiae Supporting Petitioners at 4, *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (2015) (Nos. 14-556 et al.).

enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state." *Id.* at § 9(2). Individuals or entities who discriminate in the name of any of the Preferred Religious Beliefs can thus obtain an injunction against any private party's effort to obtain relief under an anti-discrimination law, and may even be able to seek "compensatory damages" and attorneys' fees and costs from a private plaintiff who continues to pursue relief despite entry of an injunction under HB 1523. *Id.* at § 6. Accordingly, pursuant to HB 1523, private victims of discrimination could be held liable for the "harm" their complaint causes the person who claims that HB 1523's religious accommodation entitled him to discriminate against them. HB 1523 similarly bars state judges and courts from imposing a "fine, fee, penalty, or injunction" against individuals claiming HB 1523's religious exemption—a provision that presumably purports to prohibit them from deciding even claims under federal law against individuals who claim their actions were consistent with adherence to the Preferred Religious Beliefs. § 4(1)(e).

Legislative History of HB 1523

HB 1523 was drafted in large part by the sectarian Christian lobbying organization Alliance Defending Freedom ("ADF"), based in Arizona. *See* Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted out of State*, Mississippi Today, May 17, 2016, https://mississippitoday.org/2016/05/17/mississippis-religious-freedom-law-drafted-out-of-state/. In its advertising materials, ADF defines itself as a "Christ-Centered" "ministry" that fights to "keep[] the door open for the Gospel," including opposing equal rights for gay and lesbian people and "redefining marriage." *See* ADF, *Statement of Faith*, https://www.adflegal.org/about-us/careers/statement-of-faith; Katie Heller, *Keeping the Door Open for the Gospel Requires an Army*, ADF (June 07, 2016), https://www.adflegal.org/detailspages/blog-details/allianceedge/2016/06/07/keeping-the-door-open-for-the-gospel-requires-an-army. "Alliance Defending Freedom remains committed to promoting the truth that marriage is the

lifelong union of one man and one woman." *See* Supreme Court Redefines Marriage, https://www.adflegal.org/campaigns/scotus/marriage-decision (last accessed June 12, 2016). Gregory S. Baylor, ADF Senior Counsel, has described gay and lesbian relationships as "both morally wrong and personally damaging." Defending Laws Affirming Marriage, Alliance Defending Freedom, https://www.adflegal.org/issues/marriage/redefining-marriage/key-issues/laws-affirming-marriage. The President and CEO of ADF, Alan Sears, has actually gone so far as to condemn Christian denominations that may disagree with ADF on these issues: "Unfortunately, just as some in the church have shown a total lack of grace, the theologically liberal church has gone the other direction and totally capitulated on the issue without ever dealing with the sin and sorrow. Rather than helping those engaging in forbidden behaviors to turn from their sin by pointing to Christ, the theologically liberal church is providing 'spiritual' cover that enables their actions and the terribly destructive results." Alan Sears and Craig Osten, The Homosexual Agenda: *Exposing the Principal Threat to Religious Freedom Today* 130 (2013).[3]

HB 1523's sponsors and supporters have made it clear that the statute's purpose is to extend benefits only to those who hold particular religious beliefs in order to promote and advance those beliefs and the sects that adhere to them, but no others. State Representative Dan Eubanks, a co-sponsor of HB 1523, for example, stated during floor debate that the bill was intended to protect "Christians" like him. Referring to same-sex relationships, Representative Eubanks said: "It's very clear what God says. Go back and look at your Bible. He calls sin,

[3] The American Family Association ("AFA"), a fundamentalist Christian organization that "believes that a culture based on biblical truth best serves the well-being of our nation and our families," also participated in drafting HB 1523. Am. Fam. Ass'n, *Our Mission*, http://www.afa.net/who-is-afa/our-mission/. Like ADF, the AFA strongly opposes equal rights for gays and lesbians on religious grounds. The AFA teaches that "[h]omosexual behavior is sinful and unnatural," that "homosexual lust is highly addictive and difficult to stop," and that all gays and lesbians live in "rebellion against God and His created order." Patrick Vaughn, *Serpents & Doves*, Am. Fam. Ass'n (October 7, 2014), http://www.afa.net/the-stand/homosexuality/2015/serpents-doves/.

'sin.'" Referring to his fellow Christians, Representative Eubanks said: "This [bill] is about aligning our right to worship, to speak, to do with our faith. And our faith is pretty clear." Representative Eubanks closed by saying that HB 1523 "protects what I am willing to die for—and what I hope you who claim to be Christians are willing to die for—which is your beliefs." Statement of Rep. Dan Eubanks, February 19, 2016.[4]

State Senator Jenifer Branning similarly acknowledged that although there are Mississippians with deeply held religious beliefs regarding gambling, the death penalty, and alcohol, HB 1523 does nothing to protect people who hold those religious beliefs because it is "very specific to same-sex marriage." Statement of Sen. Jenifer Branning, March 30, 2016. State Representative Andy Gipson, a co-sponsor of HB 1523, stated in a Facebook post that HB 1523 was supported by "[m]ore than 270 pastors," religious leaders including Rev. Franklin Graham, and churches and church organizations including the Southern Baptist Convention, Bethany Christian Services, the Catholic Dioceses of Mississippi, the National Hispanic Christian Leadership Conference, the United Pentecostal Church, and the American Association of Christian Schools.

That HB 1523 systematically places the burden of its religious accommodation squarely on the shoulders of gays and lesbians is no accident. To the contrary, HB 1523—which was enacted less than a year after the Supreme Court invalidated Mississippi's ban on gay and lesbian couples' ability to marry and less than one week after Judge Jordan enjoined Mississippi's ban on their ability to adopt children, *CSE II*, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016)—intentionally promotes the Preferred Religious Beliefs at the expense of LGBT people. State Senator Jenifer Branning, a proponent of HB 1523 who met with the bill's drafters,

[4] Video of the legislative debate regarding HB 1523 is available at http://law.mc.edu/legislature/bill_details.php ?id=4621&session=2016. All of the following statements have been transcribed from these videos.

described HB 1523 as "balancing legislation" to the Supreme Court's *Obergefell* decision. Statement of Sen. Jenifer Branning, March 30, 2016. Senator Branning's floor statements confirm that the primary purpose of HB 1523 was to encourage and enable anti-gay discrimination in furtherance of the Preferred Religious Beliefs. As she stated during floor debate, under HB 1523, it would not be discrimination for Mississippi College, as a "Baptist college," to fire or deny employment to "homosexual people on their staff." When asked by Senator Willie Simmons whether refusing to employ gays and lesbians was a form of discrimination, Senator Branning replied, "If this bill is passed, it would not be." Statement of Sen. Jenifer Branning, March 30, 2016.

ARGUMENT

A plaintiff seeking a preliminary injunction must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest." *Valley* v. *Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). As discussed below, Plaintiffs clearly meet this familiar and well-established standard here.

I. Likelihood of Success on the Merits

A. HB 1523 Violates Plaintiffs' First Amendment Rights

The Establishment Clause of the First Amendment to the United States Constitution prohibits the making of any law "respecting an establishment of religion." U.S. Const. amend I. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *accord* Miss Const. art. 3 § 18 ("[N]o preference shall be given by law to any religious sect . . . ."). Yet this is precisely what HB 1523 does—it expresses an official preference for

those religious denominations that subscribe to the Preferred Religious Beliefs over all religions, including the Episcopal Church and other Christian denominations that do not adhere to the Preferred Religious Beliefs. HB 1523 thus constitutes a grave violation of Plaintiffs' Establishment Clause rights in at least three separate ways.

1. HB 1523 Impermissibly Discriminates Between Religious Sects

Before HB 1523 was enacted, the First Amendment, Article 3, Section 18 of the Mississippi Constitution, and the Mississippi Religious Freedom Restoration Act ("Mississippi RFRA"), Miss. Code Ann. § 11-61-1, all protected all Mississippians' free exercise of religion from government intrusion. Significantly, however, not one of these statutory and constitutional protections for religious beliefs singles out any particular religious belief or creed as better than any other. The Mississippi RFRA, for example, provides that any individual who believes that the government has substantially burdened his or her exercise of religion can sue in order to seek an exemption from the allegedly burdensome law or regulation. *Id.* at § 11-61-1 (6).[5] The Mississippi RFRA does not specify or even suggest any particular religious belief that may have been substantially burdened.

HB 1523, by marked contrast, extends additional benefits only to Mississippians who hold one or more of the three specified Preferred Religious Beliefs, making it clear that the State of Mississippi considers those beliefs to be more important and more deserving of special protection than all others. As discussed above, however, the Preferred Religious Beliefs are not espoused by all religions or even by all Christian denominations. While the Southern Baptist Convention, for example, teaches that marriage should be limited to straight couples, the Episcopal Church allows ministers even in Mississippi to solemnize gay and lesbian couples'

[5] Mississippians who wish to challenge *federal* government intrusion upon their free exercise rights are also protected by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. *See generally City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

marriages and regards such marriages as equal to the marriages of straight couples. HB 1523 thus prefers the Southern Baptist Convention's beliefs to the Episcopalians'—in patent violation of state and federal constitutional guarantees of neutrality between religious denominations. *See* Miss. Const. art. III, § 18 ("No preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred."); *see also* U.S. Const. amend. 1. The Supreme Court expressed this sentiment in no uncertain terms when it explained that "[w]hatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." *Cnty. of Allegheny* v. *Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989), *abrogated on other grounds*, *Town of Greece* v. *Galloway*, 134 S.Ct. 1811 (2014).[6]

More specifically, although any Mississippian who believes that the government has substantially burdened his or her exercise of religion can invoke the Mississippi RFRA to seek an exemption from the alleged burden to defend against government enforcement action, Miss. Code Ann. § 11-61-1(6), HB 1523 excuses adherents of the Preferred Religious Beliefs from the procedures established by the Mississippi RFRA and affords them and only them the unique ability to obtain a religious accommodation automatically. Thus, when it comes to the Preferred Religious Beliefs, HB 1523 prohibits the state from taking nearly *any* "discriminatory

[6] In *Town of Greece*, the Supreme Court found that sectarian references in the context of legislative prayer are permitted because to require otherwise "would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1822 (2014). Here, however, the Mississippi legislature has done precisely what both *Allegheny* and *Town of Greece* caution against. The State has selected particular sectarian religious beliefs and expressly chosen to promote and give them alone the State's endorsement, to the significant detriment of those who do not share such beliefs. *See also id.* at 1823.

action"—defined expansively to include "alter[ing] in any way" a person or group's tax treatment, materially altering the terms and conditions of any entitlement or benefit, and disciplining a state employee—"wholly or partially on the basis" of specified conduct based on those beliefs. § 4. Moreover, to invoke the protections of HB 1523, a holder of the Preferred Religious Beliefs need not to show *any burden* on his free exercise of religion at all, let alone a substantial burden. *Cf. Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (denying Free Exercise claim because plaintiff-appellants were "unable to identify any coercion directed at the practice or exercise of their religious beliefs").

Similarly, the Mississippi RFRA permits the government to "substantially burden a person's exercise of religion" if it demonstrates that doing so "[i]s in furtherance of a compelling government interest" and is also the "least restrictive means" of furthering that interest. Miss. Code Ann. § 11-61-1(5)(b). HB 1523, on the other hand, grants an accommodation to holders of the Preferred Religious Beliefs that purports to override *all* government interests, no matter how compelling. For example, under Sections 3(5), 3(7), and 3(8) of HB 1523, the government is precluded from enforcing anti-discrimination laws that protect gay and lesbian Mississippians, even though the Supreme Court has repeatedly affirmed that the government has a compelling interest in eradicating invidious discrimination. *See, e.g.*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984) (recognizing that Minnesota had "compelling interest in eradicating discrimination against its female citizens"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education."); *see also Windsor* v. *United States*, 699 F.3d 169, 181–85 (2d Cir. 2012) (concluding that in order to survive constitutional scrutiny, statute that discriminates against gay people must be "substantially related to an important government

interest," the "explanation" for the statute must be "exceedingly persuasive" as well as "genuine, not hypothesized or invented *post hoc* in response to litigation.") (citations omitted), *aff'd*, 133 S.Ct. 2675 (2013); *CSE I*, 64 F. Supp. 3d at 942. And under Section 3(4), state agencies, including state licensure boards, are prohibited from taking any action against doctors or therapists who refuse to treat gay, lesbian, and transgender patients notwithstanding the government's "compelling interest in safeguarding the public health." *See Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011).

