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

NYKOLAS ALFORD and STEPHEN THOMAS; and ACLU OF MISSISSIPPI — PLAINTIFFS

V. — CIVIL ACTION NO. 3:16-CV-350-DPJ-FKB

JUDY MOULDER, in her official capacity as MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS — DEFENDANT

DEFENDANT JUDY MOULDER'S MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs seek a preliminary injunction contending that Section 3, (8)(a) [hereafter "Section (8)(a)] of the "Protecting Freedom of Conscience from Government Discrimination Act" ("H.B. 1523") violates the Due Process and Equal Protection Clause of the Fourteenth Amendment and is facially unconstitutional. Compl., ¶¶ 32, 36-37.[1] While pre-enforcement facial challenges often come to the court with little evidentiary record against which to access the claims, "pleadings must be something more than an ingenious academic exercise in the

---

[1] Section (8)(a) provides:

> Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal.

See H.B. 1523, § 3 (8)(a).

conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973).[2] Plaintiffs employ this type of academic exercise by piecing together a litany of speculative and hypothetical facts and injuries they surmise meet not only constitutional standing principles, but warrant pre-enforcement facial invalidation. Plaintiffs are incorrect on both fronts and the motion for preliminary injunction should be denied.

There are at least five (5) reasons why the type of imminent and irreparable injury required for a preliminary injunction is utterly lacking in this case. First, Plaintiffs' vaguely stated intention to get married in the next three years does not constitute the type of imminent harm that is the hallmark of the extraordinary remedy of a preliminary injunction. Far more problematic than this, however, is that this facial challenge is contingent upon a number of hypothetical events that may never transpire.

For instance, there may never be a recusal by any government employee in any of Mississippi's eighty-two County Clerk's ("Clerk") offices pursuant to Section (8)(a). Moreover, even if some recusals are invoked in the future, these particular Plaintiffs may seek a marriage license from a Clerk's office in which there have been no recusals. In fact, it is likely Plaintiffs would not know if any recusals had occurred unless they intentionally sought these records from the State Registrar and then proceeded to a particular Clerk's office if one existed.

[2] The Complaint additionally asserts that Plaintiffs seek "declaratory relief that HB 1523 is unconstitutional . . . as applied to Plaintiffs." Compl. [Dkt. No. 1], ¶ 5. A plaintiff seeking an injunction in an as-applied challenge has the burden to allege enough facts for the court to decide the constitutional claim while avoiding "'premature interpretation of statutes'" requiring speculation or conjecture on a "'factually barebones record.'" *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008)). *See also Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014) ("'[C]ourts, when faced with . . . 'as-applied' challenges that lack a sufficiently specific record, have declined to issue as-applied remedies.") *Id.* (citing *Worley v. Florida Secretary of State*, 717 F.3d 1238 (11th Cir. 2013). Plaintiffs do not allege **any** facts to support an as-applied challenge nor could they as neither Section (8)(a) nor or any other section of the law has gone into effect.

Further still and assuming there are recusals and that these Plaintiffs apply for a marriage license at a Clerk's office that issued a recusal, Plaintiffs' facial challenge fails because the language of H.B. 1523 expressly provides that its terms **may not** be used to prevent the state government employee from providing "a marriage license," Section 8(2), and in fact, affirmatively requires government employees to "ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." Section 3, 8(a). Thus, the very type of discrimination to which Plaintiffs' claim they will be subjected is expressly and facially prohibited by two different provisions of H.B. 1523.

Finally, recognizing they may never encounter a marriage license recusal or themselves be personally denied a marriage license on the basis of H.B. 1523, Plaintiffs resort to a "fall-back" position alleging that the mere existence of this law "stigmatizes" thereby giving rise to their equal protection challenge. However, the Supreme Court long ago rejected this type of generalized stigmatic injury. Instead, the Court said "[t]he stigmatic injury thus requires identification of some concrete interest with respect to which [plaintiffs] ***are personally subject to discriminatory treatment***. That interest must independently satisfy the causation requirement of standing doctrine." *Allen v. Wright*, 468 U.S. 737, 795 n.22 (1984) (emphasis supplied) (holding African-American plaintiffs whose children had not been victims of discriminatory exclusion from the schools whose tax exemptions they challenge lacked standing), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

Taken together, these five (5) considerations demonstrate not only why Plaintiffs' facial challenge fails, but also why there is no substantial threat of an irreparable injury for purposes of a preliminary injunction. Given the speculative and future nature of Plaintiffs' marriage, coupled

with the uncertainty regarding whether Plaintiffs will ever encounter a clerk's recusal, in addition to the protections afforded Plaintiffs by H.B. 1523, Plaintiffs simply do not establish the type of extraordinary circumstances necessary to warrant emergency injunctive relief. In fact, the problems with the Complaint and motion for preliminary injunction are so fundamental that Plaintiffs have not established that they have Article III standing or that the controversy is ripe—both which are necessary for purposes of likelihood of success on the merits for their injunctive relief. For the reasons set forth below the motion for preliminary injunction should be denied.[3]

ARGUMENT

To justify the extraordinary relief of a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits; (2) substantial threat of an irreparable injury without the relief; (3) threatened injury that outweighs the potential harm to the party enjoined; and (4) that granting the preliminary relief will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). A movant must "clearly establish each of the traditional four preliminary injunction elements." *DSC Commc'n . Corp. v. DGI Techn., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996).

[3] The pleadings are less than a model of clarity concerning the scope of the facial challenge. For instance, Plaintiffs identify several provisions of the statute in their memorandum of law to which they object. Pls.' Mem. Supp. at p. 3. But the Complaint names only Moulder as a defendant who has no connection to the provision cited at page 3. Further still, the Claim for Relief in the Complaint states that "HB 1523 is unconstitutional in all its application. Compl., ¶ 35. And finally, Plaintiffs' state that by "[d]eclaring H.B. 1523 unconstitutional and enjoining [Moulder] from enforcing it, would redress Plaintiffs' injury." *Id.* at ¶ 40. Plaintiffs' broader claim for relief is inconsistent with the singular challenge to Section (8)(a). Moreover, the State Registrar is only identified in Section (8)(a). If Plaintiffs are attempting to challenge other provisions of H.B. 1523 they clearly do not have the correct defendant for such claims. The Supreme Court has held that "our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Therefore, for purposes of this opposition to the preliminary injunction, Moulder deems Plaintiffs' challenge to encompass only Section (8)(a). If Plaintiffs' are suggesting that invalidating a single provision of H.B. 152 means the entire statute must fall, they are incorrect. *See, e.g., Regan v. Time, Inc*., 468 U.S. 641, 649 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary.).

The decision to grant a preliminary injunction is the exception rather than the rule. *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 620 (5th Cir. 1985). The Fifth Circuit has "cautioned repeatedly" that a preliminary injunction is an "extraordinary remedy" to be granted only if the party seeking it has "clearly carried the burden of persuasion" on all four elements. *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

I. Plaintiffs Cannot Demonstrate a Substantial Likelihood of Success on the Merits for Injunctive Relief.

If a plaintiff seeking a temporary or preliminary injunction fails to prove a substantial likelihood of success on the merits, he or she is not entitled to injunctive relief. *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003) (The "absence of likelihood of success on the merits is sufficient to make the district court's grant of a preliminary injunction improvident as a matter of law"); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (plaintiff must "carr[y] his burden of persuasion as to all of the four prerequisites.").

