Nos. 17-547, 17-642

IN THE

Supreme Court of the United States

RIMS BARBER, *et al.*,
Petitioners,
v.
PHIL BRYANT, GOVERNOR OF MISSISSIPPI, *et al.*,
Respondents.

CAMPAIGN FOR SOUTHERN EQUALITY, *et al.*,
Petitioners,
v.
PHIL BRYANT, GOVERNOR OF MISSISSIPPI, *et al.*,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Roy T. Englert, Jr.
Counsel of Record
Daniel N. Lerman
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW, Suite 411-L
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statute

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors of law with expertise in church-state issues, religious freedom, and the Religion Clauses. Their legal expertise bears directly on the issues before this Court. *Amici* submit this brief to show that HB 1523 injures Petitioners, that Petitioners have standing to challenge HB 1523, and that this important case is suitable for review by this Court.

Amici include (institutional affiliations provided for identification purposes only):

- Caroline Mala Corbin, Professor of Law, University of Miami School of Law;
- Ira C. Lupu, F. Elwood and Eleanor Davis Professor Emeritus of Law, The George Washington University School of Law;
- Micah J. Schwartzman, Joseph W. Dorn Research Professor of Law, University of Virginia School of Law;

[1] Petitioners and Respondents received notice at least 10 days before the due date of the intention of *amici* to file this brief and have consented to the filing of this brief. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution intended to fund its preparation or submission.

- Richard C. Schragger, Perre Bowen Professor of Law and Joseph C. Carter, Jr. Research Professor of Law, University of Virginia School of Law;
- Elizabeth Sepper, Professor of Law, Washington University School of Law;
- Nelson Tebbe, Professor of Law, Cornell Law School; and
- Robert W. Tuttle, David R. and Sherry Kirschner Berz Research Professor of Law and Religion, The George Washington University School of Law.

SUMMARY OF ARGUMENT

I. Standing in Establishment Clause cases depends on alleging injuries against which the Clause protects. The Establishment Clause both guarantees individual rights and serves as a structural restraint on government. This Court has therefore granted standing in Establishment Clause cases to plaintiffs who have alleged public or psychological harms that likely would not be cognizable in some other types of cases. For decades, the lower courts have followed that lead.

In this case, the Fifth Circuit held that Petitioners lacked standing to challenge HB 1523—Mississippi's law protecting adherents of specific religious beliefs regarding marriage, sexuality, sexual orientation, and gender—because they did not "personally confront" the statute. Barber Pet. App. 9a-10a. Under that reasoning, however, a "resolution declaring Catholicism to be the official religion of the [Nation] would be effectively unchallengeable." *Catholic League for Religious &*

Civil Rights v. *City of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010). That cannot be the law.

Fortunately, it is not. The nature of the injury against which the Establishment Clause protects informs the standing analysis. Accordingly, as this Court has explained, "the mere passage" of a law that "has the purpose and perception of government establishment of religion" inflicts a constitutional injury. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314 (2000). Recognizing standing for those who suffer stigmatic injury from the passage of a law that effects a constitutionally forbidden "establishment" is necessary to give full effect to the Clause's structural restraints on government.

Petitioners allege injuries that this Court has recognized. Petitioners contend that HB 1523 endorses religious beliefs that conflict with their own and that HB 1523's special protection of those beliefs impermissibly sends a message that they are "outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). They also allege that, by extending its protections only to those who share its favored religious beliefs, HB 1523 "denigrate[s]" all other religious beliefs relating to marriage, sexuality, sexual orientation, and gender as unworthy of equal treatment. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1823 (2014). Those and other harms suffered by Petitioners are cognizable, irrespective of whether Petitioners "personally confront" HB 1523.

In any event, Petitioners *do* "personally confront" HB 1523. They confront it when they read it on their computers or on paper. And they confront it because

HB 1523 reflects the State's official policy and governs all its citizens' behavior. In that sense it inflicts a greater injury on Petitioners than allowing a religious display on state property. Indeed, the Fourth, Ninth, and Tenth Circuits have all held that, for standing purposes, plaintiffs *do* come into "contact" with a law that impermissibly promotes or disparages religion. The decision below creates a split with those circuits and adopts a doctrine with such widespread and pernicious implications that it warrants review by this Court.

