Case Nos. 16-60477 & 16-60478

In the United States Court of Appeals for the Fifth Circuit

Rims Barber, *et al.*,
Plaintiffs-Appellees,

v.

Governor Phil Bryant, *et al.*,
Defendants-Appellants.

Campaign for Southern Equality, *et al.*,
Plaintiffs-Appellees,

v.

Phil Bryant, in his Official Capacity as Governor of the State of Mississippi, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division
Case Nos. 3:16-CV-417-CWR-LRA, 3:16-CV-442-CWR-LRA

BRIEF AMICI CURIAE OF THE ANTI-DEFAMATION LEAGUE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BEND THE ARC, CENTRAL CONFERENCE OF AMERICAN RABBIS, HADASSAH, INTERFAITH ALLIANCE, NATIONAL COUNCIL OF JEWISH WOMEN, PEOPLE FOR THE UNITED WAY FOUNDATION, T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS, UNION FOR REFORM JUDIASM, WOMEN OF REFORM JUDIASM, AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDIASM INTERFAITH ALLIANCE, AND THE HINDU AMERICAN FOUNDATION IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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.

Plaintiffs/Appellees:

Rims Barber, Carol Burnett, Joan Bailey, Katherine Elizabeth Day; Anthony Laine Boyette, Don Fortenberry, Susan Glisson, Derrick Johnson, Dorothy C. Triplett, Renick Taylor, Brandiilyn Mangum-Dear, Susan Mangum; Joshua Generation Metropolitan Community Church, Campaign for Southern Equality, Susan Hrostowksi.

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Defendants/Appellants:

Phil Byrant, Governor of Mississippi; Jim Hood Attorney General of Mississippi; John Davis, Executive Director of the Mississippi Department of Human Services; and Judy Moulder, Mississippi State Registrar of Vital Records.

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Amici Curiae Supporting Appellees:

The Anti-Defamation League, Americans United for the Separation of Church and State, Bend the Arc, Central Conference of American Rabbis, Hadassah, National Council of Jewish Women, People For the American Way Foundation, Union for Reform Judaism, Women of Reform Judaism, Women's League for Conservative Judiasm, Interfaith Alliance, and T'ruah: The Rabbinic Call for Human Rights; and The Hindu American Foundation.

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STATEMENT OF INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE[1]

Amici curiae are a diverse group of religious, cultural, and civil rights organizations that advocate for religious freedom, tolerance, and equality. *Amici* have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. ADL is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. ADL believes that separation preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and

[1] Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amici curiae* state that no party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black, "[A] union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267 (1962).

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters across the country. Since its founding in 1947, Americans United has frequently participated as a party, as counsel, or as an amicus curiae in the leading church-state cases decided by the U.S. Supreme Court, the federal appeals courts, and state courts throughout the country. Americans United has long supported reasonable accommodations for religious exercise. Consistent with its support for the separation of church and state and the U.S. Supreme Court's holdings on the constitutionality of religious accommodations, Americans United opposes accommodations that harm third parties. That concern is especially strong when the requested exemption would allow discrimination against a class of people that have historically been the target of disfavor and disapproval.

Bend the Arc: A Jewish Partnership for Justice, is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans,

regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation.

The Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle of the Free Exercise Clause of the Constitution as a shield for the exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to attack the rights of third parties to be free from discrimination and to favor

particular religious views in violation of the Establishment Clause, and accordingly joins this brief.

T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Grounded in Torah and its Jewish historical experience and guided by the Universal Declaration of Human Rights, it seeks to protect and advocate for human rights in Congress, federal agencies, state legislatures, and in the courts.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Judaism; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; and Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue with a proud legacy of fighting for civil rights and social justice, including defending both religious freedom and the separation of church and state.

The Women's League for Conservative Judaism ("WLCJ") is the largest synagogue based women's organization in the world. As an active arm of the Conservative/Masorti movement, it provides service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. WLCJ strongly supports full civil equality for gays and lesbians with

all associated legal rights and obligations, both federal and state and rejects discrimination on the basis of sexual orientation.

The Hindu American Foundation ("HAF") is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans.

This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

It is clear that religious justifications motivated the passage of HB 1523, as the law protects certain religious beliefs set forth in the text of the statute. Moreover, HB 1523 has the specific—and improper—purpose of preferring a particular religious understanding of marriage and expressing moral disapproval of same-sex couples.

This improper purpose renders HB 1523 unconstitutional under the Establishment Clause. Because the statute enshrines a particular religious viewpoint into law and lacks a secular purpose, it necessarily runs afoul of Establishment Clause principles. In addition, the statute violates the Establishment

Clause because its primary effect, if not its sole effect, is to advance the religious viewpoints enshrined in the text of the law. By granting special exemptions for those who hold the enumerated religious viewpoints, the state cannot help but express that such views are deserving of a special status.

