

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

RIMS BARBER, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00417-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

AND

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00442-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION

VOLUME 2 of 2

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
JUNE 24, 2016
JACKSON, MISSISSIPPI

REPORTED BY: CHERIE GALLASPY BOND
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1 (Court Called to Order)

2 THE CLERK: Before the court this morning is cases
3 styled and numbered *Rims Barber v. Governor Phil Bryant*, civil
4 action number 3:16CV417CWR-LRA and *Campaign for Southern*
5 *Equality v. Phil Bryant*, civil action number 3:16CV442CWR-LRA.

6 THE COURT: Good morning. Are there any housekeeping
7 matters we need to take care of before we begin? All right.
8 Plaintiff may call the next witness.

9 MR. KAYE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. KAYE: Plaintiffs call Dr. Robert Jones.

12 (Witness Sworn)

13 THE COURT: Dr. Jones, before we begin, before you is
14 the microphone. You don't have to speak directly into it.
15 Please speak loudly and clearly enough for the court reporter
16 to hear you. Also speak at a pace at which she can keep up
17 with you. Allow the lawyers to finish their questions before
18 you begin to answer so that the two of you won't be speaking at
19 same time. And make sure all your responses are verbal, and
20 try to avoid using uh-huh or unh-unh because they look the same
21 on a piece of paper.

22 THE WITNESS: Yes, sir.

23 THE COURT: All right.

24 ROBERT JONES,

25 Having first been duly sworn, testified as follows:

DIRECT EXAMINATION

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BY MR. KAYE:

Q Good morning. Would you state your name for the record, please.

A Robert Patrick Jones.

Q Okay. And, Dr. Jones, what is your profession?

A I'm the CEO of Public Religion Research Institute, also known as PRRI.

Q What is PRRI?

A We are a nonprofit, nonpartisan independent research organization that specializes in research at the intersection of religion, values, and public life.

Q How long have you been the CEO?

A Since its founding in 2009.

Q And what did you do professionally before founding PRRI?

A So I worked as a professor, Assistant Professor of Religious Studies at Missouri State University, as a consultant at a number of think tanks in Washington, D.C., before founding PRRI in 2009.

Q And will you describe your educational background.

A Yes. I have a Ph.D. in religion from Emory University, I have a master of divinity degree from Southwestern Baptist Theological Seminar in Fort Worth, Texas, and a bachelor of science in mathematics from Mississippi College.

Q You have been honored in any way by your alma maters?

1 A Yes. In 2013, I was named the alumnus of the year by the
2 graduate division of religion at Emory University, and this
3 year I have just been told I've been named an alumnus of the
4 year for the mathematics department at Mississippi College.

5 MR. KAYE: Your Honor, may I approach?

6 THE COURT: Yes, you may.

7 BY MR. KAYE:

8 Q Dr. Jones, I've just handed you what's been marked as
9 Plaintiffs' Exhibit CSE Exhibit 26. Do you recognize that
10 document?

11 A Yes. It is my CV.

12 Q Thank you. You can set that aside. Now, your Ph.D. is in
13 the field of religion. What is that field exactly?

14 A So that field can be a number of things. In my case, at
15 Emory University my areas of specialization were in sociology
16 of religion, political theory, and Christian theology.

17 Q And what are some of the methods that you relied on in your
18 academic training?

19 A So both quantitative and qualitative methods. So I had
20 training both in quantitative data analyses and also in methods
21 like ethnographic interviewing for interviewing subjects.

22 Q Okay. And what do you personally study as a scholar of
23 religion?

24 A So as a scholar of religion, particularly with my role at
25 PRRI, we study public opinion and particularly this

1 intersection between religious belief and behavior and
2 affiliation, on the one hand, and how that impacts people's
3 beliefs on a whole range of public policy issues.

4 Q And at PRRI specifically, what does your work there consist
5 of?

6 A Yeah. So I am the principal researcher on all of our
7 public opinion research projects that we do. And we cover a
8 whole range of issues from climate change to immigration to
9 LGBT issues and a number of other issues as well.

10 Q And on those public opinion research projects, how do you
11 conduct those?

12 A So one of the things that we -- on our public opinion
13 research project, PRRI has been very careful from the beginning
14 because I come out of the academic world to follow all of the
15 top-shelf academic standards in all our work. So we only
16 conduct random probability samples, for example, which is the
17 highest quality of public opinion research. We -- in our
18 telephone interviewing, we conduct half -- last year we
19 conducted half of our interviews with cell phones, half of them
20 with land lines. Again, that's again the top-quality
21 academic methodology.

22 Q Slow down just a little bit.

23 THE COURT: Are you from Mississippi?

24 THE WITNESS: I am from Mississippi.

25 THE COURT: Okay. You are speaking kind of fast.

1 A I will slow down. Okay. The result of sort of being in
2 D.C. and giving sound bites, but I will slow down. Yes. Yeah,
3 so backing up so our telephone surveys are conducted 50 percent
4 cell phone, 50 percent land line. That is the very high
5 standard that has to do with a number of people not having land
6 lines any longer. So in order to get a representative sample,
7 you have to now do a lot of cell phone interviewing. Random
8 probability samples, cell phone interviewing, all our surveys
9 are actually conducted in Spanish and English, bilingual
10 interviewing as well.

11 BY MR. KAYE:

12 Q Now, is PRRI affiliated with any credentialing
13 organizations in the field of public policy research, public
14 polling?

15 A Yes. One of the challenges, I think, with public opinion
16 polling is that there have been a proliferation of polls over
17 the last decade. So what has happened is there have become
18 credentialing organizations to help sort out which public
19 opinions polls have credible findings, which ones may not.

20 So PRRI is a member of the largest credentialing
21 organizations. So one of the oldest ones is the National
22 Council on Public Polls. There are less than 40 public opinion
23 organizations that have met the criteria to be a member of the
24 National Council of Public Polls, which was founded in 1969 as
25 a way of fostering transparency and rigor in the field of

1 public opinion research.

2 The other organization that we are a member of is the
3 American Association of Public Opinion Research, also known as
4 AAPOR. This is the largest guild representing public opinion
5 pollsters in the country. PRRI is a charter member of this
6 initiative called The Transparency Initiative, which was an
7 initiative designed to set up a set of guidelines to make sure
8 that pollsters who are producing data for public consumption
9 were meeting not only ethical criteria but transparency
10 criteria such as making our entire questionnaire available for
11 public use, being very transparent about our methodology. All
12 of our reports have a very long methodological statement so you
13 can see how we created our sample, who we called, the margin of
14 sampling error --

15 THE COURT REPORTER: Stop. I lost you.

16 Q We can move on from this.

17 THE COURT: You could take a breath between
18 statements.

19 BY MR. KAYE:

20 Q Dr. Jones, will you slowly tell the court if you are a
21 member of any professional organizations yourself.

22 A Yes. So I myself am a member of AAPOR, this organization
23 that I just mentioned. I am also the national cochair of the
24 Religion and Politics Section at the American Academy of
25 Religion, which is the largest guild of academics who study

1 religion in the world, actually.

2 I also sit on the editorial board of the journal for that
3 organization, the *Journal of the American Academy Of Religion*.

4 I am also a member of the editorial board for the journal
5 *Religion and Politics*, which is published by Cambridge
6 University Press for the American Political Science
7 Association.

8 Q Okay. Dr. Jones, have you published any books on the
9 specific topic of religion, politics, and public opinion?

10 A Yes. I've published three books.

11 Q What are those books called?

12 A The first book was called *Liberalism's Troubled Search for*
13 *Equality* in 2007. The second book was called *Progressive and*
14 *Religion* in 2008. And a current book that is forthcoming in
15 just a few weeks on July 12th is entitled *The End of White*
16 *Christian America*. The first book was published by the
17 University of Notre Dame Press. The second by book Rowman &
18 Littlefield, and the third book by Simon & Schuster.

19 Q Have you published any articles or book chapters on these
20 subjects?

21 A Yes. I've published 13 academic articles or book chapters.

22 Q Okay. Have you ever served as an expert witness?

23 A No.

24 Q Are you being paid for your services today?

25 A No.

1 Q Are you being reimbursed for your travel expenses?

2 A Yes.

3 Q Okay.

4 MR. KAYE: Your Honor, I offer Dr. Jones as an expert
5 in the field of religion and public opinion.

6 THE COURT: Any objection from --

7 MR. BARNES: No objection.

8 THE COURT: This witness will be deemed an expert in
9 the field of religion and public opinion.

10 MR. KAYE: Thank you, Your Honor.

11 BY MR. KAYE:

12 Q Dr. Jones, what have you been asked here today to offer
13 your expert opinion on?

14 A To generally talk about the relationship between religious
15 belief, behavior and affiliation, and attitudes on same-sex
16 marriage and other related issues around LGBT equality.

17 Q And has PRRI published any reports on those issues
18 recently?

19 A Yes. Earlier this year we published a major report looking
20 at national attitudes around three specific issues, attitudes
21 towards same-sex marriage, attitudes toward LGBT
22 nondiscrimination laws, and attitudes toward religiously based
23 service refusals around these laws.

24 MR. KAYE: Your Honor, may I approach?

25 THE COURT: Yes, you may.

1 BY MR. KAYE:

2 Q Dr. Jones, I've just handed you all of my copies of that
3 exhibit.

4 THE CLERK: You can have this one back.

5 BY MR. KAYE:

6 Q I just handed you what's been marked as CSE Exhibit 14. Do
7 you recognize this document?

8 A I do. This is the major report that I just mentioned.

9 Q Okay. And what subjects does this report cover?

10 A This covers -- this report covers attitudes on same-sex
11 marriage, LGBT nondiscrimination laws, and religiously based
12 service refusals and breaks down attitudes by religious
13 affiliation and belief.

14 Q And why did you choose those subjects to put together in
15 this report?

16 A Well, one of the reasons for PRRI's existence is to study
17 attitudes that are at the forefront of cultural debate and
18 change in the country. And these three issues are -- as we are
19 seeing in the court today, demonstrate or are issues that are
20 really up for debate in today's culture.

21 Q Could you just speak for a moment about the methodology
22 that's reflected in this particular report?

23 A Well, one of the remarkable things about this study is, to
24 my knowledge, it's one of the largest studies ever conducted on
25 these issues. We interviewed more than 42,000 Americans in a

1 random probability sample. Now, to put that in perspective for
2 you, your typical political survey that you may read from the
3 *Washington Post* or in the news has 1,000 interviewees. This
4 survey is more than 40 times as large as most public opinion
5 surveys that you see in the public. This gives us a high
6 degree of confidence in the results.

7 Q I'd like to turn to the report's findings on opinions about
8 same-sex marriage and direct you -- direct you to page 6 of
9 this report. What does the table on this page show?

10 A The table on this page shows views on same-sex marriage by
11 religious affiliation.

12 Q And what in particular stands out to you about this?

13 A Well, what we see in the country is overall 53 percent of
14 Americans support same-sex marriage, 37 percent oppose. And we
15 see a wide range of difference of opinion among religious
16 groups. So religious affiliation in short matters on this
17 topic.

18 Q And in terms of religious groups that are most opposed to
19 marriage between same-sex couples --

20 A Yep.

21 Q -- what did you find?

22 A So in particular in our survey, other surveys, for quite a
23 while now, we have seen a very steady pattern that there are
24 basically two major groups that stand out on this issue. So
25 white evangelical protestants among whom two thirds,

1 67 percent, oppose same-sex marriage, and the other group that
2 looks nearly identical are Mormons, among whom 67 percent
3 oppose same-sex marriage. These groups stand out as like the
4 two most opposed --

5 THE COURT: Slow down just a little bit. You've got a
6 bunch of reporters in here, and they are going to want to write
7 down there too. But slow down for the court reporter.

8 BY MR. KAYE:

9 Q And you said that opinion maps to really -- what do you
10 mean by that?

11 A So there's a high degree of correlation between religious
12 affiliation and attitudes on same-sex marriage.

13 Q Okay. And on the other end, what religious groups are most
14 in favor of marriage between same-sex couples?

15 A We do see a number of religious groups. It general what we
16 see is this nonChristian religious groups that have the highest
17 levels of support for same-sex marriage. For example:

18 Jewish Americans: 76 percent favor same-sex marriage.

19 Buddhists: 85 percent favor same-sex marriage.

20 Hindus: 66 percent favor.

21 And among the one that maybe stands out the most are
22 Unitarian Universalists, among whom 96 percent favor same-sex
23 marriage.

24 Q Okay. Now, what about religiously unaffiliated Americans?

25 A Religiously unaffiliated Americans also stand out for being

1 strongly in favor of same-sex marriage. So approximately eight
2 in ten, 78 percent, of religiously unaffiliated Americans say
3 they favor same-sex marriage. Less than one in five oppose.

4 Q And what does it mean when you say "religiously
5 unaffiliated Americans"?

6 A So these are people in public opinion surveys -- and I
7 should say that our religious identification question mirrors
8 Pew and -- Pew's question and is a pretty standard way of
9 understanding religious affiliation in political science and
10 sociologies circles.

11 But the basic definition on public opinion surveys when we
12 ask, *What is your religion? Are you Protestant, Catholic,*
13 *Jewish, et cetera,* these are people who say, *Nothing in*
14 *particular* so they claim no religious affiliation or they say
15 they are atheist or agnostic in the answer to that question.

16 Q A few moments ago you mentioned white evangelical
17 protestants.

18 A Yep.

19 Q What does that mean?

20 A Again, this is a self-edification measure on public opinion
21 surveys. It is -- in order to be categorized as a white
22 evangelical Protestant, you would identify as white, as
23 nonHispanic, as Christian, as Protestant and would also
24 identify as evangelical or born-again Christian.

25 Q Are there any denominations that are well known that fall

1 into that category?

2 A Sure. And certainly here in Mississippi the largest one
3 would be the Southern Baptist Convention. Also a large number
4 of nondenominational Protestant churches would fit this
5 definition as well.

6 Q And the data you have just been sharing with the court is
7 national data. Right?

8 A That's right.

9 Q How does that data compare to the data here in Mississippi?

10 A Well, one thing to say about Mississippi, of course, is
11 that it's fairly unique state, unique state in terms of its
12 religious demography. So, for example, it is tied with Alabama
13 as the state that has the fewest nonreligious people in the
14 state. So only about 13 percent of Mississippians claim no
15 religious affiliation whatsoever. Eighty percent of the state
16 identifies as Christian and perhaps most interestingly three in
17 ten Mississippians identify as one particular type of Christian
18 and that is white evangelical Protestant.

19 Q Now, generally speaking, do views of adherence to a
20 particular religion or sect correspond to their views on
21 marriage between same-sex couples?

22 A Generally -- you mean in terms of the official position of
23 the institutional form of the religion?

24 Q Exactly.

25 A So generally speaking, yes, with one particular notable

1 exception, and that is Roman Catholics. So what we find in the
2 data is actually a division between the official Catholic
3 position, which is, of course, in opposition to the
4 legalization of same-sex marriage and the public opinion of
5 rank and file Catholics when we ask them in public opinion
6 surveys among whom about six in ten actually favor same-sex
7 marriage.

8 Q How do you explain that discrepancy?

9 A Well, it's interesting. One of the things that we know
10 about Catholics is that for Catholics, religious identity is
11 more complex, I think, than for Protestants. It is about not
12 only belief, but it is also about a kind of ethnic identity in
13 many cases of being Polish and Irish and identifying as
14 Catholic is part of that.

15 The other thing that we see in the data is that those --
16 Catholics -- this is true for most religions, but Catholics who
17 attend religious services more than once a week are much more
18 likely to be aligned with the official church position than
19 those who maybe have a more ethnic identification and attend
20 religious services fewer. So it is 48 percent of Catholics who
21 attend weekly or more favor same-sex marriage. When you look
22 at all of those two attend far less frequency -- less
23 frequently, the number is two thirds support same-sex marriage.

24 Q Okay. Now, in addition to the study that we're talking
25 about from PRRI, are there other similar studies that

1 corroborate your findings?

2 A Yes. This question of same-sex marriage is one that has
3 been polled a lot. So if you look at data from the Pew
4 Research Center, for example, one of the longest trend lines
5 there, the data looks very, very similar to the religious
6 breaks that I've just been giving.

7 Q Okay.

8 MR. KAYE: I've just handed the witness document that
9 have been marked as Exhibit D-2 and D-3. I believe the court
10 already has copies?

11 THE COURT: Yes.

12 MR. KAYE: Okay. Thank you.

13 BY MR. KAYE:

14 Q Dr. Jones, do you recognize these documents?

15 A I do.

16 Q And what are they?

17 A This -- these are reports generated from the Pew Research
18 Center's Religion in America Religious Landscape Survey in
19 2014.

20 Q And generally speaking, do these -- do the -- does the data
21 here corroborate, in your view, the data in the PRRI study?

22 A Yes, to an exceptional degree. This survey was also
23 conducted with a very large sample size of 35,000 Americans.
24 It was conducted a year prior to the PRRI data. But just to
25 give you a couple of examples, the Pew Research Center finds

1 53 percent of Americans in that study support same-sex
2 marriage; the PRRI study finds 53 percent of Americans support
3 same-sex marriage.

4 If we look at white evangelical Protestants, just to give
5 you one more number, 28 percent in the Pew study favor same-sex
6 marriage; and in the PRRI study, 26 percent favor same-sex
7 marriage.

8 Q I'm going to show you --

9 MR. KAYE: Your Honor, may I approach?

10 THE COURT: Yes, you may.

11 BY MR. KAYE:

12 Q Do you recognize this document?

13 A I do.

14 Q What is this?

15 A This is a 2016 report for the Pew Research Center showing
16 basically steady support for same-sex marriage over time.

17 Q And how does this correspond to the data in your -- the
18 PRRI report?

19 A Well, as the headline of the report indicates, it indicates
20 that the data have not moved significantly in any way and
21 basically corroborate the other two studies.

22 Q You can set this document aside. Now, turning back to your
23 study, I'd like to direct your attention to page 12. For the
24 record, we're back to CSE-14. And what does the table on this
25 page show?

1 A So this table is Views on LGBT Nondiscrimination Laws by
2 Religious Affiliation.

3 Q What are the groups that are most opposed to
4 nondiscrimination laws?

5 A We again see a similar pattern here with white evangelical
6 Protestants being most opposed on this law. However, even
7 though they are sort of least in favor, 57 percent of them
8 actually favor nondiscrimination laws.

9 Q On the other end, the religious groups that are most in
10 favor of these laws?

11 A Religious groups most in favor, again similar pattern.
12 Hindus, Buddhists, Jews, Unitarian Universalists and then all
13 the religiously unaffiliated at eight in ten, 81 percent, in
14 favor of nondiscrimination laws.

15 Q I'd like to direct your attention to page 16.

16 THE COURT: I just want to make sure I've heard the
17 question right and the response with respect to page 12.

18 MR. KAYE: Yes.

19 THE COURT: Views on LGBT nondiscrimination laws by
20 religious affiliation, and the question posed to those people.
21 "Do you favor or oppose laws that would protect gay, lesbian,
22 bisexual, and transgender people against discrimination in
23 jobs, public accommodation and housing?" Now, what is your
24 question as it relates to that specific question because that's
25 the chart. I just want to make sure.

1 MR. KAYE: Yeah. Let me clarify, Your Honor. Thank
2 you.

3 BY MR. KAYE:

4 Q To that specific question that the court just read, the
5 groups that were most in favor -- the groups that were most
6 opposed to that type of law that protects against
7 discrimination, those groups are?

8 A Those groups are white evangelical Protestants for the most
9 part. Interestingly enough, Mormons are not as opposed on this
10 particular question.

11 Q And the religious groups that are most in favor of that
12 type of law that protects against discrimination?

13 A Yes, Unitarian Universalist, Jews, Buddhists, Hindus, and
14 here actually Muslims also two thirds support.

15 Q Okay. And religiously unaffiliated?

16 A 81 percent in favor, only 16 percent opposed.

17 Q Now, I'd like to move on to the question of, "Do you favor
18 or oppose allowing a small business owner in your state to
19 refuse to provide products or services to gay or lesbian people
20 if doing so violates their religious belief?"

21 What did your -- first let me ask, the report actually
22 phrases that as -- if you look at page 15, the headline is,
23 "Most Americans oppose allowing businesses to refuse services
24 to LGBT people." So how is the question phrased in this study?

25 A Yes, let me clarify. So the exact wording of the question

1 is: "Do you favor or oppose allowing a small business owner in
2 your state to refuse to provide products or services to gay and
3 lesbian people if doing so violates their religious beliefs?"

4 Q Okay. And what did your study find in terms of those who
5 support that kind of question based on religious affiliation?

6 A We found a similar pattern to same-sex marriage with one
7 exemption, but generally speaking we found again Unitarian
8 Universalists, Jewish Americans, Buddhists, and Muslims and
9 Hindus strongly opposing this law. We also found interestingly
10 enough on this particular question while African-American
11 Protestants only about four in ten support same-sex marriage,
12 we found two thirds of African-American Protestants actually
13 opposed religiously based service refusals on this question.

14 Q Thank you. And religiously unaffiliated people: Where do
15 they come in?

16 A The religiously unaffiliated, 71 percent of them oppose
17 allowing religiously based service refusals; 25 percent
18 support.

19 Q Dr. Jones, in light of the statistics we have just
20 discussed and your years of study in the field of religion and
21 politics, how would you characterize the percentage of
22 Americans who are religiously unaffiliated who hold the moral
23 conviction as opposed to a religious belief that gay and
24 lesbian couples should not be permitted to marry?

25 A Well, what we see is less than one in five. I think the

1 standard question on do you favor same-sex marriage or not is
2 maybe the best answer to this question. Less than one in five,
3 17 percent oppose same-sex marriage. That's a very small
4 minority. I would say overwhelming majorities of religiously
5 unaffiliated Americans support same-sex marriage.

6 Q Okay. And how you would characterize the percentage of
7 Americans who are religiously unaffiliated who hold the moral
8 conviction as opposed to the religious belief that LGBT people
9 should not get protection against discrimination?

10 A Again, the religiously unaffiliated are very consistent on
11 these questions. About eight in ten say that they favor
12 nondiscrimination laws to protect LGBT people.

13 Q And how would you characterize the percentage of Americans
14 who are religiously unaffiliated who hold the moral conviction
15 as opposed to the religious belief that small business owners
16 should be able to refuse service to people just because they
17 are gay, lesbian, bisexual, or transgender?

18 A Again 71 percent oppose. That's overwhelming opposition.

19 MR. KAYE: No more questions at that time, Your Honor.

20 THE COURT: Okay. Thank you. Before
21 cross-examination, Mr. McDuff, do you have any questions for
22 this witness?

23 MR. McDUFF: I do not, Your Honor.

24 THE COURT: All right.

25 MR. BARNES: May I proceed?

1 THE COURT: Yes, you may.

2 CROSS-EXAMINATION

3 BY MR. BARNES:

4 Q Good morning, Dr. Jones.

5 A Good morning.

6 Q My name is Paul Barnes, and I will say that as a
7 Mississippian who's been accused by court reporters as speaking
8 too fast, we are in the same group. And at least I speak a
9 little slower than some of the lawyers in the room. But I
10 still -- I know she will catch -- she will point to me if I
11 start talking too fast. I know Judge Reeves will catch me.

12 But let's talk about -- a little more about the Pew
13 Research Center and your organization. They are very similar
14 in the type of work that you do. And again I believe my
15 question was that your group and entity, your institution and
16 the Pew Research, are very similar in what you do. Correct?

17 A Correct. In fact, our director of research used to work at
18 the Pew Research Center.

19 Q And so you agree that Pew Research is also well respected
20 and nonbiased?

21 A Absolutely.

22 Q And I apologize that I may skip around a little bit.

23 A Sure.

24 Q But normally when we have to cross-examine an expert
25 witness, we would have a report and I would have kind of a

1 guide to go by, but I'm on the fly a little bit. So I
2 apologize if I jump around. I want to ask you on exhibit
3 CSE-14, I'd like to go back to page 4, if you don't mind.

4 A 14. All right. That's the PRRI report. Correct?

5 Q Yes. I'm sorry. Yes, your report.

6 A Yes.

7 Q What page?

8 A Page 6.

9 Q It's the table of views on same-sex marriage by religious
10 affiliation. I notice you skipped over a number of groups when
11 you were outlining the before. So I wanted to ask you about
12 that. I didn't hear you mention Jehovah's Witnesses.