II. The importance of this case is magnified because the standing holding insulates from review a plainly unconstitutional statute. HB 1523 violates the Establishment Clause, and injures Petitioners, in four related ways. First, it impermissibly promotes a particular set of religious beliefs—namely, the specific beliefs about marriage, sexuality, sexual orientation, and gender enumerated in (and protected by) the statute. And it does so even though Respondents themselves do not believe that HB 1523 is necessary to lift any existing free-exercise burden. Second, HB 1523 endorses the enumerated religious beliefs, and disparages non-adherents. It therefore creates distinct classes of insiders and outsiders based solely on their religious belief, and thereby fractures the polity along religious lines. Third, HB 1523 discriminates on the basis of religious belief and picks favorites by placing the State's imprimatur on a set of orthodoxies shared by some religious groups, but not others. HB 1523 is essentially a creedal statement masked as an accommodation.

Finally, HB 1523 shifts unreasonable hardships to third parties. Religious accommodations that do

so violate the constitutional principles laid down in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), and *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005). Because HB 1523 affords protections to a virtually unlimited array of acts that are consistent with the enumerated religious beliefs, it burdens third parties in multiple ways. HB 1523 also protects the religious beliefs listed in the statute without requiring courts even to consider the burdens placed on third parties. HB 1523 violates the Establishment Clause and inflicts concrete, cognizable injuries on Petitioners.

By allowing HB 1523 to go into effect, the Fifth Circuit's opinion will unleash religious strife and suppression in Mississippi—and invite other religious groups, in Mississippi and elsewhere, to lobby for their own religious beliefs to be enshrined in law. This Court's review is necessary to vindicate principles of religious liberty.

ARGUMENT

I. STANDING IN ESTABLISHMENT CLAUSE CASES DEPENDS ON ALLEGING INJURIES AGAINST WHICH THE CLAUSE PROTECTS, AND PETITIONERS HAVE DONE SO HERE

1. The Establishment Clause occupies a unique role within the Bill of Rights because it simultaneously guarantees individual rights and serves as a structural restraint on governments.[2]

---

[2] See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein *v.* Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. Rev. 115,

The individual rights protected by the Clause include, for example, the right to be free from religious coercion by the government. *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992). The structural restraints imposed by the Clause include its prohibition on the establishment of a state religion or of government preference for one religious sect over another. *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). Such policies divide the community along religious lines.[3]

This Court has recognized that the "various rules of standing" have "been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). "[T]he standing inquiry in Establishment Clause cases," in particular, "has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer." *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); see Lupu & Tuttle, *supra*, 2008 B.Y.U. L. Rev. at 120 (describing the relationship between the substance of the Establishment Clause and the justiciability of claims arising under the Clause).

Because the Establishment Clause protects against structural harms in addition to individual

---

133-34 (2008); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & Pol. 445, 453-57 (2002).

[3] Structural restraints also include a prohibition on government authorship of prayers. *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962).

harms, this Court has granted standing in Establishment Clause cases to plaintiffs who have alleged "public" injuries that likely would not be cognizable in some other types of cases. For example, taxpayers and mere observers have standing in certain Establishment Clause cases, despite sharing their injury with the public at large.

Flast v. *Cohen* articulated an exception to the general rule against taxpayer standing. That exception is narrow, see *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 138 (2011), but it remains unique to the Establishment Clause, see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 347 (2006). The recognition of a distinctive type of standing in Establishment Clause cases reflects the unique types of restraints the Clause places on governments.

More specifically, the taxpayer-standing exception illustrates "that [the] no-establishment [restraint] was regarded by the Court as behaving like a structural clause, capable of having its limits exceeded," even without the type of harm often required for standing in other types of cases. Esbeck, *supra*, 18 J.L. & Pol. at 457-58. Thus, "the injury alleged in Establishment Clause challenges to federal spending [is] the very extract[ion] and spen[ding] of tax money in aid of religion"—one of the prime evils that the drafters of the Establishment Clause sought to prevent. *DaimlerChrysler*, 547 U.S. at 348 (internal quotation marks omitted). "And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* at 348-49.

This Court has also recognized the injuries of plaintiffs who challenge state-sanctioned religious displays and exercises that endorse a particular religion or stigmatize non-adherents. See, *e.g.*, *McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844 (2005). "Because in many circumstances such people could rather easily avert their eyes or ears, the injury caused by these displays is primarily psychological—the distress caused by knowledge that the government promotes a religious sentiment." Lupu & Tuttle, *supra*, 2008 B.Y.U. L. Rev. at 119. Such harms to observers are not always justiciable in other contexts. But, because a core purpose of the Establishment Clause is to prevent government promotion of sectarian beliefs, this Court's precedents reflect the necessity of conferring standing on observers to challenge such actions.

