Case No. 16-60477

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RIMS BARBER, et al.,

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, et al.,

Defendant-Appellant.

On appeal from the United States District Court for the Southern District of Mississippi, Cause Nos. 3:16-CV-417 & 3:16-CV-442 (Judge Carlton W. Reeves)

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF DEFENDANT-APPELLANT GOVERNOR PHIL BRYANT

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QUESTION PRESENTED

Whether the U.S. Supreme Court's *Obergefell v. Hodges* decision precludes a state from enacting legal protection for the religious and moral convictions of those who hold traditional views of marriage and sexuality.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws; promoting a return to the historic and original interpretation of the United States Constitution; and educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has filed *amicus* briefs in cases concerning same-sex marriage, the right of counseling students concerning sexual identity and orientation, public display of the Ten Commandments, the recitation of the Pledge of Allegiance and prayer, partial-birth abortion, and many others.

[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

The Foundation is interested in this case because it believes religious freedom is the first and foremost right given by God and guaranteed by the Bill of Rights. The Foundation is therefore concerned that there appears to be a concerted drive to subordinate this fundamental right beneath recently court-created rights to same-sex marriage and recognition of one's self-perceived and self-proclaimed gender identity. The Foundation is concerned that if these trends continue, those who hold traditional religious and moral convictions will be forced to violate their convictions or be barred from serving as judges, clerks, other public officers, or serving in the legal and other learned professions, thus reducing them to the status of second-class citizens.

The Foundation is located in Alabama, but Alabama and Mississippi are neighboring states that share many common interests and values. Legal developments in Mississippi are therefore of great interest to Alabamians.

SUMMARY OF ARGUMENT

In the proceedings below, the District Court accepted the reasoning of the Plaintiffs' counsel that some brand of injury, though not yet occurring nor particularized, could result to the harm of Plaintiffs if HB 1523 is left intact. This is a peculiar progress of judicial reasoning. HB 1523 was enacted in an effort to protect a class of persons.[2] Yet, the argument from the Plaintiff-Appellees appears to be an effort to disparage a particular group and ensure that a suspect class of citizens does not enjoy the explicit protection of the state. Armed with this nebulous cause of action Plaintiff-Appellees received the full extent of their requested relief below, including an injunction and a ruling striking down HB 1523, despite the undeniable fact that not a single citation to legal authority compelling this course of action appears in Plaintiffs' entire Complaint,[3] nor in their sixteen page amended complaint.[4]

Nevertheless, the District Court to established for itself a new legal doctrine and apply it against the State of Mississippi and the constitutional rights of the multitude of religious persons HB 1523 sought to protect. Such a decision is

[2] This effort the District Court apparently accepts though arriving at an ultimately different conclusion. *See* (Doc. 39 at 9) (J. Reeves citing to the legislative decision making of the Mississippi Legislature).
[3] *See generally* (Doc. 1).
[4] *See generally* (Doc. 35).

suitable for review by this Court and is subject to honest scrutiny if ever a legal opinion was.

ARGUMENT

INTRODUCTION

"At common law, only innkeepers and common carriers had an obligation to serve all comers…other businesses generally had the right, as property owners, to exclude anyone for any reason."[5] The general common law rule that, "absent some reasonable ground…innkeepers and common carries [are] under a duty to furnish accommodations to all persons" has undergone an evolution in modern times.[6] Today, both state and federal statutory laws cover more protected classes and extend the prohibition to a much larger realm of society.[7] While anti-discrimination statutes have likely done some good in eliminating animus and providing equality, these statutes, as applied to a number of Americans, raise the possibility of unjust

[5] *See*, Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations*, 72 N.Y.U.L. Rev. 1243 (quoting Earl M. Maltz, *Separate But Equal and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L.J. 553, 553-54 (1986), as it discusses obligations of common carriers); *see also* Alfred Avins, *What Is a Place of "Public" Accommodation?*, 52 Marq. L. Rev. 1, 2-7 (1968) ("discussing common law rule that innkeepers and common carriers could not exclude, while others were legally permitted to do so.")

[6] *See James v. Marinship Corp*, 155 P.2d 329 (Cal. 1944) (quoting 52 L.R.A. (N.Y.) 740; 43 Am. Jur. 586-87).