13 A Uh-huh.

14 Q But they strongly oppose same-sex marriage. Correct?

15 A That's correct. Yes, 72 percent.

16 Q And as I read this data, the Jehovah's Witnesses are the
17 most opposed to same-sex marriage.

18 A Let's see. Yes, that's true. They are within 5 percentage
19 points of the white evangelical Protestants. Yes, 72 percent
20 versus 67 percent.

21 Q Muslims. I didn't hear you talk about the Muslim faith. A
22 majority of Muslims oppose same-sex marriage. Correct?

23 A No, that's incorrect. And plurality of Muslims oppose
24 same-sex marriage. It's only 45 percent who oppose and
25 41 percent who favor.

1 Q And I apologize. The only course I ever took in statistics
2 was like long time ago, and it was very basic. But I
3 understand your point.

4 A If we get to 51 percent, we can say majority.

5 Q So not a majority, but more Muslims reported that they
6 opposed same-sex marriage than reported that they favored it.

7 A Correct.

8 Q Is that accurate?

9 A That's accurate.

10 Q Okay. I want to ask you a question about white mainline
11 Protestant.

12 A Uh-huh.

13 Q I believe I understand that designation as it's used in the
14 research, but I want to make sure. Mainline -- mainline
15 Protestant denominations are those like Methodist, Episcopal,
16 Presbyterian?

17 A Yes, sir.

18 Q Correct? That at one time were the majority of the
19 Protestant denominations.

20 A That's correct. Yes, they were in -- certainly the most
21 prominent visible part of the white Protestant world.

22 Q But at some point in the mid Twentieth Century, they
23 actually became less than a majority of the Protestant faith.

24 A That's correct. Their numbers began to decline in the
25 1960s, and that decline continued through the 1990s when it

1 began to plateau. But there was a precipitous decline between
2 the 1960s and the 1990s, that group.

3 Q And back to the chart -- and I apologize again for skipping
4 around. But I don't believe you mentioned black Protestant
5 views --

6 A Uh-huh.

7 Q -- or Hispanic Protestant views or other nonwhite
8 Protestant views. So I know you didn't mean to skip that, but
9 a majority of black Protestants oppose same-sex marriage.

10 Correct?

11 A That's correct. 54 percent oppose.

12 Q A majority of Hispanic Protestant -- a strong majority
13 oppose.

14 A That's correct, 59 percent.

15 Q Other nonwhite Protestants -- not a majority but
16 38 percent report favor, favoring same-sex marriage;
17 48 percent's oppose -- so a plurality -- is that the right
18 term --

19 A That's right.

20 Q -- opposes same-sex marriage.

21 A Yes, sir.

22 Q And then also you've got the Catholic faith broken down
23 into white Catholic, Hispanic Catholic, other nonwhite
24 Catholic. But it looks to me like the numbers are fairly
25 similar.

1 A They are. Those differences are not statistically
2 different from one another, yes.

3 Q So not statistically significant.

4 A In their differences, yes.

5 Q Within the margin of error.

6 A Yes.

7 Q And you were asked about the Catholic faith specifically
8 because of the dichotomy between the official position or
9 doctrine of the church and the opinions reported by the
10 adherence. Correct?

11 A Yes.

12 Q Do you recall that? And you do agree it is the official
13 doctrine of the Catholic Church that same-sex marriage is
14 wrong. It is a sin.

15 A That's correct. That's the official position of the
16 church.

17 Q And the Catholic church is a hierarchal -- I can't
18 pronounce it. I apologize. The Pope is the head of the
19 church.

20 A Correct.

21 Q And everybody below the Pope is supposed to follow the
22 Pope.

23 A Correct.

24 Q As opposed to nonhierarchal denominations such as most of
25 the Protestant denominations. They don't have a Pope. It's

1 much more a individualized belief or groups can form their own
2 beliefs. Is that fair? A bad question?

3 A Not exactly. Among Protestant groups, as you probably
4 know, it is very, very complex. Some Protestant denominations
5 have more binding positions on their clergy, for example, on
6 this issue, and other denominations have less binding. But,
7 for example, the United Methodist Church has a binding position
8 on this, and clergy who violate the position, for example, by
9 officiating at a same-sex couple's wedding ceremony can be
10 disciplined by the church.

11 Q Thank you. And I asked a very poor question, and I admit
12 that -- my personal experience is limited. I'm a Southern
13 Baptist too. But the Catholics -- and I don't want to
14 characterize the Catholics that favor same-sex marriage versus
15 those who do not. But you said there was a correlation between
16 Catholics who attend church regularly tend to oppose same-sex
17 marriage; those who favor same-sex marriage tend to not attend
18 as regularly. Correct?

19 A Right. So among those who attend weekly or more, only
20 48 percent favor same-sex marriage. But if you look at those
21 who attend monthly or less, two thirds favor same-sex marriage.
22 So clear division by church attendance.

23 Q Would you agree with me that in none of the faiths depicted
24 or where there's data concerning groups in this chart on page
25 6, is there a unanimous position? Universal -- Unitarian

1 Universalist is near unanimous. Correct?

2 A That's correct. 96 percent is near unanimous. It is
3 correct -- I would say in public opinion research, anything
4 that runs like seven in ten or more is generally overwhelming
5 support. Never have I seen unanimous on a public opinion
6 research survey.

7 Q I understand. Thank you. We already covered the Methodist
8 distinction so I appreciate that. I would like to ask you --
9 strike that. Do you already have exhibit -- I think you have
10 Exhibit D-3 in front of you, which is the Pew Research Center.

11 A Let's see. I have D-2.

12 Q Let's use D-2 because it's got both the -- obviously the
13 numerical tables and in the back it has the bar graphs.

14 A Yes.

15 Q Do you have a copy of D-4?

16 A I do not. I have D-2 and D-3, which are the bar graphs.

17 Q Bar graphs in D-2 are toward the back. If you look in the
18 bottom right-hand corner, there's some numbers that say D-2-21.
19 I apologize. Those were supposed to make it more helpful to
20 find.

21 A I have D-2 and I have D-3 things on the back of that.

22 Q Right. Exactly.

23 A Okay.

24 Q But it's just the graphs from D-3, not all of the other
25 explanatory materials. All right. I'd like to give you D-4.

1 MR. BARNES: Your Honor, may I approach?

2 THE COURT: Yes, you may.

3 MR. BARNES: The court has a copy?

4 THE COURT: Yes.

5 BY MR. BARNES:

6 Q And this is -- appears to be a little bit more detailed
7 information similar to or perhaps the basis of the chart on
8 page 6.

9 A This is data from 2014 so it is from the same study but
10 from a year earlier.

11 Q Okay. And on D-4, I guess what I was most interested in
12 was there's a lot more detailed breakdown concerning the
13 various denominations where they strongly favor or -- simply
14 favor same-sex marriage, et cetera. I notice that the Jewish
15 faiths you do not break that down.

16 A It's in there. It is 1, 2, 3, 4, 5, 6 from the bottom.

17 Q What I meant to say was aren't there more -- isn't this
18 more than one Jewish faith or a type of Judaism?

19 A Oh, I see what you mean. Yes. But the sample size did not
20 permit us to break those numbers down any further.

21 Q But don't you agree with me that the group -- as I
22 understand it, it's an umbrella term. The term Orthodox
23 Judaism is an umbrella term, as Rabbi Simons told us yesterday.
24 I don't know if you were privy to that, by Rabbi Simons told us
25 that was an umbrella term. But do you agree that many of the

1 groups that identify as orthodox Jews oppose same-sex marriage?

2 A I don't have any data to speak to that.

3 Q Let's look at D-2.

4 A Okay. D-2. Yes.

5 Q I have to say it looks like Pew Research kind of covered
6 the field to some extent on some of their -- on what type of
7 beliefs might have an impact on views on same-sex marriage such
8 as frequency of meditation, feelings of spiritual peace and
9 well-being. Frequency of feeling wonder about the universe is
10 kind of -- was an interesting one to me. But I would like to
11 start with -- it's page 10 of 2014, it says at the top, at
12 bottom D-2.10.

13 A .10. Yes.

14 Q And so would you agree with me that this is a chart based
15 on the number of adults who say they identify what they look to
16 most for guidance on right and wrong? And specifically in the
17 context of same-sex marriage. Correct?

18 A Correct.

19 Q And so for those who strongly favor same-sex marriage, only
20 17 percent say that religion is the strongest influence on
21 their belief.

22 A That is correct.

23 Q That's what the data report.

24 A That's what the data says in the table, yes.

25 Q 15 percent cite philosophy or reason, 53 percent report

1 common sense, 13 percent report science, and 2 percent reported
2 that they don't know. Do you have any data that contradicts or
3 disagrees with this?

4 A We have not asked this question. The reason we have not
5 asked this question this way is because I think these
6 categories are actually a little muddy. So, for example, if
7 you're about to answer a telephone survey and you're called and
8 you're at your kitchen and you're going through a public
9 opinion survey and they are asking you a number of questions,
10 they say to you as you've got one hand on dinner, "What do you
11 look to as sources of right or wrong about views on same-sex
12 marriage," and they give you these categories, I think they are
13 just maybe a clumsy set of categories. So we have not actually
14 asked the question because we didn't think these categories
15 were actually that useful.

16 Q So does that mean you don't think this is valid?

17 A You know, it -- the data is what it says, but I think
18 the -- saying, for example, for many religious people common
19 sense, right, that category draws on their religious beliefs.
20 It is grounded in that what is common sense for religious
21 people is grounded in their religious belief. So I just think
22 these categories are not mutually exclusive categories.

23 Q Fair enough. But you just don't have strong beliefs that
24 are not founded in religion?

25 A Certainly they would, yes.

1 Q But you would agree that this Pew -- you have not done any
2 research that contradicts this.

3 A No.

4 Q So -- and I hope I do the math right. I'll rely on you.
5 But so it appears that of those who strongly favor same-sex
6 marriage, 68 percent -- 81 percent report that philosophy
7 reason, common sense, or science is their primary source of
8 views about same-sex marriage?

9 A Let's see. I've got -- I've got 81 percent --

10 Q 81 percent.

11 A -- on this table. If you add up philosophy and reason,
12 common sense, and science.

13 Q And I know that you did mention that a lot of phone calls
14 is the way you have to do a lot of research in this area.
15 Right?

16 THE COURT: Make sure all your responses are verbal.

17 A Yes, sorry. Start again.

18 Q I apologize. I didn't really give you a chance. I'll try
19 to slow down. But so the same type of problems with -- like
20 people getting ready, cooking dinner, et cetera, those are
21 going to be true of any type of phone study, are they not?

22 A Yes, sir. That's correct.

23 Q Now, again, on D-2.10, that same chart, of those who oppose
24 or strongly oppose same-sex marriage, 55 percent say religion
25 is the primary source of that belief.

1 A Correct.

2 Q But 5 percent say philosophy or reason, 33 percent say
3 common sense, and 5 percent say science. I believe that's
4 43 percent of those who oppose or strongly oppose same-sex
5 marriage at least reported on this survey that their primary
6 source of their beliefs or their opposition were other than
7 religion.

8 A Correct.

9 Q But --

10 A 45 --

11 Q I apologize. I spoke over you. But a majority,
12 55 percent, over 50 percent, reported that it was their
13 religious views that were the basis.

14 A That's right. Majority, 55 percent.

15 Q Doctor, if you would, I'd like to return to CSE-14. That's
16 your organization's report. I would like to ask you about page
17 12 and compare it with page 17. I guess we'll start on page
18 12.

19 A Okay.

20 Q So this is the table regarding "Views on LGBT
21 Nondiscrimination Laws by Religious Affiliation." Correct?

22 A Correct.

23 Q On page 17, is that not the same table?

24 A Yes, sir. This table was duplicated.

25 Q Okay. Now, so I'd like to back up a couple of pages from

1 17 or just back up to page 16.

2 A Yes.

3 Q And on page 16, middle lower part of the page there's a
4 heading "Service Refusals by Religious Affiliation," and then
5 there is some textual analysis.

6 A Correct.

7 Q And you flip over to 17, and I guess my question is was
8 that supposed to be a chart reflecting data on the service
9 refusals by religious affiliation and this was -- was this a
10 mistake? Was it supposed to have a different chart?

11 A The chart was just duplicated here, yes.

12 Q On everything else as I see, there is some type of graphic
13 regarding the headings except for service refusal by religious
14 affiliation. There may be others. I'm not trying to imply
15 anything improper. I'm just saying there's not a chart that
16 reflects that data.

17 A That's correct. The number that I cited are on page 16.

18 Q But I want to -- in comparing those numbers, the numbers on
19 the bottom of page 16 concerning the two major religious
20 groups, which a majority favor allowing small business owners
21 to refuse products or services, white evangelical Protestants
22 is 56 percent and Mormons 58 percent. Correct?

23 A Correct.

24 Q When you turn to 17 against the same chart, 57 percent of
25 white evangelical Protestants and 38 percent say they favor

1 nondiscrimination laws for the LGBT community. Am I
2 interpreting that correct?

3 A That's correct. So for white evangelical Protestants, they
4 both favor basic nondiscrimination laws to protect gay,
5 lesbian, bisexual, and transgender people against
6 discrimination in jobs, public accommodations, and housing. And
7 at the same time, they favor allowing small business owners to
8 refuse services on the basis of religious belief. So they hold
9 both of those views simultaneously, and they strongly opposed
10 same-sex marriage. So that's the portrait of white evangelical
11 protestants.

12 Q Sounds a little confused. But so, again, so they favor
13 nondiscrimination laws but also favor religious accommodations.

14 A That's correct.

15 MR. BARNES: Could I have one moment, Your Honor?

16 THE COURT: Yes, you may.

17 (Short Pause)

18 MR. BARNES: Nothing further. Thank you, doctor.

19 REDIRECT EXAMINATION

20 BY MR. KAYE:

21 Q Just a few questions, Your Honor. Dr. Jones, I'd like to
22 direct you back to Exhibit D-2 --

23 A Yes.

24 Q -- back to page 10 that you were looking at before, the
25 table with the title "Sources of Guidance on Right and Wrong by

1 Views about Same-Sex Marriage."

2 A Yes.

3 Q Based on your understanding of polling methodology, would
4 the questioner have read these subjects seriatim? Would they
5 have read them all and then asked for a response, or would you
6 expect that there would have been an open-ended question and it
7 would have been categorized?

8 MR. BARNES: Your Honor --

9 A I would have to see --

10 THE COURT: Hold on. I assume we have an objection.

11 MR. BARNES: I object to the extent it calls for
12 speculation, and I believe the methodology is provided on the
13 website if we need to explore that. I object. I believe this
14 calls for speculation about what he would expect to see, would
15 it have been read seriatim.

16 A So this is an empirical question --

17 THE COURT: Hold on. Hold on. Rephrase your
18 question.

19 BY MR. KAYE:

20 Q Dr. Jones, are you familiar with the methodology that was
21 used in this study?

22 A I am familiar with the methodology used in this study. I
23 am not familiar with exactly the way this particular question
24 was asked, which is not clear on this exhibit.

25 Q In your studies, when you ask people to explain their

1 reasoning for things, is that something PRRI does?

2 A Yes.

3 Q And how do you present those questions -- those options, or
4 do you?

5 A Well, most of the time we used closed-end questions where
6 we will actually read a list of options. They are usually
7 randomized in their order. But from time to time we will also
8 ask open-ended questions.

9 Q And is this a type of question where if PRRI was asking it
10 you would have left it open ended or closed?

11 A For the most part, I think we would probably have asked
12 this as -- you, know, actually I'm not sure. It may depend on
13 the study, is the honest answer to the question that -- yeah,
14 it depends on -- the judgments that go into this are whether
15 people have a strong sense of previous data that can give you
16 some guidance on a closed-end question. If you don't,
17 sometimes you would ask an open-ended question to try to sort
18 it out.

19 The challenge with an open-ended question is that then the
20 analysts have to take a whole range of responses that may be
21 sentences, some may be paragraphs, some may be one word, and
22 then they have to make some -- the analysts have to make some
23 sense of that data and put them into categories for them to
24 produce a table like this.

25 Q And if this were asked as a closed-ended question, could

1 the respondent choose more than one category?

2 A It depends on the study.

3 Q Okay.

4 MS. KAPLAN: I have no further questions.

5 THE COURT: Dr. Jones, I have a couple of questions,
6 and I'll let the parties follow up based on what I've asked.

7 EXAMINATION

8 BY THE COURT:

9 Q Your research -- do you know from your research or
10 otherwise -- I think you did testify about Mississippi being --
11 only 13 percent of Mississippians claim no religious
12 affiliation whatsoever.

13 A That's right.

14 Q 80 percent claim to be Christian, and I guess of that
15 number, 30 percent are white evangelical Protestants.

16 A That 30 percent is of the entire population. Three in ten
17 of all Mississippians claim to be white evangelical
18 Protestants.

19 Q You were looking at these different groups. Do we know
20 what percentage the population say that they are Jewish, for
21 example?

22 A Yes. In Mississippi that number is very, very small.
23 Mississippi numbers?

24 Q Mississippi numbers.

25 A Yes, less than half a percent.

1 Q What about Muslim?

2 A The same, less than half a percent.

3 Q What about Buddhists?

4 A The same less, than half a percent.

5 Q Hindu?

6 A Less than half a percent.

7 Q Mormon?

8 A The same actually, less than half a percent.

9 Q Has your research indicated what religious preferences
10 members in the Mississippi legislature claim to be?

11 A No, sir. I'm afraid I don't have any data on that
12 unfortunately. The one thing I might add is that there are
13 really two groups that make up six in ten Mississippians and
14 about three in ten are white evangelical Protestants. The
15 other group that is about this same size are African-American
16 Protestants. And between those two groups, that makes up six
17 in ten of Mississippi's population.

18 Q Okay. So you would not know whether there are Muslims in
19 the legislature, for example?

20 A I don't know the answer to that question.

21 Q Or any Jewish members of the legislature?

22 A Sorry. I do not know.

23 Q Or Jehovah's witnesses.

24 A (Witness shakes head)

25 Q Or Mormons. I'm sorry. You need to answer out loud.

1 A No, sir. So all of our data is public opinion data, and we
2 don't have any data on the religious affiliation of Mississippi
3 legislators.

4 THE COURT: Any follow up questions based on what I've
5 asked from the plaintiffs?

6 MR. KAYE: None from plaintiffs, Your Honor.

7 THE COURT: From the defendants?

8 MR. BARNES: No, Your Honor.

9 THE COURT: All right. Is there witness finally
10 excused?

11 MR. KAYE: Yes, Your Honor.

12 THE COURT: Dr. Jones, thank you for coming back home.
13 Spend a lot of money over the weekend here. Plaintiff prepared
14 to call its -- I'll let you confer. Plaintiff prepared to call
15 its next witness? Plaintiff rests?

16 MS. KAPLAN: Mr. Jones -- Dr. Jones, I should say, was
17 our last witness, Your Honor.

18 THE COURT: All right. Defendant wish to call any
19 witnesses?

20 MR. BARNES: No, Your Honor.

21 THE COURT: All right. Okay. Can you approach,
22 please? Just a representative.

23 (At the bench, off the record)

24 THE COURT: Court is going to be in recess for about
25 20 minutes. There will be no closing arguments, but the court

1 will hold arguments on the merits and we will proceed from
2 there. Please take your 20-minute break, and we'll be ready to
3 start back up.

4 MS. KAPLAN: Your Honor, I apologize. Before we
5 start, there is one more housekeeping matter that we probably
6 should do before oral argument.

7 THE COURT: Okay.

8 MS. KAPLAN: That is, at this time plaintiffs offer
9 exhibit into evidence CSE-2, 5, 6, 7, 8 and 9. One was the
10 Episcopal letter that came in through -- was offered in
11 connection with Dr. Hrostowski's testimony, and the others were
12 through Rabbi Simons.

13 MR. BARNES: Your Honor, I believe we have already
14 made our objections and the court --

15 THE COURT: They will be admitted now.

16 (Exhibit CSE-2, CSE-5, CSE-6, CSE-7, CSE-8 and CSE-9
17 marked)

18 THE COURT: Were there other objections -- I think I
19 reserved ruling on Exhibit 30, I think the exhibits tied to
20 that. I had reserved ruling. Have those been admitted, Ms.
21 Smith?

22 THE CLERK: No.

23 MS. KAPLAN: We are no longer offering that. We put
24 her on live.

25 THE COURT: Okay.

1 MR. BARNES: Your Honor, I did have one question
2 about -- we objected to the exhibits to Exhibit 31, I believe,
3 which is the affidavit. Are those -- are those the
4 documents -- have they now come in through another way?

5 MS. KAPLAN: 30 is Dr. Hrostowski -- Reverend Dr.
6 Hrostowski's that we are now waiving. One of the exhibits did
7 come in was 2. The other one we are not seeking to admit.

8 MR. BARNES: Okay.

9 MS. KAPLAN: And the other affidavit was Jasmine Beach
10 Ferrara. I thought we had agreement on that because we didn't
11 put her on.

12 MR. BARNES: We agreed that she would testify to that,
13 but I believe that we specifically objected to the exhibits to
14 the declaration.

15 MS. KAPLAN: So, Your Honor, the exhibits attached to
16 Jasmine Beach Ferrara's affidavit are similar in kind to the
17 ones we just talked about. They are the United Church of
18 Christ's position on these issues.

19 THE COURT: Give me those exhibit numbers again.

20 MS. KAPLAN: 3 and 4. And, Your Honor, one of the
21 arguments that I think they come in under is hearsay exception
22 803(3), which talks about a statement of intent or plan. I
23 think these would both come in as statements of intent or plan
24 as the United Church of Christ's intent or plan with respect to
25 same-sex marriage.

1 THE COURT: Any response from the defendant?

2 MR. BARNES: Your Honor, we still believe they need to
3 have a proper sponsor to put them in context so we stand on our
4 objections.

5 THE COURT: Okay. The objection will be overruled.
6 Obviously any rulings with respect to these exhibits does not
7 bind the court on the ultimate hearing that we might have on
8 the merits in the future. So I'm going to admit those. And
9 that was Exhibits 3 and 4.

10 MS. KAPLAN: Yes, Your Honor.

11 THE COURT: Okay.

12 (Exhibit CSE-3 and CSE-4 marked)

13 MR. BARNES: I apologize. One issue, I don't believe
14 that plaintiffs offered Josh's affidavit with the amicus
15 briefs. Do we need to address that any further as we
16 objected -- I don't believe they offered it into evidence, but
17 we objected to being considered as evidence in the record, and
18 we discussed it before the hearing started.

19 THE COURT: Correct. The affidavit will not be
20 entered into the record, but the court -- the briefs that are
21 attached to that affidavit, the court will look at those as
22 publicly filed documents because they were submitted through
23 various courts. All right. So we'll start back at 10:05.

24 (Recess)

25 THE COURT: I'm thinking -- I guess you can say I was

1 out about 25 minutes, you should have been thinking about this
2 already. I'm thinking how we should proceed.

3 MS. KAPLAN: If it would help, Your Honor, the parties
4 had some discussions about that.

5 THE COURT: Okay.

6 MS. KAPLAN: So what we decided -- and it's obviously
7 completely subject to Your Honor -- is that each side -- these
8 two cases combined and the state would each get an hour for
9 argument, obviously subject to whatever questions Your Honor
10 has. At least kind of rough, that's what we agreed to during
11 the break.

12 THE COURT: One side at a time? That's what I'm
13 trying to --

14 MS. KAPLAN: I apologize for that. That's wasn't even
15 discussed.

16 THE COURT: I'm trying to map out in my head if I
17 allow the Barber plaintiffs to go first, for example, the state
18 respond to those --

19 MS. KAPLAN: If it would help, Mr. McDuff and I have
20 divided the argument so I'm going to be handling the
21 establishment clause part of it, and I gave Mr. McDuff --
22 Mr. McDuff has graciously taken everything else. So we may be
23 able to combine it that way and do both and then let them
24 respond to both. Between us, we'll cover all the arguments.

25 THE COURT: Okay.

1 MR. McDUFF: I think that's right. I'm -- some of the
2 things I'm going to address -- some of the things I'm going
3 to --

4 THE COURT: Make sure you're talking into the mic,
5 Mr. McDuff.

6 MR. McDUFF: Some of the things I'm going to be
7 talking about are actually relevant to both establishment
8 clause arguments, which we have both raised, and the
9 Fourteenth Amendment arguments. But I do think it makes sense
10 for, because there's overlap between our case and the CSE III
11 case, to go ahead and have Ms. Kaplan speak and I will follow
12 up and let the state respond to both of our presentations after
13 which we can reply in whatever time we have left.

