CASE NO. 16-60477

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

PLAINTIFFS-APPELLEES,

v.

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

DEFENDANTS-APPELLANTS.

Cons w/ Case No. 16-60478

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

PLAINTIFFS-APPELLEES,

v.

PHIL BRYANT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSISSIPPI; AND JOHN DAVIS, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS- APPELLANTS.

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

BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* SUPPORTING APPELLEES' PETITIONS FOR REHEARING EN BANC

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that he is aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. Caroline Mala Corbin, Ira C. Lupu, Micah J. Schwartzman, Richard C. Schragger, Elizabeth Sepper, Nelson Tebbe, and Robert W. Tuttle are individuals who have no parent corporation or any publicly held corporation that owns 10% or more of stock.

Dated: July 7, 2017

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are scholars with wide-ranging expertise in church-state issues arising under the First Amendment. They submit this brief to emphasize the many ways in which HB 1523 violates the Establishment Clause and thereby inflicts injury on the plaintiffs. This also seek to warn against the broader harm to religious liberty that would result from concluding that plaintiffs lack standing to challenge HB 1523.

A full list of *amici* is attached as an appendix to this brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has a long tradition of religious accommodation. When laws impose burdens on the free exercise of religion, government often provides exemptions out of respect for liberty of conscience. There are, however, settled limits on the accommodation of religion. Under the Establishment Clause, government may not structure accommodations in ways that have the purpose of promoting religious beliefs, that endorse or discriminate against religious beliefs, or that shift unreasonable hardship to other citizens. *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545

[1] No counsel for a party authored this brief in whole or in part. No party and no party's counsel contributed money that was intended to fund preparing or submitting this brief. Nor has any other person made a monetary contribution intended to fund preparing or submitting this brief.

U.S. 844, 876 (2005). These limitations—long enforced by courts—safeguard liberty for Americans of all faiths, denominations, and spiritual persuasions.

While this rule sometimes requires close calls, the unconstitutionality of HB 1523 is not one of them. Despite Appellants' effort to describe it as an ordinary accommodation, HB 1523 is anything but. It is anomalous in scope and structure, and evokes the most fundamental Establishment Clause concerns. Taken together, HB 1523's unusual features result in four distinct constitutional flaws: it (1) has the purpose of announcing religious truth, (2) endorses three religious beliefs (the "Enumerated Beliefs") and disparages non-adherents, (3) discriminates on the basis of belief and denomination, and (4) inflicts significant harm on third parties.

HB 1523 is thus a true outlier: a sword against non-adherents, rather than a shield for the faithful. If put into effect, it would inflict significant injury on the plaintiffs. The panel's conclusion that no plaintiff has shown Article III injury is inconsistent with the settled rule that government-inflicted stigma, disparagement, and exclusion *are* injuries in this context. Put simply, HB 1523 inflicts on the plaintiffs "a daily experience of contact with a government that officially condemns [their] religion." *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc)

Due to the extraordinary importance of HB 1523 itself and the more general principles here at issue, *en banc* review is necessary. By allowing HB 1523 to go

into effect, the panel opinion will unleash religious strife and suppression in Mississippi. Further, by effectively thwarting any Establishment Clause review of laws like HB 1523, the panel opinion invites every other religious group to lobby for its own creedal statements to be enshrined in law. This is dangerous business. Full court review is therefore warranted to vindicate principles of religious liberty.

ARGUMENT

I. HB 1523 IS UNCONSTITUTIONAL AND INJURES PERSONS WHO DO NOT ADHERE TO THE ENUMERATED BELIEFS

In the Establishment Clause context, "[f]eelings of marginalization and exclusion are cognizable forms of injury . . . because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (citation omitted). That rule controls this case. HB 1523 violates the Establishment Clause in four related respects—and thereby inflicts concrete, particularized injury on non-adherents of the Enumerated Beliefs in Mississippi (including the plaintiffs). A careful study of the merits issues in this case clarifies the nature and severity of the injury wrought by HB 1523, and reveals the troubling implications of denying judicial review.

1. In general, government may pass laws with the purpose of showing respect for free exercise values. But when a state passes a landmark law singling

out specific religious beliefs for special treatment, and then swears that the law lifts no burden on the exercise of those beliefs, it cannot be said that the State is pursuing a general concern for religious freedom. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("[T]o perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action."). Rather, in that exceptional and peculiar circumstance, it must be inferred that the State's purpose is to speak on matters of faith—thus establishing itself as an arbiter of correct religion and demeaning non-adherents of its chosen tenets. *See Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

That is exactly what Mississippi did here. While Appellants characterize HB 1523 as a response to legal "assaults" on opponents of same-sex marriage, they repeatedly and unequivocally insist that there is no burden on free exercise under state law that HB 1523 in fact lifts. *See* Br. at 19-29. If we take Appellants at their word, Mississippi has written three creedal statements into law and conferred significant benefits on anyone who agrees with them—and has done so on the premise that HB 1523 does not achieve any actual free exercise objective not already achieved by existing law.[2] Especially given a legislative record full of

[2] Appellants err in characterizing HB 1523 as without effect. But that error is irrelevant here; a purpose inquiry looks only to the State's *actual* intent.

religious statements by HB 1523's sponsors, this reveals that HB 1523 is an effort to proclaim religious truth.

