UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY; REBECCA BICKETT; ANDREA SANDERS; JOCELYN PRITCHETT; and CARLA WEBB,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:14-cv-00818-CWR-LRA**
vs.	§	
PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; and BARBARA DUNN, in her official capacity as Hinds County Circuit Clerk,	§	**Oral Argument Requested**
Defendants.	§	

MOTION TO REOPEN JUDGMENT, FILE SUPPLEMENTAL PLEADING, AND MODIFY THE PERMANENT INJUNCTION

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PRELIMINARY STATEMENT

On October 20, 2014, Plaintiffs the Campaign for Southern Equality ("CSE"), Rebecca Bickett, Andrea Sanders, Jocelyn Pritchett, and Carla Webb brought this challenge to Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2), which defined marriage as "only between a man and a woman" and prohibited "marriage between persons of the same gender," respectively. On November 25, 2014, this Court struck down these laws because they "deprive[d] same-sex couples and their children of equal dignity under the law," relegated gay and lesbian Mississippians to "second-class citizenship," and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014). Once the preliminary injunction order was affirmed by the United States Court of Appeals for the Fifth Circuit seven months later, 791 F.3d 625, 627 (5th Cir. 2015), this Court entered a permanent injunction enjoining the "State of Mississippi and all its agents, officers, employees, and subsidiaries" from enforcing the provisions of the Mississippi Constitution and code that barred gay couples from getting married as well as the recognition of their marriages in Mississippi. Permanent Injunction, Dkt. No. 34 (July 1, 2015) (the "Permanent Injunction").[1]

No sooner had Plaintiffs begun to enjoy their rights as equal citizens in Mississippi, than Defendant Bryant signed into law HB 1523, the so-called "Protecting Freedom of Conscience from Government Discrimination Act," which authorizes, indeed encourages, discrimination against LGBT Mississippians based on certain "sincerely held religious beliefs" including that: (a) "[m]arriage is or should be recognized as the union of one man and one

[1] Five weeks ago, another Court in this district, relying on those precedents, struck down Mississippi's ban on gay couples adopting. *See Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, --- F. Supp. 3d ----, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016). The state indicated that it would not appeal and has filed papers seeking to convert the preliminary injunction in that case into a permanent injunction. Def's Mot. for Permanent Inj. and Final J., Dkt. No. 68 (May 5, 2016).

woman"; (b) "[s]exual relations are properly reserved to such a marriage"; or (c) "[m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." HB 1523 § 2(a)–(c). The sweep of HB 1523 is extremely broad, giving the State's official stamp of approval on discrimination against LGBT Mississippians in nearly every aspect of everyday life—from "floral arrangements," *id.* § 3(5)(b), to "jewelry sales," *id.*, to "adoption or foster care," *id.* § 3(2)–(3), to "psychological [or] counseling [] services," for LGBT persons and their families. *Id.* § 3(4).

The sole focus of this motion, however, is Section 3(8) of HB 1523, which explicitly targets the rights of gay and lesbian couples to marry in Mississippi by permitting "any person employed or acting on behalf of the state government who has authority to authorize or license marriages" to "recuse" themselves from doing so for gay couples based on the above-described "sincerely held religious beliefs," provided that such notices of recusal are filed with the State Registrar of Vital Records of the Mississippi Department of Health ("MDH") "who shall keep a record of such recusal." *Id.* § 8(a).[2] While HB 1523 states that "the authorization and licensing of any legally valid marriage [shall] not [be] impeded or delayed as a result of any recusal," *id.*, it leaves the manner of doing so completely up to the person who "recused" him or herself, and provides no enforcement mechanism for making sure that there is no delay or impediment.

This Court, however, has already made it clear that "the effect of the [Mississippi marriage ban] was (and is) to label same-sex couples as different and lesser, demeaning their sexuality and humiliating their children," and that "[t]hat is something the voters cannot do." *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d at 948–49. The effect of HB 1523, of course,

[2] By this motion, which focuses solely on the "recusal" provisions in Section 3(8) of HB 1523, Plaintiffs do not (yet) challenge the other provisions in HB 1523.

is no different. Indeed, any doubt about the potential for Section 3(8) of HB 1523 to interfere with this Court's Permanent Injunction was eliminated when MDH took the position not only that it is *not* subject to the Court's Permanent Injunction, but that neither MDH nor any state official other than a clerk who has filed a recusal has any responsibility whatsoever for ensuring that the constitutional rights of gay and lesbian couples in Mississippi who seek to marry are not "impeded or delayed." *See* Ex. 2.