[7] *See e.g.* 42 U.S.C.A. § 2000; Col. R.S.A. § 24-34-601(2).

government censorship. Consequently, amicus believes the 5th Circuit should reflect on what one scholar has observed stating: "[t]he rise of equal access rights nevertheless does not mandate the fall of individual liberties."[8]

[8] Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 Pac. L.J. 1047, 1048 (1985).

I. THE DISTRICT COURT IS IN ERROR.

In no sensational or exaggerated terms, the Southern District of Mississippi has just informed millions of Mississippians that their First Amendment-guaranteed right to freely "exercise" their religion has been sharply curtailed. On the bottom of page seven of its opinion the District Court surmised:

> "As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from *acting on* those objections …" (emphasis not added).[9]

According to the Southern District, free exercise includes thought and voice but not action. A more logical definition is provided by Merriam Webster's Dictionary, stating 'exercise' is:

> "*a* : the act of bringing into play or realizing in action : use <*the exercise of self-control*> *b* : the discharge of an official function or professional occupation <*exercise of his judicial duties*> *c* : the act or an instance of carrying out the terms of an agreement (as an option) — often used attributively <*an option's exercise price*>." [10]

[9] (quoting Laurence H. Tribe, *Equal Dignity: Speaking Its Name,* 129 Harv. L. Rev. F. 16 (Nov. 10, 2015).
[10] *Exercise,* Merriam Webster's Dictionary, (11th ed.).

The appearance of 'act' in the definition of 'exercise' is no coincidence. For this reason, if the District Court's so-called "doctrine of equal dignity" prohibits religious persons, "from *acting on*…[religious] objections," then the District Court has sharply curtailed on religious exercise, at least where such beliefs conflict with LGBT matters. A viewpoint such as this goes beyond the scope of the current litigation, Mississippi's HB 1523 itself, and *Obergefell*. It also plainly exceeds the constitutional authority of that judicial institution.

When James Madison presented what is now the First Amendment to Congress in 1789, it read:

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

There is no transcript from the first session of Congress, so we do not know was said or what reasons were given for changing "full and equal rights of conscience" to "free exercise [of religion]." But it would be reasonable to surmise that they changed the language because they wanted to protect religious actions as well as religious beliefs.

In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court stated at 303-04:

> ...the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

The trial court below correctly recognized that constitutional protection for religious actions is not absolute, but the court incorrectly implied that religious actions are not protected at all. Out of *Cantwell* developed the doctrine that religious actions may be regulated only if the state has a compelling interest that cannot be achieved by less restrictive means, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Employment Division v. Smith*, 494 U.S. 872 (1990), restricted the compelling interest / less restrictive means test to laws directly aimed at religion (which this arguably is not) or cases in which the party asserts a "hybrid right" such as free exercise of religion plus free speech (which the parties clearly do in this case). Furthermore, strict scrutiny test clearly applies under the Mississippi Religious Freedom Act.

II. HB 1523 UPHOLDS BASIC PRINCIPLES OF LAW AND RESPONDS TO SYSTEMATIC DISCRIMINATION RATHER THAN CREATING IT.

Of all of the liberties guaranteed by the Bill of Rights, religious liberty is the first. The Framers of the First Amendment recognized the primacy of religious liberty because a person's relationship with God and duty to God transcends all human relationships, including that with civil government. HB 1523 actually deprives no one of the right to obtain a same-sex marriage or the right to identify with one or another gender. The law simply provides that those who have sincere religious or moral convictions about such matters shall not suffer legal penalties because they exercise their First Amendment rights.[11] There has been no showing that an exemption for those who do not believe in same-sex marriage would result in anyone not being able to get married.

Exemption from certain legal requirements for those whose sincere religious beliefs are burdened by them has long been an accepted way of reconciling the needs of the majority with the rights of the minority. *See*, e.g. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Commonly these have been narrow exemptions for specific groups like the Seventh Day Adventists

[11] House Bill 1523, Mississippi State Legislature (2016).

(*Sherbert*) or the Amish (*Yoder*). But the District Court complains that the exemption provided by HB 1523 is too narrow, even though it applies to any religious or moral belief and therefore covers anyone of any religion or of no religion at all who holds such religious or moral convictions.

