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M E M O R A N D U M

TO: INTERESTED PARTIES

FROM: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT

RE: MISSISSIPPI H.B. 1523 & THE ESTABLISHMENT CLAUSE

DATE: APRIL 5, 2016

As legal scholars with expertise in matters of religious freedom, civil rights, and the interaction between those fields, we offer our opinion on the scope and meaning of Mississippi House Bill 1523, which was signed into law today by Governor Phil Bryant. Specifically, we wish to call attention to language in the law that we believe conflicts with the Establishment Clause of the U.S. Constitution. We share the view of Justice Kennedy when he expressed that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," and would add that neither can such a desire be justified in the name of religious liberty.[1] HB 1523 presents a conflict with First Amendment religious freedom doctrine by providing for religious exemptions that will meaningfully harm the rights of others, particularly LGBT Mississippians.

The Establishment Clause of the First Amendment forbids the government from favoring or disfavoring any particular religion or religion in general.[2] Since the Supreme Court decided *Estate of Thornton v. Caldor*, it has been understood that the Establishment Clause restricts legislative accommodations for religious beliefs where such accommodations would cause a meaningful harm to other private citizens.[3] In *Caldor*, the Court struck down a Connecticut statute that gave workers the absolute right to a Sabbath day of rest. It held that the statute impermissibly advanced religion by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing]

[1] *Romer v. Evans*, 517 U.S. 620, 634 (1996) (*quoting Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (ellipses in original; italics omitted)).
[2] *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion…favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal quotation marks omitted).
[3] *See*, *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). *See also*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,* 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment") (Kennedy, J., concurring).

employee."[4] Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court found that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to "become indirect and vicarious donors" to religious entities.[5] In *Cutter v. Wilkinson*, the Court upheld a broad religious accommodation law while explaining that accommodations need not be granted where they "impose unjustified burdens" on third parties or the State.[6] Most recently, in *Burwell v. Hobby Lobby*, the Court granted a religious accommodation to an employer but repeatedly emphasized in the opinion the fact that employees would, according to the Court, not be harmed.[7] Further, even where an accommodation does not impose a clear burden on others, the government may violate the Establishment Clause if its actions tend to express support for a particular religious faith or belief.[8]

In light of these clear interpretations of the scope and meaning of constitutional and statutory religious liberty rights, HB 1523 without question disrupts the balance between religious and secular rights and oversteps the limitations on state action set out by the Establishment Clause. It grants public and private actors broad immunities that allow them to discriminate against Mississippians based on a specific set of religious beliefs: that marriage should be a union between one man and one woman, that sex should only take place within such a marriage, and that "man" and "woman" are immutable, biological categories determined at birth. Only these narrow beliefs are protected, although they are far from universal, even among religious individuals or denominations. Those who will be most harmed by this law are LGBT Mississippians, intersex persons, persons who defy sex and gender stereotypes, and persons who have had sex outside marriage—the most easily-identifiable of whom are unmarried parents and pregnant persons.

HB 1523 violates the Establishment Clause by impermissibly accommodating religion in a way that harms third parties.[9] In many different contexts that will be enumerated below, the law strips Mississippians of applicable antidiscrimination protections in order to accommodate the preferences of religious individuals and institutions. Several Mississippi municipalities have

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[4] *Caldor*, 472 U.S. at 709.
[5] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).
[6] *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).
[7] *See*, *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").
[8] *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community") (O'Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach …the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.").
[9] We note that not all provisions of the law pose clear Constitutional problems. For example, it prohibits any civil claims or government action against a house of worship, clergy member, or minister who refuses to solemnize a marriage because of sincerely held religious belief that marriage "should be recognized as the union of one man and one woman." H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016). While this section does not violate the Establishment Clause, it is an unnecessary protection. Clerics already have this right under the Free Exercise Clause of the First Amendment, which provides extremely robust protections to houses of worship and religious leaders. *See*, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012).

