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

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION FOR EXPEDITED CONSIDERATION

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Governor Phil Bryant, on behalf of the State of Mississippi, respectfully seeks a stay of the preliminary injunction entered against House Bill 1523, also known as the "Protecting Freedom of Conscience from Government Discrimination Act" (attached as App. A).

The district court issued its ruling at 11:23 P.M. on the night before the law was scheduled to take effect, which deprived the State of the opportunity to seek appellate review before the statute's effective date. The harm to the State has been compounded by the astonishing nature of the district court's ruling, which held that the State lacked a rational basis for enacting a law that protects the conscientious scruples of its citizens, and held further that a State violates the establishment clause when it enacts legislation to protect or accommodate an enumerated conscientious belief. *See* Memorandum Opinion and Order (doc. 39) at 39, 48–51 (attached as App. B). The reasoning in the district court's opinion would invalidate every piece of conscience-clause legislation that confers specific statutory protections on those who oppose abortion, sterilization, or contraception. *See* Lucas Mlsna, *Stem Cell Based Treatments and Novel Considerations for Conscience Clause Legislation*, 8 Ind. Health L. Rev. 471, 480 (2011) ("[F]orty-six states have enacted conscience clauses that allow some health care professionals to refuse to perform abortions"). And it would nullify at least two federal statutes that protect the conscientious scruples of abortion opponents. *See* 42 U.S.C. § 238n (attached as App. H); Pub. L. No. 111-117, 123 Stat. 3034, 3280 § 508(d)(1) (attached as App. I).

Because the State is suffering irreparable injury from the district court's injunction against its duly enacted law, we respectfully ask the Court to decide this mo-

tion as soon as possible, after time for the plaintiffs to file a response and the State to file a reply. The State also requests expedited consideration of this appeal, regardless of whether the Court grants or denies the stay. Finally, the State moves to consolidate the appeal in *CSE v. Bryant*, No. 16-60478, with the appeal in this case.[1]

STATEMENT OF THE CASE

American law has long protected and accommodated the conscientious scruples of individuals and institutions who cannot participate in certain activities on account of their religious beliefs or moral convictions. Those who do not believe in swearing oaths are permitted to affirm. *See* U.S. Const. art. II, § 1, ¶ 8; *id.* art. VI, ¶ 3. Pacifists are exempted from military conscription. *See Gillette v. United States*, 401 U.S. 437 (1971). And opponents of abortion are protected from retaliation or discrimination when they refuse to participate in abortion-related activities. *See, e.g.*, 42 U.S.C. § 238n; *see also* Mlsna, 8 Ind. Health L. Rev. at 480 ("[F]orty-six states have enacted conscience clauses that allow some health care professionals to refuse to perform abortions."). Each of these laws singles out specific beliefs or convictions for unique legal protections—pacifism, opposition to oath-taking, and opposition to abortion. And each of these laws protects the adherents of those beliefs from being coerced to act in a manner contrary to their conscientious scruples.

[1] The State has filed a motion for a stay in the district court, *see* Fed. R. App. P. 8(a)(2)(A)(i), but as of Monday, July 11, 2016, the district court has not yet ruled on it. We do not expect the district court to stay its decision and respectfully ask this Court to consider this application without waiting for the district court to rule. We will notify the Court as soon as the district court rules on the State's motion.

Until recently, there was no need for the law to protect the conscientious scruples of those who oppose same-sex marriage. That is because it was unthinkable—until recently—that government officials might try to coerce religious organizations or private citizens into participating in same-sex marriage ceremonies, or penalize them for their refusal to do so. But state and local governments are already taking action against Christians who decline to participate in these ceremonies on account of their religious beliefs. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). And at oral argument in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Solicitor General acknowledged that the tax-exempt status of religious institutions could be in jeopardy if they do not recognize same-sex marriage. *See* Oral Argument Transcript, *Obergefell v. Hodges*, No. 14-556, at 36–38 (U.S. Apr. 28, 2015).

Mississippi has responded to these episodes by enacting HB 1523, a statute that gives the opponents of same-sex marriage the same conscientious-objector protections that federal law confers on opponents of abortion. *See, e.g.*, 42 U.S.C. § 238n. HB 1523 ensures that churches, religious organizations, and private citizens may decline to participate in same-sex marriage ceremonies without fear of reprisal from the State. *See* HB 1523 §§ 3(1)(a); 3(5). It also allows private citizens to decline to perform sex-change operations or provide counseling or fertility services that violate their sincerely held religious or moral beliefs. *See id.* § 3(4). And it allows state employees to recuse themselves from licensing same-sex marriages—but only if they provide "prior written notice to the State Registrar of Vital Records" and "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." *Id.* at § 3(8).

