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

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

Plaintiffs,

v. **Civil Action No. 3:16-cv-417-CWR-LRA**

PHIL BRYANT, GOVERNOR OF MISSISSIPPI; JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI; JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; and JUDY MOULDER, MISSISSIPPI STATE REGISTRAR OF VITAL RECORDS,

Defendants.

RESPONSE OF *BARBER* PLAINTIFFS TO THE MOTION FOR A STAY PENDING APPEAL

The Governor has moved for a stay pending appeal, and has been joined by his appointee, the Executive Director of the Mississippi Department of Human Services. The Attorney General, who is the State's chief legal officer and who defended H.B. 1523 in this Court, has concluded upon further review that the case should not be appealed, and he does not join in the appeal or the motion for a stay.

The following four factors are considered in evaluating such a motion.

> (1) whether the stay applicant has made a *strong* showing that he is likely to succeed on the merits; (2) whether the applicant will be *irreparably*

> injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v Holder, 556 U.S. 418, 426 (2009) (emphasis added, citation omitted). "The first two factors of the traditional standard are the most critical." *Id.* at 434. With respect to the first factor, "[i]t is not enough that the chance of success on the merits be 'better than negligible.'" *Id*. (citation omitted). Similarly, "simply showing some 'possibility of irreparable injury,' fails to satisfy the second factor." *Id.* at 434-35 (internal citation omitted).

The Merits

Standing Regarding the Establishment Clause

The Governor's motion claims that the Plaintiffs' allegation that they are offended by the endorsement of the three protected religious beliefs in H.B. 1523 is nothing more than "an unfulfilled desire to see other people penalized or punished by the State" and an "ideological grievance." Memo (doc. no. 47) at 3-4. That is simply not true. The Plaintiffs oppose the State's endorsement and provision of special protection for certain religious beliefs and its denial of unequal treatment in H.B. 1523. But that does not amount to a desire to "see other people penalized or punished" and is much more than an "ideological grievance." While the Governor's motion cites *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 485 (1982), this Court's opinion (doc. no. 39 at 23) and our reply brief in support of the preliminary injunction motion (doc. no. 33 at 2-3, 5-6), explain why *Valley Forge* does not apply and why standing exists here.

In concluding that standing exists in this case, this Court relied on *Croft v. Governor of Texas,* 562 F.3d 735, 746 (5th Cir. 2009). *See* Op. (doc. no. 47 at 22-23). There, the Fifth Circuit held that parents whose children observe a state-imposed moment of silence and are "offended" by it have standing to challenge it. Similarly, citizens who observe and are offended by their State's endorsement in a statute of a religious belief they do not share have just as much standing as those who observe a crèche or a moment of silence.

The Supreme Court's explanation of the Establishment Clause injury that flows from school-sponsored religious speech in *Santa Fe Independent School Dist. v. Doe* demonstrates that this is not simply an "ideological grievance."

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch* [*v. Donnelly*], 465 U.S. [666], at 688 [(1984)] (O'Connor, J., concurring).

530 U.S. 290, 309-310 (2000). The same is true for a statute, in which the "audience" for the ancillary message are not those attending a football game, but the residents of the state who are governed by the statute.

The Governor's motion argues there is no endorsement of religion in H.B. 1523, and cites the Supreme Court's decision in *Gillette v. United States,* 401 U.S. 437 (1971). Memo. (doc. no. 47) at 4. But the plaintiffs in *Gillette* had standing. The Governor's argument on this point really goes to the merits and therefore will be discussed later in this response.

Standing Regarding the Equal Protection Clause

This Court correctly held that the LGBT plaintiffs and Dr. Glisson have standing to raise an Equal Protection claim. That, of course, was enough for the Equal Protection claim to be resolved on the merits. But we respectfully contend that the other plaintiffs have standing as well. Either way, the Governor's motion for stay should be denied.

In *Heckler v. Matthews*, when discussing standing to bring an equal protection claim, the Supreme Court spoke of the "the right to equal treatment."

> [T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982), can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. Accordingly, as Justice Brandeis explained, when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

Heckler v. Matthews, 465 U.S. 728, 739-40 (1984) (footnotes omitted).

Heckler's equal protection language about "stigmatizing members of the disfavored group" as "less worthy participants in the political community" mirrors the language (quoted above) about the injury stemming from Establishment Clause violations contained in *Santa Fe Independent School Dist. v. Doe*: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the

political community.'" 530 U.S. at 309-10, *quoting Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Thus, the factors that confer Establishment Clause standing on the Plaintiffs also confer it for purposes of the Equal Protection Clause.

In *Romer v. Evans,* 517 U.S. 620, 632 (1997), the Supreme Court described the types of injuries that stemmed from Colorado's Amendment 2, which was the subject of that case, and also stem from H.B. 1523 and give all of the plaintiffs standing to challenge it. The Supreme Court said that the targeting of gay and lesbian citizens through the withdrawal and preclusion of certain legal protections "imposes a special disability upon those persons alone," adding that "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631. The Court added: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

> [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' *Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973).