HB 1523 thus affords far greater benefits and protections to people who hold the Preferred Religious Beliefs than to others, including religious persons like The Rev. Dr. Susan Hrostowski, or the Executive Director of the Campaign for Southern Equality, Rev. Jasmine Beach-Ferrara, who is an ordained minister in the United Church of Christ. Such blatant discrimination between and among different religious beliefs is a core violation of the Establishment Clause. "Government in our democracy . . . may not aid, foster, or promote one religion or religious theory against another . . . . The First Amendment mandates government neutrality between religion and religion[.]" *Epperson* v. *Arkansas*, 393 U.S. 97, 103–04 (1968). *See also Larson*, 456 U.S. at 246 ("[T]his Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'"); *Sch. Dist. of Abington Tp., Pa.* v. *Schempp*, 374 U.S. 203, 215 (1963) (holding that, with respect to the diversity of "religious opinions and sects," government "is neutral, and, while protecting all, it prefers none, and it disparages none"); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("government must be neutral when it comes to competition between sects. It may not thrust any sect on any person."); *Ingebretsen* v.

Jackson Pub. Sch. Dist., 88 F.3d 274, 279 (5th Cir. 1996); *Herdahl* v. *Pontotoc Cnty. Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995).

It is plain that HB 1523 has the aim and effect of "aid[ing], foster[ing], or promot[ing] one . . . religious theory against another," *Epperson*, 393 U.S. at 104, by affording special treatment and extra protections to the Preferred Religious Beliefs. Although Defendants have characterized HB 1523 as merely a protection for some Mississippians' free exercise rights, *see* Opp. Br. at 9–10, *Alford* v. *Moulder*, No. 3:16-CV-350 (S.D. Miss. May 24, 2016), Dkt. No. 15, as the Supreme Court has recognized, the First Amendment "can be guaranteed only when legislators . . . are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. No one could credibly argue that the religious organization that drafted HB 1523 or the Mississippi legislators who sponsored it have done that here.

2. HB 1523 Impermissibly Favors Religion over Nonreligion

Even if HB 1523 treated the views and beliefs of all religious sects equally (which it does not), it would still violate the Establishment Clause by imposing the weighty burden of religious accommodations on innocent third parties. In *Estate of Thornton* v. *Caldor Inc.*, the Supreme Court considered a Connecticut religious accommodation law providing that "[n]o person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day." 472 U.S. 703, 706 (1985). Like HB 1523, the Sabbath law at issue in *Thornton* was purportedly enacted to protect the free exercise of religion. *See id.* at 712 (O'Connor, J., concurring). And like HB 1523, the Sabbath law "arm[ed]" people who held the state's preferred religious belief, to wit, Sabbath observance, "with an absolute and unqualified right." *Id.* at 709–10. By commanding that the preferred religious belief "automatically control[led] over all secular interests at the workplace" and taking "no account of

the convenience or interests of the employer or . . . other employees who do not" share the preferred religious belief, the Sabbath law impermissibly imposed "significant burdens on other employees."[7] *Id.* It therefore had "a primary effect that impermissibly advances a particular religious practice," in violation of the Establishment Clause. *Id.* at 710.

HB 1523 similarly imposes significant burdens on Mississippians who do not hold the Preferred Religious Beliefs. But unlike the Sabbath law at issue in *Thornton*, HB 1523 does not merely inconvenience atheists or non-religious persons. Instead, it violates the fundamental constitutional rights of gay and lesbian Mississippians, a "quasi-suspect class" who have long "been treated differently due to prejudice." *See CSE I*, 64 F. Supp. 3d at 940. Across a wide variety of contexts, HB 1523 exhorts Mississippians to discriminate against their LGBT neighbors—in violation of state and federal laws as well as the United States Constitution—by providing an absolute immunity to people who trample upon Plaintiffs' rights. An illustrative, though far from comprehensive, list of the burdens imposed upon Plaintiffs by HB 1523 is as follows:

- Marriage. HB 1523 substantially burdens the fundamental right of gay and lesbian Mississippians to marry. *See Obergefell*, 135 S. Ct. at 2604–05. Section 3(8) permits anyone "employed or acting on behalf of the state government who has authority to authorize or license marriages" to "seek recusal from authorizing or licensing lawful marriages" based upon any of the three Preferred Religious Beliefs. As Plaintiff Campaign for Southern Equality has argued in a pending motion for injunctive relief in a related case, the law provides no enforcement mechanism for ensuring that the fundamental right to marry is not unduly

[7] In *Burwell* v. *Hobby Lobby Stores, Inc.*, the United States Supreme Court held that the plaintiffs' requested religious accommodation was lawful in part because it had "precisely zero" effect on third parties—in that case, female employees covered by plaintiffs' health plans. 134 S. Ct. 2751, 2760 (2014). Here, however, HB 1523 has a significant deleterious effect on gay and lesbian Mississippians.

impeded, delayed, or otherwise burdened. Mot. to Reopen J., File Suppl. Pleading, and Modify the Permanent Inj., *Campaign for S. Equal.* v. *Bryant*, No. 3:14-cv-818 (S.D. Miss. May 10, 2016), ECF No. 39.[8] Under HB 1523, every or nearly every clerk and deputy clerk in a county could theoretically recuse himself or herself, such that no state employees will be available to issue marriage licenses to same-sex couples, without any mechanism to ensure that gay or lesbian couples would receive licenses without "imped[iment] or delay[]." HB 1523 § 3(8)(a). Moreover, HB 1523 does not even acknowledge, much less attempt to address, the humiliation and stigmatic harm that Plaintiffs will endure when they are informed that an agent of the State refuses to provide them service because of their sexual orientation. *See, e.g.*, *CSE I*, 64 F. Supp. 3d at 939 ("Mississippi law perpetuates the false notion of gay inferiority by denying equal marriage rights to gay and lesbian citizens[.]").

- Access to Public Accommodations. HB 1523 also makes it harder for gay and lesbian couples to celebrate marriage—before, during, and after their weddings. Section 3(5) permits a person or business claiming the Preferred Religious Beliefs who provides "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage" to deny services to LGBT Mississippians with impunity. The array of covered goods and services includes, but is not limited to, "[p]hotography," "videography," "printing," "publishing," "[f]loral arrangements," "dress making," baking, "assembly-hall" rentals, "car-service rentals," and "jewelry sales and services." HB 1523 § 3(5). The statute is worded so expansively that it could apply to not just wedding-related businesses but also almost any business that serves gay or lesbian married

[8] Although the relief sought by the plaintiffs in the motion to reopen *CSE I* will not be necessary if the Court enjoins enforcement of HB 1523 in its entirety, given the high likelihood of an appeal to the Fifth Circuit and possibly the Supreme Court on all issues currently before the Court, CSE respectfully requests that the Court rule on the relief sought by CSE in *CSE I* as well.

couples. For example, a restaurant could potentially refuse to seat a married lesbian couple like Susan and her wife at a table for two if it viewed the couple's dinner date as a "celebration" or "recognition" of their marriage. *See id.* A hotel could refuse to let them stay in a room together. Even a furniture store could turn Susan and her wife away with impunity if it fears that supplying home furnishings relates to the "formation" or "recognition" of their marriage. Every time this religious accommodation is invoked, Susan will suffer the tangible and dignitary harm that arises from being turned away because of someone else's religious views about her sexual orientation.

- Protection from Discrimination. HB 1523 forbids the government, and even private state-court plaintiffs, from taking action against individuals or businesses that invoke the Preferred Religious Beliefs as a justification for violating preexisting antidiscrimination protections. Under HB 1523, government officials are prohibited from taking nearly any action—including withholding, denying, or changing the conditions of a license or certification, *see* § 4(1)(f)—against someone who declines to provide treatment, counseling, fertility services, or surgeries due to their Preferred Religious Beliefs. § 3(4).

The government is likewise prohibited from taking action against someone who has declined to provide services, accommodations, facilities, goods, or privileges related to celebrating or recognizing a marriage, if the refusal is based upon or done "in a manner consistent with" one of the three Preferred Religious Beliefs. § 3(5). This section could be interpreted to prohibit a municipality, like Jackson, from enforcing its own laws aimed at prohibiting discrimination against LGBT people. *See, e.g.*, Jackson, Mississippi Code of Ordinances § 86-193 (prohibiting differential treatment by a police officer on the basis of, among other things, sexual orientation and gender identity); *id.* § 126-161 (prohibiting passenger

discrimination, including on the basis of sex and sexual orientation, by drivers of a vehicle for hire).

And if the government were to take action, an adherent of a Preferred Religious Belief could seek injunctive relief that prevents or "remedies" any resulting adverse governmental action against them, effectively tying the hands of government agencies or officials who would otherwise enforce anti-discrimination protections. § 6. Meanwhile, private state-court plaintiffs could be denied relief because HB 1523 defines "state government" to also include 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." § 9(2)(d).

- Family and Parenthood. HB 1523 creates barriers to raising children despite Judge Jordan's recent holding in *CSE II* that there is *no* constitutionally permissible basis for preventing same-sex couples from adopting and raising children, *CSE II*, 2016 WL 1306202, at *13–14. Section 3(2) of HB 1523 permits adoption and foster care agencies to invoke the Preferred Religious Beliefs to refuse to place children with same-sex parents. Such a decision imposes an enormous burden both on would-be parents and on children who are denied loving homes. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). HB 1523 also creates a similarly unrestricted ability for holders of the Preferred Religious Beliefs to deny fertility-related services to a gay or lesbian couple. HB 1523 § 3(4). The Supreme Court explained in *Obergefell* that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." 135 S. Ct. at 2599. And yet the decision to raise a child—one of the most "profound choices" a couple can make—is entirely disregarded when HB 1523's religious exemption is invoked, regardless of

the extent to which facilitating an adoption or providing fertility services would actually burden anyone's exercise of religion.

- Access to Health Services. Last, but certainly not least, HB 1523's religious accommodation burdens gay and lesbian couples' ability to keep their relationships and families strong by erecting obstacles to accessing essential health services. Section 3(4) permits healthcare professionals and staff who adhere to any of the Preferred Religious Beliefs to deny marriage counseling or other psychological or counseling services to a gay or lesbian patient, or to the child of a gay or lesbian couple.

* * *

Indeed, like the Sabbath law at issue in *Thornton*, HB 1523 provides that the interests of people who hold the Preferred Religious Beliefs "automatically control" over the interests of their gay and lesbian neighbors. *See* 472 U.S. at 709. In her concurring opinion in *Thornton*, Justice O'Connor emphasized that this "absolute" nature of the religious accommodation in that case was its fatal flaw. *Id.* at 712 (O'Connor, J., concurring) ("Since Title VII['s religious accommodation provision] calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only [the preferred religious beliefs], I believe that an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice."); *see also Cutter* v. *Wilkinson*, 544 U.S. 709, 720–24 (2005) (upholding the Religious Land Use and Institutionalized Persons Act against an Establishment Clause challenge because, unlike the statute at issue in *Thornton*, it allowed courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and "[did] not differentiate among bona fide faiths"). By singling out certain religious beliefs and preventing

courts from considering the burdens HB 1523 imposes upon gay and lesbian Mississippians, HB 1523 impermissibly endorses the "particular religious practice" of discriminating against gays and lesbians. *See Thornton*, 472 U.S. at 712 (O'Connor, J., concurring); *Cutter*, 544 U.S. at 720.

3. HB 1523 Was Enacted With the Impermissible Purpose of Advancing Religion

That HB 1523 advances and promotes particular religious beliefs is surely no accident. Even if the text of the bill itself did not include phrases like "religious belief" and left any ambiguity as to its purpose, HB 1523's authors, sponsors and supporters have made it crystal clear that it was enacted with the express purpose of declaring official governmental support for the Preferred Religious Beliefs and promoting and advancing those beliefs over all others. *See Doe* v. *Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 294 (5th Cir. 2001) (considering "legislators' contemporaneous statements" in determining that a statute was enacted with the impermissible purpose of advancing religion).

