Nos. 16-60477 & 16-60478

In the United States Court of Appeals for the Fifth Circuit

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, 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

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; JOHN DAVIS, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division

BRIEF FOR GAY MEN'S HEALTH CRISIS, INC., AIDS SERVICES COALITION, GRACE HOUSE, INC., AND MY BROTHER'S KEEPER, INC., AS AMICI CURIAE IN SUPPORT OF APPELLEES

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STATEMENT REGARDING AMICI CURIAE

Amici curiae Gay Men's Health Crisis, Inc., the AIDS Services Coalition, Grace House Inc., and My Brother's Keeper, Inc. are four not-for-profit organizations that provide support services to persons affected by the Human Immunodeficiency Virus ("HIV") and Acquired Immune Deficiency Syndrome ("AIDS").[1] Through the provision of HIV testing, counseling, treatment, and other community-based assistance, amici are committed to the ultimate goal of ending the AIDS epidemic in America.

Founded in the early 1980s, Gay Men's Health Crisis, Inc. ("GMHC")[2] is the world's first and leading provider of HIV prevention, care, and advocacy services. For more than thirty years, GMHC has witnessed firsthand how the stigmatization of lesbian, gay, bisexual, and transgender ("LGBT") individuals and those living with HIV hinders efforts to encourage testing and treatment for the disease. Today, GMHC promotes comprehensive solutions to the AIDS crisis in the United States

[1] HIV is a virus that compromises an individual's immune system by, among other mechanisms, decreasing the number of healthy CD4+ T cells that are essential to warding off infection. AIDS is the name ascribed to a person's condition if they develop one of the serious opportunistic infections associated with an immune system compromised by HIV, or if blood tests show that their immune system's CD4+ T cell count has dropped below 200 cells per cubic millimeter of blood, compared with the average healthy person's 500-1,500 CD4+ T cells per cubic millimeter. GMHC, *HIV/AIDS Basics*, http://www.gmhc.org/hiv-info/hivaids-basics; NAM, FACTSHEET: CD4 CELL COUNTS 1-2 (2016).

[2] The lead counsel for Plaintiffs-Appellees the Campaign for Southern Equality and The Reverend Doctor Susan Hrostowski, Roberta A. Kaplan, is co-chair of the Board of Directors of GMHC.

through holistic education and advocacy efforts, policy research, legal assistance, counseling, HIV testing, supportive housing, meal assistance, and medical care referral services.

The AIDS Services Coalition is a community-based organization in Mississippi that provides direct services to people affected by HIV and AIDS. Founded in 2002, the AIDS Services Coalition provides HIV counseling and testing services to Mississippians out of the Clearview Recovery Center in Hattiesburg. The AIDS Services Coalition also operates a housing assistance program for people living with AIDS that covers 73 of Mississippi's 82 counties. Many of the individuals the AIDS Services Coalition serves experience stigma on account of their HIV status, sexual orientation, or homelessness.

Grace House Inc., based in Jackson, Mississippi, was founded in 1995 to provide a safe haven from the stigma that homeless HIV-positive Mississippians experience by offering those individuals a place to live without fear or prejudice. Today, Grace House also provides tenant-based rental assistance, permanent housing placement, and transitional living support. Additionally, like the AIDS Services Coalition, Grace House provides educational services to Mississippians aimed at reducing the spread of HIV and the stigma associated with the virus.

Founded in 1999, My Brother's Keeper, Inc. is a nonprofit dedicated to the prevention of HIV and the treatment of and care for persons living with the

infection. Now with five offices across Mississippi, including the Open Arms Clinic primary care facility in Jackson, My Brother's Keeper has expanded its mission to addressing all health disparities that disproportionately impact minority and other marginalized communities, including HIV, cardiovascular disease, diabetes, hypertension, obesity, and cancer.

Amici are authorized to file this amicus curiae brief by Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no one other than amici's counsel made any monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF THE ARGUMENT

If permitted to take effect, Mississippi House Bill 1523 ("HB 1523") would single out one class of Mississippians, the LGBT community, and impose a unique burden on all members of that group: the inability to seek legal recourse when the denial of certain services or benefits is based on one's sexuality or gender identity. Amici have an interest in this case because the discrimination enshrined by HB 1523 will directly undermine the fight against HIV and AIDS.