A. Plaintiffs Have No Likelihood of Success on the Merits Because Section (8)(a) is not Facially Unconstitutional.

In assessing a facial constitutional challenge, the Supreme Court has said "we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined"). Furthermore, "[e]xercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues,

but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (quoting *Raines*, 362 U.S. at 22).

Because Plaintiffs' challenge is facial, they face a heavy burden to show that Section (8)(a) is unconstitutional in all its applications.[4] As the Supreme Court has instructed,

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Washington State Republican Party, 552 U.S. at 450-51 (internal citations and quotation marks omitted). The relevant question for a court assessing a facial challenge is whether the plaintiffs can demonstrate that the statute is "unconstitutional in all of its applications," or, in other words, whether "no set of circumstances exists under which the Act would be valid." *Washington State Grange*, 552 U.S. at 449; *see also Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 290 n.5 (5th Cir. 2015); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 n.23 (5th Cir. 2008); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006); *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004). "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly

[4] Moulder appreciates that the Court is required to address standing and ripeness before proceeding to the question of whether Plaintiffs have met their burden in a facial challenge for purposes of likelihood of success on the merits. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."). However, the nature of the facial challenge is instructive with respect to standing and ripeness and is thus presented first in the order of argument.

invalid. . . ." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also In re IFS Fin. Corp.*, 803 F.3d 195, 208 (5th Cir. 2015).

The Fifth Circuit has said that "[s]tandard principles of constitutional adjudication require courts to engage in facial invalidation only if no possible application of the challenged law would be constitutional." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (citing *Salerno*, 481 U.S. at 745). In light of this burden, the Supreme Court has categorized a facial challenge as "the most difficult challenge to mount successfully." *See Raines*, 362 U.S. at 22 ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined"); *Cf. United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("[S]tatutes should be construed whenever possible so as to uphold their constitutionality.").

There are at least two reasons why Plaintiffs cannot show Section 3, (8)(a) is facially unconstitutional and therefore cannot demonstrate a substantial likelihood of success on the merits. First, the statute on its face provides that "[t]he person recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage ***is not impeded or delayed as a result of any recusal***." Section (8)(a) (emphasis supplied). Moreover, the statute states that "[n]othing in this act shall be construed to prevent the state government from providing, either directly or through an individual entity not seeking protection under this act, any benefit or service authorized under the state law." Section (8)(2). Thus, if Alford and Thomas apply for a marriage license they will receive one on the same material terms and conditions as everyone else—that is their license cannot be denied, delayed or impeded.[5]

[5] Plaintiffs also fundamentally mischaracterize H.B. 1523 by suggesting the statute "provides *complete immunity* for certain individuals . . . to act or refuse to act based on their religious or moral

The hallmark of an equal protection challenge—fundamentally lacking in this case—is that similarly situated persons are treated differently. *See, e.g., Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("The equal protection clause of the fourteenth amendment is essentially a mandate that all persons similarly situated must be treated alike."); *see also City of Cleburne, Tex. v. Cleburne Living Center*m 473 U.S. 432 (1985) (same). H.B. 1523 mandates that Plaintiffs receive a marriage license and that they not be denied, impeded or delayed in obtaining the license. *See* Section 3, (8)(a) and Section 8(2). Thus, equal protection considerations are not implicated by Section (8)(a).

While the vast majority of Plaintiffs' brief addresses their alleged equal protection claim, the same reasons set forth above demonstrate why Plaintiffs cannot show Section (8)(a) is facially unconstitutional under the Due Process Clause.[6] Should Plaintiffs seek a marriage license, Section (8)(a) facially mandates that their efforts not be impeded or delayed as a result of

---

beliefs that marriage is or should be recognized as the union of one man and one woman." Compl. ¶ 22. Plaintiffs further advocate that "[w]hen acting or refusing to act based on such beliefs HB 1523 immunizes those individuals and organizations *from all legal liability*. . . ." *Id.* However, nothing in H.B. 1523—or more particularly Section (8)(a)—immunizes a government employee from federal liability. Moreover, there is no basis for assuming that any government employee will violate federal law. Governor Phil Bryant's signing message for H.B. 1523 makes this point clear and reads in part:

> This bill does not limit any constitutionally protected rights or actions of any citizen of this state under federal law or state law. It does not attempt to challenge federal laws, even those which are in conflict with the Mississippi Constitution, as the Legislature recognizes the prominence of federal law in such limited circumstances.

See Bryant, Phil, Twitter, (@PhilBryantMS) April 5, 2016.

[6] As the Court in *Oberefell* noted, "the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." Plaintiffs' due process challenge is vague and must be inferred from their reference statement that "H.B. 1523 violates the Fourteenth Amendment by subjecting lawful marriages of same sex couples to different terms and conditions than those accorded to different-sex couples." Compl., ¶ 3. While Moulder obviously disagrees with Plaintiffs' characterization, the point is that whether Plaintiffs' claim is couched either as a due process or equal protection claim, the fact remains that Section (8)(a) facially mandates that Plaintiffs receive a marriage license without impediment or delay. Thus, Plaintiffs cannot show that the statute is facially unconstitutional for purposes of their motion for preliminary injunction.

a recusal if one occurs. Moreover, it cannot be presumed that a government employee will act in an unconstitutional manner. Plaintiffs' reliance on *Obergefell* in this context is unavailing.

Second, religious accommodation laws are not facially unconstitutional. In fact, the Fifth Circuit foreshadowed the need for such laws when it addressed Supreme Court's decision on same-sex marriage. Section (8)(a) provides an accommodation for same-sex marriages under the Fourteenth Amendment (no impediment or delay as a result of any recusal) and for those persons with "sincerely held religious beliefs or moral convictions" recognized under the First Amendment. *See* H.B. 1523, § 2. The Fifth Circuit in *Campaign for Southern Equality v. Bryant*, 791 F.3d 625 (5th Cir. 2015), quoting *Obergefell v. Hodges*, No. 14–556, —— U.S. ——, 135 S.Ct. 2584, —— L.Ed.2d ——, 2015 WL 2473451 (June 26, 2015), stated that "[h]aving addressed fundamental rights under the Fourteenth Amendment, **the [Supreme] Court, importantly, invoked the First Amendment**, as well:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. *The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.* The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

2015 WL 2473451 at *22 (quoting *Obergefell*, 135 S.Ct. at 2607) (emphasis supplied).

> *Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court. *We express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them.*

Id. at 2607, 2015 WL 2473451 at *22 (emphasis supplied). Thus, under *Obergefell* and *Campaign for Southern Equality*, Section (8)(a) represents a constitutionally permissible accommodation between First and Fourteenth Amendment interests protected by the Constitution.

Similar statutory accommodations are well-established regarding religious beliefs and the performance of certain public functions. For instance 42 U.S.C. § 300a-7(a) prohibits authorities from imposing certain requirements contrary to religious beliefs and moral convictions in public funding of abortion. *Id.* (receipt of public funding does not authorize any court or any public official to require: "(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure would be contrary to his religious beliefs or moral convictions."). *Id.*

In *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 830 (D.C. Cir. 2006), the court stated that "Congress, since 1996 has forbidden 'discrimination' against an individual who 'refuses . . . to perform . . . abortions, or to provide referrals for . . . abortions.'" *Id.* (citing Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 515, 110 Stat. 1321, 1321-224 (codified at 42 U.S.C. § 238n(a)(1), (c)(2)). The court found that ". . . the 1996 provision hasn't given rise to the parade of horribles that plaintiff hypothesizes—not even a single horrible." *Id.* Thus, similar accommodations are certainly not new. Plaintiffs cannot establish that Section (8)(a) is unconstitutional in all its applications and therefore cannot show a substantial likelihood of success on the merits. This fact alone warrants denial of the motion for preliminary injunction.

