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

CAMPAIGN FOR SOUTHERN EQUALITY, *et al.*
THE REV. SUSAN HROSTOWSKI PLAINTIFFS

v. CIVIL ACTION NO.: 3:16-CIV-442-CWR-LRA

PHIL BRYANT, in his official capacity, *et al.* DEFENDANTS

MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PLAINTIFFS'MOTION FOR PRELIMINARY INJUNCTION

Governor Phil Bryant ("Governor Bryant"), Attorney General Jim Hood ("Attorney General Hood"), John Davis, Executive Director of the Mississippi Department of Human Services ("Executive Director Davis") and Judy Moulder, Mississippi State Registrar of Vital Records ("State Registrar Moulder") (sometimes referred to as "these Defendants"), submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Plaintiffs[1] bring this facial challenge contending the "Protecting Freedom of Conscience from Government Discrimination Act"[2] ("H.B. 1523" or "the Act") passed during the 2016 Regular Legislative Session violates the Establishment Clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. Plaintiffs urge the Court to enjoin *these defendants* because they believe the Act: (a) impermissibly discriminates between religious sects; (b) impermissibly favors religion over non-religion, and (c) was enacted with the impermissible purpose of advancing religion. Despite Plaintiffs' ruminations about what "*could theoretically*" happen when the Act takes effect on July 1, 2016, the fact remains that they cannot

[1] There are two Plaintiffs—Susan Hrostowski and the Campaign For Southern Equality ("CSE").
[2] Miss. Laws 2016, H.B. 1523 (eff. July 1, 2016).

demonstrate the "irreducible constitutional minimums" of Article III standing—much less their burden for granting extraordinary injunctive relief.

That Plaintiffs alleged injury is "hypothetical and conjectural" is confirmed by their supporting memorandum. *See, e.g.*, Pls.' Mem. at 18. ("[E]very or nearly every clerk and deputy clerk in a county ***could theoretically recuse himself or herself***, such that no state employees will be available to issue marriage licenses to same sex couples."). Plaintiffs further portend that "a restaurant ***could potentially*** refuse to seat a married lesbian couple like [Plaintff Hrostowski] and her wife at a table for two. . . [and] a hotel ***could*** refuse to let them stay in a room together." *Id.* (emphasis supplied). Such unadorned speculation does not provide the foundational footing necessary for a facial challenge. Furthermore, Plaintiffs' assertions demonstrate, at a bare minimum, that their claims are not ripe.

Even assuming *arguendo* Plaintiffs could establish the requisite elements for Article III standing as to these defendants, the Court should still deny the Plaintiffs' motion because the Establishment Clause claim fails on the merits. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Justice Kennedy, writing for the majority, acknowledged that many people of faith and conscience believe same-sex marriage is morally wrong and recognized their First Amendment interests. He wrote *"[t]he 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 (emphasis supplied).

Unlike *Obergefell* where the Court was confronted solely with the denial of same-sex couples' legal right to marry under the Fourteenth Amendment, this Court now—consistent with the teachings of *Obergefell* and First Amendment jurisprudence—must consider individuals'

First Amendment interests encapsulated in the Act in order to "ensure[ ] that religious organizations and persons are afforded proper protection." *Id.* at 2607. Against this backdrop, the Supreme Court has cautioned against the "latent dangers of government hostility to religion . . . [drawing] a distinction between an unlawful intent to favor religion and a lawful intent to accommodat[e] the public service to [the people's] spiritual needs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 (1989) (citations and internal punctuation omitted). H.B. 1523 effectively draws this distinction by continuing to protect same-sex couples' right to marry while accommodating those with "sincerely held religious beliefs or moral convictions" under the First Amendment. The Constitution requires nothing less.

Despite Plaintiffs unrelenting effort to cast the Act as something it is not and to speculate about circumstances that have not occurred and may never occur, the primary effect of H.B. 1523 is to protect individuals' freedom of conscience and prohibit State government discrimination against those persons with sincerely held religious beliefs or moral convictions. To grant Plaintiffs' relief would cast aside the rights of those who may disagree with Plaintiffs on same-sex marriage, but wish to exercise their religious beliefs and moral convictions free from the threat of discriminatory action by State government. Service in state government should not be discouraged by mandating that a person leave their sincerely held religious beliefs or moral convictions at the door or face discriminatory action by State government solely because of those beliefs. The Establishment Clause does not go so far.

ARGUMENT

To warrant the extraordinary relief of a preliminary injunction, Plaintiffs must clearly demonstrate: (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). Plaintiffs 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). 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) (emphasis supplied).

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

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); *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 Not Likely to Succeed on Merits--the Act is Facially Constitutional.

In assessing a facial constitutional challenge, the Supreme Court has held "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 . . . unconstitutional is not to be exercised with reference to hypothetical cases thus imagined"); *see also United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("[S]tatutes should be construed whenever possible so as to uphold their constitutionality.").

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. The Court has instructed that:

> 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. (internal citations and quotation marks omitted)

Washington State Republican Party, 552 U.S. at 450-51.

The relevant question for a court is whether 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). In *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 313 (2000), the Court said in Establishment Clause context, the Court will look to the factors articulated in *Lemon v. Kurtzman* 403 U.S. 602, 612 (1971).

"The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly 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 "[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).[3]

First, religious accommodation and conscience laws are not facially unconstitutional. *See infra*, at n.5, and the Fifth Circuit foreshadowed this intersection between First and Fourteenth Amendment interests post-*Obergefell*. In *Campaign for Southern Equality v. Bryant*, 791 F.3d 625 (5th Cir. 2015) (*CSE I*), quoting *Obergefell v. Hodges*, No. 14–556, —— U.S. ——, 135 S.Ct. 2584 (June 26, 2015), the court stated that "[h]aving addressed fundamental rights under the Fourteenth Amendment, the [Supreme] Court invoked the First Amendment:

> *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.

Id. at 626 (quoting *Obergefell*, 135 S.Ct. at 2607).