It is likely that Mississippi residents already enjoyed these protections under the state's Religious Freedom Restoration Act—at least to the extent that their conscientious objections rest on religious rather than secular beliefs. *See* Miss. Code Ann. § 11-61-1 (2014). But that statute requires religious-liberty claims to give way when a "compelling governmental interest" is involved, and some judges have construed that phrase broadly when controversial culture-war issues are at stake. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (asserting a "[c]ompelling governmental interest[]" in "uniform compliance with the law"); *see also id.* at 2799–2801 (Ginsburg, J., dissenting) (asserting a "compelling interest" in forcing employers to subsidize their employees' contraception). HB 1523 mitigates this chilling effect on religious freedom by clarifying that the State's residents may follow their conscientious scruples and decline to participate in same-sex marriage ceremonies, without requiring them to gamble their finances and livelihoods on how a future court might interpret the plastic and ill-defined "compelling governmental interest" standard.

Mississippi's statute is carefully crafted and exceedingly limited in its scope. It does not authorize *any* business to discriminate against homosexuals or transgendered people in employment, housing, or access to places of public accommodation.[2] It requires state employees who recuse themselves from same-sex marriages to ensure that the licensing of marriages is not "impeded or delayed." *Id.*

[2] The provisions governing employment and housing discrimination apply only to "religious organizations." That term is defined in the statute, and it does not include business corporations. *See* HB 1523 § 9(4); *compare id.* § 9(3)(b) *with id.* § 9(3)(c).

at § 3(8). And it limits the statute's protections to those who decline, for reasons of religious belief or moral conviction, to participate in activities that they consider immoral or sinful. Homosexuals and transgendered people will still receive marriage licenses, health care, and wedding-related services, but they cannot force private citizens or religious organizations to provide these services in violation of their religious or conscientious beliefs. This regime is no different from the laws that shield doctors and health-care entities who refuse to participate in abortions.

On June 30, 2016, the district court issued a preliminary injunction against HB 1523. The court held that HB 1523 fails rational-basis review, and therefore violates the equal-protection clause. *See* Memorandum Opinion and Order (doc. 39) at 39 (attached as App. B). The court also held that HB 1523 violates the establishment clause by conferring special statutory protections on an enumerated subset of conscientious scruples. *See id.* at 48.[3] In the district court's view, the government must protect *all* conscientious scruples equally; otherwise it is creating "an official preference for certain religious tenets." *Id.*

The governor has appealed on behalf of the State, and respectfully asks for a stay of the injunction pending appeal.

[3] *See* HB 1523 § 2 ("The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.").

ARGUMENT AND AUTHORITIES

In deciding whether to stay a preliminary injunction pending appeal, a court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quotation omitted). Each of these four factors cuts in favor of the State's application.

I. THE STATE IS LIKELY TO PREVAIL ON APPEAL

The district court held that HB 1523 violates both the equal-protection clause and the establishment clause. Neither conclusion is likely to survive appellate review.[4]

A. HB 1523 Easily Satisfies Rational-Basis Review

The district court held that HB 1523 violates the equal-protection clause because it fails rational-basis review. *See* Doc. 39 at 39 ("Even under this generous standard, HB 1523 fails."). That conclusion is untenable. HB 1523 has an obvious

[4] The plaintiffs also lack standing to challenge HB 1523, because the injuries that they allege are either ideological or speculative. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982) (no standing for ideological injuries); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147–50 (2013) (no standing for speculative future injuries). The district court held otherwise, but the State is not seeking a stay on this basis because the district court's resolution of the merits is so clearly wrong, and because the complex and technical nature of Article III standing doctrine makes it difficult to show in a 20-page brief that the district court erred in a manner grave enough to warrant a stay. The State is in no way conceding the issue of standing, and we will vigorously contest the plaintiffs' standing on appeal.

rational basis: Protecting the State's citizens from being forced or pressured to act in a way that violates their deeply held religious or moral beliefs. Even the district court acknowledged that this qualifies as a "legitimate government interest." *Id.*

Yet the district court reached the astounding conclusion that HB 1523 "does not advance" the State's interest in protecting religious liberty. *Id.* at 40. The Court wrote:

> HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity.