B. Plaintiffs Lack Article III Standing and Cannot Demonstrate Imminent and Irreparable Injury Necessary for a Preliminary Injunction.

For reasons similar as to why the merits of the facial challenge fails, Plaintiffs' alleged injury-in-fact is so remote and utterly speculative that they cannot establish standing—a requirement for both likelihood of success on the merits and substantial threat of an irreparable injury. In fact, given the highly speculative nature of Plaintiffs' alleged injury, the Court may not need to resolve the facial challenge given that Plaintiffs cannot demonstrate: (a) injury-in-fact, (b) causation, and (c) redressability—all required to confer Article III standing.

This standing deficiency is illustrated by the following: (1) Plaintiffs' intention to get married in the next three years is not type of imminent harm necessary for affording injunctive relief; (2) there may never be any recusal by any government employee pursuant to Section (8)(a); (3) if there are recusals at some point in the future, these Plaintiffs may not actually utilize a Clerk's office that issued any of the recusals; (4) assuming there are recusals and these Plaintiffs apply at a Clerk's office that has issued a recusal, Section (8)(a) facially prohibits the type of discriminatory treatment Plaintiffs' claim; and (5) Plaintiffs have not alleged that they have been personally subject to discriminatory treatment for purposes of a stigmatic injury.

Thus, standing is directly related to Plaintiffs' ability to show that they face a substantial threat of irreparable injury for obtaining injunctive relief. This is because "[t]he equitable remedy [of injunction] is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Because Plaintiffs cannot demonstrate a real or immediate threat of substantial and immediate irreparable injury, they cannot carry their burden for injunctive relief.

The Article III standing requirements are familiar. First, a plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—that is the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This "triad of injury-in-fact, causation, and redressability constitutes the core of Article III's "case or controversy" requirement. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104-05 (1998). Plaintiffs bear the burden of establishing its existence. *Lujan* 504 U.S. at 560.

In *Flast v. Cohen*, 392 U.S. 83, 98 (1968), the Supreme Court said the "fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* "This is so federal courts will not be asked to decide 'illdefined controversies over constitutional issues.'" *Id.* (citation omitted). Thus "the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Sedlin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Federal jurisdiction can only be invoked when "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .'" *Id.* at 499 (quoting *Linda R.S. v. David D.*, 410 U.S. 614, 617 (1973)).[7]

[7] "The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process."

In *Clapper v. Amnesty Int'l. USA*, 133 S.Ct. 1138, 1150 (2013) the Court again laid down the requisite elements for standing for future injury claims:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending. Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that [a]llegations of possible future injury are not sufficient.

Id. at 1150 (internal quotation marks and citations omitted). For an equal protection challenge, standing exists only for those persons who are personally denied equal treatment by the challenged discriminatory conduct. *U.S. v. Hays*, 515 U.S. 737 (1995); *Walker v. City of Mesquite*, 169 F.3d 973, 979 (5th Cir. 1999) (citing *Allen*, 468 U.S. at 755 (1984)); *see also Valley Forge Christian College*, 454 U.S. at 489 n.26 (1982) (rejecting proposition that every citizen has standing to challenge every affirmative-action program on the basis of a personal right that government does not deny equal protection).

1. Alford and Thomas have not suffered an injury-in-fact.

Alford and Thomas have not suffered an injury-in-fact necessary to confer Article III standing. This is because Plaintiffs' alleged injury-in-fact is conjectural and hypothetical. *See DaimlerChrysler Corp.*, 547 U.S. at 344–46, 350; *Little v. KPMG LLP*, 575 F.3d 533, 539 (5th Cir. 2009). Moreover, if the injury's existence depends on actions or decisions by third parties not before the court, the claimed injury is usually too conjectural or hypothetical to confer standing. *Id.*; *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Alford and Thomas' alleged injury (that Moulder will receive recusal notices) is predicated on speculation that at some time in the future yet to be identified government employees may recuse himself or

---

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

herself pursuant to Section 8(a).[8] Whether this occurs is wholly independent of any action on Moulder's part as the State Registrar has no control over whether a government employee will or will not issue a recusal.

Beyond this threshold assumption, Alford and Thomas further invite the Court to speculate about a myriad of hypothetical events that might occur during their lifetime, including: (a) when they celebrate their anniversary they **might** be refused goods and services, Compl. ¶ 30; (b) **if** they seek to adopt a child out of foster care, adoption agencies **could** turn them away, *id.;* (c) **if** they seek counseling or fertility services, a hospital employee **may** refuse to interact with them, *id.;* and (d) **if** they have a child the school guidance counselor **could** tell their child that his or her parents' marriage is an abomination or refuse to provide any counseling services to their child. *Id.* However, such "'[s]ome day intentions—without any description of concreate plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.[9]

The Supreme Court has consistently declined to find standing where an injury may occur at some unknown point in the future. *City of Los Angeles*, 461 U.S. at 102-03 ("[a]bstract injury is not enough . . . [and] plaintiff must show that he has sustained or is immediately in

[8] Further illustrating the hypothetical nature of this case is that Plaintiffs have not (because they cannot) named any government employee who would actually be the subject of a potential future recusal under Section (8)(a). By contrast, Moulder's role is to "keep a record of such recusal," if one is received. Moreover, nothing on the face of Section (8)(a) nullifies the effectiveness of a government employees' recusal if, for some reason, the State Registrar did have a record of the recusal. For instance, if a government employee could demonstrate that he or she provided the notice pursuant to Section (8)(a), although the State Registrar did not have a record, it cannot be determined at this juncture whether that recusal would nonetheless be valid and effective for purposes of the government employee.

[9] In *Clapper*, the Court said that in "some instances, we have found standing based on a 'substantial risk' that the harm will occur. . . ." *Clapper*, 133 S.Ct. at 1150 n.5. The Court continued "[b]ut to the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard, *in light of the attenuated chain of inferences necessary to find harm here.* (citation omitted). In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Id.* (quoting *Lujan*, 504 U.S., at 562, 112 S.Ct. 2130) (emphasis supplied).

danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical). *See also United Public Workers v. Mitchell,* 330 U.S. 75, 89–91 (1947); *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941); *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923). In *Whitmore,* 495 U.S. 149 at 155, the Court reiterated that the "injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable, as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical."' *Id.* (citations omitted).[10] *See also Valley Forge Christian College,* 454 U.S. at 485-86 (no standing where plaintiffs failed to show a personal injury suffered other than the psychological consequence presumably produced by observation of conduct with which one disagrees). In *Gaillot v. U.S. Dept. of Health, Ed. and Welfare* 464 F.2d 598 (5th Cir. 1972) (per curiam), the Fifth Circuit said:

> A controversy in this sense involves considerably more than mere abstract philosophical disagreement with the wisdom, propriety or desirability of specific governmental activities, necessitating a judicial opinion advising what the law would be upon a hypothetical state of facts. As a corollary proposition, *a party seeking relief must establish his interest in the outcome of the litigation by demonstrating actual or immediately threatened interference with his legal rights, rather than some speculative future adversity that may never materialize*.