Romer, 517 U.S. at 634-35 (emphasis in original).

As with Amendment 2 in Colorado, H.B. 1523 endorses religious beliefs and moral convictions that demonize same-sex couples who marry or might marry, unmarried people who engage in sexual relations, and transgender people. By granting special immunities against state action to those who hold those beliefs, H.B. 1523 precludes the

people in the demonized groups from seeking or obtaining the protection of the State in certain instances, thereby "impos[ing] a special disability upon those persons alone," and "forbidd[ing them] the safeguards that others enjoy or may seek without constraint." 517 U.S. at 631. As with Amendment 2, H.B. 1523 declares that "it shall be more difficult for one group of citizens than for all others to seek aid from the government," which is "itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. And as with Amendment 2, H.B. 1523 "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 635. *See also id.* (citation omitted) ("[A] bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

In addition to imposing special disabilities on the groups targeted by Section 2 of the bill, H.B. 1523 imposes special disabilities on those who subscribe to religious beliefs and moral convictions different from those endorsed in Section 2 of the bill. Safeguards are granted by H.B. 1523 to those who subscribe to the endorsed beliefs and convictions, but not to those who don't. The only way to obtain those safeguards and protections is to convert to the specific religious beliefs and moral convictions that are endorsed by H.B. 1523. For those who do not convert, "it shall be more difficult . . . to seek aid from the government" with respect to certain matters, which is "itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

In addition, by providing special protections only to those who subscribe to the endorsed beliefs, H.B. 1523 denies "equal treatment," as that term is used in *Heckler,* to all who hold different beliefs. And it also denies "equal treatment" to those demonized

by H.B. 1523 by precluding the State and its agencies and subdivisions from granting certain legal protections to them and thereby imposing a special disability that is born of animus.

For these reasons, the LGBT plaintiffs and Dr. Glisson in particular have standing, but the other plaintiffs do as well, inasmuch as none of the plaintiffs subscribe to the endorsed beliefs and they all are denied the special protection the State has bestowed on those who do. Finally, plaintiff Katherine Elizabeth Day has additional standing because, as explained in the amended complaint, she is a transgender person who lives in Jackson and she will be denied the protections of the new Jackson anti-discrimination ordinance if H.B. 1523 is implemented.

The Equal Protection Merits

In arguing that H.B. 1523 complies with the Equal Protection Clause, the Governor claims that the legitimate end served by H.B. 1523 is "[p]rotecting the citizens of Mississippi from being forced or pressured to act in a manner contrary to their deeply held religious or moral beliefs." Memo (doc. no. 47) at 4. The Mississippi Religious Freedom Restoration Act, Miss. Code Ann. § 11-61-1, may have rationally advanced that legitimate end, but H.B. 1523 clearly doesn't. First, it does not protect "the citizens of Mississippi." What protection it provides goes only to some of the state's citizens --- specifically those who subscribe to the three beliefs endorsed by the statute. As for the rest of the citizens who do not subscribe to those beliefs, they are essentially told "that they are outsiders, not full members of the political community," *Santa Fe Independent School Dist.*, 530 U.S. at 309-10 (citation omitted). Moreover, they are denied "the right

to equal treatment" by being stigmatized as "less worthy participants in the political community," *Heckler*, 465 U.S. at 739-40, and by being denied the special legal protections that are granted to those who share the preferred beliefs. This outright discrimination in favor of those who hold these particular religious beliefs, and against those who hold different beliefs, is a completely irrational way of furthering the State's alleged goal of "protecting the citizens of Mississippi."

And of course, the discrimination is even more pronounced for those who are condemned as sinners according to the religious beliefs that are given special protection under H.B. 1523: gays and lesbians who are married or want to marry, unmarried people who engage in sexual relations, and transgender people. Contrary to the Governor's claim that this Court's holding regarding animus in unsupported, Memo (doc. no. 47 at 5), H.B. 1523 clearly raises what *Romer* calls "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," 517 U.S. at 635, particularly given the absence of a rational relationship to a legitimate governmental objective.

The Establishment Clause Merits

The Governor contends that "[i]t is perfectly acceptable for the government to choose the conscientious scruples that it will protect and accommodate, while withholding those protections and accommodations from other deeply held beliefs." Memo (doc. no. 47) at 5. But that clearly is not true in all contexts and certainly not in the context of this case, as this Court has thoroughly explained in its opinion. *See* Op. (doc. no. 39) at 47-55.