Id. That is a non-sequitur. Even if one accepts the district court's premise—that HB 1523 "creates a vehicle for state-sanctioned discrimination"—its conclusion that HB 1523 "does not advance" the State's interest in protecting religious freedom does not follow. The district court is criticizing the *means* by which the State is protecting the religious liberty of its citizens, but that does not show that HB 1523 "does not advance" the State's admittedly legitimate interest in protecting religious liberty. HB 1523 most assuredly advances that interest; it just does so in a way that the district court disapproves. Yet "rational-basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted). Once the district court acknowledged that the protection of religious liberty qualifies as a "legitimate government interest," its task under rational-basis review came to an end.

The district court's rational-basis analysis is also incompatible with *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *Amos* upheld Title VII's statu-

tory exemption for religious organizations as a permissible religious accommodation—even though this statutory exemption "creates a vehicle for state-sanctioned discrimination." Doc. 39 at 40. Yet the Supreme Court held that the authorization of discriminatory behavior did *not* make Title VII's exemption an impermissible or irrational means of protecting religious liberty or autonomy. *See Amos*, 483 U.S. at 334 ("[T]he government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause.") (quotation omitted); *id.* at 340–41 (Brennan, J., concurring in the judgment) (acknowledging that "[a]ny exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees" yet concluding that "religious organizations have an interest in autonomy in ordering their internal affairs"). The district court did not even attempt to explain how its holding could be reconciled with *Amos*, even though the State cited that case repeatedly in its district-court filings. *See* Memo. in Opp. to Pls.' Mot. for Prelim. Inj. (doc. 30) at 30, 33 (attached as App. E).

Finally, the district court's claim that HB 1523 reflects unconstitutional "animus" toward homosexuals and transgendered people is indefensible. Only laws that reflect a "*bare* desire to harm a politically unpopular group" can be invalidated on the ground of "animus." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (emphasis added) (quoting *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973)). Laws that advance a rational or legitimate state interest—such as the protection of religious freedom—do not evince a "*bare* desire to harm a politically unpopular group," even if those laws impose inconveniences or harms on a subset of the citizenry.

Almost every law inflicts harm or disadvantages on someone; if that made a legislature guilty of unconstitutional "animus," then few if any laws would survive judicial review. The test is whether a law exists *only* to harm a politically unpopular group, or whether the law can be said to serve some legitimate or rational end.

HB 1523 advances a purpose that even the district court recognized as legitimate: protecting the religious and conscientious freedom of the State's citizens. *See* Doc. 39 at 39. So long as the law serves that rational and legitimate purpose, it cannot be said to embody a "*bare* desire to harm a politically unpopular group." HB 1523 is no different in this regard from the statutes that protect the conscientious scruples of abortion opponents. *See* 42 U.S.C. § 238n ("Coates amendment") (forbidding governments to penalize or discriminate against any "health care entity" that refuses to perform abortions or provide abortion training or referrals). The Coates amendment does not reflect a "bare desire to harm" abortion patients—even though it likely has the effect of reducing access to abortion—because the law *also* serves the valid and legitimate purpose of protecting the freedom of conscience of abortion opponents. That rational basis for the law defeats any accusation that the law is born of unconstitutional "animus." So too with HB 1523.

B. HB 1523 Does Not Violate The Establishment Clause

The district court's interpretation of the establishment clause is even more off-base. The district court held that the establishment clause forbids the State to protect the specific religious beliefs and moral convictions listed in HB 1523—unless the State confers identical statutory protections on every other conscientious scru-

ple that might be asserted in the State of Mississippi. *See* Doc. 39 at 48–50. To allow a State to protect only an enumerated subset of conscientious scruples would, in the view of the district court, violate the establishment clause by creating an "official preference for certain religious tenets." *Id.* at 48. That is an absurd construction of the establishment clause.

It is perfectly constitutional for statutes and regulations to extend specific protection to conscientious scruples that have come to the government's attention, and which might be endangered by state action, without legislating broadly in the abstract for situations that have not arisen, might never arise, and might present different countervailing considerations. Indeed, almost every conscience clause that exists in federal or state legislation specifies the conscientious scruples that it will protect and accommodate, while declining to extend protections and accommodations to other deeply held beliefs. The federal statutes that protect the conscientious scruples of abortion opponents, for example, offer no protections to opponents of contraception. *See* 42 U.S.C. § 300a-7 ("Church amendment") (attached as App. G); 42 U.S.C. § 238n ("Coates amendment") (attached as App. H); Pub. L. No. 111-117, 123 Stat 3034, 3280 § 508(d)(1) ("Weldon amendment") (attached as App. I). And most of the 46 states that have enacted conscience-clause protections for abortion opponents do not extend those statutory protections to contraception or other types of conscientious scruples. *See* Mlsna, 8 Ind. Health L. Rev. at 480 & nn.42–44 (2011). Yet on the district court's reasoning, all of these statutes violate the establishment clause, because they confer an "official preference" on the conscientious scruples of abortion opponents, while those with conscientious

scruples against contraception (and other controversial health-care practices) are left out in the cold. Doc. 39 at 48.

