

**CASE NO. 16-60477**

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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

*PLAINTIFFS-APPELLEES,*

v.

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

*DEFENDANTS-APPELLANTS.*

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**CONSOLIDATED WITH CASE NO. 16-60478**

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR SUSAN HROSTOWSKI,

*PLAINTIFFS-APPELLEES,*

v.

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

*DEFENDANTS- APPELLANTS.*

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

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**BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT  
OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Campaign for Southern Equality (“CSE”), Plaintiff-Appellee. Campaign for Southern Equality is a North Carolina non-profit corporation with no parent corporation. No publicly held company owns ten percent or more of CSE’s stock.
2. Susan Hrostowski, Plaintiff-Appellee.
3. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for Plaintiffs-Appellees the CSE and Susan Hrostowski (the “CSE Plaintiffs-Appellees”) (Roberta A. Kaplan and Joshua D. Kaye representing).
4. Dale Carpenter, Counsel for the CSE Plaintiffs-Appellees.
5. Fishman Haygood, LLP, Counsel for the CSE Plaintiffs-Appellees (Alysson Mills representing).
6. 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-Appellees (the “Barber Plaintiffs-Appellees”).
7. McDuff & Byrd, Counsel for the Barber Plaintiffs-Appellees (Robert B. McDuff, Sibyl C. Bird, and Jacob W. Howard representing).
8. Mississippi Center for Justice, Counsel for the Barber Plaintiffs-Appellees (Beth L. Orlansky, John Jopling, Charles O. Lee, and Reilly Morse representing).
9. Lambda Legal, Counsel for the Barber Plaintiffs-Appellees (Susan Sommer and Elizabeth Littrell representing).
10. Phil Bryant, in his official capacity as the Governor of the State of Mississippi, Defendant-Appellant.

11. John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services, Defendant-Appellant.
12. James Otis Law Group, LLC, Counsel for Defendant-Appellants Phil Bryant and John Davis (Jonathan F. Mitchell and D. John Sauer representing).
13. Alliance Defending Freedom, Counsel for Defendant-Appellants Phil Bryant and John Davis (Kevin H. Theriot representing).
14. Drew L. Snyder, Counsel for Defendant-Appellant Phil Bryant.
15. Office of the Attorney General for the State of Mississippi, Counsel for Defendant-Appellant John Davis (Tommy D. Goodwin, Paul E. Barnes, and Douglas T. Miracle representing).
16. *Amici Curiae* Christian Legal Society & National Association of Evangelicals (“CLS & NAE”).
17. Christian Legal Society, Center for Law & Religious Freedom, Counsel for *Amici Curiae* CLS & NAE (Kimberlee Wood Colby)
18. Carl Esbeck, Counsel for *Amici Curiae* CLS & NAE.
18. Ottsen, Leggat & Belz, L.C., Counsel for *Amici Curiae* CLS & NAE (Timothy Belz & Matthew Belz representing).
19. *Amicus Curiae* Foundation for Moral Law (John Eidsmoe representing).
20. *Amici Curiae* the States of Texas, Arkansas, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, and Utah, and the Governor of Maine (Ken Paxton, Jeffrey C. Mateer, Scott A. Keller, J. Campbell Barker, Michael P. Murphy, Leslie Rutledge, Jeff Landry, Douglas J. Peterson, Adam Paul Laxalt, E. Scott Pruitt, Alan Wilson, and Sean D. Reyes representing).
21. *Amici Curiae* Church-State Scholars Caroline Mala Corbin, Ira C. Lupu, Micah J. Schwartzman, Richard C. Schragger, Elizabeth Sepper, Nelson Tebbe, and Robert W. Tuttle are individuals who have no parent corporation or any publicly held corporation that owns 10% or more of stock.
22. Robbins, Russell, Englert, Oreck, Untereiner & Sauber, LLP, Counsel for *Amici Curiae* Church-State Scholars (Joshua Matz and Roy T. Englert, Jr. representing).

Dated: December 22, 2016

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## TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF AUTHORITIES .....	vi
IDENTITY AND INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	5
I. RELIGIOUS ACCOMMODATIONS MUST ADHERE TO THE LIMITATIONS OF THE ESTABLISHMENT CLAUSE.....	5
II. HB 1523 FACIALLY VIOLATES THE ESTABLISHMENT CLAUSE.....	7
A. HB 1523 Was Enacted With A Prohibited, Religious Purpose .....	8
B. HB 1523 Endorses The Enumerated Beliefs And Disparages Those Who Do Not Adhere To Them.....	11
C. HB 1523 Discriminates On The Basis Of Belief And Denomination .....	15
D. HB 1523 Is Unconstitutional Under <i>Thornton</i> And <i>Cutter</i> .....	17
1. <i>The Rule Against Third Party Harms</i> .....	18
2. <i>HB 1523 Inflicts Substantial Third Party Harms</i> .....	21
3. <i>Further Evidence Of Forbidden Endorsement</i> .....	23
III. HB 1523 IS UNLIKE THE ACCOMMODATIONS CITED BY APPELLANTS AND UPHOLDING IT WOULD POSE A SIGNIFICANT THREAT TO RELIGIOUS FREEDOM.....	26
IV. FACIAL INVALIDATION OF HB 1523 IS REQUIRED .....	28
CONCLUSION .....	30