The problem, the court says, is that HB 1523 applies to those who object to same-sex marriage but not to those who do not object to same-sex marriage, and thereby it prefers those who object over those who do not object. The court notes on p. 49 that some religious persons do not object to same-sex marriage, and Amicus agrees, although we recognize that these religious and moral objections cross denominational lines. But there is a perfectly legitimate reason the Legislature drafted the law to protect those who object: they are the ones who are threatened with legal sanctions because of their convictions. No one is threatening legal sanctions against those who are willing to perform or serve same-sex marriages, but those who refuse are facing consequences all across the nation.

So far as Amicus is aware, Plaintiff-Appellees have not shown that they have suffered, nor are likely to suffer, any discriminatory denial of any right which they might hold because of HB 1523. Their only claim, according to the District Court's ruling on p. 21, is that they will suffer "stigma" because of it. The logical conclusion of this argument is that no one has a right to criticize or disapprove of anyone's behavior or lifestyle, because such criticism or disapproval would be

"stigmatic." But certainly the right of freedom of speech and freedom of religion includes the right to hold and express religious and moral convictions, even if others disagree or find those convictions offensive. Not long ago, the LGBT movement asked only that their lifestyles be tolerated. Now, they demand that their lifestyles be not only tolerated but also accepted and affirmed, and their goal is to relegate those who will not affirm them to second-class status and brand them as intolerant bigots. *See*, D.A. Carson, *The Intolerance of Tolerance*, Grand Rapids: Eerdmanns (2012).

Amicus believes that the lack of any sufficient injury on behalf of Plaintiffs presents the 5th Circuit with more than a mere standing problem; it is instead a total mockery of the real and actual harms,which Mississippian's sought to remedy with HB 1523, that have befallen many members of society simply because they maintain particular religious beliefs. These include:

- Andrew Cash, a Missouri State University counseling student who was dismissed from the program when he made known he would not counsel homosexuals, but only as to their marriage. See *Cash v. Governors of Missouri State University*, Case No. 2016-CV- (W.D. Mo. 2016).

- Ruth Neely, a Lutheran Wyoming municipal judge was suspended from her position as circuit court magistrate because she told a reporter she would not preside over same-sex marriages. Consequently, the Wyoming Commission on Judicial Conduct and Ethics has recommended her removal from the bench. Her case is now before the Wyoming Supreme Court, yet at the time of her suspension, she had not even been asked to perform a same-sex wedding. See *Neely v. Wyoming Commission on Judicial Conduct and Ethics*, No. J-16-0001 (Wyo. 2016).

- Jack Philips, owner of Masterpiece Cakeshop, who peacefully served goods to Colorado for 20 years. Fined and threatened with imprisonment by the State of Colorado for politely declining to design a specialty wedding cake, but offering instead to provide "birthday cakes, shower cakes…cookies and brownies,"[12] to the homosexual couple.

- Kim Davis, a county clerk in Kentucky, was jailed by a federal judge for five days for refusing to issue marriage licenses to same-sex couples in violation of her religion. *See Miller v. Davis*, CIVIL ACTION NO. 15-44-DLB (2015) (Doc. 69).

- Betty and Richard Odgaard had to close down their business and pay $5000 because they refused to host a same-sex wedding in violation of their religious beliefs. They routinely employed and served gays in other capacities, but they declined to participate in same-sex wedding ceremonies. See *Odgaard v. Iowa Civil Rights Commission* (Ia. Dist. Ct. 2014)

- The Ocean Grove Camp Meeting Association, once a wedding destination, is no longer used as a wedding venue after an administrative law judge found the Christian group was guilty of discrimination for refusing to host a same-sex wedding ceremony. See *Bernstein et al v. Ocean Grove Camp Meeting Association*, OAL Dkt. CRT. No. 6145-09 (New Jersey Office of Administrative Law) (2012).

- The McCarthys, the owners of a Christian farm in upstate New York, were recently fined $10,000 and assessed $1,500 in damages for not allowing a lesbian couple to use their land and home for a wedding. *McCarthy v. Liberty Ridge Farm, New York State Division of Human Rights*, Case Nos 10157952, 10157912 (2014).

- Donald and Evelyn Knapp were threatened with closure of their wedding venue, the Hitching Post, or risk being in violation of an Idaho ordinance disallowing discrimination against homosexuals because they refused to perform or host same-sex weddings. *Knapp v. City of Coeur D' Alene*, Case No.: 2:14-cv-00441-REB (D. Idaho 2016).

[12] *Masterpiece Cakeshop*, CR 2013-0008, at 2.

