No. 16-60477

In the United States Court of Appeals for the Fifth Circuit

RIMS BARBER, CAROL BURNETT, JOAN BAILEY, KATHERINE ELIZABETH DAY, ANTHONY LAINE BOYETTE, DON FORTENBERRY, SUSAN GLISSON, DERRICK JOHNSON, DOROTHY C. TRIPLETT, RENICK TAYLOR, BRANDIILYNE MANGUM-DEAR, SUSAN MANGUM, AND JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

v.

PHIL BRYANT, GOVERNOR OF MISSISSIPPI, AND JOHN DAVIS, EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division
Case No. 3:16-cv-417-CWR-LRA

REPLY BRIEF IN SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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I. THE STATE IS LIKELY TO PREVAIL ON APPEAL

HB 1523 easily passes muster under both the establishment and equal-protection clauses, for the reasons explained in our opening brief. None of the plaintiffs' constitutional attacks on HB 1523 hold water.[1]

A. HB 1523 Complies With The Establishment Clause

The plaintiffs first contend that HB 1523 lacks a "secular purpose"—even though they appear to acknowledge (as they must) that the protection of conscientious scruples qualifies as a permissible "secular purpose." *See* Response at 4; *Gillette v. United States*, 401 U.S. 437 (1971). Yet they claim that HB 1523 cannot serve this purpose because the State's Religious Freedom Restoration Act already provides the protections established in HB 1523.[2] This is false for many reasons.

First, RFRA requires religious freedom to give way whenever a court thinks that a "compelling governmental interest" is involved, and pre-*Smith* courts routinely ruled against religious-liberty claimants under this seemingly demanding test. *See Gillette,* 401 U.S. at 461 (1971) (rejecting a free-exercise challenge to the conscription of those who opposed a particular war on religious grounds); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *see also Employment Div., Dep't. of Human Res. of*

[1] The plaintiffs observe that preliminary injunctions are reviewed for abuse of discretion, but they neglect to mention that an error of law is a *per se* abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ."); *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412 (5th Cir. 2011) (same). So the State needs only to show the district court erroneously interpreted the Constitution to prevail in its appeal.

[2] The CSE plaintiffs make a similar argument. *See* CSE Response at 1 (claiming that the State's Religious Freedom Restoration Act "already fully protect[s] all Mississippians' rights to believe what they choose and to practice their religions accordingly.").

Oregon v. Smith, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring) ("Oregon has a compelling interest in prohibiting the possession of peyote by its citizens."). This is precisely why legislatures have enacted specific and absolute protections for religious-liberty claimants who would lose (or who might lose) under the "compelling interest" standard. *See, e.g.*, Tex. Health & Safety Code Ann. § 481.111(a) (exempting from drug laws those who use peyote "in bona fide religious ceremonies" "of the Native American Church"); 21 C.F.R. § 1307.31 (1990) (same); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (rejecting establishment-clause challenges to these exemptions). And that is why the State enacted HB 1523: The "compelling interest" standard is vague and its meaning hinges on the proclivities of individual judges. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799–2801 (2014) (Ginsburg, J., dissenting). HB 1523 provides the clear and unambiguous protections that are needed, and it obviates the chilling effects that arise from the subjective and indeterminate "compelling interest" test.

Second, the state's RFRA offers no protections at all for those with *secular* conscientious scruples against same-sex marriage, transgender behavior, or non-marital sex. HB 1523 supplies those missing protections, and the plaintiffs never explain how the protection of *secular* conscientious beliefs can be an establishment of "religion."

Finally, the plaintiffs surely believe that the government *has* a "compelling interest" in enforcing anti-discrimination norms (or any other type of law) against those who wish to opt out of same-sex marriages. *Cf. Dale v. Boy Scouts of America*, 734 A.2d 1196, 1227 (N.J. 1999) ("It is unquestionably a compelling interest of this

State to eliminate the destructive consequences of discrimination from our society."), *rev'd by Boy Scouts v. Dale*, 530 U.S. 640 (2000). So it is disingenuous for the plaintiffs to claim that the state's RFRA fully protects the conscientious scruples enumerated in HB 1523, when they know full well that they and their allies would argue vigorously against any interpretation of RFRA that protects those with religious objections to same-sex marriage or transgender behavior. *See, e.g.*, Letter from Legal Scholars to President Barack Obama (July 14, 2014), *available at* http://bit.ly/1oXpQAT.

The plaintiffs' claim that HB 1523 is the "only [law] whose text provides special legal protection for *specific* religious beliefs" is also false. *See* Response at 8. To begin, none of the beliefs listed in section 2 are "religious beliefs," and HB 1523 protects those who adhere to those beliefs for religious *or secular* reasons. It is true that *some* people oppose homosexuality, transgender behavior, and sex outside of marriage for religious reasons. But that is equally true of pacifism, opposition to swearing oaths, opposition to abortion, and opposition to capital punishment. The fact that *some* people may have religious motivations for adhering to a belief does not transform that belief into a "religious belief."