The district court tried to distinguish these statutes by observing that the Church amendment confers symmetrical protections on abortion-performing and anti-abortion doctors. *See id.* at 54–55. But that is true only of the Church amendment. The Coates and Weldon amendments—and most of the state conscience-clause provisions—protect *only* the health-care entities that *refuse* to participate in abortions, and all of these statutes violate the establishment clause under the district court's reasoning. And the court never addressed the problem posed by these statutes' failure to protect the opponents of contraception. Under the district court's ruling, the failure to extend equal conscience protections to opponents of contraception violates the establishment clause by treating opponents of contraception as "second-class Christians" and "send[ing] a message that they are outsiders, not full members of the political community." Doc. 39 at 48 (citation omitted).

The district court's reasoning is untenable. There are all sorts of valid and legitimate reasons for why a legislature might choose to protect some conscientious scruples over others. Some conscientious scruples may be too insubstantial to warrant statutory protection. Congress might decide, for example, that objections to contraception should receive fewer statutory protections than objections to abortion because contraception (unlike abortion) does not involve the intentional destruction of a human fetus. Other conscientious scruples may be too abhorrent to receive statutory protection. Congress need not, for example, protect the conscientious scruples of racist or eugenic health-care providers who are unwilling to treat

minority patients, and Congress need not protect those "conscientious scruples" on the same terms that it protects the opponents of abortion. And some conscientious scruples may not need statutory protection because they are not under assault by government officials or by the culture. All of these factors go into determining whether a conscientious scruple receives explicit statutory protection—and it is inevitable (and entirely constitutional) that some conscientious scruples will receive greater statutory protection than others. As Professor McConnell has explained:

> It does not follow . . . that accommodations are suspect merely because they accommodate only a particular religious practice. Most accommodations are of this sort; when the legislature becomes aware that a particular law or government action infringes on the religious exercise of a particular religious minority, it typically carves out a particular exception. When Congress enacted Prohibition, it incorporated an exception for sacramental wine; when Congress enacted military conscription, it included an exception for religious conscientious objectors; when Congress extended Social Security to self-employed persons, it included an exemption. That these laws work to the benefit of only those religious groups whose practices are inconsistent with the law in question cannot be an objection.

Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 706 (1992). And Professor James Ryan, in his 1992 student note, uncovered more than 2,000 religious exemptions in federal and state law that protect specific conscientious objections. *See* James Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445–50 (1992) (attached as App. J). All of this would be swept away under the district court's reasoning, and neither the district court nor the plaintiffs have ex-

plained how any of these ubiquitous religious-accommodation statutes could survive if HB 1523 violates the establishment clause.

The district court also defied the Supreme Court's ruling in *Gillette v. United States*, 401 U.S. 437 (1971), which explicitly rejected the view of the establishment clause that the district court has propounded. The petitioners in *Gillette* had brought an establishment-clause challenge to the Selective Service Act of 1967, which exempted from military conscription those who were "conscientiously opposed to participation in war *in any form*," but refused to exempt those with conscientious objections only to a *particular* war. *See* Pub. L. 90-40, § 7 (emphasis added). The petitioners' argument in *Gillette* tracked the district court's reasoning in this case: they argued that Congress had violated the establishment clause by accommodating the conscientious beliefs of full-time pacifists, while withholding those accommodations from part-time pacifists who object only to a particular type of war. This distinction, according to the petitioners, established "a de facto discrimination among religions." *Gillette*, 401 U.S. at 452; *see also id.* at 449 ("[P]etitioners ask how their claims to relief from military service can be permitted to fail, while other 'religious' claims are upheld by the Act.").

Yet the Supreme Court rejected the petitioners' argument, and it specifically held that the establishment clause permits Congress to discriminate among the conscientious scruples that it will recognize and accommodate—so long as Congress extends those statutory protections on equal terms to members of different faiths and religious denominations and refrains from "religious gerrymanders." *Id.* at 452. A law that protects only certain conscientious scruples and not others

"simply does not discriminate on the basis of religious affiliation or religious belief"—even though beliefs about war are heavily correlated with one's religious affiliation and beliefs. *Id.* at 450.