Under HB 1523 Section 3(4), the state government is forbidden from taking any action against any person who declines to provide psychological or counseling services on account of an individual's gender identity or sexual orientation, effectively giving certain medical professionals free license to discriminate.[3] This provision poses particular risks in the context of HIV prevention and treatment services because post-HIV test counseling is *required* by the state's public health regulations. Medical care providers who decline to counsel LGBT individuals cannot administer HIV tests, thus limiting access to testing for the population that

[3] The counseling provision reads in relevant part: "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 psychological, counseling, or fertility services based on a sincerely held religious belief or moral conviction described in Section 2." H.B. 1523, 2016 Leg. Reg. Sess., § 3(4) (Miss. 2016). Section 2, in turn, defines these beliefs as "the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; (c) Male (man) and female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." *Id.* § 2.

needs it most. Moreover, under Section 3(4), any medical provider can refuse to offer counseling services of any kind—including conversations about prevention or care strategies—to gay men or transgender persons, two groups at heightened risk. Even when medical providers do not refuse service under HB 1523, the mere threat of being turned away, and the associated humiliation and indignity, will deter some LGBT individuals from seeking out medical care in the first place, thus exacerbating the structural discrimination they already experience in the health care system.

But HB 1523's effects go beyond those imposed by Section 3(4). The law as a whole sends a powerful and unmistakable message: LGBT individuals can be devalued, demeaned, and literally turned away in a host of contexts, ranging from employment and housing to education and health care. *See* HB 1523 §§ 3(1)(b)-(c), (4), (6). HB 1523 is, by design and effect, a public denouncement of the LGBT community. Further, because HIV-positive individuals often share in the stigma and attendant discrimination directed at LGBT individuals, HB 1523 imposes a substantial burden on all HIV-positive Mississippians, gay or straight. This is especially pernicious in the context of HIV prevention, where enhanced stigma is recognized by public health professionals to be a powerful contributor to decreased testing and heightened rates of HIV, particularly among the LGBT community.

By sanctioning the denial of counseling to and the stigmatization of LGBT persons, HB 1523 endangers the success of HIV prevention and treatment efforts. At a time when HIV remains a significant public health threat that disproportionately harms the LGBT community, the burden imposed by HB 1523 is nothing short of substantial and the harm it will cause irreparable.

ARGUMENT

I. HIV and AIDS Remain a Public Health Crisis

Since the epidemic's onset in the early 1980s, AIDS has claimed the lives of more than 650,000 people in the United States. Centers for Disease Control, *Diagnoses of HIV Infection in the United States and Dependent Areas*, 27 HIV SURVEILLANCE REP. 1, 68 (2015). Despite life-saving advances in treatment and substantial public and private initiatives focused on curbing new infections, the virus remains a significant public health crisis in America. Today, more than 1.2 million Americans are living with HIV, a number that continues to grow. CENTERS FOR DISEASE CONTROL, HIV IN THE UNITED STATES: AT A GLANCE 1 (2015). In 2014, more than 44,000 people in this country were newly diagnosed as HIV positive. *Id.* That same year, 12,333 people in the United States died of AIDS or AIDS-related complications. *Id.*

The public health crisis posed by HIV is particularly acute in Mississippi, which suffers from the eighth-highest rate of HIV infection in the nation. Centers

