CASE NOTES

Barber v. Bryant: The Fifth Circuit Holds that LGBT Plaintiffs Lack Standing to Challenge Mississippi's Response to *Obergefell*, HB 1523, the Protecting Freedom of Conscience from Government Discrimination Act

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I. OVERVIEW

After the Supreme Court held that the right to marry is a fundamental right that cannot be denied to same sex couples, the State of Mississippi introduced HB 1523, entitled the Protecting Freedom of Conscience from Government Discrimination Act.[1] HB 1523 states that the government shall not take any "discriminatory" action against a religious organization or individual who acts in accordance with certain sincerely held "religious beliefs or moral convictions."[2] Section 2 of HB 1523 expressly protects the following beliefs: (1) marriage should be recognized as the union between one man and one woman; (2) sexual relations are properly reserved to such a marriage; and (3) "male" or "female" refer to biological sex as determined by anatomy and genetics at birth.[3] Under HB 1523, the government cannot take action against a religious organization on the basis that it declines to solemnize any marriage, makes an employment-related decision, or makes any decision concerning rental or sale of property on the basis of the aforementioned

1. Barber v. Bryant, 860 F.3d 345, 350-51 (5th Cir. 2017) (citing H.B. 1523, 2016 Leg., Reg. Sess. § 2 (Miss. 2016)); *see* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the right to same sex marriage is a fundamental right).

2. *Barber*, 860 F.3d at 350-51 (citing Miss. H.B. 1523 § 2).

3. *Id.* at 351 (citing Miss. H.B. 1523 § 2).

protected beliefs.[4] Further, HB 1523 prevents the government from taking action against adoption and foster care organizations that decline services on the basis of any section 2 beliefs, or any individual who raises a foster or adoptive child in accordance with section 2 beliefs.[5]

Before HB 1523 was enacted, religious leaders, LGBT individuals, and other persons who do not share the HB 1523 section 2 beliefs filed multiple suits in the District Court for the Southern District of Mississippi against Mississippi Governor Phil Bryant and others.[6] These suits were consolidated,[7] and Plaintiffs sought a preliminary injunction of HB 1523 on the basis that it is a violation of Equal Protection under the Fourteenth Amendment and a violation of the First Amendment Establishment Clause.[8] The district court held for the plaintiffs and issued a preliminary injunction of HB 1523.[9] The defendants appealed the district court ruling.[10] The United States Court of Appeals for the Fifth Circuit *held* that the plaintiffs lacked standing because they had not alleged an injury in fact and reversed the district court's injunction. *Barber v. Bryant*, 860 F.3d 345 (2017), *reh'g denied*.

II. BACKGROUND

In order to successfully establish standing, the United States Supreme Court has held that a plaintiff must allege (1) an injury in fact that is concrete and particularized, as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and (3) that a favorable decision is likely to redress the injury.[11] The Supreme Court has held that a plaintiff must "show that he personally has suffered some actual or threatened injury" to meet the "personal injury" requirement.[12] However, a "threatened injury must be certainly

4. *Id.* (citing Miss. H.B. 1523 § 3). Under HB 1523 section 3(5), the government is prohibited from acting against individuals who refuse to provide wedding related services, goods, accommodations based on section 2 beliefs. HB 1523 section 3(8) states that individuals employed by the state government who have the authority to issue marriage licenses or perform marriages may seek recusal from such duties based on section 2 beliefs with prior written notice and the government may not act against these individuals based on their recusal.

5. *Id.* (citing Miss. H.B. 1523 § 3(2)-(3)).

6. *Id.* at 351-52.

7. *Id.*

8. *Id.* at 352.

9. *Id.*

10. *Id.*

11. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

12. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

impending to constitute injury in fact."[13] Because the court stopped its inquiry after it determined that the plaintiffs failed to allege an injury sufficient to confer standing, the focus of this Note is the injury element of standing.