Thus, although the most recent efforts by the State of Mississippi to disregard the constitutional rights of LGBT Mississippians through HB 1523 may be somewhat more subtle than the "steel-hard, inflexible, undeviating official policy" of the past, *see United States* v. *City of Jackson, Miss.*, 318 F.2d 1, 5 (5th Cir. 1963) (ordering end of racial segregation in bus and railway terminals), the underlying impulse is exactly the same. HB 1523 seeks to relegate a minority group (here, LGBT Mississippians) to second-class citizenship in violation of the United States Constitution. The response from this Court today should be no different than it was from the federal courts decades ago. Defendants "must adjust to the reality" of LGBT equality under the law by making sure that the constitutional right of gay and lesbian Mississippians to marry is protected. *Bynum* v. *Schiro*, 219 F. Supp. 204, 206 (E.D. La. 1963) (Wisdom, J.) In other words, there can be no such thing as "separate, but (un)equal" marriage for gay and lesbian couples in Mississippi. The Supreme Court could not have been clearer about this when it said in *Obergefell* that states must allow same-sex couples to marry "on the same terms and conditions" as all other couples. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015). There really is "no excuse left—no excuse which a court, bound by respect for the Rule of Law, could now legitimize as a legal justification." *Bynum*, 219 F. Supp. at 206.

Accordingly, Plaintiffs respectfully move this Court to: (1) reopen this case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure; (2) permit Plaintiffs to file a supplemental complaint adding Judy Moulder, the Mississippi Registrar of Vital Records, as a defendant for the avoidance of any doubt as to the applicability of this Court's injunction to her and her office pursuant to Rule 15(d); and (3) modify the Permanent Injunction to require that: (a) the State of Mississippi and all its agents, officers, employees, and subsidiaries shall not impede or delay the authorization and licensing of any legally valid marriage to same-sex couples; (b) Defendants shall provide each recusal notice submitted under Section 3(8) of HB 1523 to Plaintiff CSE and this Court within one week of receipt; (c) any state officer or employee seeking to recuse himself or herself from issuing marriage licenses pursuant to Section 3(8) of HB 1523 shall submit to Plaintiff CSE and this Court a detailed plan identifying the steps he or she will take to ensure that the authorization and licensing of legally valid marriages to same-sex couples will not be impeded or delayed as a result of such recusal; (d) Defendants shall post all recusal notices to a prominent place on the website of MDH; and (e) any person recusing himself or herself under Section 3(8) of HB 1523 must treat all couples equally and shall therefore desist from issuing any marriage licenses to any other couples, including opposite-sex couples.

RELEVANT FACTUAL AND LEGAL BACKGROUND

Plaintiffs' Challenge to Mississippi's Marriage Ban

Plaintiffs are lesbian residents of Mississippi who sought to marry or to have their out-of-state marriages recognized by the State of Mississippi, as well as CSE, a non-profit advocacy group with associational standing to advocate for its members including gays and

lesbians who have not yet married.[3] *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d at 913, 917–18. On November 25, 2014 this Court issued a Memorandum Opinion and Order (the "Preliminary Injunction Order") holding that Mississippi's ban on gay and lesbian couples marrying was unconstitutional because it "deprives same-sex couples and their children of equal dignity under the law" thereby subjecting them to "second-class citizenship." *Id.* at 913. This second-class treatment could not stand, this Court explained, because, under the United States Constitution, "[g]ay and lesbian persons are full citizens that share the same rights as other citizens, including the right to marry." *Id.* at 926 (citing *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and *United States* v. *Windsor*, 133 S. Ct. 2675 (2013)).

In reaching this result, the Court described the long and painful history of discrimination against LGBT people in Mississippi. *Id.* at 930–37. As the Court noted, "[d]iscrimination against gay and lesbian Mississippians is not ancient history. The last five years reveals a number of complaints and lawsuits alleging discriminatory treatment at the hands of State and local governments." *Id.* at 936. The Court observed that "Mississippi law perpetuates the false notion of gay inferiority by denying equal marriage rights to gay and lesbian citizens, prohibiting gay and lesbian couples from adopting children together, and requiring schools to teach the idea that gay sex is criminal. Even as public opinion changes in America, Mississippi law sends a plain message that gay and lesbian citizens are less deserving than other citizens." *Id.* at 939 (citations omitted). Ultimately, this Court held that "[w]ithout the right to marry," gay and lesbian Mississippians were being "subjected to humiliation and

[3] Since this Court issued its Permanent Injunction, the four individual Plaintiffs have legally married or had their out-of-state marriage recognized by the State of Mississippi. Plaintiff CSE, however, represents gay and lesbian Mississippians who have not yet married but intend to do so and therefore continues to have associational standing to seek the requested relief. *See Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d at 913, 917–18.

indignity" and "state-sanctioned prejudice" in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 913.

The Permanent Injunction

While the appeal of the Preliminary Injunction Order was pending before the Fifth Circuit, the Supreme Court issued its decision in *Obergefell* v. *Hodges*, holding that "same-sex couples may exercise the fundamental right to marry" and state laws to the contrary "are now held invalid to the extent they exclude same-sex couples from civil marriage *on the same terms and conditions as opposite-sex couples*." 135 S.Ct. at 2605 (emphasis added). The Supreme Court thus affirmed what this Court had already recognized: Mississippi's marriage laws barring gay and lesbian couples from marrying and precluding the state from recognizing their marriages performed elsewhere were and are unconstitutional.

