**No. 17-**

# In the Supreme Court of the United States

RIMS BARBER, ET AL.,

*Petitioners,*

V.

GOVERNOR PHIL BRYANT, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), this Court held that the Constitution entitles same-sex couples to join in civil marriage on the same terms as different-sex couples. In response, Mississippi enacted the Protecting Freedom of Conscience from Government Discrimination Act, Miss. Code Ann. § 11-62-1 *et seq*. (2016) ("HB 1523"). HB 1523 grants broad immunity to any person who commits enumerated acts of discrimination on the basis of religious beliefs or moral convictions opposing marriage of same-sex couples; transgender individuals; and sexual relations outside of a male-female marriage. The court of appeals held that petitioners, who do not share the endorsed beliefs, lack standing under the Establishment Clause because the religious endorsement takes the form of a statute rather than a religious display that they can physically encounter, and held that they lack standing under the Equal Protection Clause because they have suffered no unequal treatment. The questions presented are:

1. Whether petitioners have standing to challenge HB 1523 on the ground that it violates the Establishment Clause by endorsing religious opposition to marriages of same-sex spouses, transgender individuals, and sexual relations outside of marriage.

2. Whether petitioners have standing to challenge HB 1523 on the ground that it violates the Equal Protection Clause by partially preempting existing anti-discrimination protections for lesbian, gay, bisexual, and transgender ("LGBT") individuals, and by bestowing legal privileges only on those individuals who subscribe to HB 1523's state-endorsed religious and moral beliefs.

## PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellees below) are Rims Barber; Carol Burnett; Joan Bailey; Anthony Laine Boyette; Don Fortenberry; Susan Glisson; Derrick Johnson; Dorothy C. Triplett; Renick Taylor; Brandilyne Magnum-Dear; Susan Magnum; and Joshua Generation Metropolitan Community Church.

Respondents (defendants-appellants below) are Phil Bryant, in his official capacity as Governor of the State of Mississippi, and John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 860 F.3d 345. The order of the court of appeals denying rehearing en banc, App. 20a, and the opinion dissenting from denial, App. 23a, are not yet reported. The opinion of the district court, App. 35a, is reported at 193 F. Supp. 3d 677.

## JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. Petitions for rehearing were denied on September 29, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Miss. Code Ann. § 11-62-1 *et. seq*. (2016) ("HB 1523"), is reproduced in the appendix to this petition. App., *infra*, 115a.

## INTRODUCTION

Shortly after this Court recognized a fundamental right to marriage for same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Mississippi enacted a statute that establishes religious opposition to those marriages as the official policy of the State. Enacted for the purpose of recognizing "God's design for marriage," App. 46a, HB 1523 provides that businesses, individuals, religious organizations, and government officials may refuse services to lesbian, gay, bisexual, and transgender individuals on the basis of certain enumerated beliefs, including opposition to the marriage of same-sex couples and the rights of transgender individuals. HB 1523 is a transparent attempt to undermine the equal dignity of LGBT citizens established in this Court's decisions, beginning with *Lawrence v. Texas*, 539 U.S. 558 (2003), and continuing through *Obergefell*. It is an equally transparent attempt to endorse particular religious beliefs as official state policy.

Petitioners—who include LGBT individuals and others who disagree with the beliefs endorsed by HB 1523—challenged the statute as a violation of the Establishment Clause and the Equal Protection Clause of the United States Constitution. The court of appeals held that petitioners lack standing to bring either claim. With respect to the Establishment Clause, the court concluded the petitioners lack standing because the State endorsed its preferred religious beliefs in a statute, rather than in a tangible item that petitioners could physically encounter, such as a "religious display" or a "religious symbol on [a] public utility bill." App. 9a. The court's decision is wrong on the merits; it conflicts with the decision of other courts of appeals; and it has staggering

implications. Under the court's reasoning, a State could enact a statute establishing Christianity—or any other religion—as the official religion of the State, and no plaintiff would have standing to challenge that statute. The court's decision is sure to embolden other state legislatures that wish to express their disagreement with *Obergefell* in religious terms. Numerous measures similar to HB 1523 have already been introduced in state legislatures around the country. This Court's review is warranted to correct the court of appeals' insupportable holdings and to protect the promise of *Obergefell*.

## STATEMENT

1. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), this Court held that the constitutional guarantees of equal protection and due process entitle same-sex couples to join in civil marriage on the same terms as different-sex couples. *Id.* at 2604–05. Explaining that "[t]he right to marry is fundamental as a matter of tradition," the Court held that while "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, . . . its inconsistency with the central meaning of the fundamental right to marry is now manifest." *Id.* at 2602. "With that knowledge," the Court concluded, "must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter." *Id.*

The Court acknowledged that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." *Id.* But it recognized that "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the

imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* Notwithstanding the existence of personal and religious opposition, then, the State must accord same-sex couples "the same legal treatment as opposite-sex couples" with respect to civil marriage. *Id.*

2. a. Mississippi officials vehemently disagreed with the *Obergefell* decision. Governor Phil Bryant declared that it "usurped" states' rights and imposed a federal regime that was "certainly out of step with the majority of Mississippians." App. 44a–45a. The state legislature had a similar reaction. On the day of the decision, "Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an 'overreach of the federal government.'" App. 45a. Speaker of the House Philip Gunn stated that the decision was "in direct conflict with God's design for marriage," and some legislators suggested that the State should stop issuing marriage licenses entirely. App. 45a–46a.