Finally, the Appellants' argument that this legislation is merely an "accommodation" of religious beliefs and is automatically rendered valid for that reason cannot be squared with the broad reach of the statute or with relevant controlling precedents.

The District Court's entry of a preliminary injunction should be sustained.

ARGUMENT

HB 1523 UNCONSTITUTIONALLY CODIFIES AND PROVIDES UNQUALIFIED PROTECTION TO A RELIGIOUS UNDERSTANDING OF MARRIAGE.

Appellants assert that HB 1523 is indistinguishable from existing conscience protection laws, Appellants' Br. at 1, but in fact the law is far more sweeping. In addition to allowing individual state employees to refuse to issue marriage licenses to same-sex couples, HB 1523 allows various businesses to deny services to LGBT individuals, effectively exempting them from public accommodation and antidiscrimination laws. The various protections and exemptions in the law amount to a license to discriminate against same-sex couples, under the guise of protecting the religious liberty of those who purport to be unable, as a matter of

religious belief, to treat marriages of same-sex couples as the equivalent of marriages of opposite-sex couples.[2]

As the legislative record and general context motivating the enactment of HB 1523 make clear, the primary purpose of HB 1523 was to take sides in the religious debate over marriage of same-sex couples[3] by putting the full force of the state behind an express religious condemnation of a vulnerable minority—gay men and lesbians. Providing substantial legal protections to, and effectively insulating from penalty, only those adherents to particular religious viewpoints opposed to marriage of same-sex couples has no legitimate secular purpose. Moreover, HB 1523 has no purpose or effect at all except to express and promote a particular

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[2] In addition, HB 1523 extends these sweeping protections to persons who hold religious beliefs that sexual relations should be exclusively limited to opposite-sex marriage, or that "… Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."

[3] In the religious sphere, both within and between denominations there continues to be considerable debate about how religion should treat marriages of same-sex couples. To be sure, the Catholic Church, the Church of Jesus Christ of Latter Day Saints, the Southern Baptist Convention, and some other groups have a leadership that opposes marriage equality. But throughout society and across religious denominations, religious condemnations of same-sex couples marrying have waned in recent years. Many groups, including the Union for Reform Judaism, the Conservative Jewish Movement, the Presbyterian Church (U.S.A.), the Unitarian Universalist Church, the United Church of Christ, the Quakers, and the Episcopal Church, now embrace marriage equality. *See generally* Human Rights Campaign, Faith Positions *Available at* http://www.hrc.org/resources/faith-positions; Pew Research Center, Where Christian Churches, Other Religions Stand on Gay Marriage *Available at* http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/

religious viewpoint. As demonstrated below, this runs afoul of the Establishment Clause.

A. Under Settled Establishment Clause Tests, HB 1523 Violates Appellees' First Amendment Rights.

HB 1523 plainly violates the Establishment Clause. The statute has an impermissible religious purpose and has the primary effect of advancing and endorsing religion.

1. HB 1523 Has an Impermissible Religious Purpose.

States cannot, consistent with the Establishment Clause, enact laws for the exclusive or primary purpose of promoting a religious viewpoint. The "touchstone" of the Establishment Clause "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary Cty., Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). To that end, "all creeds must be tolerated and none favored." *Id.* at 590; *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

"[I]n . . . light of its history and the evils it was designed forever to suppress," the Supreme Court has consistently given the Establishment Clause "broad meaning." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 14-15 (1947). Hence, the Court has invalidated laws that aid one particular religion. *Id.* at 15-16 ("Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."). Indeed, even when a civil law lacks an overtly religious message or provision, it still violates the Establishment Clause if it advances a specific religious belief or is disconnected from any secular purpose. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court distilled these principles into a test that remains instructive: A law must have a preeminently secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive governmental entanglement with religion. *Id.* at 622.

HB1523 fails to satisfy the secular-purpose requirement. The Supreme Court has emphasized that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864 (citations omitted). The Court has emphasized that this test has "bite": a law will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is secondary to the religious purpose or was constructed after the fact. *Id.* at 865 & n.13. HB 1523 cannot meet this requirement. It has no legitimate secular

purpose; rather, protecting religious believers who oppose marriage equality on religious grounds was the primary (indeed, sole) reason for the law's enactment.

Appellants themselves acknowledge that the law was enacted in response to state and local governments who were "taking action against devout Christians who decline to participate in [same-sex] marriage ceremonies." Appellants' Br. at 5. The authors and sponsors of HB 1523 made it abundantly clear that the law was enacted with the express purpose of promoting and advancing certain Christian beliefs about gays and lesbians and marriage of same-sex couples—and no other beliefs. *See* Pl. Mem. in Supp. of Prelim. Inj., at 8-11.