passed resolutions opposing discrimination against LGBT people, or protecting LGBT people from some forms of discrimination.[10] As acceptance for LGBT rights continues to grow, other municipalities are likely to follow suit. In addition, some administrative agencies and courts have held that sex discrimination laws are properly interpreted to prohibit discrimination on the basis of sex stereotyping, sexual orientation, or gender identity.[11] In 2013, for example, the 5th Circuit found that the prohibition of sexual harassment in Title VII of the Civil Rights Act protected a male employee whose male co-workers called him "kind of gay" and a "faggot."[12] By exempting certain religious entities from an obligation to treat all Mississippians equally, HB 1523 effectively sacrifices the equality rights of many in order to accommodate the religious

[10] Seven cities in Mississippi—Jackson, Waveland, Bay St. Louis, Greenville, Magnolia, Oxford, and Hattiesburg—have passed resolutions formally opposing discrimination against LGBT citizens. *See*, *Eight Mississippi City Passes LGBTQ-Inclusive Resolution*, UNITY MS (June 3, 2014), http://unityms.org/news/eighth-mississippi-city-passes-lgbtq-inclusive-resolution.html. In January 2015, Starkville, Mississippi, which had been the first city to adopt such a resolution, rescinded its antidiscrimination resolution. *See*, *Starkville, MS Leaders Rescind Two LGBT Equality Issues*, HUMAN RIGHTS CAMPAIGN (Jan. 21, 2015), http://www.hrc.org/blog/starkville-ms-leaders-rescind-two-lgbt-equality-issues. Additionally, LGBT Mississippians are protected from discrimination in a few contexts by discrete local ordinances. *See, e.g.*, Jackson, Mississippi Code of Ordinances § 86-191 (Stating that "[i]t is the policy of the City of Jackson to respect the rights of, and provide equal services to, all persons regardless of… religious beliefs, sexual orientation, or gender identity or expression." However this provision also states "nothing in this article shall be construed as creating any duty, liability, or responsibility on the part of the City of Jackson greater than that already existing under state or federal laws."); Jackson, Mississippi Code of Ordinances § 126-161 (prohibiting drivers for hire from refusing "to accept a passenger solely on the basis of… sexual orientation"); Jackson, Mississippi Code of Ordinances § 86-193 (prohibiting police officers from discriminating in the provision of services or the finding of reasonable suspicion based on sexual orientation or gender identity or expression.); Oxford, Mississippi Code of Ordinances § 102-643 (prohibiting discrimination in the granting or denying of public assembly permits on the basis of "gender related grounds"). To the extent that HB 1523 preempts municipal ordinances that protect LGBT Mississippians from discrimination, it also conflicts with Romer v. Evans. *See*, *Romer v. Evans,* 517 U.S. 620 (1996).

[11] Most of these opinions involve employment discrimination against LGBT employees or employees who challenge gender norms and expectations. *See*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("'"[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702, 435 U. S. 707, n. 13 (1978), *quoting Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971)"). *See also*, *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (finding that Title VII of the Civil Rights Act prohibits discrimination based on gender identity); *Fabian v. Hosp. of Centr. Conn.*, 2016 WL 1089178 (D. Conn. 2016); *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015) (finding that Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation); U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII, http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited Mar. 16, 2016). However LGBT persons may also have some protections under the Fair Housing Act. *See* HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited Mar. 16, 2016) ("a lesbian, gay, bisexual, or transgender (LGBT) person's experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act"); Thomas v. Osegueda *et al*, No. 2:2015cv00042 - Document 11 (N.D. Ala. 2015) *available at* http://law.justia.com/cases/federal/district-courts/alabama/alndce/2:2015cv00042/154020/11/. In addition, a lawsuit recently filed by Lambda Legal has the potential to expand LGBT protections under the Fair Housing Act. *See* Chris Johnson, *New Lawsuit Asserts Anti-LGBT Bias Illegal in Housing*, WASHINGTON BLADE (Jan 16, 2016), http://www.washingtonblade.com/2016/01/16/new-lawsuit-could-extend-lgbt-success-to-housing-discrimination/. Note, however, that there are no protections from sex discrimination—and therefore sex stereotyping, sexual orientation or gender identity discrimination—within federal public accommodations law. *See* 42 U.S. Code § 2000a.

