Nos. 16-60477, 16-60478

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RIMS BARBER, *et al.*,

Plaintiffs-Appellees,

v.

GOVERNOR PHIL BRYANT, *et al.*,

Defendants-Appellants,

CAMPAIGN FOR SOUTHERN EQUALITY, *et al.*,

Plaintiffs-Appellees,

v.

PHIL BRYANT, *et al.*,

Defendants-Appellants.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Mississippi
Case No. 16-cv-417, Hon. Carlton W. Reeves

CONSENT MOTION TO FILE BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND ANTI-DEFAMATION LEAGUE AS *AMICI CURIAE* SUPPORTING BARBER APPELLEES' PETITION FOR REHEARING *EN BANC*

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Under Federal Rule of Appellate Procedure 29(b)(2), Americans United for Separation of Church and State and Anti-Defamation League respectfully move to submit the accompanying *amicus* brief in support of the Barber Appellees' petition for rehearing *en banc*. The parties have consented to the filing of the proposed brief.

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that represents more than 125,000 members and supporters nationwide. Its mission is to preserve the separation of church and state as a vital component of democratic governance. To that end, Americans United has long defended the fundamental right to be free from religiously motivated discrimination, regularly bringing and participating in legal challenges to governmental action that favors or disfavors groups based on religious beliefs. *See, e.g.*, *UMAA v. Trump*, No. 17-cv-00537 (D.D.C.) (counsel to plaintiffs in challenge to President Trump's travel ban); *Miller v. Davis*, 667 Fed. App'x 537 (6th Cir. 2016) (supporting challenge to county clerk's refusal to issue marriage licenses to same-sex couples); *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (supporting challenge to Oklahoma constitutional amendment that singled out Islam for official disfavor).

The Anti-Defamation League was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. ADL is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state embodied in the Establishment Clause of the First Amendment. ADL believes that separation preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black, "a union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

REASONS WHY THE *AMICUS* BRIEF IS DESIRABLE AND USEFUL IN CONSIDERING WHETHER TO GRANT REHEARING *EN BANC*

Following the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), state legislatures throughout the United States have attempted to curtail the rights of LGBTQ citizens. *See* Pet. 6. Mississippi's

HB 1523 was passed in that legislative furor. This case thus presents one of the first opportunities for the federal courts to consider whether a state may constitutionally pass laws that license and even mandate official discrimination against LGBTQ individuals and couples premised on religious beliefs. That issue is a new and important one that entails deciding substantial questions of constitutional law both on the threshold issue of Article III standing and on the merits under the Establishment and Equal Protection Clauses.

Amici bring to bear decades of experience and expertise in Establishment Clause law, including having litigated or served as *amici curiae* in scores of cases addressing the sometimes "elusive" concept of Establishment Clause standing (*Murray v. City of Austin*, 947 F.2d 147, 151–52 (5th Cir. 1991)). Notably, Americans United was appellate counsel to the plaintiff, and ADL served as *amicus curiae*, before both the panel and the *en banc* Court in *Staley v. Harris County*, 485 F.3d 305 (5th Cir. 2007) (en banc). Americans United was a party, and ADL served as *amicus curiae*, in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982). And both Americans United and ADL served as *amici* in *Doe v. Beaumont Independent School District*, 240 F.3d 462 (5th Cir. 2001), *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), and *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc).

The panel decision's treatment of those cases and the standing rules that they implement are the heart of the decision on which rehearing is being sought.

The proposed *amicus* brief explains why the panel opinion relies on the wrong line of standing cases given the nature of the injury here, and why, in doing so, the decision creates intra- and inter-circuit conflicts that will leave the lower courts at a loss as to the governing Article III standards, while simultaneously making the ability to vindicate fundamental constitutional rights turn on where one happens to reside rather than on the merits of one's legal claims. The *amicus* brief should thus be helpful in the Court's determination whether *en banc* review is warranted.

CONCLUSION

The Court should grant this consent motion to file an *amicus* brief and order the Clerk's office to accept the accompanying proposed brief for filing.

Respectfully submitted,

/s/ *Richard B. Katskee*

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Date: July 13, 2017

CERTIFICATE OF SERVICE

I certify that on July 13, 2017, this motion was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

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CERTIFICATE OF INTERESTED PARTIES

Amici are nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of either of them.

