Nos. 16-60477, 16-60478

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

On Appeal from the United States District Court for the Southern District of Mississippi (Northern Division)
Nos. 3:16-cv-00417-CWR-LRA, 3:16-cv-00442-CWR-LRA (Hon. Carlton Reeves)

BRIEF OF AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS (GLAD), NATIONAL CENTER FOR LESBIAN RIGHTS, AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF JUDGMENT

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**Admission Pending*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record for amici curiae GLBTQ Legal Advocates & Defenders (GLAD), the National Center for Lesbian Rights (NCLR), and the American Civil Liberties Union (ACLU) state that GLAD, NCLR, and ACLU are nonprofit corporations with no parent, subsidiary, or stock held by any person or entity, including any publicly held company; and certifies that the following listed 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.

- Rims Barber, *Plaintiff-Appellee*
- Carol Burnett, *Plaintiff-Appellee*
- Joan Bailey, *Plaintiff-Appellee*
- Katherine Elizabeth Day, *Plaintiff-Appellee*
- Anthony Laine Boyette, *Plaintiff-Appellee*
- Don Fortenberry, *Plaintiff-Appellee*
- Susan Glisson, *Plaintiff-Appellee*
- Derrick Johnson, *Plaintiff-Appellee*
- Dorothy C. Triplett, *Plaintiff-Appellee*
- Renick Taylor, *Plaintiff-Appellee*
- Brandiilyne Mangum-Dear, *Plaintiff-Appellee*
- Susan Mangum, *Plaintiff-Appellee*
- Joshua Generation Metropolitan Community Church, *Plaintiff-Appellee*

- Campaign for Southern Equality, *Plaintiff-Appellee*
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Dated: December 23, 2016

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INTEREST OF *AMICI CURIAE*[1]

Through litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (GLAD) works to create a just society free of discrimination based on gender identity and expression, HIV status and sexual orientation. GLAD has litigated widely in both state and federal courts regarding marriage, the federal Defense of Marriage Act, marriage recognition, as well as equal treatment for lesbian, gay, bisexual and transgender (LGBT) persons like all others.

The National Center for Lesbian Rights (NCLR) is a national legal advocacy organization for LGBT people. NCLR has litigated cases representing same-sex couples seeking both the freedom to marry and equal recognition of their marriages in states across the country, including married same-sex couples from Tennessee in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). NCLR has also represented transgender children, parents, and individuals seeking equal protection and recognition in a variety of employment, family law, school, asylum, and health care cases.

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU and its state affiliate, the ACLU of Mississippi, have advocated for equal rights of LGBT people and the freedom to marry for same-sex couples in Mississippi and across the country.

SUMMARY OF THE ARGUMENT

Over the past twenty years, the Supreme Court has made clear that LGBT citizens are entitled to equal treatment before the law. The Court has struck down attempts to treat LGBT individuals as "stranger[s]" to the law's protection, *Romer v. Evans*, 517 U.S. 620, 635 (1996), and ruled that states cannot "demean [LGBT people's] existence" by interfering with their personal decisions about intimacy and family relationships, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Windsor v. United States*, 133 S. Ct. 2675, 2692–93 (2013). Most recently, in rejecting state marriage bans in *Obergefell v. Hodges*, the Supreme Court ruled that LGBT citizens share the fundamental right to marry "on the same terms and conditions as opposite-sex couples" and were entitled to "equal dignity" before the law. 135 S. Ct. 2584, 2605 (2015). Soon after, this Court admonished that *Obergefell* was the "law of the land," and should "not be taken lightly by actors

within the jurisdiction of this Court." *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015).

The Mississippi legislature responded with HB1523, a law that facilitates and immunizes discrimination against LGBT citizens in a range of activities, from celebrating marriages to forming a family to medical care and counseling. *See* HB1523, § 3(1)–(8). While *Obergefell* sought to remove the "instability and uncertainty" imposed on LGBT people and their families by the denial of equal recognition under state marriage laws, 135 S. Ct. at 2607, HB1523 forces LGBT couples back into a state of uncertainty as to whether their rights and marriages will be recognized—and whether the law truly treats them as equals.

HB1523 fundamentally departs from traditional conscientious-objector statutes, which allow individuals to opt out of certain activities—such as war, executions and abortion—based on closely held beliefs about *those activities*. By contrast, HB1523 authorizes the refusal of a range of services to a *class of people* based on their status.

As the District Court recognized, HB1523 imposes immediate harm on Plaintiffs, both by limiting their rights under existing law and by imposing the indignity of unequal treatment. Those harms are more than sufficient to support standing.

The District Court also correctly ruled that HB1523 violates the Equal Protection Clause. This Court should subject HB1523 to heightened scrutiny, because it infringes on fundamental liberties and selectively imposes burdens on LGBT people. In addition, because HB1523 privileges three specific religious or moral beliefs that target LGBT people as a class—and because religious beliefs are already adequately protected under existing law—it fails even rational basis review. The Court should affirm the decision of the District Court.