Alliance Defending Freedom, a Christian legal advocacy and lobbying organization that is committed to opposing equal rights for gays, lesbians, and same-sex couples, played a key role in drafting the legislation. *Id*. at 8. The leadership and staff of Alliance Defending Freedom have publicly stated that they view same-sex relationships as morally wrong and have condemned the "theologically liberal church" for enabling these "forbidden" relationships. *Id*. at 8-9.

Moreover, the sponsors of HB 1523 in the state legislature explicitly intended for the legislation to protect and promote Christians who disapprove of marriages of same-sex couples from having to act in violation of their religious beliefs. *Id*. at 9-10. State Representative Dan Eubanks, one of the bill's co-

sponsors, made that crystal clear: as he put it, the bill "protect[s] . . . what I am willing to die for—and [what] I hope you that claim to be Christians are willing to die for[—]and that is your beliefs." *Id.*

The only cognizable impetus for allowing opponents of marriage equality such a sweeping opt-out from generally applicable laws and duties, therefore, was the desire of the government to insulate from penalty only those who subscribe to a particular set of Christian values. The law therefore has an unconstitutional religious purpose under the Establishment Clause.

2. HB 1523 Has The Effect Of Advancing And Endorsing Religion.

HB 1523 also violates the Establishment Clause because it has the primary effect of advancing and endorsing religion. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999) (analysis under endorsement and primary-effects tests is the same). The Establishment Clause's endorsement test examines whether an objective observer who is acquainted with a statute's text, legislative history, and implementation would perceive it as governmental endorsement of religion. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *McCreary*, 545 U.S. at 866 (stating that precedents demand that the objective observer in the endorsement test cannot "turn a blind eye to the context in which [a] policy arose"). A reasonable observer of HB 1523 would perceive that it provides exemptions or benefits only to individuals and organizations that

hold one of three religious or moral beliefs about marriage of same-sex couples, sexual relations outside of opposite-sex marriage, and transgender individuals, communicating that these beliefs are favored by the state.

Moreover, the reasonable observer would be aware of the general background and legislative record, which clearly shows that certain individuals and organizations desired to confer legal protections on Christians who hold these religious beliefs because they perceived those individuals to be under threat in light of legal developments advancing the rights of LGBT individuals. As a result, everything about HB 1523 communicates to observers that the state endorses a particular set of religious beliefs expressly because those beliefs are held by what the legislature deems to be "devout Christians." That message of religious favoritism violates the endorsement test. Moreover, the statute has little effect except to express a particular religious viewpoint and thus it also violates the primary-effects prong of *Lemon*.

B. The District Court Correctly Ruled That HB 1523 Is An Invalid Religious Exemption That Violates The First Amendment.

Contrary to Appellants' characterization, HB 1523 is not a traditional and permissible accommodation of religious exercise. Rather, it is an unqualified and expansive codification of a religious understanding of marriage that falls well outside the "play in the joints" between the Establishment and Free Exercise Clauses. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).

To be sure, the Supreme Court has not forbidden all governmental action that benefits religion. "[T]he government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987)). But "[t]he principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587. And paramount among these is the rule that no denomination or religious view may be favored or preferred over any other. *See Larson*, 456 U.S. at 244, 247.

Accordingly, the "accommodation" exception has historically been available solely to remove significant government-imposed burdens on the free exercise of religion, not to favor any religious belief or practice. "[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (1989) (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

Crucially, an accommodation must not impose "burdens * * * on nonbeneficiaries" or "override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 723–24 (2005) (upholding a religious-accommodation statute that

"does not differentiate among bona fide faiths" and "confers no privileged status on any particular religious sect"); *see also Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 710 (1985) (invalidating a religious accommodation because it was "absolute and unqualified" and because it imposed "significant burdens" on third parties). Here, the District Court correctly found that HB 1523 imposes "significant burdens" on Mississippians who do not hold one of the particular beliefs set forth in the statute—particularly gay and transgender people—meaning that the statute is not a permissible accommodation but instead is an Establishment Clause violation. *See* ROA.16-60478.773–774, 776, 810.

Furthermore, a constitutional accommodation of religion must "confer[] no privileged status on any particular religious sect" and must be "administered neutrally among different faiths." *Cutter*, 544 U.S. at 720, 723. But Mississippi has provided a special benefit to those religious believers whose faith is hostile to marriage of same-sex couples or to transgender people, to the detriment of anyone who does not share in those religious beliefs. There is simply no precedent supporting Appellants' position that a sweeping, unqualified set of exemptions for religious believers is a constitutional accommodation under the Establishment Clause. Concluding that HB 1523 is a "broad religious exemption [that] comes at the expense of other citizens," ROA.16-60478.809, the District Court correctly ruled that it violates the First Amendment.

CONCLUSION

For the foregoing reasons, the District Court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,252 words.

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