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

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INTERESTS OF THE *AMICI CURIAE*[1]

As described more fully in the accompanying motion, *amici curiae* Americans United for Separation of Church and State and Anti-Defamation League are civil-rights organizations that work to preserve the constitutional safeguards for religious freedom. These safeguards protect the rights to worship, or not, according to the dictates of conscience, and therefore do not include the right to use government to impose one's religious beliefs on others. Proper interpretation and application of Article III's standing requirements are essential to ensure the promise of these fundamental rights.

Laws like HB 1523 that license and mandate religiously based discrimination against LGBTQ and unmarried persons are irreconcilable with our fundamental constitutional commitment to religious freedom. Because the panel's view of Establishment Clause standing forecloses a remedy for real, substantial constitutional injuries, and hence erodes the substantive rights of disfavored classes, and all Americans, *amici* believe that *en banc* review and reversal are warranted.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. An unopposed motion for leave to file accompanies this brief.

ARGUMENT

Plaintiffs wake up each day knowing that they are expressly disfavored under Mississippi law: To promote certain religious views, the State has designated Plaintiffs as fair game for discrimination and has mandated that the public officials and courts of Mississippi cannot protect Plaintiffs when they suffer that discrimination. By officially favoring religious beliefs to Plaintiffs' detriment, the State has violated the bedrock constitutional principle of "'governmental neutrality between religion and religion, and between religion and nonreligion'" (*McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The panel held, however, that Plaintiffs do not have standing to challenge HB 1523—the law that brands them as second-class citizens. That ruling contradicts this Circuit's standing jurisprudence, bars the district court from timely addressing federal questions of immense importance for countless injured individuals, and creates a conflict with at least three other Circuits. *En banc* review is warranted.

A. The panel decision creates inconsistent Circuit precedent.

Because Article III standing must "reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer," and the harm of being officially disfavored and denigrated based on religion stands at the heart of First Amendment concerns, this Court has "recognize[d] that noneconomic or

intangible injury may suffice" as an injury-in-fact. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001). Thus, the panel here correctly recognized that stigmatic injury is cognizable in Establishment Clause cases. Slip Op. 6. The panel concluded, however, that there is no harm from "confront[ing] statutory text" (Slip Op. 8) and that Plaintiffs have not yet been subjected to any "legal effect of HB 1523" (*id.* at 10), so there is no injury to those whom Mississippi has made the object of legally sanctioned, religiously based discrimination.

That decision cannot be squared with existing Circuit precedent.

1. HB 1523 expressly authorizes (and for public officials requires) religiously based discrimination against LGBTQ people and other disfavored groups; that is the statute's sole purpose. The State has declared that same-sex couples may be denied housing. Mothers may be fired for being unmarried. Plaintiffs and countless others may be subjected to discrimination at every turn and know that they have no legal recourse, because state officials are not just licensed to ignore their plight but are required by statute to do so.

This official denigration, and the resulting immediate and pervasive threat of discrimination, is the intended and actual legal effect of HB 1523. It satisfies Article III because, as a matter of law under both the Establishment and Equal Protection Clauses, a legal classification that would allow "unjust

unequal treatment" "is an injury unto itself." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991). Plaintiffs' injury-in-fact is, in other words, not just the imminent, officially authorized discrimination that Plaintiffs will experience—though it is certainly that—but also the bare fact of the State's religiously grounded classification of Plaintiffs as unworthy of equal dignity, equal citizenship, and equal protection of the laws.

Thus, Plaintiffs are not merely "concerned bystanders" (*Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466-467 (5th Cir. 2001)); they are the express targets of official, religiously based discrimination. The State has told them, and everyone else, that Plaintiffs "are outsiders, not full members of the political community" (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)), and that they may—indeed must—be treated as such. If that is not an injury under *Peyote Way*, nothing is.

2. When "inappropriate government involvement in religious affairs [is] inevitable," plaintiffs need not "wait for actual implementation of the statute and actual violations of [their] rights" before suing. *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996). Here, the "inappropriate government involvement" is not just inevitable; through passage of HB 1523, it is already occurring. The panel's opinion is inconsistent with *Ingebretsen*.

3. Sowing further confusion, the panel opinion takes this Court's standing rules for religious-display cases as the pertinent authority and concludes that there is no standing because of inadequate direct contact with HB 1523's language.