- Florist Barronelle Stutzman has been penalized $1001 for declining to provide flowers for a same-sex wedding in violation of her religious beliefs. See *Ingerson v. Arlene Flowers*, Case No. 91615-2 (Wash. 2016).

- The owners of Aloha Bed and Breakfast, a Christian business in Hawai'i, has been forced to violate their religious beliefs and "accommodate" a same-sex couple. See *Cervelli v. Aloha Bed and Breakfast*, Civ. No. 11-1-3103-12 ECN (Hawai'i Cir. Ct. 2013).

- Christian Bed and Breakfast owners in Illinois were sued by a homosexual activist who demanded monetary damages, attorneys' fees, and an order directing the Walders to violate their free exercise of religion rights. See *Wathen v. Timber Creek Bed and Breakfast*, Illinois Human Rights Campaign Charge no. 2011 SP 2488 (2011).

- Owners of Vermont's Wildflower Inn paid a settlement that included $20,000 in a charitable trust for two lesbians after they declined to host their same-sex wedding ceremony in violation of their religious beliefs. *Baker & Linsley v. Wildflower Inn*, Vermont Superior Court Civil Division Docket No. 183-7-11 (2012).

- Aaron and Melissa Klein, owners of a Christian bakery in Oregon, were fined $135,000 for refusing to bake a cake for a homosexual wedding in violation of their religious beliefs. They are appealing. See *Klein v. Oregon Bureau of Labor & Industries*, Agency Nos. 44 14, 45 14 CA A159899 (Or. Ct. App. 2016).

- Elaine Huguenin, whose declining to take same-sex wedding photographs resulted in an original agency order "to pay $6,637.94 in attorneys' fees,"[13] before ultimately losing on appeal by which amicus believes her costs were greatly increased. See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (2013).

[13] Lorence, Jordan, *New Mexico Supreme Court: Wedding Photographer May Not Decline Business from Same-Sex Couple's Commitment Ceremony*, The Federalist Society, available at: http://www.fed-soc.org/publications/detail/new-mexico-supreme-court-wedding-photographer-may-not-decline-business-from-same-sex-couples-commitment-ceremony.

- David and Edie Delmore, who own a bakery in Texas, declined to produce a cake for a gay wedding only to have "their home…vandalized…and their son…threatened with rape by a broken beer bottle."[14]

The legislature is not required to wait until similar incidents arise in Mississippi. A prudent Legislature acts to prevent problems before they occur. The American Bar Association has this year adopted a new provision to its Model Code of Professional Responsibility:

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules…
>
> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing [diverse] employees or sponsoring diverse law student organizations.

The practical effect of this provision, if adopted by Mississippi and other states, could be that a lawyer who speaks against same-sex marriage or transgender accommodations, or a lawyer who takes a position in a case that could be

[14] *Here it is: Complete catalogue of 'same-sex marriage' violations of faith*, available at: http://www.wnd.com/2015/04/courts-conclude-faith-loses-to-gay-demands/#T9pI1AvFL08FPOmI.99

perceived as hostile to LGBT interests, could be subject to discipline or even disbarment. True, the provision does contain a caviat that exempts "legitimate advice or advocacy consistent with these rules," but the terms "legitimate" and "consistent with these rules" are subject to myriad interpretations.

In fact, it is those who hold traditional religious and moral convictions who are threatened with stigma. Justice O'Connor observed in her concurring opinion in *Lynch v. Donnelly*, 605 U.S. 668, 688 (1984), that "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 of the political community. Disapproval sends the opposite message." Telling "nonadherents" (in this context, those whose religious and moral convictions compel them to object to same-sex marriage) that they must either violate their religious or moral convictions or give up the right to hold office or close down their businesses, sends to these people a distinct message of exclusion that they are "outsiders, not fully members of the political community."

Each of the aforementioned authentic and tangible grievances to religious citizens point toward the inevitable conclusion that the state had every reason to enact legislation such as HB 1523 which would protect a class of religious persons who are being subjected to profound injury throughout the country. Mississippi's choice to take a stand against such injuries should be commended, not condemned.