> *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*

[3] H.B. 1523 states that it "shall be construed in favor of broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by state and federal law." H.B. 1523 § 8(1). Whether an invalid or unconstitutional portion of a statute is severable is an issue of state law. *See e.g. Virginia v. Hicks*, 539 U.S. 113, 121 (2003). The Mississippi Code contains a general severability provision. *See* Miss. Code Ann. § 1-1-31; *see also* Miss. Code Ann. § 1-3-77.

> *instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them.*

Id. (emphasis supplied). This is precisely the balance the Act strikes between the First and Fourteenth Amendment. For instance, Section 3 (8)(a) protects same-sex couples' right to marry under the Fourteenth Amendment in *Obergefell,* (no impediment or delay as a result of any recusal) while providing an appropriate and constitutionally permissible accommodation for those persons with "sincerely held religious beliefs or moral convictions" recognized under the First Amendment. H.B. 1523, § 2.

Specifically, the Act prohibits State government from discriminating against those who hold the beliefs set forth in Section 2. Under *Obergefell* and *CSE I*, H.B. 1523 represents a constitutionally permissible accommodation between same sex couples' right to marry under the Fourteenth Amendment and those with a sincerely held religious beliefs or moral convictions under the First Amendment's Free Exercise Clause. Moreover, the Act does not infringe upon Plaintiffs' First Amendment guarantee of free exercise.

Similar religious and conscience-based statutory accommodations have long been recognized relative to public functions. For instance, immediately following *Roe v. Wade*, 410 U.S. 113 (1973), Congress recognized the need to protect health care providers who have religious or moral objections to performing abortions. Congress did so through passage of 42 U.S.C. § 300a-7(a) which prohibits authorities from imposing 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.*[4] The Act does nothing less than recognize the right of persons with "sincerely held religious beliefs or moral convictions" to be free from government discrimination.[5] Plaintiffs have failed to demonstrate that they have a substantial likelihood of success on the merits as to their facial challenge.

B. Plaintiffs' Lack Article III Standing And Their Claims Are Not Ripe.

Plaintiffs fail to demonstrate that they have standing as to each defendant in this case. *See Campaign for Southern Equality v. Mississippi Dept. of Human Servs*., ---F.3d ---, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016) ("*CSE II*"). Moreover, even if the Plaintiffs had standing, their claims are not ripe. *See, e.g.*, *Google Inc. v. Hood*, 2016 WL 1397765 (5th Cir Apr. 8, 2016), as *modified* (vacating district court's preliminary injunction for lack of ripeness).[6]

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[4] *See, e.g.,* The Church Amendments, 42 U.S.C. § 300a-7 (West 2011) (even though entities receive federal funds, personnel from funded entities may refuse to provide or perform abortions or sterilizations if those procedures violate their religious or moral beliefs); The Coats Amendment, 42 U.S.C. § 238n (West 2011) (neither federal, state, nor local governments may discriminate against entities that refuse to provide or require abortion training or individuals who refuse abortion training); Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2008) (every year since 2004, Congress attaches the "Weldon Amendment" to the yearly Labor Health and Human Services (LHHS) appropriations bill; the Amendment forbids federal agencies and programs, and state and local governments that receive money under the act, from discriminating against individuals or entities, including health insurance plans, because they refuse to provide, pay for, provide coverage of, or refer for abortions). 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.*

[5] The Ninth Circuit in *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311 (9th Cir. 1974) rejected an Establishment Clause challenge to the Church Amendments because plaintiff "fail[ed] to distinguish between an action taken to preserve 'government('s) neutrality in the face of religious differences' and action which affirmatively prefers one religion over another. Here Congress sought to retain its neutrality in the debate over the morality of voluntary sterilizations by preventing the reception of federal health care program funds from being used as a basis for compelling a hospital to perform such surgery against the dictates of its religious or moral beliefs." *Id.*

[6] "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). Ripeness "separates those matters that are

In *CSE II*, the district court reiterated that "standing is not . . . a mere technicality, and its applicability differs . . . with respect to the various Plaintiffs and the officials against whom they bring this suit." *Id.* at *2. It is well-established that a preliminary injunction is never appropriate when the moving parties lack Article III standing. *Prestage Farms, Inc. v. Board of Sup'rs of Noxubee County, Miss.*, 205 F.3d 265, 267-68 (5th Cir. 2000), *reh'g en banc denied*, 215 F.3d 1081 (vacating preliminary injunction for lack of standing and remanding for dismissal).

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). "The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6). Plaintiffs bear the burden of establishing its existence. *Lujan* 504 U.S. at 560.

In reversing the Ninth Circuit this term, the Supreme Court again reiterated that an injury-in-fact must be "concrete *and* particularized." *Spokeo, Inc. v. Robins* 136 S.Ct. 1540,

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premature because the injury is speculative and may never occur from those that are appropriate for judicial review. "The justiciability doctrines of standing, mootness, political question, and ripeness all originate in Article III's case or controversy language." *Choice Inc. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012). "[I]n measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp.3d 604 (M.D. La. October 29, 2015). For the reasons articulated as to the hypothetical and conjectural nature of Plaintiffs' claims with regard to standing, their claims are not ripe.

1548 (2016) (emphasis supplied). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* (citations omitted). The Court stated that "[p]articularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis . . . that independent requirement was elided." *Id.* The Court elaborating on the meaning of "concrete" said:

> A "concrete" injury must be "de facto "; *that is, it must actually exist*. When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract. Concreteness, therefore, is quite different from particularization. (internal citations omitted).

Id. at 1548 (emphasis supplied). The Court concluded that "[b]ecause the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete." *Id.* at 1549.

The Supreme Court has emphasized that plaintiffs seeking relief under the Establishment Clause must meet the same irreducible minimal constitutional requirements as in other areas of the law. *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 133-34, 143 (2011). The Court has recognized two ways in which an Establishment Clause plaintiff may satisfy the Article III: (1) economic injury, *i.e.* taxpayer standing, *Flast v. Cohen*, 392 U.S. 83 (1968), and (2) non-economic injuries, *Van Orden v. Perry*, 545 U.S. 677 (2005). Plaintiffs have neither taxpayer standing nor have they suffered the type of non-economic injury required for Establishment Clause standing.