Analogies to existing case law may provide guidance when the "concept of injury" is "elusive in Establishment Clause cases" (*Murray v. City of Austin*, 947 F.2d 147, 151–52 (5th Cir. 1991)). But direct importation of the standing rules for religious displays makes little sense here because the injury from HB 1523 is not just offense at the statute's language; the statute's very existence communicates to Plaintiffs, and everyone else, that Plaintiffs are fair game for discrimination.

Contact is required for standing in display cases because the constitutional infirmity inheres solely in the government's religious message. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The actionable harm comes when one receives the message that government favors a faith to which one does not subscribe. *See Murray*, 947 F.2d at 150–51. Hence, when one cannot see a display and does not receive its impermissible message, one is not harmed: Out of sight, out of mind. *See Staley v. Harris Cty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982), stands for a related principle: When

government engages in otherwise-secular conduct—such as disposing of unneeded lands—those with no connection or exposure to the governmental action have no injury-in-fact because the government is not aiming to communicate any religious message, and none is received. There is thus no "*consequence* of the alleged constitutional error" to would-be plaintiffs. *Id.* at 485.

4. HB 1523 does not come close to the limits of Establishment Clause standing under *Staley* and *Valley Forge*, for at least three reasons. First, there is no "out of sight, out of mind" here, because HB 1523 is not shut away in a dusty copy of the Mississippi Code on a law-library shelf. At all times, the statute authorizes religiously based discrimination against Plaintiffs and strips them of recourse to prevent that discrimination. As a result, Plaintiffs can never be free from the fear of government-approved (and government-mandated) discrimination. Second, the message that the law communicates is not just that someone else's faith is favored, but that because that particular faith is favored, Plaintiffs are not worthy of, and will not receive, equal respect and equal treatment under law. Third, far from being unconnected to the governmental action and the message that it sends, Plaintiffs are its explicit target. Yet under the panel decision, injuries from the State's official policy here do not rise to the level of harm to objectors who see a passive Bible display outside a courthouse. That cannot be.

5. In treating *Staley* and *Valley Forge* rather than *Ingebretsen*, *Peyote Way*, and *Beaumont* as setting the standing rules for this case, the panel decision muddies the law of this Circuit, leaving litigants and the district courts in a quandary over whether and when suits may be brought for Establishment Clause violations. The full Court should dispel that confusion.

B. This case presents important questions worthy of the full Court's attention.

Beyond all of that, this case presents novel and important questions: May a state license, approve, and require discrimination against LGBTQ people, unmarried couples, and single parents, in service of particular religious beliefs that the legislature favors? Under what circumstances do the targets of that governmental action have a right to seek legal redress?

The panel decision sidestepped both questions by reasoning (Slip Op. 7 n.5) that because HB 1523 also authorizes discrimination based on "moral" objections, it does not impermissibly favor any religion. But extending a religiously based license to discriminate to people who may not themselves hold the religious belief doesn't make the law any less religiously based. It merely compounds the harm.

In all events, the asserted secular purpose of governmental action "has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. And the religious objective here is manifest: The

architects and sponsors of HB 1523 made it crystal clear that the law is designed to promote and advance certain Christian beliefs about gay, lesbian, and transgender people, sexuality, and marriage of same-sex couples. *See* Pet. 3–4; *Amici*'s Panel Br. 10–12.

Whether the Establishment Clause bars Mississippi from pursuing that religious objective to the detriment of disfavored classes is a question that should be addressed on the merits, and addressed now. As explained above, the statute is already inflicting grave constitutional harms on Plaintiffs. They should not be forced to endure yet *more* harms before seeking relief. *Cf. Ingebretsen*, 88 F.3d at 278. And standing doctrine should not "become a vehicle for . . . disallowing disfavored claimants from even getting their claims considered." *Catholic League for Religious & Civil Rights v. City of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc).

The worry goes well beyond Mississippi's borders. Many States are endeavoring to frustrate enforcement of the rights recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Romer v. Evans*, 517 U.S. 620 (1996). In the first half of 2017 alone, legislators in eight states introduced ten bills similar to HB 1523. Three states enacted laws allowing discrimination by child-placement agencies against same-sex couples and LGBTQ youth, among others. Legislators in five states introduced bills—one of which was enacted—to prohibit state universities from adopting antidiscrimination policies that

cover student groups. Legislators in two states proposed bills to allow public employees to discriminate based on religion in issuing marriage licenses and conducting marriage ceremonies. And three state legislatures considered bills to abrogate *Obergefell*. *See 2017 State Legislation Tracker*, PROTECT THY NEIGHBOR, http://www.protectthyneighbor.org/state-legislation-2017 (linking to bills that use religion as ground for discrimination) (last visited July 13, 2017). HB 1523 is the most draconian measure yet passed, making it, and this case, the bellwether for what will follow throughout this Circuit and across the country.