14 THE COURT: Okay. Is that okay with the state in that
15 way? Is that okay?

16 MR. BARNES: We think so, Your Honor, yes. We're
17 still mulling it over, but we think yes.

18 THE COURT: We'll do that until it stops working,
19 which is bound to happen.

20 MR. MIRACLE: And I think as we told Your Honor before
21 we started, when we were discussing this off the record that
22 we're trying to not duplicate arguments even though there may
23 be things from Mr. Barnes in the establishment clause portion
24 that relates to Mr. McDuff's briefing, and the same with
25 respect to Ms. Kaplan and the CSE III, Mr. Barnes is going to

1 address, I think, primarily in most of the establishment clause
2 issues. There may be things at the back end, if Your Honor
3 will indulge me, that I may cover as well. I think that's the
4 part we're going have to wait and see, if that's okay with Your
5 Honor.

6 THE COURT: Okay. Okay. Then let's start.

7 ARGUMENT FOR CSE PLAINTIFFS

8 MS. KAPLAN: I'm so excited because I get to push this
9 thing down again. I love that.

10 Good morning, Your Honor. Now, it's obvious to
11 everyone here including, of course Your Honor, that I'm the
12 lawyer in this case. My job is to advocate so I don't
13 really -- I couldn't as a matter of professional obligation
14 have an objective view on this case.

15 But keeping that in mind, I really don't think that
16 under the establishment clause -- settled establish clause
17 jurisprudence of this country this is a very difficult case.
18 In fact, I think it's an easy case.

19 I think it's clear from the evidence that you've heard
20 and from the case law -- and there's years and years of
21 established case law on this -- that HB 1523 falls clearly
22 within the ambit of the First Amendment's establishment clause
23 and is exactly the kind of statute that the clause was designed
24 to prevent.

25 Before I get into the weeds, I thought that it might

1 be a helpful to read some passages from prior Supreme Court
2 opinions which I think make this point very clear. I'm going
3 to start from a quote from Justice Black in the *Everson* case in
4 1947. And what he says, he's describing the establishment
5 clause and the origins of it in terms of this nation's history.

6 And he says, "A large proportion of the early settlers
7 of this country came here from Europe to escape the bondage of
8 laws which compelled them to support and attend
9 government-favored churches. The centuries immediately before
10 and contemporaneous with the colonization of America had been
11 filled with turmoil, civil strife and persecutions, generated
12 in large part by established sects determined to maintain their
13 absolute political and religious supremacy.

14 "With the power of government supporting them, at
15 various times and places Catholics had persecuted Protestants.
16 Protestants had persecuted Catholics. Protestant sects had
17 persecuted other Protestant sects. Catholics of one shade of
18 belief had persecuted Catholics of another shade of belief.
19 And all of these had from time to time persecuted the Jews.

20 "In efforts to force loyalty to whatever religious
21 group happened to be on top and in league with the government
22 of a particular time and place, men and women had been fined,
23 cast in jail, cruelly tortured and killed."

24 One more quote, and this is from Justice Clark in the
25 *Abington Township* case from 1963. "The wholesome neutrality of

1 which this court's cases speak thus stems from a recognition of
2 the teachings of history that powerful sects or groups might
3 bring about a fusion of governmental and religious functions or
4 a concert or dependency of one upon the other to the end that
5 official support of the state or federal government would be
6 placed behind the tenets of one or all orthodoxies."

7 I don't think, Your Honor, that it is exaggeration to
8 say that the times that we live in in this country today with
9 fierce debates going on about religion and between religions,
10 as you heard in the testimony, particularly -- on all issues,
11 but particularly on the issue of the equal dignity of LGBT
12 people, that these times are not all that different from what
13 was experienced by the early colonists. As I said before, you
14 saw it and you heard it in the testimony that we presented over
15 the past day.

16 They too, the colonists, just like the people you
17 heard from, had fierce debates about matters of religion,
18 including taxation to support official churches. Those debates
19 too were vigorous, controversial, at times even rancorous. But
20 our founders decided to resolve those disputes by preventing
21 the establishment of any religion by the state.

22 The point was -- and this was true -- the State of
23 Virginia prior to the First Amendment had a state religion.
24 The point of the first -- of the establishment clause of the
25 First Amendment was to stop that, to prevent it, and to make

1 sure that states like Virginia, Rhode Island, South Carolina,
2 et cetera, could not have an established religion or religious
3 belief of the state.

4 As Justice Kagan explained recently when quoting
5 George Washington's 1790 letter to the leader of the Rhode
6 Island Jewish community, "This is America's promise in the
7 First Amendment: Full and equal membership in the polity for
8 members of every religious group, assuming only that they, like
9 anyone who lives under the government's protection, should
10 demean themselves as good citizens."

11 So I'm going to address, Your Honor, as we said before
12 I started, the section or the prong of the preliminary
13 injunction standard that goes to likelihood of success. And I
14 will be focusing solely on the establishment clause arguments.

15 As I said yesterday, we essentially have three
16 arguments -- independent and separate arguments under the
17 establishment clause, each of which I think violates -- voids
18 the statute and any one of which could void the statute.

19 The first one is that HB 1523 impermissibly endorses
20 religion. The second one is that HB 1523 prefers some
21 religions or some religious beliefs over others. And the third
22 is that HB 1523 creates an impermissible accommodation because
23 it does not take into account the burden it imposes on people
24 who do not hold the preferred religious beliefs, namely, LGBT
25 people.

1 Let me start with the endorsing religion argument.
2 This one I think, as I said before, like all of them, is pretty
3 easy. Let's start with the name of the bill. The bill itself
4 is entitled "The Protecting Freedom of Conscience from
5 Government Discrimination Act." In it, as we've heard over and
6 over in the past couple of days, it talks explicitly about
7 three specific preferred, quote, religious beliefs, unquote,
8 or, quote, moral convictions.

9 Public statements by the drafter, sponsors, and
10 proponents of HB 1523 make its religious purpose crystal clear.
11 And on this I want to, again, be very clear. This is not a
12 situation where even Justice Scalia contended that a court
13 could not consider legislative history.

14 In considering whether the purpose of a statute under
15 the establishment clause endorses or promotes religion in an
16 unconstitutional way, the Supreme Court has instructed judges
17 to look at the context in which a government policy arose.
18 That comes from the *McCreary County, Kentucky*, case. And,
19 indeed, the court has said, Justice O'Connor now, that the
20 court -- the court must be deemed aware of the history and
21 context of the government action.

22 Now, as you heard from Professor NeJaime, HB 1523
23 appears to have been drafted, at least in parts, by the
24 Alliance Defending Freedom, which describes itself as a
25 Christ-centered ministry that fights to keep the doors open for

1 the gospel. And it and its compatriot organizations have taken
2 the position that homosexual behavior is sinful and unnatural
3 and that all gay and lesbian people live in rebellion against
4 God and his created order.

5 Now, I understand -- I expect the State to argue,
6 *Well, what's the big deal, Ms. Kaplan?* because in any statute
7 you have groups advocating for the statute. Different groups
8 draft statutory language and give it to legislatures. That's
9 just part of the Democratic process.

10 While that is certainly true, when the court is
11 considering whether a statute has a religious purpose, was
12 religiously motivated, endorses and promotes religion, the fact
13 that it was drafted, promoted and supported by an explicitly
14 religious organization is relevant to determining whether or
15 not it has any possible secular purpose.

16 While there is a fuller account --

17 THE COURT: What about if members of the legislature
18 simply just find the existence or the nature of same-sex
19 marriages being something, they're philosophically opposed to
20 the notion and want to do everything that they can do to
21 restrict the dignity on those people separate and apart from
22 whatever religious views they might have?

23 MS. KAPLAN: So I think the answer -- so what you're
24 basically -- if I understand your question, Your Honor, is if
25 the legislators had been, shall we say, more careful and if

1 they had not used words like "religious belief" and they had
2 not made the statements that were made during the legislative
3 debates, et cetera, but they just wanted to restrict LGBT
4 rights as a matter of dignity in some kind of secular way, what
5 would be the problem?

6 Whether or not it would be an establishment clause
7 problem would depend. That's not the case before us. It
8 certainly would be an equal protection problem because under
9 *Windsor* and *Obergefell*, the Supreme Court has made it pretty
10 clear that there is no constitutional -- there is no rational
11 basis for the United States government in any way to treat LGBT
12 people differently for any secular nonreligious reason. If you
13 look at both those cases, they go through the reasons and they
14 reject them all as a constitutional matter.

15 THE COURT: And how much of the legislative debate --
16 I forget how many members in the Mississippi -- how many
17 members of the legislature there are in the house and the
18 senate. It's a lot. It's a lot in the house. 144? I don't
19 know. Whatever the number that is, it's way up there.

20 How do you extrapolate from the debate what one or two
21 or five or six might say about a particular bill -- whether
22 it's a sponsor or anybody else, how do we know that that -- if
23 they say, *This is -- I'm doing this because I'm a Christian*,
24 the house member who is sitting in the seat, because they do
25 share tables, I think, or some desk, the desk-mate might vote

1 for it for his own independent reason separate and apart from
2 his colleague's view that it has anything to do with religion.

3 MS. KAPLAN: I would say two things. I'd say, first
4 of all and most crucially, you're going to want to look at the
5 statements made by the proponents of the bill because, again,
6 you're trying to figure out what is the purpose of the bill.
7 And the most probably relevant evidence of that is what the
8 proponents say. And, second of all, again, I'm going to rely
9 on this exception, this carve-out that the Supreme Court has
10 made for legislative history in the context of the
11 establishment clause.

12 Your Honor raises a very good question. It's a
13 question that Justice Scalia has raised in connection with
14 equal protection and other issues, but because the
15 establishment clause says that the government shall not
16 establish religion, the Supreme Court has said -- then you're
17 talking about state action. The Supreme Court has said, which
18 is relevant to standing, which I can touch on. But the Supreme
19 Court has said that looking at statements like this is, in
20 fact, permissible and, in fact, should be done. You need to
21 understand the context in which the statute was presented to
22 the legislature.

23 Obviously, no one can get in the minds of any
24 individual person when they vote. And I would suspect that if
25 you actually -- if they were aware of these issues and you

1 asked some of the proponents now today did they -- if you put
2 them on the stand and said, *Did you pass this for religious*
3 *reasons?* they'd give you the answer no. I suspect that's not
4 motivated them actually at the time.

5 Now, the defendants' other argument that HB 1523 was
6 enacted to create a constitutional accommodation of religion is
7 discredited here by the fact -- two reasons. One, as you've
8 heard me say -- and I apologize for my objection yesterday.
9 You heard me say it. There's this thing called the First
10 Amendment, free exercise clause. It's been around since the
11 establishment clause. It's always existed and it's applied to
12 the State of Mississippi since the Supreme Court applied the
13 Bill of Rights.

14 So there's always been -- that's where accommodation
15 law first began, as you heard Professor NeJaime explain.
16 That's always existed. But even on top of that, you have a
17 Mississippi RFRA which fully protects those rights. But unlike
18 HB 1530 -- HB 1523 does so in a neutral way. Moreover, the
19 Supreme Court precedents make it clear that you're not
20 permitted to look at a statute in the establishment clause
21 context in a vacuum the way the State is suggesting.

22 In *Wallace v. Jaffree*, the court declined to credit
23 Alabama's stated secular rationale of accommodation for
24 legislation authorizing a period of silence in schools for
25 meditation or voluntary prayer given the implausibility of that

1 explanation in light of another statute that already
2 accommodated children who wish to pray. So too here, Your
3 Honor. Exact same thing is true with respect to the
4 Mississippi RFRA.

5 THE COURT: So you're saying that the Mississippi RFRA
6 is enough to protect persons who might have religious views who
7 are working for the public?

8 MS. KAPLAN: It's enough to do so in a
9 constitutionally permissible way. Correct. A, it's neutral as
10 to religions and religious beliefs; and, B, it requires the
11 balancing of burdens that the Supreme Court has said must be
12 done in connection with a religious accommodation.

13 THE COURT: And speaking to the religious beliefs, are
14 we -- other than the context of a couple of members in the
15 legislature invoking Christianity and saying it's Christian,
16 couldn't -- what other -- what other label -- I mean, is there
17 a -- can there -- can there be another label? I mean, other
18 religions might also have that same view. Other than the
19 members of the legislature saying that this is Christian, is
20 that enough to say that the RFRA laws are not enough? I
21 mean --

22 MS. KAPLAN: I don't understand -- I understand that
23 religious proponents would like to have RFRA's the way this is
24 that are automatic. So under HB 1523, you get the right to do
25 various things and you don't have to prove anything. It's

1 automatic. You say, *This is my belief*; you can do it.

2 Under RFRA, that's not the case, under any of the
3 RFRA's. I think you heard Professor NeJaime say this. There
4 has to be a balancing of the burdens and the burden on the
5 believer and the burden of others. That's what the Supreme
6 Court has said is constitutionally required.

7 I would refer Your Honor to Justice Ginsburg's opinion
8 in the *Cutter* case in which she was considering the
9 constitutionality -- I'm going to mangle this -- of the RLIUPA
10 statute, which was the statute that was passed by Congress in
11 the wake of the decision that Congress didn't have authority to
12 pass federal RFRA, and that's exactly what she says. So I
13 think it's the most you can get and be constitutionally -- I'm
14 going use a religious term -- kosher under the constitution.

15 Now, in an effort to kind of come up with some
16 nonreligious, permissible purpose for HB 1523, we seem to hear
17 yesterday, again similar things, that the statute is needed to
18 protect a minister's ability to marry whomever they choose.
19 But no statute was needed for that. Frankly, you don't need a
20 RFRA for that.

21 Going back to what you heard me say about the
22 founders, from the very beginnings of this country it's been
23 very clear that no state or federal government has any ability
24 to tell any minister, rabbi, imam or anyone who's religious who
25 they can or cannot marry. That's the part of religious belief

1 that is fully protected by the free exercise clause -- or
2 exercise clause.

3 In the *Hosanna-Tabor* case, 132 S.Ct. 694, the Supreme
4 Court said that "The First Amendment guarantees houses of
5 worship the power to decide for themselves, free from state
6 interference, matters of church government as well as those of
7 faith and doctrine." And we completely agree with that.

8 THE COURT: And nothing about *Obergefell* or anything
9 else shifted the landscape with that simple proposition.
10 Nothing.

11 MS. KAPLAN: Nothing. In fact, it actually came up in
12 argument. I was sitting there in the court that I day at
13 argument. And I think it was Justice Scalia asked Mary Bonauto
14 some questions about that, and her answer was, *It's already*
15 *protected. You can't tell a minister or a rabbi who they can*
16 *marry.*

17 HB 1523's use of the word "moral convictions" does not
18 save the statute either. In this context, the court has said
19 that a statute doesn't need to adopt -- it does here, but it
20 doesn't need to adopt explicit language identifying the
21 religious beliefs or the religious basis for the beliefs to run
22 afoul of the establishment clause, especially where it is clear
23 that it's religious belief and religious convictions that
24 motivated the law in the first place. And I would refer Your
25 Honor to the *Epperson* case discussing Arkansas -- the Arkansas

1 law relating to teaching of evolution.

2 THE COURT: Is that any different from the *Wallace* and
3 *Jaffree* case where the moment of silence is just a moment of
4 silence? A kid could be thinking or being silent on whatever
5 issue he wants to be. Right?

6 MS. KAPLAN: Exactly right. I -- exactly right. I
7 would say that their argument -- the argument was stronger in
8 *Wallace* and *Jaffree* for the other side than it is here.
9 Exactly right, Your Honor, because there's more arguably
10 secular purpose to a moment of silence than there is to a law
11 that says there's these three religious beliefs.

12 Moreover, the court in *McCreary* made it clear that the
13 secular purpose for the statute has to be genuine, not a sham,
14 and not merely secondary to the religious objective. And we
15 cite that in our brief. So that's, I think, it for my argument
16 on endorsement. I think it's crystal clear.

17 But this law favors -- subtles -- excuse me -- suffers
18 from another fatal constitutional flaw which is that it
19 impermissibly discriminates between religions and between and
20 among religious believers even within religions, as you heard
21 about the testimony of Carol Burnett -- we can't believe she's
22 named Carol Burnett. We've all been talking about that on the
23 team -- from Carol Burnett, not the comedian, who testified --

24 THE COURT: I'm so glad we had this time together.

25 MS. KAPLAN: -- who testified about the Methodists.

1 So, as you know, HB 1523 protects only three state-specific
2 religious beliefs. As you've heard in I think an overwhelming
3 record that we put forward to the court, those beliefs are
4 protected by some but not by all religious persons. They are
5 adhered to by some but not all religions. And that is true as
6 we heard this morning and from Your Honor's questions even
7 within the state of Mississippi.

8 I think here you have kind of the classic -- if we're
9 focusing on Mississippi, you have the -- kind of the classic
10 establishment clause problem, just like George Washington was
11 talking about with the leader of the Jewish community in
12 Rhode Island, where you do have some minority religious groups
13 in Mississippi -- Jews, Episcopalians, and others -- who believe
14 that their religion compels them to recognize the dignity of
15 everyone as created in the divine image and to fully recognize
16 the equality of LGBT people, and you have religions -- majority
17 of religions in the state of Mississippi that do not.

18 It's clear under the law that giving -- extending
19 special rights and privileges -- and I can go through those
20 rights, the automatic exemption I already referred to under the
21 statute -- that giving those rights to certain believers or
22 certain sects and not others violates the establishment clause.
23 That's why all the other RFRA's up to now have been neutral,
24 even if they were actually being promoted by Christian groups.

25 The Supreme Court has adhered to the principle -- and

1 this comes from the *Larson* case -- clearly manifested in the
2 history and logic of the establishment clause that no state can
3 pass laws which aid one religion or that prefer one religion
4 over the other.

5 And, indeed, a statute isn't required in this analysis
6 to specifically identify which religious -- which religious
7 groups or which religious views it's denigrating. For example,
8 in the -- I guess it's the *Larson* case, the statute, which was
9 about the Moonie church, but the statute itself did not say it
10 was about the Moonie church. It punished by requiring
11 disclosure of churches that got more than 50 percent of their
12 donations from nonmembers. That's all the statute said.

13 And the Supreme Court concluded that that was clearly
14 singling out certain religious groups, treating them
15 differently than others, even though it was not doing so based
16 on religious beliefs. It was just based on how much money they
17 got from which people, that that was a violation of the
18 establishment clause principle that you can't distinguish
19 between and among religious groups.

20 And, again, here the word "moral conviction" doesn't
21 save the statute. In America overall, there's a relative --
22 not relative. There's a strong minority of Americans who are
23 nonreligious who have a separate moral conviction, if they do
24 at all, that gay people shouldn't be allowed to get married.
25 And in Mississippi, the amount of nonaffiliated Mississippians

1 is almost negligible.

2 The State's attempt to draw parallels here to the
3 laws -- certain laws relating to abortion also don't work in
4 their favor. The State points to the Church Amendment, for
5 example, which provides that grant recipients cannot
6 discriminate against the doctor for having refused to perform
7 abortions. However, the statute also gives the same privilege
8 to doctors who perform abortions.

9 Again, it's neutral as to any religious view one way
10 or the other on abortion. It does not do what HB 1523 does and
11 pick a side, rest its hands on one side of the scale.

12 Moreover, the church amendment, unlike HB 1523, is
13 relatively narrowly constructed or narrowly created in order to
14 provide exemptions only for particular acts related to
15 abortion. Here, HB 1523 in terms of its breadth goes way
16 beyond one specific circumstance. It goes through many, many
17 other circumstances that the legislature couldn't possibly have
18 weighed, as I said is required by Supreme Court precedents, the
19 difference between the burden on the believer and the burden on
20 people who are hurt by the statute. And that's very different
21 than what they were considering in the abortion contest.

22 THE COURT: So is there any difference than between --
23 I guess those who might oppose performing abortions -- there is
24 an argument, I guess, that they oppose it because they are
25 killing a child --

1 MS. KAPLAN: Yeah.

2 THE COURT: -- or a future child or stopping life.
3 Should the court view the -- the issue of issuing a marriage
4 license similarly, someone could have such moral objection to
5 participating at all in anything that in their religious view,
6 their sincerely religious -- religiously held view, that they
7 cannot participate at all in that process? Is there -- you
8 talk about balancing the harm.

9 MS. KAPLAN: So I would say two things. So, one, in
10 the *Harris v. McRae* case, if you look at the lower court
11 decision, the lower court found that they're -- exactly what
12 Your Honor is pointing to, that because of this view -- and I'm
13 not saying I adhere to it, Your Honor -- that abortion is a
14 form of killing, that there was a not identifiable religious
15 purpose for the statute.

16 Here I think you have to look at HB 1523 as a whole.
17 A, there's no secular purpose. And you have to look at other
18 portions. Whether a particular public official should be
19 allowed or not allowed to issue a license to a gay couple based
20 on their sincerely held religious belief, first of all, that's
21 already protected in RFRA, in the Mississippi RFRA.

22 Second of all, what has to be done there is exactly
23 what we've asked for in CSE I, which is figure out what the
24 situation is. Are there other people that can do it? What's
25 the burden? Is there an impediment underlay or not? We don't

1 know the answers to those questions.

2 But, here, HB 1523 imposes automatic exemptions in a
3 whole host of other areas where it's very hard to see what the
4 secular purpose could be. Not allowing -- allowing a counselor
5 who's otherwise ethically required to do so -- here's the thing
6 we were talking about last night, which is the most horrific
7 maybe example of the statute.

8 Say a kid -- a teenage kid has been going to a mental
9 health counselor because he is depressed. And let's say in the
10 course of those counseling sessions that the kid -- and perhaps
11 even suicidal. The kid says, *You know what? I think the*
12 *reason I may be feeling this way is because I might be gay.*

13 Let's assume at that point in time, which they would
14 be authorized to do under this statute, although not authorized
15 under their ethical guidelines, the counselor says, *"You know*
16 *what? No more counseling. I think you're going to hell, and*
17 *I'm not going to counsel you anymore. I can't see you ever*
18 *again.* They are entitled to do that under the statute. I
19 don't even want -- I'm not even going to try to speculate of
20 what the implications of that could be.

21 So it's very, very hard when you look at the statute
22 as a whole to come up with any secular purpose for this
23 statute. Sure, in individual circumstances there may be
24 individual accommodations that would satisfy the
25 First Amendment under free exercise, but that's not what the

1 statute does. It gives an automatic exemption. It doesn't
2 even, as we talk about, require that there be some finding that
3 there's no impediment or delay before the clerk recuses.

4 THE COURT: Does -- speaking of that example with the
5 counselor, does HB 1523 apply to any and all government
6 officials, state or local, or -- I'm just -- I'm asking. How
7 wide is the breadth of 1523?

8 MS. KAPLAN: As I recall, the definition of "person"
9 in the statute is pretty broad. There's a state government
10 definition which pretty much means anyone acting for the state
11 government or under color of state law. And that's
12 Section 9(2)(a) -- Section 9(2)(a). And then it defines
13 "person" as a natural person in his or her individual capacity
14 regardless of religious affiliation or in his capacity as a
15 member, officer, owner, volunteer, employee, manager, religious
16 leader, clergy, or minister of any entity. It's pretty broad.

17 So if you had a federal employee in the state of
18 Mississippi who is not a state employee, they would certainly
19 qualify as a natural person. They might be violating federal
20 law in doing so. And the crucial thing there, frankly, is
21 they -- if they violated federal law -- and this is an issue
22 with state court judges that we looked about.

23 Actually, if you look at HB 1523, it requires state
24 court judges to violate the constitution and violate the
25 federal law, because it tells them that they must ignore

1 provisions like Title IX, which protects transgender people,
2 and Title VII, which says you can't make the kind of
3 distinctions based on gender that the statute allows. It
4 creates a horrible problem for that state judge if someone
5 brought a civil rights case and they are supposed to be
6 ignoring the constitution and federal law, I don't know what
7 that state's judges do. And they're subject to an injunction.

8 THE COURT: Well, and the State may be -- obviously,
9 the State is listening to the questions that I'm asking because
10 I will want to know the answer to this.