Within ten months, the Mississippi legislature enacted legislation in response to *Obergefell*, in the form of the Protecting Freedom of Conscience from Government Discrimination Act, App. 115a–126a (Miss. Code Ann. § 11-62-1 *et. seq.*) ("HB 1523"). Introduced by Representative Gunn, HB 1523 was described as "a solution to the crossroads we find ourselves in today as a result of *Obergefell v. Hodges*," and as "very specific to same-sex marriage." App. 79a n.28. Representative Gunn commented that "[a]fter the Supreme Court decision in Obergefell (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay mar-

riage and the right to gay marriage created by the decision." App. 48a n.12.

b. HB 1523 establishes a system of legal benefits for the class of Mississippi citizens who condemn marriage between same-sex spouses, sex outside of marriage, and transgender individuals on religious or moral grounds. Section 2, App. 115a (§ 11-62-3), sets forth three specific "sincerely held religious beliefs or moral convictions" that the statute protects: (1) "Marriage is or should be recognized as the union of one man and one woman"; (2) "Sexual relations are properly reserved to such a marriage"; and (3) "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." *Id.* ("Section 2 beliefs").

HB 1523 provides legal protection to government officials, individuals, religious organizations, and businesses who take certain actions on the basis of the beliefs that Section 2 singles out for privileged legal status. The protected conduct includes declining to provide psychological counseling or fertility services, App. 117a (§ 11-62-5(4)); refusing to provide services, accommodations, facilities, goods, or privileges related to marriage, including services such as wedding venue and car service rentals, App. 116a–118a (§§ 11-62-5(1)(a), (5)); establishing sex-specific standards or policies concerning employee or student access to restrooms, App. 118a (§ 11-62-5(6)); and, for state employees, refusing to license lawful marriages, App. 118a–119a (§ 11-62-5(8)), and engaging in expressive conduct in the workplace based upon Section 2 beliefs, App. 118a (§ 11-62-5(7)). *See generally* App. 115a–120a.

HB 1523 provides broad immunity to those who engage in any of the enumerated acts. The statute prohibits the "state government"—defined to include both the State and its political subdivisions, as well as any private person or third party suing under state law, App. 124a (§ 11-62-17(2))—from taking "any discriminatory action" against any entity that engages in the protected conduct. App. 115a (§ 11-62-5(1)). "Discriminatory actions" include both private and public actions. App. 120a–121a (§ 11-62-7). Private parties who have been denied services or otherwise injured by the protected conduct may not sue under any state law or ordinance. App. 124a (§ 11-62-17(2)(d)). If a private party does sue, HB 1523 provides a defense "in any judicial or administrative proceeding." App. 121a (§ 11-62-9(1)). The statute also forbids the state government from responding to the protected conduct by imposing any tax or licensing consequences, or denying any state funding (such as grants, contracts, and scholarships). App. 120a (§ 11-62-7(1)). The state government also may not discipline state employees who engage in the privileged conduct, or alter their terms and conditions of employment. App. 121a (§ 11-62-7(1)(g)).

3. a. In June 2016, petitioners—individual citizens and residents of Mississippi and the Joshua Generation Metropolitan Community Church in Hattiesburg—filed this suit against Mississippi officials ("the State"), challenging HB 1523 as a violation of the Establishment and Equal Protection Clauses.[1]

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[1] One week later, the Campaign for Southern Equality and Reverend Dr. Susan Hrostowski filed a separate challenge to HB 1523 on Establishment Clause grounds. The two cases were consolidated for purposes of the proceedings in the district

(footnote continued)

App. 35a. As the district court explained, petitioners fall into three categories: (1) ministers who disagree with and object to the beliefs protected by HB 1523; (2) members of groups targeted by HB 1523 (a man engaged to marry his male partner, a married lesbian couple, transgender individuals, and a person in a non-marital relationship that includes sexual relations); and (3) other citizens who disagree with and object to the beliefs protected by HB 1523. App. 37a.

Petitioners sought a preliminary injunction to prevent enforcement of the statute. App. 57a. The State contended that petitioners lacked Article III standing to raise their Establishment Clause and equal-protection challenges. *Id.*

b. After a hearing, the district court concluded that petitioners had standing to raise their claims, and that they were entitled to a preliminary injunction. App. 57a–114a.

With respect to standing, the court explained that a plaintiff must show (1) that she has "suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted). Because petitioners sought injunctive relief, the court observed, it would be sufficient to establish that

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court and the court of appeals, but the parties filed separate briefs. *See generally* App. 1a–160a.

at least one petitioner had standing with respect to each claim. App. 58a.

The district court concluded that petitioners had standing to bring their Establishment Clause challenge because they had sufficiently alleged that HB 1523 is "an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others." App. 65a. The court explained that the Supreme Court "has found standing in a wide variety of Establishment Clause cases" where the only injury alleged was stigmatic injury caused by the government's endorsement of religious beliefs not shared by the plaintiffs—in other words, harm to "the religious or irreligious sentiments of the plaintiffs." App. 64a. The district court further concluded that petitioners' alleged injuries were directly traceable to HB 1523 and would be redressed by enjoining the statute. App. 67a–69a.[2]

The district court also held that the LGBT petitioners, who are targeted by HB 1523, had standing to raise their equal-protection challenge. The court reasoned that "stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement." App. 59a. HB 1523 inflicted that injury by establishing a "broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status." App. 62a. The court also observed that HB 1523 injured petitioners by "'withdraw[ing] from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others,

[2] The court also concluded that the petitioner church had associational standing. App. 69a–70a.

specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies.'" App. 61a–62a (quoting *Romer v. Evans*, 517 U.S. 620, 627 (1996)).