The Legislature could have gone further and protected all who have convictions about these matters, and this Court could so construe the law. But legislatures are permitted to proceed piecemeal on matters of civil rights reform, and a law is not to be invalidated simply because it could have gone further than it did. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved a provision of the Voting Rights Act of 1965 that prohibited literacy tests for Puerto Rican immigrants who had completed the sixth primary grade in a Puerto Rico. Against the argument that this provision singled out Puerto Rican immigrants for preferential treatment that was not accorded to other minorities or immigrants, the Court stated at 657,

> ...in deciding the constitutional propriety of the limitations in such a reform measure, we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U. S. 337, 279 U. S. 339, that a legislature need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 294 U. S. 608, 294 U. S. 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U. S. 483, 348 U. S. 489.

The District Court's opinion shows a distinct hostility toward religion in numerous snide references: p. 2 which says religious people disapprove of LGBT people when in fact they disapprove the lifestyle, not the people themselves; p. 9 fn 8 which compares religious beliefs to racism; p. 11 which "analyzes" the nature of the bill by quoting a newspaper article about it; p. 20 which says religious people

refuse to serve same-sex couples when in fact they only refuse to participate in same-sex ceremonies.

The District Court says citizens already enjoy protection under Mississippi's RFRA and under the Mississippi and U.S. Constitutions. Although this is possible, Amicus makes the following observations: (1) If so, how can the Appellees claim they are harmed by HB 1523? (2) Duplicate protection does not make the law unconstitutional. (3) That protection is uncertain, as seen in pending cases in other states.

The District Court says the Establishment Clause was not forced on the states; rather, the states wanted the Establishment Clause. However, we should remember that the understanding of the time was that the Establishment Clause restricted only the federal government, not the states (*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). When the court further says at p. 43 that "the public may be surprised" at the origins and intent of the First Amendment, the court displays its low esteem for the understanding of the people of Mississippi. In fact, the people of Mississippi, like the people of Alabama and other states, fully support the Establishment Clause and do not want an established religion. They object, not to the Establishment Clause itself, but to the extreme extra-constitutional interpretations of the Establishment Clause imposed by some courts.

III. THE DISTRICT COURT MISCHARACTERIZES ACCOMMONDATION OF RELIGION AS EQUIVALENT TO ESTABLISHMENT OF RELIGION.

The "principle" of the "doctrine of equal dignity" which the District Court states was, "reaffirmed…in *Burwell v. Hobby Lobby Stores*," involved Justice Kennedy's concurring opinion in that, from his perspective, "[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons…in protecting their own interests." 134 S. Ct. 2751, 2786-87. Despite what amicus believes is a basic misunderstanding of Justice Kennedy's writing, even if the District Court were correct in its interpretation, the citation of a law review article and the concurring opinion of a singular Supreme Court Justice is insufficient to overturn the plain language the First Amendment. Furthermore, the whole thrust of *Hobby Lobby* is the opposite of what the lower court implies, as amicus will demonstrate below.

The District Court's judgment that HB 1523 is unconstitutional because it exempts those who object to same-sex marriage but not those who do not object, in fact runs contrary to the U.S. Supreme Court's ruling in

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___ (2014). In that case, Hobby Lobby's owners held religious objections to a regulation adopted by the U.S. Department of Health and Human Services (HHS) under the Affordable Care Act (ACA) requiring employers to cover certain contraceptives for their female employees. The Court held that the HHS must exempt Hobby Lobby from its regulation. Note that the Court did not simply affirm a law or regulation that created a religious exemption; rather, the Court declared the existences of a constitutional exemption where none existed by law or regulation.

Hobby Lobby is analogous to the case at hand. The religious exemption was granted to those who hold religious beliefs that forbid these forms of contraception. No similar exemption was required for those whose religious beliefs do not forbid these forms of contraception, for the obvious reason that their beliefs were not threatened by this law. In like manner, those whose religious beliefs do not forbid same-sex marriage are not threatened by *Obergefell* and actions which have followed *Obergefell*, so no exemption for them was necessary. The fact that the exemption ordered by the Court in *Hobby Lobby* exempted those who objected but not those who do not object, did not render the exemption constitutionally suspect.

Interestingly, Lambda Legal, an LGBT legal defense foundation, filed an *amicus* brief in the *Hobby Lobby* case, arguing that a religious exemption for contraception coverage might adversely impact anti-gay discrimination laws. Clearly, however, the Court was not persuaded by their arguments.