ARGUMENT

I. HB1523 ENSHRINES DISCRIMINATION AGAINST LGBT MISSISSIPPIANS INTO STATE LAW.

A. HB1523 Was Enacted In Direct Response To *Obergefell*'s Recognition of LGBT Citizens' Right to Marry.

In the first legislative session after *Obergefell*, a number of Mississippi legislators expressed their displeasure at the Supreme Court's decision requiring states to recognize the marriages of same-sex couples. Some believed that *Obergefell* was "in direct conflict with God's design for marriage as set forth in the Bible," ROA.16-60477.316 (quoting Speaker of the House Philip Gunn), while others asserted that businesses and individuals providing marriage-related goods and services would "not [be] comfortable" dealing with same-sex couples. *E.g.*, Tr. of Mar. 30, 2016 Senate Floor Debate at 3:1-3, 24:12–13, *Campaign for S. Equal. v. Bryant*, No. 3:16-cv-00442-CWR-LRA (S.D. Miss. Dec. 6, 2016), ECF

No. 53. *Discomfort* with same-sex couples was explicit throughout the legislature's consideration of the law. *Id.*

As enacted, HB1523 purports to protect holders of three privileged beliefs ("Section 2 Beliefs"): "[m]arriage is or should be recognized as the union of one man and one woman," "[s]exual relations are properly reserved to such a marriage," and "[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." HB1523, § 2. HB1523 grants an array of special protections to citizens who hold those selectively favored beliefs. In doing so, it systematically diminishes the rights and protections of LGBT citizens on account of their LGBT status.

B. HB1523's Unique Provisions Sanction Discrimination in Fundamental Aspects of LGBT Mississippians' Lives.

Appellants' attempt to characterize the scope of HB1523 as "exceedingly limited," Appellants' Br. 8, and related only to "events related to the provision of marriage," ROA.16-60477.755, does not square with the text of the law itself.

1. HB1523 Permits Discrimination in Situations Far Beyond Marriage-Related Services.

HB1523's reach extends to aspects of LGBT citizens' lives that are entirely unrelated to "marriage-related goods and services." For example, Section 3(3) prohibits any state actor from taking action against a foster or adoptive parent who

treats a child in a "manner consistent with" their Section 2 Beliefs. HB1523 thus protects not only caregivers who may be unsupportive of an LGBT youth's identity, but those who may employ harmful techniques—including so-called "conversion therapy"[2]—to impose their beliefs. At best, Section 3(3) creates an exception to the "best interest and welfare of the child" standard that otherwise governs family law and child placement in Mississippi. *E.g.*, *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *see also* Miss. Code Ann. § 43-21-105. At worst, HB1523 could prevent the Mississippi Department of Child Protective Services from intervening on behalf of a child if mistreatment is based on a Section 2 Belief.

To take another example reaching deep into everyday life, Section 3(4) authorizes any person to decline to participate in the provision of "psychological, counseling, or fertility services" because of their Section 2 Beliefs—regardless of professional ethical standards or institutional policies.[3] Under current Mississippi law, a doctor is afforded a broad right of conscience, but nonetheless cannot "refuse to participate in a health care service regarding a patient because of [a]

[2] "Conversion therapy" is "not supported by credible evidence," "has been disavowed by behavioral health experts and associations," and "may put young people at risk of serious harm." *See* Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Ending Conversion Therapy* 1 (2015).

[3] *See, e.g.*, Am. Sch. Counselor Ass'n, *ASCA Ethical Standards for School Counselors* 1 (2016) (requiring that school counselors "[r]espect students' and families' . . . sexual orientation" and "gender identification/expression").

patient's . . . sexual orientation." Miss. Code Ann. § 41-107-5(1). But under Section 3(4), LGBT Mississippians could be turned away by a counselor or medical professional *at any time* because of their LGBT status. Even students seeking help from school counselors, state psychologists, or suicide hotline attendants—who would otherwise be required to come to the student's aid, *see* Miss. Code Ann. § 37-9-79—could be turned away or subjected to unprofessional treatment. Given the well-documented vulnerability of LGBT youth,[4] arbitrary denials of service or unprofessional treatment based on Section 2 Beliefs are particularly dangerous. *See* Campaign for S. Equal. ("CSE") Appellees' Br. 7.[5]

Section 3(4) also burdens married couples trying to start families. Combined with Section 3(2)'s authorization for broadly defined "religious organization[s]" to deny LGBT people's right to adopt, Section 3(4)'s authorization to deny "fertility services" to LGBT couples establishes yet another barrier to equal treatment of same-sex couples who wish to build a family with children. *Cf. Campaign for S. Equal. v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016)

[4] *E.g.*, Advocates for Youth, *Gay, Lesbian, Bisexual, Transgender and Questioning (GLBTQ) Youth: A Population in Need of Understanding and Support* 1 (2010) (citing national survey in which 84.6% of GLBTQ students reported being verbally harassed and 40.1% reported by physically harassed).