Having concluded that petitioners had standing, the district court held that petitioners were entitled to a preliminary injunction. App. 74a–114a. The court held that petitioners were likely to succeed on their Establishment Clause claim because HB 1523 impermissibly establishes state-preferred religious beliefs, App. 97a, and gives Mississippians with those preferred beliefs "an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service," App. 108a. The court also held that petitioners were likely to succeed on their Equal Protection Clause claim, concluding that, "[a]s in *Romer* and [*United States v.*] *Windsor*, [133 S. Ct. 2675 (2013),] the effect of HB 1523 would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law." App. 82a–83a. The court concluded that petitioners faced irreparable damage from the statute; indeed, "an almost endless parade of horribles . . . could accompany the implementation of HB 1523." App. 87a n.32.

4. The court of appeals reversed, holding that petitioners lacked standing to raise their claims under both the Establishment and Equal Protection Clauses. App. 1a–20a.

With respect to petitioners' Establishment Clause challenge, the court recognized that "stigmatic injury" arising from the government's endorsement of particular religious beliefs "can be a cognizable Establishment Clause injury." App. 7a. It concluded,

however, that petitioners' alleged injury was insufficiently concrete. App. 8a. In the court's view, a stigmatic injury arising from state action endorsing or disapproving religious beliefs is sufficiently concrete only if it arises from a "personal confrontation" with the action in question. App. 9a. Thus, the court explained, while it was well established that an individual who encounters a physical religious display or a religious message written on currency has a direct and concrete injury sufficient to establish standing, that injury depended on the plaintiffs' face-to-face encounter with the message. App. 9a–10a. Petitioners, by contrast, made "no clear showing of a personal confrontation with Section 2: The beliefs listed in that section exist only in the statute itself." App. 9a.

With respect to petitioners' equal-protection claim, the court of appeals held that "[w]hen plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment." App. 15a. In the court's view, HB 1523 imposed only a "clear message" of disapproval, rather than any discriminatory treatment. App. 16a. The court rejected petitioners' argument that HB 1523 partially preempted existing local anti-discrimination ordinances protecting LGBT individuals, and therefore denied them legal protections they had previously enjoyed. App. 17a–18a (citing *Romer*, 517 U.S. at 623–24). The court reasoned that "HB 1523 preempts the local anti-discrimination policies only in the circumstances enumerated" in the statute, and therefore petitioners "would have to allege plans to engage in [the specified] conduct in Mississippi for which they would be subject to the denial of service and would be stripped of a preexisting remedy for that denial." App. 18a. Having concluded that petitioners lack standing, the

court of appeals did not address the district court's ruling that HB 1523 likely violates the Establishment and Equal Protection Clauses and will inflict irreparable harm on LGBT Mississippians.

4. The court of appeals denied petitioners' petition for rehearing en banc. App. 21a. Judge Dennis, joined by Judge Graves, dissented. App. 23a–34a. The dissenting judges believed that "the panel opinion committed serious error in concluding that the plaintiffs lacked standing to bring suit under the Establishment Clause," App. 23a, and "unjustifiably create[d] a split from [the court's] sister circuits." App. 34a.

The dissenting judges argued that the panel's reliance on religious-display and religious-exercise cases was misplaced. While in "cases involving challenges to religious exercises or displays, courts have generally required some sort of physical exposure to the challenged object or conduct," in "cases involving challenges to laws or official policies in the plaintiffs' own communities," App. 25a, "the stigmatic harm that flows from the enactment of the law or the adoption of the policy tending to make the plaintiffs feel marginalized or excluded in their own community is sufficient" to establish an injury-in-fact, App. 32a. That is because "[t]he First Amendment 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'"—which is precisely what HB 1523 does. App. 33a (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989)). The dissent concluded that the court of appeals' holding "will thus deny citizens a forum in which to challenge 'the evils against which the Estab-

lishment Clause was designed to protect.'" App. 34a (quoting *Mueller v. Allen*, 463 U.S. 388, 399 (1983)).

5. On October 9, 2017, the Fifth Circuit issued the mandate in the case, allowing HB 1523 to take effect.

## REASONS FOR GRANTING THE PETITION

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), this Court held that marriage is a fundamental right that must be available to same-sex couples on the same terms as to different-sex couples. In response, Mississippi enacted HB 1523, which grants broad immunity to religiously motivated denials of goods and services to same-sex couples and transgender individuals. HB 1523 "put[s] the imprimatur of the State itself" on religious opposition to same-sex marriage, thereby creating a regime that "demeans [and] stigmatizes" same-sex couples and denies them equal treatment under the law. *Id*. at 2602. That is precisely the harm that *Obergefell* sought to rectify.