For example, State Representative Dan Eubanks, a co-sponsor of HB 1523, stated during floor debate that the bill was intended to protect "Christians" like him. Statement of Rep. Dan Eubanks, February 19, 2016. Referring to his fellow Christians, Representative Eubanks said: "This [bill] is about aligning our right to worship, to speak, and to do according to our faith. And our faith is pretty clear." *Id.* He closed by saying that HB 1523 "protect[s] . . . what I am willing to die for—as I hope you that claim to be Christians are willing to die for as well—and that is your beliefs." *Id.* Similarly, State Senator Angela Burks Hill stated during floor debate that HB 1523 was intended to protect people who "want to exercise [their] religion not just in their church on Sunday but throughout their daily life." Statement of Sen. Angela Burks Hill, March 30, 2016. And State Senator Chris McDaniel stated during floor debate that under

HB 1523, "now the state can't force a Christian, or whomever, to violate" their religious beliefs. Statement of Sen. Chris McDaniel, March 30, 2016.

The law's sponsors and supporters were just as explicit about its pro-Christian purpose in other public statements. For example, State Representative Andy Gipson, a co-sponsor of HB 1523, stated in a Facebook post that HB 1523 was supported by "[m]ore than 270 pastors," religious leaders including Rev. Franklin Graham, all of whom are Christian organizations. Andy Gipson, Facebook (April 4, 2016), https://www.facebook.com/repandygipson/posts/10204530323092860. In a blog post on his campaign website, State Representative Dana Criswell stated that HB 1523 is opposed by "those who oppose basic [C]hristian values." Dana Criswell, *Rep. Dana Criswell – At Your Capitol, Week of March 28*, Dana Criswell for Mississippi (Apr. 2, 2016), http://www.danacriswellformississippi.com/rep_dana_criswell_at_your_capitol_week_of_march_28.

Governor Bryant, who signed HB 1523 into law, has also made it clear that the bill was explicitly intended to protect and uplift certain sectarian Christian religious beliefs. The Family Research Council, a conservative Christian ministry whose self-proclaimed "mission is to advance faith, family and freedom in public policy and the culture from a Christian worldview," Family Research Council, Vision and Mission Statements, http://www.frc.org/mission-statement (last visited June 12, 2016), recently presented Governor Bryant with an award for having signed HB 1523 into law. Leah Jessen, *'We Will Never Be Silent': Mississippi Governor Receives Religious Freedom Award*, The Daily Signal (May 27, 2016), http://dailysignal.com/2016/05/27/we-will-never-be-silent-mississippi-governor-receives-religious-freedom-award/. Governor Bryant accepted the award at a convention on May 26, 2016, where Family Research Council president Tony Perkins introduced him to the audience of

conservative Christian ministers by remarking, "You are not the only ministers that God has called . . . God has also called ministers to government." *Id.* Governor Bryant rallied the audience by noting that "the secular, progressive world" was angry with him for signing HB 1523. "They don't know that Christians have been persecuted throughout the ages," Bryant said. "They don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and savior, Jesus Christ." Emily Wagster Pettus, *Mississippi Governor: 'Secular' World Angry at LGBT Law*, The Clarion-Ledger (June 1, 2016), http://www.clarionledger.com/story/news/politics/2016/05/31/mississippi-governor-secular-world-angry-over-lgbt-law/85208312/.

HB 1523 was drafted at least in part by two Christian advocacy groups. Both groups have been clear that all of their work—including the drafting of HB 1523—is motivated by a desire to conform government to their sectarian Christian worldview, which includes the religious practice of discriminating against gays and lesbians. For example, a year after *Obergefell* was decided, ADF stated that it "remains committed to promoting the truth that marriage is the lifelong union of one man and one woman," and that gay and lesbian relationships are "both morally wrong and personally damaging." *Marriage is Our Future*, Alliance Defending Freedom, https://www.adflegal.org/issues/marriage/marriage-is-our-future (last visited June 9, 2016); Gregory Baylor, *"Say You're 'Gay,' Get a Scholarship"*, Alliance Defending Freedom Blog (Aug. 26, 2011), http://adflegal.org/detailspages/blog-details/allianceedge/2011/08/26/say-you're-'gay-'-get-a-scholarship. Like ADF, the AFA teaches that "[h]omosexual behavior is sinful and unnatural," that "homosexual lust is highly addictive and difficult to stop," and that all gays and lesbians live in "rebellion against God and His

created order." Patrick Vaughn, *Serpents & Doves*, Am. Family Ass'n (Oct. 7, 2014, 12:52 pm), http://www.afa.net/the-stand/homosexuality/2015/serpents-doves/.

HB 1523's origins and legislative history thus confirm that this promotion of the Preferred Religious Beliefs, and not any secular objective, is the purpose of the bill itself. HB 1523's provisions ensure that the bill has the primary effect of advancing the Preferred Religious Beliefs, even at the cost of LGBT Mississippian's fundamental rights. By identifying particular state-sanctioned sectarian beliefs and requiring the state to afford special privileges so long as those beliefs are "sincerely held" and that an actor's conduct is "consistent with" them, *see, e.g.*, HB 1523 § 3(7), HB 1523 excessively entangles government and religion by requiring "surveillance by state authorities" over matters of theology. *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971). HB 1523 thus fails all three prongs of the *Lemon* test. *See id.* at 612–13 (A "statute must have a secular legislative purpose," its "primary effect must be one that neither advances nor inhibits religion," and it "must not foster an excessive government entanglement with religion.") (internal quotation marks and citation omitted).

It cannot be seriously disputed that HB 1523 was enacted with the impermissible purpose of promoting certain sectarian Christian religious beliefs. HB 1523 was not "motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose." *Wallace* v. *Jaffree*, 472 U.S. 38, 43, 56 (1985) (invalidating law providing for a minute of "mediation or voluntary prayer" at beginning of school day because explicitly enacted in "effort to return voluntary prayer to the public schools"). Such "endorsement sends a message to nonadherents [of the Preferred Religious Beliefs] that they are outsiders, not full members of the political community, and an accompanying message to adherents [of the Preferred Religious Beliefs] that they are insiders, favored members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688

(1984) (O'Connor, J., concurring); *accord Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309–10 (2000). As the Supreme Court has held, the professed purpose of advancing religion, standing alone, is sufficient to give rise to an Establishment Clause violation: "[T]he purpose apparent from government action can have an impact more significant than the result expressly decreed: when the government maintains Sunday closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable." *McCreary Cnty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citing *McGowan* v. *Maryland*, 366 U.S. 420 (1961)); *see also Am. Civil Liberties Union of Miss.* v. *Miss. State Gen. Servs. Admin.*, 652 F. Supp. 380, 383 (S.D. Miss. 1987) ("If there is no clearly secular purpose for [a challenged government] activity, then the activity is illegal." (internal quotation marks omitted)).

B. Plaintiffs Have Standing to Sue

In order to establish standing in Federal court, a plaintiff must satisfy three elements: "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second . . . the injury has to be fairly traceable to the challenged action of the defendant . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Def's of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks, citations, and alterations omitted).

In a suit under the Establishment Clause, plaintiffs can show "standing based on the direct harm of what is claimed to be an establishment of religion" or "on the ground that they have incurred a cost or been denied a benefit on account of their religion." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 129–30 (2011). Further, even though taxpayers

generally do not have standing to challenge the government's spending choices, a taxpayer does have standing to challenge a direct government expenditure that violates the Establishment Clause. *Id.* at 138–39. As set forth below, Plaintiffs have standing under each of these theories.

1. HB 1523 Causes Plaintiffs "Direct Harm"

"A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause[.]" *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970). Although the "psychological consequence . . . produced by observation of conduct with which one disagrees" ordinarily will not constitute an injury in fact for standing purposes, *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, where the plaintiff's injury has a direct and personal nexus to a government action, the plaintiff has sustained a constitutionally cognizable injury and has standing to challenge it. *Murray* v. *City of Austin, Tex.*, 947 F.2d 147, 151–52 (5th Cir. 1991).

In *Murray*, for example, the Fifth Circuit held that an Austin resident who regularly used Austin public services had standing to challenge the city's use of a Latin cross as part of its city insignia which appeared on government correspondence, on city vehicles, and on government buildings. *Id.* at 150–52. Because the plaintiff "personally confront[ed] the insignia in many locations around the City" and the city's use of "such a religious symbol truly offends" him, the court found his case readily distinguishable from one in which the "plaintiffs learned of challenged conduct through the media and did not live in or near the alleged offending state." *Id.* at 150–52 (citing *Valley Forge*, 454 U.S. at 485–87). Here, as in *Murray*, Plaintiffs are state residents who are forced to confront their local government's endorsement of certain religious doctrines not only in the media, but in their conversations with friends and neighbors and in their everyday lives. As a married lesbian Episcopalian, The Rev. Dr. Susan Hrostowski is singled

out because the State of Mississippi has decreed that other Christian sects are more favored than her own and has dictated that those who adhere to the Preferred Religious Beliefs are entitled to a religious accommodation that directly burdens her as a married lesbian mother and infringes on even her most fundamental constitutional rights. *See supra* at 17-21. She clearly has a personal and direct nexus to the statute's elevation of the Preferred Religious Beliefs since HB 1523 unambiguously signals to both religious and nonreligious Plaintiffs that they are outsiders and not full members of the political community. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Even more so than the city insignia at issue in *Murray*, HB 1523 causes a psychological and dignitary injury to Plaintiffs sufficient to give rise to standing.

Recent circuit court decisions are directly on point. In *Catholic League for Religious and Civil Rights* v. *City and County of San Francisco*, for example, Catholic plaintiffs challenged the San Francisco Board of Supervisors' adoption of a nonbinding resolution denouncing the Archbishop of San Francisco and condemning Catholic doctrine. 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc). Although the nonbinding resolution did not require any particular action or inaction or the expenditure of any government funds, the court nevertheless found that it caused plaintiffs concrete stigmatic injury giving rise to standing.[9] *Id.* at 1052–53. Much like the Fifth Circuit in *Murray*, the *Catholic League* court distinguished *Valley Forge* by analogizing the plaintiffs in that case to "Protestants in Pasadena suing San Francisco over its

[9] This holding drew a powerful dissent by Judge Susan Graber, which Defendants may be tempted to quote from in their opposition brief. 624 F.3d at 1062. Judge Graber emphasized that the challenged resolution was "entirely non-binding" and "has no legal effect," and therefore could not have caused a concrete redressable injury to plaintiffs. *Id.* at 1076; *see also id.* at 1079 ("The mere existence of an enactment on the books (or virtual books) is not enough."). This case can easily be distinguished from the dissent on the facts—unlike the challenged San Francisco resolution, HB 1523 is not merely hortatory but rather imposes both benefits and burdens on state residents. Moreover, Judge Graber speculated that "the parties who [were] personally the subjects of the resolution . . . [i.e. the officials and groups singled out for condemnation by name] could demonstrate cognizable harm." *See id.* at 1081. Here, given the breadth of its reach into nearly every facet of everyday life, HB 1523 condemns not just a particular gay individual, but rather all gay and lesbian people and all those who recognize the inherent dignity of gay people and their relationships.

anti-Catholic resolution"—in other words, they had no personal nexus to the challenged government action. *Id.* at 1052. "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*." *Id.* (emphasis added) (quoting *Valley Forge*, 454 U.S. at 485). In *Catholic League*, the plaintiffs had standing to challenge a "stigmatizing resolution [that left] them feeling like second-class citizens of the San Francisco political community, and express[ed] to the citizenry of San Francisco that they are. The cause of the plaintiff's injury here is not speculative: it is the resolution itself." 624 F.3d at 1052.