[5] Further curtailing access to mental heath care would be devastating in a state where the U.S. Department of Justice has already found mental health services to be woefully inadequate. *See* Complaint ¶¶ 14–15, *United States v. Mississippi*, No. 3:16cv622 CWR FKB (S.D. Miss. Aug. 11, 2016).

(same-sex couples must be allowed to adopt on same terms as opposite-sex couples).[6]

Under Section 3(7), state employees would be permitted to engage in "expressive conduct" in the workplace consistent with their Section 2 Beliefs, and would be free of any potential consequences if they do so. Armed with Section 3(7), a state employee may claim that berating LGBT individuals or denying or delaying service is a type of "expressive conduct" consistent with their Section 2 Beliefs. Section 3(7) could also prevent municipalities from enforcing ordinances barring their employees from demeaning or refusing service to LGBT individuals as an "expressive" act. In addition, Section 3(7) purports to prevent schools that currently have anti-discrimination policies from prohibiting anti-LGBT expressive conduct by teachers in the classroom. *See infra* Part II(A).

Even HB1523's provisions that apply only to "religious organizations" are poised to permit broad discrimination. No party disputes the core rights of churches and houses of worship under the First Amendment to practice their religion freely. But HB1523's definition of "religious organization" extends to any "religious group, corporation . . . or similar entity, *regardless of whether it is*

[6] By both defining marriage and targeting same-sex couples and unmarried individuals who are sexually active, HB1523 targets all gay people as a class. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (no distinction between status and conduct in this context). Likewise, HB1523 systematically disadvantages single-parent families, as well as nonmarital same-sex couples raising children, who are disproportionately people of color. *See* Gary J. Gates, Williams Inst., *LGBT Parenting in the U.S.* 1 (2013).

integrated or affiliated with a church or other house of worship." HB1523, § 9(4)(b) (emphasis added). That definition permits private, for-profit corporations to define themselves as "religious organizations" and refuse to serve LGBT individuals in areas as varied as housing, employment, and adoption, notwithstanding legal protections otherwise available to LGBT individuals. *See generally* HB1523, § 3(1)–(2). For example, a religious provider of emergency or transitional housing assistance could simply turn away an LGBT person or single-parent family on the basis of Section 3(1)(c) without jeopardizing state funding and support.

The portions of HB1523 that apply directly to "marriage" or "marriage-related services" likewise protect broader discrimination than first meets the eye. Section 3(5) allows the denial of service by an expansive set of public vendors (including florists, hotel owners, car-service rentals, or "similar marriage-related services") "for a purpose related to the solemnization, formation, celebration, or *recognition* of any marriage" (emphasis added). At the very least, Section 3(5) gives broad license to any of the covered parties to renege on a contract with an LGBT counterparty and simply proffer their Section 2 Beliefs as a defense to breach. *See* HB1523, § 5. Moreover, the law places no temporal limit on the "recognition" of a marriage, allowing businesses to deny services that involve, in

some way, "recogni[zing]" a couple's marriage at any time throughout their lives. HB1523, § 3(5).

Finally, Section 3(8) permits any person with the authority to issue marriage licenses to refuse to provide licenses for same-sex couples. Although the provision requires the "person who is recusing himself or herself" to take "necessary steps" to avoid delays in issuing a license, the provision still permits unequal treatment. LGBT Mississippians who arrive at a leanly staffed office may be forced to wait for a "gay-friendly" clerk to arrive at the office—perhaps from miles away or on a different day. Even when clerks are readily available, same-sex couples will be subjected to the indignity of being shunted to a separate set of "gay-friendly" clerks, while heterosexual couples may utilize any available official. This scenario may repeat itself on a couple's wedding day, when judges authorized to solemnize marriages may selectively opt out of performing their official duties. Such disparate treatment denies LGBT couples marriage with "equal dignity" and on the same "terms and conditions" as heterosexual couples. *Obergefell*, 135 S. Ct. at 2605, 2608.

In sum, HB1523 sanctions a broad range of discrimination against LGBT individuals *because of who they are and whom they have chosen (or may choose)* to marry.

2. HB1523 Is a Radical Departure from Traditional Religious Protection Statutes.

While laws protecting the exercise of religious beliefs are nothing new in Mississippi or elsewhere, HB1523 is unprecedented in its special protection of three specified religious beliefs at the expense of a particular group of citizens. Laws seeking to protect religious freedoms typically apply generally, without singling out specific beliefs or discovered groups. *E.g.*, Miss. Code Ann. § 11-61-1 (state Religious Freedom Restoration Act ("RFRA") protects the right of general "religious exercise" and the "free exercise of religion"); 42 U.S.C. §§ 2000bb-2000bb-4 (1993) (same); Ind. Code § 34-13-9-1 to -11 (2015) (same); Ark. Code Ann. § 16-123-401 to -406 (2015) (same). HB1523 has no such general application; it only protects the three Section 2 Beliefs. *See* Barber et al. Appellees' Br. 5, 33.