Indeed, the district court concluded that "[t]he title, text, and history of HB 1523 indicate that the bill was the State's attempt to put LGBT citizens back in their place after *Obergefell*." App. 81a. HB 1523 is thus simply the latest example of a state measure enacted to counteract this Court's decisions protecting the rights of LGBT individuals. Just as "*Lawrence [v. Texas*, 539 U.S. 558 (2003)] . . . birthed the state constitutional amendments" prohibiting marriage of same-sex couples, "now *Obergefell* has led to HB 1523." App. 44a.

In order to safeguard the promise of *Obergefell* and protect their rights as full citizens of Mississippi, petitioners challenged HB 1523 as a violation of the Establishment Clause and the Equal Protection Clause. The court of appeals' conclusion that peti-

tioners lack standing has sweeping and unacceptable implications. Under the court of appeals' reasoning, the State could enact a law declaring Christianity, Hinduism, or any other faith to be the official state religion, and no one would have standing to challenge that unconstitutional endorsement of religion, absent some sort of physical manifestation of that law. Unsurprisingly, the court of appeals' decision denying standing conflicts with this Court's precedent and the decisions of other courts of appeals.

The standing question is an important and recurring one: in the wake of *Obergefell*, many other state legislatures have introduced similar proposals intended to privilege religiously motivated refusals to serve same-sex couples and transgender individuals. The court of appeals' decision will likely embolden still others. This Court should grant review to bring clarity to the standards governing standing to challenge such statutes.

## I. This Court Should Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Establishment Clause Challenge.

The court of appeals' conclusion that petitioners lack standing to challenge HB 1523 under the Establishment Clause conflicts with decisions of three other circuit courts. App. 24a (recognizing that the panel's decision "creates a conflict between [the Fifth Circuit] and [its] sister circuits on the issue of Establishment Clause standing"). The decision is also unsupportable. The court acknowledged that HB 1523 "endorse[s]" particular religious beliefs against same-sex marriage and transgender individuals. App. 7a. The court also acknowledged that psychological or spiritual harm arising from

government endorsement of particular religious beliefs "can be a cognizable Establishment Clause injury." *Id.* Yet the court held that petitioners' injury is insufficiently concrete because HB 1523 is a statute that, unlike a monument or other tangible religious display, cannot be personally encountered in the physical world. That conclusion is baseless. Under the court of appeals' view, when the State engages in the most powerful act of endorsement available to it—enacting its preference for particular religious beliefs into state law—no plaintiff will have standing to challenge that action as a violation of the Establishment Clause. This Court's review is warranted to correct the court of appeals' "grievous error." App. 34a (Dennis, J., dissenting from denial of rehearing en banc).

### A. The Court Of Appeals' Decision Conflicts With The Decisions Of Three Other Circuits.

1. In *Catholic League for Religious and Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1048–53 (9th Cir. 2010) (en banc), the Ninth Circuit held that "a Catholic civil rights organization and two devout Catholics" had standing to challenge a San Francisco resolution expressing disapproval of the Catholic Church's policy against adoption by same-sex parents. Because the resolution did not impose any actual disability on Catholic charities or individuals, the plaintiffs alleged only that "the resolution conveys a government message of disapproval and hostility toward their religious beliefs." *Id.* at 1048. The court explained that the plaintiffs had a sufficiently concrete and personal injury because they were Catholic residents of San Francisco, and therefore were "members of the community who have had

contact with the resolution and have suffered spiritual harm as a result." *Id.* By disapproving specific religious beliefs and endorsing others, the resolution "sends a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 1049 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)). To hold otherwise, the court stated, would mean that a "resolution declaring Catholicism to be the official religion of the municipality would be effectively unchallengeable." *Id.* at 1048.

In reaching its conclusions, the court drew an analogy to cases involving religious displays such as crosses on government property or on city seals. The court observed that "[t]he harm to the plaintiffs in those cases was spiritual or psychological harm," and "[t]hat is the harm plaintiffs claim here." *Id.* at 1050–51. Indeed, the court stated, it would be "difficult" to "distinguish[]" the religious display cases "convincingly." *Id.* at 1051.

The Ninth Circuit's decision directly conflicts with the decision below. Like the San Francisco resolution at issue there, HB 1523 takes an official position on a matter of religious belief. The court of appeals asserted that *Catholic League* was distinguishable because the resolution at issue there disparaged an "identified religion," while HB 1523 does not. App. 13a n.9. That is incorrect. The Ninth Circuit expressly acknowledged that the resolution was indistinguishable, for standing purposes, from a resolution adopting Catholicism as the City's official religion—even though such a resolution would not disparage any identified religion. *Catholic League*, 624 F.3d at 1048; *id.* at 1052 (concrete psychological harm is caused by "government condemnation of one's own religion *or endorsement of another's* in one's own

community") (emphasis added); *see Awad v. Ziriax*, 670 F.3d 1111, 1122–23 (10th Cir. 2012) (standing exists even when a religious display does not "expressly target and condemn a specific religion"). Like the plaintiffs in *Catholic League*, petitioners do not adhere to the beliefs endorsed by the government, and as residents of the community, they have had "contact" with the statute "and have suffered spiritual harm as a result." *Catholic League*, 624 F.3d at 1048.