Indeed, "[i]t is beyond dispute that" the Clause prevents the government from acting "in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee*, 505 U.S. at 587 (internal quotation marks omitted; bracketed addition in original). That, after all, is the fundamental structural harm addressed by the Establishment Clause. See *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church," or "prefer one religion over another.").

Consider a law proclaiming Catholicism to be "the one true faith and national religion," and providing that all conduct consistent with Catholic beliefs must be accommodated by the government. Such a law would surely run afoul of the Establishment Clause.

But would any citizen have standing to challenge the law?

Under the decision below, the answer would be no. The court of appeals held that Petitioners lacked standing to challenge HB 1523 because they did not "personally confront" the statute. Barber Pet. App. 9a-10a. The same reasoning would bar plaintiffs from challenging the hypothetical law above. Thus, a "resolution declaring Catholicism to be the official religion of the [Nation] would be effectively unchallengeable." *Catholic League for Religious & Civil Rights* v. *City of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010). That cannot be the law.

This Court has taken an approach to standing in the Establishment Clause context that gives effect to its structural protections. Accordingly, the Court has recognized injuries associated with religious alienation, offense to taxpayer conscience, sectarian preference, the absence of a secular purpose, and similar harms,[4] precisely because the Establishment Clause embodies those normative concerns. Unless plaintiffs alleging such harms have standing, the very evils feared by the Founders—such as the establishment of a national religion or the government's use of the spending power in aid of

---

[4] Lupu & Tuttle, *supra*, 2008 B.Y.U. L. Rev. at 135-36 (citing *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 625-26, 633 (1989) (O'Connor, J., concurring); *Mitchell* v. *Helms*, 530 U.S. 793, 867 (2000) (O'Connor, J., joined by Breyer, J., concurring); *id*. at 899 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987)).

religion—will go unchecked. The standing issue therefore merits this Court's review.

2. The injuries Petitioners allege here fit comfortably within the types of harms recognized by this Court in the Establishment Clause context.

"Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,'" the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) (internal quotation marks omitted). Among other things, such government endorsement sends a message to non-adherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309-10 (2000) (internal quotation marks omitted). "This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence." *Lee*, 505 U.S. at 627.

As discussed below, Petitioners allege that the religious beliefs HB 1523 explicitly protects conflict with their own. Petitioners include ministers and LGBT individuals who disagree with HB 1523's creedal statements that "[m]arriage is or should be recognized as the union of one man and one woman"; that "[s]exual relations are properly reserved to such a marriage"; and that the terms "male" and female" refer to "immutable biological sex" (Barber Pet.

App. 115a). See Barber Pet. 7; Campaign for Southern Equality Pet. 11. They contend that, by conferring special "protect[ion]" for those "religious beliefs" (Barber Pet. App. 115a)—not just specific practices, as is commonly the case in accommodation laws—HB 1523 impermissibly sends a message that Petitioners are "not full members of the political community." *Santa Fe*, 530 U.S. at 309-10 (internal quotation marks omitted). That alleged injury is a cognizable one.

For example, in *Santa Fe* this Court held that a public school's sponsorship of a religious message violated the Establishment Clause because it sent the message to "nonadherents that they are outsiders." 530 U.S. at 309-10 (internal quotation marks omitted). The Court rejected the defendant's argument that the plaintiff's facial challenge to the school policy was premature because no religious message had yet been given under the policy:

> This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," and that we guard against other different, yet equally important, constitutional injuries. *One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion.* Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

Id. at 313-14 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 694 (2002) (O'Connor, J., concurring)) (emphasis added) (citation omitted). Just as this Court in numerous cases has linked the nature of the Establishment Clause injury to the often-minimal showing of individualized harm required for standing, this Court in *Santa Fe* entertained a pre-enforcement facial challenge because of the nature of the Establishment Clause harm.

Santa Fe also makes it clear that the exact sort of harm Petitioners allege here constitutes Establishment Clause injury. When a law endorses religion over non-religion (or one religious belief over another), *Santa Fe* holds, that endorsement or establishment of religion is *itself* an injury. Here, Petitioners allege that HB 1523 constitutes such impermissible endorsement of particular religious beliefs.