Further, religious freedom laws generally balance competing rights. While under the Mississippi RFRA the "[g]overnment should not substantially burden religious exercise without compelling justification," Miss. Code Ann. § 11-61-1(2)(c), if there is any dispute, neither the person engaging in religious exercise nor the government automatically prevails. Not so under HB1523. The law is devoid of any consideration of countervailing rights or generally applicable state interests, such as child welfare or the ability of citizens to access state services without facing discrimination. HB1523 does not even acknowledge the *possibility* that the

government or LGBT individuals might have rights that conflict with the broad exercise of Section 2 Beliefs. LGBT individuals are thus left to bear the significant costs of another person's religious exercise. And under HB1523, which permits anyone to assert his or her Section 2 Beliefs as a defense in "any judicial or administrative proceeding," LGBT individuals must bear those costs with no recourse to the courts. HB1523, § 5.

3. Appellants' Comparison of HB1523 to Existing Conscientious Objector Statutes is Inapposite and Misleading.

Much of Appellants' brief turns on the claim that HB1523 is no different from the existing federal and state "conscientious objector" statutes that grant opt-out rights to individuals who oppose, for example, war, abortion or capital punishment. This analogy rests on a mischaracterization of HB1523. Existing conscientious objector statutes allow individuals to opt out of *certain activities* based on closely held convictions about *those activities*. By contrast, HB1523 permits individuals to opt out of providing a wide range of services to a *class of people*. The "objectors" under HB1523 do not object to marriage; they object to *gay or lesbian people* getting married. They do not object to adopting children; they object to *gay and lesbian people* adopting children. Appellants attach well over 300 pages of "conscience-protection" statutes to their brief. Not one of them draws the class-based distinction at the heart of HB1523.

Appellants accordingly attempt to characterize HB1523 as simply an opt-out for a narrow range of activities—such as the "solemnization" of marriage. But as discussed above, HB1523 extends well beyond performing a marriage and providing "marriage-related goods and services." It permits discrimination in the care of adoptive and foster children, housing, fertility treatments, and even dress codes in schools. Providing license to discriminate against someone seeking counseling, for example, because they married a same-sex partner does not simply accommodate a religious objection to *marriages* of same-sex couples; it improperly sanctions an objection to the lives of gay and lesbian *people*.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS HAVE STANDING TO ADDRESS EQUAL PROTECTION VIOLATIONS.

HB1523 immediately curtails the rights afforded to LGBT Mississippians under existing law and denies them equal dignity before their government. Those injuries readily support standing. They are "concrete, particularized," and "actual or imminent." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The "substantial risk" of future injury to the Plaintiffs is directly traceable to HB1523 and Appellants' enforcement of the law's discriminatory provisions. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper*, 133 S. Ct. at 1147). And only invalidation of the entire measure will redress the harm it

inflicts.[7] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (describing elements of standing).[8]

A. HB1523 Would Immediately Limit Rights and Benefits Currently Enjoyed by LGBT Mississippians.

Appellants' argument against standing rests on the fiction that HB1523 has no impact on the rights of LGBT citizens, because Mississippi lacks a statewide law prohibiting discrimination on the basis of LGBT status. Appellants' Br. 19. But as the District Court correctly ruled, LGBT Mississippians already enjoy important rights and benefits that would be curtailed by HB1523, including both express protections and the requirement of equal protection of generally applicable laws.[9]

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[7] As Plaintiffs explain, Appellants' assertion that standing must be shown for each individual provision of Section 3 is irrelevant where Plaintiffs mount a facial challenge to Section 2, which dooms the statute as a whole. CSE Appellees' Br. 33; Barber et al. Appellees' Br. 13–14.

[8] The district court correctly characterized Plaintiffs and other LGBT Mississippians as the "object" of HB1523, affording them a presumption of standing. *See Lujan*, 504 U.S. at 561–62 (observing that when the plaintiff is the object of the challenged government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it"). Though the statute purports to confer a benefit—namely, conscientious objector status—to one group of individuals, that benefit comes at the expense of Plaintiffs and their fellow LGBT Mississippians. That targeted group, singled out to bear the costs of another's religious objections, is the true object of this statute. *Cf. Christian Legal Soc'y*, 561 U.S. at 689 (permitting courts to scrutinize pretextual justifications to determine true target of a law or policy); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (observing that a "tax on wearing yarmulkes is a tax on Jews," even if such a tax purported to apply to conduct and not to a class of persons).

[9] Appellants' argument that the District Court applied a 12(b)(6) standard rather than a "clear showing" standard on the issue of standing is a red herring. *See* Appellants' Br. 13–14. The harms described in the sections that follow are abundantly clear from the record and the face of the statute itself.