2. Similarly, in *Awad*, 670 F.3d at 1123, the Tenth Circuit held that a Muslim plaintiff had standing to challenge a proposed amendment to the Oklahoma Constitution banning courts from considering Sharia law. The court held that the plaintiff had sufficiently alleged a concrete injury arising from "personal and unwelcome contact with an amendment to the Oklahoma constitution that would target his religion for disfavored treatment." *Id.* at 1122 (internal quotation marks omitted). "As a Muslim and citizen of Oklahoma," the court reasoned, the plaintiff was "directly affected by the law." *Id.* Like the Ninth Circuit, the *Awad* court recognized that the stigmatic injury inflicted by the proposed amendment was indistinguishable from the harm inflicted by religious displays. *Id.* at 1121. Under the Tenth Circuit's reasoning, petitioners have alleged a sufficiently concrete injury arising from HB 1523.

The court below concluded, however, that *Awad* was distinguishable because there the plaintiff also alleged that the amendment, if adopted, would prevent Oklahoma courts from someday probating his will. App. 12a. But the *Awad* court did not rely on that allegation in finding standing. After describing the stigmatic harm inflicted by the proposed amend-

ment's message of condemnation, the court stated that "that is enough to confer standing." *Awad,* 670 F.3d at 1122. The court went on to describe the amendment's potential effect on Awad's will as an injury "beyond" the stigmatic harm necessary to establish standing. *Id.*

3. In *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), the Fourth Circuit held that a non-Christian high-school student and her father had standing to challenge a school district policy allowing students to receive academic credit for private, off-campus Christian religious instruction. The court rejected the argument that the parents lacked standing simply because their children had not participated in the private religious course or been harassed in any way for not participating. *Id.* at 603, 607. Instead, recognizing that "[m]any of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic," *id.* at 605 (internal quotation marks omitted), the court held that the parents had standing because the school's "alleged Christian favoritism made them feel like 'outsiders' in their own community," *id.* at 607; *accord Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 582–83 (4th Cir.) (en banc) (holding that "feelings of marginalization and exclusion" gave rise to injury sufficient to challenge order suspending entry from seven Muslim-majority countries), *cert. granted*, 137 S. Ct. 2080 (2017). Like the school district policy at issue in *Moss*, HB 1523 is a state-sanctioned message that sends a message to the plaintiffs and other nonadherents "that they are outsiders, not full members," of their own Mississippi communities. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). Under the Fourth Circuit's reasoning,

petitioners have alleged the precise type of nontangible, value-laden harms that are sufficient to confer Establishment Clause standing.

### B. The Court Of Appeals Incorrectly Concluded That Petitioners Lack Standing To Bring Their Establishment Clause Challenge.

Under the Establishment Clause, a State "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The State violates that core constitutional protection not only when it establishes a religion or a religious practice, but also when it purposefully "endorses" one religion over another, or religion over nonreligion. *Santa Fe*, 530 U.S. at 309–10. In the context of challenges to state enactments, this Court has made clear that one of the injuries against which the Establishment Clause protects is "the mere passage by the [government] of a policy that has the purpose and perception of government establishment of religion." *Id.* at 314. State "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 309–10 (internal quotation marks omitted).

The injury caused by state endorsement of a religious message is thus the psychological or spiritual harm that arises when a member of the community receives the government's message and feels denigrated or excluded. *See id.*; *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). A plaintiff

may therefore establish standing to challenge the government's endorsement of particular religious beliefs by alleging stigmatic injury resulting from the endorsement. App. 27a (Dennis, J., dissenting from denial of rehearing en banc) (*Santa Fe*'s "explication of the relevant constitutional injuries against which the Establishment Clause guards" is highly relevant to standing).

That stigmatic injury must, of course, be sufficiently concrete: the plaintiff must allege that she is "directly affected" by the challenged endorsement. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982). In the context of challenges to religious displays on state property, courts have found the requisite "direct effect" when the plaintiff alleges that she is a member of the community and a nonadherent of the religious beliefs promoted by the government, that she has had unwelcome contact with the display, and that hearing the government's message caused her stigmatic injury. *See, e.g.*, *Awad*, 670 F.3d at 1122; *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010) (standing to challenge roadside crosses); *Van Orden v. Perry*, 545 U.S. 677, 682 (2005) (adjudicating challenge to Ten Commandments monument on state property without discussing standing, where plaintiff alleged that "he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds"); *Cnty. of Allegheny*, 492 U.S. at 588 (adjudicating challenge by local residents to holiday display on county property).

Petitioners have alleged that HB 1523 has caused them precisely the same direct and personal injury.

If anything, HB 1523 inflicts a much more concrete injury than any religious display. Enshrining particular religious beliefs in a state statute is the most emphatic endorsement the State can make—it represents the State's official and considered policy, and it is intended to govern all state citizens. Indeed, the First Amendment itself recognizes as much, stating that "Congress shall make *no law* . . . respecting an establishment of religion." U.S. Const. amend. I (emphasis added). By endorsing its preferred religious beliefs in a statute, the State left no ambiguity about its position: it believes that religious opposition to marriage between same-sex spouses, and the other Section 2 beliefs, should be privileged under state law, while opposing views should not.[3] *See Catholic League*, 624 F.3d at 1050 n.20 ("A symbol such as a crèche on the city hall lawn is ambiguous. . . . The resolution at issue, like a symbol, conveys a message, but unlike a symbol, the message is unambiguous."). The statute thus unmistakably conveys to those who hold the disfavored views that they are "outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309–10.