(1) Taxpayer Standing.

In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court held a plaintiff's status as a taxpayer is generally inadequate to establish standing. In *Flast*, the Court created a "narrow exception" that taxpayer standing may be enough in an Establishment Clause case if there is a sufficient nexus between plaintiff's status as a taxpayer, the expenditure of tax funds,

and the law challenged. However, the *Winn* Court found a plaintiff mush show a logical link between the taxpayer status and the type of law attacked, and a nexus between the plaintiff's taxpayer status and the precise nature of the alleged infringement. *Winn*, 563 U.S. at 138-39. In other words, a plaintiff has to show that such a claim is "a-good faith pocketbook action" in that the taxpayer has been economically injured because state taxes are being spent specifically to carry out the challenged law—the mere "incidental expenditure of tax funds" is not enough. *Winn*, 563 U.S. at 138-39 (citing *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952)).

Plaintiffs' rely on *Henderson v. Stalder*, 287 F.3d 374, 381 n.7 (5th Cir. 2002); *Doe el rel Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 & n.2 (5th Cir. 1999) and *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). Plaintiffs state they "live in Mississippi [and] pay state taxes, including state income taxes." Pls.' Mem. at 31. They offer three ways H.B. 1523 purportedly supports their taxpayer standing theory: (1) Section 6 which provides for compensatory damages and reasonable attorneys' fees; (2) direct expenditure to fund advocacy by prohibiting government from withholding, reducing, or materially altering the terms and conditions of the items listed in Section 4; and (3) direct expenditure of taxpayer funds to keep records of officials recuse under Section 3(8)(a). *Id.* at 31-32.

In citing *Henderson*, plaintiffs try to distinguish the Louisiana law because the court found the "statute at issue require[d] the payment of an additional . . . fee, in addition to the regular motor vehicle license fees, to offset a portion of the associated administrative costs." *Henderson*, 287 F.3d at 381. Plaintiffs surmise that because H.B. 1523 does not have a comparable provision as in *Henderson* (where the court found no standing), tax revenues will be spent to support the Act. The absence in the Act of a comparable fee provision in no way

relieves Plaintiffs of their obligation to demonstrate "a nexus between the plaintiff's taxpayer status and the precise nature of the alleged infringement. *Winn,* 563 U.S. at 138-39.

With respect to the three categories identified by Plaintiffs, they do not allege any facts showing the required nexus between their taxpayer status and H.B. 1523.[7] Plaintiffs in essence argue that because they are taxpayers and because they believe tax revenues will be expended in support of H.B. 1523, they have met their burden. This is not the test in *Winn*. First, H.B. 1523 does not appropriate any funds for carrying out the law, nor does the Act require expenditure of state tax revenues. And with respect to the alleged expenditure of funds for the State Registrar to maintain records of officials who recuse under Section 3 8(a), such "incidental expenditure[s]" do not satisfy *Doremus*. Plaintiffs have not shown that funds that might be expended in the event that Moulder receives recusals would be anything other "incidental expenditures" carried out in the course of business. Further, even if Plaintiffs could show an injury-in-fact, they have not alleged much less demonstrated the causation and redressability prongs of Article III. *Winn*, 563 U.S. 125, 133-34. Plaintiffs do not have taxpayer standing.

(2) Non-Economic Injury

The Supreme Court has acknowledged that in proper circumstances, non-economic injuries can be sufficient to establish standing for an Establishment Clause challenge. *Van Orden*, 545 U.S. at 682-83. However, the Court has limited the type of non-economic injury that is sufficient holding that "the psychological consequence presumably produced by observation of

[7] For instance, Plaintiffs allege that tax revenues may be expended in furtherance of the State Registrar having to maintain a list of people who might recuse under Section 3 (8)(a). However, Plaintiff Hrostowski is married and thus there is no nexus between her status as a taxpayer and that provision of the Act. CSE has simply alleged they have members who pay income taxes in Mississippi. CSE has not alleged, nor can they demonstrate, any nexus between its unidentified members and the provisions of Section 3 (8)(a). There number of speculative events that would have to occur to implicate Section 6 which preclude Plaintiffs from establishing the required nexus.

conduct with which one disagrees" is not enough to establish standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 485-86 (1982). Further even if a plaintiff meets the injury requirement, based on taxpayer status or repeated unwelcome confrontation with an offensive religious symbol, Plaintiffs must still also satisfy the traceability and redressability requirements. *Winn*, 563 U.S. at 143. They have not.

Plaintiffs rely on *Murray v. City of Austin, Tex.*, 947 F.2d 147, 151-52 (5th Cir. 1991), *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010 (en banc) and *Awad v. Ziriax*, 670 F.3d 111 (10th Cir. 2012). These cases are inapposite. *Murray* is easily distinguishable because there plaintiff objected to being confronted with a Christian *cross in insignia*. The Fifth Circuit, in finding plaintiff did not have standing, stated:

> In so ruling, we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases, such as *Lynch v. Donnelly* . . . (plaintiffs were the American Civil Liberties Union and residents of the community in which the crèche in issue was displayed in a private park, who were also members of the ACLU) and *County of Allegheny v. American Civil Liberties Union* . . . (plaintiffs were the ACLU and several residents of a community where a crèche and a menorah were displayed in the County Courthouse and just outside the City–County Building respectively).

Id. at 151-52. This case does not involve a religious symbol which "confronts" Plaintiffs, which even in *Van Orden*, the Court found insufficient to confer standing.

Likewise, the Oklahoma constitutional amendment challenged in *Awad* bears no resemblance to H.B. 1523. In *Awad*, the court held that a plaintiff, who was of Muslim faith, had Establishment Clause standing because he alleged the proposed Oklahoma constitutional amendment would have *specifically barred the use of Sharia law*. 670 F.3d at 1122. The Tenth Circuit compared "the personal and unwelcome contact" plaintiff had with the constitutional amendment to the contact plaintiffs in other cases (*Lynch*, *County of Allegheny*) had with

government-sponsored religious symbols in the creche/menorah cases. *Id.* Plaintiffs try to analogize H.B. 1523 to the constitutional amendment in *Awad*. The flaw in this theory is readily apparent from the *Awad* Court's analysis. *Id.* at 1120. The Oklahoma constitutional amendment at issue constituted *an express prohibition* on the use of Sharia law, an integral part of plaintiffs' religion:

> The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law . . . and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.