A. Injury in Fact

For a plaintiff to establish an injury in fact, she must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[14]

In *Allen v. Wright*, the Supreme Court held that the plaintiffs lacked standing to challenge a government action, when they alleged that government conduct was unconstitutional and subjected them to racial stigma.[15] Plaintiffs alleged the IRS had not adopted adequate standards and procedures to deny tax exempt status to private schools that discriminated based on race.[16] The plaintiffs claimed injury on the basis of two theories: (1) the government was acting in violation of the law; and (2) their children experienced a diminished ability to receive an education at a racially integrated school.[17] The Court held that the plaintiffs lacked standing on their first claim of injury because "an asserted right to have the Government act in accordance with law is not sufficient . . . to confer jurisdiction on a federal court."[18] The Court held that the plaintiffs' second claim was a concrete personal interest sufficient to support standing, except that it failed because the injury was not fairly traceable to the conduct that the plaintiffs challenged as unlawful.[19]

In *Clapper v. Amnesty International, USA*, the Supreme Court held that an imminent injury cannot be too speculative and must be "certainly impending"[20] but also commented that in some cases the Court has found standing based on "substantial risk" that harm will occur.[21] In *Clapper*, the plaintiffs challenged § 702 of the Foreign Intelligence Surveillance

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13. Clapper v. Amnesty Int'l, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).
14. *Lujan*, 504 U.S. at 560.
15. Allen v. Wright, 468 U.S. 737, 739-40 (1984).
16. *Id.*
17. *Id.* at 753-54, 756.
18. *Id.* at 754.
19. *Id.* at 756-57.
20. Clapper v. Amnesty Int'l, 568 U.S. 398, 401 (2013).
21. *Id.* at 414 n.5.

Act of 1978 (FISA), which would allow the government to intercept communication between people in the United States and those in foreign countries.[22] Plaintiffs were attorneys, and human rights and media organizations whose work required them to communicate with individuals located abroad.[23] The plaintiffs pleaded that they had ceased certain communications to protect confidentiality based on the belief that the government was likely to surveil certain of their foreign contacts under § 1881a.[24] The Court held that the plaintiffs' "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending."[25]

In *City of Los Angeles v. Lyons*, the plaintiff, who had been choked unconscious by police during a traffic stop, sought an injunction barring the use of police chokeholds except in situations where the individual appeared to be threatening the use of deadly force.[26] The Supreme Court held that the plaintiff's standing to seek an injunction turned on whether there was an imminent threat that he would be stopped by police and choked again.[27] The Court determined that the plaintiff lacked standing because he could not show that he, personally, was at imminent risk of being choked by police during a future traffic stop.[28]

In some cases, courts have held that plaintiffs lacked standing when they did not sufficiently allege a personal impact. For example, in *Sierra Club v. Morton*, the plaintiffs challenged the construction of a ski resort in Mineral King Valley in California but were denied standing because they did not allege personal use of the area they sought to protect.[29] The Supreme Court held that a "mere interest" in the problem did not support standing.[30] Similarly, in *Lujan v. Wildlife Federation*, the plaintiffs challenged a policy that lessened protections for certain federal lands but were denied standing because they only stated that they used land in the area, not the exact land in question.[31]

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22. *Id.* at 401 (citing Foreign Intelligence Surveillance Act (FISA) of 1978 Amendments Act of 2008 (FAA), Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438 (codified as amended at 50 U.S.C. § 1881a (2012)).
23. *Id.* at 406.
24. *Id.*
25. *Id.* at 410.
26. City of L.A. v. Lyons, 461 U.S. 95 (1983).
27. *Id.* at 105.
28. *Id.*
29. Sierra Club v. Morton, 405 U.S. 727 (1972).
30. *Id.* at 739.
31. Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

B. Standing in Establishment Clause Cases

The Establishment Clause of the First Amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion."[32]

In *Flast v. Cohen*, the Supreme Court held that taxpayers had standing to challenge the Elementary and Secondary Education Act of 1965, which used federal funds to finance instruction and materials for religious schools.[33] The plaintiffs alleged that such federal funding was a violation of the Establishment Clause of the First Amendment.[34] The Court held that a taxpayer may have standing when a plaintiff (1) challenges an exercise of Congress to spend for the general welfare under Article I, Section 8 of the Constitution and (2) shows the program exceeds specific constitutional limitations imposed on Congress's power to tax and spend.[35] The Court held that the plaintiffs in *Flast* had standing because they challenged Congress's taxing and spending power, and the program they challenged involved a substantial amount of federal money, allegedly in violation of the Establishment and Free Exercise Clauses of the First Amendment.[36] The Court commented that "one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general."[37]

