Case 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
Cases No. 3:16-cv-417-CWR-LRA (lead case), 3:16-cv-442-CWR-LRA (consolidated)

RESPONSE TO PETITIONS FOR REHEARING EN BANC

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Statement Regarding Propriety Of Rehearing En Banc

A litigant seeking rehearing en banc must allege that the panel decision conflicts with a decision of the Supreme Court of the United States or a decision of this Court, or that it otherwise involves a "question[] of exceptional importance." Fed. R. App. P. 35(b)(1). The petitioners do not come close to meeting this demanding standard.

The panel's opinion is a routine application of Article III standing doctrine—hardly a question of "exceptional importance" given that the tri-partite test for standing has been settled at the Supreme Court for nearly half a century. And the panel opinion's ruling that the petitioners lack standing to challenge HB 1523 is unassailable. Litigants have no standing to challenge a conscience-protection law that shields *others* from government penalties or reprisals, and the petitioners' unfulfilled desires to see others punished by the government does not qualify as Article III injury. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). The petitioners have no more standing to challenge HB 1523 than an abortion-rights activist who objects to a law that shields doctors and health-care workers who refuse to perform abortions. *See, e.g.*, *Women's Health Ctr. v. Webster*, 871 F.2d 1377, 1383-84 (8th Cir. 1989).

The panel's opinion carefully and correctly applies the precedents of the Supreme Court, and the cases on which the petitioners rely to establish their purport-

ed circuit splits are easily distinguishable. The petitions for rehearing en banc should be denied.

I. The Panel's Opinion Does Not Contradict Any Ruling Of The Supreme Court

The Supreme Court has never held that the mere existence of a statute that "endorses" religious belief inflicts Article III injury on those who do not share those beliefs.[1] Both sets of petitioners rely on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), but they cannot get themselves to assert a "conflict" between *Santa Fe* and the panel's decision. And for good reason: The issue of standing was not even discussed in *Santa Fe*, and the passages that the petitioners quote are discussing the *merits* of the Establishment Clause—not Article III standing. When *Santa Fe* says that the Establishment Clause is violated by "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion," 530 U.S. at 314, it is not saying anything about who might have *standing* to challenge such a policy—and it is assuredly not holding or suggesting that there is universal standing to challenge such a policy. *See Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal deci-

1. Of course, nothing in HB 1523 comes anywhere close to "endorsing" religion. The beliefs described in section 2 are not "religious" beliefs; they are conscientious beliefs that some people happen to hold for religious reasons. What's more, a State does not "endorse" a conscientious belief (or even a religious belief) when it enacts a law to prevent the adherents of that belief from being coerced into violating the dictates of their conscience. Laws that exempt pacifists from military conscription do not "endorse" pacifism. And laws that allow Native Americans to ingest peyote during religious ceremonies do not "endorse" the use of peyote or the Native American religions. But even if one assumes that HB 1523 "endorses" religion and violates the Establishment Clause, the petitioners lack standing to challenge it.

sion, the decision does not stand for the proposition that no defect existed.").[2] For the petitioners to suggest that this passage from *Santa Fe* has anything to say on issue of standing is a misrepresentation of precedent.[3]

The *Barber* petitioners try to establish standing under *Heckler v. Mathews*, 465 U.S. 728 (1984), by asserting that HB 1523 has denied them a benefit that the statute extends to others. Their theory is that HB 1523, by forbidding state-sponsored punishment and reprisals against those who subscribe to the conscientious beliefs described in HB 1523, has "injured" the petitioners by allowing them to remain subject to state-sponsored discrimination on account of *their* conscientious beliefs.

The problem with this argument is that the petitioners have not alleged or shown that the State is discriminating against them on account of the conscientious beliefs that they hold—nor have they alleged that there is *any* possibility that the State might do so in the future. The petitioners claim that they subscribe to a belief system contrary to the values protected by HB

2. *See also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *United States v. Verdugo-Urquidez*, 494 U. S. 259, 272 (1990) (holding that the Supreme Court's "assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions."); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

3. The CSE plaintiffs cite *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), but these opinions are similarly bereft of any discussion of Article III standing. *See* note 2, *supra*.