for Disease Control, *Diagnoses of HIV Infection, supra*, at 102. In 2015, the rate of new infections among adults and adolescents in the state—20.6 per 100,000 each year—was 40% higher than the national average. *Id.* at 99. Jackson, the state's largest city, ranks fourth-highest among major U.S. metropolitan areas in terms of rate of new infections, and highest in terms of rate of new AIDS diagnoses. *Id* at 107, 110. Even as rates of infection decline nationally, the rate of new infections in Mississippi and other Southern states remains notably higher than in other regions of the country. *Id.* at 6 (new infection rate was 16.8 per 100,000 in the South in 2015 compared to 11.8 in the Northeast, 9.8 in the West, and 7.6 in the Midwest). While an HIV-positive diagnosis is not the death sentence it once was, HIV-positive Mississippians are also disproportionately likely to suffer and die from AIDS. *See* CENTERS FOR DISEASE CONTROL, STATE HIV PREVENTION PROGRESS REPORT, 2010-2013 68 (2015). The death rate among Mississippians diagnosed with AIDS, according to 2012 data, was 25.3 per 1,000—the fourth-highest death rate in the nation, behind only Alabama, Delaware, and Louisiana. *Id.* at 41. These figures underscore the necessity of enhancing and supporting HIV prevention efforts, particularly in the South.

Even when it does not prove terminal, HIV still inflicts an extraordinary toll. An HIV diagnosis introduces an individual to a life-long chronic medical condition, the treatment of which requires careful adherence to a multi-drug regimen with

potentially serious side effects that must be closely monitored by trained specialists. AIDSINFO, HIV TREATMENT: HIV MEDICATION ADHERENCE 1 (2016) (patients with HIV must take multiple different pills on different schedules with "significant side effects from some HIV medicines," making it hard to stick to an HIV regimen).

Individuals living with HIV also confront discrimination in many aspects of their personal and professional lives. Friends, neighbors, and coworkers frequently "do not want to work with an HIV-positive person, share an apartment with one, or have an HIV-positive individual teaching their children," on account of latent anti-gay stigma as well as misconceptions about how the virus is transmitted. Press Release, GMHC, Half of Americans Believe HIV Stigma Reinforces Anti-Gay Bias, Research Shows (April 2, 2009); *see also Though Not a Death Sentence, HIV/AIDS Still Holds a Powerful Stigma* (NPR radio broadcast Aug. 16, 2015) (reporting on the discrimination individuals living with HIV experience in the workplace and in personal relationships). Persons living with HIV also face significant discrimination in housing. *See, e.g.*, Press Release, GMHC, From Village to Village in NYC, Still Battling AIDS Stigma (April 16, 2012) (recounting GMHC's role in helping families evicted from their homes because the landlord discovered an AIDS diagnosis within the household); *see also* CTR. FOR HIV LAW & POLICY, HOUSING RIGHTS OF PEOPLE LIVING WITH HIV/AIDS 3 (2010)

(cataloguing how discrimination based on HIV status can be embedded in zoning policies, group home restrictions, homeless shelter screening practices, and other contexts).

Beyond the individualized physical and emotional toll, HIV exacts a staggering financial cost: the lifetime expense of treating an individual HIV infection is estimated to be nearly $380,000—a figure that does not account for lost wages or other non-medical expenditures. CENTERS FOR DISEASE CONTROL, HIV COST-EFFECTIVENESS 1 (2015).

II. HB 1523 Section 3(4) Will Undermine the Fight Against HIV and Harm LGBT Mississippians' Health

Faced with a public health crisis that continues to impose extraordinary costs on both individuals and society, an essential component of amici's work is the promotion of government policies that encourage HIV testing and ensure access to treatment. HB 1523, and in particular Section 3(4), directly undermines that work. By permitting providers to deny counseling to LGBT individuals in Mississippi—a demographic group at greater risk of HIV infection—Section 3(4) will limit LGBT Mississippians' access to HIV testing and counseling necessary to manage their HIV risk, which in turn will heighten the preexisting barriers they already encounter when seeking medical care.

A. Section 3(4) Will Limit LGBT Mississippians' Access to HIV Testing

On its face, Section 3(4) allows a provider to deny essential counseling because she disapproves of the kind of "sexual relations" in which an individual engages. *See* HB 1523 § 3(4). It also allows a provider to deny counseling if an individual's gender identity does not match the gender assigned to her at birth. *Id.* There is no doubt that Section 3(4) will reduce access to HIV testing because providers who are unwilling to counsel LGBT patients *cannot lawfully* provide them with an HIV test. According to Mississippi Department of Health regulations, an HIV test cannot be administered without post-testing counseling. *See* Miss. Admin. Code 15-2-11:1.14 (2016) ("No [HIV] testing shall be performed without appropriate post-test counseling of individuals tested."). Were Section 3(4) to go into effect, LGBT Mississippians would *inevitably* be faced with a diminished universe of health providers from which to seek HIV testing.