Id. at 1117-18 (emphasis supplied). H.B. 1523 contains no prohibition on Plaintiffs practicing any part of their religion as in *Awad*. In fact, H.B. 1523 does just the opposite by affording an accommodation to **any** person who holds the "sincerely held religious beliefs or moral convictions" regardless of particular religion, religious faith or denomination. Plaintiffs merely assume for their argument that the religious beliefs or moral convictions defined in Section 2 of the Act apply to particular religious denominations. This is "whole cloth" devised for the sake of argument as H.B. 1523 does not identify, prefer or endorse one religion or denomination over another. H.B. 1523 must be read as it is written.

After *Awad*, the Tenth Circuit in *COPE v. Kansas State Bd. of Educ*., --- F.3d ---, 2016 WL 1569621 (Apr. 19, 2016), stepped away from its expansive standing analysis in *Awad* finding plaintiffs who challenged certain Kansas educational standards lacked standing. In *COPE*, plaintiffs alleged that by attempting to adopt "a non-religious worldview in the guise of science education . . . driven by a covert attempt to guide children to reject religious beliefs" the Kansas educational standards violated the Establishment Clause. *Id.* In distinguishing *Awad*, the court emphasized that in *Awad*, the proposed law "*targeted the Muslim religion explicitly* and

interfered with the plaintiff's ability to practice his faith and access legal processes." *Id.* at *2 (emphasis supplied). The *COPE* Court concluded plaintiffs had not "offer[ed] any allegations to support the conclusion that the [educational standards were] a government-sponsored religious symbol." *Id.* (citation omitted). As in *COPE*, Plaintiffs have not and cannot demonstrate that the Act constitutes a "government sponsored religious symbol."

Plaintiffs' reliance on *Catholic League* is also misplaced. Notably, the district court in *COPE* distinguished the Ninth Circuit's 6-5 decision in *Catholic League*. *See COPE v. Kansas State Bd. of Educ.* 71 F. Supp.3d 1233, 1248 (D. Kan. 2014). The district court acknowledged the *Awad* Court's reference to *Catholic League*. *Id.* The district court stated that "though the non-binding city resolution in *Catholic League* conveyed 'a government message,' the proposed constitutional amendment in *Awad* did more: it conveyed 'more than a message; *it would impose a constitutional command'* prohibiting the consideration of Sharia law in state courts." *Id.* The district court concluded that "the Tenth Circuit did not rely on the Ninth Circuit's reasoning [in *Catholic League*] that a 'government message' conveyed by a non-binding resolution is sufficient, by itself, to allege an injury to establish standing." *Id.* at 1249.

In fact, the district court in *COPE* was correct opining that:

> [T]he Tenth Circuit would not reach the same conclusion on standing as the Ninth Circuit reached in *Catholic League* on the facts alleged by Plaintiffs here. Even if the Tenth Circuit were to apply the reasoning of *Catholic League* to the facts presented in this case, the Court predicts that it would conclude plaintiffs' allegations were more like those made in *Valley Forge* than allegations at issue in *Catholic League*.

Id. at 1249. This case, like *COPE*, is factually distinguishable from *Catholic League*. Nothing in H.B. 1523 targets a religion, like *Awad*, or condemns a particular religious viewpoint like *Catholic League*. Plaintiffs try to key on the fact that in *Catholic League*, the court found

standing even though the resolution was non-binding whereas H.B. 1523 has the force of law. This comparison is illusory.[8]

The district court in *COPE* held that "[u]nlike the plaintiffs in *Catholic League*, plaintiffs have not alleged the [school] Board's adoption of educational standards *denounces*, *condemns*, or *disapproves* of their religion." *COPE*, 71 F. Supp.3d 1244 (D. Kan. 2014) (emphasis supplied). As in *COPE*, H.B. 1523 does not denounce, condemn or disapprove of any religious beliefs held by Plaintiffs or anyone for that matter, but prohibits State government from taking discriminatory action against those persons with a "sincerely held religious beliefs or moral convictions." H.B. 1523, § 2. The Act proscribes government action against persons with religious beliefs or moral convictions, and does not proscribe or condemn any conduct or beliefs or convictions held by Plaintiffs as in *Awad* and *Catholic League*.

Further distinguishing the H.B. 1523 from *Awad* and *Catholic League* is that the only affirmative command in the Act is directed to the person seeking recusal: "[t]he 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." H.B. 1523, § 3 (8)(a). Thus, the on the one hand, the Act commands that same-sex couples not be impeded or delayed in obtaining a marriage license, while on the other hand, accommodating

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[8] The resolution in addressed, by name, a specific Cardinal in the Catholic Church and called the Archbishop and the Catholic Charities defy the Cardinal's directives. The resolution read in part:

> WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and
>
> * * *
>
> WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear[.]

Catholic League, 624 F.3d at 1047.

persons with "sincerely held religious belief or moral convictions" only after such persons have taken the steps required in Section 3 (8)(a).

Like Plaintiffs in this case, the *COPE* plaintiffs also alleged the adoption of the educational standards "sends a message that they are 'outsiders' within the community." *Id.* at 1249. The court held, however, that "[t]his message, even if true, is not sufficient to confer standing because the plaintiffs only allege an '*abstract stigmatic injury*' rather than a direct and concrete injury." *Id.* (emphasis supplied) (citing *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), *cert denied*, 562 U.S. 1271 (2011); *see also Allen v. Wright*, 468 U.S. 737, 795 n.22 (1984) (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).

But beyond this, Plaintiffs do not have a cognizable right to for a particular government official give them a 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). The court aptly noted that "[t]here is no reason to even inform them of [the employee's] religious views or the [c]ounty's accommodation of those views. *Id.* at 1195.