Likewise, *Little Sisters of the Poor Home for the Aged v. Burwell*, ___ U.S. ___ (2016), dealt with similar issues concerning the Affordable Care Act as applied to a nonprofit religious corporation. Using reasoning very similar to that in *Hobby Lobby*, the Court's Per Curiam opinion directed the U.S. Government to seek an accommodation with the Little Sisters. Again, the fact that the exemption applied to those who object to contraception but not to those who do not object to compensation, did not render the exemption an unconstitutional establishment of religion in violation of the First Amendment.

With this reality the District Court's "doctrine of equal dignity" fails to do that which its name implies: the 'equality' of 'dignity' which the court extends to LGBT members of society comes at the expense of religious individuals whose beliefs are not favored by the District Court's perspective and as such are not afforded the 'dignity' or 'equality' of judicial protection.

Moreover, governmental efforts which result in increasing or merely specifying protections for religious persons do not breach the Establishment

Clause. In *Cutter v. Wilkinson*, 544 U.S. 709, 709 (2005), state prisoners sued prison officials in three separate actions, alleging that each prisoner was denied the right to practice his religion. The Supreme Court held that section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which increased the level of protection of prisoners' and other incarcerated persons' religious rights, did not violate Establishment Clause. *Id*. Similar to the opinion of the Southern District of Mississippi in the current case, the Sixth Circuit erroneously concluded that § 3 of (RLUIPA) impermissibly advanced religion by giving greater protection to religious rights than to other constitutionally protected rights, and suggested that affording religious prisoners superior rights might encourage prisoners to become religious. *Id.* The United States Supreme Court disagreed. Instead, the Court suggested that the Sixth Circuit misread the Supreme Court's precedents to require invalidation of RLUIPA as impermissibly advancing religion *Id.* In contrast to the Sixth Circuit's view, the Supreme Court stated:

> "Were the Court of Appeals' view correct, all manner of religious accommodations would fall. For example, Ohio could not, as it now does, accommodate traditionally recognized religions by providing chaplains and allowing worship services." *Cutter*, at 710.

The accommodation afforded to Mississippians by HB 1523 is consistent with the accommodations approved by the Supreme Court in *Sherbert*, *Yoder*, *Hobby Lobby*, *Little Sisters*, *Cutter*, and a host of other cases. If the Supreme Court

had used the reasoning of the trial court in this case, all of these accommodations would have been denied.

IV. RELIGIOUS TESTS ARE FORBIDDEN BY THE CONSTITUTION.

The post-*Obergefell* trend in this country is essentially setting up a "religious test" in that public officials are being required to shed their religious convictions at the workplace door or face litigation. HB 1523 sought to protect those public officials in Mississippi such as county clerks and judges who issue marriage licenses, but with the district court's ruling, those people must now choose between their offices or their religious convictions. The tragedy of this is that the religious convictions of many officials, particularly in Mississippi, were perfectly in line with the law until *Obergefell*'s sweeping declaration that same-sex marriage is a right that must be recognized in all states.

Article VI of the Constitution prohibits religious tests as a "qualification to any office or public trust of the United States." In *Torcaso v. Watkins*, hearing a challenge to a Maryland constitutional amendment that prohibited religious tests "other than a declaration of belief in the existence of God," the Supreme Court declared that "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion." 366 U.S. 488, 495

(1961) (internal citations omitted). Although not calling for "religious tests" outright, courts around the nation are basically declaring that Christians, Muslims, Jews, and those of many other faiths may no longer hold public office if they intend to execute the duties of their office in line with their beliefs regarding marriage. The effect of this trend on officials such as Judge Neely in Wyoming, Kim Davis in Kentucky, and those in Mississippi who would have been protected under HB 1523 is a religious test, is that one must essentially profess a disbelief in religion (since most religions expressly prohibit homosexual conduct) in order to hold public office.

HB 1523 is a sensible compromise, as it allows officials with no conviction regarding same-sex marriage to continue issuing licenses and allowed those with conviction to opt-out at with no prejudice. Now, public officials in Mississippi and elsewhere face an impossible choice: either violate their religious beliefs or be punished by the law. While Article VI and *Torcaso* speak only to public officials, HB 1523 highlights the fact that private business owners are beginning to face a religious test as well.