11 For example, you mentioned a counselor. Could a
12 teacher decide that she's not going to -- he or she is not
13 going to teach a class because the class contains children who
14 are being reared in the home of a same-sex couple because,
15 again, that child is being influenced by a same-sex marriage
16 that the teacher does not agree with, and can that teacher then
17 refuse or tell that principal, *That child must be removed from*
18 *my classroom?*

19 MS. KAPLAN: I think that could, Your Honor. I mean,
20 it would be -- it certainly would be a colorable claim under
21 HB 1523. And if the teacher got disciplined by the school, if
22 the teacher said, *I don't want to teach this kid*, and the
23 school then instead, *Okay. You're fired*, that teacher would
24 have a claim for immunity in an injunction under HB 1523.

25 And even worse, frankly, is the situation you heard

1 about from Joce Pritchett where it's probably more likely that
2 what teachers are going to do rather -- I'd rather, frankly,
3 have them not teach the kid. The worst scenario is that they
4 are going to teach the kid and they're going to say things to a
5 five-year-old or a six-year-old that are just horribly scarring
6 and horribly offensive to that kid's dignity and self-esteem,
7 which we all know is so important, particularly for kids -- as
8 parents, for kids at that age.

9 The State's argument that HB 1523 is somehow required
10 by *Obergefell*, we talked that a little bit in that the sense
11 that we don't under the argument the First Amendment and RFRA
12 always existed. Moreover, *Obergefell* doesn't deal with two of
13 the three religious beliefs in HB 1523. It doesn't deal with
14 marriage -- the court didn't say anything about people not
15 having sex before marriage, which I think is protected going
16 back to *Griswold*, by the way.

17 And it didn't say anything about transgender issues,
18 about this fact that you -- whatever biology was -- you come
19 out of the womb with is necessarily your biology forever, even
20 though, frankly, as a matter of science -- and you heard it
21 here from the rabbi, unfortunately -- that's -- there are kids
22 who come out of the womb with indeterminate genders.

23 THE COURT: What the kid who comes out of the womb
24 with a particular sex, like a little boy who goes through
25 circumcision that is botched --

1 MS. KAPLAN: Right. That's exactly right. And that
2 happened --

3 THE COURT: -- totally botched, and the child is so
4 young that the parents might have to make the choice of the
5 child living the rest of his life, his life, without a penis --

6 MS. KAPLAN: Yeah. It --

7 THE COURT: -- or use treatment and therapy because
8 the child is so young to engage in the same-sex -- excuse me --
9 the sex change operation? But 1523 would -- how would that
10 treat that child?

11 MS. KAPLAN: Again, the -- someone could treat --
12 could basically discriminate against that child. Almost anyone
13 in the state of Mississippi could refuse to provide goods or
14 services to that kid, including counseling, psychological
15 services, including accommodations and restaurants, at a
16 private -- I know there's a place my son went where there's
17 like a water park somewhere in Jackson. They could refuse to
18 let the kid go into the water park all based on the view -- the
19 religious view that whatever the parents did with respect to
20 that kid they shouldn't have done because whatever his or her
21 gender was was some different gender that was determined at
22 birth.

23 And you heard the rabbi talk about it in the Talmud.
24 The rabbis actually talked about this a lot because you won't
25 be surprised to hear circumcisions were botched from time to

1 time, sadly. And that is something that happened and
2 continues, sadly, to happen today.

3 Let me go to the third of our arguments, which is the
4 not taking into account -- it creates an absolute accommodation
5 without taking into account the burdens. The court -- the
6 Supreme Court case that is key on this is the *Estate of*
7 *Thornton v. Caldor* case. That's a case that involved a Sabbath
8 law in Connecticut that gave people exemptions based on Sabbath
9 observance.

10 The problem with the case and the problem with the
11 statute is it didn't take into account the burdens both on the
12 observer and on the employer. *Caldor* was about a guy who
13 didn't work to work on the Sabbath and lost his job. And what
14 the court said there is because the statute didn't take that
15 into account and didn't think about the burdens on a small
16 private employer and whether they had to let everyone take
17 Sabbath off, it was unconstitutional.

18 That's not to say that you can't have Sabbath
19 accommodations. You can. But like under RFRA, you need to do
20 the balancing. And that's what this statute doesn't do. It
21 gives an automatic -- like in Monopoly, you get a "Get Out Of
22 Jail Free" card automatically without any consideration.

23 We've outlined the burdens pretty extensively in our
24 brief, the burdens on gay people. I don't think I need to go
25 into that. And you heard some of it in the testimony itself.

1 I'm happy to answer any questions, but I think you know what
2 they are. And, again, they are outlined pretty comprehensively
3 in our brief.

4 I'm going to turn really briefly to the standing issue
5 because I'm running out of time, and I apologize. It's
6 important to note here that standing under the establishment
7 clause is different than standing in almost any other statutory
8 or constitutional area. And the reason for that, if you think
9 about just as a matter of logic, the establishment clause says
10 that the state cannot establish a religion.

11 So it's necessarily talking about what the government
12 can do, and it's necessarily talking about the state
13 establishing or endorsing certain beliefs. And it's very clear
14 from what we've presented that our plaintiff Susan and Joce,
15 who is a CSE member, have established classic establishment
16 clause standing, the kind of standing that you've seen in other
17 cases.

18 For example, if there was standing in the *Austin* case
19 that we cited in our brief, the *Murray v. City of Austin* case,
20 if the plaintiff there had standing to challenge the insignia
21 of the City of Austin that had a coat of arms in it with a
22 cross, there can be no question, it's laughable, Your Honor, to
23 suggest that our clients don't have standing to challenge
24 HB 1523.

25 And, indeed, if you take the State's arguments to its

1 logical conclusion, if the State of Mississippi were to pass a
2 law saying that the Southern Baptist Church is the official
3 church of the state of Mississippi without having any spending
4 or anything that goes along with it, under the State's logic,
5 no plaintiff would be -- would have standing to challenge that
6 statute because there would be no one to sue under *Okpalobi*.

7 That cannot be correct. It is not correct. And if
8 you look at the court's decision in the *Blanco* case in the
9 Eastern District of Louisiana which considered this question of
10 establishment clause standing in *Okpalobi*, it clearly
11 determined that not only did the plaintiff have standing but
12 that redressability was satisfied because the establishment
13 clause is different.

14 I would argue that exactly the same logic applies
15 here. And I'm really running out of time. So I'm going to
16 cede to my able colleague Mr. McDuff.

17 THE COURT: All right. Before you do, you did
18 indicate this notion of different religious sects, religious
19 beliefs. If it is not explicit, I guess it's your view that we
20 look at other things -- the context I think is what you said
21 with respect to -- if it's not explicit, you look to the
22 context of just its passage or who might have sponsored, I
23 think you sort of said? What other things do you look at as
24 far as to show context or what type of evidence would one try
25 to look to to determine if it has a religious purpose.

1 MS. KAPLAN: So that's why we put on
2 Professor NeJaime. I think it's totally appropriate here to
3 also consider the history of these laws, how they developed
4 over time, who is currently supporting them. I think
5 Professor NeJaime said this. If he didn't, it certainly is in
6 his article. But what he had said is that basically once the
7 conservative religious groups lost the argument in *Windsor* and
8 then *Obergefell* that gay people don't have equal dignity under
9 the constitution, they shifted that religious argument from an
10 equal protection kind of strategy to a religious accommodation
11 strategy.

12 And they make it very clear in their materials that
13 that's what they're doing. They make it very clear that
14 they're doing it for religious reasons.

15 The other thing I think I would say is that you don't
16 have to specify -- this statute actually does specify its
17 religious belief and says what they are, but under the decision
18 about the Moonies, the court was so careful that it said even
19 if you have a law that treats certain religious groups
20 differently based on who their donors are, that violates the
21 establishment clause. So it's very, very careful, I would say
22 strict construction in terms of laws that distinguish among
23 religions and among religious beliefs.

24 THE COURT: Hypothetical here. I know 1523 identifies
25 three specific things that it does, but suppose it also -- you

1 think about -- I think somebody mentioned the Eucharist and all
2 of that, the bread and the wine. Obviously, bread has its own
3 makeup, but it has special significance in religion. So does
4 wine, has -- it's made out of grapes and whatever else, but it
5 has a tie to some religions and, for particular, it is
6 sacrosanct, I guess, I mean, if you -- in some religions.

7 So the -- would it be constitutional to protect bread
8 and wine? I mean, it's not to say bread and wine as a -- can
9 you say that that would be secular and not religiously based in
10 some way?

11 MS. KAPLAN: What I would say, Your Honor, is if the
12 state were to pass a law -- two things. One, if the state were
13 to pass a law that somehow restricted wines that are made --
14 for example, I'm thinking of kosher wines, which is my
15 religion. So I know it best. If they somehow passed a law
16 that said you couldn't sell -- make or sell kosher wine and
17 there's certain chemicals that can't be in kosher wine and
18 those chemicals have to be in all wines in the state of
19 Mississippi, I think the -- that the manufacturers of those
20 wines and Jewish people would have a very strong free exercise
21 claim. Even if they didn't have it under the constitution,
22 which I think they do, they would surely have it under
23 Mississippi RFRA. That's analogous to the peyote smoking
24 situation -- drinking situation that I'm sure you're familiar
25 with.

1 The other thing I would say is that the Supreme Court
2 has said a couple of times now that a tax on yarmulkes is a tax
3 on -- is an establishment clause violation with respect to
4 Jewish people. You can't take a yarmulke and say that somehow
5 that's some secular things and, therefore, there's no religious
6 purpose.

7 With bread and wine, you could have. You obviously
8 can regulate the production of bread and wine in the state of
9 Mississippi. The state has every right to do that and that's
10 under -- probably just under rational basis for equal
11 protection. But if it's doing so in a way that's trying to get
12 at some kind of religious practice or observance relating to
13 either bread or wine, then it potentially would be an
14 establishment clause violation and you'd have to look at the
15 balancing test that RFRA requires.

16 THE COURT: Because the state -- because the
17 legislature has passed something that says "sincerely held
18 religious view," "moral convictions" -- I think all of those
19 words are in there somewhere -- doesn't that capture every
20 religion?

21 MS. KAPLAN: It would in the RFRA. It does in the
22 RFRA. The RFRA says "sincerely held religious beliefs," and it
23 doesn't specify them. The problem with this statute -- the
24 statute that -- that makes the statute so egregious -- and,
25 frankly, I don't even know why the AFA tried to promote because

1 it's just so unconstitutional on its face -- is that it picks
2 three religious beliefs.

3 The legislative history we talked about there was some
4 questioning of one of the senators about, *Well, what about*
5 *people who believe, I think, in the Sabbath or people who have*
6 *religious beliefs against drinking, would they be protected*
7 *under this statute?* And her answer, as I recall, was no.

8 This statute only protects three religious beliefs
9 relating to gay people, transgender people, and having sex
10 before marriage. That's exactly what statutes can't do. They
11 have to be neutral with respect to matters of religion. If the
12 establishment clause means anything, it means that.

13 THE COURT: You mentioned standing -- and I realize
14 I'm stepping on some of your time. You'll get all of that
15 back. I want to make sure, does the court have to find
16 standing as to each plaintiff?

17 MS. KAPLAN: No. Under established Fifth Circuit law,
18 you only have to find standing as to one plaintiff and one
19 defendant.

20 THE COURT: Okay. So is -- okay. But standing is
21 not -- standing good to one is not good to all.

22 MS. KAPLAN: It's not good to all, but because this is
23 an establishment clause case and because what we're seeking is
24 invalidation of the law, it frankly doesn't matter.

25 THE COURT: And the invalidation of the law itself

1 would redress these plaintiffs' injuries, I presume?

2 MS. KAPLAN: No question about that, Your Honor.

3 THE COURT: So that I'll have your point on
4 concreteness, which is an element of this standing thing, let
5 me hear you on how -- how do -- how have you proved
6 concreteness?

7 MS. KAPLAN: Let me talk about concreteness. This
8 comes up a lot in the establishment clause in the cases -- and
9 the state relies on this. I'm glad Your Honor asked it.
10 There's a whole line of establishment clause cases about
11 erecting crosses or creches or religious symbols. And the
12 courts have come out, frankly, both ways on whether plaintiffs
13 have standing in those cases.

14 In the *Valley Forge* case, the court held that the
15 plaintiff there didn't have standing because -- I think it was
16 Pennsylvania?

17 THE COURT: Yes.

18 MS. KAPLAN: It was Pennsylvania and the plaintiff
19 lived out of state. I mean, it was kind of a silly case to
20 bring. And they couldn't prove that they actually had to daily
21 encounter this huge cross that offended them. And they said
22 that's not sufficiently concrete.

23 This is exactly the opposite. This presents the
24 paradigmatic case on the opposite. Here you're talking about
25 plaintiffs who live in Mississippi, who have to every day face,

1 as you heard the Reverend Hrostowski say, the concern that they
2 could walk into a restaurant and not know whether they could be
3 kicked out. It doesn't get much more concrete than that, Your
4 Honor.

5 THE COURT: But if they walk into a restaurant -- I've
6 got to use my hometown, Yazoo City. Nobody in Yazoo City knows
7 the Hrostowskis. And when they walk through the door, they are
8 going to see two ladies coming in to have a nice little lunch
9 or whatever. Why should they have any fear about going to any
10 restaurant --

11 MS. KAPLAN: Because --

12 THE COURT: -- when nobody knows them or their
13 relationship?

14 MS. KAPLAN: Because sometimes people see two women
15 with a son -- they have a 16-year-old kid -- and you see two
16 women with a son and you assume they're -- you know, in the way
17 they're relating to each other -- they don't have to make out
18 on the way to the restaurant, but the way they are relating to
19 each other as a couple, and people assume that they are a
20 lesbian couple.

21 You know, you can't live your life -- I can speak for
22 myself, Your Honor. You don't know what people are going to
23 think and you can't -- if you have to live your life thinking
24 about that, if you even have to worry going into the restaurant
25 about how you relate to your wife -- and, again, not talking

1 about being unduly intimate, but even touching her or how you
2 walk in, that's exactly the kind of concrete injury. Frankly,
3 that's much more concrete injury than in almost any case in
4 which the court has found there to be standing based on a
5 dignitary harm under the establishment clause.

6 And one of the reasons why this comes up so often I
7 think in the creche cases and the cross cases and the public
8 display cases is because, to be honest, Your Honor -- and I'm
9 going use another semi-Jewish term here -- no state in the
10 country before has had the *chutzpah* to pass a statute that says
11 there's only these three religious beliefs and these three
12 religious beliefs are the preferred beliefs of the state of
13 Mississippi. The reason why you don't have standing -- we
14 can't given you a case showing that standing, there's no one
15 who's ever tried it before.

16 But under the establishment clause, if you have
17 standing to say -- if you have standing, for example, in the
18 Ninth Circuit to say that a resolution from the City of
19 San Francisco condemning the Catholic Church's position on gay
20 marriage, you have standing to challenge that, you have
21 standing to challenge this.

22 You have standing to challenge a state law that says
23 the state cannot ever consider sharia law and you're a Muslim
24 and the only real argument he has is that their sharia law
25 might be referenced in his will, you have standing to challenge

1 this. And if you have standing to challenge the seal of the
2 City of Austin that has a coat of arms with a cross in it
3 somewhere, clearly, you have standing to challenge HB 1523.

4 THE COURT: How many people see the seal every day?

5 MS. KAPLAN: That's exactly what the court said. I
6 don't even know where the seal of the City of Austin is --
7 comes up. I guess when they stamp documents. I don't know.
8 But the court made that very observation. These people see, to
9 use Your Honor's terms, they metaphorically see HB 1523 in
10 almost every asset of their day-to-day life. That has to
11 create standing under the establishment clause.

12 THE COURT: Thank you, Ms. Kaplan.

13 MR. McDUFF: Good morning, Your Honor.

14 THE COURT: Good morning.

15 ARGUMENT FOR THE BARBER PLAINTIFFS

16 MR. McDUFF: I'm not going to try to cover all of the
17 topics that we have briefed, but there are a couple of things
18 that I think are very important as we close out this hearing.

19 One of them came up in response to a question you
20 asked about the breadth of 1523. It has a wide breadth. It
21 prevents state officials from taking actions in a variety of
22 arenas where they otherwise might believe action should be
23 taken in the best interest of the people of the state.

24 I do not believe -- and I think this is important
25 because you may decide not to enjoin the statute. You may

1 enjoin the statute. The Fifth Circuit may lift your
2 injunction. Possibly -- we hope not, of course, but it's
3 always possible. If this law goes into effect, there are some
4 limits. And I do not believe it authorizes teachers to refuse
5 to teach your child. I do not believe it authorizes teachers
6 to talk down to a child, to kick a child out of a class because
7 he comes from a family with gay or lesbian parents. It does
8 authorize -- it does authorize people to refuse to counsel a
9 child. And that can be devastating.

10 The other problem with 1523, the biggest problem in my
11 view, is that it encourages people to discriminate. I mean,
12 you know, people out in the -- who are dealing with 1523,
13 they're not lawyers. They're not going to parse it like we
14 parse it. And so I can imagine there are some teachers who
15 think they don't have to teach a child or they can talk down to
16 a child or they can do what happened in Rankin County that was
17 talked about yesterday and tell the class that a child is --
18 comes from a -- not from a proper family. And state officials
19 who should be disciplining that teacher might believe they
20 can't because of 1523. 1523 sends a terrible, terrible
21 message. But even when you look at the confines of what it
22 specifically does allow and doesn't allow, it's very broad.

23 The most important thing about 1523, even if it had no
24 impact whatsoever, is that for both establishment clause
25 purposes and equal protection clause purposes it draws lines

1 that affect people's status in the community. And we've
2 discussed that thoroughly in our briefs. And irrespective of
3 the actual legal impact, the lines that are drawn that endorse
4 certain religious views and that treat some people unequally,
5 to grant privileges to some people and not to others, those
6 violate both the First and Fourteenth Amendments.

7 And what I really want to focus on in the time that I
8 have is the question of whether, as the State alleges, there is
9 a secular purpose to this statute and there is a -- and whether
10 the statute is a rational response to some legitimate
11 governmental problem or governmental interest, because those
12 overlap. It's important both to the First and the Fourteenth
13 Amendment issues.

14 And, you know, I was struck yesterday when the
15 colloquy was quoted between Senator Fillingane and Senator
16 Branning where Senator Fillingane said, *We are passing -- we*
17 *need to pass this bill to prevent reverse discrimination.* And
18 my question is, What reverse discrimination? In what way is
19 there anything in this record, anything in the legislative
20 discussion, anything in the reality of the way the world works
21 in this state in which straight people are being discriminated
22 against?

23 In what sense are people who believe in these views
24 that are endorsed by the statute that marriage should only be
25 between a man and a woman, in what way are they being

1 discriminated against? You know, the fact that a gay and
2 lesbian couple marries doesn't prevent a straight couple from
3 marrying. The fact that the people in the Joshua Generation
4 Metropolitan Community Church celebrate theologically weddings
5 of gay and lesbian people and straight people as well doesn't
6 prevent people in the Southern Baptist Church or the United
7 Methodist Church from holding their doctrines. And this notion
8 of somehow it is reverse discrimination is just -- you know,
9 it's just absurd.

10 And Senator Fillingane said, *Oh, we don't want to give*
11 *special rights to these people. And so in order to prevent*
12 *them from getting special rights, we're going to create special*
13 *rights for everybody who disagrees with them, who opposes them,*
14 *who has a religious view that what they are doing is wrong and*
15 *immoral. It makes no sense.*

16 And when you look at the question of what legitimate
17 interest is the state putting forward and you look at whether
18 there is any legitimate interest that is not already dealt with
19 by the RFRA statute, look at page 30, note 31 -- I'm going to
20 read it -- of their brief in opposition to our motion for
21 preliminary injunction. And it says, quote, *Obergefell*
22 *dramatically tilted the playing field against conscientious*
23 *objectors to same-sex marriage after the state RFRA was*
24 *adopted.*

25 That's the reason they say that RFRA is not

1 sufficient. That's like saying *Brown v. Board of Education*
2 tilted the playing field against white supremacists. It's like
3 saying it tilted the playing field against people who have
4 religious beliefs against racial integration. It's like saying
5 the 1964 Civil Rights Act and the 1965 Voting Rights Act and
6 the 1968 Fair Housing Act tilted the playing field against
7 people who don't believe in those -- in those, you know,
8 monumental changes in the law.

9 And so the fact that *Obergefell* -- *Obergefell* leveled
10 the playing field for purposes of marriage so that same-sex
11 couples can get married just like straight couples. And the
12 fact that that decision was issued in no way shows that RFRA is
13 inadequate. In fact, RFRA was passed in Mississippi in the
14 anticipation of the possibility of the *Obergefell* decision.
15 And there is nothing in the record, nothing in the record to
16 suggest that's not the case.

17 If you look at 1523, there's -- and whether it was
18 necessary, there's absolutely no evidence whatsoever of a
19 florist in Mississippi who has said, *Oh, my God, I was forced*
20 *to sell flowers to a lesbian couple that wanted to have a*
21 *wedding and it just ripped me apart spiritually.*

22 You know, it's been a year since -- *Obergefell* will be
23 one year old in two days. Okay? There is no evidence of a
24 spiritual crisis in Mississippi because people are getting
25 married. There is no evidence of somebody who has a plantation

1 house, antebellum plantation house, that they rent out for
2 weddings saying, *Oh, my God, my great-great-grandfather would*
3 *be turning over in his grave because some gay people wanted to*
4 *use my house as a way -- for a reception.*

5 There's no evidence of a circuit clerk saying, *You*
6 *know I had to go to church and pray for forgiveness because I*
7 *was in the office at the lunch hour by myself and I had to*
8 *issue a marriage license. None whatsoever. There is no*
9 *evidence of a church who had some property to sell and they*
10 *said, I was forced to sell it to a gay couple that was going to*
11 *get married, and it really violates all of my religious*
12 *beliefs.*

13 There is no -- this one is really -- is really -- I
14 think illustrates how silly and how unreasonable this bill is.
15 Section 3, subsection 4, 3(4), "The state government shall not
16 take any discriminatory action against a person on the basis
17 that the person declines to participate in the provision of
18 treatments related to sex reassignment or gender identity
19 transitioning, based upon a sincerely held religious belief or
20 moral conviction described in subsection 2." I mean, you would
21 think that the state is going to go be telling orthopedic
22 surgeons that they have got to do sex change operations.

23 I mean, you know, if I go to a doctor who tells me
24 that for, I don't know, whatever reason he doesn't heart
25 surgery and I need heart surgery and he says he's never done

1 heart surgery because he's got some religious objection to it
2 and, therefore, he's not going to do my heart surgery, I would
3 say, *Thank you for telling me*, and I'll go find somebody who
4 wants to do it and has experience.

5 And I would think that if somebody wants treatment
6 related to sex reassignment or gender-identity transitioning,
7 they are going to go to someone who has experience because that
8 person is willing to do it and wants to do it. And so the
9 notion that doctors are going to be sued because they won't do
10 gender-identity transitioning procedures is absurd.

11 There is no evidence that some state employee has been
12 fired because that person expressed during the lunch hour that,
13 you know, *Under my religious teachings, marriage is between a*
14 *man and a woman or I don't understand about this whole*
15 *gender-identity transition thing. That's against my religious*
16 *teachings*. No evidence of that yet whatsoever, yet we have a
17 provision that says you can't discriminate against people who
18 hold those beliefs.

19 THE COURT: Let me ask you this. I understand you're
20 pointing out the evidence that the State has not put out there,
21 but is there any evidence that there a person who has attempted
22 to go to the circuit clerk's office, get a marriage license and
23 be denied?

24 MR. McDUFF: I don't know the answer to that; but I
25 think, obviously, if that happens, a person can bring a

1 lawsuit. And if some circuit clerk says, *Well, you know, I was*
2 *the only one at lunch and that's why I didn't give it to you*
3 *because I have a religious belief and I'm sorry your license is*
4 *delayed, but this violates my religious beliefs,* and somebody
5 brings suit against that circuit clerk, that circuit clerk can
6 impose RFRA as a defense. It can be litigated in court.