Id. (emphasis added internal citations and quotation marks omitted).

The only "evidence" adduced by Alford and Thomas—and even then with only a bare-bones level of specificity—is that they intend to get married sometime in the next three years.

[10] In *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) the Court stated "Article III standing 'is not to be placed in the hands of concerned bystanders, who will use it simply as a 'vehicle for the vindication of value interests.'" *Id*. (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)) (citation omitted). "[N]o matter how deeply committed [plaintiffs] may be . . . or how 'zealous [their] advocacy,' that is not a 'particularized' interest sufficient to create a case or controversy under Article III. *Id.* (citing *Lujan,* 504 U.S., at 560 and n.1).

Alford Decl., ¶8; Thomas Decl., ¶ 8.[11] Plaintiffs assume that by including a future time-frame for their marriage they have automatically demonstrated that their injury is "imminent and concrete." The time frame in which Plaintiffs might get married is not the operative fact for purposes of analyzing whether the alleged injury is hypothetical or conjectural. Even if Plaintiffs get married in less than three years, the speculative events set forth above do not become any more concrete. So even accepting Alford and Thomas' averment as true, this expressed intention to get married does not, as they suggest, *ipso facto* transform otherwise hypothetical occurrences into something "concrete in both a qualitative and temporal sense." *Whitmore*, 495 U.S. at 155.

This is particularly true because Plaintiffs' alleged injury is tied to the hypothetical future actions of unknown government employees who may or may not recuse themselves pursuant to Section (8)(a). Plaintiffs have no idea if and when any such recusals may or may not take place. For instance, what if Alford and Thomas decide to get a marriage license on July 1, 2016, the effective date of H.B. 1523, but as of that date there have been no? Can it be said that Plaintiffs have suffered a concreate and particularized injury because the law exits but has not delayed or impeded their right to get married? This answer for a number of reasons is and must be—no.

In *Clapper*, the Court reiterated that "[i]n the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 1150.[12] In *Massachusetts v. E.P.A.*, 549 U.S. 497, 545-46 (2007), the Court said "[we] previously . . . explained that when the existence of an element of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to

[11] Thomas' declaration also states that "[w]hen Nykolas and I plan our wedding we won't be able to even go to a bakery for a wedding cake without worrying that we *might* be turned away." Thomas Decl., ¶ 11. The speculative nature of this assertion speaks for itself.

[12] The Court "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 133 S.Ct. at 1150.

predict,' a party must present facts supporting an assertion that the actor will proceed in such a manner." *Id.* (quoting *Lujan*, 504 U.S. at 562 (citation omitted)).

Plaintiffs' injury-in-fact theory is based on the discretion that may or may not be exercised in the future by presently unknown and potentially never to exist government employees. For instance, a government employee may have a "sincerely held religious belief or moral conviction" as defined in Section 2, but for reasons personal to that individual, choose not to recuse. Further lost in Plaintiffs argument is that if Alford and Thomas seek a marriage license from a Clerk's office and if a government employee has recused him or herself, that government employee must ensure their marriage is not impeded or delayed as a result of the recusal. If a government employee impedes or delays their legal right to obtain a marriage license, then Plaintiffs have the same legal recourse that exists today. *See, e.g.*, *Miller v. Davis*, 123 F. Supp.3d 924 (E.D. K.Y 2015) (County clerk's policy of refusing to issue any marriage licenses likely caused irreparable harm to fundamental due process rights of both opposite-sex and same-sex couples, supporting issuance of preliminary injunction to enjoin the policy). *Id.* at 935

That is not the case today. The simple fact is that if Alford and Thomas seek a marriage license they will obtain one assuming they otherwise meet the requirements in Mississippi Code Annotated Section 93-1-5 (**Prerequisites for marriage license**). If they do not obtain the marriage as the result of a government employees' delay or refusal, Plaintiffs have the same legal rights as presently exist and nothing in Section (8)(a) alters that reality. Furthermore, H.B. 1523 does not provide Plaintiffs with a private right of action if a government employee impedes or delays Plaintiffs' marriage.

Plaintiffs cite *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510 (5th Cir. 2015) arguing they need only show that an injury would be concretely felt "in the logical course

of probable events." *Id.* at 520. Plaintiffs' contend that Moulder is part of that link for purposes of standing. Distinguishing *McCardell* from this case is the fact that the court found that the chain-of-events framework did not involve any "unfounded assumptions."[13] *Id.* In the present case, other than a vague intention to get married sometime in the next three years, Plaintiffs' assertions rest on nothing but unfounded assumptions.[14] Plaintiffs rely on *Bryant v. Holder*, 2011 WL 710693, at *10 (S.D. Miss. Feb. 3, 2011) arguing that temporal remoteness is but one factor in determining whether an injury is certainly impending. *Id.*[15] Again this contention incorrectly focuses on the timing of Plaintiffs' future marriage plans. Plaintiffs' plans to get married do not make future recusals by government employees any less hypothetical nor that

[13] The court distinguished the facts from *Clapper* noting: McCardell's asserted injury would be concretely felt in the logical course of probable events flowing from an unfavorable decision by this court: (1) HUD approves the already-pending plan for redevelopment; (2) redevelopment occurs according to the approved plan; (3) segregation and minority—and poverty-concentration occur in McCardell's neighborhood *as specifically anticipated in several expert reports contained in the record*. The Court concluded that "[u]nder *Lujan*, we take as true "specific facts . . . set forth by affidavit or other evidence." McCardell asserts facts with more specificity and support than those found wanting in *Clapper*. We conclude that she has adequately alleged a threatened injury that is "certainly impending." *Id.* (emphasis supplied).

[14] Plaintiffs also rely on *Adarand v. Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). This is another case involving a set-aside program similar to *City of Jacksonville* where the Court said "[t]he injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Id.* (citing *City of Ja*cksonville, 508 U.S. at 667). Plaintiffs in this case are not competing for a finite number of marriage licenses. In *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153 (5th Cir. 2008), also cited by Plaintiffs, the alleged injury was the "*denial of voter registration* and hence the right to have one's vote counted . . ." *Id.* at 1161 (emphasis supplied). Plaintiffs here are not being denied a marriage license. *Lee v. Wiseman*, 505 U.S. 577, 584 (1992) is also dissimilar in that the Court found "plaintiff [is] enrolled as a student at Classical High School in Providence *and from the record it appears likely, if not certain, that an invocation and benediction will be conducted* at her high school graduation. *Id.* at 584 (emphasis supplied). No record exists here to say that Plaintiffs' alleged injury is likely if not certain.

[15] Ten Mississippi residents with no health insurance brought a facial challenge to the "minimum essential coverage" provision of the Patient Protection and Affordable Care Act ("PPACA") arguing that the provision constituted a concrete threat of injury insofar as it will force them to purchase health insurance or be subject to a financial penalty. Plaintiffs' alleged injuries were: 1) the economic harm of having to purchase health insurance, 2) the economic harm of having to pay a tax penalty in the event they do not purchase health insurance, or 3) the economic harm of having to arrange their financial affairs to prepare for such expenditures. The court concluded that it was not certain—based solely on the allegations of plaintiffs' complaint—that they would be forced to purchase insurance or, alternatively, to pay a tax penalty, and thus did not have standing. *Id.* at 11.