So it is perfectly acceptable for the government to exempt conscientious objectors who oppose all forms of warfare, without extending identical protections to those who oppose only a particular war. *See id.* at 450. It is also acceptable for the government to protect the conscientious scruples of health-care workers who oppose abortion, without extending similar protections to those who oppose contraception. *See* 42 U.S.C. § 238n. It is also acceptable for the government to protect churches and clergy that oppose same-sex marriage, without extending similar protections to churches and clergy that oppose interracial marriage. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). And it is acceptable for the Religious Freedom Restoration Act to protect religiously motivated conscientious scruples, without extending similar protections to conscientious scruples rooted in secular moral belief. *See Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005).[5] None of this violates the establishment clause—and neither does HB 1523.

And just what "religion" has the State "established" by enacting HB 1523? Opponents of same-sex marriage can be found in *every* faith tradition and religious denomination, and the statute protects all of them—including non-believers whose conscientious objections rest exclusively on secular moral beliefs. *See* HB 1523 § 2.

[5] It is not clear how the federal Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act could survive under the district court's interpretation of the establishment clause, since each of these statutes discriminates by limiting their protections and accommodations to *religious* conscientious scruples.

So how can this be an establishment of *religion*? And if so, *what is* the religion that the State has established?

The district court and the plaintiffs argue that HB 1523 establishes a de facto "denominational preference" because the opponents of same-sex marriage are more likely to be found among the ranks of the Southern Baptists than the Episcopalians. *See, e.g.*, Doc. 39 at 49–50 ("HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine. . . ."). If that makes a statute violate the establishment clause, then every conscience-protection and religious-accommodation law is unconstitutional, because there will always be disagreements among faith traditions over the issues that trigger the need for such a law, and conscientious objectors will never be equally distributed across religious denominations.

That may be exactly what the plaintiffs want—and they have never tried to explain how 42 U.S.C. § 238n and the state-law conscience-clause protections for abortion opponents could survive under their theory of the establishment clause. But it is hard to imagine that this Court (or the Supreme Court) would adopt that interpretation of the establishment clause on appeal.[6]

[6] The district court also erred by holding that the establishment clause forbids religious accommodations that have adverse impacts on third parties. Exempting pacifists from military conscription compels non-pacifists who would otherwise escape conscription to be drafted and sent to fight and die on battlefields. Yet these exemptions are perfectly constitutional. *See Gillette*, 401 U.S. 437. In all events, HB 1523 does not impose substantial burdens on third parties, for the reasons discussed in Part III, *infra*.

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

Even if one thinks that the district court's reasoning is plausible, its decision to issue a *preliminary injunction* on these claims was indefensible. Both the Supreme Court and this Court have repeatedly held that a preliminary injunction is an "extraordinary remedy," which is not to be granted unless the applicant makes a "clear showing" that he is likely to succeed on the merits. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) ("This court has *repeatedly* cautioned that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." (emphasis added) (citation omitted)). Yet the plaintiffs' legal challenges to HB 1523 are (at best) debatable, and they cannot support a preliminary injunction even if one thinks that the plaintiffs should ultimately prevail in the end.

To its credit, the district court recited the proper standard for awarding a preliminary injunction. *See* Doc. 39 at 31. But although the district court mouthed the words, it did not hold the plaintiffs to the demanding standard that the law imposes on those who seek preliminary injunctions—especially a preliminary injunction that enjoins the law of a sovereign State. *See Ex Parte Young*, 209 U.S. 123, 166 (1908) ("[N]o injunction ought to be granted unless in a case reasonably free from doubt."). No reasonable jurist could conclude that the plaintiffs made a "clear showing" that HB 1523 fails the rational-basis test, or a "clear showing" that HB

1523 violates the establishment clause. And it is unacceptable that a State's duly enacted laws can be temporarily thwarted by a single district judge in the absence of a "clear showing" that the law is invalid. *See generally* David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 6 (1964).

II. The State Will Suffer Irreparable Injury Absent A Stay

The State will suffer irreparable injury absent a stay because the district court's injunction prevents the State from enforcing a duly enacted statute. *See Abbott*, 734 F.3d at 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *see also Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation and internal quotation marks omitted)).