Members of this Court have differing views regarding the endorsement test. But this Court has recognized other structural harms that are also implicated in this case. For example, the Court has made clear that government-sanctioned acts that are permissible in some contexts may violate the Establishment Clause if they "denigrate nonbelievers or religious minorities." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1823 (2014). That is what Petitioners say enactment of HB 1523 does: By extending its protections only to those who share its favored religious beliefs on highly controversial and divisive subjects, HB 1523 denigrates all other religious beliefs relating to marriage, sexuality, sexual orientation, and gender as unworthy of equal treatment.

It also undisputed that the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587. Thus, even "[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). For example, the Establishment Clause plainly "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." *Ibid.* That is because "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Ibid.*

But here, too, Petitioners challenge an "obtrusive year-round religious display"—HB 1523, a statute that is on the books for all to see, year round.[5] And they allege that the statute places the government's weight behind an effort to "proselytize" (*ibid.*) on behalf of "certain"—and plainly not all—"religious beliefs" regarding marriage, sexuality, sexual orientation, and gender (Barber Pet. App. 115a). HB 1523 articulates and protects those specific religious beliefs, and not others.

---

[5] It would be a perverse civics lesson indeed if the law were to deem citizens more likely to see a public display than to see a public law. As the Campaign for Southern Equality Petitioners point out, "Citizens are generally expected to know and respect the law of the land." Pet. 18. Moreover, there was ample publicity surrounding the passage of HB 1523. See *id*. at 5-7.

In short, it is well settled that government-inflicted stigma, denigration, and exclusion are injuries in the Establishment Clause context. Petitioners allege such injuries here, and therefore have standing to challenge HB 1523. The lower court's approach to standing, in contrast, is divorced from the purposes of the Establishment Clause, and deserves this Court's review because it would allow even the most flagrant violations of the Clause to go unchecked.

3. The Fifth Circuit held that Petitioners lack standing because, "[j]ust as an individual cannot 'personally confront' a warehoused monument, he cannot confront statutory text." Barber Pet. App. 10a. But that is a flawed analogy. HB 1523 is not a slip of paper stored in some dusty warehouse where no one can see it, like the Ark of the Covenant in an Indiana Jones movie. See *Raiders of the Lost Ark* (1981). Rather, it is a duly enacted statute codified in Mississippi's legal code, Miss. Code Ann. § 11-62-1 *et seq.* (2016), which Petitioners (and all citizens) can view on their computer screen or hold in their hands. In other words, Petitioners *do* "personally confront" HB 1523.

More to the point, the Fifth Circuit's cramped "personal confrontation" requirement ignores the self-evident fact that a state law endorsing some religious beliefs and disparaging others inflicts a *greater* injury on that state's citizens than merely permitting the display of the Ten Commandments on state property. Such a display can send multiple messages, and does nothing to protect any specific beliefs or conduct. A statute, in contrast, is *binding law* that reflects the state's official policy, governing

all its citizens. HB 1523 provides a complete defense with respect to any actions taken "wholly or partially" on the basis of such beliefs. Barber Pet. App. 115a. And there is no doubt about the purpose of HB 1523: the "Protection of certain sincerely held religious beliefs" regarding marriage, sexuality, sexual orientation, and gender. *Ibid.*

As Petitioners explain (see Barber Pet. 14-18; Campaign for Southern Equality Pet. 9-14), other courts of appeals have held that, for purposes of standing under the Establishment Clause, plaintiffs *do* come into "contact" with laws that impermissibly promote or disparage religion. In *Awad* v. *Ziriax*, 670 F.3d 1111 (10th Cir. 2012), for example, the Tenth Circuit held that the plaintiff suffered "a form of personal and unwelcome *contact* with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment." *Id.* at 1122 (internal quotation marks omitted) (emphasis added). In *Moss* v. *Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012)—a case involving a policy, not a physical symbol—the Fourth Circuit recognized that plaintiffs have standing when they are "spiritual[ly] affront[ed] as a result of direct and unwelcome *contact* with an alleged religious establishment within their community." *Id.* at 605 (internal quotation marks omitted) (emphasis added).

And in *Catholic League* the Ninth Circuit similarly held that the plaintiffs challenging a non-binding resolution disapproving of the Catholic Church's policy against adoption by same-sex parents had standing because "they have come in *contact* with the resolution," which conveyed a

message of hostility to their religious beliefs. 624 F.3d at 1053 (emphasis added).[6]

Those cases therefore stand for the commonsense proposition that, in all ways that matter, a plaintiff comes into "contact" with a law that establishes, promotes, or disparages religious belief. Under the Fifth Circuit's rule, however, plaintiffs can never "confront" a state law governing their lives unless that law is displayed on a billboard on state property, in addition to being codified in the law books. This Court should resolve the clear circuit conflict, and should do so in favor of recognizing standing for those who challenge a law that allegedly inflicts on them a recognized form of Establishment Clause injury.