Plaintiffs will utilize a Clerk's office that issued a recusal. The court in *Holder* cautioned that while it is clear that a future injury may, in some circumstances, be sufficiently certain or imminent to satisfy Article III's standing requirements, it is likewise clear that there is an outer limit as to how far a plaintiff may reach. *Id.* The court continued stating that "[the court] . . . may not imagine circumstances that would confer standing upon a plaintiff." *Id.* This is precisely what Plaintiffs have done by imagining any number of things that may or may not happened during their lifetime.

(a) Plaintiffs are not the "object" of H.B. 1523.

In an effort to bolster their standing argument, Plaintiffs suggest that "[t]he marriages of same-sex couples are one of the 'objects' of H.B. 1523. . . ." Pls.' Mem. Supp. at p. 9. Plaintiffs adopt this position reasoning that "if a plaintiff is an object of government regulation, then that plaintiff ordinarily has standing to challenge the regulation." *Id.* (citing *Duarte ex rel Duarte v. City of Lewisville, Tex*, 759 F.3d 514, 518 (5th Cir. 2014); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) and *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.* 508 U.S. 656, 666 (1993)).[16]

Plaintiffs' misconstrue the application of these cases in the context of Section (8)(a). First, Plaintiffs' unilateral declaration that same sex marriages are the "object" of H.B. 1523 finds no textual support in the bill itself.[17] In fact the object of the statute, as demonstrated from

[16] Plaintiffs clearly borrowed this line of cases from this Court's decision in *Campaign for Southern Equality v. Mississippi Department of Human Services*, --- F. Supp.3d --- 2016 WL 1306202 *2-4 (S.D. Miss. March 31, 2016), but they are inapposite in this context. The statute at issue in *MDHS* provided that: "Adoption by couples of the same gender is *prohibited*." Mississippi Code section 93–17–3(5) (emphasis supplied). There is no similar statutory language in this case.

[17] No fewer than nine times, H.B. 1523 provides that "*the state government shall not take any discriminatory action* . . . ." *Id.* Furthermore, the statute mandates a legally valid marriage shall not be impeded or delayed as a result of any recusal. *See* § (8)(a). Moreover, as a statute that accommodates both First and Fourteenth Amendment guarantees, the Fifth Circuit's admonition in *Campaign for Southern Equality*, clearly supports an application of the statute other than that urged by Plaintiffs.

its actual text, is persons "with a sincerely held religious belief or moral conviction described in Section 2 of this act." The textual object of Section (8)(a) is further defined by proscribing the state's action in that "state government shall not take discriminatory action *against a state employee* . . ." provided that the state employee complies with the statute. In turn, Section (8)(a) mandates that "lawful marriages" not be impeded or delayed because of a recusal.

In *State of W. Virginia v. United States Dep't of Health & Human Servs*., 2015 WL 6673703, at *13 (D. D. C. October 30, 2015), the court discussed the proper analytical framework in assessing when someone is an object of government action in this context:

> In *Lujan*, the Court distinguished "objects" of a government action or inaction, from those entities whose claimed injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." As to the former—the "objects"—the Court observed, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." By contrast, for a party that is not the object of the challenged conduct, "much more is needed .... [and] causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction." Thus, as HHS correctly observes, *Lujan* 's discussion about a party as the "object" of a government action related to the causation and redressability elements of standing, and not injury-in-fact.

Id. (emphasis original internal citations omitted). In the present context, nothing in the text of the statute supports Plaintiffs' contention that they are the object of government regulation. Plaintiffs' conduct is not being regulated; only the potential conduct of a government employee who might recuse utilizing Section (8)(a). If in fact a government employee decides to recuse and does not provide notice, then the government employee is at risk of losing the protections afforded by statute. In either event, Section (8)(a) does not alter the legal rights of Plaintiffs.

This situation is vastly different from the cases cited by Plaintiffs in their supporting memorandum. For instance in *Duarte* a registered sex offender challenged a local ordinance making it unlawful for any person live within a certain distance of where children commonly

gather. Because of the ordinance, plaintiff and his family alleged they were not able to locate a home in the city. *Id.* at 516.[18] The Fifth Circuit had little difficulty finding that plaintiff was the object of the statute—he was a registered sex offender (his conduct was being regulated) and the ordinance limited where he could live as a result. *Id.* at 518. Plaintiffs face no similar limitation in getting a marriage license.

Similarly in *Time Warner Cable* the court found a Texas statute facially discriminated against incumbent cable operators by extending benefits of a statewide license to its competitors while *denying that same* benefit to incumbent cable providers. 667 F.3d at 636. The court said "[t]here can be no dispute that the plaintiffs are the object of government action here when [Senate Bill 5] singles out certain incumbent operators *as ineligible for the benefits* of a statewide franchise." *Id.* (emphasis supplied). Unlike the incumbent cable operators who were denied a concrete benefit by the government, Plaintiffs face no similar obstacle and are not ineligible or being denied any benefits afforded to couples of the opposite sex.

In *City of Jacksonville*, [a minority contract set-aside program] the Supreme Court held that an association of general contractors had standing to challenge a city ordinance affording preferential treatment to certain minority-owned businesses in awarding city contracts. 508 U.S. at 658-59.[19] Plaintiffs cite *City of Jacksonville* for the proposition that the injury in an equal

[18] The court alluded to the evidence presented by plaintiffs that they had contacted the county's sex offender registrar at least nine times to inquire about potential residences. The government official informed plaintiffs that six of those houses were in restricted areas under the ordinance. The Court noted that "[t]his is a far cray from the evidence in *Lujan*, in which those plaintiffs expressed mere 'some-day' intentions. . . ." *Id.* at 518.

[19] The Court relied on its earlier decisions in *Turner v. Fouche*, 396 U.S. 346 (1970) (limiting school board membership to property owners); *Clemons v. Fashing*, 457 U.S. 957 (1982) (barrier to running for public office by requiring resignation from current office for some but not all state officials), and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (school admission policy reserving places in class for minority applicants). The Court relied most heavily on *Bakke* "where a twice-rejected white male applicant claimed that a medical school's admissions program, which reserved 16 of the 100 places in the entering class for minority applicants was inconsistent with the Equal Protection Clause." *Id.* at

protection case is the imposition of a barrier not the ultimate inability to obtain the benefit. Pls.' Mem. Supp. at p. 10. However, the barrier to which the Court addressed in *City of Jacksonville* was entirely different and not present in the instant case.

The Court said that "[in the context of a challenge to a set-aside program], the 'injury in fact' is the *inability to compete* on an equal footing in the bidding process, not the loss of a contract." *Id.* at 666 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("The [set-aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely on their race) (emphasis original). To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis."). First, Plaintiffs are not competing for a fixed-percentage of marriage licenses and thus, the "barrier" identified by the Court in *City of Jacksonville* is not present here. Second, Section (8)(a) mandates that Plaintiffs be afforded the same treatment as couples of the opposite sex in that their marriage must not be impeded or delayed as a result of a recusal.