In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, plaintiffs sued on the grounds that a conveyance of government land to Valley Forge Christian College was a violation of the Establishment Clause.[38] The Department of Health, Education, and Welfare (HEW) owned the tract of land, which it conveyed to Valley Forge Christian College in fee simple with conditions subsequent.[39] The conditions required Valley Forge to use the land solely for the educational purposes that Valley Forge described in its application.[40] The requirements included meeting the standards of the State of Pennsylvania, the American Association of Bible Colleges, the Division of Education of the General Assemblies of God, and the

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32. U.S. CONST. amend I.
33. Flast v. Cohen, 392 U.S. 83 (1968).
34. *Id.* at 86.
35. *Id.* at 102-03.
36. *Id.* at 103.
37. *Id.*
38. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 469 (1982).
39. *Id.* at 468.
40. *Id.*

Veterans Administration.[41] The Supreme Court held that the plaintiffs lacked standing to sue as taxpayers under *Flask* because they did not challenge a congressional action.[42] The Court further held that the plaintiffs lacked standing because they failed to identify any personal injury they suffered as a consequence of the alleged constitutional error.[43] The Court reasoned that the plaintiffs, who resided in Maryland and Virginia and had headquarters in Washington, D.C., lacked standing to challenge a conveyance of land in Pennsylvania that caused the plaintiffs no injury.[44]

The United States Court of Appeals for the Fifth Circuit has also addressed the issue of standing in Establishment Clause cases. In *Murray v. Austin*, Murray sued the city claiming that the city insignia containing Christian crosses violated the Establishment and Free Exercise Clauses of the First Amendment.[45] Murray stated that he was injured when he confronted the insignia in many places around the city including his utility bills and asserted that the insignia was an endorsement of Christianity in general.[46] The court held that Murray had standing, reasoning: "In so ruling we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases . . . ."[47]

In *Ingebretsen v. Jackson Public School District*, parents, students, and taxpayers sued to enjoin the enforcement of the Mississippi School Prayer Statute, which allowed prayer during voluntary and involuntary school activities.[48] The Fifth Circuit held that the plaintiffs had standing to challenge the statute that had not yet been implemented, reasoning, "There is no need for Ingebretsen to wait for actual implementation of the statute and actual violations of his rights under the First Amendment where the statute 'makes inappropriate government involvement in religious affairs inevitable.'"[49] The court looked to testimony given in the

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41. *Id.*
42. *Id.* at 479-80.
43. *Id.* at 485-86.
44. *Id.* at 486-87.
45. Murray v. Austin, 947 F.2d 147, 149 (5th Cir. 1991).
46. *Id.* at 150.
47. *Id.* at 151. Although the court held that the plaintiff had standing it ultimately held that his claim failed under the "Lemon Test," which the Supreme Court established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), holding that a statute does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect is one that neither advances nor inhibits religion, and (3) the statute does foster an excessive government entanglement in religion.
48. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 277 (5th Cir. 1996).
49. *Id.* at 278 (citing Karen B. v. Treen, 653 F.2d, 897, 902 (5th Cir. 1981)).

district court that indicated "enormous interest in school prayer" to conclude that implementation of the statute would "inevitably lead to improper state involvement in school prayer."[50]

In *Doe v. Tangipahoa Parish School Board*, the Fifth Circuit (*en banc*) majority held that the plaintiffs lacked standing to challenge religious invocations that occurred at a school board meeting, when it was based on an "abstract knowledge that invocations were said."[51] The dissent and majority agreed that courts cannot infer standing from Supreme Court decisions in similar Establishment Clause cases, where the issue of standing was not addressed.[52]

Finally, in *Littlefield v. Forney Independent School District,* the Fifth Circuit held that the plaintiffs had standing to challenge a school uniform policy that exempted students who attested that their religious beliefs would be violated if they were required to wear a uniform.[53] The court reasoned that the application of the opt-out policy "appears to favor certain organized religions to which the Families do not belong. This direct exposure to the policy satisfies the 'intangible injury' requirement to bring an Establishment Clause challenge."[54]