[12] *See*, *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013).

preferences of a few. In some cases, accommodations will also intrude upon Mississippians' privacy rights. Allowing discrimination based on sexual practices and gender identity could lead employers, housing providers, businesses, and even the state to demand intrusive and unnecessary information from citizens about their sexual histories, practices, and even their private anatomies. Provisions of HB 1523 that allow state workers or state-funded programs to discriminate based on their religious faith violate the Establishment Clause even more clearly, by lending the color of law to a particular religious belief.[13]

1. HB 1523 Violates the Establishment Clause By Allowing Government Employees to Discriminate against Mississippians Who Are LGBT or Do Not Conform to Religious Sex and Gender Norms

Several provisions of HB 1523 allow government employees—who represent the state and have sworn to uphold the law—to discriminate against LGBT and unmarried Mississippians based on their religious beliefs. Section 3(8) of the law will allow government employees and officials to refuse to provide marriage licenses or solemnize weddings if doing so would violate their religious convictions. While the law provides that some religious objectors, including clerks, must 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,"[14] this does not mitigate the equality and dignitary harms caused by the exemption. Further, it's unclear what will happen if all clerks at a particular location exempt themselves. Section 3(7) of the law additionally allows government employees to express their religious opposition to same-sex marriage, sex outside marriage, or transgender identities *at work*, so long as this speech is "consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief." Thus a clerk or judge may be protected if he or she openly disparages a same-sex couple seeking a marriage license. Such speech would not otherwise be protected by the First Amendment, since the Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[15]

Allowing government workers to refuse to marry LGBT Mississippians, or couples who have had sex outside marriage, or to espouse their opposition to such marriage at work, imposes a burden on those exercising their Constitutional right to marry.[16] Now that HB 1523 has become law, LGBT couples may face administrative barriers and pejorative treatment in state courthouses and other institutions of government. Even if a couple is able to obtain a marriage license or have their marriage solemnized by a non-objecting employee without a significant delay, this does not negate the stigmatizing effect of being denied a government service because of their identity. Not only does this violate the Establishment Clause, it undermines the

[13] *See, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (holding that the government violates the Establishment Clause when it "conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred") (internal citations and quotation marks omitted).
[14] H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016). In the case of judges and magistrates who refuse to marry same-sex couples, it is the responsibility of the Administrative Office of Courts to "ensure that the performance or solemnization of any legally valid marriage is not impeded or delayed." *Id.*
[15] *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
[16] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Fourteenth Amendment's guarantee of equal protection under the law.[17] The law entrenches a form of discrimination against same-sex couples immediately after their right to marry has been acknowledged by the U.S. Supreme Court.[18] The exemptions are all the more troubling considering that public employees and officials have an obligation to impartially perform their duties and serve the public under Mississippi's judicial code of conduct,[19] oaths of office,[20] and the federal constitution.[21] The Supreme Court ruled in *Obergefell* "that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[22] Exemptions that condone discrimination by government employees who have sworn to uphold the law similarly impose a disability on, and express disapproval for, a class of persons whose relationships are otherwise entitled to recognition by the state.

Two other provisions of HB 1523 pose similar constitutional problems. Section 3(4) prohibits the government from taking "discriminatory action" against persons who decline to provide counseling or other medical services based on their religious beliefs about sex, marriage, and gender identity. Nothing in HB 1523 clearly removes government workers from the law's definition of "person," and the definition of discriminatory action in the law includes refusing to hire, or firing, "a person employed or commissioned by the state government." Thus 3(4) appears to be applicable to state workers, which means the law forbids the government from terminating or punishing certain state employees who discriminate against Mississippians who are LGBT or have had sex outside marriage. For example, a mental health counselor employed at a public school, whose salary is paid by the government, could refuse to work with LGBT students because of her religious beliefs and keep her job. The law contains no requirement that the state mitigate the effects of an accommodation, for example by hiring a second counselor to treat LGBT students. Denying mental health counseling to LGBT youth, who already experience a

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[17] *See generally,* Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages (June 30, 2015) *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf [*hereinafter* "PRPCP Public Officials Memo"].

[18] *Obergefell v. Hodges*, 135 S. Ct. 2584.

[19] *See,* Mississippi Code of Judicial Conduct, Canon 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

[20] *See,* MISS. CONST., Art. 6, § 155 ("The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit: 'I, _____ , solemnly swear (or affirm) that I will administer justice without respect to persons…and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the State of Mississippi. So help me God.'"); MISS. CONST., Art. 14, § 268 ("All officers elected or appointed to any office in this State, except judges and members of the Legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath: 'I, _____ , do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof…that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God.'").