In addition, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Supreme Court rejected the alleged secular purpose of "academic freedom" behind Louisiana's bill requiring the teaching of "creation science" because "[t]he Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life." *Id*. at 587. The Court also rejected the additional alleged secular purpose of "fairness" put forward by the State of Louisiana. As the Court explained, "the goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution" given that "[t]he Act forbids school boards to discriminate against anyone who 'chooses to be a creation-scientist' or to teach 'creationism,' but fails to protect those who choose to teach evolution or any other non-creation science theory, or who refuse to teach creation science." *Id*. at 588. The Court concluded that "the primary purpose of the Creationism Act is to endorse a particular religious doctrine," and therefore "the Act furthers religion in violation of the Establishment Clause." *Id*. at 594. Thus, the fact that the statute was not needed to preserve the rights of teachers, and that its purported protections applied only to certain people and not others, demonstrated that it was an unconstitutional endorsement of religion and not a permissible accommodation.[1]

[1] This Court correctly concluded that the new law should be analyzed under the principles of *Larson v. Valente*, 456 U.S. 228 (1982). But the Court also noted that H.B. 1523 would be unconstitutional under the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), inasmuch as it "was not motivated by any clearly secular purpose." Op. (doc. no. 39) at 53 n.43 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) and citing *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987)).

As in *Edwards*, and as this Court has pointed out, the State's claim of a secular motive in this case --- that HB 1523 was passed to "accommodate" religion --- is implausible given that Mississippi had already passed in 2014 its own Mississippi Religious Freedom Restoration Act (Miss. Code Ann. § 11-61-1) which is specifically designed to accommodate religious beliefs. The Mississippi RFRA, like other RFRAs around the country, does not endorse specific religious beliefs, but instead applies (in the language of the Mississippi RFRA statute) to all "exercise[s] of religion." By contrast, H.B. 1523 is similar to the statute held unconstitutional in *Edwards* in that it contains (to use the language of *Edwards*) a "discriminatory preference" which "forbids [the State] to discriminate against anyone" who subscribes to the three religious beliefs but "fails to protect those" who don't. *Edwards*, 482 U.S. at 588. As in *Edwards,* this indicates that the purpose of passing 1523 was to endorse those three specific beliefs and that any alleged purpose of accommodation is not credible.

The Governor argues that *Gillette v. United States*, 401 U.S. 437 (1971), which upheld the portion of federal law exempting from the military draft those who are opposed to all wars but not just a particular war, demonstrates that governments may pick and choose among the religious beliefs they seek to protect. Memo (doc. no. 47) at 4-5. But that is not an accurate assessment. In *Gillette*, the Court pointed out that "[a] virtually limitless variety of beliefs are subsumable under the rubric, 'objection to a particular war,'" and "the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events." 401 U.S. at 455-56. By contrast, said the Court, "the objector to all war --- to killing in all war --- has a claim

that is distinct enough and intense enough to justify special status, while the objector to a particular war does not." *Id*. at 460. In other words, the universal objection to the killing of others that is held by objectors to all wars is in a category by itself that distinguishes it from other objections and allows a specific exemption.

The same can be said for the statutes that protect certain health-care workers from participating in abortions based on their beliefs against abortion. If required to participate, they would be involved in what they believe is the killing of another. But there is no other universally lawful health-care practice in which a health-care worker could be forced to participate in what she believes is a killing of another. Similarly, other than the military draft, there is no government conscription program that would force a citizen who is universally opposed to killing to participate in the killing of another. These are situations that are in categories by themselves and therefore the government is not providing enhanced protection to those religious beliefs but not to other comparable yet differing beliefs. That is not the case with the protections provided by the Creationism Act in *Edwards* or H.B. 1523.

At any rate, irrespective of the analysis regarding the draft exemption and the protection to health care workers who oppose abortion, this case must be judged on the allegedly secular rationale used to justify H.B. 1523. The situation with H.B. 1523 is much closer to that in *Edwards* than to the draft exemption case, and the "discriminatory preference" (to use the language in *Edwards*) for adherents of the three religious beliefs set forth in 1523 helps to demonstrate that the law is not based on a secular purpose but instead designed to endorse those beliefs.

Severance

The Governor complains that "[t]here is no justification for this Court's refusal to sever Section 3(1)(a) from the rest of HB 1523." Memo (doc. no. 47) at 6. But the Court was never asked to sever that section. Even if it had been, severance would not have been appropriate given that all of the sections in the bill are dependent upon Section 2.

The Remaining Equities

In the opinion granting the preliminary injunction, this Court weighed the equities and concluded that they favor the grant of an injunction. As the Court's discussion indicates, they also favor the denial of a stay. In particular, the State has not demonstrated any harm that will result if this Court's preliminary injunction remains in place pending the appeal by the Governor and the Executive Director of MDHS.

Conclusion

The motion for a stay pending appeal should be denied.

July 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing pleading with the Clerk of the Court using the ECF system, which sent notification to all counsel who have entered their appearance in this matter.

This the 21st day of July, 2016.

s/ Robert B. McDuff
ROBERT B. MCDUFF