For example, the City of Jackson—the state's most populous city—affirmatively protects by ordinance residents and visitors from discrimination on the basis of sexual orientation and gender identity (the "Ordinance"). ROA.16-60477.254-55 (Jackson Mun. Code § 86-226). The Ordinance empowers the City to hear discrimination complaints and issue penalties and equitable relief. *Id.* § 86-230. Plaintiff Katherine Elizabeth Day, a Jackson resident, and other LGBT residents are protected by this Ordinance in all aspects of their work and daily life. *See* ROA.16-60477.220, ¶ 1. More than 30,000 students and employees in the Jackson Public Schools are likewise protected by policies prohibiting discrimination on the basis of gender identity or sexual orientation. Jackson Public Schools, Parent and Student Handbook with the Code of Conduct 2016-2017, at 16, 19, 43.

Students and employees of universities in Mississippi likewise enjoy protections under institutional antidiscrimination policies. ROA.16-60477.258-62 (Univ. of S. Miss. Antidiscrimination Policy); *see also* Univ. of Miss., *Non-Discrimination and Complaint Procedure* (2016) (setting forth procedures for individuals to "seek relief" against discrimination based on sexual orientation, or gender identity or expression). Similarly, healthcare institutions, including state-run hospitals, maintain institutional policies against discrimination on the basis of

sexual orientation or gender identity or expression and provide mechanisms for addressing grievances. *See, e.g.*, Miss. State Hosp., *Notice of Nondiscrimination*.

HB1523 directly limits the rights conferred by all those antidiscrimination measures by providing holders of Section 2 Beliefs a "defense in any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party." HB1523, § 5(1). In other words, if a city, institution, or LGBT person attempted to enforce any of these antidiscrimination protections through legal or administrative action, the alleged violator would enjoy an absolute defense. Moreover, that individual could *bring a counterclaim* under Sections 5 and 6 against the victim who tried to vindicate his or her right to nondiscrimination. *Id.* §§ 5–6, 9(2)(d). HB1523 thus prevents LGBT citizens from exercising their existing rights, while bestowing a cause of action on those, and only those, who hold Section 2 Beliefs. *Cf. Romer*, 517 U.S. at 627 (striking down Colorado's Amendment 2 in part because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination"). That harm plainly supports standing. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Contrary to Appellants' suggestion, Plaintiffs need not show that they have existing claims affected by HB1523, or that those particular claims would succeed.

The injury-in-fact is "the imposition of the barrier" to bringing those claims forward, not the "ultimate ability to obtain the benefit" itself. *Id.*; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995) (plaintiff need not show that he would receive contract but for the challenged program; inability to compete on equal footing is enough); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (medical school applicant need not show certainty of admission, where school had erected a barrier that prevented him from competing for all 100 places in the class). Here, Section 5 of HB1523 erects a wall between Plaintiffs and administrative, judicial, or executive remedies to enforce their rights. That immediate infringement is sufficient injury-in-fact to support standing. The Court need look no further to find standing here.

B. HB1523 Inflicts a Concrete Injury by Endorsing Unequal Treatment of LGBT Mississippians Based on Their Status.

In addition to the limits on LGBT citizen's rights under ordinances, policies and the common law, HB1523 imposes a government-sanctioned badge of inferiority on the state's LGBT citizens. That "badge of inequality and stigmatization" is "a cognizable harm in and of itself providing grounds for standing." *Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 993 F.2d 1222, 1224 (5th Cir. 1993); *see also Walker v. City of Memphis*, 169 F.3d 973, 980 (5th Cir. 1999) (classification of homeowners by race is "an injury in and of itself"). Indeed, the Supreme Court has long recognized that non-economic harm

is sufficient to support standing where it directly impacts plaintiffs. *See Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (finding injury requirement satisfied where the government denied equal treatment to individuals "solely because of their membership in a disfavored group"); *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982).

Here, there is no question that the alleged injury affects Plaintiffs in a "personal and individual way." *Lujan*, 504 U.S. at 560 n.21. Appellants characterize Plaintiffs as passive observers claiming nothing more than vague offense at the state's enactment of HB1523. But Appellants fail to acknowledge that these Mississippi plaintiffs are directly impacted by this Mississippi statute—a connection absent from the cases on which Appellants rely. *See* Appellants' Br. 17–18. In *Allen v. Wright*, for instance, the plaintiffs failed to demonstrate any personal connection to the stigmatizing effects of the IRS's failure to revoke the non-profit status of schools in another state not attended by plaintiffs or their children. 468 U.S. 737, 755–56 (1984). Similarly, in *Valley Forge*, the plaintiffs lived in Maryland and Virginia and could not show any personal impact from the transfer of land in Pennsylvania to a religious institution. 454 U.S. at 487. But here, Plaintiffs have not "roam[ed] the country in search of governmental wrongdoing." *Id*. The "source and situs" of Plaintiffs' injury is their home, Mississippi. *Cf. Smith v. City of Cleveland Heights*, 760 F.2d 720, 722–23 (6th Cir.