2. The structure of HB 1523 confirms that it endorses the Enumerated Beliefs and disparages non-adherents. In enacting this law, Mississippi did not address the subjects of marriage, sexuality, and gender, and attempt evenhandedly to accommodate religious beliefs and practices. Rather, it singled out only specific religious viewpoints on these subjects as worthy of legal sanctuary. Those with different religious views on the *very same* questions receive no protection, despite the rule that a "scheme of exemptions" must not have the "effect of sponsoring certain religious tenets." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 16-17 (1989) (plurality opinion). HB 1523 thus creates classes—drawn *explicitly* by reference to religious belief—of insiders and outsiders. Mississippians who hold the Enumerated Beliefs receive extraordinary legal benefits, while those with a different viewpoint on the exact same questions of faith receive nothing.

This constitutional vice is exacerbated by three striking features of HB 1523. First, HB 1523 is *categorical*—it does not allow for any consideration of other governmental or private interests that might be burdened by accommodating the Enumerated Beliefs. Second, HB 1523 is exempt from Mississippi's own RFRA. *See* § 10. Thus, whenever the State burdens another person's religious practice by accommodating the Enumerated Beliefs, the Enumerated Beliefs prevail. Finally,

HB 1523 does not require that a burden on religion actually exist: it covers even speech or conduct that is merely "consistent with" the Enumerated Beliefs. § 3.

It is difficult to imagine a clearer endorsement of specific propositions of religious truth: the State picks three hotly disputed subjects; writes into law its own creedal statements; protects only a *single* religious viewpoint on those subjects; covers any conduct even "consistent with" those views; and requires that every other interest conceivably affected by its law—including contrary religious views on the same subjects—always lose in the event of a conflict. This is entirely unlike ordinary accommodations. By unavoidable implication, HB 1523 denigrates all other religious beliefs relating to marriage, sexuality, and gender as unworthy of equal treatment. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (holding government may not "denigrate nonbelievers or religious minorities").

3. HB 1523 further violates bedrock principles forbidding discrimination on the basis of religious belief. *See Larson v. Valente*, 456 U.S. 228 (1982). Time and again, the Supreme Court has identified discrimination among sects, denominations, and beliefs as a prime evil against which the Establishment Clause is aimed. *See Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). Yet not only does HB 1523 discriminate in favor of the Enumerated Beliefs and against non-adherents, but it also places the State's imprimatur on a set of orthodoxies shared by some Christians, Jews, and Muslims (among others), thereby favoring those

orthodoxies against contrary views shared by many other Christians, Jews, and Muslims (among others). Such governmental favoritism along intra- and inter-faith religious lines inflicts a quintessential legal injury on disfavored faiths.

4. Finally, HB 1523 is invalid under *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), and *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which forbid accommodations that shift unreasonable hardship to third parties.

Together, two features of HB 1523 violate *Thornton* and *Cutter*. First, whereas most accommodations define with specificity the *conduct* they cover, HB 1523 works very differently. It starts by identifying three broadly stated *beliefs* about marriage, sexuality, and gender. Then, rather than address particular conduct—*e.g.*, performing an abortion or serving in the army—it excludes from any otherwise-applicable laws a vast and vaguely defined universe of actions that may follow from those beliefs. HB 1523 thus operates across every imaginable social context, ranging from education and healthcare to family life and commerce. As a result, this law shifts the burdens of accommodating the Enumerated Beliefs to third parties (including non-adherents) in many different ways. And some of this burden shifting will result in deprivations of fundamental rights.

Second, like the law invalidated in *Thornton*, HB 1523 is "absolute and unqualified": it contains no provisions taking into consideration the interests of third parties or permitting courts to adjudicate conflicts between the interests of

religious believers and those who would be burdened by accommodating them. 472 U.S. at 710. The Enumerated Beliefs receive an "unyielding weighting." *Id.*

HB 1523 is thus invalid because it shifts substantial harm to a discrete class of third parties as the price of accommodating the Enumerated Beliefs. This injury accrues to the plaintiffs, both as non-adherents whose beliefs are treated as second class by HB 1523 and as citizens who may suffer major burdens as a result of it.[3]

* * * * *

By enacting HB 1523, Mississippi has purposefully favored a set of religious beliefs about controversial questions of marriage, sexuality, and gender. The law itself, by virtue of its unprecedented structure, endorses the Enumerated Beliefs, disparages and discriminates against those with different religious truths, and shifts substantial burdens to third parties. Each day that it is in effect, HB 1523 would declare to every Mississippi citizen—and to faith leaders and LGBT persons most