1523: That marriage should *not* be defined solely as the union of one man and one woman, that sexual relations outside of that union *are* morally acceptable. But the State of Mississippi is not penalizing or discriminating against any of the petitioners on account of those beliefs when they engage in the activities described in HB 1523. Any religious organization in Mississippi that solemnizes same-sex marriages, for example, may do so without any fear of retaliation or discrimination by the State. And foster and adoptive parents may instruct their children that homosexuality and fornication are morally acceptable without any fear that the State will take their children away. To establish standing under *Heckler*, the petitioners must show that they have been or will be subjected to the state-sponsored discrimination that the beneficiaries of HB 1523 are protected from. *See Women's Health Ctr. of W. Cty., Inc. v. Webster*, 871 F.2d 1377, 1384 (8th Cir. 1989) (holding that an abortion practitioner lacked Article III injury under *Heckler* when challenging a law that prohibits discrimination against people who refuse to participate in abortions, but not those who do participate in abortions, because the plaintiff had not been discriminated against for performing abortions). The petitioners do not even allege that they will encounter discrimination or retaliation from the State on account of their conscientious beliefs.

Finally, the Barber petitioners make a last-ditch claim that the panel's decision contradicts "the spirit and promise of *Obergefell*"—whatever that means. The Barber petitioners failed to preserve this argument in the district court and before the panel, so it is waived. *See FDIC v. Mijalis*, 15 F.3d 1314,

1327 (5th Cir. 1994). In all events, a litigant must establish Article III standing before a Court can consider whether a law contradicts the "spirit" and "promise" of a Supreme Court decision, and *Obergefell* did not curtail Article III standing requirements for litigants who challenge laws such as HB 1523. *Obergefell* also recognizes the propriety of accommodating those who oppose same-sex marriage on religious grounds, an aspect of the decision that the petitioners simply ignore. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

II. The Panel's Opinion Does Not Contradict Any Ruling Of The Fifth Circuit

This Court has held that a plaintiff has Article III standing if he personally encounters a government-sponsored prayer, moment of silence, or religious symbol and must alter his routine to avoid it. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996); *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009); *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991). The petitioners try to stretch these holdings to confer standing on anyone who reads a statute that allegedly endorses religion. *See* Barber Pet. at 9–11. The panel correctly rejected this theory of standing, which contradicts the Supreme Court's holding in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8, 16–18 & n.8 (2004). The plaintiff in *Newdow* had challenged a

federal statute that added the phrase "under God" to the Pledge of Allegiance. But the Supreme Court held that Mr. Newdow lacked standing to challenge this statute in *any* capacity, either on his own behalf or as his daughter's next friend.[4] If the mere existence of a statute that endorses religion could inflict an Article III injury, then Mr. Newdow would have had standing to challenge the federal Pledge of Allegiance statute.

There is another problem with the petitioners' theory of standing: Any "injury" that a plaintiff might suffer from reading a statute is impossible to redress with judicial relief. The federal judiciary has no power to erase or remove a statute from the books, even when it declares a statute unconstitutional or enjoins its enforcement, so the "endorsement" that appears in HB 1523 will remain no matter what declaratory or injunctive relief the court provides. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("[A] favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (citation omitted)); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* 181 (7th ed. 2015) ("[A] federal court has no authority to excise a law from a state's statute book."). There is *nothing* a federal court can do to remove an endorsement of religion that appears in a duly enacted law, which is why the petitioners must allege an "injury" that extends beyond the mere offense taken at the exist-

4. *Id.* at 8 (noting that Newdow's complaint "seeks a declaration that the 1954 Act's addition of the words 'under God' violated the Establishment . . . Clause[]" and that "[i]t alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as 'next friend'").

ence of HB 1523. They must allege or show that the *enforcement* or *implementation* of the statute will injure them in some "concrete and particularized" way.