Similarly, in *Awad* v. *Ziriax*, a Muslim plaintiff was found to have standing to seek a preliminary injunction preventing the certification of election results approving a state constitutional amendment barring Oklahoma courts from considering Sharia law. 670 F.3d 1111, 1118–19 (10th Cir. 2012). Although "the amendment had not yet taken effect or been interpreted by any Oklahoma court," the plaintiff had nevertheless suffered a cognizable constitutional injury: the imminent enactment of a state law that "expressly condemns his religion and exposes him and other Muslims in Oklahoma to disfavored treatment." *Id.* at 1123. The *Awad* court distinguished *Valley Forge*, holding that the plaintiff had not suffered mere "hurt feelings" but rather a statutory "directive of exclusion and disfavored treatment." *Id.*

Like the laws at issue in *Catholic League* and *Awad*, HB 1523 communicates to Mississippians that Plaintiffs—who do not hold the Preferred Religious Beliefs and in fact engage in conduct condemned by the favored religious beliefs—are second-class citizens.

2. HB 1523 Subjects Plaintiffs to Illegitimate, Unequal Treatment

HB 1523 also causes cognizable injury to Plaintiffs by excluding them from a benefit—the absolute right to a religious accommodation—that the statute extends to people who hold the Preferred Religious Beliefs. *See Larson*, 456 U.S. at 246 (invalidating a "state law granting a denominational preference"). This is so even though the only available relief is to remove the unconstitutional benefit from the favored group, rather than providing the withheld benefit to the burdened group. *See Heckler* v. *Matthews*, 465 U.S. 728, 740 (1984) ("[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." (internal quotation marks omitted)).

In *Peyote Way Church of God, Inc.* v. *Thornburgh*, the Fifth Circuit considered an analogous claim and found that plaintiffs who were excluded from a religious accommodation (specifically, a DEA regulation providing that peyote was not a controlled substance for members of a designated church) had standing to challenge the sect-discriminatory grant of the accommodation under the Establishment Clause. 922 F.2d 1210, 1213–14 (5th Cir. 1991). Plaintiffs had not been the subject of any civil or criminal enforcement action—they merely sought a declaratory judgment that the challenged religious accommodation was unconstitutional. *Id.* The court held that plaintiffs had standing because the "Supreme Court recognizes that illegitimate unequal treatment is an injury unto itself." *Id.* at 1214 n.2 (citing *Heckler*, 465 U.S. at 739). Plaintiffs had alleged a cognizable injury in fact because "they would suffer unjust unequal treatment if the exemptions accorded the [designated church] stand and if those exemptions unconstitutionally exclude [plaintiffs'] membership." *Id.*

Like the DEA regulation at issue in *Peyote Way*, HB 1523 makes a religious accommodation available to some Mississippians while excluding others, including Plaintiffs.

Plaintiffs therefore have standing to challenge this "illegitimate unequal treatment" and seek appropriate injunctive relief.

3. Plaintiffs Have Taxpayer Standing

Of course, like other Mississippians, The Rev. Dr. Susan Hrostowski and the CSE members who live in Mississippi pay state taxes, including state income tax. "Unlike the general test for taxpayer standing, which requires 'direct injury' to the taxpayer . . . the Supreme Court's test in Establishment Clause cases requires only income taxpayer status and the showing of a direct expenditure of income tax revenues on the allegedly unconstitutional program." *Henderson* v. *Stalder*, 287 F.3d 374, 381 n.7 (5th Cir. 2002) (citing *Flast* v. *Cohen*, 392 U.S. 83, 88 (1962)); see also *Doe ex rel. Doe* v. *Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 & n.22 (5th Cir. 1999) (plaintiffs seeking to establish "state or municipal" taxpayer standing need not show direct injury); *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) (Establishment Clause plaintiff asserting taxpayer standing must "show that tax revenues are expended on the disputed practice").

In *Henderson*, the Fifth Circuit found that plaintiffs lacked taxpayer standing because the challenged statute (creating a pro-life license plate that supported pro-life charities) expressly provided that no public funds would be expended on the "Choose Life Council." 287 F.3d at 381. HB 1523, however, contains no such provision. To the contrary, the primary function of the statute is to create a new private right of action against the State of Mississippi that expressly permits the award of "[c]ompensatory damages," "attorneys' fees and costs", and "[a]ny other appropriate relief." The scheme created by HB 1523 would be toothless and could not function without the direct expenditure of income tax revenues expressly provided for in § 6—the damages award is intended to serve as a meaningful check on government action.

HB 1523 further provides for the direct expenditure of tax dollars to fund advocacy of the Preferred Religious Beliefs by prohibiting the government from withholding, reducing, or materially altering the terms or conditions of "any state grant, contract, subcontract, cooperative agreement, guarantee, loan scholarship, or other similar benefit" or the employment of any individual on the basis of advocacy of the Preferred Religious views, even when this advocacy is funded by taxpayer dollars. *See* §§ 3(7), 4(5). In addition, HB 1523 requires the direct expenditure of taxpayer funds to maintain a system that requires the State Registrar of Vital Records to keep records of officials who refuse to serve gay and lesbian people due to adherence to Preferred Religious Beliefs. *Id.* § 3(8)(a). These direct expenditures of taxpayer revenues are also integral to HB 1523's overall statutory scheme.

II. HB 1523 Causes Plaintiffs Irreparable Harm

By depriving Plaintiffs of basic constitutional protections, HB 1523 inflicts continuous injury on gay and lesbian Mississippians that constitutes irreparable harm *per se*. "It is well settled that the loss of First Amendment freedoms even for minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Medical Center* v. *City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)); *see also Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Doe* v. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (granting preliminary injunction because plaintiffs' likely success on the merits of their Establishment Clause claim constituted a "threat of irreparable injury"); *Springtree Apartments, ALPIC* v. *Livingston Par. Council,* 207 F. Supp. 2d 507, 515 (M.D. La. 2001) ("It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law.") (citing *Elrod*

v. *Burns*, 427 U.S. 347, 373 (1976)); *Cohen* v. *Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992).

Even if Plaintiffs' Establishment Clause injury did not constitute irreparable harm *per se*, "[a]n injury is irreparable if money damages cannot compensate for the harm." *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014). There is obviously no dollar amount that can make Plaintiffs or their family members whole for the humiliation and stigma inflicted by the State's endorsement of the Preferred Religious Beliefs. There is no actuary who could quantify the pain The Rev. Dr. Susan Hrostowski feels by virtue of the fact that her State has declared that neither the Church to which she has devoted her life nor the family she has built around her faith (including her teenage son, Hudson Garner) are worthy of respect, dignity, or equality under the law.

III. The Threatened Harm if the Injunction is Denied Outweighs Any Harm That May Result

Defendants' inability to enforce an illegal and unconstitutional statute privileging Preferred Religious Beliefs are not "harms" that this Court should recognize. As a result, Mississippi is "in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks omitted). *See also De Leon*, 975 F. Supp. 2d at 664; *Bassett* v. *Snyder*, 951 F. Supp. 2d 939, 971 (E.D. Mich. 2013).

By contrast, the Plaintiffs' harms—the deprivation of their First Amendment freedoms—are immediate and irreparable. Without a preliminary injunction, Plaintiffs will suffer from the denial of their rights under the Establishment Clause which far outweighs any potential damage that the requested injunction may cause to the State of Mississippi. *See New Orleans Secular Humanist Ass'n, Inc.* v. *Bridges*, Civil Action No. 04-3165, 2006 WL 1005008,

at *5 (E.D. La. Apr. 17, 2006) ("The plaintiff is being denied its First Amendment freedoms while the statute remains in operation. In contrast, the State, at a minimum, does not appear to be at risk of suffering any harm from a grant of the preliminary injunction.").

Ultimately, granting a preliminary injunction simply returns Mississippi to the status quo following the Supreme Court's recognition of gay and lesbian couples' fundamental right to marry. *See Jackson Womens' Health Org.* v. *Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013), *aff'd as modified sub nom. Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448 (5th Cir. 2014) ("the Court concludes that the threatened injury outweighs any harm that will result if the injunction is granted. This order essentially continues the status quo.").

IV. The Grant of an Injunction Will Not Undermine the Public Interest

Finally, and for similar reasons, a preliminary injunction vindicating Plaintiffs' most basic constitutional rights would only serve to reinforce this "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders." *Goldberg* v. *Kelly*, 397 U.S. 254, 264–65 (1970). *See also Doe* v. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) ("Assuming that the [plaintiffs'] Establishment Clause rights have been infringed, the threat of irreparable injury to the [plaintiffs] and to the public interest that the clause purports to serve are adequately demonstrated."); *Am. Civil Liberties Union of Mississippi* v. *Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380, 383 (S.D. Miss. 1987) ("The public interest must fall on the side of Constitutional rights of individuals over the will of the majority. That is the underlying fundamental of the Bill of Rights of our Constitution."). *Keyes* v. *Sch. Dist. No. 1, Denver, Colorado*, 396 U.S. 1215, 1216 (1969); *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). For this reason, injunctions protecting constitutional rights "are always in the public interest." *Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 298

(5th Cir. 2012). *See also Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *8 (M.D. Tenn. Mar. 14, 2014).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction and such other and further relief as the Court may deem proper.

Dated: June 13, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2016, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing.

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C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY, *et al.*
THE REV. SUSAN HROSTOWSKI PLAINTIFFS

v. CIVIL ACTION NO.: 3:16-CIV-442-CWR-LRA

PHIL BRYANT, in his official capacity, *et al.* DEFENDANTS

MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFFS'MOTION FOR PRELIMINARY INJUNCTION

Governor Phil Bryant ("Governor Bryant"), Attorney General Jim Hood ("Attorney General Hood"), John Davis, Executive Director of the Mississippi Department of Human Services ("Executive Director Davis") and Judy Moulder, Mississippi State Registrar of Vital Records ("State Registrar Moulder") (sometimes referred to as "these Defendants"), submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Plaintiffs[1] bring this facial challenge contending the "Protecting Freedom of Conscience from Government Discrimination Act"[2] ("H.B. 1523" or "the Act") passed during the 2016 Regular Legislative Session violates the Establishment Clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. Plaintiffs urge the Court to enjoin *these defendants* because they believe the Act: (a) impermissibly discriminates between religious sects; (b) impermissibly favors religion over non-religion, and (c) was enacted with the impermissible purpose of advancing religion. Despite Plaintiffs' ruminations about what "*could theoretically*" happen when the Act takes effect on July 1, 2016, the fact remains that they cannot

[1] There are two Plaintiffs—Susan Hrostowski and the Campaign For Southern Equality ("CSE").
[2] Miss. Laws 2016, H.B. 1523 (eff. July 1, 2016).

demonstrate the "irreducible constitutional minimums" of Article III standing—much less their burden for granting extraordinary injunctive relief.

That Plaintiffs alleged injury is "hypothetical and conjectural" is confirmed by their supporting memorandum. *See, e.g.*, Pls.' Mem. at 18. ("[E]very or nearly every clerk and deputy clerk in a county ***could theoretically recuse himself or herself***, such that no state employees will be available to issue marriage licenses to same sex couples."). Plaintiffs further portend that "a restaurant ***could potentially*** refuse to seat a married lesbian couple like [Plaintff Hrostowski] and her wife at a table for two. . . [and] a hotel ***could*** refuse to let them stay in a room together." *Id.* (emphasis supplied). Such unadorned speculation does not provide the foundational footing necessary for a facial challenge. Furthermore, Plaintiffs' assertions demonstrate, at a bare minimum, that their claims are not ripe.

Even assuming *arguendo* Plaintiffs could establish the requisite elements for Article III standing as to these defendants, the Court should still deny the Plaintiffs' motion because the Establishment Clause claim fails on the merits. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Justice Kennedy, writing for the majority, acknowledged that many people of faith and conscience believe same-sex marriage is morally wrong and recognized their First Amendment interests. He wrote *"[t]he 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. Obergefell*, 135 S.Ct. at 2607 (emphasis supplied).

Unlike *Obergefell* where the Court was confronted solely with the denial of same-sex couples' legal right to marry under the Fourteenth Amendment, this Court now—consistent with the teachings of *Obergefell* and First Amendment jurisprudence—must consider individuals'

First Amendment interests encapsulated in the Act in order to "ensure[ ] that religious organizations and persons are afforded proper protection." *Id.* at 2607. Against this backdrop, the Supreme Court has cautioned against the "latent dangers of government hostility to religion . . . [drawing] a distinction between an unlawful intent to favor religion and a lawful intent to accommodat[e] the public service to [the people's] spiritual needs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 (1989) (citations and internal punctuation omitted). H.B. 1523 effectively draws this distinction by continuing to protect same-sex couples' right to marry while accommodating those with "sincerely held religious beliefs or moral convictions" under the First Amendment. The Constitution requires nothing less.