In citing *City of Jacksonville*, Plaintiffs characterize their injury as being a potentially reduced number of eligible government employees that may be available to them when they apply for a marriage license. Compl., ¶ 28 ("Same-sex couples are thus relegated to a more limited set of governmental employees willing to issue them marriage license."); *see also* Pls.' Mem. Supp. at p. 9. Plaintiffs thus equate the allegedly fewer number of employees available to

---

665. The Court concluded that the "'constitutional requirements of Art. III' had been satisfied, because the requisite 'injury' was the medical school's decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race. Thus, 'even if Bakke had been unable to prove that he would have been *admitted* in the absence of the special program, it would not follow that he lacked standing." *Id.* (emphasis original). Plaintiffs do not compete for a limited number of marriage licenses and these cases are inapposite.

them when they apply for a marriage license with the fixed number of contracts available in *City of Jacksonville*.

First, Plaintiffs argument is undercut by the fact that it requires a series of assumptions: (1) Plaintiffs will in fact get married at some point in the future; (2) that government officials will recuse themselves pursuant to Section (8)(a); and (3) that if there are recusals issued by government employees in some Clerk's offices at some point in the future, these Plaintiffs actually utilize a Clerk's office that issued any of the recusals. But even assuming these things come to pass, Plaintiffs have no legally cognizable interest (and thus no injury-in-fact) in the number of government employees available to them to issue a marriage license or that a particular government employee issue them marriage license. In *Slater v. Douglas County*, 743 F. Supp. 2d 1188 (D. Oregon 2010) the Court reached this logical conclusion:

> [A] domestic partnership registrant has no cognizable right to insist that a specific clerical employee with religious-based objections process the registration as opposed to another employee (having no such objection). ***So long as the registration is process in a timely fashion, the registrant's have suffered no injury***.

Id. at 1195 (emphasis supplied).[20] On its face, Section (8)(a) mandates that Plaintiffs' marriage shall not be impeded or delayed as a result of a government employee's recusal. Thus, the notion that Plaintiffs will suffer a legally cognizable injury as a result of hypothetical recusals finds no grounding in constitutional law.

(b) Alford and Thomas' stigmatic injury claim fails.

Plaintiffs acknowledge they may never actually be the subject of a recusal under Section (8)(a), so they resort to a fall-back position that even if they are not impeded or delayed in their ability to obtain a marriage license, they nonetheless have a cognizable stigmatic injury. Pls.'

[20] The court aptly noted that "[t]here is no reason to even inform them of [the employee's] religious views or the County's accommodation of those views. *Id.* at 1195.

Mem. Supp. at p. 10. In support, Alford states in his declaration that "as a result of HB 1523, government officials can 'recuse' themselves from issuing us a marriage license. . . ." Alford Decl., ¶ 10. Alford continues that "it is part of a second-class status that our relationship will be subjected to for the rest of our lives. . . ." *Id.*, ¶ 11.[21]

Plaintiffs rely on *Campaign for S. Equal v. Bryant*, 64 F. Supp. 3d 906 (S.D. Miss. 2014) and *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014). Pls.' Mem. Supp. at p. 10. While courts have addressed the role of stigma in the context of standing, Plaintiffs theory misses the central holding of these cases: "stigmatic injury . . . requires identification of some concrete interest with respect to which [plaintiff is] personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine." *Allen* 468 U.S. at 795 n.22. Plaintiffs do not identify the discriminatory denial of any governmental benefit which independently satisfies the requirements of standing. They simply contend that a record of government employees who might one day recuse themselves causes them stigmatic injury.

The Supreme Court addressed the constitutional insufficiency of stigmatic injury in *Allen* while considering a challenge to government tax exemptions granted to schools which discriminated on the basis of race. 468 U.S. at 740-41. The Supreme Court assumed that the challenged "Government tax exemptions" were the direct "equivalent of Government discrimination" and framed the issue as whether African-American plaintiffs whose children had not been victims of "discriminatory exclusion from the schools whose tax exemptions they challenge" had standing to challenge this overt act of "Government discrimination," based on race. *Id.* at 746, 754 n.20. The Court held that "a claim of stigmatic injury, or denigration,

[21] Plaintiffs' declaration that their stigma claim is enhanced by what they call a "no same-sex couples allowed" list is inflammatory and Moulder declines to engage along those lines.

suffered by all members of a racial group when the Government discriminates on the basis of race" is not an injury for purposes of Article III standing. *Id*. at 754.

> [Plaintiffs lack] standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.

Id. at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–740 (1984)).[22]

> Respondents' stigmatic injury, though not sufficient for standing in the abstract form in which their complaint asserts it, is judicially cognizable to the extent that respondents are **personally subject** to **discriminatory treatment**. The point is, the stigmatic injury requires identification of some **concrete interest** with respect to which respondents are personally subject to discriminatory treatment. That interest must **independently satisfy** the causation requirement of standing doctrine.

Id. at 795 n.22 (citation omitted; emphasis supplied).

The application of *Allen* to claims of stigmatic injury is familiar in this context. The Fourth Circuit in *Bostic* applied *Allen* in finding a same-sex couple had standing to challenge Virginia's ban on same-sex marriages. Quoting *Allen*, the Fourth Circuit found that plaintiffs' stigmatic injury supported standing only because plaintiffs had identified "some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine." *Id*. The

[22] *Allen*'s conclusion that stigmatic injury is not sufficient follows the well-established rule that standing is possessed by persons who are directly injured by the challenged government action and is not handed out *en gros* to anyone who shares the race or gender of others discriminated against. *Compare Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972) (plaintiff had no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership); *O'Shea*, 414 U.S. at 502 (plaintiffs had no standing to challenge racial discrimination in the administration of their city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices) *with Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982) (male plaintiff denied admission because of gender had standing to challenge admission policies).

plaintiffs were denied tax and adoption benefits afforded married couples of opposite sexes. *Id*. Because plaintiffs' alleged "specific, concrete instances of discrimination rather than making abstract allegations, their stigmatic injuries are legally cognizable." *Id*.

In *Campaign for Southern Equality v. Bryant*, the court quoted *Allen*'s language directly from *Bostic* in reaching its conclusion that "[s]tigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement **if** the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine." *Bryant*, 64 F. Supp.3d at 917 (emphasis supplied). The Fourth Circuit's analysis in *Bostic* illustrates the point:

> The Virginia Marriage Laws erect such a barrier, *which prevents* same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage. Second, Schall and Townley allege that they have suffered stigmatic injuries *due to their inability to get married* in Virginia and Virginia's refusal to recognize their California marriage. Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies "*some concrete interest with respect to which [he or she] [is] personally subject to discriminatory treatment*" and "[t]hat interest independently satisf[ies] the causation requirement of standing doctrine."

Id. (emphasis supplied; internal citations omitted).

In contrast, Plaintiffs cannot satisfy standing in this case because unlike the State's administration of a program such as Medicaid or the State's regulation of marriage licenses, the fact that a government employee in a Clerk's office might recuse does not itself provide or deny a concrete government benefit to Plaintiffs. This is true because a Clerk's office **must** issue Plaintiffs a marriage license without impediment or delay if they otherwise meet the statutory requirements. Failure to issue the license because Plaintiffs are a same-sex couple would be

deemed a sufficient injury for injunctive relief. *See Davis* 123 F. Supp.3d at 935. However, the decision in a Clerk's office as to which individual might issue the license is not such an injury.