The Barber petitioners claim that the State conceded at oral argument that "standing would exist" if the State posted the text of HB 1523 on a billboard and a plaintiff would have had to alter his routine to avoid encountering it. A plaintiff would indeed have standing in that scenario, but he would have standing to challenge only the *display*; he would *not* have standing to challenge the existence or the enforcement of HB 1523 unless he alleges an actual or imminent injury caused by the State's *enforcement* of the law. The only relief that a plaintiff would have standing to request in this hypothetical scenario is a judicial order to remove the display. And a request of that sort would fail on the merits because the Constitution does not prohibit a State from displaying its statutes on a billboard. The State never conceded that the petitioners would have standing to challenge the *existence* or *enforcement* of HB 1523 if the State posted the words of the statute on a billboard.[5]

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5. The full text of the exchange appears below:

   Judge Elrod: So if they put on a big board the statute and put it in front of the state capitol and said 'proudly supporting the rights of religious people' and put this up on a big board, they might have standing because they live around the block or go to the state capitol, would that be a different scenario?

   Mr. Mitchell: Under the Establishment Clause, I believe they would have standing under Your Honor's hypothetical, because the direct and personal contact with something that is alleged to be a religious symbol sponsored by the State is enough for Article III standing. . . .

   Judge Elrod: And that was a hypothetical, as well, and we all understand. . . .

Finally, the petitioners' efforts to analogize this case to *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), are specious. The plaintiff in *Peyote Way* was *criminally prohibited* from ingesting peyote, while the Native American church was given an allowance to use the drug. *Id.* at 1212–13. The petitioners in this case, by contrast, do not face *any* state-law prohibition or policy that discriminates against them on account of their conscientious beliefs, so they are not "injured" by the fact that Mississippi has outlawed state-sponsored discrimination against others who hold different conscientious beliefs. The petitioners complain that HB 1523 does not give them an *explicit* statutory protection against state-sponsored discrimination, but that is because the petitioners do not need that statutory protection, as there is zero risk that any state or local official in Mississippi will punish or discriminate against the petitioners when they engage in the activities described in section 3 of HB 1523, and the petitioners have not alleged or shown that any such risk exists. *See Women's Health Ctr.*, 871 F.2d at 1384.

Mr. Mitchell: It's a hypothetical, and they should still lose on the merits to be sure, but as far as the Article III standing inquiry goes, if they are personally confronting a billboard sponsored by the State, with what they allege to be a religious message, that's enough for standing.

Judge Elrod: But personally confronting the statute book is not confrontational enough under the law, is your position?

Mr. Mitchell: That can't be enough for standing. If it were, everyone would have standing to challenge any law they disagree with, and that's inconsistent with many decisions of the Supreme Court, including *Newdow*, because Michael Newdow was not allowed to have standing to challenge the federal statute that added the phrase "under God" to the Pledge of Allegiance.

III. The Cases Cited From Other Courts Of Appeals Are Easily Distinguishable

The petitioners claim that that panel's decision conflicts with *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), and *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 583 (4th Cir. 2017), but each of those cases is readily distinguishable, as the panel correctly found.

The plaintiff in *Awad* alleged an "actual and imminent" Article III injury because he claimed that the challenged constitutional provision would prevent the Oklahoma courts from probating his will. 670 F.3d at 1119. The petitioners allege no "concrete and particularized" injury of that sort. *Clapper*, 133 S. Ct. at 1143.

Catholic League is distinguishable because the resolution in that case had "directly disparaged" the plaintiffs' religious beliefs and denounced them as "hateful and discriminatory," "insulting and callous," and "insensitiv[e] and ignoran[t]," *Catholic League*, 624 F.3d at 1053. HB 1523 does no such thing; it protects the conscientious beliefs enumerated in section 2 but it does not "directly disparage[]" the petitioners' religious beliefs. Indeed, HB 1523 does not even mention the religious beliefs espoused by the petitioners, let alone denounce them as "hateful" or "ignorant."

Finally, the plaintiff in *International Refugee Assistance Project* had standing because he alleged that President Trump's travel ban had barred his wife

from entering the United States. *See Int'l Refugee*, 857 F.3d at 583. The Fourth Circuit did not hold in that case that *every* Muslim residing in the United States would have standing to challenge the travel ban on the ground that it makes them feel "excluded and marginalized." *Id.*

And the petitioners conveniently neglect to mention that their own theories of standing would contradict rulings from other courts of appeals and create a circuit split for the Supreme Court to resolve. In *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), for example, the Ninth Circuit held that the mere existence of a statute that endorses religion is insufficient to confer Article III standing, even if the plaintiff alleges that the statute leads to feelings of "offense" and "stigma." *See id.* at 643 ("Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing." (citing *Allen v. Wright*, 468 U.S. 737, 755–56 (1984)). And in *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989), the Eighth Circuit held that an abortion practitioner lacked Article III standing to challenge a law that prohibited discrimination against people who refuse to participate in abortions, because the plaintiff had failed to show that he had been discriminated against for performing abortions. *Id.* at 1384.