B. Standing in Equal Protection Cases

In *Heckler v. Matthews*, the Supreme Court held that a man who sued to challenge a social security pension offset that applied to nondependent men, but not women, had alleged injury sufficient to confer standing.[55] The Court reasoned that he alleged "a type of personal injury we have long recognized as judicially cognizable . . . . [He is subject] to unequal treatment . . . solely because of his gender."[56] The Court reasoned that "discrimination itself[,] . . . by stigmatizing members of the disfavored group as 'innately inferior[,]' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."[57]

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50. *Id.*
51. Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 497 (5th Cir. 2007).
52. *Id.* at 498, 507. The dissent argued that "courts should hold standing exists when the parties repeatedly admit by implication the facts necessary to satisfy standing."
53. Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 294 n.31 (5th Cir. 2001).
54. *Id.*
55. Heckler v. Matthews, 465 U.S. 728 (1984).
56. *Id.* at 738.
57. *Id.* at 739-40 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

In *Allen v. Wright*, the Supreme Court held that when plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment.[58] The Court distinguished *Allen* from *Heckler* on the grounds that *Heckler* alleged discriminatory treatment, and the plaintiffs in *Allen* only alleged that they were stigmatized.[59]

In *Northeast Florida Chapter of the Association of General Contractors of America v. Jacksonville*, the plaintiffs challenged a city ordinance that set a percentage of contracts for minority business enterprises.[60] The Supreme Court held that when the government enacts a barrier that makes it harder for members of one group to obtain a benefit than members of other groups, to have standing the plaintiff does not need to allege that he would have obtained the benefit but for the barrier.[61] The Court held that the "'injury in fact' element of standing in such an equal protection case is the denial of equal treatment resulting from the imposition of the barrier."[62]

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the Fifth Circuit relied on a strict interpretation of the Supreme Court doctrine of standing established in *Clapper* and *Allen* to deny the plaintiffs' standing. While the court followed the framework it created in *Murray* and *Tangipahoa*, it diverged from its reasoning in *Ingebretsen* in order to determine that the plaintiffs did not allege sufficient injury to have standing to challenge HB 1523 as a violation of the Establishment Clause.

A. Establishment Clause

The court first addressed its determination that the plaintiffs lacked standing under the Establishment Clause. The court held that it is insufficient to claim a general violation of the Establishment Clause; instead, plaintiffs must allege a personal violation of rights.[63] The court held, "In cases involving religious displays and exercises, we have required an encounter with the offending item or action to confer

58. Allen v. Wright, 468 U.S. 737, 755 (1984).
59. *Id.*
60. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 659 (1993).
61. *Id.* at 657.
62. *Id.*
63. Barber v. Bryant, 860 F.3d 345, 353 (5th Cir. 2017).

standing."[64] The court reached this decision in *Murray v. City of Austin*, holding that the plaintiff had standing to challenge the display of a religious symbol contained in the city insignia that appeared on his utility bill among other things.[65] However, in *Murray*, the court also held that once the display was removed, the plaintiff could not claim injury and therefore no longer had standing.[66] Although the plaintiffs in the noted case alleged that their injury is like the injury in the various religious display cases, the court still held that "[j]ust as an individual cannot personally confront a warehoused monument, he cannot confront statutory text."[67] Furthermore, the court also held that it is bound by *Doe v. Tangipahoa*, which held that the plaintiffs lacked standing under the Establishment Clause because they only knew of invocations that occurred at a school board meeting but were not personally exposed to the invocations.[68]

The court dismissed the plaintiffs' assertion that under *Santa Fe Independent School District v. Doe*, a stigmatic injury is sufficient to support an Establishment Clause claim.[69] The court reasoned that in *Santa Fe*, the issue of standing was not addressed, and although the Supreme Court found injury when non-adherents witnessed prayer at a school football game, the language the Court used did not eliminate the injury in fact requirement.[70] The court further disagreed with the plaintiffs' assertion that the decisions in *Awad v. Ziriax* and *Trump v. International Refugee Assistance Project* provide support for standing.[71] The court reasoned that in both of those cases the plaintiffs alleged a concrete injury in fact, whereas the plaintiffs in the noted case "only allege offense at the message Section 2 [of HB 1523] sends" and are relying on stigmatic injury for standing.[72]