7 THE COURT: Senator Fillingane says that *That's why we*
8 *wanted to embolden these deputy circuit clerks, so that they*
9 *won't have to give up their sincerely held religious views and*
10 *be forced to issue a marriage license to same-sex couples.*

11 MR. McDUFF: It's been a year since *Obergefell* was
12 decided, and I'm not aware and there's been nothing in the
13 record of this case or in the legislative debates about a
14 single circuit clerk who's had that problem. Now, maybe in the
15 circuit clerks they've worked it out and they said, *Look, I'm*
16 *not comfortable issuing marriage licenses. You deal with the*
17 *marriage licenses. I'll deal with the voter registration*
18 *applications.* But there is not a single instance of somebody
19 saying they had to violate their own religious beliefs.

20 If it happens and there's litigation over it, then --
21 I think Ms. Kaplan said it very well and I think it's clear,
22 all of this can be evaluated under the Religious Freedom
23 Restoration Act. You don't need a bill that endorses certain
24 specific religious beliefs and provides protection only to some
25 people.

1 THE COURT: There's statutes that -- there's different
2 statutes, I presume, that protect different things. And is
3 there anything wrong with the legislature -- yes, RFRA may be
4 sufficient, but what's wrong with adding another tool in
5 somebody's arsenal, if you will, to help them out? What's
6 wrong with enacting another statute that helps them even though
7 RFRA is there?

8 MR. McDUFF: Because it endorses religions, specific
9 religious beliefs, because it provides special protection to
10 the people holding those specific religious beliefs and because
11 it creates -- it provides special protection to people based
12 on -- and thereby gives unequal treatment to others because of
13 their views on a particular issue, and it also -- and I think
14 this is important -- it really demonizes certain groups of
15 people, specifically same-sex couples who are married or want
16 to marry, unmarried people engaged in sexual relations, and
17 transgender people, and specifically demonizes them and targets
18 them for unequal treatment.

19 And so I think it violates for those reasons the First
20 and Fourteenth Amendment. And I think that RFRA not only is
21 sufficient to handle it, but it does bring into play the
22 weighing of the burdens that are necessary to address these
23 issues in a constitutional fashion. And RFRA is -- to burden
24 someone's religion you have to prove under RFRA a -- that it is
25 the most narrowly tailored means of a compelling state

1 interest. That's a very difficult test to meet.

2 So you don't need additional protections that violate
3 the constitution and is not -- it's not a valid secular purpose
4 and it's not a rationally related legitimate government
5 interest to say you do need special protections so that you can
6 endorse these specific views and draw these lines that
7 otherwise violate the constitution.

8 I want to just talk about two other things related to
9 this bill that I think are very important. One of the
10 provisions says that the State cannot take discriminatory
11 action in foster placements, adoption placements on the basis
12 of a parent's or potential parent's sincerely held religious
13 beliefs. I'm not aware of any instance and there's none in the
14 record of the State taking a gay and lesbian child or
15 transgender child away from foster parents or adoptive parents
16 because of those parents' religious views.

17 I would hope that -- and what I think one of the
18 biggest concerns about 1523, I would hope that even if it does
19 go into effect, that people at the Department of Human Services
20 and the child welfare department will take those children away
21 if the parents, not in terms of their beliefs, but in their
22 actions are doing things that are not in the best interest of
23 that child and harm that child.

24 A great fear about 1523 is that it will embolden
25 foster parents to do those things and it will make DHS and

1 child welfare workers timid and afraid to take action in the
2 best interest of their child.

3 THE COURT: Let me ask you this, Mr. McDuff, because
4 that raises an interesting point about the parties in this
5 case. I just want to make sure, because part of the argument
6 of CSE I or, I don't know, reopening CSE I is who's a state
7 officer and all that? There's a transition that has occurred
8 with respect to the executive director's relationship with
9 who's over foster care now, I think.

10 MR. McDUFF: Right.

11 THE COURT: Justice Chandler is now -- so if we're
12 talking about foster care placement and stuff, I -- and I'm
13 going to ask the State this too because I want to make sure we
14 have the right parties in. Should Chandler be named a party
15 defendant in this case because there was special legislation or
16 something that --

17 MR. McDUFF: Not at this point.

18 THE COURT: Not at this point?

19 MR. McDUFF: The statute provides basically for a
20 two-year transition period.

21 THE COURT: Okay.

22 MR. McDUFF: Now, it can be escalated and the new
23 agency can move out from under DHS prior to that time. But I
24 think the absolute deadline, if I remember correctly, is
25 December 31, 2017. I actually researched this issue because I

1 was thinking about the same point you raise.

2 And it is my understanding the child welfare offices
3 are still under the purview of DHS at the time former Justice
4 Chandler and the director of DHS are supposed to develop a
5 plan. I don't know if they've developed it yet or not, a
6 transition plan; but the transition has not occurred yet. If
7 it does, of course, we can always add Justice Chandler --
8 former Justice Chandler, but it's not necessary because DHS
9 still has some responsibilities that are affected by this
10 statute and some -- and the main thing about the statute is it
11 prevents state officials from taking actions. And so,
12 therefore, the governor, the attorney general, the director of
13 DHS are all -- are all proper defendants because if this
14 statute is enjoined, they will have to be told they are no
15 longer bound by these restrictions; and, therefore, they are --
16 they are proper defendants here.

17 At any rate, what I'm saying is all of these concerns
18 and protections and whatnot that are given to these people on
19 the basis of their sincerely held religious beliefs, there's
20 simply been no evidence to show that this is a secular purpose,
21 that there's any need for this or that it is rationally related
22 to a legitimate government interest.

23 And for that reason, I just -- I think House Bill 1523
24 is a giant hoax. It is a problem. It's -- I'm sorry. It is a
25 solution in search of a problem that doesn't exist. And, you

1 know, the Supreme Court in the *Romer* decision said, "Laws of
2 the kind now before us raise the inevitable inference that the
3 disadvantage imposed is borne of animosity toward the class of
4 persons affected."

5 And given the fact that there is no need for this law,
6 given the fact that there is no problem that it addresses,
7 given the fact that there is no need for a solution because
8 there is no problem, I think the court can certainly draw the
9 conclusion that this law is based on animus to the people who
10 are targeted -- targeted by this bill.

11 And so, really, Your Honor, there are -- you know,
12 there are a number of other things that we have said in the
13 brief and a number of other things I would like to say at this
14 point, though, only really one more that I want to add, and
15 that is at page 16 of the brief, the defendants say none of the
16 plaintiffs allege that they have been denied anything.

17 And what they have been denied is equal status in the
18 eyes of the law by 1523. What they have been denied is equal
19 status in the eyes of the law for their religious beliefs. And
20 so we're not asking for special treatment. We're asking to
21 just go to the things they were -- the way they were in terms
22 of the areas covered by this law prior to House Bill 1523.
23 We're just asking the court -- and I think it is a very modest
24 request -- to maintain the status quo, prevent this statute
25 from going into effect while this case is resolved on the

1 merits.

2 And I want to conclude by quoting from the *Heckler v.*
3 *Mathews* case, which deals with equal protection and I think
4 standing. "The right to equal treatment guaranteed by the
5 constitution is not coextensive with any substantive rights to
6 the benefits denied the party discriminated against.

7 Rather" --

8 THE COURT: Slow down. Slow down. Slow down.

9 MR. McDUFF: -- "rather, as we have repeatedly
10 emphasized, discrimination itself by perpetuating archaic and
11 stereotypic notions or by stigmatizing members of the
12 disfavored group as innately inferior and, therefore, as less
13 worthy participants in the political community can cause
14 serious noneconomic injuries to those persons who are
15 personally denied equal treatment solely because of their
16 membership in a disfavored group.

17 "Accordingly, as Justice Brandeis explained, when the
18 right invoked is that of equal treatment, the appropriate
19 remedy is a mandate of equal treatment, a result that can be
20 accomplished by withdrawal of benefits from the favored class
21 as well as extension of benefits to the excluded class."

22 And even though this bill doesn't say anyone is
23 innately inferior, it certainly does stigmatize people and it
24 certainly provides benefits to the favored class, the people
25 who hold these specific religious views, beliefs or moral

1 convictions that it does not provide anyone else. So we're not
2 asking for special treatment. We're asking for equal treatment
3 of people, of their views, of their convictions and of their
4 religious beliefs.

5 And the final thing I want to say is, we talked
6 yesterday -- both Reverend Carol Burnett and Reverend Susan
7 Hrostowski talked about the fact that for people of faith, when
8 they are talking about these issues, their moral convictions
9 are the same as their religious beliefs. Their moral
10 convictions stem from their religious beliefs.

11 So when you're talking about religious beliefs and
12 moral convictions, they're really one and the same, and you
13 can't separate them out. And so I -- and that, by the way, is
14 borne out by the testimony of the witness this morning who said
15 only 13 percent of the people in Mississippi classify
16 themselves as nonreligious.

17 So for purposes of this statute, I think it is
18 governed in its entirety by the establishment clause. To the
19 extent any portion of it is not, it is governed by the equal
20 protection clause. And I do because -- you know, you are
21 always very thorough. And we have raised multiple claims here,
22 First Amendment and Fourteenth Amendment. We do think in the
23 event there is an appeal, that it will be necessary to have a
24 ruling from the court on both, and we do ask you to preserve
25 the status quo and prevent this unconstitutional bill from

1 taking effect and to create a situation where there is equal
2 treatment, not special treatment for certain people based on
3 their religious beliefs and their moral convictions.

4 THE COURT: Let me ask you this question. You raised
5 the word "animus." And, obviously, this is prefacing what
6 might come to the State, but -- and Ms. Kaplan talked about
7 context in the establishment clause thing. You've mentioned
8 animus for equal protection purposes, I think.

9 MR. McDUFF: Yes, sir.

10 THE COURT: There's a steady -- there's a truncated
11 timeline that one can look at, I think. There was a case out
12 of Hawaii that was the first one to acknowledge a right to
13 same-sex relationships and at some time -- at some point in
14 time -- maybe that's a referendum or something. Then there was
15 the Massachusetts case that really got the ball rolling, I
16 think --

17 MR. McDUFF: Yes, sir.

18 THE COURT: -- for states. And I think after that
19 case was announced, '94, '95, '96 or so, Mississippi then
20 adopted in 1997 a statute that prohibits same-sex marriages.
21 Again, it may be sort of shielding itself from what might come.

22 Then we had DOMA, the Defense of Marriage Act, which
23 was a response, I think, the court found in *Windsor* in setting
24 forth the timeline. The Defense of Marriage Act was passed,
25 and Mississippi then I believe in 2004 decided to amend its

1 constitution to strengthen its right to stave off future
2 same-sex marriages, I believe. You made a point about footnote
3 31 on page 30.

4 MR. McDUFF: Yes, sir.

5 THE COURT: The Supreme Court has now said *Obergefell*
6 is what the condition of the law of the land ought to be. And
7 I think you say that the State has at least said that one of
8 its reasons for it is a response to *Obergefell*. Could the
9 court look at those things and say that it is a basis in which
10 to prove or show animus?

11 MR. McDUFF: Yes. Yes. By the way, the State has not
12 said that *Obergefell* is one of the reasons. It says it's the
13 only reason. The only reason that they passed this bill, the
14 only reason that they say RFRA is not sufficient is because
15 *Obergefell*, quote, tilted the playing field. So that in and of
16 itself is ridiculous and is fallacious. It's is not a basis to
17 uphold this bill.

18 But I do think in analyzing animus you can as -- look
19 at this entire history of actions that were taken against gay
20 and lesbian people as you did in the CSE I case. It does
21 reflect an animus. And I think this is just a continuation of
22 that pattern. And every time these issues have gone to the
23 U.S. Supreme Court from *Romer*, to *Windsor* to *Obergefell*, the
24 court has concluded that there is an element of animus
25 involved. And the fact that special protections are set up for

1 these particular religious beliefs in House Bill 1523 is a
2 clear perpetuation of that pattern, and it's clearly
3 unconstitutional.

4 THE COURT: I know we have avoided talking about
5 *Loving* and all of that in the equal protection thing, and
6 that's fine; but if there was a -- if one of the -- the
7 same-sex marriage -- it says same-sex marriage and I think it
8 says sexual relations -- moral belief or sexual relations of
9 those who are not married. And maybe I should have asked the
10 experts this. And I don't know if there's any religion that
11 suggests that people ought to engage in intrafaith marriages
12 only, but if there were -- if one of the moral codes was no
13 interfaith marriages, could that survive an establishment
14 clause attack?

15 MR. McDUFF: No. No, I don't think so. I think
16 just -- just as a statute that said -- that provided special
17 protections to people who on religious grounds oppose
18 interracial marriage, I think a statute saying that we are
19 building special protections for people who oppose interfaith
20 marriages would be equally flawed and equally unconstitutional.

21 THE COURT: Thank you, Mr. McDuff.

22 MR. McDUFF: Thank you.

23 THE COURT: The court is going to take a ten-minute
24 recess for the court reporter, primarily, I mean, you know, and
25 then we'll be back. Court's in recess.

1 (Recess)

2 THE COURT: Are we ready for the State?

3 MR. BARNES: We are, Your Honor.

4 THE COURT: Okay. Let me throw a curve at you real
5 quick, Mr. Barnes. We've talked about in the -- off the record
6 and also on the record about the motion to consolidate, and
7 I've heard all of your arguments with respect to whether or not
8 these cases ought not -- why these cases should not be
9 consolidated.

10 Is there any reason at this point -- I know we
11 consolidated them for hearing purposes, and I think I
12 ordered -- basically said that we would probably take this
13 matter back up and all that. But is there any reason at this
14 point why these cases should not be consolidated from this
15 point forward on all issues if this matter were to continue to
16 a trial on the merits? It seems like the issues are quite
17 similar.

18 Is there -- so I'm asking the State now. Is there --
19 and we could do it on the back end of the other argument, but I
20 was thinking about the earlier consolidation issues and the
21 objections that the State had, and I said we would do it for
22 hearing purposes only.

23 But now that the hearing has been fleshed out and
24 everybody has had their opportunity, if the court denies the
25 temporary -- the preliminary injunction, then this matter would

1 proceed to discovery, trial, all of that and if the court
2 grants it or whatever. But, still, whenever it is all heard,
3 it's going to be heard. And can they be heard together? Would
4 any party be prejudiced by having these cases combined?

5 MR. BARNES: Well, Your Honor, I consider myself more
6 of a fast ball hitter. So could I have just a moment to
7 consult with my colleagues?

8 THE COURT: Okay.

9 MR. BARNES: Though I would say that on the front end
10 the injury to the State and the damage and the prejudice that
11 has occurred did relate or certainly occurred leading up to
12 this hearing, but -- so we still object to consolidation on
13 that ground and we -- you know, I think we adequately reserved
14 those objections on the record. So we still object. But give
15 me just a moment.

16 THE COURT: Okay. Thank you, Mr. Barnes.

17 (Short Pause)

18 MR. BARNES: And we have a consensus, Your Honor.
19 We're not saying no definitively today, but we would like the
20 opportunity to consult and consider in detail because, quite
21 honestly, you know, I've got a lot of things that the other
22 side has given me to think about, and that was not on the
23 forefront --

24 THE COURT: Okay.

25 MR. BARNES: -- of our minds.

1 THE COURT: Okay.

2 MR. BARNES: May it please the court.

3 THE COURT: You may proceed.

4 ARGUMENT FOR DEFENDANTS HOOD AND MOULDER

5 MR. BARNES: Your Honor, I'd like to start by
6 answering the question that you asked I believe Mr. McDuff, and
7 the answer is there's no evidence that anyone has been denied a
8 marriage license since *Obergefell*. There's no evidence in
9 the -- at least in this record and none that I'm aware of that
10 anyone has been denied a marriage license or that it's been
11 impeded, that a marriage license has been delayed. There's no
12 evidence that anyone has recused themselves. So to answer that
13 question, the answer is, no, there's no evidence of that.

14 Like Ms. Kaplan, I'd like to start by reading from a
15 Supreme Court case. And I guess to the extent that it's been
16 characterized as absurd, we're at least in good company because
17 this comes from Chief Justice Roberts, his dissent in
18 *Obergefell*.

19 "Today's decision, for example, creates serious
20 questions about religious liberty. Many good and decent people
21 oppose same-sex marriage as a tenet of faith, and their freedom
22 to exercise religion is unlike the right imagined by the
23 majority actually spelled out in the constitution. Respect for
24 sincere religious conviction has led voters and legislators in
25 every state that has adopted same-sex marriage democratically

1 to include accommodations for religious practice. The
2 majority's decision imposing same-sex marriage cannot, of
3 course, create any such accommodations.

4 "The majority graciously suggests that religious
5 believers may continue to advocate and teach their views of
6 marriage. The First Amendment guarantees, however, the freedom
7 to exercise religious. Ominously, that's not a word the
8 majority uses. Hard questions arise when people of faith
9 exercise religion in ways that may be seen to conflict with the
10 new right to same-sex marriage."

11 Skipping a few sentences, "There's little doubt that
12 these and similar situations" -- "similar questions will soon
13 be before this court. Unfortunately, people of faith can take
14 no comfort in the treatment they receive from the majority
15 today."

16 THE COURT: How are people in Mississippi being
17 prohibited from exercising their religion? If you look at what
18 Chief Justice Roberts said, "teach," I believe, or "exercise,"
19 how -- well, no, no. I think it's Justice Kennedy in
20 *Obergefell* talks about teaching; justice Roberts emphasizing
21 exercise.

22 How are the people in Mississippi being prohibited
23 from exercising their religion if their religion tells them
24 they don't have to participate in a same-sex wedding, they
25 don't have to officiate over a same-sex wedding? That law --

1 nothing about the law has changed that. So how are people
2 being prohibited from exercising their religious?

3 MR. BARNES: Well, to start with, I guess the clerk
4 provision is a good example. HB 1523 gives clerks the right to
5 recuse themselves in that situation. And their right to free
6 exercise is violated when a clerk is required to issue a
7 marriage license that conflicts with their sincerely held
8 religious beliefs. And HB 1523 attempts to provide a solution
9 to provide a mechanism whereby both the rights of the person
10 seeking the license and the religious beliefs of the clerk may
11 be accommodated.

12 THE COURT: Isn't the government required to provide
13 access to public benefits, public resources, i.e., a public
14 license on the same terms and conditions to each of its
15 citizens and no clerk should be able to withhold a benefit, a
16 resource, a document to a citizen who pays taxes like everybody
17 else on -- on different terms and conditions?

18 I mean, you know, I'm -- the condition here that a
19 clerk faces, for example, in this context is a same-sex couple.
20 So are they allowed to trump or minimize the dignity of those
21 who are in same-sex relationships just because their religion
22 tells them to?

23 MR. BARNES: No, Your Honor, and that's not what HB
24 1523 does, and it doesn't purport to do any of those things. A
25 clerk who simply recuses himself and says, *Bob, is going to*

1 *help you or says, I'm recusing myself, but we've got somebody*
2 *in my office who is going to provide this to you, that's a*
3 *minimal affront I would say to anyone there as far as any*
4 *stigmatic injury when no one is going to be denied that.*

5 And I think it's important to look at the situation in
6 Kentucky where you had a clerk that not only said, *I'm not*
7 *going to give any licenses*, she actively attempted, according
8 to the record, you know, to prevent her clerks, her deputies,
9 from assisting people from obtaining same-sex marriage
10 licenses. And the solution crafted by the district court in
11 the Kentucky case was, *All right. You step aside. Your*
12 *deputies will issue licenses. And as long as that happens,*
13 *that's fine.*

14 That accommodation, at least to some extent, you know,
15 it did allow her to not personally issue the license; but it
16 also at the same time provided that a deputy would. And
17 HB 1523 does exactly the same thing when it says that -- let me
18 quote it because I don't want to -- I don't want to misquote
19 the statute. And we've all talked about it. When it says in
20 Section-- I believe it's 3 -- I'll get there, Your Honor. I
21 apologize.

22 THE COURT: No problem.

23 MR. BARNES: Oh, okay. And, again, a little bit of
24 confusion because the act, you know, has the bold sections and
25 then it also has a lot of subsections and there's repetition.

1 But it's in Section 3(a), and that's bold Section 3,
2 Provision (a). As far as clerks are concerned, "The person who
3 is recusing himself or herself shall -- shall take all
4 necessary steps to ensure that the authorization and licensing
5 of any legally valid marriage is not impeded or delayed as a
6 result of any recusal. If a clerk --"

7 THE COURT: One of the things that came up the other
8 day in our argument, "clerk," who does that speak to? Is that
9 the clerk who's elected and holds the office or is that the
10 deputy clerk or the deputy deputy clerk or the clerk to the 1.0
11 or 0.1 degree? I mean, is it the clerk, the county clerk, the
12 elected clerk, or is it the person who is recusing? Because
13 that could be 18 different people, theoretically.

14 MR. BARNES: Well, your Honor, all I can say is that
15 HB 1523 places that burden on the person who is recusing
16 himself or herself.

17 THE COURT: Okay. So that gets me to the point. The
18 circuit clerk recuses, appoints a deputy clerk to do it. That
19 deputy clerk, as I asked the State the other day, goes to the
20 same church, same Sunday school class as this person here, and
21 they have the same sincerely held religious belief, and it goes
22 down to the next person, the next person, the next person to
23 the next person ad infinitum. There's no guarantee that you'll
24 be able to find someone. Right? Does the law allow persons to
25 be specially designated who are not employed by that office?

1 MR. BARNES: Your Honor, the law -- the law doesn't
2 contemplate that; but the simple answer is, if they're going to
3 claim the protections of HB 1523, they have to fulfill this
4 requirement that they take all steps necessary.

5 THE COURT: I understand if they want to claim the
6 protections, but the protections -- what does one -- I mean,
7 the protections. So --

8 MR. BARNES: So I think the answer is, Your Honor, if
9 they cannot ensure -- I think they would have to issue the
10 license.

11 THE COURT: So you would force someone who cannot --
12 if they have sincerely held beliefs, just because they can't
13 find somebody to issue the license, that they must set aside
14 their sincerely held religious views and issue the license.

15 MR. BARNES: I think that that highly hypothetical
16 conjectural situation might arise. I'm not -- but I -- we
17 haven't seen any evidence that that's the case or that it could
18 be the case because -- again, back to Kentucky. You had the
19 clerk, the head clerk, said, *I'm not doing it*. I believe she
20 had six or seven deputies. They all said, *We'll give the*
21 *licenses*.

22 So I guess that situation is just so far down the
23 road, Your Honor, that it's not a type -- it's not an imminent
24 and concrete harm that's likely to occur just because 1523 goes
25 into effect.

1 THE COURT: You may proceed.

2 MR. BARNES: Thank you, Your Honor. Nothing in the
3 text of 1523 purports to immunize any violation of federal law.
4 It doesn't say it in the text. It doesn't purport to do that.
5 And, in fact, it, again, requires that the person recusing take
6 all steps necessary.

7 Another point about 1523 is in Section 8 --

8 THE COURT: Does it close off the courthouses, the
9 state courts, to those who --

10 MR. BARNES: No, Your Honor. And I should have said
11 maybe that overreaching is a theme that I was hoping to play
12 on, because I heard a lot of extremely expansive descriptions
13 of what 1523 could lead to, and I have a very difficult time
14 connecting those with the text of this bill. And one of the
15 things that people -- a state court would be required to deny
16 someone access as part -- like a 1983 lawsuit. I just -- I
17 don't see that as being a credible possibility.

18 THE COURT: Does one have a right under state law,
19 though, to seek a remedy for every wrong done to him? And is
20 that remedy or is that avenue to a remedy foreclosed by 1523
21 under state law? Are the courthouse doors open to those who
22 invoke the provisions or whatever to 1523?

23 MR. BARNES: I think they are, Your Honor. I think
24 that they are open. And I think the first thing about it is
25 that this law is not about general situations that just come up

1 that have something to do with the same-sex married couples.

2 This law is about the provision of marriage or events
3 related to the provision of marriage, which is why -- I
4 appreciated Mr. McDuff acknowledging, I mean, the idea that
5 this could apply in a school situation. That's -- we don't --
6 I agree with Mr. McDuff. We don't think that it goes there,
7 and schools are a special situation.