IV. The Petitioners Grossly Misrepresent The Effects Of HB 1523 And The Panel Decision

Much of the petitioners' discussion rails against the merits of HB 1523, which has little if any bearing on the Article III standing question. But we think it appropriate to counter the misrepresentations of the statute that appear throughout the petitioners' briefs.

First, the Barber petitioners are wrong to say that three conscientious beliefs protected by HB 1523 are "three specified religious views." *See* Barber Pet. at 3. The notion that "[m]arriage is or should be recognized as the union of one man and one woman" is not a religious belief. Neither is the belief that "[s]exual relations are properly reserved to such a marriage." HB 1523, § 2. These are conscientious beliefs that *some* people happen to hold for religious reasons—but the statute protects *everyone* who holds these beliefs, regardless of whether they hold these beliefs for religious or non-religious reasons.[6] The law protects many conscientious beliefs that overlap with religious teaching, including the beliefs that warfare is immoral, or that abortion is the unjustified taking of human life. But none of those are "religious" beliefs—even though many people who adhere to those beliefs do so for religious reasons. *See Harris v. McRae*, 448 U.S. 297 (1980) (rejecting an attempt to equate anti-abortion sentiment with "religious belief").

6. *See* HB 1523, § 2 ("The sincerely held religious beliefs *or moral convictions* protected by this act are *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; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.") (emphases added).

Second, the CSE petitioners are wrong to say that HB 1523 confers immunity to violate "a laundry list of statutes and regulations," CSE Pet. at 3, because there are *no* laws in Mississippi—other perhaps than the Jackson anti-discrimination ordinance—that prohibit *any* of the conduct protected by HB 1523. *See* Appellants' Br. 19–20. And the CSE petitioners fail to identify any of these "statutes and regulations" that HB 1523 supposedly curtails. Asserting that HB 1523 establishes carve-outs for "a laundry list of statutes and regulations" of laws when HB 1523 alters the scope of zero existing state laws and only one local ordinance is, at best, misleading.

Finally, HB 1523 does not protect restaurateurs that refuse to seat homosexual couples, foster parents who inflict child abuse, or county clerks who "shunt[] aside" same-sex couples. Section 3(5) protects businesses only from being compelled to provide marriage-related services that would violate the owners' religious or moral beliefs. Serving a meal to a couple on a date is not a "marriage-related service" under any reasonable understanding of that term. *See* HB 1523 §§ 3(5)(a), 3(5)(b). Section 3(3) prohibits the State only from taking "*discriminatory* action" against foster and adoptive parents who instruct their children that homosexuality, nonmarital sex, and transgender behavior are wrong. This does not alter or curtail laws that the State enforces equally and evenhandedly against all types of foster and adoptive parents, such as laws prohibiting child abuse. And while section 3(8) allows state employees to recuse themselves from authorizing or licensing same-sex marriages, it allows recusal *only if* they provide "prior written notice to the State

Registrar of Vital Records" and "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." *Id.* at § 3(8). State employees cannot "shunt[] aside" a same-sex couple and make them wait for another employee, because that would "delay" the issuance of their marriage license

The Barber petitioners also mischaracterize the panel's decision when they say that it will "shut" the "courthouse doors" to the petitioners. The petitioners remain free to challenge HB 1523 if and when they encounter an "actual and imminent" injury on account of the statute. If, for example, one of the petitioners plans to marry a same-sex partner and finds out that his preferred caterer is unwilling to provide services at same-sex weddings, then that person will have an "actual and imminent" Article III injury that he can assert in a lawsuit against state officials (or against the plaintiffs). But the petitioners must wait until an injury of this sort becomes "imminent"; they cannot challenge a statute based on conjecture and speculation and what-if scenarios.

Conclusion

The petitions for rehearing en banc should be denied.

Respectfully submitted.

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