Second, federal and state drug laws specifically protect the use of peyote "in bona fide religious ceremonies" "of the Native American Church," Tex. Health & Safety Code Ann. § 481.111(a); 21 C.F.R. § 1307.31 (1990)—and this Court rejected an establishment-clause challenge to those religion-specific protections in *Peyote Way Church of God*. *See* 922 F.2d at 1216–17. Other statutes specifically protect the conscientious scruples of those opposed to abortion, regardless of whether that op-

position is rooted in religious or secular convictions. *See, e.g.*, 42 U.S.C. § 238n(a); Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280. True, the abortion statutes do not protect specific *religious* beliefs, but neither does HB 1523; like the abortion statutes, it equally protects those with religious or secular objections. And, like the abortion statutes, HB 1523 has the same secular purpose: protecting citizens from being coerced to act in a manner contrary to their deeply held convictions.

The plaintiffs and the district court try to get around *Gillette* and the abortion statutes by suggesting that the government *may* enact specific conscientious-objector protections—but only for those who "might be forced to participate in what they believe is the killing of others." Response at 11; *see also* Doc. 54 at 4 ("Matters of life and death are sui generis."). Those with conscientious objections to practices that fall short of killing other human beings—such as swearing oaths, sterilizations, or same-sex marriages—are constitutionally forbidden to seek specific statutory protections and must repair to the vague balancing tests that appear in RFRA-like statutes. Neither the plaintiffs nor the district court cites any authority to support this arbitrary distinction that they have concocted. And there is nothing in the text of the establishment clause—or in *any* decision of the Supreme Court—that suggests such a distinction. If the State has "established" a "religion" by enshrining the specific statutory protections for the conscientious scruples listed in HB 1523, then Congress has also "established" a "religion" by enacting specific and absolute statutory protections for pacifists and abortion opponents. And there is no exception in the establishment clause (or in the Supreme Court's case law) that would allow government to establish a religion in order to protect those with

conscientious objections to warfare, abortion, or capital punishment, but not to protect those with conscientious objections to swearing oaths, sterilizations, or same-sex marriage. The plaintiffs' and the district court's reasoning would also render the Church Amendment unconstitutional, to the extent that it protects those who object to sterilization procedures. *See* 42 U.S.C. § 300a-7.

The plaintiffs' efforts to analogize HB 1523 to a law that shields racists who decline to participate in interracial marriages has nothing to do with the establishment clause; the plaintiffs' hypothetical statute would implicate the equal-protection clause and not the first amendment. *See* Section I.B, *infra*. But the plaintiffs' attempt to equate opposition to same-sex marriage with racism is not only an insult to the millions of Americans who oppose same-sex marriage—including those who have offered thoughtful and scholarly arguments for this position[3]—it also directly contradicts the Supreme Court's opinions in *Obergefell* and *Loving*. *Obergefell* states unequivocally that opposition to same-sex marriage rests on "decent" and "honorable" premises, while *Loving* described anti-miscegenation laws as an odious at-

[3] *See, e.g.,* Sherif Girgis, et al., *What Is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2011); James Q. Wilson, *Against Homosexual Marriage*, Commentary (Mar. 1, 1996), http://bit.ly/1m5SK1b; George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004). The psychologist Jonathan Haidt has explained how conservatives and liberals differ in their conceptions of morality—which largely explains their divergent views on the same-sex marriage issue. *See, e.g.*, Haidt & Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize*, 20 Social Justice Research 98, 100–01 (2007) ("[O]n the issue of gay marriage it is crucial that liberals understand the conservative view of social institutions. Conservatives generally believe . . . that human beings need structure and constraint to flourish, and that social institutions provide these benefits. . . . These are not crazy ideas."); Graham, Haidt, & Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 Journal of Personality and Social Psychology 1029 (2009).

tempt to preserve white supremacy. *Compare Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."); *id.* at 2594 ("This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."); *with Loving v. Virginia*, 388 U.S. 1, 11 (1967) (denouncing anti-miscegenation laws as "measures designed to maintain White Supremacy."). So until a future Supreme Court issues an opinion that equates opposition to same-sex marriage with racism, neither lower courts nor litigants may equate the two.

B. HB 1523 Easily Passes Rational-Basis Review

The plaintiffs claim that HB 1523 fails rational-basis review, but they do not understand what rational-basis review is. Rational-basis scrutiny does not require a precise fit between means and ends, and a State may enact under-inclusive or over-inclusive conscience-protection laws. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010) ("[R]ational basis review allows legislatures to act incrementally and to pass laws that are over (and under) inclusive. . . ."). So it does not matter that HB 1523 protects only some and not all conscientious scruples—at least when a court is applying rational-basis review.