Despite Plaintiffs unrelenting effort to cast the Act as something it is not and to speculate about circumstances that have not occurred and may never occur, the primary effect of H.B. 1523 is to protect individuals' freedom of conscience and prohibit State government discrimination against those persons with sincerely held religious beliefs or moral convictions. To grant Plaintiffs' relief would cast aside the rights of those who may disagree with Plaintiffs on same-sex marriage, but wish to exercise their religious beliefs and moral convictions free from the threat of discriminatory action by State government. Service in state government should not be discouraged by mandating that a person leave their sincerely held religious beliefs or moral convictions at the door or face discriminatory action by State government solely because of those beliefs. The Establishment Clause does not go so far.

ARGUMENT

To warrant the extraordinary relief of a preliminary injunction, Plaintiffs must clearly demonstrate: (1) a substantial likelihood of success on the merits; (2) substantial threat of an irreparable injury without the relief; (3) threatened injury that outweighs the potential harm to the

party enjoined; and (4) that granting the preliminary relief will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). Plaintiffs must "clearly establish each of the traditional four preliminary injunction elements." *DSC Commc'n . Corp. v. DGI Techn., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996). The decision to grant a preliminary injunction is the exception rather than the rule. *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 620 (5th Cir. 1985). The Fifth Circuit has "cautioned repeatedly" that a preliminary injunction is an "*extraordinary remedy*" to be granted only if the party seeking it has "clearly carried the burden of persuasion" *on all four elements*. *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005) (emphasis supplied).

I. Plaintiffs Cannot Demonstrate a Substantial Likelihood of Success on the Merits.

If a plaintiff seeking a temporary or preliminary injunction fails to prove a substantial likelihood of success on the merits, he or she is not entitled to injunctive relief. *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (plaintiff must "carr[y] his burden of persuasion as to all of the four prerequisites.").

A. Plaintiffs Not Likely to Succeed on Merits--the Act is Facially Constitutional.

In assessing a facial constitutional challenge, the Supreme Court has held "we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act . . . unconstitutional is not to be exercised with reference to hypothetical cases thus imagined"); *see also United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("[S]tatutes should be construed whenever possible so as to uphold their constitutionality.").

Furthermore, "[e]xercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (quoting *Raines*, 362 U.S. at 22. The Court has instructed that:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. (internal citations and quotation marks omitted)

Washington State Republican Party, 552 U.S. at 450-51.

The relevant question for a court is whether Plaintiffs can demonstrate that the statute is "unconstitutional in all of its applications," or, in other words, whether "no set of circumstances exists under which the Act would be valid." *Washington State Grange*, 552 U.S. at 449; *see also Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 290 n.5 (5th Cir. 2015); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 n.23 (5th Cir. 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006); *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004). In *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 313 (2000), the Court said in Establishment Clause context, the Court will look to the factors articulated in *Lemon v. Kurtzman* 403 U.S. 602, 612 (1971).

"The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also In re IFS Fin. Corp.*, 803 F.3d 195, 208 (5th Cir. 2015). The Fifth

Circuit has said "[s]tandard principles of constitutional adjudication require courts to engage in facial invalidation only if no possible application of the challenged law would be constitutional." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (citing *Salerno*, 481 U.S. at 745).[3]

First, religious accommodation and conscience laws are not facially unconstitutional. *See infra*, at n.5, and the Fifth Circuit foreshadowed this intersection between First and Fourteenth Amendment interests post-*Obergefell*. In *Campaign for Southern Equality v. Bryant*, 791 F.3d 625 (5th Cir. 2015) (*CSE I*), quoting *Obergefell v. Hodges*, No. 14–556, —— U.S. ——, 135 S.Ct. 2584 (June 26, 2015), the court stated that "[h]aving addressed fundamental rights under the Fourteenth Amendment, the [Supreme] Court invoked the First Amendment:

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

Id. at 626 (quoting *Obergefell*, 135 S.Ct. at 2607).

> *Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court. *We express no view on how controversies involving the intersection of these rights should be resolved but*

[3] H.B. 1523 states that it "shall be construed in favor of broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by state and federal law." H.B. 1523 § 8(1). Whether an invalid or unconstitutional portion of a statute is severable is an issue of state law. *See e.g. Virginia v. Hicks*, 539 U.S. 113, 121 (2003). The Mississippi Code contains a general severability provision. *See* Miss. Code Ann. § 1-1-31; *see also* Miss. Code Ann. § 1-3-77.

> *instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them.*

Id. (emphasis supplied). This is precisely the balance the Act strikes between the First and Fourteenth Amendment. For instance, Section 3 (8)(a) protects same-sex couples' right to marry under the Fourteenth Amendment in *Obergefell,* (no impediment or delay as a result of any recusal) while providing an appropriate and constitutionally permissible accommodation for those persons with "sincerely held religious beliefs or moral convictions" recognized under the First Amendment. H.B. 1523, § 2.

Specifically, the Act prohibits State government from discriminating against those who hold the beliefs set forth in Section 2. Under *Obergefell* and *CSE I*, H.B. 1523 represents a constitutionally permissible accommodation between same sex couples' right to marry under the Fourteenth Amendment and those with a sincerely held religious beliefs or moral convictions under the First Amendment's Free Exercise Clause. Moreover, the Act does not infringe upon Plaintiffs' First Amendment guarantee of free exercise.

Similar religious and conscience-based statutory accommodations have long been recognized relative to public functions. For instance, immediately following *Roe v. Wade*, 410 U.S. 113 (1973), Congress recognized the need to protect health care providers who have religious or moral objections to performing abortions. Congress did so through passage of 42 U.S.C. § 300a-7(a) which prohibits authorities from imposing requirements contrary to religious beliefs and moral convictions in public funding of abortion. *Id.* (receipt of public funding does not authorize any court or any public official to require: "(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure would be contrary to his religious beliefs or moral

convictions."). *Id.*[4] The Act does nothing less than recognize the right of persons with "sincerely held religious beliefs or moral convictions" to be free from government discrimination.[5] Plaintiffs have failed to demonstrate that they have a substantial likelihood of success on the merits as to their facial challenge.

B. Plaintiffs' Lack Article III Standing And Their Claims Are Not Ripe.

Plaintiffs fail to demonstrate that they have standing as to each defendant in this case. *See Campaign for Southern Equality v. Mississippi Dept. of Human Servs*., ---F.3d ---, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016) ("*CSE II*"). Moreover, even if the Plaintiffs had standing, their claims are not ripe. *See, e.g.*, *Google Inc. v. Hood*, 2016 WL 1397765 (5th Cir Apr. 8, 2016), as *modified* (vacating district court's preliminary injunction for lack of ripeness).[6]

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[4] *See, e.g.,* The Church Amendments, 42 U.S.C. § 300a-7 (West 2011) (even though entities receive federal funds, personnel from funded entities may refuse to provide or perform abortions or sterilizations if those procedures violate their religious or moral beliefs); The Coats Amendment, 42 U.S.C. § 238n (West 2011) (neither federal, state, nor local governments may discriminate against entities that refuse to provide or require abortion training or individuals who refuse abortion training); Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2008) (every year since 2004, Congress attaches the "Weldon Amendment" to the yearly Labor Health and Human Services (LHHS) appropriations bill; the Amendment forbids federal agencies and programs, and state and local governments that receive money under the act, from discriminating against individuals or entities, including health insurance plans, because they refuse to provide, pay for, provide coverage of, or refer for abortions). In *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 830 (D.C. Cir. 2006), the court stated that "Congress, since 1996 has forbidden 'discrimination' against an individual who 'refuses . . . to perform . . . abortions, or to provide referrals for . . . abortions.'" *Id.* (citing Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 515, 110 Stat. 1321, 1321-224 (codified at 42 U.S.C. § 238n (a)(1), (c)(2)). The court found that ". . . the 1996 provision hasn't given rise to the parade of horribles that plaintiff hypothesizes—not even a single horrible." *Id.*

[5] The Ninth Circuit in *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311 (9th Cir. 1974) rejected an Establishment Clause challenge to the Church Amendments because plaintiff "fail[ed] to distinguish between an action taken to preserve 'government('s) neutrality in the face of religious differences' and action which affirmatively prefers one religion over another. Here Congress sought to retain its neutrality in the debate over the morality of voluntary sterilizations by preventing the reception of federal health care program funds from being used as a basis for compelling a hospital to perform such surgery against the dictates of its religious or moral beliefs." *Id.*

[6] "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical." *New Orleans Pub. Serv., Inc., v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987). Ripeness "separates those matters that are

In *CSE II*, the district court reiterated that "standing is not . . . a mere technicality, and its applicability differs . . . with respect to the various Plaintiffs and the officials against whom they bring this suit." *Id.* at *2. It is well-established that a preliminary injunction is never appropriate when the moving parties lack Article III standing. *Prestage Farms, Inc. v. Board of Sup'rs of Noxubee County, Miss.*, 205 F.3d 265, 267-68 (5th Cir. 2000), *reh'g en banc denied*, 215 F.3d 1081 (vacating preliminary injunction for lack of standing and remanding for dismissal).

First, a plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—that is the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6). Plaintiffs bear the burden of establishing its existence. *Lujan* 504 U.S. at 560.

In reversing the Ninth Circuit this term, the Supreme Court again reiterated that an injury-in-fact must be "concrete *and* particularized." *Spokeo, Inc. v. Robins* 136 S.Ct. 1540,

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premature because the injury is speculative and may never occur from those that are appropriate for judicial review. "The justiciability doctrines of standing, mootness, political question, and ripeness all originate in Article III's case or controversy language." *Choice Inc. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012). "[I]n measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp.3d 604 (M.D. La. October 29, 2015). For the reasons articulated as to the hypothetical and conjectural nature of Plaintiffs' claims with regard to standing, their claims are not ripe.

1548 (2016) (emphasis supplied). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* (citations omitted). The Court stated that "[p]articularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis . . . that independent requirement was elided." *Id.* The Court elaborating on the meaning of "concrete" said:

> A "concrete" injury must be "de facto "; *that is, it must actually exist*. When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract. Concreteness, therefore, is quite different from particularization. (internal citations omitted).

Id. at 1548 (emphasis supplied). The Court concluded that "[b]ecause the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete." *Id.* at 1549.

The Supreme Court has emphasized that plaintiffs seeking relief under the Establishment Clause must meet the same irreducible minimal constitutional requirements as in other areas of the law. *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 133-34, 143 (2011). The Court has recognized two ways in which an Establishment Clause plaintiff may satisfy the Article III: (1) economic injury, *i.e.* taxpayer standing, *Flast v. Cohen*, 392 U.S. 83 (1968), and (2) non-economic injuries, *Van Orden v. Perry*, 545 U.S. 677 (2005). Plaintiffs have neither taxpayer standing nor have they suffered the type of non-economic injury required for Establishment Clause standing.

(1) Taxpayer Standing.

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court held a plaintiff's status as a taxpayer is generally inadequate to establish standing. In *Flast*, the Court created a "narrow exception" that taxpayer standing may be enough in an Establishment Clause case if there is a sufficient nexus between plaintiff's status as a taxpayer, the expenditure of tax funds,

and the law challenged. However, the *Winn* Court found a plaintiff mush show a logical link between the taxpayer status and the type of law attacked, and a nexus between the plaintiff's taxpayer status and the precise nature of the alleged infringement. *Winn*, 563 U.S. at 138-39. In other words, a plaintiff has to show that such a claim is "a-good faith pocketbook action" in that the taxpayer has been economically injured because state taxes are being spent specifically to carry out the challenged law—the mere "incidental expenditure of tax funds" is not enough. *Winn*, 563 U.S. at 138-39 (citing *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952)).