Petitioners are directly affected by HB 1523. They "are citizens of Mississippi and are subject to its

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[3] The fact that HB 1523 privileges "moral" as well as religious beliefs does not alter or dilute the State's clear endorsement of the enumerated religious beliefs. The mere addition of the word "moral" does not create a broader context that "neutraliz[es] the religious content" or "negates any message of endorsement." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); *see Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (concluding that disclaimer of secular purpose did not dilute Ten Commandments' message of religious endorsement).

laws." App. 28a (Dennis, J., dissenting from denial of rehearing en banc). Petitioners are aware of the statute and its protection of discrimination based on particular religious beliefs. Indeed, HB 1523 protects the belief that some of the petitioners' marriages to same-sex spouses are wrong and that transgender individuals' gender identity should not be acknowledged—thus placing the State's imprimatur on religious beliefs that not only conflict with petitioners' beliefs, but that repudiate central aspects of petitioners' lives, families, and identities. Each day, as petitioners live and work in the State, they must do so with the knowledge that their government has chosen to endorse religious beliefs condemning their lives and relationships and very existence, and that their government has permitted government officials, individuals, businesses, and organizations to freely discriminate against them. This is a direct and concrete injury. *See Awad*, 670 F.3d at 1122.

The court of appeals asserted, however, that petitioners' injury is insufficiently direct because HB 1523, unlike a religious display, cannot be physically encountered. App. 9a–11a. That literal-minded reasoning cannot withstand scrutiny. The purpose of requiring a plaintiff challenging a religious display to allege a "personal encounter" with the display is simply to ensure that the plaintiff has a personal stake—that she herself has been subjected to the government's message of endorsement. *Catholic League*, 624 F.3d at 1048 ("Had a Protestant in Pasadena brought this suit, he would not have had standing. Catholics in San Francisco, on the other hand, have sufficient interest."). There is no talismanic significance to the face-to-face confrontation with a monument or other tangible display. The court of appeals' reasoning suggests that a citizen would have

standing to challenge HB 1523 if the State publicly displayed the law's text on a billboard outside the state capitol building, but that the citizen lacks standing when confronted with the knowledge that the offending statute is the enacted law of the State. In both instances, the harm on which standing is based is the feeling of exclusion and subordination that results from the State's conveyance of its message. *Santa Fe*, 530 U.S. at 309–10. Here, there can be no question that petitioners have been personally subjected to the State's message of exclusion: they are aware of the statute and, as citizens of Mississippi, are governed by it. As Judges Dennis and Graves concluded, that is sufficient. App. 25a (Dennis, J., dissenting from denial of rehearing en banc). To conclude otherwise would be to hold that no plaintiff would ever have standing to challenge a state statute endorsing particular religious beliefs—even one declaring that Christianity is the State's official religion—absent a physical manifestation that the plaintiff could encounter. *Catholic League*, 624 F.3d at 1048. That cannot be the law.

The court of appeals was also incorrect in concluding that petitioners' claims are merely a generalized grievance. *See Valley Forge*, 454 U.S. at 483–85. The rule that a plaintiff may not establish standing by alleging that she shares "the generalized interest of all citizens in constitutional governance" is simply another way of expressing the principle that a plaintiff must have a personal stake in the challenged action. *Id.* at 483. In *Valley Forge*, for instance, the plaintiffs, residents of the Washington, D.C. area, challenged a land conveyance from the government to a religious college in Pennsylvania. They had no personal nexus to the challenged government action—they had learned of the action in the press—

and thus their stake in the litigation amounted only to a generalized interest in the legality of the government's conduct. *Id.* at 485. Here, by contrast, petitioners *are* personally affected for the reasons stated above. *See* App. 24a–34a (Dennis, J., dissenting from denial of rehearing en banc). To be sure, their injury may be widely shared among nonadherents in Mississippi—but that is simply a function of the State's use of a statute to endorse its favored beliefs. That does not make petitioners' injury a generalized grievance. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016), as revised (May 24, 2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.").

## II. This Court Should Also Review The Court Of Appeals' Conclusion That Petitioners Lack Standing To Bring Their Equal Protection Clause Challenge.

The court of appeals' conclusion that petitioners lack standing to bring their equal-protection claim also warrants review. The court wrongly held that HB 1523 sends only a "discriminatory message." App. 15a. To the contrary, the statute establishes an unequal legal regime bestowing benefits only on adherents to Section 2 beliefs and permitting those adherents to discriminate against LGBT individuals with impunity. That disparate treatment demeans and stigmatizes petitioners and relegates them to second-class status. HB 1523 also preempts anti-discrimination ordinances that previously protected LGBT individuals, and limits the scope of any similar

ordinances enacted in the future. As other courts of appeals have recognized, the discriminatory legal regime established by HB 1523 inflicts a concrete injury in fact.

### A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Circuits.

The court of appeals' decision creates a conflict in the circuits as to whether an allegation of stigmatic harm arising from unequal treatment confers standing to bring an equal-protection claim. In *Hassan v. City of New York*, 804 F.3d 277, 284 (3d Cir. 2015), the Third Circuit concluded that plaintiffs of the Islamic faith had standing to challenge a government-surveillance program allegedly directed at Muslim individuals and institutions. Although the plaintiffs did not allege that they had personally been surveilled or necessarily would be surveilled, the court held that the existence of a program directed only at Muslims inflicted "the indignity of being singled out . . . for special burdens." *Id.* at 289. Unequal treatment, the court reasoned, "is a type of personal injury [that] ha[s] long [been] recognized as judicially cognizable, and virtually every circuit court has reaffirmed—as has the Supreme Court—that a discriminatory classification is itself a penalty, and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." *Id.* at 289–90 (internal quotation marks and citations omitted). That reasoning would apply here too: by immunizing discrimination against LGBT individuals, HB 1523 "single[s] out" those individuals for "special burdens" not shared by other Mississippi citizens. *Id.* at 289.