V. THE FIRST AMENDMENT PROTECTS REASONABLE DISSENTERS AND HB 1523 IS WITHIN THAT TRADTION.

Professor Leo Pfeffer called the Free Exercise Clause the “favored child” of the First Amendment. (Leo Pfeffer, Church, State and Freedom (Boston: Beacon Press, 1953) p. 74. Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). “Of the two principles,” he said, "voluntarism may be the more fundamental," and therefore, “the free exercise principle should be dominant in any conflict with the anti-establishment principle.” (Lawrence H. Tribe, American Constitutional Law Second Ed. (Mineola, New York: Foundation Press, 1978), (cf. 2nd Ed. sec. 14-3, p. 1160). Voluntarism is central to the case at hand, for the District Court’s ruling has the effect of compelling many Mississippians to act involuntarily in contravention their most basic beliefs. This is a violation of the right to free exercise at its very core.

Even if we could agree that the courts are empowered to recognize rights not mentioned in the Constitution, that certainly does not lead to the conclusion that an unmentioned right to engage in same-sex marriage takes precedence over the right of free exercise of religion which is set forth as a foremost if not the foremost right of all rights guaranteed by the Constitution. That is exactly what the District Court

has done here—elevated the right of a same-sex couple to marry and compel a private party to provide a work of art to celebrate that union, officiate the union, or otherwise facilitate the couple, over the constitutionally enumerated right of free exercise of religion and free speech which forbids government compulsion to act in a way that contrasts with one's sincerely held religious beliefs.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court overruled a previous decision (*Minersville School District v. Gobitis*, 310 U.S. 586 (1940)) and held that a West Virginia policy requiring school children to salute the flag and say the Pledge of Allegiance violated the free exercise and free speech rights of children who held religious objections to the ceremony, because it was "a compulsion of students to declare a belief." *Id.* at 631. In the same way, the District Court is attempting to compel Mississippi speakers to declare a belief that same-sex marriage is acceptable, or at the very least, that it is not unacceptable for a devout Christian to participate in a same-sex wedding. Therefore, the District Court's opinion directly opposes the ruling in *Barnette*.

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), Weisman objected to prayer at a middle-school graduation for which the audience was requested to stand and maintain respectful silence. The U.S. Supreme Court majority said at 593 that this constitutes coercion, because "in our culture

standing or remaining silent can signify adherence to a view or simple respect for the views of others." Certainly, officiating at a same-sex ceremony, issuing a license for such a ceremony, or providing a cake, photography, or other such services, can signify approval of the ceremony, either by the participant or by the observers. *Weisman*, like HB 1523, plainly provides precedent for the Supreme Court's firm observance of the rights of dissenters in a free society, and todays "dissenters" may be those who hold traditional beliefs about marriage and sexuality.

While free exercise is compatible with HB 1523, the safeguard to freedom of speech also favors a view consistent with HB 1523's protective goals.[15] The District Court's opinion in this case seemingly ignores the First Amendment inquiries that the United States Supreme Court set forth in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). First, the Supreme Court found the St. Patrick's Day Parade was an expressive event because the march involved more than merely making a trip, but "a public dram[a] of social relations."[16] Most importantly, the Court took note of a speaker's autonomy to convey a message which he

[15] *See generally* U.S. Const. Amend. I.
[16] *Hurley* at 568 (quoting S. Davis, *Parades and Power: Street Theatre in Nineteenth-Century Philadelphia*, 6 (1968)).

or she chooses.[17] Thus, the Supreme Court concluded, the leaders of an organized march carrying a "particularized message" could not be compelled by the state to include whomever sought to take part in the parade.[18] On the contrary, the Court stated, "this use of the State's power" to force a private speaker to include speech which he or she may or may not agree with, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[19] Likewise, the Court concluded that, "like a composer, the [speaker] selects the expressive units of the parade from potential participants."[20] And these choices of what messages to include and which to exclude "is enough to invoke [the speaker's] right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[21]

This point is re-made with respect to business owners in *Marsh v. State of Alabama*. There, the Court succeeded in careful line-drawing between a business owner's expressive rights and his customer's.[22] For instance, in *Marsh*, the Supreme Court held that a private business could

[17] *See id* at 569.
[18] *See id* at 570.
[19] *Id* at 573.
[20] *Id* at 574.
[21] *Id.*
[22] *See generally Marsh v. State of Alabama*, 326 U.S. 501 (1946) (recognizing the right of businesses to control what speech is expressed on its property).

control what messages were being expressed on the business' property.[23] Similarly, owners of bakeries, photography shops, and other places of business should not be required to propagate messages against which they have strong religious or moral convictions.