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64. *Id.* (citing Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 497 (5th Cir. 2007)).
65. *Id.* at 353 (citing Murray v. City of Austin, 947 F. 2d 147, 150 (5th Cir. 1991)).
66. *Id.* at 353-54 (citing Stanley v. Harris Cty., 485 F.3d 305, 309 (5th Cir. 2007)).
67. *Id.* at 353 (citing *Stanley*, 485 F.3d 305 at 309).
68. *Id.* (citing *Tangipahoa*, 494 F.3d at 497).
69. *Id.* (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)).
70. *Id.* (citing *Santa Fe*, 530 U.S. at 309-10).
71. *Id.* at 355 (citing Awad v. Ziriax, 670 F.3d 1111, 1120-24 (10th Cir. 2012) (holding that allegation that Oklahoma constitutional amendment condemns Plaintiff's religious faith and exposes him to disfavored treatment is sufficient to confer standing); Trump v. Int'l Refugee Assistance Project, 857 F.3d 554, 583 (4th Cir. 2017) (recognizing a distinct injury in the fact that the executive order "sends a state-sanctioned message condemning [Plaintiff's] religion and causing him to feel excluded and marginalized in his community")).
72. *Id.*

The court next addressed the plaintiffs' claim that they have standing as taxpayers under *Flast v. Cohen*, which allowed standing to challenge programs under the Taxing and Spending Clause that "involved more than 'an incidental expenditure of tax funds in the administration of an essentially regulatory statute.'"[73] The court held that HB 1523 does not fall within *Flast*'s exception to the rule against taxpayer standing, reasoning that HB 1523 only allows for compensatory damages and attorney's fees against state officials who engage in conduct prohibited by HB 1523.[74]

B. Equal Protection

The court also held that the plaintiffs lacked standing under the Equal Protection Clause of the Fourteenth Amendment.[75] The court reasoned that under *Allen*, "when plaintiffs' ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment."[76] The court acknowledged that under *Clapper*, future injuries can provide a basis for standing, but those injuries must be "certainly impending."[77] The court reasoned that the plaintiffs lack standing because their affidavits only claim offense at the "'clear message' of disapproval that is being sent by the state" but contain "no statement that any of the plaintiffs plans to engage in a course of conduct in Mississippi that is identified in Section 3 [Miss. Law HB 1523 section 3]."[78] The court held that Plaintiff Taylor's stated intention to marry was insufficient for standing because he did not state that he intended to marry in Mississippi, or that he was seeking wedding related services from a business "that would deny him."[79] The court stated that, at minimum, the plaintiffs would have to allege plans to engage in conduct outlined in HB 1523 section 3 for which they would be refused service and denied a previously existing recourse.[80]

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73. *Id.* at 356 (citing Flast v. Cohen, 392 U.S. 83, 102 (1968)).
74. *Id.*
75. *Id.* at 358.
76. *Id.* at 356 (internal quotation marks omitted) (quoting Moore v. Bryant, 853 F.3d 245, 251 (5th Cir. 2017)).
77. *Id.* at 357 (citing Clapper v. Amnesty Int'l, 568 U.S. 398, 409 (2013)).
78. *Id.*
79. *Id.*
80. *Id.* at 358.

IV. ANALYSIS

In the noted case, the Fifth Circuit misused its discretion to determine that the plaintiffs failed to allege injury sufficient to confer standing. Although some areas of the doctrine of standing are well established, other areas are less clear. The first prong of the standing inquiry requires a plaintiff to allege an injury that is concrete and particularized as well as actual or imminent.[81] The court is correct in its analysis that according to *Allen* stigmatic injury alone is not sufficient to confer standing under the law.[82] However, the Supreme Court has not consistently defined what constitutes an "imminent" injury.[83] Although the Court held that a future injury must be "certainly impending" in *Clapper*, the Court also noted that in some cases "substantial risk" was sufficient to confer standing.[84] Even if the Fifth Circuit determined that the plaintiffs have not yet suffered actual injury, it is unreasonable under the circumstances that the court held that there is no imminent injury.