APPENDIX.....	31
CERTIFICATE OF SERVICE .....	32
CERTIFICATE OF COMPLIANCE .....	33

## TABLE OF AUTHORITIES

	Pages
<b>Cases</b>	
<i>Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet</i> , 512 U.S. 687 (1994) .....	<i>passim</i>
<i>City of Los Angeles, Calif. v. Patel</i> , 135 S. Ct. 2443 (2015) .....	29
<i>Corp. of the Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987) .....	10, 20
<i>Croft v. Perry</i> , 624 F.3d 157 (5th Cir. 2010) .....	12
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005) .....	<i>passim</i>
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987) .....	16
<i>Employment Div., Dep’t of Human Res. of Oregon v. Smith</i> , 494 U.S. 872 (1990) .....	5, 6
<i>Estate of Thornton v. Caldor, Inc.</i> , 472 U.S. 703 (1985) .....	<i>passim</i>
<i>Gillette v. United States</i> , 401 U.S. 437 (1971) .....	5, 21
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. EEOC</i> , 132 S. Ct. 694 (2012) .....	17
<i>Larkin v. Grendel’s Den, Inc.</i> , 459 U.S. 116 (1982) .....	7
<i>Larson v. Valente</i> , 456 U.S. 228 (1982) .....	3, 16

<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) .....	6
<i>Loughrin v. United States</i> , 134 S. Ct. 2384 (2014) .....	14
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) .....	12
<i>Marx v. Gen. Revenue Corp.</i> , 133 S. Ct. 1166 (2013) .....	13
<i>McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.</i> , 545 U.S. 844 (2005) .....	<i>passim</i>
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015) .....	9
<i>Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church</i> , 393 U.S. 440 (1969) .....	17
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963) .....	5
<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989) .....	7, 12, 16
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961) .....	16
<i>Town of Greece v. Galloway</i> , 134 S. Ct. at 1811 (2014).....	15
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977) .....	20, 25
<i>Turpen v. Missouri-Kansas-Texas R. Co.</i> , 736 F.2d 1022 (5th Cir. 1984) .....	20, 25
<i>United States v. Lee</i> , 455 U.S. 252 (1982) .....	20



<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985) .....	2, 7, 10
---	----------

## Statutes

42 U.S.C. § 2000cc-1(a)(1).....	18
---------------------------------	----

## Other Authorities

Richard H. Fallon, Jr., <i>Fact and Fiction About Facial Challenges</i> , 99 Cal. L. Rev. 915 (2011).....	28, 29
--	--------

Frederick M. Gedicks & Rebecca G. Van Tassell, <i>RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion</i> , 49 Harv. C.R.-C.L. L. Rev. 343 (2014).....	19
---	----

Ira Lupu and Robert Tuttle, <i>Secular Government, Religious People</i> (2014) .....	20, 21
---	--------

James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> ¶ 4 (1785) .....	17
---	----

Micah Schwartzman, Richard Schragger, and Nelson Tebbe, <i>Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter</i> , Balkinization (Dec. 09, 2013) .....	20
---	----

Nelson Tebbe, Micah Schwartzman & Richard Schragger, <i>How Much May Religious Accommodations Burden Others?</i> , available on SSRN (July 19, 2016).....	23
--	----

Nelson Tebbe, Micah Schwartzman & Richard Schragger, <i>When Do Religious Accommodations Burden Others?</i> , available on SSRN (July 19, 2016).....	21
---	----

Robin Fretwell Wilson, <i>Laws Should Show “Malice Toward None, Charity Toward All,”</i> Hattiesburg American (April 6, 2016) .....	26
---	----

## **IDENTITY AND INTEREST OF *AMICI CURIAE***

Amici are scholars with wide-ranging expertise in church-state issues arising under the First Amendment. They submit this brief to warn against the significant religious freedom dangers that would be posed by *upholding* HB 1523.

A full list of amici is attached as an appendix to this brief.<sup>1</sup>

## **SUMMARY OF ARGUMENT**

The United States has a long tradition of religious accommodation. When laws impose burdens on the free exercise of religion, government often provides accommodations out of secular respect for liberty of conscience. There are, however, well-established limits on the accommodation of religion. Under the Establishment Clause, government may not structure accommodations in ways that have the purpose of promoting religious beliefs, that endorse or discriminate against religious beliefs, or that shift unreasonable hardship to other citizens. *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 876 (2005). These limitations safeguard religious liberty for Americans of all faiths, denominations, and spiritual persuasions.

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<sup>1</sup> All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party and no party's counsel contributed money that was intended to fund preparing or submitting this brief. Nor has any other person made a monetary contribution intended to fund preparing or submitting this brief.

Mississippi’s HB 1523—which singles out for special treatment three specified beliefs (the “Enumerated Beliefs”)—cannot be squared with the Establishment Clause, for four reasons.

First, it was enacted with the forbidden purpose of promoting particular religious creeds, as evidenced by Appellants’ own contradictory statements. Even as Appellants characterize HB 1523 as a response to legal “assaults” on opponents of same-sex marriage, they emphatically deny that HB 1523 has legal effect as to *any* of the Enumerated Beliefs (and say nothing about its provisions regarding non-marital sexual relations and gender identity). But when a State enacts legislation affording special treatment to three contested religious beliefs, and does so on the explicit premise that those beliefs face no actual burdens, it cannot be concluded that the law is based in genuine free exercise concerns. Rather, the Supreme Court has inferred that such legislation has the purpose of announcing State support for the selected religious beliefs. *See Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

Second, HB 1523 endorses the Enumerated Beliefs—and disparages those who do not share them. *See McCreary*, 545 U.S. at 860. HB 1523 does not attempt evenhandedly to protect holders of all views on marriage, sexuality, and gender against burdensome regulation. Instead, it singles out specific religious *viewpoints* on these subjects and treats them as superior to all contrary beliefs. The law thus creates insiders and outsiders, whose rights vary significantly depending

on whether they agree with Mississippi's controversial creedal statements. Moreover, HB 1523 provides that the Enumerated Beliefs *always* and *automatically* prevail over any other free exercise interest that may be affected, including interests based in different religious beliefs about the *exact same* subjects of marriage, sexuality, and gender. HB 1523 thus tells every single citizen of Mississippi that adherents of the Enumerated Beliefs rank above all others—and that non-adherents are unworthy of equal treatment.