Because diagnosing and treating HIV is essential to improving individual outcomes and preventing new infections, limiting access to HIV testing would have profound effects on public health. As Kathy Garner, Executive Director of the AIDS Services Coalition testified in the District Court, individuals who test positive for HIV are promptly introduced to a "continuum of care." ROA 16-60478.1255. Access to such care ensures, among other things, that HIV-positive individuals receive medication that suppresses their viral loads, that is, the

presence of the HIV virus in their blood. *Id.* Diagnosing the infection as early as possible is crucial because the initiation of antiviral therapy soon after a patient contracts HIV has been linked to significantly improved long-term health outcomes. WORLD HEALTH ORG., GUIDELINE ON WHEN TO START ANTIRETROVIRAL THERAPY AND ON PRE-EXPOSURE PROPHYLAXIS FOR HIV 26 (2015) (summarizing research showing that early intervention with antiviral treatment leads to lower rates of HIV-related morbidity). Legislation such as HB 1523 that limits access to HIV testing would accordingly be extremely harmful to Mississippians living with an undiagnosed HIV infection. An estimated 150,000 people living in the United States are HIV positive and unaware of their status; 1,700 of those people live in Mississippi. Centers for Disease Control, *Prevalence of Diagnosed and Undiagnosed HIV Infection – United States, 2008-2012*, 64 MORBIDITY & MORTALITY WKLY. REP. 657, 657-62 (2015).

Access to HIV testing and treatment not only improves patients' health, it also markedly reduces the likelihood of transmission to sexual partners. ROA 16-60478.1255-57; WORLD HEALTH ORG., *supra*, at 26 (summarizing clinical trial results that demonstrate "[antiviral therapy] is highly effective at prevention of sexual transmission of HIV"). The consequences of undiagnosed infections for individual and public health are significant, as individuals living with HIV who do not know their status are more than twice as likely to transmit the infection than

those who are aware that they are HIV-positive and receiving treatment. Jacek Skarbinski et al., *Human Immunodeficiency Virus Transmission at Each Step of the Care Continuum in the United States*, 175 JAMA INTERNAL MED. 588, 588, 593-94 (2015) (91.5% of the estimated 45,000 HIV transmissions in the United States in 2009 originated from HIV-positive individuals who were either undiagnosed or diagnosed but not receiving medical treatment). Testing for, and then treating HIV infection, is thus essential to curbing the epidemic. Studies of communities with significant populations of men who have sex with men "have shown that as [antiviral therapy] use increased within the community, the community's viral load declined, as did rates of new HIV diagnoses." Centers for Disease Control, *Prevention Benefits of HIV Treatment* (Feb. 9, 2016), https://www.cdc.gov/hiv/research/biomedicalresearch/tap/.

B. Section 3(4) Will Compromise LGBT Mississippians' Access to Counseling Necessary to HIV Prevention and Care

Section 3(4) would also compromise LGBT Mississippians' ability to access information essential to managing their health risk posed by HIV. Providing appropriate sexual health counseling in public health clinics, emergency rooms, and primary care settings is necessary for educating individuals about methods for reducing the risk of HIV transmission. *See* Jean L. Richardson et al., *Effect of Brief Safer-Sex Counseling by Medical Providers to HIV-1 Seropositive Patients: A Multi-Clinic Assessment*, 18 AIDS 1179, 1185 (2004) (concluding that

"counseling and messages that emphasize the risks or negative consequences" of certain sexual practices have been shown to help HIV-positive patients manage risk of transmission); AM. PSYCHOLOGICAL ASS'N, *Counseling in HIV Testing Programs*, *in* COUNCIL POLICY MANUAL (2014) (noting that "[c]ounseling . . . provid[es] important information and prevention messages" for HIV-negative patients). Patient counseling is also an important means of addressing the emotional and psychological challenges associated with living with HIV. *See* Centers for Disease Control, *Sexually Transmitted Diseases Treatment Guidelines, 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 1, 22 (2015) ("Behavioral and psychosocial services are an integral part of health care for persons with HIV infection . . . [because] many persons will require assistance with . . . coping and with changes in personal relationships."); AM. PSYCHOLOGICAL ASS'N, *supra*, (observing that patient counseling "serv[es] a vital educative and emotional support function for individuals who test positive").