Plaintiffs offer several hypothetical circumstances under which they claim H.B. 1523 "impedes the ability of gay and lesbian couples and individuals to fully participate in the legal and social order." Compl., [Dkt. No. 1], ¶ 100; Pls. Mem. at 16-20. Standing, however, 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)). Plaintiffs cannot demonstrate a real or immediate threat of substantial and immediate irreparable injury.

3. No Causal Connection to These Defendants

Plaintiffs have not alleged that their injuries are "fairly traceable" to these defendants and thus suffer from the same flaw as in *CSE II*. 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).

a. The Governor

Plaintiffs allege that Governor Bryant, (1) is the chief executive of the State of Mississippi and "responsible for ensuring compliance with state law, and (2) that he "bears responsibility for the formulation and administration of the policies of the executive branch, including administrative agency policies." Compl., ¶¶ 19-20. Plaintiffs made similar generalized averments against Governor Bryant in *CSE II*, which were rejected by the court. *CSE II*, 2016 WL 1306202 at *4 (Plaintiffs' injuries not fairly traceable to any act by the Governor of Mississippi). The circumstances are no different in this case and Plaintiffs cannot show their alleged injuries are fairly traceable to Governor Bryant.

b. The Attorney General

Like *CSE II*, some of these same Plaintiffs sued Attorney General Hood and the result should be precisely the same—they lacked standing in *CSE II* and they lack standing to pursue claims against the Attorney General in this case. Plaintiffs allege that "Attorney General Hood is the chief law enforcement officer of the State. . . ." Compl., ¶ 21. In *CSE II*, the district court stated that "[a]s noted in *Okpalobi*, the required causal connection comes from an officer's "coercive power" regarding the disputed statute. 244 F.3d at 426 (holding plaintiff must show "power to enforce the complained-of statute"). *Id.* at *6.

"The duty to defend the state in litigation is not the same thing as the power to enforce a statute. *Id. Cf. Harris v. Cantu*, No. H–14–1312, 2014 WL 6682307, at *5 (S.D. Tex. Nov. 24, 2014) (holding that attorney general's duty to defend does not trigger *Ex parte Young* exception) (citing *Ex parte Young*, 209 U.S. 123 (1908) (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply because he "might represent the state in litigation involving the enforcement of its statutes")). This case mandates no different result than in *CSE II* as Plaintiffs have failed to show the necessary "coercive power" required by *Okpalobi*.

c. Executive Director Davis

With respect to the Executive Director of MDHS, Plaintiffs have failed to show a causal connection between the Plaintiffs in this case and Mr. Davis. Plaintiffs rely on *CSE II* for the proposition that "Mr. Davis is . . . in charge of the agency 'statutorily empowered to set policies and participate directly in the adoption process'. . . ." Compl., ¶ 23 (citing *CSE II*, 2016 WL 1306202, at * 12).

Plaintiffs have not alleged a single set of circumstances in which a causal connection exists with respect to their claims. Plaintiff Hrostowski has not alleged she plans on seeking adoption services involving the MDHS. Further, Plaintiff CSE has not alleged nor demonstrated that any of its members plan to use adoption services involving MDHS. Thus, Plaintiffs have simply alleged an abstract proposition which has no causal connection to their Establishment Clause claim.

d. State Registrar Moulder

Plaintiffs' claim against State Registrar Moulder is that Section 3 (8)(a) requires her to accept notice and maintain records for those persons who seek recusal under the act. Compl., ¶ 23. But while this looks appealing on the surface, it crumbles under scrutiny. With respect to Plaintiff Hrostowski, because she is married there is no causal connection with respect to her and State Registrar Moulder. Plaintiff CSE fairs no better as to causation. *See K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (Board could unilaterally preclude the Plaintiffs from claiming benefits of limited liability and independent medical review).

Unlike *LeBlanc* State Registrar Moulder does not "unilaterally preclude Plaintiffs from claiming benefits of [the law]." Instead, Plaintiffs' causation theory necessarily requires further speculation that for State Registrar Moulder to "keep a record" she must first receive one from a government employee who might choose to provide one in the future. This has not yet occurred and cannot be known with any degree of certainty if and when she might receive a recusal after July 1, 2016. State Registrar Moulder has no control over whether she receives or does not receive a recusal notice.

4. Plaintiffs Have Not Demonstrated Redressability Under *Lujan*

Under the third *Lujan* prong, Plaintiffs must show "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Plaintiffs cannot meet their burden. For instance, Plaintiffs cannot show that it is likely as opposed to speculative that a favorable decision will prevent a person from recusing himself or herself from issuing marriage licenses, from providing wedding-related services, or declining to provide health-care or adoption related services.

C. CSE Lacks Associational Standing

CSE avers that it has associational standing on behalf of its members. Compl., ¶ 12. Essentially, CSE asserts that it has standing because courts in this district have found that it had standing in previous cases. Compl., ¶ 9. That CSE has been found to have had associational standing in other cases is simply *ipse dixit* reasoning and does not support standing in this case. 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).

D. No Substantial Likelihood of Success for Establishment Clause Claim.

The Fifth Circuit has summarized three tests the Supreme Court has used in various Establishment Clause challenges: (1) the *Lemon* test; (2) the Coercion test; and (3) the Endorsement test. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, (5th Cir. 2001):

> First, the three-part inquiry of *Lemon v. Kurtzman* asks (1) whether the purpose of the practice is not secular; (2) whether the program's primary effect advances or inhibits religion; and (3) whether the program fosters an excessive government entanglement with religion. The second test, the "coercion" test, measures whether the government has directed a formal religious exercise in such a way as to oblige the participation of objectors. The final test, the "endorsement" test, prohibits the government from conveying or attempting to convey a message that religion is preferred over non-religion.

Id. Although the *Lemon* test has been much-criticized, a majority of the Court has never expressly overruled *Lemon*. Regardless, H.B. 1523 is constitutional under *Lemon* or the endorsement test as a reasonable accommodation of religious beliefs and moral convictions. Plaintiffs do not contend the coercion test applies.