Plaintiffs' alleged stigmatic injury based on the message they believe is being conveyed by Section (8)(a) by itself is insufficient to establish standing. *See* Thomas Decl., ¶ 9; Alford Decl., ¶ 11. Alleged stigma alone is insufficient to convey standing is further supported by the well-established prohibition on the litigation of generalized grievances.[23] The Supreme Court has said that a "generalized grievance" is a harm "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Moreover, "[p]rudential principles are judicial rules of self-restraint, founded upon the recognition that the political branches of government are generally better suited to resolving disputes involving matters of broad public significance.

The judicial power to adjudicate constitutional questions is reserved for those instances in which it is necessary for the vindication of individual rights." *Apache Bend Apartments, Ltd.*, 987 F.2d 1174, 1176 (5th Cir. 1993) (en banc) (citing *Lujan*, 504 U.S. at 560). *Allen*'s holding that "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is not an "injury judicially cognizable" requires dismissal of this matter. 468 U.S. at 754. In the end, Plaintiffs' claim of stigmatic injury does not comport with the principles articulated *Allen,* and applied by later courts, and therefore provides them vehicle through which standing can be conferred.

2. No Causal Connection between Alleged Injury and Moulder

Next, Plaintiffs' argue their alleged injury is fairly traceable to the State Registrar under the theory that she "participates in enforcing H.B. 1523 against the Plaintiffs and other same-sex

[23] "The prudential principle barring adjudication of 'generalized grievances' is closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." *Apache Bend Apartments,* 987 F.2d at 1176.

couples by keeping a record of all recusal notices. . . ." *Id.*[24] The second *Lujan* prong requires a "causal connection between the alleged injury and the conduct complained of—in other words, the alleged injury must be traceable to the defendant and not the result of the independent action of a third party." *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (citing *Lujan*, 504 U.S. at 60–61). "In other words, the case or controversy limitation of Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon.*, 426 U.S. at 41-42.

This element looks to whether the line of causation between Plaintiff's alleged injury and alleged wrongdoing is "too attenuated." *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986) (citation omitted). The "unadorned speculation" as to the existence of a relationship between the challenged government action and the third-party conduct "will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44. Here, there is no causal connection between Plaintiffs' alleged injury and Moulder.

Plaintiffs rely on *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) claiming Moulder is among those who "would contribute to the Plaintiffs' harm." Pls.' Mem. Supp. at p. 14. However, Plaintiffs overstate *LeBlanc's* holding to this case. In addressing the causal connection prong the Fifth Circuit in *LeBlanc* concluded:

> Although the Board cannot prevent a private litigant from pursuing relief in Louisiana court, *it can unilaterally preclude the Plaintiffs from claiming the benefits of limited liability and independent medical review.* It can subsequently refuse to recognize the right to call on the Fund to pay a settlement or court judgment. This places the Defendants among those who would contribute to Plaintiffs' harm. *The Board is the body with the initial authority to disburse or withhold the benefits* associated with Fund membership.

[24] Plaintiffs distinguish this case from *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc) where the court found the defendants did not enforce the statute. Plaintiffs' deficiency as to a causal connection does not rise or fall on *Okpalobi* for the reasons set forth by Moulder.

Id. at 123. Unlike *LeBlanc* where the Board could unilaterally preclude Plaintiffs from claiming benefits under the law, Section (8)(a) states "the State Registrar . . . shall keep a record of such recusal. . . ." Plaintiffs' causation theory necessarily forces the Court to speculate that for Moulder to "keep a record" she must first receive one from a government employee who might choose to provide one. This has not yet occurred and cannot be known with any degree of certainty if and when Moulder might receive a recusal after July 1, 2016. Further, the State Registrar is a recipient of a written notice provided at the discretion of government employees defined in Section (8)(a). Moulder has no control over whether she receives or does not receive a recusal notice. Unlike the Board in *LeBlanc*, the State Registrar is not the *initial authority* as to whether a government employee issues a recusal notice. Thus, if Moulder does not receive a recusal notice, she has no connection to the Plaintiffs' alleged injury.

Plaintiffs' reliance on *Bostic*, *Marie v. Moser*, 65 F. Supp. 3d 1175, 1191 (D. Kan. 2014) and *Wolfe v. Walker*, 2014 WL 1729098, at *4 (W.D. Wis. April 30, 2014) are likewise unavailing. In *Bostic*, the registrar of vital records was deemed to be a proper defendant because she *promulgated* marriage application forms. *Id.* In *Moser* the Secretary of the Kansas Department of Health was found to have a number of affirmative statutory duties regarding *marriage licenses*, which included: supervising the registration of all marriages; supplying marriage certificate forms to district courts; and maintaining an index of marriage records and providing certified copies of those records on request. *Moser*, 65 F. Supp. 3d at 1190. Finally, in *Walker*, Wisconsin's State Registrar was deemed a proper defendant because of his official duty to *prescribe* forms related to *acquiring marriage licenses*. *Walker*, at *4.

This line of cases has two things in common. First, each government official had an affirmative statutory due with respect to the marriage license itself and it was the denial of the

marriage license to a same-sex couple that caused the injury. Second, each government official's role statutorily mandated some affirmative act with respect to the marriage license independent of the actions of third parties, *e.g.*, government employees sending recusal notices.[25] By contrast, Moulder plays no role in Section (8)(a) with respect to the issuance of a marriage license. Furthermore, Section (8)(a) does not require Moulder to promulgate any forms or take any other action independent of "keeping a record" of a recusal notice. Plaintiffs' causal chain simply does not exist.

3. Plaintiffs Cannot Demonstrate Alleged Injury will be Redressed Through the Requested Injunction.

Plaintiffs' theorize that "if [Moulder] refused to accept and record these recusal notices, it would nullify the entire process of opting out from issuing marriage licenses, or at least make it substantially more difficult to enforce." Pls.' Mem. Supp. at p. 15. In *Warth* the Court rejected this argument type of argument noting that plaintiff's relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had (defendants) acted otherwise, and might improve were the court to afford relief." 422 U.S. at 507. The same holds true here regarding Plaintiffs' allegations.

Plaintiffs also fail to explain how an injunction would prohibit a governmental employee from providing notice of their recusal and what effect, if any, this would have on that governmental employee's rights under Section (8)(a). For herein lies the problem with Plaintiffs' argument—Section (8)(a) prohibits the state government from taking any discriminatory action against a state employee "wholly or partially on the basis of such recusal."

[25] Plaintiffs' reliance on *Ivy v. Williams*, 781 F.3d 250, 253 (5th Cir. 2015) is unavailing. In *Williams*, the Fifth Circuit said "[h]ere, the injury alleged is quite obvious—the named plaintiffs' *inability to receive driver education certificates*, which in turn prevents them from receiving driver's licenses." *Id.* at 253 (emphasis supplied). The causal connection was that TEA's failure to inform private driver education schools of their ADA obligations and its failure to deny licenses to driver education schools that violate the ADA. By contrast, there is no denial of any service to the Plaintiffs in the instant case.

See Section 3, (8)(a). Plaintiffs have not and cannot offer any pre-enforcement evidence that failure on the part of the State Registrar to "keep a record of such recusal" would nullify the state employee's compliance with Section (8)(a). This is particularly true in light of the statutory protection afforded a state employee who provides prior written notice of his or her recusal.