Plaintiffs' rely on *Henderson v. Stalder*, 287 F.3d 374, 381 n.7 (5th Cir. 2002); *Doe el rel Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 & n.2 (5th Cir. 1999) and *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). Plaintiffs state they "live in Mississippi [and] pay state taxes, including state income taxes." Pls.' Mem. at 31. They offer three ways H.B. 1523 purportedly supports their taxpayer standing theory: (1) Section 6 which provides for compensatory damages and reasonable attorneys' fees; (2) direct expenditure to fund advocacy by prohibiting government from withholding, reducing, or materially altering the terms and conditions of the items listed in Section 4; and (3) direct expenditure of taxpayer funds to keep records of officials recuse under Section 3(8)(a). *Id.* at 31-32.

In citing *Henderson*, plaintiffs try to distinguish the Louisiana law because the court found the "statute at issue require[d] the payment of an additional . . . fee, in addition to the regular motor vehicle license fees, to offset a portion of the associated administrative costs." *Henderson*, 287 F.3d at 381. Plaintiffs surmise that because H.B. 1523 does not have a comparable provision as in *Henderson* (where the court found no standing), tax revenues will be spent to support the Act. The absence in the Act of a comparable fee provision in no way

relieves Plaintiffs of their obligation to demonstrate "a nexus between the plaintiff's taxpayer status and the precise nature of the alleged infringement. *Winn,* 563 U.S. at 138-39.

With respect to the three categories identified by Plaintiffs, they do not allege any facts showing the required nexus between their taxpayer status and H.B. 1523.[7] Plaintiffs in essence argue that because they are taxpayers and because they believe tax revenues will be expended in support of H.B. 1523, they have met their burden. This is not the test in *Winn*. First, H.B. 1523 does not appropriate any funds for carrying out the law, nor does the Act require expenditure of state tax revenues. And with respect to the alleged expenditure of funds for the State Registrar to maintain records of officials who recuse under Section 3 8(a), such "incidental expenditure[s]" do not satisfy *Doremus*. Plaintiffs have not shown that funds that might be expended in the event that Moulder receives recusals would be anything other "incidental expenditures" carried out in the course of business. Further, even if Plaintiffs could show an injury-in-fact, they have not alleged much less demonstrated the causation and redressability prongs of Article III. *Winn*, 563 U.S. 125, 133-34. Plaintiffs do not have taxpayer standing.

(2) Non-Economic Injury

The Supreme Court has acknowledged that in proper circumstances, non-economic injuries can be sufficient to establish standing for an Establishment Clause challenge. *Van Orden*, 545 U.S. at 682-83. However, the Court has limited the type of non-economic injury that is sufficient holding that "the psychological consequence presumably produced by observation of

[7] For instance, Plaintiffs allege that tax revenues may be expended in furtherance of the State Registrar having to maintain a list of people who might recuse under Section 3 (8)(a). However, Plaintiff Hrostowski is married and thus there is no nexus between her status as a taxpayer and that provision of the Act. CSE has simply alleged they have members who pay income taxes in Mississippi. CSE has not alleged, nor can they demonstrate, any nexus between its unidentified members and the provisions of Section 3 (8)(a). There number of speculative events that would have to occur to implicate Section 6 which preclude Plaintiffs from establishing the required nexus.

conduct with which one disagrees" is not enough to establish standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 485-86 (1982). Further even if a plaintiff meets the injury requirement, based on taxpayer status or repeated unwelcome confrontation with an offensive religious symbol, Plaintiffs must still also satisfy the traceability and redressability requirements. *Winn*, 563 U.S. at 143. They have not.

Plaintiffs rely on *Murray v. City of Austin, Tex.*, 947 F.2d 147, 151-52 (5th Cir. 1991), *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010 (en banc) and *Awad v. Ziriax*, 670 F.3d 111 (10th Cir. 2012). These cases are inapposite. *Murray* is easily distinguishable because there plaintiff objected to being confronted with a Christian *cross in insignia*. The Fifth Circuit, in finding plaintiff did not have standing, stated:

> In so ruling, we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases, such as *Lynch v. Donnelly* . . . (plaintiffs were the American Civil Liberties Union and residents of the community in which the crèche in issue was displayed in a private park, who were also members of the ACLU) and *County of Allegheny v. American Civil Liberties Union* . . . (plaintiffs were the ACLU and several residents of a community where a crèche and a menorah were displayed in the County Courthouse and just outside the City–County Building respectively).

Id. at 151-52. This case does not involve a religious symbol which "confronts" Plaintiffs, which even in *Van Orden*, the Court found insufficient to confer standing.

Likewise, the Oklahoma constitutional amendment challenged in *Awad* bears no resemblance to H.B. 1523. In *Awad*, the court held that a plaintiff, who was of Muslim faith, had Establishment Clause standing because he alleged the proposed Oklahoma constitutional amendment would have *specifically barred the use of Sharia law*. 670 F.3d at 1122. The Tenth Circuit compared "the personal and unwelcome contact" plaintiff had with the constitutional amendment to the contact plaintiffs in other cases (*Lynch*, *County of Allegheny*) had with

government-sponsored religious symbols in the creche/menorah cases. *Id.* Plaintiffs try to analogize H.B. 1523 to the constitutional amendment in *Awad*. The flaw in this theory is readily apparent from the *Awad* Court's analysis. *Id.* at 1120. The Oklahoma constitutional amendment at issue constituted *an express prohibition* on the use of Sharia law, an integral part of plaintiffs' religion:

> The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law . . . and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.

Id. at 1117-18 (emphasis supplied). H.B. 1523 contains no prohibition on Plaintiffs practicing any part of their religion as in *Awad*. In fact, H.B. 1523 does just the opposite by affording an accommodation to **any** person who holds the "sincerely held religious beliefs or moral convictions" regardless of particular religion, religious faith or denomination. Plaintiffs merely assume for their argument that the religious beliefs or moral convictions defined in Section 2 of the Act apply to particular religious denominations. This is "whole cloth" devised for the sake of argument as H.B. 1523 does not identify, prefer or endorse one religion or denomination over another. H.B. 1523 must be read as it is written.

After *Awad*, the Tenth Circuit in *COPE v. Kansas State Bd. of Educ*., --- F.3d ---, 2016 WL 1569621 (Apr. 19, 2016), stepped away from its expansive standing analysis in *Awad* finding plaintiffs who challenged certain Kansas educational standards lacked standing. In *COPE*, plaintiffs alleged that by attempting to adopt "a non-religious worldview in the guise of science education . . . driven by a covert attempt to guide children to reject religious beliefs" the Kansas educational standards violated the Establishment Clause. *Id.* In distinguishing *Awad*, the court emphasized that in *Awad*, the proposed law "*targeted the Muslim religion explicitly* and

interfered with the plaintiff's ability to practice his faith and access legal processes." *Id.* at *2 (emphasis supplied). The *COPE* Court concluded plaintiffs had not "offer[ed] any allegations to support the conclusion that the [educational standards were] a government-sponsored religious symbol." *Id.* (citation omitted). As in *COPE*, Plaintiffs have not and cannot demonstrate that the Act constitutes a "government sponsored religious symbol."

Plaintiffs' reliance on *Catholic League* is also misplaced. Notably, the district court in *COPE* distinguished the Ninth Circuit's 6-5 decision in *Catholic League*. *See COPE v. Kansas State Bd. of Educ.* 71 F. Supp.3d 1233, 1248 (D. Kan. 2014). The district court acknowledged the *Awad* Court's reference to *Catholic League*. *Id.* The district court stated that "though the non-binding city resolution in *Catholic League* conveyed 'a government message,' the proposed constitutional amendment in *Awad* did more: it conveyed 'more than a message; *it would impose a constitutional command'* prohibiting the consideration of Sharia law in state courts." *Id.* The district court concluded that "the Tenth Circuit did not rely on the Ninth Circuit's reasoning [in *Catholic League*] that a 'government message' conveyed by a non-binding resolution is sufficient, by itself, to allege an injury to establish standing." *Id.* at 1249.

In fact, the district court in *COPE* was correct opining that:

> [T]he Tenth Circuit would not reach the same conclusion on standing as the Ninth Circuit reached in *Catholic League* on the facts alleged by Plaintiffs here. Even if the Tenth Circuit were to apply the reasoning of *Catholic League* to the facts presented in this case, the Court predicts that it would conclude plaintiffs' allegations were more like those made in *Valley Forge* than allegations at issue in *Catholic League*.

Id. at 1249. This case, like *COPE*, is factually distinguishable from *Catholic League*. Nothing in H.B. 1523 targets a religion, like *Awad*, or condemns a particular religious viewpoint like *Catholic League*. Plaintiffs try to key on the fact that in *Catholic League*, the court found

standing even though the resolution was non-binding whereas H.B. 1523 has the force of law. This comparison is illusory.[8]

The district court in *COPE* held that "[u]nlike the plaintiffs in *Catholic League*, plaintiffs have not alleged the [school] Board's adoption of educational standards *denounces*, *condemns*, or *disapproves* of their religion." *COPE*, 71 F. Supp.3d 1244 (D. Kan. 2014) (emphasis supplied). As in *COPE*, H.B. 1523 does not denounce, condemn or disapprove of any religious beliefs held by Plaintiffs or anyone for that matter, but prohibits State government from taking discriminatory action against those persons with a "sincerely held religious beliefs or moral convictions." H.B. 1523, § 2. The Act proscribes government action against persons with religious beliefs or moral convictions, and does not proscribe or condemn any conduct or beliefs or convictions held by Plaintiffs as in *Awad* and *Catholic League*.

Further distinguishing the H.B. 1523 from *Awad* and *Catholic League* is that the only affirmative command in the Act is directed to the person seeking recusal: "[t]he 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." H.B. 1523, § 3 (8)(a). Thus, the on the one hand, the Act commands that same-sex couples not be impeded or delayed in obtaining a marriage license, while on the other hand, accommodating

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[8] The resolution in addressed, by name, a specific Cardinal in the Catholic Church and called the Archbishop and the Catholic Charities defy the Cardinal's directives. The resolution read in part:

> WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and
>
> * * *
>
> WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear[.]

Catholic League, 624 F.3d at 1047.

persons with "sincerely held religious belief or moral convictions" only after such persons have taken the steps required in Section 3 (8)(a).

Like Plaintiffs in this case, the *COPE* plaintiffs also alleged the adoption of the educational standards "sends a message that they are 'outsiders' within the community." *Id.* at 1249. The court held, however, that "[t]his message, even if true, is not sufficient to confer standing because the plaintiffs only allege an '*abstract stigmatic injury*' rather than a direct and concrete injury." *Id.* (emphasis supplied) (citing *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), *cert denied*, 562 U.S. 1271 (2011); *see also Allen v. Wright*, 468 U.S. 737, 795 n.22 (1984) (stigmatic injury requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine).

But beyond this, Plaintiffs do not have a cognizable right to for a particular government official give them a marriage license. In *Slater v. Douglas County*, 743 F. Supp. 2d 1188 (D. Oregon 2010) the court reached this logical conclusion:

> [A] domestic partnership registrant has no cognizable right to insist that a specific clerical employee with religious-based objections process the registration as opposed to another employee (having no such objection). ***So long as the registration is process in a timely fashion, the registrant's have suffered no injury***.

Id. at 1195 (emphasis supplied). The court aptly noted that "[t]here is no reason to even inform them of [the employee's] religious views or the [c]ounty's accommodation of those views. *Id*. at 1195.

Plaintiffs offer several hypothetical circumstances under which they claim H.B. 1523 "impedes the ability of gay and lesbian couples and individuals to fully participate in the legal and social order." Compl., [Dkt. No. 1], ¶ 100; Pls. Mem. at 16-20. Standing, however, is

directly related to Plaintiffs' ability to show that they face a substantial threat of irreparable injury for obtaining injunctive relief. This is because "[t]he equitable remedy [of injunction] is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Plaintiffs cannot demonstrate a real or immediate threat of substantial and immediate irreparable injury.