[21] *NYC Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) ("The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Clause announces a fundamental principle: the State must govern impartially.").

[22] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). *See also*, *U.S. v. Windsor*, 133 S.Ct. 2675, 2694 (2013) ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.").

higher risk of bullying, harassment, and violence,[23] would immeasurably harm an already-vulnerable population.

Section 3(6) prohibits government discrimination against a person who "establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction." Like Section 3(4), this provision appears to apply to government employees. Thus, a manager of a government agency could impose a religiously-motivated dress code requiring female employees to wear skirts and dresses. Many employees may find such a dress code, which is rooted in gender-based assumptions and stereotypes, unfair and demeaning. Such a policy could, in some circumstances, violate Title VII of the Civil Rights Act, which prohibits sex-stereotyping in the workplace.[24]

Sections 3(4) and 3(6) will also allow state workers to demand intrusive and unnecessary information from students or employees, such as whether they have had sex, or whether they are transgender or intersex, receive hormone treatment, or have received genital reconstruction surgery. Demanding this type of information may infringe upon employees' dignity and privacy rights.

All of the accommodations discussed in this section violate the Establishment Clause by shifting a burden from religious state employees to the citizens they have sworn to serve impartially and fairly. HB 1523 creates special rights for religious actors that go far beyond, for example, those enshrined in the federal Religious Freedom Restoration Act.[25] Not only does the law prevent the government from taking adverse actions against state employees for their religious beliefs and actions, it also provides religious objectors with immunity from civil suits by private actors whose rights they have violated. Thus HB 1523 allows religious faith to always trump other private rights, including the right to be free from invidious discrimination, without considering how religious liberty claims might be balanced against the rights of other Mississippians and other important state interests. Further, as applied to state workers, the law runs the risk of violating the Establishment Clause by improperly endorsing, or seeming to endorse, certain religious beliefs.[26] For example, if a same-sex couple is denied services by a judge because of his religious opposition to same-sex marriage, a belief that is explicitly protected by law, this could cause a reasonable person to think that the government has endorsed the religious grounds for such opposition. This specter of government endorsement for a particular religious view raises significant Establishment Clause concerns.[27]

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[23] *See*, CENTERS FOR DISEASE CONTROL AND PREVENTION, *Lesbian, Gay, Bisexual, and Transgender Health* (last updated Nov. 12, 2014), http://www.cdc.gov/lgbthealth/youth.htm.

[24] *See*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

[25] 42 U.S. Code § 2000bb–1.

[26] *See, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (holding that the government violates the Establishment Clause when it "conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred") (internal citations and quotation marks omitted).

[27] *See generally,* PRPCP Public Officials Memo, *supra* note 17. The specificity of the religious beliefs protected by HB1523, as opposed to protecting religious liberty more generally, may also suggest the state's endorsement of the particular religious beliefs enumerated by the statute, thus creating an Establishment Clause problem.

Not only are these provisions unconstitutional, they also substantially limit the ability of the state and municipalities to fund necessary government services, such as mental health counseling, and to combat discrimination. Mississippians have compelling interests in ensuring that public employees serve members of the public equally without regard to any particular identity characteristic, and that the religious beliefs of state employees are not prioritized over the rights and needs of those they have sworn to serve. HB 1523 ignores these interests and requires that the faith-based beliefs of government employees always be put above their duties as public servants.

2. HB 1523 Violates the Establishment Clause By Allowing Recipients of Government Grants and Contracts to Discriminate against Mississippians Who Are LGBT or Do Not Conform to Religious Sex and Gender Norms

HB 1523 forbids the government from taking any "discriminatory action" against religious organizations that discriminate in the context of employment and housing. It also forbids "discriminatory action" against persons who discriminate in the provision of adoption services, counseling, or who implement sex-specific policies regarding dress and grooming or the use of bathrooms and other facilities. Significantly, "discriminatory action" by the government is defined to include any action to "[w]ithhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any state grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, or other similar benefit." In practice, this means that Mississippi will lose the power to withdraw taxpayer money from an organization because it explicitly discriminates against LGBT Mississippians or those who have had sex outside marriage. For example, a taxpayer-funded adoption agency could refuse to place a child with same-sex couples without risk of losing a government grant or contract. A state-funded domestic violence shelter could refuse to house or hire single parents due to its religious beliefs about premarital sex, and the government will be unable to withdraw its support. These are not mere hypotheticals—adoption agencies across the country have refused to work with loving same-sex couples who wish to start a family, and there are numerous examples of women who have been fired from religious organizations for getting pregnant outside marriage.[28] Funding organizations that discriminate based on religious beliefs violates the Establishment Clause by accommodating these organizations in ways that harm the intended beneficiaries of taxpayer funding.