Counseling is also critical to ensuring effective implementation of HIV prevention efforts in the community. For example, in 2012 the Food and Drug Administration approved a medication for pre-exposure prophylaxis that reduces the risk of infection for HIV-negative individuals if the medication is taken regularly. Press Release, Food & Drug Admin., FDA Approves First Drug for Reducing the Risk of Sexually Acquired HIV Infection (July 16, 2012). Since

approval, numerous organizations have recommended that HIV-negative individuals receive access to this medication to stem the spread of HIV. *See, e.g.*, UNITED STATES PUB. HEALTH SERV., PREEXPOSURE PROPHYLAXIS FOR THE PREVENTION OF INFECTION IN THE UNITED STATES 9 (2014) (recommending pre-exposure prophylaxis as "one prevention option for sexually-active adult men who have sex with men . . . [and for] heterosexually active men and women"); WORLD HEALTH ORG., *supra*, at 42 (recommending that pre-exposure prophylaxis "should be offered as an additional preventive choice for people at substantial risk of HIV infection"). But because pre-exposure prophylaxis poses adherence concerns, counseling is essential to ensuring patients take it as prescribed. UNITED STATES PUB. HEALTH SERV., *supra*, at 44 ("Medication education and adherence counseling . . . will be needed to support daily [pre-exposure prophylaxis] use."). By compromising access to necessary counseling, Section 3(4) would undermine the efficacy of pre-exposure prophylaxis and other public health measures essential to stemming the tide of new infections.

C. LGBT Mississippians Will Be Particularly Harmed as Section 3(4) Exacerbates Preexisting Barriers to Health Care

The risks to LGBT Mississippians posed by Section 3(4) are especially acute because HIV and AIDS disproportionately harm the LGBT community in the state. "In Mississippi, the burden of HIV is disproportionately high for men who have sex with men," many of whom identify as LGBT. *Mississippi HIV Statistics*,

Miss. State Dep't of Pub. Health (Oct. 23, 2015), http://www.msdh.state.ms.us/msdhsite/index.cfm/14,0,150,134,html. Only 3.3% of Mississippi's population identifies as LGBT. *LGBT Data and Demographics—LGBT Proportion of Population: Mississippi*, WILLIAMS INSTITUTE (May 2016), http://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=28#density. Yet, nearly half of all HIV-positive individuals in Mississippi contracted the virus through same-sex contact. *Mississippi Highlights*, AIDSVu, https://aidsvu.org/state/mississippi/ (68% of all HIV-positive individuals in Mississippi are men; of these, 73% contracted the virus through same-sex intimate contact). According to a recent study, the HIV rate among men who have sex with men in Jackson was the highest among major metropolitan areas in the nation—four in ten gay men in the city are estimated to be HIV positive. Eli Rosenberg et al., *Rates of Prevalent HIV Infection, Prevalent Diagnoses, and New Diagnoses Among Men Who Have Sex With Men in US States, Metropolitan Statistical Areas, and Counties, 2012-2013*, JMIR PUB. HEALTH & SURVEILLANCE, May 2016, at 1, 9; Sarah Fowler, *HIV Rate Among Jackson Gay, Bisexual Men Highest in US*, The Clarion-Ledger, May 19, 2016.