Section (8)(a) protects the government employee who has recused from discriminatory action by the state government. Section (8)(a) does not afford any affirmative protection for the State Registrar not keeping a record of the recusal. Furthermore, the State Registrar may have an independent obligation separate and apart from Section (8)(a) to maintain a recusal notice provided by a government employee pursuant to the Mississippi Public Records Act. *See, e.g.,* Miss. Code Ann. § 25-61-3; *see also* § 25-61-15 (Penalty for wrongful denial of access to record). Thus, Plaintiffs suggestion that if Moulder "refused to accept and record these recusal notices . . . would nullify the entire process of opting out . . .," is baseless. Thus, Plaintiffs have not and cannot show that an injunction prohibiting Moulder from accepting recusal notices would "nullify the entire process of opting out."

C. Plaintiff ACLU Lacks Associational Standing

Plaintiff ACLU avers that it has associational standing on behalf of its members. Pls.' Mem. Supp. at p. 15. The Supreme Court in *Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) held:

> A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. The first two components of *Hunt* address constitutional requirements, while the third prong is solely prudential. *See United Food & Commercial Workers Union Local 751 v. Brown Grp.,*

Inc., 517 U.S. 544, 555 (1996). For the same reasons that Alford and Thomas lack standing, so too does Plaintiff ACLU. The declaration of Riley-Collins makes Plaintiff ACLU's claims no less speculative or hypothetical simply because that marriage might take place sooner. Pls.' Mem. Supp. at p. 16; Riley-Collins Decl., ¶ 3.

Plaintiff ACLU's suggestion that it has a member who may marry as early as 2017, and thus injury is even more "imminent" than the Alford and Thomas marriage, continues to incorrectly identify the source of the alleged injury. The question is not simply when any member of the ACLU's may get married in the future. Instead, the inquiry for purposes of this pre-enforcement facial challenge is whether Plaintiffs' injury is conjectural and hypothetical. Plaintiffs' *ipso facto* assumption that they will suffer an injury simply because they intend to marry is incorrect for the reasons set forth herein. For the same reasons applicable to Alford and Thomas, the same rational applies with equal force to any member of the ACLU and thus the ACLU's associational standing claim lacks merit.

II. Plaintiffs Have No Likelihood of Success Nor Irreparable Injuries Because Their Claims Are Not Ripe.

Ripeness and standing are related because they share the constitutional prerequisite of imminent injury. *Prestage Farms, Inc. v. Bd. of Supervisors*, 205 F.3d 265, 268 n.7 (5th Cir. 2000) ("The justiciability doctrines of ripeness and standing often intersect because the question of whether a plaintiff has suffered an adequate harm is integral to both."); *see also WesternGeco L.L.C.*, 776 F. Supp.2d at 351 ("In determining hardship, the doctrine of ripeness overlaps with the doctrine of standing's examination of whether a plaintiff has suffered a concrete injury." (internal quotation marks omitted)).

"A case or controversy must be ripe for decision, meaning that it must not be premature or speculative. That is, ripeness is a constitutional prerequisite to the exercise of jurisdiction."

Shields v. Norton, 289 F.3d 832, 835 (5th Cir. 2002). For these reasons, a ripeness inquiry is often required when a party is seeking pre-enforcement review of a law or regulation. *See, e.g., Poe v. Ullman*, 367 U.S. 497 (1961); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972).[26] "Ripeness doctrine 'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993)).

The Fifth Circuit has said that when compared with standing:

> This kindred doctrine [of ripeness] shifts to a temporal focus, timing review to secure a fit of controversy and judicial resolution. Ripeness considers the fluidity of the events defining the dispute, such as whether the claim rests upon facts yet airborne or sufficiently upon facts that have found ground. It then balances the hardship of withholding decision and the fitness of the case for judicial resolution. Courts work best with historical facts and often must wait until history is determinable.

Brooklyn Union Gas Co. v. FERC, 190 F.3d 369, 373 (5th Cir. 1999). The ripeness doctrine is designed to serve as "a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). Plaintiffs ask this Court declare as facially unconstitutional a provision of H.B. 1523 based solely on facts which have yet to occur and more importantly do not constitute an injury-in-fact in the first instance.

[26] "A case or controversy must be ripe for decision, meaning that it must not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987) (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* Ripeness "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *Id.*

For the same reasons set forth with respect to Plaintiffs' lack of standing, their claims likewise are not ripe for adjudication.

III. The Balance of Equities Public Interest Weigh Heavily Against the Injunction.

The Court should deny Plaintiffs' motion for preliminary injunction under the remaining balancing factors for injunctive relief. Predictably, Plaintiffs declare that their alleged injury outweighs any harm to the State in granting the injunction. Pls.' Mem. Supp. at p. 20. This argument rings hollow when Plaintiffs' hypothetical, speculative and non-imminent injuries are juxtaposed against the State's interest in accommodating both First and Fourteenth Amendment constitutional interests.

At the outset, the "central purpose" of a preliminary injunction "is to prevent irreparable harm," *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975), and **proof of that irreparable injury** "must be proven separately and convincingly" from the likelihood of success on the merits. *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (emphasis supplied). Yet as has been set forth above, Plaintiffs cannot show anything close to justifying "convincingly" that they will suffer irreparable injury.

First, Plaintiffs' intention to get married in the next three years does not constitute the type of imminent harm necessary for affording injunctive relief. Second, there may never be any recusal by any government employee. Third, if there are recusals at some point in the future, these Plaintiffs may not actually utilize a Clerk's office that issued any of the recusals. Fourth, assuming there are recusals and these Plaintiffs apply at a Clerk's office that has issued a recusal, Section (8)(a) prohibits the type of alleged discriminatory treatment Plaintiffs' claim they will suffer. Finally, Plaintiffs have not alleged they have been personally subject to discriminatory treatment required for a stigmatic injury.

Despite this, Plaintiffs still contend that the balance of harms weighs in favor of an injunction. This simply ignores reality. On the other side of the ledger, "[when a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Perry* 769 F.3d 890, 895 (5th Cir. 2014) (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *accord Maryland v. King*, —— U.S. ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (Roberts, Circuit Justice, in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice, in chambers); *Voting for Am., Inc. v. Andrade*, 488 Fed.Appx. 890, 904 (5th Cir. 2012) (unpublished).

Plaintiffs merely repeat the same argument regarding the public interest prong without analysis, Pls.' Mem. Supp. at 20, and fail to consider the balancing of interests between the First and Fourteenth Amendment recognized by the Supreme Court *Obergefell.* "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell*, 135 S.Ct. at 2607. The State's is manifest interest is in enforcing laws that recognizes both constitutionally protected interests and an injunction harms its ability to do so.

CONCLUSION

For the reasons set forth, Judy Moulder, in her official capacity as the State Registrar of Vital Statistics, requests that the Court deny Plaintiffs' motion for preliminary injunction.

This the 24th day of May, 2016.

Respectfully Submitted,

JUDY MOULDER, in her official capacity as MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS

BY: JIM HOOD, ATTORNEY GENERAL STATE OF MISSISSIPPI

BY: */s/ Douglas T. Miracle*
DOUGLAS T. MIRACLE (MSB NO. 9648)
SPECIAL ASSISTANT ATTORNEY GENERAL

MISSISSIPPI ATTORNEY GENERAL'S OFFICE
STATE OF MISSISSIPPI
CIVIL LITIGATION DIVISION
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-5654
dmira@ago.state.ms.us

CERTIFICATE OF SERVICE

I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing document with the Clerk of this Court using the ECF system which transmitted a copy to all counsel of record

This the 24th day of May, 2016.

/s/ Douglas T. Miracle
DOUGLAS T. MIRACLE