Providing public funds to an organization that uses those funds in ways that discriminate against the intended beneficiaries of a publicly funded program may also create the perception that the government has endorsed such discrimination.[29] Awarding a grant to an organization that

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[28] *See*, Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, THE ATLANTIC (Sept. 23, 2015), http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/; Molly Redden & Dana Liebelson, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, MOTHER JONES (Feb. 10, 2014), http://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant.

[29] Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions on a neutral basis. *See*, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way.

refuses to provide services to transgender youth, for example, could cause a reasonable observer to believe that the government has endorsed the religious belief that this population is sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that "impose religiously based restrictions on the expenditure of taxpayer funds."[30]

The exemptions offered to grantees in the law are not just unconstitutional, they will also hinder the government's ability to prevent discrimination and ensure the delivery of necessary services. When private organizations choose to apply for a publically-created grant or contract, delivering services that are funded with general tax revenues and that are intended to benefit particular communities, the public has a strong interest in seeing that the delivery of those services advances public values, including the value of non-discrimination. Allowing the recipients of government grants and contracts to selectively withhold or deny services that they have undertaken to provide will make it impossible for the state to effectively carry out its policy goals.[31]

3. HB 1523 Violates the Establishment Clause By Accommodating the Religious Preferences of Private Groups and Individuals In A Way That Causes Meaningful Harm to Other Private Citizens

In addition to the accommodations offered to state employees and recipients of government grants, HB 1523 effectively creates a right to discriminate for private religious organizations, individuals, and for-profit corporations. Like the provisions discussed previously, these accommodations violate the Establishment Clause by disrupting the balance between religious freedom and the liberty and equality rights of third parties.

First, Section 3(1) of the law gives religious organizations—defined broadly to include schools, universities, and corporations—blanket immunity from compliance with otherwise applicable laws regulating equal opportunity in the educational, housing, and employment contexts based on their beliefs about sex, marriage, and gender identity. Religious organizations are permitted to take adverse employment actions against employees "whose conduct or religious beliefs are inconsistent with those of the religious organization" with regard to sex, marriage, and gender identity. This exemption is not limited to the hiring and firing of ministers, but appears to

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Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

[30] *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also*, *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) ("The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion…would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.").

[31] *Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."). *See also*, *id*. at 711-12 (Burger, C.J., concurring) ("Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the program.").

apply to *all* employees of religious organizations.[32] This language grants religious organizations a license to discriminate in a wide range of settings. For example, it would allow a religious university to fire a single mother working in its cafeteria, who supports her children on her own, because the university has a religious opposition to sex outside marriage. It would also allow religious employers and housing providers to impose rigid, invasive, and discriminatory codes of conduct on employees and tenants.[33]

Second, both religious and secular organizations, corporations, and individuals are afforded a right to discriminate against a wide array of Mississippians in the provision of wedding-related services and with regard to certain sex-specific policies. Under Section 3(1), religious organizations are permitted to refuse to provide facilities and services for marriages or celebrations that they find objectionable on account of their religious beliefs or moral convictions. Section 3(5) allows individuals and businesses, including secular businesses, to refuse to provide wedding-related services if doing so would be "inconsistent with a sincerely held religious belief or moral conviction." This latter provision covers a range of services including photography, wedding planning, printing, floral arrangements, disc-jockeying, dress making, car-service rentals, and the rental of facilities.

Third, as mentioned earlier in the context of government employees, Section 3(6) allows individuals and some religious or secular companies to establish "sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms" and other facilities. Thus even a non-religious employer could impose a rule requiring transgender employees to dress in clothing, and use restrooms and other facilities, which match the gender they were assigned at birth rather than their current gender identity.