Despite their heightened risk of HIV infection, LGBT individuals nationwide, and in Mississippi in particular, already face unique challenges in accessing the health care system. *See generally* INST. OF MED., THE HEALTH OF

LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE (2011) (documenting how the history of discrimination LGBT individuals have faced creates unique obstacles in accessing medical care). Many LGBT individuals and people living with HIV are expressly discriminated against and are denied services altogether. According to one study, 8% of lesbian, gay, and bisexual people, 27% of transgender and gender non-conforming individuals, and 19% of HIV-positive individuals have been denied needed health care services outright. LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV 5 (2010). The figures are even higher among low-income and minority LGBT persons, whose communities are disproportionately afflicted by HIV. *Id.* Discrimination in medical care has been identified as one of the leading factors resulting in three out of ten gay and bisexual men reporting that they do not have a primary care physician or a regular treatment clinic. JEN KATES ET AL., HEALTH AND ACCESS TO CARE AND COVERAGE FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER INDIVIDUALS IN THE U.S. 6 (2016). Transgender individuals are perhaps at even greater risk as high rates of stigma intersect with other barriers to care—including low rates of insurance coverage and relatively high rates of poverty—to preclude access to critical and often life-saving services. *See* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 72 (2011) (noting that

48% of transgender respondents postponed or went without care because they could not afford it).[4]

Moreover, many LGBT individuals fear revealing their sexual orientation to medical providers, anticipating that their sexuality or gender identity may reduce the quality of their care or result in their being denied treatment altogether. *See, e.g.*, Grayce Alencar Albuquerque, *Access to Health Services by Lesbian, Gay, Bisexual, and Transgender Persons: Systematic Literature Review*, 16 BMC INT'L HEALTH & HUM. RTS. 1 (2016) (reviewing literature discussing stigma-induced fear as a barrier to treatment). Even in the context of HIV and AIDS, where the consequences of forgoing treatment can be severe, "[p]ersonal beliefs and perceptions about whether one can access quality health care have been shown to strongly affect whether and how individuals seek medical care and interact with medical professionals." LAMBDA LEGAL, *supra*, at 12. Failing to disclose one's sexuality—particularly in the context of sexual health counseling, where an honest and candid discussion about sexual history can be essential to a patient's diagnosis and treatment—compromises the quality of care that LGBT patients receive. *Id.*

[4] In California, for example, a transgender woman reported that a doctor refused to treat her on the grounds that: "God made you a man," a response that caused her to feel "shock, embarrassment, intimidation, . . . humiliation, [and] fear." Complaint at 4-5, *Hastings v. Seton Med. Ctr.*, No. CGC-07-470336 (Cal. Sup. Ct. Dec. 21, 2007). Beyond the emotional harm caused, denial of treatment can have devastating health consequences. *See, e.g.*, NAT'L WOMEN'S LAW CTR., FACT SHEET: HEALTH CARE REFUSALS HARM PATIENTS 1–2 (2013) (compiling stories of patients who were denied medical treatment based on sexuality, gender, or HIV status and the subsequent negative consequences for their health).

Section 3(4) would increase barriers to effective and quality health care along both of these dimensions. First, it will deter LGBT individuals from seeking out testing and counseling services altogether. The fact that *some* doctor at a given medical facility may be willing to provide HIV counseling and testing to an LGBT individual may be cold comfort to those who risk the humiliation and indignity of being turned away by the first, second, or third doctor they seek out. The mere threat of being denied health care services can directly influence decisions whether to seek treatment in the first place, as "many stigmatized individuals regulate their own behavior to avoid others' hostility and abuse." Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J. L. MED. & ETHICS 594, 595 (2002); *see also* Fiona Clark, *Discrimination Against LGBT People Triggers Health Concerns*, 383 THE LANCET 500, 502 (2014) ("People may not feel comfortable coming forward and identifying as LGBT in the health care system, which will make them less likely to get tested [for HIV] or get the [HIV] treatment they need early on.").

Second, Section 3(4) makes LGBT individuals more likely to hide their identities or sexual histories from service providers, inhibiting the quality of care they ultimately receive. This effect is particularly pronounced in "many states [where there is] still a lot of stigma attached to being LGBT." Clark, *supra*, at 502.

By placing the State's imprimatur on the refusal to provide counseling services, Section 3(4) makes these threats and risks real and concrete.