The court reasoned that HB 1523 is limited enough in scope that there is no "certainty that any member of an affected group will suffer an injury."[85] In fact, HB 1523 is extremely broad in that it grants any individual or religious organization immunity for discriminating against any person in a nonheterosexual marriage or seeking such, any person engaged in a sexual relationship out of marriage, and any transgender person regarding (1) marriage, issuance of marriage licenses, marriage related services; (2) sale or rental of property; (3) adoption or foster care; (4) employment; (5) counseling or medical treatment related to gender identity or sex reassignment; (6) use of locker rooms, bathrooms, showers, dressing rooms, etc.; (7) sex specific standards regarding employee dress and grooming, and (8) speech based on HB 1523 section 2 beliefs.[86] Given that several of the plaintiffs in this case are LGBT and/or are in unmarried intimate relationships, it is difficult to understand the court's assessment that there is no certainty that any one of them will suffer discrimination in any of the aforementioned categories.

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81. *Clapper*, 568 U.S. at 409.

82. *See* Allen v. Wright, 468 U.S. 737, 755-56 (1984).

83. Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 220-22 (Winter 2014).

84. *Clapper*, 568 U.S. at 414 n.5.

85. *Barber*, 860 F.3d at 358.

86. H.B. 1523, 2016 Leg., Reg. Sess. § 2 (Miss. 2016).

HB 1523 section 3 allows those with section 2 beliefs to deny any unmarried person in an intimate relationship, any LGBT person who is married or seeking to get married, and any transgender person, access to bathrooms, dressing rooms and locker rooms. The court reasoned that Plaintiff Taylor lacked standing in part because he did not plead that he intended to marry in Mississippi or that he was seeking wedding services from someone who "would deny him."[87] Although there could be some rationale to the court's reasoning that Taylor lacks standing because he did not say he planned to marry in Mississippi, it is unreasonable to argue that none of the plaintiffs will use a bathroom, locker room, or dressing room in Mississippi, for example.

The district court commented that "[a]t oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*."[88] Governor Bryant said that *Obergefell* "mandated that states comply with federal marriage standards . . . that are out of step . . . with the majority of Mississippians."[89] Given Mississippi's apparent need to exclude itself from the reaches of *Obergefell*, it defies logic for the court to reason that the same citizens who wanted HB 1523 enacted will not certainly make use of the protections that it affords them. The State cannot reasonably argue that the "majority of Mississippians" disagree with *Obergefell*, but also argue there is no substantial risk that they will make use of the law designed specifically to thwart it. In *Ingebretsen*, the court looked to testimony indicating that there was a great deal of interest in school prayer to determine that a statute allowing it would "inevitably lead to improper state involvement in school prayer."[90] The same reasoning applies here. Given Governor Bryant's assertion that most Mississippi residents disapprove of *Obergefell*, it seems inevitable that HB 1523 will be utilized by those with section 2 beliefs. This, in turn, inevitably results in state-sanctioned preferential treatment of section 2 beliefs.

The court also erred when it looked to the imminence standard established in *Clapper* to determine that Taylor's injuries were too speculative to grant him standing.[91] The court did not consider the Supreme Court's decision in *Jacksonville*, which held that when the government enacts a barrier that makes it harder for members of one group to obtain a benefit than members of other groups, to have

87. *Barber*, 860 F.3d at 357.

88. Barber v. Bryant, 193 F. Supp. 3d 677, 700 (S.D. Miss. 2016).

89. *Id.* at 691-92 (quoting Press Release, Phil Bryant, Governor, Governor Bryant Issues Statement on Supreme Court Obergefell Decision (June 26, 2015), http://www.governorbryant.ms.gov/Pages/_Governor-Bryant-Issues-Statement-on-Supreme-Court-Obergefell-Decision.aspx).

90. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278 (5th Cir. 1996).

91. *Barber*, 860 F.3d at 357.

standing, the plaintiff does not need to allege that he would have obtained the benefit but for the barrier.[92] Under *Jacksonville*, Taylor has standing because HB 1523 makes it more difficult for him than others to obtain marriage services. It is unnecessary to allege that he would have obtained the benefit but for the barrier.