Third, HB 1523 violates bedrock principles forbidding discrimination on the basis of religious belief and denomination. *See Larson v. Valente*, 456 U.S. 228 (1982). Not only does it discriminate in favor of the Enumerated Beliefs and against non-adherents, but it also places the State's imprimatur on a set of religious beliefs embraced by some denominations, denied by others, and actively debated by many. Such governmental favoritism along religious lines is prohibited.

Fourth, and finally, HB 1523 is invalid under *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), and *Cutter v. Wilkinson*, 544 U.S. at 720, which forbid accommodations that shift unreasonable hardship to third parties. HB 1523 imposes serious harm on LGBT persons. Yet this unique law privileges the Enumerated Beliefs over every conceivable third-party interest—even though it operates across countless societal contexts and will shift burdens to third parties in ways that infringe on fundamental rights. Given HB 1523's uncompromising and

categorical character, it is *impossible* that Mississippi adhered to *Cutter*’s directive to “take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” 544 U.S. at 720 (citing *Thornton*, 472 U.S. at 703).

In enacting HB 1523, Mississippi has purposefully favored a set of religious beliefs about controversial questions of marriage, sexuality, and gender. The law itself, by virtue of its unprecedented structure, endorses the Enumerated Beliefs, disparages and discriminates against those with different religious truths, and shifts substantial burdens to LGBT citizens and their families. HB 1523 thus declares to every citizen of Mississippi, and in particular to faith leaders and LGBT persons, that the Enumerated Beliefs are exalted above all others in the eyes of the State.

Upholding HB 1523 would pose a grave threat to religious freedom. Apart from HB 1523’s own harms, which are considerable, a decision allowing this kind of legislation would open the door to hundreds of laws just like it: statutes that identify specific propositions of religious belief, confer comprehensive protections *only* on persons who hold a particular viewpoint on those disputed religious issues, and require that every imaginable contrary interest (including other religious free exercise interests) automatically give way in the event of a conflict. If this Court blesses HB 1523, it will invite many other religious groups—of all doctrinal and political persuasions—to use whatever political clout they can muster to write their own core tenets into law, unleashing forces of religious conflict and suppression.

The only proper remedy in this case, required by precedent and necessary to preserve religious freedom, is facial invalidation of HB 1523.

## **ARGUMENT**

### **I. RELIGIOUS ACCOMMODATIONS MUST ADHERE TO THE LIMITATIONS OF THE ESTABLISHMENT CLAUSE**

Consistent with free exercise values, there is a robust tradition of religious accommodation in this Nation. In our pluralistic society, accommodation laws recognize the vital role of religion in many people’s lives and help to “avoid[] unnecessary clashes with the dictates of conscience.” *Gillette v. United States*, 401 U.S. 437, 453 (1971). Religious exemptions are thus widespread in American law.

But it is beyond question that statutes purporting to accommodate religion must comply with the Establishment Clause. The Supreme Court has so held, explicitly and repeatedly. This makes it all the more remarkable that Appellants pointedly decline to acknowledge *any* limitations on laws characterized as accommodations—a position that ignores first principles of the Religion Clauses.

In the mid-twentieth century, the Supreme Court read the Free Exercise Clause as mandating accommodation whenever government imposed substantial burdens on religious practice and doing so did not serve a compelling interest. *See Sherbert v. Verner*, 374 U.S. 398 (1963). However, the Court departed from that view in *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, which held that burdens resulting from neutral laws of general applicability are not cognizable

under the Free Exercise Clause. 494 U.S. 872 (1990). After *Smith*, nearly all accommodations are *permissive*: they accommodate religious objections to a greater extent than is required by the Constitution.

Because they single out religion for special treatment, however, permissive accommodations may evoke tension between free exercise and non-establishment principles. See *Cutter*, 544 U.S. at 713. Seeking a middle ground, the Supreme Court has held that “in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). Thus, government is not barred by the Establishment Clause from accommodating religious practice, and may generally “accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.” *Cutter*, 544 U.S. at 714.

However, contrary to Appellants’ suggestion, accommodations *do not* get a blanket pass from scrutiny. Far from it: “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Because “[a]ny statute pertaining to religion can be viewed as an ‘accommodation’ of free exercise rights,” complete “deference to all legislation

that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.” *Wallace*, 472 U.S. at 82 (O’Connor, J., concurring).

Thus, an accommodation cannot stand if it “devolve[s] into ‘an unlawful fostering of religion.’” *Cutter*, 544 U.S. at 714 (citation omitted). This rule has bite. The Supreme Court has repeatedly tested accommodations for compliance with the Establishment Clause, invalidating numerous laws on this basis. *See, e.g., Kiryas Joel*, 512 U.S. at 706; *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (plurality opinion); *Thornton*, 472 U.S. at 708-10; *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982).