8 By the same token, we think that the extremely,
9 extremely broad interpretation being placed on this counselor
10 provision takes it out of context and it's cherrypicking. I
11 mean, that provision says, "The state government shall not take
12 any discriminatory action against a person" --

13 THE COURT: Slow down and direct me to the specific
14 portion.

15 MR. BARNES: I apologize, Your Honor. It is in
16 Section 3(4). And it reads -- and I will try to slow down for
17 the court reporter. "The state government shall not take any
18 discriminatory action against a person, wholly or partially, on
19 the basis that the person declines to participate in the
20 provision of treatments, counseling, or surgeries related to
21 sex reassignment or gender-identity transitioning or declines
22 to participate in the provision of psychological counseling or
23 fertility services based upon a sincerely held religious belief
24 or moral conviction described."

25 Now, they've taken the sentence "psychological

1 counseling or fertility services" out of context.

2 THE COURT: What type -- it says "provision of
3 treatments."

4 MR. BARNES: Right.

5 THE COURT: "Treatments," comma, "counseling." So any
6 kind of treatment, I presume, if one objects to providing
7 treatment because of your religious views, you're fine.
8 Counseling. It doesn't say -- that's why I asked about school
9 systems, because it doesn't say what type of counseling. Is
10 counseling -- I mean, is it psychological counseling? I assume
11 it includes marriage counseling. I don't know.

12 MR. BARNES: Your Honor, it's counseling that related
13 to sex reassignment or gender-identity transitioning. It's
14 just a continuation of the same sentence. That's why I was
15 saying it is taken out of context. If you read the provision
16 as a whole, it relates to treatments, counseling, or surgeries
17 related to sex reassignment or gender-identity transitioning or
18 declines to participate in psychological counseling, fertility
19 services. So we think that it's taken -- that's just an
20 extremely broad expansion.

21 And I guess the other thing is we're talking about a
22 situation -- there's no proof of that happening. There's no
23 proof in this record. There's no evidence that anyone is going
24 to be denied counseling services. First of all, you've got the
25 issue that 1523 -- and I apologize. Let me slow down. 1523

1 doesn't bar any counselor from providing any counseling or any
2 other type of professional from doing exactly what their
3 personal sense of ethics and their personal professionalism as
4 a counselor requires them to do. Nothing in 1523 tells a
5 counselor, *You cannot provide this counseling.*

6 1523, the title is Protecting -- in Section 1,
7 "Protecting Freedom of Conscience from Government
8 Discrimination Act." Plaintiffs have thrown around the phrase
9 "preferred religious beliefs" a lot. You're not going to find
10 that in the text. The act does say, "Sincerely held religious
11 beliefs or moral convictions protected by this act are the
12 belief or conviction that," and it proceeds to include that
13 cluster of three beliefs, "marriage... recognized as the union
14 of one man and one woman; sexual relations are properly
15 reserved to such marriage; and male (man) or female (woman)
16 refer to an individual's immutable biological sex as
17 objectively determined by anatomy and genetics at time of
18 birth."

19 Now, I believe I heard Professor NeJaime say that that
20 is a cluster of beliefs, that it's not -- you don't pull them
21 out, but those are generally considered to be together. And,
22 now -- and the provision I meant -- I was trying to get to to
23 emphasize, Your Honor, was Section 8 of 1523 says, "This act
24 shall be construed in favor of a broad protection of free
25 exercise of religious belief and moral convictions to the

1 maximum extent permitted by the state and federal
2 constitutions."

3 So by including that language, the legislature is
4 saying, to the extent that this law violated the federal
5 constitution, we recognize it would be invalid. Moreover, to
6 the extent, even though this law doesn't have a specific
7 severability provision in it, as the court's well aware,
8 Mississippi -- the Mississippi Code includes a general
9 severability provision which is incorporated into every law
10 whether or not it's specifically mentioned or not.

11 By protecting these three particular beliefs, 1523
12 does not say there are not other beliefs which are worthy of
13 protection. It does not say these are the only beliefs that
14 are worthy of protection. I know plaintiffs' position is
15 that's the message that it sends. That's the message that it
16 sends. But that is not what it says.

17 And one of the most important distinctions between
18 some of the cases relied on by plaintiffs is the fact that in
19 those cases, you had laws that specifically said Muslims are
20 disfavored; the Catholic Church is disfavored. For example, in
21 *Awad*, the constitutional amendment in Oklahoma specifically
22 said sharia law can't be considered by the courts in Oklahoma.

23 Sharia law is specific and integral to the Muslim
24 faith. That law specifically denigrated Mr. Awad's personal
25 religion, specifically said it cannot be considered. That

1 would be like a law saying the Ten Commandments can be
2 considered by a court and -- well, as Justice O'Connor pointed
3 out, *Well, you know, Ten Commandments says, Thou shalt not*
4 *kill; but that doesn't me you can't have laws against murder.*

5 And in *Harris v. McRae* when the court said, you know,
6 many religions say stealing is wrong, but that doesn't mean
7 that the court violates -- I mean that the government violates
8 the establishment clause when you have a law against larceny.
9 So those laws specifically denigrate. That law specifically
10 denigrated. In the --

11 THE COURT: So what is the secular purpose of this
12 law? Does it have to be a -- let me rephrase that. Because
13 these plaintiffs have brought an establishment clause attack on
14 the law, do we have to find that there's a secular purpose or
15 do you rest on -- what is the secular purpose behind had law?

16 MR. BARNES: Well, protection of free exercise of
17 freedom of conscience is a secular purpose. That's the same
18 secular purpose that's behind all of the RFRAs, federal and
19 state.

20 THE COURT: What does this law do that Mississippi's
21 existing RFRA law does not do?

22 MR. BARNES: Well, you know, that's a little
23 interesting, Your Honor, because, as I believe Mr. McDuff
24 mentioned in his argument, you know, at the time that the state
25 RFRA was filed, it was -- it was considered to be intended to

1 be discriminatory against same-sex marriage rights. And there
2 was I think a pretty good bit of hoopla about it.

3 But now the plaintiffs are saying pretty much that,
4 *Well, state RFRA law is great. It provides all the protection*
5 *that you would ever need. Well, that doesn't mean that*
6 *tomorrow or next week that somebody else is not going to file a*
7 *challenge to the state RFRA law and say, This is*
8 *unconstitutional.*

9 And, certainly, I think you could reasonably
10 anticipate a situation where if someone -- whether HB 1523 goes
11 into effect or not, a person goes and is denied service, denied
12 renting a facility or a wedding cake and they, you know, try to
13 defend on the basis of state RFRA, well, the first thing is
14 they probably would be sued in federal court, but -- and we'd
15 be right back here with a lot of the same faces and Your Honor
16 would probably be telling them, *Well, you know, whatever that*
17 *does as a matter of state court, that certainly -- that doesn't*
18 *touch the federal constitution. It doesn't affect religious*
19 *rights.*

20 So the fact that they are not choosing to challenge
21 state RFRA today doesn't mean that they may not challenge it
22 and try to strike -- you know, struck down tomorrow because --
23 and Mr. Goodwin is going to speak to the *Romer* issues directly.

24 But, you know, Mr. McDuff made a big deal about the
25 fact that -- he said, *Look, there's no evidence that this is*

1 *happening to anyone. There's no evidence that these people are*
2 *doing it, but that's because there is no law in effect in most*
3 *of the state that would permit those things to happen. But*
4 *that appears to be the type of situation that the plaintiffs*
5 *want and where someone could be disciplined for acting contrary*
6 *to their beliefs.*

7 *So in Obergefell --*

8 THE COURT: I mean, we do recognize that you were
9 quoting from Chief Justice Roberts decision, and it's --

10 MR. BARNES: It was in the dissent.

11 THE COURT: -- it was in the dissent.

12 MR. BARNES: It is a dissent. Absolutely, Your Honor.
13 It's not controlling, but it's just foreshadowing the situation
14 we're in.

15 THE COURT: Well, this issue of protecting freedom of
16 conscience from government discrimination, I guess that leads
17 to the question, how has the government been discriminating
18 against those who are in opposite-sex relations, those who only
19 engage in sexual relations within the marriage confines?
20 Turning the moral things on its -- looking at the mirror
21 opposite, this is protecting freedom of conscience from
22 discrimination -- from government discrimination.

23 So tell me how the legislature thought that the
24 government had been discriminating against those who -- I guess
25 don't have these moral codes, I guess.

1 MR. BARNES: Of course, nothing in 1523 says they
2 can't hold whatever moral codes and live by whatever code they
3 wish. But I think the answer is that after *Obergefell*, whether
4 plaintiffs consider it to be rational or reasonable or not,
5 just like the chief justice and the three -- well, the four
6 dissenters at the time, you know, recognized the serious
7 conflict between -- potential serious conflict between same-sex
8 marriage rights and free exercise of religion and I guess
9 actually, technically, all nine members of the Supreme Court
10 unanimously recognized that there was an issue with that
11 intersection, because the majority, Justice Kennedy said it,
12 and then the dissenters did and, of course -- and I believe it
13 was Justice Smith in the Fifth Circuit order also foreshadowed
14 this, but that in that context after *Obergefell*, citizens who
15 hold the beliefs that are protected by 1523 were effectively
16 told by the U.S. Supreme Court, *Your beliefs are garbage*.

17 THE COURT: I mean, is it any different, though -- and
18 I don't want to sort of try to elevate anything, race in this
19 here, but 1967 there was *Loving*. The Supreme Court spoke -- I
20 think it was *Loving*. I think it was '67 -- spoke. Now, if the
21 state in response to *Loving* filed a brief that says that, *Now*
22 *we have pushed down to the clerks the issuing of licenses.*
23 *It's not going to be issued by the state anymore. It's going*
24 *to be issued by the clerk. We have amended our statute. And*
25 *not only that, we've amend it, and we allowed these clerks to*

1 use their strongly held religious views to withhold granting a
2 license that the Supreme Court -- to the marriage of
3 interracial couples -- the Supreme Court did that. Some states
4 had laws on their book that says, *We won't acknowledge them.*
5 Same way as *Obergefell*. Now the Supreme Court has spoken.

6 What's the difference if the State had gone back and
7 created or devised a mechanism that allowed clerks to withhold
8 granting of a marriage license to those of opposite races or
9 opposite faiths, is one thing that I asked Mr. McDuff. Doesn't
10 that -- I mean, does that pass the smell test?

11 MR. BARNES: Well, the first answer, of course, Your
12 Honor, is that it didn't happen, thank goodness. But in
13 *Loving* --

14 THE COURT: But things did happen -- again, I don't
15 want to mix up, because I do -- I don't want to mix up race
16 stuff, because things did happen; and the State moved mighty,
17 mighty slow on doing things, creating barriers, creating --
18 doing things with -- in all deliberate speed, if I will -- if
19 you may.

20 MR. BARNES: And, Your Honor, you just hit on the
21 difference. When the Supreme Court in *Brown* concluded that
22 with all deliberate speed, that language, you know, enabled a
23 whole lot of lengthy and contentious issues.

24 And I agree. I would rather not dwell on that aspect
25 of our state's history; but in *Loving*, the difference, as I

1 understand it is -- well, first of all, the Supreme Court
2 didn't say like it did in *Obergefell*, And, oh by the way, there
3 are many, you know, people who hold sincerely held religious
4 beliefs and moral convictions that white supremacy is the way
5 it is. I'm saying they weren't, but I'm saying the court
6 didn't say, That is a potential intersection we have to be
7 concerned with and -- because in *Obergefell*, the majority says,
8 *You've got rights protected by the Fourteenth Amendment; you've*
9 *got rights protected by the First Amendment*, same thing Justice
10 Roberts said. So to me, that is the distinction is that you're
11 not dealing with a situation that the Supreme Court recognized
12 and --

13 THE COURT: Well, one --

14 MR. BARNES: The racism is not --

15 THE COURT: Well, one distinction may be is that
16 obviously there are a lot economic consequences to sort of
17 forcing people to change their school districts overnight,
18 build new schools and all of that.

19 A matter of issuing a license, you don't need all
20 deliberate speed. It's just a matter of changing a form either
21 from husband and wife to spouse to spouse or spouse one to
22 spouse two and issuing it. So that may be one distinction.

23 MR. BARNES: And I appreciate you offering me that
24 distinction, Your Honor. I certainly agree, of course, just
25 like all you have to do is issue a license, all you have to do

1 is step aside and let the next clerk issue a license. That's
2 just as easy.

3 And again, though, I think we've gotten a little far
4 afield. And the point I was trying to make about *Obergefell*
5 was that at that point people who hold the beliefs that are
6 protected -- described as protected in HB 1523, they felt
7 denigrated. They felt disfavored. And the Mississippi
8 legislature did react to *Obergefell*, but it didn't react to
9 *Obergefell* by saying, *No, no, no, we're going to bar it this*
10 *way. We're going to bar it that way. We're going to prevent*
11 *it this way.*

12 HB 1523 focuses on the people who are protected and --

13 THE COURT: Can one who has sincerely held religious
14 beliefs -- and I don't know if there's a person out there who
15 does through a religion have sincerely held religious views
16 against opposite-sex marriages; and if they do, does that
17 statute protect that person?

18 MR. BARNES: I'm trying to parse it out, Your Honor.
19 I haven't considered that. Based on the text of the act, I'd
20 would say, no, Your Honor. I'd say that as far as I can read
21 the text, it does not specifically do that. But I have not,
22 you know, fully analyzed that question. I apologize, but
23 the --

24 THE COURT: Does it -- in giving the right of an
25 individual to determine which marriages or which -- well, the

1 right to pick and choose which types of marriages that they
2 will not recognize based on their sincerely held religious
3 belief, does that in and of itself establish a religion under
4 the First Amendment?

5 MR. BARNES: We don't think it does, Your Honor. And
6 because -- first of all, the first story -- the first argument
7 we heard was *This is sectarian. This is Baptist versus*
8 *Methodist, Methodist versus Catholic.* The evidence shows
9 that's not true because there are some churches specifically
10 have doctrinal preferences or commands about same-sex marriage;
11 there are others who do not. But all the evidence shows that
12 regardless of what those churches officially say, the members
13 actually believe whatever they want to believe.

14 So the closest example is the abortion context and
15 which is why we discussed the Church Amendment and the Hyde
16 Amendment, which came later and was addressed in *Harris v.*
17 *McRae.* And as the court's well aware, *Roe v. Wade* was a kind
18 of a social upheaval case which changed the playing field.
19 Prior to *Roe*, states had laws that said conducting -- some
20 states had laws that said conducting an abortion is a crime.
21 When the Supreme Court said in *Roe* a woman has a right to
22 choose whether or not to have an abortion, well, that took that
23 out of the question.

24 So when you look at the Church Amendment, the question
25 is: Who was Congress intended to protect? Plaintiffs say,

1 *Well, it protects both sides. It protects both the person who*
2 *does abortions, and it protects the person who doesn't perform*
3 *abortions. And it is true that the Church Amendment does*
4 *include language that specifically says that with regards to*
5 *employment matters and discrimination regarding privileges that*
6 *entities can't -- receiving public money can't discriminate*
7 *whether somebody has performed abortions based on sincerely*
8 *held religious beliefs or has sincerely held religious beliefs*
9 *that prevent them from performing abortions.*

10 But after -- but it -- the section before that
11 contains a provision that is specific to people who oppose
12 abortion, and it reads -- it's in our brief -- "The government
13 cannot require such individual to perform or assist in the
14 performance of any sterilization procedure or abortion if his
15 performance or assistance in the performance of such procedure
16 or abortion would be contrary to his religious beliefs or moral
17 convictions." So the Church Amendment says you cannot force
18 that person, that health care worker, to act against their
19 beliefs.

20 And I've been trying to come up with a situation where
21 other doctors would need protection. But, candidly, I think
22 the section relied on by plaintiffs, again even though it lists
23 both, that preceding section shows who Congress was trying to
24 protect: The person who had religious beliefs that prevented
25 them from performing abortion. And the Church Amendment was

1 held constitutional by the Ninth Circuit -- I believe it was
2 the *Chrisman* case. I'm not -- I believe Mr. Miracle cited it
3 in his brief; I don't know that we did. But in 1974, I
4 believe, the Ninth Circuit said, *Church Amendment is*
5 *constitutional.*

6 And then followup, you had the Hyde Amendment which
7 said, you know, *The government can prohibit the use of public*
8 *funds for performing abortion.* And the argument raised was,
9 *But wait, wait. Look, opposition to abortion,* as it was
10 perceived at that time, they said, *That's the Catholic church*
11 *talking.* The Hyde Amendment simply incorporates the official
12 position of the Roman Catholic Church as to when life begins
13 and that abortion is a sin, and the Supreme Court in *Harris v.*
14 *McRae* said, *This does not violate the establishment clause.*

15 So is it very rare that you have a situation where a
16 law like this can survive constitutional scrutiny? I think it
17 is. I think this is like the situation right after *Roe*, just
18 one of those special situations.

19 Your Honor, I apologize -- and Mr. Miracle has to have
20 time and Mr. Goodwin. There was so much to respond to, but I
21 would like make a few points.

22 The school cases. Plaintiffs rely on a lot of school
23 prayer cases, a lot of moment of silence cases, a lot of forced
24 to say an oath that uses the words "under God" in them. Your
25 Honor, public -- schools are a totally separate. There are a

1 special context. The Supreme Court has recognized that many
2 times that the schools, you're dealing with impressionable
3 young people who are particularly open to the coercive effects
4 of perceived endorsement of religion.

5 THE COURT: How coercive is a moment of silence? A
6 teacher walks into the room and just say, *Let's be quiet here*
7 *for about 30 seconds. Y'all think about what you want to do*
8 *during that 30 seconds.*

9 MR. BARNES: Well, Your Honor, you know, I think --
10 I'm thinking back to something that Ms. Kaplan started off by
11 saying, *We think this is an easy establishment clause case*, and
12 I had to think -- I don't think there's any easy establishment
13 clause cases personally because if there were, *Engel v. Vitale*
14 would have ended the school prayer debate, and it did not,
15 which is shown by how many school prayer and moment of silence
16 cases there are. And in some of those cases, the Supreme Court
17 said this moment of silence --

18 THE COURT: If this court enjoins the state on this --
19 if the court enjoins this statute, what prevents the State from
20 coming back trying to find another way to do exactly what it
21 did this time? They were -- *Obergefell* came down. *Obergefell*
22 says, *Recognize these people in all the dignity and all the*
23 *liberty.* Justice Kennedy's opinion was rather broad and
24 expansive, if one wants to read it that way, despite
25 probably -- and that's probably why the four dissenters

1 attacked it in the way that they did. Maybe. But it talked
2 about dignity and liberty, as one of the dissenters said,
3 without citing anything with respect to the law.

4 So what would prevent the State of Mississippi from
5 doing what I call the whack-a-mole theory? You knock down one,
6 and you come up with another, and then we will be in litigation
7 again. And you would have thought that *Obergefell* was the end
8 of the story, the progression with *Romer*, with *Windsor*,
9 *Obergefell*, you would have thought that was the end of the
10 story, but it's not.

11 MR. BARNES: And like *Roe*, you would have thought that
12 that would have ended the situation, but it sure didn't. So I
13 guess the answer is based on the fact that we live in a
14 democracy where legislatures -- and policy decisions like this
15 are specifically, you know, within the purview of legislators,
16 there's always going to be the chances that may occur.

17 But I think you have to look at each of those
18 situations -- to some extent you have to look at the law that
19 is passed, make a decision on the basis of that law. If this
20 court were to enjoin 1523 and state its reasons, certainly --
21 speculating, but certainly people could take that decision -- a
22 legislature could conceivable take that decision and say, *Well,*
23 *this is what Justice Reeves says is wrong were the law so --*

24 THE COURT: No, no, not Justice Reeves. Come on, now.
25 Let the transcript reflect not Justice Reeves.

1 MR. BARNES: Judge Reeves. I was not trying to be
2 clever. It just slipped out. I think the school case is a
3 specific context, and I guess the legislative process lends
4 itself to the fact just like you can't resolve moment of
5 silence one and for all or abortion once and for all, that
6 there's always that possibility.

7 There was a lot of these really hypothetical
8 situations that the testimony went to, and there's just a few
9 of them I'd like to hit on. Ms. Garner and the connection
10 between the AIDS treatment and HB 1523, we don't understand
11 that connection. We think that's much too attenuated.

12 I mean, you're supposed to be able to connect anybody
13 in the world to Kevin Bacon with like six degrees of
14 separation, and you have to go a lot of steps there. I heard
15 one of my colleagues refer to it as the "Three Ifs Rule." If
16 you've got to the say, *If this happens and if this happens and*
17 *if this happens*, that's it. If you have to go one more, then
18 you've got a situation where you don't have a concrete and
19 particularized injury.

20 Also we do not dispute that all the testimony offered
21 by the plaintiffs concerning how HB 1523 makes them feel was
22 not their sincere subjective beliefs about HB 1523. That is
23 the way that it made them feel. But the evidence that that was
24 the intent of 1523 is missing. And if you read -- when you
25 look through the history, first of all, yes, the court can

1 consider legislative history, especially on purpose of passing
2 a statute. But that's only part of the question.

3 And an unofficial transcript of a floor debate is just
4 the tip of the iceberg, and it is true that we can never know
5 all the things considered by the legislature, what the
6 neighbor -- one legislator leaned over and said to the other.
7 And so, yes, the court can consider it, but it's not
8 dispositive.

9 The religious symbol cases, I would just like to
10 mention that specifically. Those cases don't say the existence
11 out there of a law means that anybody who knows about the
12 existence of that law has standing. They just don't. And
13 those laws do emphasize -- you have a physical symbol, a
14 reminder, which carries weight across a menorah, a Star of
15 David, that gives -- it's at the heart of those cases.

16 And we think those -- they are distinguishable. They
17 just are distinguishable. Rolling those over from the cross,
18 menorah, creche thing to an abstract feeling about a law is a
19 stretch. It just goes farther -- it certainly goes farther
20 than the Supreme Court has gone. I believe it goes farther
21 than the Fifth Circuit has gone.

22 You restaurant hypothetical to me illustrated kind of
23 the hypothetical impact. You say, *How would they know -- how*
24 *would somebody, a restaurateur, know that a couple was a*
25 *same-sex couple and therefore discriminate?* And Ms. Kaplan's

1 response was, *Well, when they see two women together, they*
2 *assume they are lesbian.* Well, that's an assumption on
3 Ms. Kaplan's part.

4 THE COURT: But is it okay for the government to
5 legislate that type of behavior -- to condone -- I mean to sort
6 of ratify that type of behavior? Because now -- I mean, if the
7 law goes into effect and two people go into a restaurant who
8 says, *We are a same-sex couple. We have on shirts We Love Each*
9 *Other,* the restaurant owner can close the door in their face
10 and says, *We are not going to serve you because you are in a --*
11 *because you told us you're married.*

12 Now, yes, it's hypothetically. But the law says that
13 that would then become legal conduct under state law. Am I
14 right or am I wrong?

15 MR. BARNES: Well, I think --

16 THE COURT: The conduct of the business owner.

17 MR. BARNES: I think that that's the state of the law
18 whether 1523 goes into effect or does not go into effect. I
19 think that's already the state of the law, which is why as
20 again address the local ordinances because it is true, there is
21 no state antidiscrimination law. And 1523 doesn't affect --
22 and most importantly, 1523 would not affect any federal cause
23 of action or any federal right that was violated that could
24 be --

25 THE COURT: I want to be protected by my state

1 government and not necessarily the feds every time. So I
2 understand you said there's no state law that -- so what -- I
3 think there's any evidence that the City of Jackson and
4 University of Southern Mississippi has enacted their own little
5 thing to sort of protect that. But they have no duty to
6 enforce it if it's not pursuant to state law. Right?

7 MR. BARNES: Well, Your Honor, again this goes more
8 into *Romer*, but I would just say to a limited extent. What
9 1523 says is to the extent that a local ordinance doesn't
10 provide the same level of protection that this does, then that
11 law would not be enforceable. And it's a matter -- I believe
12 it's *Ryals* -- R-Y-A-L-S -- is one of the Mississippi Supreme
13 Court cases that says, you know, as a matter of state law, any
14 local ordinance which conflicts with a statute is invalid to
15 the extent that it explicitly contradicts that law.

16 So the decision concerning antidiscrimination laws,
17 the state legislature does have the authority to make decisions
18 that are statewide. The City of Jackson does not have the
19 power to force the state to adopt the policy. That's just a
20 matter of the way state government is built. So I will let --
21 again that will be discussed more in the context of *Romer*.