Similarly, the Fourth Circuit held in *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790

(4th Cir. 2004), in the context of an analogous First Amendment challenge, that plaintiffs had established injury arising from the fact that the State offered "pro-life" but not "pro-choice" license plates. Because there were no pro-choice license plates for the plaintiffs to obtain in any event, the sole alleged injury was the disparate treatment. Relying on equal protection cases and applying the analysis "typically seen in equal protection cases," *id.,* the court explained that the plaintiffs alleged injury arising from "the discriminatory treatment they suffer from the State's use of the license plate forum to promote one political viewpoint (pro-life) in the debate about abortion." *Id.* at 790. That discriminatory treatment "is a harm that is sufficiently particular to qualify as an actual injury for standing purposes." *Id.*; *see also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (finding injury in fact arising from "the denial of equal treatment" where plaintiffs would be required to show photo identification if they voted in person but not if they voted absentee).

### B. The Court Of Appeals Incorrectly Concluded That Petitioners Lack Standing To Bring Their Equal-Protection Claim.

The court of appeals concluded that petitioners lack standing to challenge HB 1523 on equal-protection grounds because the statute merely "expos[es]" them "to a discriminatory message, without a corresponding denial of equal treatment." App. 15a. That is incorrect: HB 1523 is a gross denial of equal treatment, and petitioners have sufficiently alleged injury in fact.

1. This Court has repeatedly held that the denial of equal treatment to particular individuals solely

because of "their membership in a disfavored group" gives rise to a concrete injury in fact. *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). "[D]iscrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community," causes serious "non-economic injuries to those persons who are personally denied equal treatment." *Id.* (internal quotation marks and citations omitted). The Court has also held that a cognizable denial of equal treatment occurs when the government provides a less favorable legal regime to a disfavored class—regardless of whether members of the class are actually denied benefits as a result. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). "The 'injury in fact' in an equal-protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

HB 1523 subjects petitioners to discriminatory treatment in at least two ways. First, it bestows legal privileges only on those who subscribe to the Section 2 beliefs, immunizing their denials of service to same-sex couples and transgender individuals. By conferring sweeping immunity from private suits and state action on those who act on the Section 2 beliefs, the statute leaves a disfavored group of people with no recourse—legal or otherwise—when they are (for example) denied health care or psychological counseling, or denied services in connection with their wedding.

That is the definition of unequal treatment under the law. HB 1523 establishes an unequal legal re-

gime, both creating a favored class of people and allowing them to deny with impunity a range of services to another, disfavored, class of people. There is no question that if the statute permitted businesses to deny service on the basis of race, that discriminatory regime—its relegation of racial minorities to "innately inferior" status—would give rise to injury in fact. *Heckler*, 465 U.S. at 739–40.

Second, HB 1523 partially preempts existing local anti-discrimination policies and would limit the scope of any local protections petitioners could hope to secure in the future. The statute is thus analogous to the Colorado constitutional amendment invalidated in *Romer v. Evans*, 517 U.S. 620 (1996). That amendment "operate[d] to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government," and also "bar[red] homosexuals from securing protection against the injuries that these public-accommodations laws address." *Id.* at 629. The amendment imposed a "special disability" on gays and lesbians, and therefore violated the Equal Protection Clause. *Id.* at 631. To be sure, the Court in *Romer* did not address the challengers' standing because the case arose out of the State's appeal of a state-court injunction. But the Court's description of the equal-protection violation effectively defines the injury for standing purposes. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing "often turns on the nature and source of the claim asserted"). The "actual or threatened injury required by Article III" arises from a violation of the substantive protections of the Equal Protection Clause. *Id.* The Equal Protection Clause protects against the "special disability" that results when a statute rolls back a targeted class's existing protections and makes other protections

harder to obtain; therefore, the government's imposition of that disability inflicts injury in fact.[4] That is exactly what petitioners have alleged here.

2. The court of appeals wrongly held that petitioners' alleged injuries are insufficiently "certain[]" because petitioners have not alleged that they will be subject to specific denials of service at the hands of people protected by HB 1523. App. 18a. But petitioners' injury in fact arises from the unequal treatment embedded in the statute itself, not from potential future instances of discrimination abetted by the law. It is the statute that denies equal treatment by establishing a legal regime that favors proponents of the Section 2 beliefs, and by preempting existing ordinances and impeding future ones. The statute thus imposes a special legal disability on petitioners—individuals who do not subscribe to Section 2 beliefs and may be discriminated against under HB 1523. The existence of that injury does not turn on whether petitioners ultimately are denied services in reliance on HB 1523. *See Ne. Fla.*, 508 U.S. at 666; *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991) ("[I]llegitimate unequal treatment is an injury unto itself, 'not coextensive with any [injury due to the denial of] substantive rights to the . . . party discriminated against.'" (quoting *Heckler*, 465 U.S. at 739)).

[4] Any other conclusion would lead to the odd result that a plaintiff could raise a *Romer*-type claim only in state court.