## **II. HB 1523 FACIALLY VIOLATES THE ESTABLISHMENT CLAUSE**

To safeguard religious freedom for all Americans, the Establishment Clause prohibits government from adopting as its own any religion or religious belief. *See McCreary*, 545 U.S. at 876. While religion plays a vital role in public life, the State may never install itself as the arbiter of correct religion. *Id.* at 860. In reviewing laws that purport to accommodate religious practices, courts are required by the First Amendment to police the all-important line between laws that respect free exercise values and laws that turn government into a “mouthpiece for competing religious ideas.” *McCreary*, 545 U.S. at 883.

This rule sometimes requires close calls, but the unconstitutionality of HB 1523 is not one of them. Despite Appellants’ effort to pass it off as an ordinary



accommodation, HB 1523 is anything but. It is anomalous in scope and structure, and evokes the most fundamental Establishment Clause concerns. Taken together, HB 1523’s unusual features result in four distinct constitutional violations: it (1) has a religious purpose, (2) endorses the Enumerated Beliefs, (3) discriminates on the basis of belief and denomination, and (4) inflicts significant harm on third parties. In these ways, HB 1523 is a true outlier—a sword against non-adherents, rather than a shield for the faithful. It cannot stand under the Constitution.

**A. HB 1523 Was Enacted With A Prohibited, Religious Purpose**

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

Here, Appellants describe HB 1523 as Mississippi’s response to actions by “state and local governments” against “devout Christians” and others who “decline

to participate in [same-sex marriage] ceremonies.” Br. 5. In that telling, the State enacted HB 1523 with the valid, secular purpose of respecting free exercise values that may be affected by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Even on its own terms, there is a striking misalignment between this account of HB 1523’s purpose and the law’s structure. Appellants offer no explanation for why HB 1523 addresses religious beliefs about non-marital sex (including sex between opposite-sex partners), or why it covers beliefs about gender. Nor does Appellants’ explanation of HB 1523 account for the many, unprecedented features of the law—described *infra*—that set it apart from ordinary accommodations.

In any event, after describing Mississippi’s exclusive purpose as lifting free exercise burdens relating to same-sex marriage, Appellants immediately pivot and deny that any such burdens actually exist. For instance:

Even before HB 1523, it was legal in Mississippi for individuals, businesses, and religious organizations to decline to participate in same-sex marriages and the other activities mentioned in HB 1523—and it would have remained legal even if HB 1523 had never been enacted.

Br. 19. And again:

[Appellants] have no intention to penalize or discriminate against the persons or entities protected by HB 1523—even if HB 1523 is enjoined—because no other provision of state law authorizes or requires them to do so.

Br. 20. Appellants thus insist, repeatedly, that there is no burden on free exercise under state law that HB 1523 in fact lifts. *See* Br. 19-29.

Government may certainly pass laws with the purpose of showing respect for free exercise values. But when a state passes a landmark law singling out specific religious beliefs for special treatment, and then swears that the law lifts no burden on the exercise of those beliefs, it cannot be said that the State is pursuing a general concern for religious freedom. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (“[T]o perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action.”). Rather, in that exceptional circumstance, it must be inferred that the State’s purpose is to speak on matters of faith.

Indeed, the Supreme Court invoked similar reasoning to infer impermissible purpose in *Wallace v. Jaffree*, which struck down a law providing for a minute of “meditation or voluntary prayer” during the school day. 472 U.S. at 58-59. When that statute was passed, state law *already* provided for a silent minute of personal meditation, and school prayer had been deemed unconstitutional. *See id.* Given that the statute did not authorize or prohibit any new conduct—and thus had no practical effect—the Court inferred that it had been enacted with the purpose of sending a message that the State supports religious prayer. *See id.* at 59.

That logic applies here. Appellants describe HB 1523 as accommodating objectors to same-sex marriage, but say nothing about the favored status that HB

1523 bestows on religious views that condemn non-marital sexual relations and transgender rights. And then Appellants flatly deny that HB 1523 lifts an actual, existing burden on persons who hold *any* of the Enumerated Beliefs, including the view that marriage is between a man and a woman. If we take Appellants at their word, Mississippi has written three controversial creedal statements into law and conferred significant benefits on anyone who agrees with them—and has done so on the premise that HB 1523 does not achieve any actual free exercise objective not already achieved by existing law.<sup>2</sup> Especially when coupled with a legislative record rife with religious statements by HB 1523’s sponsors, Appellants’ convoluted position supports “a commonsense conclusion that a religious objective permeated” the enactment of HB 1523. *McCreary*, 545 U.S. at 863.<sup>3</sup>

**B. HB 1523 Endorses The Enumerated Beliefs And Disparages Those Who Do Not Adhere To Them**

Mississippi’s law endorses one set of religious doctrines over all others. Yet this Court has held that “the government runs afoul of the Establishment Clause

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<sup>2</sup> Appellants err in characterizing HB 1523 as without effect. But that error is irrelevant here; a purpose inquiry looks only to the State’s actual intent.

<sup>3</sup> If Mississippi did not see any existing burdens on religion, but instead aimed HB 1523 at speculative and undefined burdens that might arise at some unknown point, this law is the statutory equivalent of using a high-powered jackhammer to drive multiple nails into a structure that does not yet exist, but might someday. Such massive disproportionality strongly supports the inference that Mississippi acted with the primary purpose of announcing its support for the Enumerated Beliefs.

when it endorses a particular religious belief, because ‘endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.’” *Croft v. Perry*, 624 F.3d 157, 169 (5th Cir. 2010) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)). Irrespective of its actual purpose, government may not convey “a message of endorsement or disapproval,” which may occur when it aids “one religion,” aids “all religions,” or favors “one religion over another.” *Id.* (citation omitted).