The legislation's effects will be all the more harmful given the shortage of health care and HIV services available to the Mississippi LGBT community. *See* SOUTHERN HIV/AIDS STRATEGY INITIATIVE ET AL., HIV INFRASTRUCTURE STUDY (May 2015) (documenting the lack of LGBT and HIV health services in rural Mississippi counties outside of Jackson). The state has only one major health care facility that is certified as a leader in LGBT health care equality, compared with six each in Alabama, Louisiana, and Georgia, and 495 nationwide. HUMAN RIGHTS CAMPAIGN, HEALTHCARE EQUALITY INDEX 53-99 (2016) (identifying leaders in LGBT health care equality based on training in LGBT patient-centered care, patient non-discrimination policies, and equal visitation policies). Organizations such as the AIDS Services Coalition and My Brother's Keeper work to address these structural gaps in Mississippi's health care system, but significant barriers to accessing HIV care in the state remain.

For these reasons, and based on their extensive experience in the provision of HIV-related services to LGBT communities in Mississippi and across the country, amici strongly believe that if implemented, Section 3(4) will deter and reduce HIV testing and treatment, directly impair the effectiveness of the health care system for LGBT individuals, and increase the rate of new HIV infections.

III. HB 1523 Exacerbates LGBT Stigma That Will Deter HIV Testing and Treatment

In addition to directly harming HIV prevention efforts and LGBT health, HB 1523 also enhances the stigmatization of LGBT persons, which in turn discourages individuals from seeking the health care they need for fear of being identified as part of the LGBT community.

A. HB 1523 Stigmatizes LGBT Mississippians

Defendants-Appellants contend that many portions of HB 1523 will not have any operative legal effect:

> 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. There is no state law that outlaws discrimination on account of sexual orientation or gender identity, and the anti-discrimination ordinance in Jackson must give way to the state's Religious Freedom Restoration Act.

Defendants-Appellants Brief at 19. If this argument is valid, then HB 1523 truly has no purpose other than condoning discrimination against LGBT persons. In fact, HB 1523 and other laws like it send a clear stigmatizing message to society and, in particular, to their targets: that LGBT Americans are "somehow lesser" than their fellow citizens. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (acknowledging that bans on same-sex marriage caused the children of same-sex couples to "suffer the stigma of knowing their families are somehow lesser");

Lawrence v. Texas, 539 U.S. 558, 575 (2003) (striking down Texas's anti-sodomy law because—among other reasons—of "[t]he stigma [the] statute impose[d]").

HB 1523 is, of course, not the first law or policy to stigmatize LGBT Americans. Homosexuality was widely considered to be a mental illness until 1974, the year it was removed from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"). *See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 2015 BEHAVIORAL SCI. 566, 571 (2015); Andres De Block & Pieter R. Adriaens, *Pathologizing Sexual Deviance: A History*, 50 J. SEX. RES. 276, 285 (2013) (explaining that homosexuality was not removed from the DSM until 1974). Through 2003, several states prohibited intimacy between individuals of the same sex. *Lawrence*, 539 U.S. at 570-71. Until 2011, gay individuals could not openly serve in the U.S. armed forces. Memorandum from the Under Sec'y of Def. 1 (Sept. 20, 2011) ("[T]he law commonly known as 'Don't Ask, Don't Tell' (DADT), 10 U.S.C. Sec 654, is repealed and no longer in effect in the Department of Defense."). And until 2015, same-sex couples could not marry in many states. *Obergefell*, 135 S. Ct. at 2593. Even today, the Food and Drug Administration prohibits gay men from donating blood unless they have refrained from sexual contact with other men for one year, thus "perpetuat[ing] the stigma that HIV is a gay disease." Rob Stein,

FDA Lifts Ban on Blood Donations by Gay and Bisexual Men, NPR (Dec. 21, 2015) (quoting Kelsey Louie, CEO of GMHC).