1985) (finding plaintiff's allegations that city policies "stigmatize him as an inferior member of the community in which he lives" sufficient to support standing).

Indeed, HB1523 touches upon the foundational aspects of Plaintiffs' lives, from marriage to physiological care to forming a family with children to facing humiliation in ordinary encounters with public employees. *See Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (where Virginia law did not recognize lesbian couple's California marriage, plaintiffs suffered "[s]tigmatic injury" and discriminatory treatment "sufficient to satisfy standing's injury requirement" (citing *Allen*, 468 U.S. at 757 n.22)). Under HB1523, the state of Mississippi would force its LGBT citizens to run a gauntlet, enduring state-protected discrimination with no recourse. That experience has a direct effect on psychological, physical, social, and economic well-being. *See* Am. Psychological Ass'n, *Sexual Orientation & Marriage* (July 28 & 30, 2004); Ctrs. for Disease Control and Prevention, *Stigma and Discrimination* (Mar. 3, 2011); David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. of Behavioral Med. 1, 1 (2015). At very least, it directly "interferes with [Plaintiffs'] lives in a concrete and personal way," satisfying the standard for

injury.[10] *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 519 (5th Cir. 2014).

Appellants nonetheless assert that, to establish "imminent" harm, each Plaintiff must show that third parties *will* discriminate them, and that those parties *will* invoke HB1523 as a defense to such discriminatory treatment. Appellants' Br. 18–19. Not so. This Court has ruled that discriminatory treatment by the government constitutes a sufficiently imminent injury to confer standing, whether or not a plaintiff will "sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012). Similarly, Appellants argue that any harm caused by Section 3(8) is speculative, because HB1523 requires that clerks who refuse to issue licenses to LGBT couples take steps to avoid delays. That argument misses the forest for the trees. The existence of a two-track system of government—where LGBT Mississippians are told to wait for the "gay-friendly" clerk (who may or may not be readily available in small offices), while their fellow citizens enjoy unrestricted service from all public employees—imposes a harm in itself. Even supposing the service provided was somehow seamless, the law

[10] Appellants' comparison to the "concerned bystanders" in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013), accordingly fails. The *Hollingsworth* petitioners were supporters of Proposition 8 who intervened in the district court action reviewing the law's constitutionality. *Id.* at 2662. Those intervenors lacked standing because their interest in the statute rested solely on their political interest in its enactment. *Id.* By contrast, Plaintiffs' interest in HB1523 lies in its direct and consequential impact on Plaintiffs' lives.

imposes an impermissible stigma on LGBT persons by codifying sexual orientation as a permissible basis for differential treatment by the government. Such separate treatment is not marriage "on the same terms and conditions" as non-LGBT couples, and cannot be reconciled with *Obergefell*'s demand that LGBT persons receive "equal dignity in the eyes of the law." 135 S. Ct. at 2608; *cf. Windsor*, 133 S. Ct. at 2693 (holding that a ban on federal recognition of marriage for same-sex couples "impose[d] a disadvantage, a separate status, and so a stigma" upon married same-sex couples); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292 (1964) ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." (Goldberg, J., concurring)).

C. Plaintiffs' Injuries Are Fairly Traceable to HB1523's Enactment, and Invalidating HB1523 Would Redress Those Injuries In Full.

Appellants attempt to minimize the negative impact of HB1523 by suggesting that third parties may discriminate against Plaintiffs even in the absence of HB1523. But under HB1523, LGBT persons would be stripped of the ability to assert their rights to equal treatment under existing ordinances, policies, and the common law. They would have no access to HB1523's exclusive cause of action, which is available only to those who wish to discriminate against LGBT individuals. And on its face, HB1523 puts LGBT Mississippians into a uniquely

disfavored class of persons, subjecting them to official stigma and marking them with an official badge of inferiority.[11] Those harms are directly traceable to Defendants' enforcement of the challenged statute. *See Romer*, 517 U.S. at 632; *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009).

Enjoinment of the statute will redress those harms. An injunction would leave intact existing antidiscrimination measures and generally applicable protections for all Mississippians and reverse HB1523's declaration that LGBT Mississippians are acceptable targets of discrimination. *Cf. City of Cleveland Heights*, 760 F.2d at 724 (finding redressability satisfied where injunctive relief would "remove the official implementation" of the discriminatory government action, thereby "eras[ing] the source of [the plaintiff's] stigmatic injury").

III. THE DISTRICT COURT CORRECTLY HELD THAT HB1523 VIOLATES THE EQUAL PROTECTION CLAUSE UNDER ANY LEVEL OF SCRUTINY.

Equal protection requires "*equal*" protection, not just the protection a governing majority may prefer. "The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Romer*, 517 U.S. at 633–34 (internal quotations omitted).