HB 1523 conflicts with this rule. Mississippi did not simply address the subjects of marriage, sexuality, and gender, and attempt evenhandedly to accommodate religious beliefs and practices. Rather, it singled out only specific religious *viewpoints* on these subjects as worthy of legal sanctuary. Those with different religious views on the very same questions receive *no* protection, despite the rule that a “scheme of exemptions” must not have the “effect of sponsoring certain religious tenets.” *Tex. Monthly*, 489 U.S. at 16-17 (plurality opinion).

Thus, under HB 1523, a state employee cannot be fired for speech based in religious *opposition* to same-sex marriage, but is afforded no protection against termination for religious speech *supporting* it. State-funded programs cannot lose money for religious objections to aiding transgendered persons, but can lose funds for religiously motivated transgender outreach. And so on. HB 1523 offers shields

against “discrimination” by Mississippi, but *only* to those who hold three State-selected views about the religious disputes in question.

HB 1523 thus creates classes—drawn *explicitly* by reference to religious belief—of insiders and outsiders. Those who hold the Enumerated Beliefs receive extraordinary legal benefits, while those with a different viewpoint on the *exact same* questions of religious truth receive nothing. Henceforth, all Mississippians will know that their views about HB 1523’s creedal statements will dictate what legal protections, if any, attach to their speech and conduct. A clear message of endorsement necessarily emerges from HB 1523’s extraordinary privileging of those who hold preferred religious views.

This constitutional vice is exacerbated by three of HB 1523’s most striking features. First, unlike ordinary accommodations, HB 1523 does not require that a burden on religion actually exist. Rather, it covers all speech or conduct “based upon *or in a manner consistent with*” the Enumerated Beliefs. HB 1523 § 3 (emphasis added). Thus, any person who claims that his or her conduct was “consistent” with the Enumerated Beliefs receives complete protection—even if his or her conduct was not motivated by a personally held religious belief.<sup>4</sup> For

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<sup>4</sup> The drafters of HB 1523 plainly ascribed different meaning to “based upon” and “in a manner consistent with.” Courts presume against surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). Further, HB 1523 §3(4) refers

example, if a mixed-race, same-sex couple wanted to celebrate their wedding at a restaurant, and the owner refused to host them *exclusively* because he disapproves of interracial marriage, HB 1523 (by its plain text) would nonetheless completely exempt the owner’s conduct from Mississippi anti-discrimination law. After all, in refusing to “provide services . . . for a purpose related to the solemnization, formation, celebration or recognition” of a same-sex marriage, the owner has acted “in a manner *consistent with*” one of the Enumerated Beliefs. HB 1523 § 3(1)(a).

Second, HB 1523 is *automatic*—it does not allow for any consideration of governmental or private interests, including interests in protecting those adversely affected by a religious actor’s practices. Unlike federal and state Religious Freedom Restoration Acts (RFRA), it contains no balancing provisions, even though its breadth of regulatory effect is *vastly* broader than ordinary state and local accommodations (including all of those referenced by Appellants).

Finally, HB 1523 is exempt from Mississippi’s RFRA. *See* § 10. Thus, whenever accommodating the Enumerated Beliefs results in a burden on another person’s religious practice, the Enumerated Beliefs *always* prevail. In this way, HB 1523 writes into law the State’s privileging of the Enumerated Beliefs over

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*only* to conduct “based upon” the Enumerated Beliefs, suggesting deliberate textual choices. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

every other *religious* interest in Mississippi, even if the affected interest is “based upon” a different religious view on issues of marriage, sexuality, and gender.

This is an endorsement of the Enumerated Beliefs, plain and simple. Indeed, it is difficult to imagine a clearer endorsement of specific propositions of religious truth: the State picks three intensely disputed subjects; writes into law its own creedal statements; protects only a *single* religious viewpoint on those subjects; extends that protection to people who do not even hold the favored religious belief; and requires that every other interest conceivably affected (including religious views on the same subjects) *always* and *automatically* lose in the event of a conflict. This is entirely unlike ordinary accommodations. And, by unavoidable implication, HB 1523 denigrates all other religious beliefs relating to marriage, sexuality, and gender as unworthy of equal treatment. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (holding government may not “denigrate nonbelievers or religious minorities”).<sup>5</sup>

### **C. HB 1523 Discriminates On The Basis Of Belief And Denomination**

The discriminatory nature of HB 1523 also renders the law invalid. Time and again, the Supreme Court has identified discrimination among sects, denominations, and beliefs as a prime evil against which the Establishment Clause

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<sup>5</sup> It is also proper to consider these objective features of the law in assessing the State’s *purpose*. It is hard to see how a secular purpose of respecting religious freedom would produce a law discriminating *within* and *against* religious views.



is aimed. *See Kiryas Joel*, 512 U.S. at 705; *Thornton*, 472 U.S. at 708-10; *Larson*, 456 U.S. at 244; *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). And it has applied this principle to laws meant to lift burdens on religion. For example, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales tax exemption that Texas provided only to religious periodicals. *See* 489 U.S. at 16 (plurality opinion). As the Court explained, if Texas sought to promote discussion of profound questions, its exemption “could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity,” without violating the Establishment Clause. *Id.*

But HB 1523 engages in even more egregious religious discrimination. On its face, it discriminates against those who do not hold the Enumerated Beliefs. *See Edwards v. Aguillard*, 482 U.S. 578, 588 (1987) (condemning Creationism Act for protecting only those who choose to teach creationism, but failing to protect those who teach other theories). Equally fatal, HB 1523 places the State’s imprimatur on a set of orthodoxies shared by some Christians, Jews, and Muslims (among others), thereby favoring those orthodoxies against contrary views shared by many other Christians, Jews, and Muslims (among others).