Finally, as noted above, from the First Amendment context *Hurley* asked the important question which the District Court seems to largely overlook: whether or not the conduct would be expressive. In *Hurley* the Court determined the parade to be expressive indeed. The matter facing Mr. Phillips at Masterpiece Cakeshop in 2012 was equally expressive. So too is the matter of Elane Photography, florist Barronelle Stutzman, and the student, Andrew Cash. Each of these circumstances invoke not only First Amendment "exercise" questions, but First Amendment "speech" concerns also.

In fact, wedding ceremonies are unique events in that they are dedicated to expressing a celebration of the couple's union. Even the most private wedding ceremonies 'speak' a message which, from start to finish, suggests the love of the couple is a beautiful and wonderful thing. For this very reason many couples send invitations to various members of their communities inviting guests to witness and partake in the celebration.

[23] *See id.*

Additionally, many weddings incorporate the famous tradition by which the officiant poses the question to the crowd asking if any here know of a reason why the couple should not be wed, "let him now speak or else, hereafter forever hold his peace."[24] Furthermore, in many if not most traditions the wedding officiant proclaims at the close of the ceremony language like "By the authority given to me by God and by the State of _____, I now pronounce you husband and wife." How can an officiant possibly make this proclamation without violating his/her religious or moral convictions, if he/she sincerely believes that God does not approve same-sex marriage and/or that the laws by which this is done are contrary to the higher Law of God or to the supreme law of the land?

For these reasons, it is difficult to imagine an event which is more expressive than a wedding ceremony. Likewise, the Supreme Court has held, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[25]

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[24] *See Solomized Matrimony*, traditional delivery. available at http://www.episcopalnet.org/1928bcp/ Matrimony.html.

[25] *Boy Scouts of America*, 530 U.S. at 661 (quoting *Hurley*, 515 U.S. at 579).

CONCLUSION

As the District Court pointed out, Mississippi's RFRA requires that the State, "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." *Barber v. Bryant*, Memorandum Opinion and Order (Doc. 39) (quoting Miss. Code Ann. 11-61-1(5)(b)). On its face, Mississippi's RFRA protects religious conscientious objectors from being confronted by state power for exercising their religious convictions. The "only" exception to this, that Mississippi demonstrate a compelling interest with which to charge the religious objector, is entirely absent here. Fortunately, the law of the land sets up an easy answer to this difficult question.

In a free and diverse nation, circumstances arise wherein religious persons of many different faiths encounter actual or perceived barriers to the practice of their religious convictions. The government's response to such circumstances, in light of this nation's law and history, has been to accommodate religious choice whenever possible. Conversely, in the case now before the 5th Circuit, the District Court saw fit to redefine "exercise" of religion and equate that honorable tradition with simply "voic[ing]" an objection. This bizarre reassignment of rights seems

more like an Orwellian scheme in which, "All *animals* are *equal* but *some animals* are *more equal than others*,"[26] such that the Plaintiffs-Appellees' viewpoint on marriage –which does not condemn homosexuality- is favored above the viewpoint of other religious individuals whose First Amendment rights apparently end whenever such beliefs encounter LGBT matters.

Considering the central role religion has played in America from colonial times through the present, it would be a travesty and waste to relegate people who hold traditional religious and moral beliefs to second-class status similar to dhimmitude in some Islamic societies.[27] The First Amendment's free exercise clause, Mississippi's RFRA, HB 1523, *Cutter*, *Hobby Lobby*, *Little Sisters*, *Hurley*, and many more controlling precedents from the United States Supreme Court, as well as the unique and robust history and traditions of the nation and the period before the nation favoring tolerance of religious choice, all demand the simple conclusion that the rights of Mississippians who hold traditional religious and moral convictions about marriage and sexuality should be respected.

[26] Orwell, Goerge, *Animal Farm* (1945) (emphasis added).
[27] Efraim Karsh, *Islamic Imperialism: A History* (Yale University Press, 2006), 25-26; John Eidsmoe, *Historical and Theological Foundations of Law* (Nordskog Publishing 2016) II:652-62.

Respectfully submitted, this the 2nd day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated this 6th day of March, 2015.

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I hereby certify that on November 2nd, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered as CM/ECF Filers and that they will be served by the appellate CM/ECF system:

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