In addition, HB 1523 would preempt existing policies that protect LGBT persons from discrimination. For example, the district court discussed the University of Southern Mississippi's policy that prohibits discrimination based on sexual orientation or gender identity.[93] The city of Jackson, Mississippi, also has a municipal ordinance that prohibits discrimination based on sexual orientation.[94] HB 1523 would render Jackson's, USM's, and other similar antidiscrimination policies useless, which is an injury that is certain to occur under HB 1523. The court held that to have standing, the plaintiffs would have to allege that they seek to engage in section 3 conduct in Mississippi for which they could be denied service and would be "stripped of a preexisting remedy for that denial."[95] Because one of the plaintiffs is an employee of USM,[96] and HB 1523 would strip her of the preexisting remedy of USM's antidiscrimination policy,[97] it is difficult to fathom how the court reasoned that she lacks standing.[98]

The court's holding that the plaintiffs lack standing because they cannot physically "confront" a statute, as could the plaintiffs in the religious display cases, is a misapplication of those cases. In his dissent to the court's denial of rehearing en banc, Judge Dennis argued that there is no requirement that plaintiffs physically confront a statute to have standing.[99] He asserted that a plaintiff has standing when the enactment of a law or policy causes stigmatic harm that deems a non-adherent plaintiff an outcast in her own community.[100] Judge Dennis cited the Fourth Circuit's holding in *International Refugee* and asserted "the stigmatic harm that flows from the enactment of the law . . . tending to

92. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 657 (1993).

93. *Barber*, 193 F. Supp. 3d at 699.

94. *Id.*

95. *Barber*, 860 F.3d at 358.

96. *Barber*, 193 F. Supp. 3d at 688.

97. *Id.* at 699.

98. Mississippi Law HB 1523 section 3 protects from government action any state employee who expresses Section 2 beliefs in the workplace and any person who establishes "sex specific standards or policies concerning employee or student dress or grooming."

99. Barber v. Bryant, No. 16-60477, 2017 WL 4508782, at*5 (5th Cir. June 29, 2017); *Barber*, 860 F.3d 345.

100. Barber v. Bryant, 872 F.3d 671, 678 (5th Cir. 2017).

make the plaintiffs feel marginalized or excluded in their own community is sufficient [to confer standing]."[101]

Judge Dennis also asserted that the court misused *Littlefield* when it used the *Littlefield* holding to support the notion that stigmatic harm is not sufficient to confer standing in cases involving challenges to policy or law.[102] He argued that in *Littlefield*, the court held that direct exposure to the uniform opt-out policy was *sufficient* to confer standing, but that it did not find direct exposure was *required* for standing.[103]

Judge Dennis also took issue with the court's interpretation of *Santa Fe*.[104] The court held that *Santa Fe* was inapplicable to the standing inquiry because the Supreme Court did not address standing in *Santa Fe*.[105] Judge Dennis acknowledged that the Court did not directly address standing in *Santa Fe* but argued that its elucidation of the constitutional injuries against which the Establishment Clause protects is relevant to what constitutes an injury for the purposes of standing in an Establishment Clause case.[106]

The court similarly found that the plaintiffs cannot use *Romer v. Evans* as support for their standing because in *Romer*, standing was not addressed.[107] However, the *Romer* Court did address what constitutes an injury under the Equal Protection Clause and held that making it more difficult for one group of people than for all others to seek aid from the government "is itself a denial of equal protection of the laws in the most literal sense."[108] Although the similarity between the injuries in *Romer* and the ones suffered by the Barber plaintiffs does not automatically confer standing to the Barber plaintiffs, it suggests that the plaintiffs have sufficiently alleged injury under the Equal Protection Clause to satisfy the injury in fact requirement of the standing analysis.

If the court had found that the plaintiffs had standing, HB 1523 would have almost certainly failed the *Lemon* Test.[109] HB 1523 clearly has no secular purpose and favors specific religious beliefs for special privileges. The district court's decision included a lengthy and well-reasoned analysis of this issue when it granted the preliminary injunction

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101. *Id.* at 677.
102. *Id.* at 678.
103. *Id.*
104. *Id.* at 675.
105. Barber v. Bryant, 860 F.3d 345, 354 (5th Cir. 2017).
106. *Barber*, 872 F.3d at 675.
107. *Barber*, 860 F.3d at 357-58.
108. Romer v. Evans, 517 U.S. 620, 633 (1996).
109. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

finding that the plaintiffs were likely to succeed on the merits.[110] The Fifth Circuit utilized the only area of law that could conceivably undercut the plaintiffs' case. In doing so, the court has allowed those who discriminate against LGBT and unmarried persons to hide behind the shield of "religious freedom."

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110. Barber v. Bryant, 193 F. Supp. 3d 677, 722 (S.D. Miss. 2016).

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