Such governmental favoritism collides with the Establishment Clause. The State may not throw its weight, in laws that speak explicitly of religious belief, behind one side in a matter of intra-denominational religious controversy, giving

adherents of favored views the upper hand. The Constitution bars governmental intervention into purely ecclesiastical questions. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704 (2012) (explaining that precedent “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969).

Even if HB 1523 does lift burdens on religious liberty, the State may not accommodate religion in this discriminatory way. *See Kiryas Joel*, 512 U.S. at 706 (“[A]ccommodation is not a principle without limits.”).

#### **D. HB 1523 Is Unconstitutional Under *Thornton* And *Cutter***

An original purpose of the Establishment Clause was to prohibit government from requiring one person to support another’s religion. *See, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785). That purpose is now reflected in precedents barring government from imposing unreasonable hardship on third parties in order to accommodate religion. HB 1523 cannot be squared with this requirement.

### *1. The Rule Against Third Party Harms*

The leading case is *Thornton*, which struck down a statute that granted every employee an absolute right to be free from work on his or her Sabbath—even when doing so “would cause the employer substantial economic burdens or when the employer’s compliance would require the imposition of significant burdens on other employees.” 472 U.S. at 709-710. Noting the absence of any exceptions, the Supreme Court observed that “religious concerns automatically control over all secular interests” in the “absolute and unqualified” statute. *Id.* The Court then held that this “unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . . ‘The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.’” *Id.* at 710. *Thornton* thus holds that an accommodation cannot survive Establishment Clause review if it shifts unreasonable hardship to third parties.

In *Cutter v. Wilkinson*, the Supreme Court unanimously affirmed this interpretation of *Thornton*. Rejecting a facial attack on the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1), the Court held that “an accommodation *must* be measured so that it does not override other significant interests.” *Cutter*, 544 U.S. at 722 (emphasis added). Applying that rule, the Court held that RLUIPA “does not founder on shoals our prior

decisions have identified”—but only because, “[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” 544 U.S. at 720 (citing *Thornton*, 472 U.S. at 703).<sup>6</sup>

Reading *Thornton* and *Cutter* together, accommodations may not shift unreasonable hardship to third parties. If an accommodation will do so, it must provide a means by which the government can avoid inflicting third-party harms, such as delegating to courts the power to limit accommodations based on a “compelling interest” test. Otherwise, the accommodation is unconstitutional.

The third-party-harm rule has deep roots: “Ardent accommodationists, strict separationists, and many in between agree that the Establishment Clause precludes permissive accommodations that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently.” Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343, 361-62 (2014).

Thus, even before *Smith*, the Supreme Court while interpreting the Free Exercise Clause regularly considered whether an accommodation would impose

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<sup>6</sup> Appellants argue that there cannot be an Establishment Clause limit on “religious accommodations that impose costs or burdens on third parties,” because that would “invalidate most if not all of RLUIPA.” Br. 50. But *Cutter* articulated that very doctrine and upheld RLUIPA precisely because—unlike HB 1523—it *does* require consideration of burdens on third parties. 544 U.S. at 720.

costs on third parties. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant employer an exemption from payroll taxes because, among other reasons, that would burden employees). And this principle was central to *Trans World Airlines, Inc. v. Hardison*, which interpreted Title VII of the Civil Rights Act of 1964 to require accommodation of religious practices *only* when resulting burdens on employers and other employees are *de minimis*. 432 U.S. 63, 85 (1977). In fact, consistent with the Supreme Court’s later rulings in *Thornton* and *Cutter*, this Court has held that *Hardison* was based in “the prohibitions of the Establishment Clause.” *Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984).<sup>7</sup>

These cases rest on two fundamental rationales. First, forcing non-adherents to pay the price of accommodating adherents is the regulatory equivalent of taxing one group to support another’s faith. And second, an unyielding prioritization of

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<sup>7</sup> The Supreme Court has held that that the nonprofit arm of a church may require its employees to adhere to its religious standards, despite resulting third-party burdens. *See Amos*, 483 U.S. at 336. That holding permits religious entities, like comparable value-oriented secular entities, to hire only those committed to their cause. *See Ira Lupu and Robert Tuttle, Secular Government, Religious People* 218 (2014). It might also be understood as a necessary accommodation in the shadow of the ministerial exception and pre-*Smith* law of free exercise, or as grounded in special concern for churches and religiously affiliated nonprofits. *See* Micah Schwartzman, Richard Schragger, and Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, Balkinization (Dec. 09, 2013). *Cutter*, decided after *Amos*, clarified that *Thornton* states the law outside that context.

religious accommodation over every possible contrary interest can function to *endorse*, rather than merely *accommodate*, religious belief. See Ira Lupu and Robert Tuttle, *Secular Government, Religious People* 234-235 (2014).