## III. This Court's Review Is Warranted To Resolve Important And Recurring Questions Concerning Standing Under The Establishment Clause And The Equal Protection Clause.

A. The question whether a plaintiff has standing to challenge a state statute that permits businesses and government officials to deny services to LGBT individuals on religious grounds is important and bound to recur. HB 1523 is a test balloon for a fleet of similar religious-objection laws targeting LGBT people that have already been introduced in state legislatures around the country.[5] The sheer prevalence of those measures demonstrates the pressing need to address state attempts to use religious exemptions to undermine rights to equality and dignity of LGBT people established under this Court's recent landmark cases. These religious-objection provisions are therefore certain to be challenged on the ground that they violate the First and Fourteenth Amendments and erode the promise and protection of *Obergefell*. State defendants are likely to respond, as did respondents here, by challenging the plaintiffs' standing.

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[5] For example, bills in Arkansas, Oklahoma, Texas, and Wyoming, all resembling Mississippi's HB 1523, were introduced in 2017 but did not pass during the pendency of this case. *See* H.B. 2232, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); S.B. 197, 56th Leg., Reg. Sess. (Okla. 2017); 85th Leg., Reg. Sess., H.B. 2779 (Tex. 2017); H.B. 135, 64th Leg., Reg. Sess. (Wyo. 2017). Links to bill text are available at http://www.protectthyneighbor.org/state-legislation-2017#2017FADA. Similarly, an Ohio bill would permit any business to refuse on religious grounds to participate in marriage ceremonies of same-sex couples. H.B. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2015). (footnote continued)

The disagreement among the circuits concerning the allegations necessary to establish injury in fact in challenges to statues privileging particular religious beliefs will produce different outcomes for persons who are similarly situated for standing purposes. If Oklahoma residents challenge an Oklahoma religious-objection statute, for instance, they will have standing under Tenth Circuit precedent (namely, *Awad*, *supra*) in the circumstances alleged here. This Court should therefore resolve the disagreements among the circuits in order to ensure uniformity and to provide guidance to litigants in these challenges.

B. This Court's grant of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017), underscores the importance of addressing state attempts to limit *Obergefell* by creating unprecedented religious exemptions to generally applicable laws.

*Masterpiece Cakeshop*, which concerns a baker who declined to create a cake for a wedding of a same-sex couple, presents the question whether "applying Colorado's public accommodations law to com-

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In addition, numerous other bills have been introduced but were not passed before the legislatures adjourned. Those bills could be reintroduced at subsequent sessions—particularly if the Fifth Circuit's decision in this case is allowed to stand. *See, e.g.*, S.B. 2158, 89th Leg., Reg. Sess. (Minn. 2015) (permitting businesses, individuals, and government employees to refuse service or refuse to recognize a marriage that conflicts with their religious beliefs); H.B. 2215, 55th Leg., Reg. Sess. (Okla. 2015) (requiring individuals in their marriage applications to state whether they have undergone sex reassignment surgery); H.B. 1599, 55th Leg., Reg. Sess. (Okla. 2015) (penalizing any government employee who recognizes, grants, or enforces same-sex marriages).

pel the [baker] to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment." Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop* (No. 16-111). *Masterpiece Cakeshop* thus does not concern whether a state law endorsing specific religious beliefs and privileging refusals to serve same-sex couples, among others, violates the Establishment Clause or the Equal Protection Clause. Nor does *Masterpiece Cakeshop* concern the specific questions presented here—namely, whether petitioners have standing to raise those claims. The Court's decision in *Masterpiece Cakeshop* therefore will not affect the questions presented in this case or obviate the need for review.

To the contrary, whichever way the Court rules in *Masterpiece Cakeshop*, its decision is likely to make the questions presented here even more important, by spurring more state enactments like Mississippi's. If the Court rejects the baker's claim and concludes that the challenged application of Colorado's public-accommodations law does not violate the First Amendment, states will be more likely to pass laws like HB 1523. In the absence of a First Amendment exemption to public-accommodations laws, statutes like HB 1523 may be perceived as necessary to protect individuals' ability to deny services based on religious disapproval of marriages of same-sex couples. That will result in increased litigation presenting the same standing questions at issue here.

Conversely, if the Court accepts the baker's argument that the Colorado public-accommodations law unconstitutionally compels him to engage in expressive conduct that violates his religious beliefs, that holding will not necessarily resolve the question

whether individuals may decline to provide *non-expressive* services on the basis of their religious beliefs. A decision in the baker's favor therefore would be unlikely to curtail enactment of laws that, like HB 1523, immunize individuals who deny a broad range of non-expressive services on religious grounds. *See, e.g.*, App. 117a–118a (§ 11-62-5(5)(b)) (prohibiting state action against those who refuse to provide limousine service or rent venues to same-sex couples); App. 117a (§ 11-62-5(4)) (prohibiting state action against individual who "declines to participate in the provision of treatments, counseling, or surgeries" on the basis of section 2 beliefs); H.B. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2015) (general refusal to provide commercial services); Pub. Ch. 926, S.B. 926, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016) (refusal to treat).

However the Court decides *Masterpiece Cakeshop*, therefore, litigation concerning statutes like HB 1523—and questions concerning plaintiffs' standing to bring such challenges—are likely to arise frequently in the future. This Court should grant review to resolve these important and recurring questions.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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