[3] Lacking any principled defenses of HB 1523, Appellants rely on a slippery-slope argument: if HB 1523 is invalid, they assert, then so are hundreds of other accommodations. Respectfully, that is simply untrue. There are many thousands of accommodations in this Nation, and very few (if any) of them contain even a *single* one of the constitutional infirmities addressed here. Indeed, most accommodation laws address specific *conduct* without regard to the substance of the underlying religious beliefs; in contrast, HB 1523 addresses three religious *beliefs* and then reaches out to cover nearly all conduct that may follow from them.

pointedly—that adherents of the Enumerated Beliefs are exalted above all others in the eyes of the State. As a matter of lived experience and precedent, that is injury.[4]

II. THE PANEL'S RULING IMPERILS RELIGIOUS LIBERTY

Imagine a law proclaiming that Christianity is the one true faith—and that all speech and conduct "based upon" or "consistent with" Christian beliefs must be accommodated. Would non-Christians have standing to challenge such a law?

Of course they would. This Court has held that "the Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). Nowhere does a state speak more clearly than through its

[4] The Fourth Circuit recently recognized as much in *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, No. 16-1436, 2017 WL 2722580 (U.S. June 26, 2017) (*IRAP*). There, one of the plaintiffs alleged two distinct theories of Article III injury. One such theory—which the court deemed sufficient to support standing—was that an executive order banning travel from six Muslim-majority nations conveyed a "state-sanctioned message that foreign-born Muslims, a group to which [he] belongs, are 'outsiders, not full members of the political community.'" *Id.* at 584. The court reasoned that the executive order conveyed a message of animus against his religious beliefs, thus injuring him. *Id.*

The panel's decision here cannot be squared with *IRAP*. There, a facially neutral executive order covering the whole nation—indeed, the whole world—was held to convey a concrete and particularized "message of religious condemnation" to adherents of a particular faith. *Id.* at 585. It necessarily follows that a state statute—far more localized, though equally controversial—may inflict Article III injury when it conveys a message of religious exclusion and condemnation to adherents of particular religious beliefs. As we have explained, that is precisely what HB 1523 does for Mississippians who do not hold the Enumerated Beliefs.

duly enacted laws. And here, through HB 1523, Mississippi has unequivocally and unmistakably endorsed the Enumerated Beliefs—while disparaging and demeaning non-adherents. Accordingly, HB 1523 will harm the plaintiffs by remaining on the books and going into effect, just as surely as it would harm them if recorded on a flag and flown from the capital (a scenario in which the panel decision would plainly support standing). Holding otherwise directly threatens religious liberty.[5]

Ultimately, the panel's decision blocks nearly all challenges to HB 1523. Yet that law poses a grave and continuing threat to religious freedom, and it would be highly anomalous if nobody were able to right that wrong in court. The foreseeable consequence of HB 1523 is religious suppression and discord.

The stakes of this appeal are not limited to the (important) question whether HB 1523 inflicts sufficiently concrete and particularized injury to support standing under Article III. Rather, this case is now about a decision that has opened the door to hundreds more laws just like HB 1523: statutes that proclaim specific and

[5] In a footnote, the panel concedes that an ordinance condemning Catholic beliefs *could* be challenged. *See* Op. at 11 n.9 (discussing *Catholic League*, 624 F.3d at 1052). However, the panel then asserts that HB 1523 is different because its "religious effects" are "ancillary." *Id.* This distinction does not withstand scrutiny. HB 1523 has open and notorious "religious effects" that operate directly on non-adherents throughout Mississippi. While the law is not phrased as an outright condemnation of their beliefs, HB 1523 excludes and disparages them—and is widely understood to do so—even as it elevates the Enumerated Beliefs to a privileged status in the State. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

controversial propositions of religious belief, offer no protection to adherents of different views, and trample any competing interest that may be affected. Just consider the following statements of belief, enshrined in a law like HB 1523:

- Husbands must have dominion over wives and children.
- The earth was created for all mankind, without regard to national borders.
- The consumption of alcohol is vile and immoral.

By effectively immunizing HB 1523 from judicial review, the panel's decision will encourage many other religious groups to lobby for their own core tenets to be written into law. This is a recipe for invidious inter-faith conflict.

Accordingly, en banc review of the panel decision is warranted to vindicate the Constitution's promise of religious liberty.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should grant the petitions for rehearing en banc and affirm the judgment below.

Respectfully submitted,

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APPENDIX

Amici Curiae are legal scholars with substantial expertise relating to church-state issues, religious freedom, and the Religion Clauses of the First Amendment of the United States Constitution. Their expertise bears directly on the constitutional issues before the Court. These *Amici* are listed below. Their institutional affiliations are listed for identification purposes only.

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CERTIFICATE OF SERVICE

On July 7, 2017, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Trend Micro Officescan and is free of viruses.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(7)(B) because the brief contains 2,598 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010 (the same program used to calculate the word count).

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