Appellants assert that *Gillette*, decided in 1971, forecloses any argument based in third-party harms. Br. 49. But that position utterly fails to account for *Thornton*, *Hardison*, and *Cutter*. As a result, Appellants' unbounded reading of *Gillette* as permitting any third-party harms, of any kind, is inconsistent with numerous Supreme Court cases—and must be rejected.<sup>8</sup>

## 2. HB 1523 Inflicts Substantial Third Party Harms

Together, two features of HB 1523 violate *Thornton* and *Cutter*. First, whereas most accommodations define with specificity the *conduct* they address, HB 1523 works very differently. It starts by identifying three broadly stated *beliefs* about marriage, sexuality, and gender. Then, rather than address particular

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<sup>8</sup> In contrast, the interpretation of *Thornton* and *Cutter* set forth herein is consistent with *Gillette*. Accommodations do not implicate *Thornton* and *Cutter* when they do not impose unreasonable hardship on third parties, or when their effect is diffused across the population. See Lupu & Tuttle, *Secular Government* at 232-237; Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, available on SSRN (July 19, 2016). And while accommodation of conscientious objectors shifts the burden of military service, that burden is shifted to a large part of the population and is borne by society at large. In addition, there are considerations unique to the national security and wartime context that justified the exemption—including “the hopelessness of converting a sincere conscientious objector into an effective fighting man,” *Gillette*, 401 U.S. at 453.

conduct—*e.g.*, performing an abortion or serving in the army—it excludes from any otherwise-applicable laws a vast and vaguely defined universe of actions that may follow from those beliefs. HB 1523 thus operates across every imaginable social context, ranging from education and healthcare to family life and commerce. As a result, this law shifts the burdens of accommodating the Enumerated Beliefs to third parties (especially LGBT persons) in many different ways. And some of this burden shifting will result in deprivations of fundamental rights, grievous material harm, and interference with matters of profound personal importance.

Second, like the law invalidated in *Thornton*, HB 1523 is “absolute and unqualified”: it contains no provisions taking into consideration the interests of third parties or permitting courts to adjudicate conflicts between the interests of religious believers and those who would be burdened by granting particular exemptions. 472 U.S. at 710. No matter the stakes—indeed, even in the event of a conflict with *other* free exercise claims identifying substantial burdens on religious practice—the Enumerated Beliefs receive an “unyielding weighting.” *Id.*

Considering these unusual features of HB 1523, there can be no doubt that it will shift significant burdens to LGBT persons (and others), who will be forced to bear these costs as the price of accommodating adherents of the Enumerated Beliefs. The Framers opposed forcing non-adherents to pay a small tax in order to support others’ beliefs. But Mississippi has gone further, forcing a specified subset

of its citizens to surrender fundamental rights in order to benefit another subset of its citizens, defined exclusively by reference to their views about the State's favored religious beliefs. *Thornton* forbids this.<sup>9</sup>

HB 1523 is thus invalid because it shifts substantial harm to a discrete class of third parties as the price of accommodating the Enumerated Beliefs. See *Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring in the judgment) (“There is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.” (citing *Thornton*, 472 U.S. at 709-10)).

### 3. Further Evidence Of Forbidden Endorsement

*Cutter* and *Thornton* are also applicable for a different reason: they provide still another basis for concluding that HB 1523 *endorses* the Enumerated Beliefs. Just consider: HB 1523 will shift burdens to third parties in innumerable ways, in innumerable contexts. But Mississippi has flatly decided, *ex ante*, that everywhere and always the Enumerated Beliefs must prevail over any conceivable third-party

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<sup>9</sup> To be sure, there are some other accommodation laws that do not explicitly account for affected third-party interests. But such laws—including those referenced by Appellants and those known to *amici*—are unlike HB 1523. As scholars who have studied those laws, we can attest that the vast majority of them shift *de minimis*, diffuse, or no burdens to third parties, and thus are consistent with *Thornton* and *Cutter*. See Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, available on SSRN (July 19, 2016); Gedicks & Tassell, *RFRA Exemptions*, at 356-372.



interest, including other free exercise interests. In these respects, HB 1523’s exceptional statutory structure conveys a potent message of endorsement.

As *Cutter* made clear, the Constitution requires that any accommodation be “measured so that it does not override other significant interests.” 544 U.S. at 710. That is an easy requirement to meet. The vast majority of accommodation laws protect particular, narrowly defined conduct (*e.g.*, allowing uniformed officers to wear religiously prescribed clothing). In crafting such laws, the legislature can anticipate potential conflicts between the religious objector’s free exercise interest and other third party interests, and can decide whether to create exceptions. If it does so in a proper manner, the law is “measured” under *Cutter* and is therefore constitutional. *Cutter*, 544 U.S. at 710. But precisely the opposite is true for laws with broad scope of application, like RLUIPA, Title VII, and HB 1523. When a law will apply in thousands of contexts, imposing a diverse array of third-party burdens, it is *impossible* for the legislature to account in advance for third party interests—as it is constitutionally required to do. That is, the legislature cannot possibly ensure the law is “measured so that it does not override other significant interests.” *Cutter*, 544 U.S. at 710. The most the legislature can do is provide a mechanism for consideration of those interests as particular situations arise.

When the legislature nonetheless *refuses* to provide any means for future consideration of third-party harms, the result is a law wherein “religious concerns

automatically control over all secular interests.” *Thornton*, 472 U.S. at 709. This is why the Supreme Court, in *Hardison*, interpreted Title VII’s protections of religion to avoid shifting material burdens to third parties. 432 U.S. at 85. Indeed, as Justice O’Connor explained in *Thornton*, the limits imposed in *Hardison* are crucial to understanding why Title VII is constitutional: “Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs . . . I believe an objective observer would perceive it as an anti-discrimination law rather than [as] an endorsement of religion or a particular religious practice.” 472 U.S. at 712 (O’Connor, J., concurring). But HB 1523 lacks *both* of the features identified by Justice O’Connor: it does not apply to all religious beliefs, and it does not call only for reasonable accommodation.