Rational-basis review also does not require a State to produce evidence that a law will achieve its objectives. *See Heller*, 509 U.S. at 320 ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (holding that a legislative decision "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). So it does not matter that there is "no allegation or indication" that the State is forcing conscientious objectors to participate in same-sex marriages. See Response at 17. One can rationally surmise that the state's RFRA is insufficient to protect these conscientious objectors, because a future court might interpret its protections narrowly, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2799–2801 (Ginsburg, J., dissenting), and this chilling effect will deter conscientious objectors from opting out of same-sex marriages because they fear expensive lawsuits or ruinous judgments. That is all that is needed to show a rational basis for HB 1523. *See Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) ("It is hard to imagine a more deferential standard than rational basis. . .").

The plaintiffs' attempt to equate HB 1523 with the situation in *Romer v. Evans*, 517 U.S. 620 (1996), is absurd. *Romer* concluded that Amendment 2 was "inexplicable by anything but animus" toward homosexuals. *Id.* at 632. HB 1523, by contrast, serves the obvious and legitimate purpose of protecting the conscientious scruples of the citizenry—an interest that even the plaintiffs acknowledge as legitimate. *See* Response at 16. A law cannot be invalidated on rational-basis review so long as it is *possible to imagine* a legitimate purpose for the statute—and it is *easy* to

imagine a rational and legitimate basis for HB 1523. *See Beach Commc'ns*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.").

Finally, the plaintiffs try once again to equate HB 1523 with a statute that exempts segregationists from participating in interracial weddings. *See* Response at 20. The plaintiffs' analogy is specious. Laws that contain explicit racial classifications are subject to strict scrutiny, not rational-basis review, and the plaintiffs' hypothetical statute could not survive that demanding standard. *See, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005). Any law that seeks to protect conscientious scruples must be phrased in race-neutral terms. Indeed, many states *have* enacted laws that shield clergy, churches, and religious organizations from compelled participation in interracial marriages—but they do not confer these protections with race-specific language. Instead, they protect these entities from participating in *any* marriage that violates their religious beliefs[4]—and some statutes go further and allow them to decline to participate in any marriage regardless of their reasons.[5] All of these statutes are constitutional because they do not contain racial classifications or race-specific language. HB 1523 is constitutional for the same reason.

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[4] *See, e.g.*, Conn. Gen. Stat. § 46b-22b(b) (2009); Conn. Gen. Stat. § 46b-35a (2009); Me. Rev. Stat. tit. 19-A, § 655(3) (2012); N.H. Rev. Stat. Ann. § 457:37 (2010).

[5] *See* Del. Code Ann. tit. 13, § 106(e) (2016) ("[N]othing in this section shall be construed to require any individual, including any clergyperson or minister of any religion, authorized to solemnize a marriage to solemnize any marriage, and no such authorized individual who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal."); D.C. Code § 46-406(c) (2013) ("No priest, imam, rabbi, minister, or other official of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage.").

C. The District Court Should Not Have Issued A Preliminary Injunction

Neither group of plaintiffs attempts to defend the district court's application of the preliminary-injunction standard, which requires a "*clear showing*" of likelihood of success on the merits. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). Whatever one thinks of the plaintiffs' arguments, they fall short of a "clear showing" that HB 1523 violates the Constitution. The cases on which they rely are readily distinguishable, and even those who agree with the plaintiffs' claims would *have* to concede that reasonable jurists could go the other way. That alone is enough to show that the State is likely to succeed on appeal.

II. The State Will Suffer Irreparable Harm Absent A Stay

The mere fact that the State's law has been enjoined is a *per se* irreparable injury. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating [its] statutes . . . , it suffers a form of irreparable injury."). The CSE plaintiffs correctly note that there were *additional* harms to the State in *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers), and *Planned Parenthood v. Abbott*, 734 F.3d 406 (5th Cir. 2013), but that does not undercut the State's showing of irreparable harm.

III. The Plaintiffs Will Not Be Harmed By A Stay

The plaintiffs repeatedly acknowledge that state officials already respect the conscientious scruples of same-sex-marriage opponents. *See* Barber Response at 1 ("[not] a single instance of the state government in Mississippi threatening to take

'discriminatory action' against people who hold those beliefs"); *id.* at 7 ("Mississippi officials are not now suddenly trying to coerce unwanted participation in same-sex marriage"). They cannot simultaneously insist that a stay will open the floodgates to "discrimination." None of the named defendants intends to punish or penalize the opponents of same-sex marriage—even in the absence of HB 1523. And the preliminary injunction restrains only the named defendants and their privities; it does not extend to state-court litigants and judges who are not parties to this lawsuit. *See* Fed. R. Civ. P. 65(d)(2).

Conclusion

The preliminary injunction should be stayed pending appeal.

Respectfully submitted.

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Certificate of Service

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Certificate of Electronic Compliance

Counsel also certifies that on August 4, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

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