1. H.B. 1523 Does Not Favor A Particular Religion.

H.B. 1523 does not favor any particular religion. The Supreme Court has said that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Here, H.B. 1523 does not even have the incidental effect of burdening Plaintiffs' religious practice. In fact, Plaintiff Hrostowski states in her declaration that she has "many sincerely held religious beliefs. . . ." [Dkt. No. 2-1], ¶ 13. Nothing in H.B. 1523 infringes on her sincerely held religious beliefs.

Plaintiffs advance the theory that H.B. 1523 impermissibly discriminates between religious sects citing *Larson v. Valente*, 456 U.S. 228, 244 (1982). Pls.' Mem. at 12. However, a wide gulf exists between H.B. 1523 and the statute in *Larson*. In *Larson*, the state used the statute's fifty per cent rule to compel a particular church to register and report under the law. Because the fifty per cent rule applied only to religious organizations, the Court concluded that for purposes of the challenging that application, the church was a religious organization within the meaning of the act. *Id.* The Court found that having to complete the registration statement

was a substantial burden. However, *Larson* involved a law that made "explicit and deliberate distinctions between different religious organizations[.]" *Id.* at 456 U.S. at 246 n.23.[9] But H.B. 1523 makes no such distinction between religions or religious organizations. Plaintiffs' argument, at a minimum is nothing more than an unsupported generalization about the particular beliefs of those who subscribe to a particular religious denomination and fails to account for the myriad of different intra-denominational opinions about same-sex marriage.

Plaintiffs fail to explain how H.B. 1523 favors one religious denomination over another in any concrete sense like *Larson*. For example if more than half of a particular denomination's self-declared adherents support same-sex marriage, can it be said that H.B. 1523 favors one religious sect over another even if that denomination doctrinally does not favor same-sex marriage? Unlike the law in *Larson* which set an arbitrary threshold (i.e. fifty-percent) below which a religious organization was *required* to register under the statute, H.B. 1523 imposes no similar burdens on any religious organization. Moreover, the *Larson* Court found that having to register under the statute imposed a significant burden in light of the depth of information that had to be provided. H.B. 1523 is neutral with respect to religious sects and the sincerely held religious beliefs or moral convictions can be asserted by anyone with those beliefs.

[9] Plaintiffs at various times refer to Miss. Const. art. III, § 18 and state that H.B. 1523 violates that provision of the Mississippi Constitution. Plaintiffs also refer at length to Mississippi's RFRA, Miss. Code Ann. § 11-61-1(6). *See* Pls.' Mem. at 13-16. Plaintiffs' seek no relief under the Mississippi Constitution or Mississippi statutory law. To the extent Plaintiffs urge such claims, they are barred by the Eleventh Amendment and these defendants specifically assert Eleventh Amendment immunity. The Eleventh Amendment precludes suits in federal court against state officials named in their official capacities because such suits are essentially claims against the State. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The Eleventh Amendment immunity not only bars federal claims against the State, but it also bars all state law claims asserted against the State in federal court, including state law claims seeking prospective injunctive relief against a state official. *Pennhurst*, 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Larson's holding is also confined to cases involving laws that explicitly discriminate against certain religious or religious groups.[10] In fact, since the case was decided in 1982, the Supreme Court has never relied on *Larson's* strict scrutiny test to invalidate a statute under the Establishment Clause. Thus, *Larson* occupies a relatively obscure position in the Court's Establishment Clause jurisprudence. Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preference: Larson in Retrospect,* 8 N.Y. City L. Rev. 53, 107 (2005) ("[T]he *Larson* doctrine probably merits the obscurity it has long-received."). Further, *Larson* itself establishes that it does not apply to statutes which provide protections to certain religious beliefs, but do not discriminate among religions.

The petitioners in *Larson* argued the Minnesota statute was similar to the federal statute upheld in *Gillette v. United States*, 401 U.S. 437 (1971); *Larson*, 456 U.S. at 246 n.23. In *Gillette*, the Court held that a federal statute which granted draft exemptions to any person who "by reasons of religious training and belief," was "conscientiously opposed to participation in war in any form" did not violate the Establishment Clause, even though it did not provide an exemption to persons who objected on religious grounds to participating in a particular war. 401 U.S. at 441. The Court relied on the fact that the statute "on its face, simply [did] not discriminate on the basis of religious affiliation." *Id.* at 450. To the contrary, the statute "focused on individual conscientious belief, not on sectarian affiliation." *Id.* at 454. The Court concluded that the distinction drawn by the law was supported by neutral and secular justifications. *See id.* at 454-460.

[10] *See Lynch*, 465 U.S. at 679 (nothing that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"); *id.* at 688 (O'Connor, J. concurring) (explaining that *Larson* strict scrutiny is only appropriate when a "statute or practice . . . plaining embodies an intentional discrimination among religions").

The *Larson* Court found *Gillette* to be "readily distinguishable" because under the federal statute, "conscientious objector status was "available on an equal basis to both the Quaker and the Roman Catholic;" whereas the Minnesota law in Larson "focuse[d] precisely and solely upon religious organizations." *Larson*, 456 U.S. at 246 n.23. H.B. 1523, like the statute in *Gillette*, does not discriminate on the basis of religious affiliation; its purpose is to accommodate conscientious beliefs or convictions, not any particular religion, religious denomination or religious group. Any person who holds the beliefs described by H.B. 1523 may invoke the statute's protection, regardless of the religion they practice or the religious denomination to which they belong.

Plaintiffs devote considerable attention in arguing H.B. 1523 "affords far greater benefits and protections to people who hold the [sincerely held religious belief or moral conviction] than to others. . . ." Pls.' Mem. at 15. Plaintiffs seek to turn the Act on its head citing *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the Court stated that "[t]he First Amendment mandates government neutrality between religion and religion[.]" *Id.* But Plaintiffs take this statement too far. H.B. 1523 does not favor one religion over any other religion as any person who holds the beliefs described by H.B. 1523 may invoke the statute's protection, regardless of the religion they practice or the religious denomination to which they belong. Plaintiffs' position flies in the face of the Supreme Court's pronouncement in *Blalock*:

> It does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.