III. The Plaintiffs Will Not Be Harmed By A Stay

HB 1523 operates only to shield conscientious objectors from penalty or punishment for following the dictates of their conscience. This statute does not impose *any* legal obligations on the plaintiffs, and it does not threaten them with prosecution or any type of legal consequence. The plaintiffs may encounter psychological distress over the prospect that conscientious objectors will be protected from penalty or punishment, but that is not a legally cognizable harm. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Any harms that might befall the plaintiffs if the injunction is stayed are trivial and speculative. It is hard to see how anyone is "harmed" by receiving a marriage license from a state employee who is not conscientiously opposed to same-sex marriage—rather than from an employee who *is* conscientiously opposed—especially when the statute ensures that the issuance of marriage licenses will not be "impeded or delayed." *See* HB 1523 § 3(8). Perhaps the plaintiffs will derive psychological satisfaction from forcing a conscientious objector to issue a same-sex marriage license against the dictates of his religion, but an unfulfilled desire to see others coerced into violating their conscience does not qualify as injury-in-fact under Article III and should not qualify as "harm" when deciding whether a stay should issue. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106–07 (1998).

And it is exceedingly unlikely that a stay will cause any of the plaintiffs to be denied services or access to facilities from a conscientious objector. First, none of the plaintiffs allege that they will be seeking marriage licenses or celebrating a wedding during the appeal. Nor have they announced that they intend to seek marriage licenses, wedding-related services, or any type of business from someone who opposes same-sex marriage or transgender behavior. So there is no reason to think that any plaintiff will even encounter a conscientious objector during this appeal.

Second, *even if* one of the plaintiffs were to be denied services by a conscientious objector, it is hard to see how a stay from this Court would have *caused* that denial to occur. Even if the district court's injunction remains in effect, it is still legal in Mississippi for individuals, businesses, and religious organizations to decline to participate in same-sex marriages. There is no state law that outlaws discrimina-

tion on account of sexual orientation or gender identity, and the anti-discrimination ordinance in Jackson must give way to the state's Religious Freedom Restoration Act. *See* Miss. Code Ann. § 11-61-1 (2014). So almost all conscientious objectors will remain free under state law to decline to participate in same-sex marriages; the only conscientious objectors who might be compelled in the absence of a stay are residents of Jackson whose objections are secular rather than religious.

Third, the district court's injunction against HB 1523 does not extend to the state's judiciary. *See Ex parte Young*, 209 U.S. 123, 162 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our government."); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.21 (1997) (federal district court's rulings do not bind state courts and cannot bind future litigants in state court). So HB 1523 will continue to shield conscientious objectors in state-court proceedings between private litigants, even if the district court's injunction remains in place, unless the state judge is persuaded by the district court's analysis.

So even if one of the plaintiffs could credibly allege that he (1) intends to seek a marriage license, wedding-related service, or other service covered by HB 1523, (2) during the next few months while the appeal is pending, (3) from a conscientious objector, he would *still* have to show that the conscientious objector would capitulate if the district court's preliminary injunction remains in effect. That seems unlikely, given that: (1) The state's Religious Freedom Restoration Act continues to protect religious conscientious objectors; (2) There is no state law that prohibits discrimination on account of sexual orientation or gender identity; and (3) The conscientious objector can still invoke HB 1523 in state-court proceedings regard-

less of what happens with the preliminary injunction. So the effect of a stay pending appeal is extremely unlikely to produce new conscientious objectors at the margin. Finally, even if one indulges the speculative and unrealistic assumption that a stay pending appeal will cause new conscientious objectors to emerge, there will still be an abundance of LGBT-friendly churches and businesses available to provide whatever services and facilities the plaintiffs need.

IV. A Stay Pending Appeal Is In The Public Interest

The statutory policy of the Legislature "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). If the Court agrees with the State that HB 1523 is constitutional, then a stay pending appeal is by definition in the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

V. The Court Should Expedite This Appeal

This Court has granted expedited consideration when district courts enjoin state officials from enforcing a State's duly enacted laws. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008; *Voting for Am., Inc. v. Steen*, No. 12-40914; *Tex. Med. Providers v. Lakey*, No. 11-50814. The issues in this case are equally important and worthy of expedited review.

Conclusion

The emergency motion for stay pending appeal and the motion for expedited consideration should be granted.

Respectfully submitted.

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Certificate of Electronic Compliance

Counsel also certifies that on July 11, 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/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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On July 11, 2016, counsel for the plaintiffs indicated by way of e-mail that they oppose this motion and intend to file a response.

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