[11] The immediate, concrete harms articulated by Plaintiffs here are nothing like the harms alleged in *Clapper*, 133 S. Ct. 1138. Those harms depended on a speculative, five-step causal chain. *Id.* at 1148. Here, HB1523 has the immediate and direct effect of removing equal protection from LGBT people, depriving them of previously existing rights, and subjecting them to government-imposed stigma and denial of equal dignity.

HB1523 turns that principle on its head. After *Obergefell*, the Mississippi legislature promptly empowered individual government and private actors to discriminate against LGBT individuals and attempted to resurrect the State's overturned ban on marriage as a "protected belief." *Compare* Miss. Const. § 263A ("Marriage . . . may be valid . . . only between a man and a woman."), *abrogated by Obergefell*, 135 S. Ct. 2607, *with* HB1523, § 2 ("Marriage is or should be recognized as the union of one man and one woman"). While the State claims that HB1523 merely protects the religious liberty of people who hold Section 2 Beliefs, Appellants' Br. 38, in fact, it selectively endows people holding those favored beliefs with absolute legal rights and protections, at the direct expense of LGBT citizens as a class. That is the antithesis of an "equal law[]."

A. The Court Should Apply Heightened Scrutiny.

Heightened scrutiny is appropriate where a challenged law "infringes fundamental constitutional rights" or "proceeds along suspect lines." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). HB1523 qualifies under both categories: it violates LGBT citizens' fundamental rights to marriage and personal autonomy and discriminates based on suspect classifications.

1. **HB1523 Substantially Burdens Fundamental Rights.**

A law that "significantly interferes" with the fundamental right of marriage warrants close scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *see also*

Obergefell, 135 S. Ct. at 2599 (recognizing that "marriage is fundamental under the Constitution"). HB1523 plainly meets this requirement.

A marriage consists of much more than the ability to obtain a marriage license. It includes a suite of legal rights, protections, and recognition. *See Windsor*, 133 S. Ct. at 2693–94. Marriage rests on respect for "individual autonomy," "support[ing] a two-person union," and "safeguard[ing] children and families," and is a "keystone of our social order." *Obergefell*, 135 S. Ct. at 2599–01. Yet under HB1523, an LGBT couple's lawful marriage vacillates between "valid and enforceable" and "devoid of legal meaning," based solely on the beliefs of the government or private party with whom they are interacting. HB1523 authorizes government employees, individuals, and organizations to treat the marriages of same-sex couples as non-existent for the purpose of adopting or fostering children, receiving counseling, or accessing fertility services, even though *Obergefell* identified the right to "marry, establish a home and bring up children" as a central part of the liberty it upheld. 135 S. Ct. at 2600 (internal quotations omitted). In placing the state's stamp of approval on discomfort about "recogniz[ing]" a same-sex couple's marriage, HB1523 denies married same-sex couples and their families the certainty and protections that marriage affords to all other married couples as a "keystone" of our society. *See Obergefell*, 135 S. Ct. at 2601, 2608; *Windsor*, 133 S. Ct. at 2693–96 (holding unconstitutional a federal

statute's treatment of same-sex couples' marriages as "second-class marriages"). Fatally, that two-tiered treatment fails to recognize the marriage of same-sex couples "on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S. Ct. at 2605, 2607.

HB1523's disregard for the existence of transgender individuals and the attendant discrimination against such persons likewise merits heightened scrutiny. The Fourteenth Amendment protects the fundamental rights of individual dignity and autonomy, including the intimate decisions that define personal identity. *See Obergefell*, 135 S. Ct. at 2593; *Lawrence*, 539 U.S. at 574; *Latta v. Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014) (holding that "[s]exual orientation and sexual identity are immutable" and "fundamental to one's identity" (internal quotations omitted)). Gender identity and expression plainly fall within that category.

2. **LGBT Status Is a Suspect or Quasi-Suspect Classification.**

Heightened scrutiny is also warranted here because HB1523 relies on suspect classifications. Although the Supreme Court has not expressly ruled on the appropriate level of scrutiny for laws impacting LGBT citizens, it has recognized that LGBT individuals meet all four hallmarks of suspect or quasi-suspect status: (1) a long and undisputed history of discrimination; (2) ability to contribute fruitfully to society; (3) immutable characteristics; and (4) minority status. *See Obergefell*, 135 S. Ct. at 2594–04.

It is unsurprising, then, that at least three U.S. Circuit Courts have applied heightened scrutiny to equal-protection claims involving sexual orientation. *See Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181–82 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). For the same reasons, courts have found that classifications based on gender-identity also warrant heightened scrutiny. *See, e.g.*, *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. Nov. 16, 2015); *Glenn v. Brumby*, 663 F.3d 1312, 1315–16 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 576–78 (6th Cir. 2004). The Court should likewise apply heightened scrutiny here.