489 U.S at 892.[11] Plaintiffs cite *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) for the proposition that government must be neutral when it comes to competition between sects. *Id.* at 15. But *Zorach* says so much more than the single line extracted by Plaintiffs. In that same passage referenced by Plaintiffs, the Court went on to say that that:

> But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.

Zorach, 343 U.S. at 314. In fact, the Court in *Zorach* upheld a New York law which allowed students to leave school to attend religious classes. *Id.* Like *Zorach*, H.B. 1523 does not thrust any religious sect on Plaintiffs nor make religious observance compulsory and does not coerce any person to attend church, observe a religious holiday or take any religious instruction. The Act provides an accommodation to those who "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.[12]

2. H.B. 1523 is a Constitutionally Permissible Accommodation.

Plaintiffs also argue the Act "impos[es] the weighty burden of religious accommodation on innocent third parties." Pls.' Mem. at 16. The Supreme Court has held on numerous occasions that government may accommodate religious practices without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987);

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[11] *See Wallace v. Jaffree*, 472 U.S., at 70 (O'Connor, J., concurring) ("The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy");

[12] Plaintiffs reliance on *Sch. Dist. of Abington Tp. Pa. v. Schempp*, 374 U.S. 203, 215 (1963) is misplaced. In *Schempp*, the Court struck down action by states that required schools to start the school day with Bible verses and the recitation of the Lord's Prayer by the students in unison. The Act imposes no such required action.

see also Wisconsin v. Yoder, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemption for churches). In *Locke v. Davey*, 540 U.S. 712 (2004), the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. *Id.* at 718 (citation omitted); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("This does not mean that the law's purpose must be unrelated to religion-that would amount to a requirement 'that the government show a callous indifference to religious groups and the Establishment Clause has never been so interpreted.").

In *Harris v. McRae*, 448 U.S. 297, 319 (1980), the Court affirmed the Hyde Amendment which significantly limited federal funding for abortions and rejected an Establishment Clause challenge. The Court opined that "[a]lthough neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions." *Harris*, 448 U.S. 319-20 (emphasis added). In *Van Orden*, the Supreme Court upheld the passive display of the Ten Commandments at the Texas state capitol:

> [I]t is true that religion has been closely identified with our history and government. The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are earnestly praying, as in duty bound, that the Supreme Lawgiver of the Universe guide them into every measure which may be worthy of his blessing. (Internal citations and punctuation omitted).

545 U.S. at 683 (quoting *Schempp*, 374 U.S. at 212-13); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995) (warning against "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").[13]

Moreover, "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland;* 366 U.S. 420 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678 (1970)). "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example . . . that religion has been closely identified with our history and government and that [t]he history of man is inseparable from the history of religion. *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 434 (1962). The Court in *Cutter v. Wilkinson*, 544 U.S. 709, 717 stated that:

> [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation. . . . The Federal Government may exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment. The constitutional obligation of neutrality is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. (internal citations and quotation marks omitted).

Id. at 719.

Furthermore, the Court recognizes that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood of Se.*

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[13] The Court in *Van Orden* further stated that "[t]hese two faces are evident in representative cases both upholding[4] and invalidating laws under the Establishment Clause. Over the last 25 years the Court has sometimes pointed to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as providing the governing test in Establishment Clause challenges. *Id.* at 685-86. "Yet, just two years after *Lemon* was decided, the Court noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Id*. (citation omitted). *Van Orden*, 545 U.S. at 685-86.

Pennsylvania v. Casey, 505 U.S. 833, 873-74 (1992). For example, the Court has held that "not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Norman v. Reed*, 502 U.S. 279 (1992).

The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie*, 480 U.S. at 144-145; *Amos*, 483 U.S. at 334. In *Amos*, the Court held that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. The Act has a secular purpose because it alleviates governmental interference ("state government shall not take any discriminatory action against a state employee) from those with sincerely held religious beliefs or moral convictions.

Plaintiffs contend that the Act places impermissible burdens on them and in support cite *Estate of Thornton v. Calder*, 472 U.S. 703, 706 (1985) which struck down a state Sabbath law giving employees the right to designate the day of the week for Sabbath observance and not have to work. *Id.* at 706. Plaintiffs compare the Act to the Sabbath law in *Calder* because Plaintiffs believe someone with "sincerely held religious belief or moral convictions" can *automatically* invoke the statute's protection thereby "impos[ing] significant burdens on Mississippians who do not hold the [religious belief or moral conviction]." Pls.' Mem. 17. *Caldor* is inapposite and Plaintiffs' comparison of the two laws is both hypothetical and illusory. In *Caldor* the Court found the statute failed to provide exceptions for circumstances such as the Friday Sabbath observer employed in an occupation with a Monday through Friday or if a high percentage of an

employer's work force asserts rights to the same Sabbath. *Caldor*, 472 U.S. at 709. This is not true for H.B. 1523 which has mandates on individuals seeking protection under the law.

Purported Burdens Claimed by Plaintiffs. Plaintiffs allege that the recusal provision constitutes an impermissible burden. However, Section 3 (8)(a) places the burden solely on the person seeking recusal from issuing a marriage license. A person seeking recusal "**shall** provide prior written notice to the State Registrar. . . ." *Id.* (emphasis supplied). Thereafter, the individual is responsible for "taking all necessary steps to ensure the authorization or licensing of a legally valid marriage is not impeded or delayed as a result of such recusal." *Id.* Obviously if the person fails to comply with Section 3(8)(a), then they would lose the accommodation afforded by the Act. 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

Further, Section 3(4) of the Act provides that the section "shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law." *Id.* Thus the Act contains a prohibition on when persons under Section 3(4) can or cannot invoke the Act. H.B. 1523 is not comparable to the Sabbath law in *Caldor*.