3. No Causal Connection to These Defendants

Plaintiffs have not alleged that their injuries are "fairly traceable" to these defendants and thus suffer from the same flaw as in *CSE II*. The second *Lujan* prong requires a "causal connection between the alleged injury and the conduct complained of—in other words, the alleged injury must be traceable to the defendant and not the result of the independent action of a third party." *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (citing *Lujan*, 504 U.S. at 60–61).

a. The Governor

Plaintiffs allege that Governor Bryant, (1) is the chief executive of the State of Mississippi and "responsible for ensuring compliance with state law, and (2) that he "bears responsibility for the formulation and administration of the policies of the executive branch, including administrative agency policies." Compl., ¶¶ 19-20. Plaintiffs made similar generalized averments against Governor Bryant in *CSE II*, which were rejected by the court. *CSE II*, 2016 WL 1306202 at *4 (Plaintiffs' injuries not fairly traceable to any act by the Governor of Mississippi). The circumstances are no different in this case and Plaintiffs cannot show their alleged injuries are fairly traceable to Governor Bryant.

b. The Attorney General

Like *CSE II*, some of these same Plaintiffs sued Attorney General Hood and the result should be precisely the same—they lacked standing in *CSE II* and they lack standing to pursue claims against the Attorney General in this case. Plaintiffs allege that "Attorney General Hood is the chief law enforcement officer of the State. . . ." Compl., ¶ 21. In *CSE II*, the district court stated that "[a]s noted in *Okpalobi*, the required causal connection comes from an officer's "coercive power" regarding the disputed statute. 244 F.3d at 426 (holding plaintiff must show "power to enforce the complained-of statute"). *Id.* at *6.

"The duty to defend the state in litigation is not the same thing as the power to enforce a statute. *Id. Cf. Harris v. Cantu*, No. H–14–1312, 2014 WL 6682307, at *5 (S.D. Tex. Nov. 24, 2014) (holding that attorney general's duty to defend does not trigger *Ex parte Young* exception) (citing *Ex parte Young*, 209 U.S. 123 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he "might represent the state in litigation involving the enforcement of its statutes")). This case mandates no different result than in *CSE II* as Plaintiffs have failed to show the necessary "coercive power" required by *Okpalobi*.

c. Executive Director Davis

With respect to the Executive Director of MDHS, Plaintiffs have failed to show a causal connection between the Plaintiffs in this case and Mr. Davis. Plaintiffs rely on *CSE II* for the proposition that "Mr. Davis is . . . in charge of the agency 'statutorily empowered to set policies and participate directly in the adoption process'. . . ." Compl., ¶ 23 (citing *CSE II*, 2016 WL 1306202, at * 12).

Plaintiffs have not alleged a single set of circumstances in which a causal connection exists with respect to their claims. Plaintiff Hrostowski has not alleged she plans on seeking adoption services involving the MDHS. Further, Plaintiff CSE has not alleged nor demonstrated that any of its members plan to use adoption services involving MDHS. Thus, Plaintiffs have simply alleged an abstract proposition which has no causal connection to their Establishment Clause claim.

d. State Registrar Moulder

Plaintiffs' claim against State Registrar Moulder is that Section 3 (8)(a) requires her to accept notice and maintain records for those persons who seek recusal under the act. Compl., ¶ 23. But while this looks appealing on the surface, it crumbles under scrutiny. With respect to Plaintiff Hrostowski, because she is married there is no causal connection with respect to her and State Registrar Moulder. Plaintiff CSE fairs no better as to causation. *See K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (Board could unilaterally preclude the Plaintiffs from claiming benefits of limited liability and independent medical review).

Unlike *LeBlanc* State Registrar Moulder does not "unilaterally preclude Plaintiffs from claiming benefits of [the law]." Instead, Plaintiffs' causation theory necessarily requires further speculation that for State Registrar Moulder to "keep a record" she must first receive one from a government employee who might choose to provide one in the future. This has not yet occurred and cannot be known with any degree of certainty if and when she might receive a recusal after July 1, 2016. State Registrar Moulder has no control over whether she receives or does not receive a recusal notice.

4. Plaintiffs Have Not Demonstrated Redressability Under *Lujan*

Under the third *Lujan* prong, Plaintiffs must show "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Plaintiffs cannot meet their burden. For instance, Plaintiffs cannot show that it is likely as opposed to speculative that a favorable decision will prevent a person from recusing himself or herself from issuing marriage licenses, from providing wedding-related services, or declining to provide health-care or adoption related services.

C. CSE Lacks Associational Standing

CSE avers that it has associational standing on behalf of its members. Compl., ¶ 12. Essentially, CSE asserts that it has standing because courts in this district have found that it had standing in previous cases. Compl., ¶ 9. That CSE has been found to have had associational standing in other cases is simply *ipse dixit* reasoning and does not support standing in this case. The Supreme Court in *Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) held:

> A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. The first two components of *Hunt* address constitutional requirements, while the third prong is solely prudential. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996).

D. No Substantial Likelihood of Success for Establishment Clause Claim.

The Fifth Circuit has summarized three tests the Supreme Court has used in various Establishment Clause challenges: (1) the *Lemon* test; (2) the Coercion test; and (3) the Endorsement test. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, (5th Cir. 2001):

> First, the three-part inquiry of *Lemon v. Kurtzman* asks (1) whether the purpose of the practice is not secular; (2) whether the program's primary effect advances or inhibits religion; and (3) whether the program fosters an excessive government entanglement with religion. The second test, the "coercion" test, measures whether the government has directed a formal religious exercise in such a way as to oblige the participation of objectors. The final test, the "endorsement" test, prohibits the government from conveying or attempting to convey a message that religion is preferred over non-religion.

Id. Although the *Lemon* test has been much-criticized, a majority of the Court has never expressly overruled *Lemon*. Regardless, H.B. 1523 is constitutional under *Lemon* or the endorsement test as a reasonable accommodation of religious beliefs and moral convictions. Plaintiffs do not contend the coercion test applies.

1. H.B. 1523 Does Not Favor A Particular Religion.

H.B. 1523 does not favor any particular religion. The Supreme Court has said that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Here, H.B. 1523 does not even have the incidental effect of burdening Plaintiffs' religious practice. In fact, Plaintiff Hrostowski states in her declaration that she has "many sincerely held religious beliefs. . . ." [Dkt. No. 2-1], ¶ 13. Nothing in H.B. 1523 infringes on her sincerely held religious beliefs.

Plaintiffs advance the theory that H.B. 1523 impermissibly discriminates between religious sects citing *Larson v. Valente*, 456 U.S. 228, 244 (1982). Pls.' Mem. at 12. However, a wide gulf exists between H.B. 1523 and the statute in *Larson*. In *Larson*, the state used the statute's fifty per cent rule to compel a particular church to register and report under the law. Because the fifty per cent rule applied only to religious organizations, the Court concluded that for purposes of the challenging that application, the church was a religious organization within the meaning of the act. *Id.* The Court found that having to complete the registration statement

was a substantial burden. However, *Larson* involved a law that made "explicit and deliberate distinctions between different religious organizations[.]" *Id.* at 456 U.S. at 246 n.23.[9] But H.B. 1523 makes no such distinction between religions or religious organizations. Plaintiffs' argument, at a minimum is nothing more than an unsupported generalization about the particular beliefs of those who subscribe to a particular religious denomination and fails to account for the myriad of different intra-denominational opinions about same-sex marriage.

Plaintiffs fail to explain how H.B. 1523 favors one religious denomination over another in any concrete sense like *Larson*. For example if more than half of a particular denomination's self-declared adherents support same-sex marriage, can it be said that H.B. 1523 favors one religious sect over another even if that denomination doctrinally does not favor same-sex marriage? Unlike the law in *Larson* which set an arbitrary threshold (i.e. fifty-percent) below which a religious organization was *required* to register under the statute, H.B. 1523 imposes no similar burdens on any religious organization. Moreover, the *Larson* Court found that having to register under the statute imposed a significant burden in light of the depth of information that had to be provided. H.B. 1523 is neutral with respect to religious sects and the sincerely held religious beliefs or moral convictions can be asserted by anyone with those beliefs.

[9] Plaintiffs at various times refer to Miss. Const. art. III, § 18 and state that H.B. 1523 violates that provision of the Mississippi Constitution. Plaintiffs also refer at length to Mississippi's RFRA, Miss. Code Ann. § 11-61-1(6). *See* Pls.' Mem. at 13-16. Plaintiffs' seek no relief under the Mississippi Constitution or Mississippi statutory law. To the extent Plaintiffs urge such claims, they are barred by the Eleventh Amendment and these defendants specifically assert Eleventh Amendment immunity. The Eleventh Amendment precludes suits in federal court against state officials named in their official capacities because such suits are essentially claims against the State. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The Eleventh Amendment immunity not only bars federal claims against the State, but it also bars all state law claims asserted against the State in federal court, including state law claims seeking prospective injunctive relief against a state official. *Pennhurst*, 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Larson's holding is also confined to cases involving laws that explicitly discriminate against certain religious or religious groups.[10] In fact, since the case was decided in 1982, the Supreme Court has never relied on *Larson's* strict scrutiny test to invalidate a statute under the Establishment Clause. Thus, *Larson* occupies a relatively obscure position in the Court's Establishment Clause jurisprudence. Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preference: Larson in Retrospect,* 8 N.Y. City L. Rev. 53, 107 (2005) ("[T]he *Larson* doctrine probably merits the obscurity it has long-received."). Further, *Larson* itself establishes that it does not apply to statutes which provide protections to certain religious beliefs, but do not discriminate among religions.

The petitioners in *Larson* argued the Minnesota statute was similar to the federal statute upheld in *Gillette v. United States*, 401 U.S. 437 (1971); *Larson*, 456 U.S. at 246 n.23. In *Gillette*, the Court held that a federal statute which granted draft exemptions to any person who "by reasons of religious training and belief," was "conscientiously opposed to participation in war in any form" did not violate the Establishment Clause, even though it did not provide an exemption to persons who objected on religious grounds to participating in a particular war. 401 U.S. at 441. The Court relied on the fact that the statute "on its face, simply [did] not discriminate on the basis of religious affiliation." *Id.* at 450. To the contrary, the statute "focused on individual conscientious belief, not on sectarian affiliation." *Id.* at 454. The Court concluded that the distinction drawn by the law was supported by neutral and secular justifications. *See id.* at 454-460.

[10] *See Lynch*, 465 U.S. at 679 (nothing that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"); *id.* at 688 (O'Connor, J. concurring) (explaining that *Larson* strict scrutiny is only appropriate when a "statute or practice . . . plaining embodies an intentional discrimination among religions").

The *Larson* Court found *Gillette* to be "readily distinguishable" because under the federal statute, "conscientious objector status was "available on an equal basis to both the Quaker and the Roman Catholic;" whereas the Minnesota law in Larson "focuse[d] precisely and solely upon religious organizations." *Larson*, 456 U.S. at 246 n.23. H.B. 1523, like the statute in *Gillette*, does not discriminate on the basis of religious affiliation; its purpose is to accommodate conscientious beliefs or convictions, not any particular religion, religious denomination or religious group. Any person who holds the beliefs described by H.B. 1523 may invoke the statute's protection, regardless of the religion they practice or the religious denomination to which they belong.

Plaintiffs devote considerable attention in arguing H.B. 1523 "affords far greater benefits and protections to people who hold the [sincerely held religious belief or moral conviction] than to others. . . ." Pls.' Mem. at 15. Plaintiffs seek to turn the Act on its head citing *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the Court stated that "[t]he First Amendment mandates government neutrality between religion and religion[.]" *Id.* But Plaintiffs take this statement too far. H.B. 1523 does not favor one religion over any other religion as any person who holds the beliefs described by H.B. 1523 may invoke the statute's protection, regardless of the religion they practice or the religious denomination to which they belong. Plaintiffs' position flies in the face of the Supreme Court's pronouncement in *Blalock*:

> It does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.

489 U.S at 892.[11] Plaintiffs cite *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) for the proposition that government must be neutral when it comes to competition between sects. *Id.* at 15. But *Zorach* says so much more than the single line extracted by Plaintiffs. In that same passage referenced by Plaintiffs, the Court went on to say that that:

> But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.