Against this backdrop, where governments and institutions have repeatedly marked LGBT individuals as inferior, disordered, or diseased, the import of HB 1523 is clear: it seeks to denigrate and mark LGBT individuals as less worthy of respect. If, as Defendants-Appellants claim, the law accords no rights that do not already exist, it "serves no purpose, and has no effect, other than to lessen the status and human dignity of" LGBT individuals in Mississippi. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012) (striking down a California constitutional amendment that repealed the right of same-sex couples to marry), *vacated on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

B. Enhanced Stigma of the LGBT Community Deters Individuals from Seeking HIV Testing and Treatment

In the context of HIV prevention, the enhanced LGBT stigma wrought by HB 1523 poses direct harm to HIV prevention efforts, as the popular association of HIV with LGBT individuals—and in particular gay men—discourages individuals from seeking HIV testing or treatment for fear of being identified as part of the LGBT community.

The effects of LGBT stigma on HIV testing and treatment are rooted in the history of the epidemic, as HIV and LGBT individuals share a long history of stigmatization that is mutually reinforcing. This dynamic was evident from the

earliest days of the crisis, when AIDS was initially termed "GRID," or gay-related immunodeficiency, and dismissively referred to as the "gay plague." *See, e.g.*, Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. Times, May 11, 1982 (describing the early emergence of "GRID"); Michael VerMeulen, *The Gay Plague*, N.Y. Mag., May 31, 1982, at 52-78 (popularizing the term "gay plague"). Association of HIV with gay men increased the stigma of living with HIV; inversely, the high prevalence of HIV and AIDS among gay men, at a time when AIDS was often fatal, shaped cultural perceptions of gay men as diseased and disordered. *See* RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 322 (1987).

The stigmatization of HIV based on its historical association with gay men is unfortunately not relegated to history. *See, e.g.*, *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1278 (M.D. Ala. 2012) ("[A] relentless stigma adheres to HIV [and] becomes a proxy for prejudice against members of the gay community."). Today, the stigma associated with HIV continues to deter individuals from seeking HIV resources. A leading HIV/AIDS advocacy group explains:

> HIV is an infection which many people have fears, prejudices or negative attitudes about. Stigma can result in people with HIV being insulted, rejected, gossiped about and excluded from social activities. Fear of this happening can lead to people with HIV being nervous about telling others that they have HIV or avoiding contact with other people. They may end up suffering in silence instead of getting the help they need.

NAM AIDSMAP, WHAT IS STIGMA? 3-4 (2012). The lingering stigma associated with HIV based on homophobia is particularly pronounced in states where there is still significant opprobrium attached to being LGBT, *see* Clark, *supra*, at 502, including Mississippi. As Ms. Garner testified in the District Court hearing below, based on her experience providing HIV services in Hattiesburg: "[S]tigma in Mississippi is a huge, huge issue and actually going to . . . a doctor [and] linking yourself to care [for HIV] in the first place and staying in care is critically important, but it's also very, very scary for a lot of people." ROA 16-60478.1257. Her testimony is consistent with the experience of public health professionals elsewhere in the South. *See* Gracie Bonds Staples, *Gay Stigma Still Behind Atlanta's AIDS Epidemic*, Atlanta J. Const., May 11, 2016 (citing an interview with the executive director of AIDS Atlanta for the conclusion that "the stigma associated with being gay is the reason for the continued spread [of HIV in the South]").

Research into stigmatization confirms amici's clinical experience that increased LGBT stigma causes individuals to be less likely to get tested for HIV or to discuss HIV with their health care providers for fear of being identified with the LGBT community. *See* Chantal Den Daas et al., *Determinants of Never Having Tested for HIV Among MSM in the Netherlands*, BMJ Open 6.1 (2016). The results are predictable: areas with greater degrees of anti-gay stigma have higher

rates of HIV infection, as high-risk members of the community avoid counseling, testing, and treatment. *See* Clark, *supra*, at 502. By condoning discrimination against LGBT persons across a range of services, HB 1523 further contributes to the stigma that deters individuals from seeking HIV treatment even when they might have access to supportive, non-judgmental health care providers. The result would be a significant harm to all Mississippians through increased rates of HIV infection.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's preliminary injunction of HB 1523.

Respectfully submitted this 23rd day of December, 2016,

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On December 23, 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 a commercial virus scanning program and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,648 words, excluding the parts of the brief exempted by Rule 32(f); and (2) 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 (the same program used to calculate the word count).

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