II. HB 1523 VIOLATES THE ESTABLISHMENT CLAUSE AND INJURES PERSONS WHO DO NOT ADHERE TO THE RELIGIOUS BELIEFS ENUMERATED IN THE STATUTE

The standing issue merits review because of its widespread implications. But it also merits review

---

[6] *Catholic League* is in a relevant sense the mirror image of this case. In *Catholic League*, the plaintiffs argued that the non-binding resolution *disparaged* their religious belief that "[c]lear and emphatic opposition to homosexual unions is a duty of all Catholics." 624 F.3d at 1053 (internal quotation marks omitted). Here, Petitioners claim that HB 1523 impermissibly *promotes* the religious belief that "[s]exual relations are properly reserved" to a "union of one man and one woman," Barber Pet. App. 115a, and disparages their religious beliefs to the contrary. It cannot be that disagreeing citizens have standing to challenge a law that says "A" but disagreeing citizens lack standing to challenge a law that says "not A."

because *in this case* the decision below has allowed a clear constitutional violation to escape review. HB 1523 violates the Establishment Clause in four related respects—and thereby inflicts concrete, particularized injury on Petitioners.

1. Mississippi's singular law can only be understood to have the prohibited purpose of promoting a particular set of religious beliefs. And that violates a basic Establishment Clause principle: "Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *McCreary*, 545 U.S. at 860 (internal quotation marks omitted). Because there is "no neutrality when the government's ostensible object is to take sides" in religious matters, a statute is unconstitutional when the evidence supports "a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 860, 863.

To be sure, the government may pass laws with the purpose of showing respect for free-exercise values. But "to 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." *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring). If no burden on the exercise of religion is said to be lifted, the only logical inference is 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 to its chosen tenets. See *Wallace* v. *Jaffree*, 472 U.S. 38, 59 (1985).

That peculiar circumstance—a law that singles out specific religious beliefs for protection yet is said by its defenders to lift no burden on the exercise of those beliefs—is exactly what this litigation involves. Although Respondents have characterized HB 1523 as a response to legal assaults on opponents of same-sex marriage, they have at the very same time insisted that there is no burden on free exercise that HB 1523 in fact lifts. For example, they have stated that, "[e]ven before HB 1523, it was *legal* in Mississippi for individuals, businesses, and religious organizations to decline to participate in same-sex marriages," and that "it would have remained legal even if HB 1523 had never been enacted." Appellants' Br. at 19, *Barber* v. *Bryant*, 2016 WL 6350550 (5th Cir. Oct. 26, 2016) (No. 16-60478).

If we take Respondents at their word, Mississippi has written three creedal statements into law and conferred 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. Especially in light of a legislative record full of religious statements by HB 1523's sponsors (see Barber Pet. 4-5; Campaign for Southern Equality Pet. 6-7), that assertion reveals that HB 1523 is an effort to proclaim religious truth, and not to protect the free exercise of religion.

2. The structure of HB 1523 confirms that it endorses the enumerated "religious beliefs" (Barber Pet. App. 115a) and disparages non-adherents. In

enacting the law, Mississippi did not address the subjects of marriage, sexuality, sexual orientation, and gender, and attempt to accommodate religious beliefs and practices evenhandedly. Rather, it singled out only specific religious *viewpoints* on these subjects as worthy of legal protection. Those with different religious views on the very same questions receive no protection from HB 1523, 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).

Thus, under HB 1523, a state employee cannot be fired for speech based on religious opposition to same-sex marriage, but is afforded no protection against termination for religious speech supporting it. State-funded programs cannot lose money for religious objections to aiding transgendered persons, but can lose funds for religiously motivated transgender outreach. And so on. HB 1523 offers shields against "discrimination" by Mississippi, but only to those who hold three State-selected views about the religious disputes in question.

HB 1523 therefore creates classes—drawn explicitly by reference to "religious beliefs" (Barber Pet. App. 115a)—of insiders and outsiders. See *Santa Fe*, 530 U.S. at 309. Mississippians who hold those religious beliefs receive statutory protection, while those with different viewpoints on the exact same questions of faith do not.