All these exemptions pose Establishment Clause concerns by immunizing religious believers from relevant laws and policies that may protect the rights and liberties of Mississippians. Even where LGBT or unmarried employees, renters, or customers are protected from discrimination

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[32] The hiring and firing of clergy members is already exempted from employment discrimination law under the "ministerial exception" of the Free Exercise Clause. *See*, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012).

[33] The Supreme Court has held that an exemption within Title VII of the Civil Rights Act that allows certain religious organizations to impose religious conditions on their employees does not violate the Establishment Clause. *See, Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). However, the exemption in Title VII is narrow in scope, and HB 1523 provides a more expansive exemption than what the court upheld in *Amos*.

Specifically, Title VII exempts from its requirements any "religious corporation, association, educational institution, or society," but does not define these terms. 42 U.S.C. § 2000e-1. Under case law, "organizations not owned or operated by a formal house of worship have generally not qualified for the exemption, even where the organizations were founded based on religious principles, engage in religious activities or have boards of trustees comprised of church members." *See*, John P. Furfaro & Rise M. Salins, *Religious Organizations Exemption*, 239 N.Y. L.J. 65 (Apr. 4, 2008) *available at* https://www.skadden.com/sites/default/files/publications/Publications1379_0.pdf.

In contrast, HB 1523 defines a "religious organization" as: "(a) A house of worship, including, but not limited to, churches, synagogues, shrines, mosques and temples; (b) A religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, *regardless of whether it is integrated or affiliated with a church or other house of worship;* and (c) An officer, owner, employee, manager, religious leader, clergy or minister of an entity or organization described in this subsection (4)." H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016) (emphasis added). This exemption may be broad enough that it raises Establishment Clause questions.

under local law or expansive interpretations of federal law, these provisions eliminate any recourse if they are denied services, housing or employment due to their sexual orientation, gender identity, or marriage status for religious reasons. For example, a Jackson, Mississippi ordinance that bans drivers for hire from discriminating against passengers based on their sexual orientation would prevent a limousine driver from refusing to participate in a same-sex wedding.[34] Under HB 1523, however, a driver can do so if motivated by religious faith.

Similarly, by containing no clear requirement that religious objectors comply with relevant federal antidiscrimination law, HB 1523 gives the appearance of shielding religious persons from such laws. This may discourage those who face discrimination from bringing federal lawsuits. For example, HB 1523's seemingly unqualified protections for religious believers may dissuade a single mother from bringing a claim under the Fair Housing Act, which bans discrimination on the basis of familial status, or female employees from challenging an employer's burdensome grooming policy under Title VII of the Civil Rights Act. While federal law would presumably preempt HB 1523, the broad language of the law is likely to result in some religious objectors defying not just municipal but federal law where it conflicts with their faith. Thus these accommodations, which require Mississippians to bear the cost of others' religious values, conflict with long-standing Supreme Court precedent.[35]

Finally, section 3(3) of HB 1523 forbids the state from discriminating against a potential foster or adoptive parent on the basis that the parent "guides, instructs or raises a child, or intends to guide, instruct, or raise a child based upon or in a manner consistent with a sincerely held religious belief or moral conviction."[36] This provision bars the state from considering parents' religious beliefs and practices as they relate to sexual orientation and gender identity when placing a child, and could therefore prevent a child welfare agency from refusing to place LGBT foster children with anti-gay parents. While at first glance, this provision of the law seems reasonable, it may have unintended consequences that could harm LGBT youth, who are over-represented in the foster care system.[37]

In summary, numerous sections of HB 1523 allow—indeed encourage—religiously-motivated discrimination in ways that conflict with established First Amendment doctrine and principles of equality.

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[34] *See*, Jackson, Mississippi Code of Ordinances § 126-161.
[35] *See*, *supra*, notes 3-7.
[36] H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016).
[37] *See*, Liz Halloran, *With LGBT Youth In Foster Care Facing Bias and Discrimination, HRC Issues Call to Action to Address*, HUMAN RIGHTS CAMPAIGN (May 19, 2015), http://www.hrc.org/blog/with-lgbt-youth-in-foster-care-facing-bias-and-discrimination-hrc-issues-ca.

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