22 THE COURT: Could I ask you this question about the
23 religious -- it's freedom from whatever the name -- Protecting
24 Freedom of Conscience from Government Discrimination? I think
25 Mr. McDuff may have raised the question or at least alluded to

1 it, but did religious people in Mississippi or the people who
2 passed this statute believe that marriages of opposite sex
3 couples were somehow threatened by the newly created right of
4 those to marry the same-sex couple and therefore this freedom
5 from discrimination was important for that reason?

6 MR. BARNES: Yes, Your Honor. I think that's
7 absolutely true that, yes, there are people in this state who
8 hold these religious beliefs that were disfavored in *Obergefell*
9 and rejected essentially as irrational. Yes, I do think there
10 was concern. I do think there were -- the feeling that now
11 clerks -- obviously there was concern among clerks that they
12 might be put in a position of having to act contrary to their
13 religious beliefs.

14 THE COURT: Did opposite-sex couples believe that
15 their marriage was somehow diminished -- I mean, because what
16 we have here is, of course, again going back to *Obergefell*, the
17 broad range of dignity -- uplifting the dignity which was a
18 further development from *Windsor* because *Windsor* I think
19 Justice Kennedy talked a lot about dignity, but then he says,
20 *You're entitled to the full plate of dignity now, and we're*
21 *going to -- there should be nothing which reduces that dignity*
22 *to that marriage. In other words, all marriages will be*
23 *treated equally.* So how does this statute treat those
24 marriages equal?

25 MR. BARNES: Well, Your Honor, I guess again

1 plaintiffs may perceive it as a technicality. I know the court
2 doesn't. But Supreme Court cases -- civil rights cases aren't
3 decided just on broad principles. They have also got to be
4 decided on discrete and concrete facts and evidence.

5 And the simple truth is the way plaintiffs have
6 attacked this law is attacked every possible conceivable way
7 that some person might interpret this law, and that is not the
8 way that you're supposed to interpret the constitutionality of
9 a law and standing.

10 THE COURT: Let's --

11 MR. BARNES: Does a -- I apologize, Your Honor.

12 THE COURT: No, no. Let's ask this question then.

13 They only itemize three moral codes or whatever -- the three
14 things. Because they are limited to those three things,
15 doesn't that on its face suggest that there are things that
16 they don't recognize? It specifically says three things, under
17 Section 2, I believe.

18 MR. BARNES: It does, Your Honor. And, again, we're
19 not asking the court not -- to take this out of context or
20 consider it in isolation. We agree the court should consider
21 it in the context of *Obergefell* and what it came down. And
22 nothing in 1523 says, *We don't like same-sex couples. We're*
23 *going to do whatever we can to put this in the way of same-sex*
24 *couples. We're going to throw up whatever roadblocks we can to*
25 *same-sex couples.*

1 It says, *You can't prevent somebody -- you can't delay*
2 *them from getting a marriage license.* It also says -- one of
3 the other things specifically in that health care section we
4 talked about some, it specifically says, *You can't deny someone*
5 *access to their loved one in hospitals.* And so 1523 says this
6 is about protecting people who hold beliefs that after
7 *Obergefell* can easily be viewed as out of date, not modern.
8 And *Windsor* in the dissent, it was tarred with the brush of
9 bigotry.

10 So, yes, we think in the context of *Windsor* and then
11 *Obergefell* is a perfectly reasonable belief that persons
12 holding those particular beliefs could be put in a position of
13 being discriminated against or being forced to act contrary to
14 their beliefs. And the issue here is whether or not they can
15 live by those beliefs. Plaintiffs -- nothing in 1523 prevents
16 plaintiffs by living -- holding their beliefs and living by
17 those beliefs. And just -- like I said, the Fifth Circuit in
18 this case, you know, specifically pointed out, you know, that
19 intersection and said this is going, you know -- words to the
20 effect that this is going to be a problem.

21 So I think, Your Honor -- I've got to let -- Mr.
22 Miracle I know has things -- has answers to some of the court's
23 questions, and I just wanted to conclude by saying that, again,
24 look at the -- if we look at the evidence, if we look at the
25 evidence that the plaintiffs have presented, and you try to

1 find the connection between particular defendants and a
2 particular situation that doesn't require more than three "ifs"
3 to get to, we think that there is not sufficient evidence to
4 show that plaintiffs are in danger of suffering an imminent and
5 irreparable harm.

6 THE COURT: Thank you, Mr. Barnes.

7 MR. MIRACLE: If it please the court, Your Honor.

8 THE COURT: You may proceed.

9 ARGUMENT FOR DEFENDANTS HOOD AND MOULDER

10 MR. MIRACLE: I'm going to confine my remarks to a few
11 points on standing, and they really relate to some questions
12 Your Honor raised with Mr. McDuff about do we have the right
13 parties. And it's also in our briefing so I'm certainly not
14 going to belabor the issue. But I do think that it merits
15 attention in the context of -- we've talked a lot about CS I.
16 There was a CS II, as the court is aware of. And some of the
17 same issues that were present in CS II we have here.

18 What I mean by that is in CS II involving the adoption
19 statute, plaintiffs there, Campaign being one of them and
20 Dr. Hrostowski being another one of them, sued the governor,
21 sued the attorney general, sued the executive director, who at
22 that time was a different executive director and sued some
23 judges, state court judges, who the district court summarily
24 dismissed as to the judges.

25 But *Okpalobi* was a big part of the analysis in terms

1 of the attorney general and the governor. And counsel opposite
2 made some references to, *Well, this is an establishment clause*
3 *case and we are to look at this entirely differently*, but the
4 Supreme Court in *Winn*, you know, said you still have to look at
5 all three element of standing, the *Lujan* elements that were we
6 are all familiar with.

7 And so the remarks I'd make today, and the argument
8 I'd make today concerns the causation prong as it relates to
9 the evidence the court has heard. These particular plaintiffs
10 in the CSE III case, as it relates to the particular defendants
11 that they've sued -- and we have more plaintiffs, of course, in
12 the Barber case, but we have the same defendant. So there are
13 similarities.

14 But I'd start with the proposition that under
15 *Okpalobi*, the outcome in this case as to the governor and as to
16 the attorney general is no different than the outcome was in
17 CSE II in that the court found that there was absolutely no
18 enforcement mechanism with respect to the attorney general or
19 to the governor.

20 The allegations in the complaint in CSE III against
21 the governor is that he is the chief executive officer of the
22 state and that he has some responsibility to carry out to make
23 sure that policies and procedures are carried out. That was
24 the same argument that was made in CSE II. And under the
25 *Okpalobi* analysis and whether or not there's any connection

1 between that and the enforcement of the statute, the court said
2 there was not.

3 THE COURT: Is there a proper defendant, then, for any
4 plaintiff to sue to enjoin this particular statute or any
5 statute that is not in effect, obviously? So who would be -- I
6 don't need -- maybe I shouldn't get you to tell them who the
7 proper party to sue might be, but how does one challenge --
8 bring a facial challenge or any challenge, number one, to a
9 statute that is not in effect? But, you know, the governor has
10 no enforcement mechanism, as you might say, over only a few
11 statutes.

12 MR. MIRACLE: Number one, I won't offer up Justice
13 Chandler as a potential. And certainly I anticipated the
14 court's question on that, and certainly it's not -- I'm not
15 trying to avoid the court's question, you know, but the
16 plaintiffs chose the plaintiffs that they were going to include
17 in this, and they chose the defendants. And it is their burden
18 to challenge standing.

19 And let me draw a distinction, if I could -- and I am
20 going to answer the court's question, but I wanted to set it up
21 just a little bit. The only defendant that the court in CSE II
22 found to have some type of causal connection and not be
23 precluded under *Okpalobi* was the executive director of the
24 Department of Human Services. And the reason for that was the
25 statute at issue there was the statute that impacted a same-sex

1 couple's ability to foster or to adopt, and the court found
2 there was a sufficient connection there.

3 But we have to look at this case, these plaintiffs and
4 what this statute -- what provision of this statute -- those
5 defendants, as the court's already pointed out, the term
6 "standing is not dispensed in gross," well, this is sort of an
7 example of this. This statute covers several different areas.

8 For example, Judy Moulder can only be implicated in
9 Section 3(8)(a). She's the state -- current state registrar.
10 She's been sued in her official capacity. The court hasn't --
11 didn't hear any testimony -- there's no evidence in this record
12 that any of these plaintiffs are in any way impacted by our --
13 causally related to Judy Moulder. Those are the claims that
14 the plaintiffs chose to bring, and that's the defendant that
15 they chose to bring. But there's no proof in this record that
16 Judy Moulder has any causal connection to these particular
17 plaintiffs so I think that's a big distinction.

18 With respect to the executive director Davis, there's
19 been no testimony, there's been no proof in the record, that
20 there's any causal connection between having executive director
21 Davis as the head of DHS simply because there's a provision in
22 this statute that has something to do with adoption or with
23 foster care.

24 So they put these defendants in there and said, *Well*
25 *there's one provision that relates to Judy Moulder because*

1 *she's the registrar, and there's a provision in here that*
2 *relates to DHS so we put that defendant in here, but yet none*
3 *of these plaintiffs have -- there's no proof in the record that*
4 *any of these plaintiffs have any connection or are going to be*
5 *impacted by those defendants. So this is to me sort of a*
6 *classic example of we have a lot of potential defendants but*
7 *these plaintiffs have to have a cause of action against these*
8 *defendants.*

9 THE COURT: Should they have named every circuit clerk
10 in the state of Mississippi because only circuit clerks can
11 issue licenses and we don't know what one might do and who
12 might recuse and -- what they are trying to do, I think, is to
13 make sure that this statute does not come into play.

14 Now, even if all 82 circuit clerks decided that they
15 would recuse, there's nothing that requires them to do that
16 before July 1. Right? We agree with that, don't we? Nothing
17 requires them to file any notice of recusal before the act goes
18 into effect.

19 MR. MIRACLE: That would be correct.

20 THE COURT: So if you wanted to stop the act from
21 going into effect, and if you sued every circuit clerk, I
22 assume based on what you're saying now, the state would say,
23 *That's too early.*

24 MR. MIRACLE: Well, in fact, Your Honor, it does point
25 to the issue -- and we've briefed this and I don't want to get

1 off into that. But it does present the question whether or not
2 this is a proper facial challenge or not because -- the
3 establishment clause that's been thrown in as an umbrella to
4 sort of cover everything, and certainly standing and the
5 establishment clause does create a different set of
6 circumstances, but it doesn't eviscerate the requirement to
7 *Lujan* that you have to have injury and in fact, causation, and
8 redressability.

9 So I think the answer to the court's question there
10 goes directly to our point of why let's just take as to the
11 clerk provision because it hasn't happened and because it
12 requires us to hypothesize about is it going to be one, is it
13 going to be ten, or how is a particular circuit clerk's office
14 going to handle a recusal, those are all hypothetical.

15 And so that's why we think this is a programmatic
16 facial challenge when you start looking at what the specific
17 injuries are purported to be. None of these plaintiffs have
18 testified that they are going to get a marriage license on
19 July 1st. There's no testimony to that effect. So we have to
20 hypothesize that that might happen. Well, we think that causes
21 a significant problem with respect to a facial challenge as it
22 relates to Section 3(8)(a).

23 Same thing with had there been a plaintiff here who
24 testified that they anticipated adoption services in the
25 CSE III case, there's certainly nobody there that is in any

1 imminent danger of being denied anything that section 3(2) --
2 I'm sorry Section 3(3) purports to protect.

3 So I guess what I'm saying, Your Honor, is we are not
4 saying that there are no proper defendants, if ever. And,
5 quite frankly, it's the plaintiffs' burden to come forward to
6 establish standing in the first instance, but we do think that
7 it does show why a facial challenge when you look specifically
8 at what they are asking this court to enjoin becomes
9 significantly problematic because none of those things have
10 happened.

11 And it is -- when we start looking at discrete
12 provisions and discrete defendants and what their nexus is
13 under the causation prong for Article III standing, we do think
14 there is significant problems. So I would say with respect to
15 the governor and with respect to the attorney general, we think
16 the conclusion of the court in *CSE II* and the application of
17 *Okpalobi*, those two defendants are not proper defendants.

18 But if the plaintiffs are going to challenge
19 Section 3(8)(a) with respect to Judy Moulder over something
20 that has not yet happened, we think that does not satisfy the
21 immediate harm prong that they are required to establish for
22 purposes of a preliminary injunction.

23 THE COURT: If it's true as plaintiffs say that this
24 particular law establishes a religion, who would -- who could
25 the plaintiff sue? The governor through his advisors may have

1 been told that, *This establishes a religion, Mr. Governor; do*
2 *not sign it*, and the governor proceeds to sign it. Should they
3 sue the legislature for even passing it if they -- if it were
4 as simple as Ms. Kaplan said that the Southern Baptist Church
5 is the preferred or the adopted church of State of Mississippi,
6 I believe we may all be able to agree that that would be
7 unconstitutional.

8 So who would be the proper defendant because the
9 governor is going to sit back and sign it and nothing happens.
10 The legislature passes it and nothing happens. And the
11 attorney general comes up to defend it, but the attorney
12 general just says, *I'm doing my job*. So who would be
13 responsible for -- who could be a proper defendant -- who could
14 bring --

15 MR. MIRACLE: In that hypothetical, Your Honor, if I
16 may -- and I'm -- with respect to the governor because we do
17 see a plethora of lawsuits that the governor gets sued because
18 he's the chief executive officer or the attorney general
19 because he's the chief law enforcer, we do see those on a
20 fairly regular basis.

21 *Okpalobi*, I don't believe, is so -- *Okpalobi* had two
22 iterations. It had an Eleventh Amendment iteration to it and
23 then it had a standing iteration to it, and I believe it was
24 Judge Jolly wrote the panel opinion and it went through a lot
25 of different analysis. But I think the Fifth Circuit was very

1 careful in that case, and I think the court in CSE II was very
2 careful to analyze -- there's not any -- there are never no set
3 of circumstances, I don't think, where there might -- there
4 wouldn't a proper party.

5 And Your Honor's hypothetical suggested issues that
6 may create the nexus, if you will, because that's really what
7 *Okpalobi* looked at. And going back to *Ex Parte Young*, under
8 the Eleventh Amendment iteration, *Ex Parte Young* did the -- I
9 believe it was the attorney general in that case had specific
10 authority, specific power to do something there, to enforce.

11 You know, it has to be looked at with respect to the
12 specific statute and with respect to the facts. But simply to
13 say the governor is the chief executive in this case when
14 there's no nexus -- I simply don't know how to get around what
15 *Lujan* says and what *Winn* says. Even in establishment clause
16 context, plaintiffs still have to prove all three elements of
17 standing. You don't just get to say, you know, we have proven
18 an injury for a facial challenge, and that's sufficient.

19 THE COURT: Do you -- if this is an establishment
20 clause case and you are fighting about what the legislature has
21 enacted and that the governor has signed, who do you sue? The
22 legislature or the governor?

23 MR. MIRACLE: Your Honor, I'm going to confine my
24 answer, I believe, to based on what they have alleged, based on
25 the principles in *Winn* and *Okpalobi*, we don't believe there's a

1 nexus in this particular case to the governor or to the
2 attorney general by no means. I think Mr. McDuff made an
3 argument that they would be -- if the court enjoined the
4 statute, somehow the attorney general and the governor would be
5 prohibited from taking any action or relieved of their duties
6 under the statute.

7 But I think each defendant has -- each defendant in
8 this particular case is differently situated depending on which
9 provisions of the statute we're talking about. And so I
10 simply -- and we've made these arguments, and I don't want to
11 take up too much more of the court's time. But I do want for
12 clarify of the record when the plaintiffs claims are being
13 evaluated vis-a-vis each particular defendant with respect to
14 *Okpalobi* and with respect to causation, that there's not a
15 blanket thrown over all of those defendants and say, *Well, in*
16 *some form of fashion one of them must be the right defendant.*
17 And without completely avoiding the court's question, we simply
18 take this case as it is with these plaintiffs and with these
19 defendants and with these claims, and we think they have failed
20 with respect to the causation prong.

21 We think they failed for all three reasons, but
22 particularly I just wanted to address the causation prong and
23 further flesh that out with the court from what we said in our
24 brief.

25 THE COURT: Okay. Is it -- should there be -- should

1 the court look at standing from jurisprudential sort of view
2 differently -- well, is standing any different in an
3 establishment clause case, is it any different in a taxpayer
4 case like *Winn*? I mean, because it bothers me that if
5 plaintiff cannot show any direct harm, for example -- and again
6 this is my -- well, this is -- I'm adopting Ms. Kaplan's
7 hypothetical.

8 Southern Baptist Church becomes the official religious
9 of the state of Mississippi. No enforcement mechanism will be
10 behind it. They are not going to shut down all Methodist or
11 other churches. They just say it. They just adopt it. They
12 enact it. The attorney general is given no power, authority to
13 shut anybody else's church down. The governor is not given any
14 power to shut anybody else's thing down. Somebody ought to be
15 able to bring a suit against the state of Mississippi for doing
16 that.

17 MR. MIRACLE: As I appreciate the distinction -- and I
18 was looking for the case in my brief, and it's in my brief but
19 I was listening to the court's question. As I appreciate the
20 distinction of standing in an analysis of, let's say, a facial
21 challenge because that's really what we're dealing with here,
22 that there are a number of Supreme Court cases that have said,
23 you know, even in a facial challenge we know that the -- the
24 court should not engage in hypotheticals.

25 But in the establishment clause context -- and I

1 apologize. I just don't have the cite in front of me. The
2 court has said in the context of establishment clause, *We don't*
3 *have to completely ignore what could happen* and then loops the
4 analysis back into the *Lemon* test. And so that's how I
5 understand and appreciate how standing in a facial challenge
6 differs in the establishment clause context as opposed to a
7 nonestablishment clause facial challenge that you would look to
8 *Lemon*.

9 So I guess that's a long-winded way of saying
10 depending on the statute and depending upon who's been sued,
11 the court would still have to ultimately look at the *Lemon*
12 factors for purposes of standing.

13 THE COURT: Okay. Thank you, Mr. Miracle.

14 MS. KAPLAN: Your Honor, I had said to opposing
15 counsel that I would get them out before lunch. So if we could
16 do -- still if we could do a break for the court reporter and
17 then finish, that would certainly be our preference. I know
18 other people need to eat.

19 THE COURT: Mr. Goodwin is coming next? Is that
20 right?

21 MR. GOODWIN: Yes, Your Honor.

22 THE COURT: Okay. We'll take a 15-minute break and
23 then we'll -- I'll make sure we move it on.

24 (Recess)

25 THE COURT: Mr. Goodwin, your turn.

1 MR. GOODWIN: Thank you, Your Honor.

2 THE COURT: All right.

3 ARGUMENT FOR DEFENDANTS BRYANT AND DAVIS

4 MR. GOODWIN: Your Honor, I would like to briefly
5 address some of the issues that came up during Mr. McDuff's
6 argument earlier with regards to the equal protection clause,
7 *Romer* in particular. Given gastronomical concerns among
8 everyone in the room and Mr. McDuff's schedule this afternoon,
9 I'll keep it brief.

10 And I'm reading from my notes here so forgive me. But
11 Mr. McDuff cites in his reply brief and mentioned earlier the
12 case of *Heckler*, and he cited it with regards to standing. And
13 again this is standing for the purposes of the Fourteenth
14 Amendment. I can't begin to delve into the establishment
15 clause, and I'm glad I've not been tasked to do so, but the
16 principle of law with regards to equal protection that he cites
17 is true and correct. It is the law. However, law is made not
18 in a vacuum; it's made based on facts that are particular to
19 each case.

20 And in the *Heckler* case, that involved the denial of
21 social security benefits to a man who claimed -- well, he
22 applied for benefits and then was denied, and then his case was
23 *Well, if I had been a woman I would have gotten those benefits.*
24 And so in that case you had an actual denial.

25 Now, for the purposes of standing and injury, it --

1 the law says it has to be concrete and actual or imminent. So
2 there's that. And in this case, the plaintiffs have shown
3 neither an actual or imminent injury. We've yet to hear any
4 testimony in this case that someone was preparing or about to
5 seek a marriage license and someone was preparing or about to
6 seek some accommodation related to a marriage.

7 We've just heard no testimony about that. It's been
8 limited to that, *This law draws a line. I'm on one side of it;*
9 *others are on the other side. Therefore, I'm disfavored, and I*
10 *have terrible feelings about that.* And as we cite in our
11 briefs, Your Honor, that's simply not enough for the injury
12 component of standing so I wanted to make that point.

13 As to *Romer* itself, the law in that case is factually
14 distinguishable from the law that we have here, House Bill
15 1523. And I'd like to read the law with the court's
16 indulgence. And I'm reading from the case itself. "No
17 protected status based on homosexual, lesbian, or bisexual
18 orientation, neither the state of Colorado through any of its
19 branches or departments nor any of its agencies, political
20 subdivisions, municipalities, or school district shall enact,
21 adopt, or enforce any statute regulation, ordinance, or policy
22 whereby homosexual, lesbian, or bisexual orientation, conduct
23 practices, or relationships shall constitute or otherwise be
24 the basis of or entitle any person or class of persons to have
25 or claim any minority status, quota preferences, protected

1 status, or claim of discrimination. This section of the
2 constitution shall be in all respects self-executing."

3 That is -- and, of course, the Supreme Court struck
4 down that law, and that is the far end of the extreme when it
5 comes to a state taking action, drawing a line, and
6 discriminating against one group over another. It expressly
7 repealed every law on the books as of the day that it went into
8 effect. Not only that, but it expressly prohibited the
9 enactment of any future laws that might grant any
10 antidiscrimination protection whatsoever for the lesbian and
11 gay community in Colorado, and that's factually distinguishable
12 from House Bill 1523.

13 Your Honor, there's between a ton of discussion
14 already about what the law means, what it says, but ultimately
15 it is a law that provides additional protections for the people
16 that believe those three enumerated beliefs --

17 THE COURT: Including the fact that you don't
18 recognize the equal dignity of same-sex marriages.

19 MR. GOODWIN: Yes.

20 THE COURT: It sort of uplifts your right to say -- to
21 push back with recognition of those. It's like *Romer* in that
22 sense. You have same-sex -- persons of same-sex marriage who
23 don't have to be treated like people of opposite-sex marriages
24 or within opposite sex.

25 MR. GOODWIN: Going back to standing, Your Honor,

1 that's -- again, the plaintiffs state exactly what Your Honor
2 said, that this law, 1523 offends their dignity. And I don't
3 disagree with -- or I don't not believe anything they've said
4 with regards to their feelings. And as a Mississippian, I hate
5 to hear anyone express the sadness and the things that we've
6 heard on the stand over the last couple of days.

7 But, again, we've not heard any one of them say that
8 their injury was imminent, that they were going -- that they
9 were going to seek a marriage license, that they were going to
10 seek a cake for a marriage, anything related to a marriage,
11 counseling services, and they were in fear that they would be
12 denied those services.

13 And so for that reason, Your Honor -- and we've stated
14 all of that in our brief. But for that reason, Your Honor,
15 there's no standing in this case, especially as to the injury
16 component for the Fourteenth Amendment, and we believe that
17 *Romer* is distinguishable on those bases from 1523, Your Honor.

18 THE COURT: With respect to *Romer*, turning sort of to
19 the question that I had asked Mr. Miracle, *Romer* was the
20 governor of Colorado, and I think we've talked about *Wallace v.*
21 *Jaffree* or whatever it is, the governor of Alabama. I'm trying
22 to figure out maybe for equal protection purposes would the
23 governor be a proper defendant in this matter because the
24 governor in Colorado was good for that equal protection
25 challenge.

1 MR. GOODWIN: Your Honor, I can't speak to the
2 specific -- the ruling and the finding based on the facts in
3 *Romer* as to why the governor was a proper party in that case
4 versus what we may have here. We don't believe the governor is
5 a proper party here in this case.

6 As Mr. Miracle stated earlier, I too was involved in
7 the CSE II case, which was with regards to the adoption ban,
8 and the governor was not -- was found in that case to not be a
9 proper party, that there was standing lacking to sue him. And
10 so -- but I can't say enough about the Colorado situation to
11 say that you can transpose that to Mississippi, Your Honor.
12 You just don't know.

13 THE COURT: And if the plaintiffs' claim is one that
14 the equal dignity of our relationships are affected by this
15 statute because *We are the targets of this statute. If this*
16 *statute goes into effect, not only would we be the target, we'd*
17 *be the bullseye.* Should they have to wait until they are
18 physically harmed in some way before they seek to get some sort
19 of redressability?