Zorach, 343 U.S. at 314. In fact, the Court in *Zorach* upheld a New York law which allowed students to leave school to attend religious classes. *Id.* Like *Zorach*, H.B. 1523 does not thrust any religious sect on Plaintiffs nor make religious observance compulsory and does not coerce any person to attend church, observe a religious holiday or take any religious instruction. The Act provides an accommodation to those who "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." *Obergefell*, 135 S.Ct. at 2607.[12]

2. H.B. 1523 is a Constitutionally Permissible Accommodation.

Plaintiffs also argue the Act "impos[es] the weighty burden of religious accommodation on innocent third parties." Pls.' Mem. at 16. The Supreme Court has held on numerous occasions that government may accommodate religious practices without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987);

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[11] *See Wallace v. Jaffree*, 472 U.S., at 70 (O'Connor, J., concurring) ("The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy");

[12] Plaintiffs reliance on *Sch. Dist. of Abington Tp. Pa. v. Schempp*, 374 U.S. 203, 215 (1963) is misplaced. In *Schempp*, the Court struck down action by states that required schools to start the school day with Bible verses and the recitation of the Lord's Prayer by the students in unison. The Act imposes no such required action.

see also Wisconsin v. Yoder, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemption for churches). In *Locke v. Davey*, 540 U.S. 712 (2004), the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. *Id.* at 718 (citation omitted); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("This does not mean that the law's purpose must be unrelated to religion-that would amount to a requirement 'that the government show a callous indifference to religious groups and the Establishment Clause has never been so interpreted.").

In *Harris v. McRae*, 448 U.S. 297, 319 (1980), the Court affirmed the Hyde Amendment which significantly limited federal funding for abortions and rejected an Establishment Clause challenge. The Court opined that "[a]lthough neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions." *Harris*, 448 U.S. 319-20 (emphasis added). In *Van Orden*, the Supreme Court upheld the passive display of the Ten Commandments at the Texas state capitol:

> [I]t is true that religion has been closely identified with our history and government. The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are earnestly praying, as in duty bound, that the Supreme Lawgiver of the Universe guide them into every measure which may be worthy of his blessing. (Internal citations and punctuation omitted).

545 U.S. at 683 (quoting *Schempp*, 374 U.S. at 212-13); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995) (warning against "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").[13]

Moreover, "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland;* 366 U.S. 420 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678 (1970)). "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example . . . that religion has been closely identified with our history and government and that [t]he history of man is inseparable from the history of religion. *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 434 (1962). The Court in *Cutter v. Wilkinson*, 544 U.S. 709, 717 stated that:

> [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation. . . . The Federal Government may exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment. The constitutional obligation of neutrality is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. (internal citations and quotation marks omitted).

Id. at 719.

Furthermore, the Court recognizes that "not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right." *Planned Parenthood of Se.*

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[13] The Court in *Van Orden* further stated that "[t]hese two faces are evident in representative cases both upholding[4] and invalidating laws under the Establishment Clause. Over the last 25 years the Court has sometimes pointed to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as providing the governing test in Establishment Clause challenges. *Id.* at 685-86. "Yet, just two years after *Lemon* was decided, the Court noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Id*. (citation omitted). *Van Orden*, 545 U.S. at 685-86.

Pennsylvania v. Casey, 505 U.S. 833, 873-74 (1992). For example, the Court has held that "not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Norman v. Reed*, 502 U.S. 279 (1992).

The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie*, 480 U.S. at 144-145; *Amos*, 483 U.S. at 334. In *Amos*, the Court held that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. The Act has a secular purpose because it alleviates governmental interference ("state government shall not take any discriminatory action against a state employee) from those with sincerely held religious beliefs or moral convictions.

Plaintiffs contend that the Act places impermissible burdens on them and in support cite *Estate of Thornton v. Calder*, 472 U.S. 703, 706 (1985) which struck down a state Sabbath law giving employees the right to designate the day of the week for Sabbath observance and not have to work. *Id.* at 706. Plaintiffs compare the Act to the Sabbath law in *Calder* because Plaintiffs believe someone with "sincerely held religious belief or moral convictions" can *automatically* invoke the statute's protection thereby "impos[ing] significant burdens on Mississippians who do not hold the [religious belief or moral conviction]." Pls.' Mem. 17. *Caldor* is inapposite and Plaintiffs' comparison of the two laws is both hypothetical and illusory. In *Caldor* the Court found the statute failed to provide exceptions for circumstances such as the Friday Sabbath observer employed in an occupation with a Monday through Friday or if a high percentage of an

employer's work force asserts rights to the same Sabbath. *Caldor*, 472 U.S. at 709. This is not true for H.B. 1523 which has mandates on individuals seeking protection under the law.

Purported Burdens Claimed by Plaintiffs. Plaintiffs allege that the recusal provision constitutes an impermissible burden. However, Section 3 (8)(a) places the burden solely on the person seeking recusal from issuing a marriage license. A person seeking recusal "**shall** provide prior written notice to the State Registrar. . . ." *Id.* (emphasis supplied). Thereafter, the individual is responsible for "taking all necessary steps to ensure the authorization or licensing of a legally valid marriage is not impeded or delayed as a result of such recusal." *Id.* Obviously if the person fails to comply with Section 3(8)(a), then they would lose the accommodation afforded by the Act. If a government employee impedes or delays their legal right to obtain a marriage license, then Plaintiffs have the same legal recourse that exists today. *See, e.g., Miller v. Davis*, 123 F. Supp.3d 924 (E.D. K.Y. 2015) (County clerk's policy of refusing to issue any marriage licenses likely caused irreparable harm to fundamental due process rights of both opposite-sex and same-sex couples, supporting issuance of preliminary injunction to enjoin the policy). *Id.* at 935

Further, Section 3(4) of the Act provides that the section "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." *Id.* Thus the Act contains a prohibition on when persons under Section 3(4) can or cannot invoke the Act. H.B. 1523 is not comparable to the Sabbath law in *Caldor*.

Plaintiffs allege Section 3(4) allows healthcare professionals and staff to deny marriage counseling or other psychological counseling serves to gay or lesbian patients or to the child of a gay or lesbian couple. The provision actually provides that:

> The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of *treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services* based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. This subsection (4) shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.

Id. (emphasis added). It is undisputed that conscientious objection laws have existed in the medical profession and have been affirmed since 1974. *See supra* n.5; *see also Chrisman*, 506 F.2d at 308. Further, Plaintiffs point to no authority commanding that healthcare worker provide the services described in Section 3(4). A counselor, for example, cannot be legally mandated to provide treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services and thus, Section 3(4) does not alter the status quo relative to Plaintiffs. What the Act does it restrict State government from taking discriminatory action against a health care worker who declines to offer such services.

Moreover, Section 3(4) provides limits that the provision 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. " *Id.* Unlike the *Caldor*, Section 3(4) prohibits a person from invoking their "sincerely held religious belief or moral convictions" in the case of visitation, health care decision-making or emergency medical treatment.

Plaintiffs also hypothesize that by virtue of the Act, they could be denied a table at a restaurant or a room at a hotel. Pls.' Mem. at 18-19. According to Plaintiffs, "[t]he statute is worded so expansively, that it could apply to not just wedding-related businesses but to almost

any business that serves gay or lesbian married couples." *Id.* But Plaintiffs' hypothetical runs contrary to the dictates of *Salerno* that "[t]he fact that [a statute] might operate unconstitutionally *under some conceivable set of circumstances* is insufficient to render it wholly invalid. . . ." *Salerno*, 481 U.S. at 745 (emphasis supplied). Plaintiffs likewise fail to demonstrate how the actions of a person who provides photography, printing, publishing, floral arrangements, dress making, baking, assembly-hall rentals, car-service rentals, and jewelry sales and services, violates Plaintiffs' rights under the Establishment Clause for not providing such goods or services.

Plaintiffs also argue the Act "forbids government, and even private state-court plaintiffs from taking action against individuals that invoke the protections afforded by the law. Pls.' Mem. at 19. This is a non-starter because Plaintiffs have not alleged an equal protection violation. Plaintiffs did reference *Romer v. Evans*, 517 U.S. 620 (1996) in the Complaint, ¶ 30, but did so only by way of historical presentation. Plaintiffs' alleged burden in this regard is simply an equal protection claim masquerading in the Establishment Clause context. Moreover, sexual orientation is not protected under federal law. *See Brandon v. Sage Corp.*, 808 F.3d 266, 274 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation'");

Finally citing to H.B. 1523 Section 3(2), Plaintiffs contend the law creates barriers to raising children." Pls. Mem. at 20.[14] The organizations identified in Section 3(2) (religious organization) cannot be legally compelled to provide the services described in Section 3(2) and thus, H.B. 1523 does not change the status quo.

[14] Section 3(2) provides that [t]he state government shall not take any discriminatory action against a religious organization that advertises, provides, or facilities 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. H.B. 1523 Does Not Impermissibly Advance Religion.

The primary effect of the Act is not to advance religion but to protect an individual's "sincerely held religious beliefs or moral convictions" under the First Amendment which are at odds with but nonetheless intersect with the Fourteenth Amendment rights formally acknowledged in *Obergefell*. The Supreme Court *Lynch* captured this balance:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.* (internal citations, quotation marks omitted).

465 U.S. at 673 (emphasis supplied). The controversy over the morality of same-sex marriage transcends the religious/secular distinction. H.B. 1523 protects those whose beliefs concerning same-sex marriage, after *Obergefell*, are at odds with those views held by supporters of same-sex marriage. Moreover, persons may oppose same-sex marriage for reasons other than religious beliefs.

II. Plaintiffs Cannot Show a Substantial Threat of Irreparable Injury

Plaintiffs have not alleged, much less proved, that they have suffered a cognizable injury in fact sufficient to establish standing. Since Plaintiffs have not even shown the existence of any actionable injury, Plaintiffs have also failed to meet their burden to show a substantial threat of irreparable injury. At the outset, the "central purpose" of a preliminary injunction "is to prevent irreparable harm," *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975), and proof of that irreparable injury "must be proven separately and convincingly" from the likelihood of success

on the merits. *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989). Plaintiffs cannot show anything close to justifying "convincingly" that they will suffer irreparable injury if the injunction does not issue.

III. The Balance of Harms Favors Defendants

Plaintiffs' request for a preliminary injunction in this case must be considered in a substantially different light from the preliminary injunctions sought and obtained in *CSE I* and *CSE II*. In each of those cases, the Plaintiffs were directly and explicitly barred from enjoying rights and privileges that opposite-sex couples enjoyed. Here, Plaintiffs do not stand to suffer any irreparable injury at all. Despite this, Plaintiffs still contend that the balance of harms weighs in favor of an injunction.

This simply ignores reality. On the other side of the ledger, "[when a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Perry* 769 F.3d 890, 895 (5th Cir. 2014) (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *accord Maryland v. King*, —— U.S. ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, Circuit Justice, in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice, in chambers).

Nothing in the Act bars Plaintiffs from exercising their rights and same-sex couples will continue to enjoy the rights and benefits of marriage. The Act protects the right to marry, requiring that a clerk recusing himself or herself from issuing a marriage license "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." H.B. 1523 § 3(8)(a). The Act places a similar obligation on the Administrative Office of Courts if a judge recuses under Section 3 (8)(b).

Further, the Court must balance the potential harm to Plaintiffs based on the alleged Establishment Clause violation with the potential harm to those public officials and others who are conscientious objectors concerning the morality of same-sex marriage (whose Free Exercise rights will continue to be subject to potential harm) if H.B. 1523 is enjoined. Because any potential irreparable harm to Plaintiffs is *de minimums*, and because there are competing fundamental rights protected by the Free Exercise Clause, the balance of harms here favors Defendants, or is neutral.

IV. Granting the Injunction Would Not Serve the Public Interest.

Plaintiffs merely repeat the same argument regarding the public interest prong without analysis and fail to consider the balancing of interests between the First and Fourteenth Amendment. *Obergefell*, 135 S.Ct. at 2607. The State's manifest interest is in enforcing laws that recognizes both constitutional interests which an injunction harms its ability to do so.

CONCLUSION

For the reasons set forth, Plaintiffs' Motion for Preliminary Injunction should be denied.

THIS the 22nd day of June, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document using the ECF system which served a copy on all counsel of record:

THIS, the 22nd day of June, 2016.

/s/ Douglas T. Miracle
DOUGLAS T. MIRACLE