If pre-enforcement challenges are foreclosed, many citizens will continue living with the fear of legally sanctioned discrimination when looking for a job or a place to live, planning a wedding, adopting a child, seeking medical care, or receiving publicly funded services. HB 1523 and similar legislative efforts will deter disfavored classes from partaking in the tasks of daily living as well as the most significant events of life.

The stakes are thus too high artificially to forestall or delay consideration of Plaintiffs' substantive claims. The full Court should rehear this case, correct the panel's misapplication of standing doctrine, and address the merits.

C. The panel decision creates a split with at least three other Circuits.

The panel decision also conflicts with the standing law of at least three other Circuits, meaning that whether one has legal recourse to vindicate fundamental constitutional rights now turns not on the merits of one's claim but on one's zip code. The full Court should reconsider whether that split is genuinely warranted.

In *Catholic League*, the *en banc* Ninth Circuit held that a Catholic group had standing to challenge a nonbinding municipal resolution denouncing the Catholic Church's position on marriage and adoption by same-sex couples. 624 F.3d at 1052–53. In *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 584–85 (4th Cir. 2017) (en banc), the *en banc* Fourth Circuit held that Muslim-Americans have standing to challenge President Trump's travel ban. And in *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. 2012), the Tenth Circuit held that a Muslim man had standing for a pre-enforcement challenge to a proposed constitutional amendment to prohibit the Oklahoma state courts from looking at Sharia law when deciding cases. All three Circuits recognized standing for claims of injury less concrete, particularized, and immediate than the harms here.

The panel decision brushes aside *Catholic League*, reasoning that San Francisco condemned a religious belief while Mississippi does not. But

Catholic League held that there is harm sufficient for standing when a plaintiff experiences a "'psychological consequence' . . . produced by government condemnation of one's own religion *or endorsement of another's* in one's own community." 624 F.3d at 1052 (emphasis added). Mississippi's HB 1523 might not directly condemn Plaintiffs' religious beliefs, but it undeniably endorses religious beliefs disfavoring Plaintiffs. Under *Catholic League*, that is enough. *Id.* Yet HB 1523 also goes much further, authorizing and requiring discrimination against disfavored classes based on certain religious beliefs. That harm is concrete and substantial.

Awad, meanwhile, recognized an injury-in-fact from "a constitutional directive of exclusion and disfavored treatment." 670 F.3d at 1123. Far from being premised on possible difficulties that heirs might someday experience should they need to probate the plaintiff's will, the Tenth Circuit concluded that the plaintiff's injury was "imminent" and certain because Oklahoma "convey[ed] more than a message"—it enshrined that message in the law, and in doing so "expose[d] [the plaintiff] and other Muslims in Oklahoma to disfavored treatment." *Id.* Here, the same is true for LGBTQ people and unwed mothers.

As for *IRAP*, though the panel decision here describes the injury-in-fact as stemming from an *IRAP* plaintiff's wife's approved visa application (Slip Op. 10), the Fourth Circuit instead held that the injuries-in-fact are "both

[the] alleged message of religious condemnation *and* the prolonged separation [that the travel ban] causes between [the plaintiff] and his wife" (*IRAP*, 857 F. 3d at 585). In other words, there are two bases for standing—and one is the official message that Muslims are "outsiders, not full members of the political community" (*id.*). The panel decision here would treat that harm as not legally cognizable.

CONCLUSION

If this Court wishes to bless the inter- and intra-circuit splits wrought by the panel decision, and in doing so to leave Mississippians without a legal mechanism to end the day-by-day harms that HB 1523 is already inflicting, it should do so explicitly and with the considered judgment of the full Court. Rehearing *en banc* should be granted.

Respectfully submitted,

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Date: July 13, 2017

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g)(1) and Fifth Circuit Rules 29.2 and 32, the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(b)(4) because it contains 2,541 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2010 and is set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on July 13, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*