In *Cutter*, the Supreme Court confirmed the significance of a legislature’s decision whether to include a means for future consideration of third-party harms. Citing *Thornton*, it held that RLUIPA did not “founder on shoals our prior decisions have identified,” but only because the law explicitly required courts to take “adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” 544 U.S. at 720. RLUIPA is thus constitutional because it *does* allow free exercise claims to be overridden in a case-by-case manner by third-party burdens constituting a “compelling interest.” *Id.* at 710. Again, HB 1523 contains

no such provision, confirming that it effectively *endorses* the Enumerated Beliefs.<sup>10</sup>

### **III. HB 1523 IS UNLIKE THE ACCOMMODATIONS CITED BY APPELLANTS AND UPHOLDING IT WOULD POSE A SIGNIFICANT THREAT TO RELIGIOUS FREEDOM**

Lacking principled defenses of HB 1523, Appellants rely on a slippery-slope argument: if HB 1523 is invalid, then so are hundreds of other accommodations involving abortion, military service, capital punishment, and other issues. *See* Br. 3, 6, 11. To enhance the *in terrorem* effect of this argument, they have attached a lengthy appendix of other laws supposedly imperiled if HB 1523 is invalidated.

But that is simply untrue. There are many thousands of accommodations in this Nation, at all levels of government, and very few (if any) of them contain even a *single* one of the constitutional infirmities addressed in this brief. Indeed, most accommodation laws address specific *conduct* without regard to the substance of

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<sup>10</sup> Only a single section of HB 1523 evinces the slightest concern for third-party burdens: § 3(8)(a), which requires state employees who do not wish to participate in the licensing of same-sex marriages to “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.” Even if it were sufficient for its stated purpose, this single provision comes nowhere close to satisfying the requirements of *Thornton* and *Cutter* for HB 1523, which extends far beyond the licensing of same-sex marriage. But as even strong advocates of accommodation have noted, this provision—which lacks any enforcement mechanism—is insufficient. *See* Robin Fretwell Wilson, *Laws Should Show “Malice Toward None, Charity Toward All,”* Hattiesburg American (April 6, 2016) (“HB 1523’s measure is clunky and doesn’t address dignitary harms. It also ignores constitutional violations occurring when all clerks in a tiny office recuse themselves, blocking access to marriage.”).

the underlying religious beliefs; in contrast, HB 1523 addresses three religious *beliefs* and then reaches out to cover nearly all conduct that may follow from them.

As a result, the dangerous slippery slope here would result from *upholding* HB 1523. Could the State then pick any other religious beliefs, write them into law, and exempt from regulation all associated conduct? Consider the following statements of belief, potentially enshrined in law and held automatically to trump any competing third-party interest (including other free exercise interests):

- The earth was created for all mankind, without regard to national borders.
- The sick are healed through prayer alone.
- The consumption of alcohol is vile and immoral.
- Possession of arms must be reserved exclusively to those defending a nation in a just war.
- Husbands must have dominion over wives and children.

If this Court upholds HB 1523, it will inevitably open the door to laws like these, as religious groups lobby legislatures to confer equally far-ranging protections on their core tenets.

Appellants' slippery-slope argument fails for another, independent reason: HB 1523 is an outlier in our Nation's tradition of religious accommodation. The law stands alone in that it (a) is claimed by its sponsors not to lift any actual burdens on free exercise; (b) protects only a particular *viewpoint* on specific

religious questions and automatically overrides any countervailing interest (including other religious practices); (c) discriminates on the basis of belief and denomination; and (d) is structured in such a broad and categorical manner that it violates *Thornton* and *Cutter*. The Supreme Court has invalidated laws on the ground that they possessed even a single one of these defects; in combination, they overwhelmingly demonstrate that HB 1523 is unconstitutional. Were the Court to rely on any of these grounds, or any combination of them, Appellants' parade of horrors would be avoided.

This is not a case about free exercise in a world of new and controversial rights. Rather, it is a case about legislative efforts to affirm that three religious beliefs hold pride of place in Mississippi. But while the State is free to accommodate genuine burdens on free exercise, the Constitution prohibits it from adopting or endorsing any particular religious beliefs, and from denigrating those with different views. Here, Mississippi crossed that line, which the Framers drew because they knew that religious liberty cannot flourish under an establishment.

#### **IV. FACIAL INVALIDATION OF HB 1523 IS REQUIRED**

Facial invalidation of HB 1523 is the appropriate remedy, as is often true in Establishment Clause cases. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 937 (2011). That is because the doctrinal tests for validity under the Establishment Clause often consider statutes as a whole,

rendering *all* aspects of a statute essential to the conclusion. *See id.* at 921. Here, HB 1523 is invalid, not necessarily because of any single provision, but because of how its many provisions interact with each other and existing statutory law.

To the extent HB 1523's constitutional flaw can be traced to any single provision, however, it is certainly § 2, which defines the Enumerated Beliefs. If the Court invalidates just that section, the rest of the law is without effect.

Appellants resist facial invalidation on the ground that some of HB 1523's protections are based on the First Amendment or the State RFRA. This argument, however, "misunderstands how courts analyze facial challenges." *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2451 (2015). In assessing whether a law is "unconstitutional in all of its applications," courts consider "only applications of the statute in which it actually authorizes or prohibits conduct," not instances where it is irrelevant. *Id.* Here, looking only at actual applications of the law, there is no escaping the conclusion that it violates the Establishment Clause.

## **CONCLUSION**

For the foregoing reasons, Amici respectfully submit that this Court should agree with the district court's conclusion that Appellees have a likelihood of success on the merits of their Establishment Clause claims.

Respectfully submitted,

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## **APPENDIX**

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

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## **CERTIFICATE OF SERVICE**

On December 22, 2016, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Trend Micro Officescan and is free of viruses.

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## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,950 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010 (the same program used to calculate the word count).

Dated: December 22, 2016

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