20 MR. GOODWIN: I think, Your Honor, that's where the
21 imminent part of that injury test comes in, and there can be
22 actual or imminent. And it's got to be more than hypothetical,
23 more than conjecture. And based on the cases we have cited in
24 our briefs, it's got to be more than simply a feeling of being
25 disfavored under whatever the law is that's being enacted. And

1 so --

2 THE COURT: But the feeling of being disfavored is
3 that your rights as a same-sex couple are not equal to the
4 rights of people who are in opposite-sex marriages.

5 MR. GOODWIN: If a simple feeling was enough or
6 subjective belief feeling that you were disfavored, then you
7 would have Article 3 standing to challenge any statute on the
8 books. The law is clear that there has to be more than that,
9 at least based on our research, more than that to establish the
10 injury component for standing.

11 THE COURT: What about when you show that you are
12 the -- you are the target, if you will, of the animus of the
13 law becoming -- now, you may not be hurt in any way, but the
14 statute might have been enacted -- and I'm not suggesting that
15 that's what the court is finding -- to hurt you, to reduce your
16 dignity, animus, to -- to hurt you. Do you have to wait until
17 the statute comes into effect and that you do then a month
18 later decide to go into some restaurant and -- or decide to go
19 seek counseling or whatever, do you have to wait until that
20 point?

21 MR. GOODWIN: Preenactment facial challenges are
22 obviously allowed, Your Honor, in cases where statutes have yet
23 to be enacted. And again, I don't believe you have to wait
24 until -- you've got to show that you're making -- taking steps
25 to obtain a benefit or to seek something and that you -- at the

1 denial the injury is imminent, which to me doesn't mean that it
2 has to have actually happened and that it's happened in the
3 past and now I'm bringing it, because obviously when you're
4 challenging something that's not been enacted yet, it's not --
5 doesn't have the force of law, you haven't been damaged by it
6 in that way.

7 But you've got to show more -- based on the cases that
8 we have cited and that we've read, more than simply saying this
9 treats us differently and it's going into effect on X date when
10 it goes into effect, we're injured.

11 THE COURT: Let me ask -- I think this last question
12 of you -- is there with respect to the state officials who are
13 implicated by this statute -- and I'm using "implicated"
14 broadly -- is it confined to people in DHS who have a duty over
15 either the child adoption foster care services, is it confined
16 to those who simply issue licenses to be married, or does it go
17 beyond those who may treat persons of -- who are within
18 same-sex relationships differently?

19 You don't have to go apply for a license, for example,
20 to lose a benefit from the state. Does this law allow other
21 state officials the -- well, the law as it reads now talks
22 specifically about clerks, talks specifically about those who
23 did counseling services, whether treatment, whether it is
24 limited to same-sex treatment. Does it only apply in those
25 contexts?

1 Are there other contexts -- I'm thinking one question
2 I asked on Monday was whether the person who might be over I
3 think it was Department of Agriculture, Cindy Hyde-Smith, I
4 believe, if she decides after July 1 to exercise her strongly
5 religious -- this is a hypothetical. I don't know what her
6 religious views are. But if in doing so she does not allow the
7 coliseum or the -- or the ag museum or something like that to
8 be used to host a gathering of persons in same-sex
9 relationships, does this statute have any implication on that
10 type of conduct?

11 MR. GOODWIN: Your Honor, I would probably -- would
12 love to consult with cocounsel to make sure. But my reading of
13 it, if we're talking about -- if Your Honor is talking about a
14 convention or a conference, if you will, of same-sex couples or
15 LGBT conference, that sort of thing, that the provisions with
16 regards to accommodations for meetings, that sort of thing,
17 providing -- are provided in the marriage context and I believe
18 religious organization context --

19 THE COURT: So marriage only. So suppose somebody
20 wants to have their wedding reception at the ago museum on
21 Lakeland Drive. She says, *My sincerely held religious views*
22 *don't allow me to issue it*, does this require her then to do
23 the recusal thing?

24 MR. GOODWIN: Your Honor, I'm not certain. One
25 moment. May I?

1 THE COURT: Okay.

2 (Short Pause)

3 MR. GOODWIN: Your Honor, I've conferred with learned
4 cocounsel on that issue, and we can think of nothing in the law
5 that would apply to Cindy Hyde-Smith in that factual scenario.

6 THE COURT: Let me ask you another question, then.
7 I'm sorry. State health departments are in every county.
8 Doctors in those facilities depending on how you -- if I agree
9 were the interpretation of Mr. Barnes with respect to treatment
10 and all of that and they are not treating a person for either
11 counseling in regard to preparation for transgender stuff or
12 any of that -- just you're coming in to the health department
13 to be treated, no one in the local health department could
14 refuse treatment based on their sincerely held religious belief
15 views.

16 MR. GOODWIN: Your Honor, I'm not aware of anything in
17 my reading of it that would allow someone to do that.

18 THE COURT: Okay. All right.

19 MR. GOODWIN: Your Honor, with that, we would simply
20 ask that the motion for preliminary injunction be denied, and
21 we stand on our briefs as to any other arguments that we may
22 not have addressed today. And we want to thank the court for
23 the opportunity to be heard on this issue.

24 THE COURT: Thank you, Mr. Goodwin. Any rebuttal?

25 REBUTTAL ARGUMENT

1 MS. KAPLAN: Your Honor, if I may, I'm going to start
2 with the standing arguments made by Mr. Miracle. CSE II was an
3 equal protection case, not an establishment clause case. And
4 the problems in that case was -- one of the problems was the
5 fact that adoptions in this state are for the most part
6 approved by chancellors, and there's a lot of law that I'm sure
7 Your Honor is familiar with about not being able to sue state
8 court judges in federal court. That was really the issue that
9 we will to deal with in CSE II.

10 This, Your Honor -- or at least our version of this,
11 CSE III, is an establishment clause case. And the
12 establishment that we challenge all revolves around one section
13 of the statute, Section 2, which is the section that provides
14 for three specific religious beliefs. Every single other
15 section of the statute turns on Section 2. Every act that
16 someone can take or refusal to act that someone can do pursuant
17 to HB 1523 is because of Section 2. That's why it's an
18 unconstitutional establishment, and that's why -- and it's an
19 establishment clause case.

20 Now, in connection -- let me back up for a second. I
21 have -- I've read a lot of establishment clause cases to get
22 ready for this argument, more than I probably had ever wanted
23 to. I have never seen an-as applied establishment clause case,
24 contrary to what Mr. Miracle suggested. And, in fact, in *Bowen*
25 *v. Kendrick*, the Supreme Court said exactly the same thing,

1 47 US 589. They said, "Few of our cases in the establishment
2 clause area have explicitly distinguished between facial
3 challenges to a statute and attacks on the statute as applied."
4 This concept of an as-applied challenge in trying to use
5 *Okpalobi* in this context makes no sense in the context of the
6 establishment clause.

7 Moreover, as for the *Okpalobi* case, I'm aware -- and
8 we researched this very carefully -- of only one court who has
9 considered the Fifth Circuit's decision in *Okpalobi* in the
10 context of an establishment clause case. That's the case we
11 cited in our brief, *ACLU v. Blanco*. The cite is
12 523 F.Supp. 2d 476. It's out of Louisiana. And there the
13 court made almost exactly the same -- answered Your Honor's
14 question exactly the same we would. She asked the same
15 question. She answered the same way. She said there the
16 governor and the treasurer could be sued, and the governor
17 could be sued because before the act became law, the governor
18 had the opportunity and authority to veto any line item in the
19 appropriate bill, including the appropriations challenged in
20 this case.

21 On all fours with this case, Your Honor, the only
22 decision out there -- I would question whether *Okpalobi* even
23 applies in the context of the establishment clause; but if it
24 does, the reasoning in *Blanco* is directly applicable here and
25 should apply here.

1 Let me move on to the merits. Now, in answer to a
2 question from Your Honor about how anyone would exercise these
3 three sincerely held religious beliefs that are specified in
4 the statute, Mr. Barnes used the example of the clerks. And
5 there's been a lot of discussion about clerks. And it's
6 certainly there, but the statute, as we describe it in our
7 brief, is actually far, far broader than just a statute that
8 deals with clerks.

9 I'm just going to pick out some random words in the
10 statute. They are not my words; they are words that the
11 legislature chose. So it applies to employment-related
12 decisions. It applies to the terms and conditions of occupying
13 a dwelling or other housing. It applies, as we discussed, to
14 adoption in foster care. It applies to psychological
15 counseling or fertility services, and I'll get back to that in
16 a bit. It applies to photography, poetry, videography,
17 disc-jockey services, wedding planning, printing, publishing.
18 It applied to floral arrangements, dressmaking, cake, pastry
19 artistry, assembly-hall or other wedding-hall venues, limousine
20 or rental cars, jewelry sales, and other similar services,
21 accommodations, facilities or goods.

22 It applies -- these are all directly from the
23 statute -- to employee or student dress or grooming, to
24 restrooms, to spas, to baths, to showers, to dressing rooms, to
25 locker rooms.

1 So to suggest that this statute is somehow some narrow
2 statute that someone only exercises these religious beliefs
3 through someone working in the clerk's office completely
4 distorts the scope and the breadth of this statute.

5 THE COURT: When it says "similar marriage related
6 goods or services," I know it listed a bunch of things as
7 typically tied to weddings. Suppose there's a travel agent
8 that specializes or specifically services people in
9 honeymooning. Would it -- opposite-sex marriage, the same-sex
10 marriage. Would marriage-related goods or services, could it
11 be interpreted to include that?

12 MS. KAPLAN: There's no question in my mind that
13 someone would make that argument, Your Honor. If there was
14 someone who worked in a travel agency in Mississippi who didn't
15 want to book a honeymoon for a gay couple, I guarantee you --
16 and they knew about this, they would make that argument.

17 Moreover, the marriage-related services that you just
18 pointed out only applied to that subsection. They don't apply
19 to employment. They don't apply to housing. They don't apply
20 to a host of other things I read in this statute.

21 Indeed if HB 1523 were analogous to the Church
22 amendment that Mr. Miracle was talking about, it would only
23 apply to clerks. It would only have the clerk provision. It
24 doesn't. It's much, much broader than that. And even for
25 clerks, Your Honor, the problem with HB 1523 is that it

1 encourages Kim Davises. The point of the statute is to
2 encourage people to behave the way that Kim Davis behaved.

3 Let me go to -- there are some certain things you were
4 said about the statute in construing it that just aren't true
5 so let me try to correct those. So first, there was an
6 argument that -- somehow there seemed to be an argument that
7 HB 1523 doesn't apply in schools. Counsel was right that there
8 was a whole line of cases about applying the establishment
9 clause in schools. But there is no school exception in
10 HB 1523.

11 Indeed in the definition of people it applies to, it
12 expressly applies to all state employees at Section 3(7), and
13 it does not exclude teachers in public schools. So I don't
14 understand any argument that somehow HB 1523 does not apply
15 into the schools. By its face, by its explicit terms, it does.

16 Two, there was an argument -- and I know Your Honor is
17 in tune to this -- that says that the counseling and
18 psychological services -- let me make sure I got it right.
19 That psychological counseling or fertility services only
20 relates to sex reassignment or fertility. The problem is
21 that's not what the statute says. It's the words in the
22 statute, and this is Section I think 3 --

23 THE COURT: 3(4)?

24 MS. KAPLAN: -- 3(4) separates the words about
25 surgeries related to sex reassignment or gender identity

1 transitioning with an "or." And then it says, "or declines to
2 participate in the provision of psychological counseling or
3 fertility services based upon a sincerely held religious
4 belief." If the psychological counseling services applied only
5 to gender reassignment, again the legislature knows how to do
6 that. They know how to write a statute that says that. That's
7 not what the statute says.

8 Third, there was an argument --

9 THE COURT: Hold on for a second. I'm looking at this
10 section again. So if the legislature wanted to limit it to
11 surgeries related to sex reassignment or gender identity
12 transitioning --

13 MS. KAPLAN: They would either say --

14 THE COURT: A period there?

15 MS. KAPLAN: "Or decline to participate in the
16 provision of such services" or "decline to participate in the
17 provision of psychological counseling or fertility services
18 related to gender reassignment based on a sincerely held
19 religious belief." And the separation between those two
20 clauses with the word "or" does not connect them together.
21 It's exactly the opposite. There are two different things it's
22 talking about. They are using two different kinds of words and
23 two different kinds of language.

24 And that's why the hypothetical that I raised about a
25 kid being treated for counseling or what I talked about on the

1 stand with Joce Pritchett about someone having counseling and
2 the counselor saying, *I'm sorry. Now that I know you think you*
3 *might be gay, I no longer want to treat you,* they are
4 authorized to do that explicitly by HB 1523.

5 And that gets me to my next point. It's not only
6 about gay people who are already married. It doesn't say that.
7 It says, "A sincerely held religious belief that marriage is
8 limited to a man and a woman." That belief can go way beyond
9 whether a high -- obviously high school kids aren't getting
10 married, hopefully. But if you think that kid may be gay and
11 may ultimately want to avail themselves of the now
12 constitutional right to get married, you can deny services.
13 The sincerely held religious belief is very broad. It's the
14 belief that marriage should be limited to a man or a woman --
15 and a woman. Excuse me.

16 Four, there was an argument that the state courts --
17 the state courts were not foreclosed from litigating any
18 claims, and here this get tricky but I'm going to try to point
19 you to the language. Section 9(2) of the statute defines state
20 government, and it includes in 9(2)(b) -- Section 9(2)(b),
21 courts, includes state courts in that definition.

22 And then when you go to Section -- hold on. I've just
23 got to get it, Your Honor. I believe it's Section 6 of the
24 statute -- no, excuse me. Section 6 of the entire statute. I
25 apologize. It talks about getting injunctive relief and

1 getting certain remedies against a person who's violated the
2 act. And under the way this reads, you could get an injunction
3 against a state court judge who sought to enforce the Jackson
4 ordinance that says that you can't -- you can no longer
5 discriminate against gay people in the city of Jackson. And it
6 goes beyond that. It says if the injunction doesn't hold, then
7 you even get attorney's fees, which actually goes into the
8 taxpayer standing. You get fines and fees against that person.

9 Number 5, there was a suggestion that the statute says
10 that somehow federal law controls when HB 1523 is in conflict
11 with federal law. That's not what it says. What Section 8 of
12 the statute says is that, "This act shall be construed in favor
13 of a broad protection of the free exercise of religious beliefs
14 to the maximum extent permitted by the state and federal
15 constitutions."

16 So, yeah, Your Honor, they are right that when it
17 comes to free exercise jurisprudence, HB 1523 to the extent
18 it's any narrower than federal -- free exercise jurisprudence,
19 then the federal jurisprudence applies. But when it comes to
20 any other provision of state -- of federal law, including equal
21 protection or including Title IX, which explicitly has been
22 held to cover transgender people, there's nothing in here that
23 says federal law applies. Of course, we all know it does under
24 the supremacy clause, but there's nothing in here that says
25 that.

1 Now, another argument that we have heard the other
2 side say is this sectarian argument, and we heard it throughout
3 the cross-examination of our witnesses, this argument which is
4 no doubt true that in every church and certainly in every
5 temple -- I can speak to that -- there are people on both sides
6 of an issue. No question that that is true. In every -- in
7 the Episcopal Church there are people on both sides. In
8 Judaism, there are people on both sides. Even in, as I
9 understand it, amongst Southern Baptists there are people on
10 both sides of this issue.

11 And they seem to suggest that if in a church or temple
12 there are people -- or in a denomination there are people on
13 both sides, then you can't have sectarian discrimination. Your
14 Honor, I would respectfully submit that that suffers from a
15 fundamental logical fallacy because we know that there are
16 always people on both sides of every issue in every church or
17 synagogue. And if their theory that if there are people on
18 both sides of a particular church you can't have sect
19 discrimination were true, then all the language that I've read
20 you from Justice Marshall and from other justices of the
21 Supreme Court that says you can't prefer one church over
22 another should have been written out of those cases. It would
23 make no sense.

24 Finally, Your Honor, in the *Obergefell* case, Justice
25 Kennedy wrote at the end about the interplay, the

1 complicated-but-close interplay between equal protection and
2 due process. And I'm going to read you what he wrote. He
3 said, "It is now clear that the challenge laws burden the
4 liberty of same-sex couples. And it must be further
5 acknowledged that they abridge central precepts of equality.
6 Here the marriage laws enforced by the respondents are in
7 essence unequal. Same-sex couples are denied all the benefits
8 afforded to opposite sex couples --"

9 THE COURT: Slow down.

10 MS. KAPLAN: I apologize. "And are barred from
11 exercising a fundamental right. The imposition of this
12 disability on gays and lesbians serves to disrespect and
13 subordinate them, and the equal protection clause, like the due
14 process clause, prohibits this unjustified infringement of the
15 fundamental right to marry."

16 I would suggest, Your Honor, that the same
17 complicated-but-close interplay is at play here between the
18 First Amendment's establishment clause and the equal protection
19 clause.

20 The Louisiana statute that was discussed in the
21 *Aguillard* case, a Louisiana creationism case, had a very
22 similar title to HB 1523. It was called "The Balanced
23 Treatment for Creation Science and Evolution Science in Public
24 School Instruction." The Supreme Court, however, had no
25 trouble identifying it as a statute that violated the

1 establishment clause. And even though the state of Louisiana
2 said it treated both fairly, it saw it as an unconstitutional
3 establishment of religion.

4 In preparing for this argument today, I was reading
5 the work of Martha Nussbaum, who's a great philosopher and
6 legal professor and has written a book about the First
7 Amendment's free exercise and establishment clauses. And she
8 points this out as well. She says, "One of the most central
9 commitments in our constitutional tradition is a commitment to
10 fairness, to treating citizens as equals. What that means is
11 that no hierarchy should exist under the law or in our nation
12 and that religious membership and nonmembership should not be
13 special sources of advantage over disadvantage under the law.
14 The tradition's reason for favoring accommodation was itself a
15 reason of fairness. The majority makes laws that suit itself,
16 and minority believers often encounter special unequal burdens
17 as a result."

18 Your Honor, I would respectfully submit that it is
19 hard to imagine again a law that more fundamentally violates
20 those central commitments in our constitution to fairness for
21 treating citizens as equals under both the equal protection
22 clause and the First Amendment's establishment clause than this
23 statute. Thank you.

24 THE COURT: Thank you, Ms. Kaplan.

25 REBUTTAL ARGUMENT

1 MR. McDUFF: Three points very briefly, Your Honor.
2 Number one, the question of whether somebody in the Department
3 of Agriculture can deny services regarding a wedding
4 celebration, that would be -- they can do that. It would be
5 authorized to do that by Section 3(5) of House Bill 1523, which
6 says "The state government shall not take discriminatory action
7 against a person who declines to provide the following
8 services, accommodations," et cetera.

9 The head of the Department of Agriculture is a person.
10 And here's an example. Let's suppose there is a deputy who is
11 in charge of renting facilities and that deputy has a sincerely
12 held religious belief and says, *I'm sorry. I'm not going to*
13 *rent this. I may rent it to opposite-sex couples. I'm not*
14 *going to rent it to a same-sex couple for a marriage reception.*
15 Not only would HB 1523 authorize it, but it would prohibit that
16 person's -- the commissioner of agriculture, who would be that
17 person's supervisor, from taking any discriminatory action
18 against the deputy who wouldn't rent it. So clearly that is
19 authorized by the statute.

20 THE COURT: And discriminatory action would be
21 disciplinary action for --

22 MR. McDUFF: Any kind of disciplinary action, yeah.
23 Ms. Kaplan quite correctly stressed that House Bill 1523
24 authorizes people to deny psychological and counseling services
25 and that's whether the person works in a public health clinic

1 or a school. And it applies not just to counselors, but it
2 applies to teachers who are asked to counsel a student.

3 You had asked at one point could a teacher kick a
4 child out of the classroom. I don't think 1523 allows a
5 teacher to refuse to teach math to a student. But I do think
6 at the end of the class if a lesbian student or a transgender
7 student or gay student or student who is trying to find her or
8 her way in terms of sexual orientation and gender identity
9 comes up to the teacher to talk about a problem in that regard,
10 this would authorize the teacher to say *I don't believe -- my*
11 *sincerely held religious belief tells me that you are wrong in*
12 *your quest to discover your gender identity or You're a*
13 *lesbian, and one day you're going to marry another lesbian, and*
14 *that is sinful. Get out of my room.* 1523 allows that. And
15 that is one of the many actual harms that are contemplated by
16 this statute.

17 And the final thing I just want to say is, the
18 defendants argue that somehow this is different, this statute
19 is different from a creche or a cross because those are things
20 that a person has to confront visually. But the First
21 Amendment says Congress shall make no law establishing
22 respecting an establishment of religion. Of course, that has
23 been applied to the states through the Fourteenth Amendment so
24 that the principle is also state legislatures shall make no law
25 establishing respecting an establishment of religion.

1 And this is a law. It is the most fundamental
2 expression of the sovereignty and the power of the state. It
3 is unconstitutional. And for that reason and because it
4 violates the Fourteenth Amendment, the preliminary injunction
5 should be granted here.

6 THE COURT: And is that the reason the governor is
7 named a defendant and the attorney general?

8 MR. McDUFF: The governor is named as a defendant in
9 part because he signed it. He was just as much a part -- had
10 just as much a role in it as the legislature in enacting this
11 bill. But the other reason they are named is because their
12 powers are affected by this statute. And let's suppose that
13 some discriminatory action is taken -- let's suppose that a DHS
14 worker decides that he or she cannot take a kid out of an
15 abusive situation, a transgender or lesbian or gay child who's
16 dealing with a foster parent who is abusing them in the course
17 of their, quote, sincerely held religious beliefs, and a DHS
18 worker thinks, *I can't take this out of that because this bill*
19 *restrict me from interfering with that foster parent's*
20 *religious beliefs*, and the head of DHS says, *Oh, I can't tell*
21 *that worker to take him out because then the statute prohibits*
22 *me from taking any discriminatory action against another state*
23 *worker*, and the attorney general says, *I can't go to court to*
24 *get this kid out of this abusive situation because 1523*
25 *restricts me*, and the governor says, *I can't instruct the*

1 *director of the Department of Human Services to pull this kid*
2 *out of this situation because 1523 restricts me, you need to*
3 *issue this injunction to tell all of these people that they are*
4 *not restricted by this unconstitutional statute and that they*
5 *have the same power in this case involving this child -- this*
6 *child's best interest. And the same power in the other array*
7 *of issues that are touched by 1523 that they will before this*
8 *law was enacted. That's why they're proper defendants.*

9 THE COURT: That would equally apply to the person who
10 refused to give up the wedding venue --

11 MR. McDUFF: Yes, sir.

12 THE COURT: -- who says, *I can't do it* -- Cindy
13 Hyde-Smith's person --

14 MR. McDUFF: Right.

15 THE COURT: -- if you will, says, *I can't discipline.*

16 MR. McDUFF: Precisely. So there are other people we
17 could have named, but the people we did name are proper
18 defendants, and all of the issues with respect to standing are
19 met here.

20 THE COURT: Thank you, Mr. McDuff.

21 MR. McDUFF: Thank you, Your Honor.

22 MR. BARNES: Your Honor, we're not going to belabor
23 the points. Our fundamental disagreements with their
24 interpretation of HB 1523 are clearly briefed, and we'll stand
25 on your briefs.

1 THE COURT: Okay. Counsel, thank you for all the time
2 and the attention that you've paid to all of these issues.
3 I've received -- I think before you leave make sure we have --
4 make sure you all are in agreement on all the exhibits that got
5 in. I'm pretty clear on what I think the exhibits are, but
6 just so you will make sure that you all are on the same page
7 with me.

8 The court is going to take these cases under
9 advisement. I realize for hearing purposes I said they were
10 not consolidated. I sort of engaged in that with Mr. Barnes on
11 the initial end of his response. I initially overruled the
12 objection as -- to the objection to consolidating for hearing
13 purposes. I may speak later on whether or not we granted or
14 overruled any kind of consolidations of the matters henceforth.

15 Again thank you for your time and attention. Court is
16 going to take it under advisement, and I understand what the
17 requested relief is. So we'll take it under advisement. Have
18 a great weekend. Court's adjourned.

19 (Recess)
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CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 28th day of June, 2016.

s/ *Cherie G. Bond*
Cherie G. Bond
Court Reporter