Plaintiffs allege Section 3(4) allows healthcare professionals and staff to deny marriage counseling or other psychological counseling serves to gay or lesbian patients or to the child of a gay or lesbian couple. The provision actually provides that:

> The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of *treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services* based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. This subsection (4) shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.

Id. (emphasis added). It is undisputed that conscientious objection laws have existed in the medical profession and have been affirmed since 1974. *See supra* n.5; *see also Chrisman*, 506 F.2d at 308. Further, Plaintiffs point to no authority commanding that healthcare worker provide the services described in Section 3(4). A counselor, for example, cannot be legally mandated to provide treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services and thus, Section 3(4) does not alter the status quo relative to Plaintiffs. What the Act does it restrict State government from taking discriminatory action against a health care worker who declines to offer such services.

Moreover, Section 3(4) provides limits that the provision shall not be construed "to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law. " *Id.* Unlike the *Caldor*, Section 3(4) prohibits a person from invoking their "sincerely held religious belief or moral convictions" in the case of visitation, health care decision-making or emergency medical treatment.

Plaintiffs also hypothesize that by virtue of the Act, they could be denied a table at a restaurant or a room at a hotel. Pls.' Mem. at 18-19. According to Plaintiffs, "[t]he statute is worded so expansively, that it could apply to not just wedding-related businesses but to almost

any business that serves gay or lesbian married couples." *Id.* But Plaintiffs' hypothetical runs contrary to the dictates of *Salerno* that "[t]he fact that [a statute] might operate unconstitutionally *under some conceivable set of circumstances* is insufficient to render it wholly invalid. . . ." *Salerno*, 481 U.S. at 745 (emphasis supplied). Plaintiffs likewise fail to demonstrate how the actions of a person who provides photography, printing, publishing, floral arrangements, dress making, baking, assembly-hall rentals, car-service rentals, and jewelry sales and services, violates Plaintiffs' rights under the Establishment Clause for not providing such goods or services.

Plaintiffs also argue the Act "forbids government, and even private state-court plaintiffs from taking action against individuals that invoke the protections afforded by the law. Pls.' Mem. at 19. This is a non-starter because Plaintiffs have not alleged an equal protection violation. Plaintiffs did reference *Romer v. Evans*, 517 U.S. 620 (1996) in the Complaint, ¶ 30, but did so only by way of historical presentation. Plaintiffs' alleged burden in this regard is simply an equal protection claim masquerading in the Establishment Clause context. Moreover, sexual orientation is not protected under federal law. *See Brandon v. Sage Corp*., 808 F.3d 266, 274 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation'");

Finally citing to H.B. 1523 Section 3(2), Plaintiffs contend the law creates barriers to raising children." Pls. Mem. at 20.[14] The organizations identified in Section 3(2) (religious organization) cannot be legally compelled to provide the services described in Section 3(2) and thus, H.B. 1523 does not change the status quo.

[14] Section 3(2) provides that [t]he state government shall not take any discriminatory action against a religious organization that advertises, provides, or facilities adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act.

3. H.B. 1523 Does Not Impermissibly Advance Religion.

The primary effect of the Act is not to advance religion but to protect an individual's "sincerely held religious beliefs or moral convictions" under the First Amendment which are at odds with but nonetheless intersect with the Fourteenth Amendment rights formally acknowledged in *Obergefell*. The Supreme Court *Lynch* captured this balance:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.* (internal citations, quotation marks omitted).

465 U.S. at 673 (emphasis supplied). The controversy over the morality of same-sex marriage transcends the religious/secular distinction. H.B. 1523 protects those whose beliefs concerning same-sex marriage, after *Obergefell*, are at odds with those views held by supporters of same-sex marriage. Moreover, persons may oppose same-sex marriage for reasons other than religious beliefs.

II. Plaintiffs Cannot Show a Substantial Threat of Irreparable Injury

Plaintiffs have not alleged, much less proved, that they have suffered a cognizable injury in fact sufficient to establish standing. Since Plaintiffs have not even shown the existence of any actionable injury, Plaintiffs have also failed to meet their burden to show a substantial threat of irreparable injury. 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). Plaintiffs cannot show anything close to justifying "convincingly" that they will suffer irreparable injury if the injunction does not issue.

III. The Balance of Harms Favors Defendants

Plaintiffs' request for a preliminary injunction in this case must be considered in a substantially different light from the preliminary injunctions sought and obtained in *CSE I* and *CSE II*. In each of those cases, the Plaintiffs were directly and explicitly barred from enjoying rights and privileges that opposite-sex couples enjoyed. Here, Plaintiffs do not stand to suffer any irreparable injury at all. 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).

Nothing in the Act bars Plaintiffs from exercising their rights and same-sex couples will continue to enjoy the rights and benefits of marriage. The Act protects the right to marry, requiring that a clerk recusing himself or herself from issuing a marriage license "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." H.B. 1523 § 3(8)(a). The Act places a similar obligation on the Administrative Office of Courts if a judge recuses under Section 3 (8)(b).

Further, the Court must balance the potential harm to Plaintiffs based on the alleged Establishment Clause violation with the potential harm to those public officials and others who are conscientious objectors concerning the morality of same-sex marriage (whose Free Exercise rights will continue to be subject to potential harm) if H.B. 1523 is enjoined. Because any potential irreparable harm to Plaintiffs is *de minimums*, and because there are competing fundamental rights protected by the Free Exercise Clause, the balance of harms here favors Defendants, or is neutral.

IV. Granting the Injunction Would Not Serve the Public Interest.

Plaintiffs merely repeat the same argument regarding the public interest prong without analysis and fail to consider the balancing of interests between the First and Fourteenth Amendment. *Obergefell*, 135 S.Ct. at 2607. The State's manifest interest is in enforcing laws that recognizes both constitutional interests which an injunction harms its ability to do so.

CONCLUSION

For the reasons set forth, Plaintiffs' Motion for Preliminary Injunction should be denied.

THIS the 22nd day of June, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document using the ECF system which served a copy on all counsel of record:

THIS, the 22nd day of June, 2016.

/s/ Douglas T. Miracle
DOUGLAS T. MIRACLE