B. HB1523 Fails Any Level of Review.

Rational basis review requires that (1) legislation be enacted for a legitimate purpose and (2) the means for a chosen classification be logically and plausibly related to that purpose. *Romer*, 517 U.S. at 631–32; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013). In assessing legitimacy, courts also look to whether classifications are premised on a "tradition of disfavor," *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring), as well as "negative attitude[s]," or a "bare . . . desire to harm a politically unpopular group." *Id.* at 448, 450; *Windsor*, 133 S. Ct. at 2693 (internal quotation omitted).

In this instance, disfavor and disapproval towards LGBT people are the *raison d'etre* for HB1523—and the reason persons holding Section 2 Beliefs seek to be shielded from ordinary interactions with LGBT citizens. Under established constitutional law, a measure enacted to serve such a purpose cannot stand. *See, e.g.*, *Lawrence*, 539 U.S. at 571 ("religious beliefs" and "moral principles" cannot justify infringement on protected right to engage in sexual intimacy); *Romer*, 517 U.S. at 635 ("personal or religious objections to homosexuality" are no justification for unequal treatment). Moreover, "put[ting] a thumb on the scales" in favor of a particular religious or moral conviction is not a legitimate purpose under the Equal Protection Clause. *Windsor*, 133 S. Ct. at 2693–94; *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). And while the State *can* protect certain "conscientious scruples," Appellants' Br. 2, it may do so only evenhandedly and to the extent those "scruples" do not conflict with its obligations under the Equal Protection Clause.

HB1523 also warrants "careful consideration" because of its "unprecedented" and "unusual character." *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928)); *Windsor*, 133 S. Ct. at 2693; *see supra* Part I(B)(2)–(3) (describing departure from past religious protection and conscientious-objector laws). Under HB1523, LGBT Mississippians would no

longer enjoy protections generally available to all citizens—including laws prohibiting arbitrary or capricious government actions, *see* Miss. Unif. Cir. & City Ct. R. 5.03; Miss. Code Ann. §§ 11-46-9, 25-9-132, 37-9-113, and common-law rights to enforce contracts—as long as the opposing party articulates a Section 2 Belief. Similarly, cities and institutions would be prevented from disciplining employees who violate their anti-discrimination policies and assert Section 2 Beliefs in defense. In short, HB1523 "bars [LGBT persons] from securing protection against the injuries that [these laws and policies] address," which is fatal under the Equal Protection Clause. *Romer*, 517 U.S. at 628–29.

There is also no escaping the State's endorsement of private discrimination. The statute makes "a general announcement that [LGBT people] shall not have any particular protections from the law" when an individual seeks to discriminate against them. *Id.* at 635. The State's special protection of anti-LGBT views "in and of itself is an invitation to subject [such] persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. HB1523 will embolden state employees and private businesses to discriminate, secure in the knowledge that the State has supplied an affirmative defense to their mistreatment of LGBT individuals. "It is not within our constitutional tradition to enact laws of this sort," *Romer*, 517 U.S. at 623, and the Equal Protection Clause prevents

Mississippi from "singling out" the LGBT "class of citizens for disfavored legal status or general hardships." *Id.* at 633.

HB1523 likewise fails the rational-relationship prong of rational basis review, because the classification does not logically further the claimed purpose or make sense in light of how other "groups similarly situated" are treated. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (discussing *Cleburne*, 473 U.S. at 447–50). HB1523 provides no protection—much less a cause of action—to similarly situated individuals who have religious beliefs *supportive* of LGBT persons. It likewise leaves to the state RFRA protection for all other deeply felt religious beliefs, including those relating to marriage, gender, families, and human sexuality. That selective favoring of beliefs reveals HB1523 as a class-based measure, selectively burdening LGBT persons and couples.

Further, there is no logical connection between HB1523 and protecting citizens' religious freedom when the U.S. and State Constitutions and the state RFRA already provide extensive protections for religious beliefs across the board—including those opposed to LGBT relationships. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (rationale must have "footing in the realities of the subject addressed by" the law). Appellants themselves acknowledge the extensive protections already provided by the state RFRA in their repeated attempts to downplay the practical impact of HB1523. *See, e.g.*, Appellants' Br. 7–8. Indeed,

both the state RFRA and HB1523 purportedly defend "religious liberty," but unlike HB1523, the state RFRA is facially neutral and requires consideration of countervailing state and private interests, thus balancing of the right to free exercise of religion against the rights of affected individuals. Miss. Code Ann. § 11-61-1(5)(b). The fact that HB1523 seeks to protect religious freedoms already safeguarded under the law—with no regard for the equal protection rights of others—only underscores its different purpose: to diminish the rights of LGBT citizens.

CONCLUSION

For all the reasons discussed above and in the brief of Plaintiffs-Appellees, the decision of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman Font with 14-point type using Microsoft Word 2010.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.2, the brief contains 6,968 words, consistent with the Court's guidance provided on December 2, 2016 regarding the word limit for amici. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

Dated: December 23, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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