That constitutional vice is exacerbated by three striking features of HB 1523. First, HB 1523 is categorical and automatic. 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 Religious Freedom Restoration Act. See Barber Pet. App. 126a. Thus, whenever the State burdens another person's religious practice by accommodating the enumerated religious beliefs, the religious beliefs listed in HB 1523 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 "religious belief or moral conviction." Barber Pet. App. 116a. Thus, any person who claims that his or her conduct was "consistent" with the enumerated beliefs or convictions receives complete protection—even if that conduct was *not* motivated by a personally held religious belief.

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. That is entirely unlike typical government accommodation of religion. By unavoidable implication, HB 1523 denigrates all other religious beliefs relating to marriage, sexuality, sexual orientation, and gender as unworthy of equal treatment. See *Town of Greece*, 134 S. Ct. at 1823.

3. HB 1523 further violates bedrock principles forbidding discrimination on the basis of religious belief. Time and again, this Court has identified

discrimination among sects, denominations, and beliefs as a prime evil against which the Establishment Clause is aimed. *Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994); *Larson* v. *Valente*, 456 U.S. 228 (1982); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Yet not only does HB 1523 discriminate in favor of the listed religious 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—and collides headlong with the Establishment Clause. The State may not throw its weight, in laws that speak explicitly of religious belief, behind one side in a matter of intra-denominational religious controversy, giving adherents of favored views the upper hand. The Constitution bars governmental intervention into purely ecclesiastical questions. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 704 (2012); *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969).

4. Finally, an original purpose of the Establishment Clause was to prohibit the government from requiring one person to support another's religion. See, *e.g.*, James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 4 (1785). That purpose is reflected in Court precedents barring government from imposing

unreasonable hardship on third parties in order to accommodate religion. HB 1523 cannot be squared with that requirement.

In *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), this Court struck down a statute that granted every employee an absolute right to be free from work on his or her Sabbath—even when doing so "would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees." *Id.* at 709-10. This Court held that this "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," which give "no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (internal quotation marks omitted). *Thornton* thus holds that an accommodation cannot survive Establishment Clause review if it shifts unreasonable hardship to third parties.

Cutter v. *Wilkinson*, 544 U.S. 709 (2005), unanimously affirmed that interpretation of *Thornton*. Rejecting a facial attack on the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court held that "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722 (emphasis added). Applying that rule, the Court held that RLUIPA "does not founder on shoals our prior decisions have identified"—but only because, "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on

nonbeneficiaries." 544 U.S. at 720 (citing *Thornton*, 472 U.S. at 703).

Thornton and *Cutter* therefore set forth the rule that accommodations may not shift unreasonable hardship to third parties. If an accommodation does so, it must provide a means by which the government can avoid inflicting third-party harms, such as delegating to courts the power to limit accommodations based on a "compelling interest" test. Otherwise, the accommodation is unconstitutional.

Together, two features of HB 1523 violate the principle articulated in *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, sexual orientation, 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, the law shifts the burdens of accommodating the enumerated religious beliefs to third parties (including non-adherents) in many different ways. And some of that burden-shifting will result in deprivations of fundamental rights.[7]

---

[7] Third-party harms are therefore an Establishment Clause concern, and their existence places limits on legislative

Second, like the law invalidated in *Thornton*, HB 1523 is "absolute and unqualified," 472 U.S. at 709. 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. The religious beliefs enumerated in the statute receive an "unyielding weighting." *Id.* at 710.

HB 1523 is therefore invalid because it shifts substantial harm to a discrete class of third parties as the price of accommodating the enumerated religious beliefs. That injury accrues to Petitioners, 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.

* * *

By enacting HB 1523, Mississippi has purposefully favored a set of religious beliefs about controversial questions of marriage, sexuality, sexual orientation, and gender. The law itself, by virtue of its unprecedented structure, endorses those 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

---

accommodations—limits exceeded by this statute. While some of those third-party harms may not arise until later, this Court need not wait for those specific harms to occur in order to address the other, ongoing harms of entrenching religious beliefs into the State's code.

pointedly—that adherents of the protected religious beliefs are exalted above all others in the eyes of the State. That is cognizable injury—and it violates the Establishment Clause.

By thwarting any Establishment Clause review of HB 1523, the judgment below invites every religious group, in Mississippi and elsewhere, to lobby for its own creedal statements to be enshrined in law. That is dangerous business. This Court's review is therefore necessary to vindicate principles of religious liberty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Roy T. Englert, Jr.
Counsel of Record
Daniel N. Lerman
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW, Suite 411-L
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

Counsel for Amici Curiae

November 2017