After the Supreme Court decision in *Obergefell*, the Fifth Circuit affirmed the Preliminary Injunction Order and remanded to this Court to "enter final judgment on the merits." *Campaign for S. Equal.* v. *Bryant*, 791 F.3d at 627. In doing so, the Fifth Circuit noted that *Obergefell*, which established marriage equality throughout the United States, "is the law of the land, and consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court." *Id.*

Following the remand from the Fifth Circuit, on July 1, 2015, this Court issued its Permanent Injunction in order to protect the fundamental right of gay and lesbian Mississippians to marry. The Permanent Injunction provides as follows:

> In light of the United States Supreme Court's decision in *Obergefell* v. *Hodges*, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015), and the issuance of the mandate from the United States Court of Appeals for the Fifth Circuit, it is now appropriate to permanently enjoin the enforcement of Mississippi's same-sex marriage ban. Accordingly,

> **IT IS HEREBY ORDERED** that *the State of Mississippi and all its agents, officers, employees, and subsidiaries,* and the Circuit Clerk of Hinds County and all her agents, officers, and employees, are permanently enjoined from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1 (2).

Permanent Injunction, Dkt. No. 34 (July 1, 2015) (emphasis added).

This Court was actively involved in ensuring that the Permanent Injunction was fully implemented in the weeks following its issuance. Specifically, early in July 2015, it initially appeared that clerks in certain counties in Mississippi were reluctant to comply with the Permanent Injunction. Plaintiffs informed the Court of this when they became aware of issues in four Mississippi counties where clerks were refusing to issue marriage licenses to gay and lesbian couples. (*See* Dkt. No. 38.) This Court was prepared to involve itself in the issue, but that involvement proved unnecessary when the recalcitrant clerks began issuing marriage licenses to gay and lesbian couples. Thus, on July 7, 2015, the Court sent the parties the following e-mail: "The Court has received your correspondence. With the Fourth of July holiday now past, hopefully you have had an opportunity to discuss the concerns raised by the plaintiffs in their letter of July 2 and subsequent email. The issues may now be resolved." E-mail from Andrew Canter, Law Clerk to the Honorable District Judge Carlton W. Reeves (S.D. Miss.), to all counsel (July 7, 2015, 11:00 AM EST), Ex. 3. Fortunately, as Plaintiffs stated in an e-mail to the Court three days later, "at the Court's direction, we have discussed these issues with the Attorney General. The Attorney General has confirmed that both Smith and Simpson Counties are willing to issue licenses to gay couples. Accordingly, all eighty-two counties in Mississippi are now in compliance with the Court's order of July 1, 2015. We remain hopeful that this status quo will not change. Should there be any problems in the future, we will contact the Court promptly." E-mail from Roberta Kaplan to Andrew Canter, Law Clerk to the Honorable District Judge Carlton W. Reeves (S.D. Miss.) (July 10, 2015, 7:02 AM EST), Ex. 4.

HB 1523

Less than one year after entry of the Permanent Injunction, and not even a week after entry of a preliminary injunction striking down Mississippi's ban on gay couples adopting, *see Campaign for S. Equal.* v. *Miss. Dep't of Human Servs.*, --- F. Supp. 3d ----, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016), Defendant Bryant signed into law HB 1523, the so-called "Protecting Freedom of Conscience from Government Discrimination Act." This was hardly a surprise. On the day that the Supreme Court's decision in *Obergefell* was handed down, Defendant Bryant issued the following statement: "Throughout history, states have had the authority to regulate marriage within their borders. Today, a federal court has usurped that right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians." *See Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, Governor Phil Bryant (June 26, 2015), http://www.governorbryant.com/governor-bryant-issues-statement-on-supreme-court-obergefell-decision/. Similarly, Mississippi's senior U.S. Senator Thad Cochran declared at the time that: "The Supreme Court decision does not and cannot change the firmly held faith of most Mississippians. I believe marriage is defined as the union of one man and one woman. The court's decision raises questions about the protection of religious liberties and First Amendment rights, which the Congress may have to address. It is important that this ruling does not result in individuals, businesses, and religious-oriented schools and organizations being penalized by the government for their belief in the traditional definition of marriage." *See Cochran Statement on Supreme Court Ruling on Same-Sex Marriage*, Thad Cochran: United States Senator for

Mississippi (June 26, 2015) http://www.cochran.senate.gov/public/index.cfm/2015/6/cochran-statement-on-supreme-court-ruling-on-same-sex-marriage.[4]

HB 1523 once again seeks to limit the access of gay and lesbian Mississippians to the institution of marriage "on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S. Ct. at 2605. In addition to exhorting state residents to discriminate against their gay, lesbian and transgender neighbors in a wide variety of circumstances, Section 3(8) of HB 1523 specifically targets the equal access of gays and lesbians to marriage by purporting to enable "[a]ny person employed or acting on behalf of the state government who has authority to authorize or license marriages" to recuse themselves from issuing marriage licenses to gay or lesbian couples so long as they profess to hold the "sincerely held religious belief" that "[m]arriage is or should be recognized as the union of one man and one woman." HB 1523 §§ 2(a), 3(8)(a). While Section 3(8) of HB 1523 gestures towards compliance with this Court's Permanent Injunction by providing that persons who recuse themselves in this manner must ensure that doing so will not "impede[] or delay" the licensing of any marriage, HB 1523 is absolutely silent as to how the right of all Mississippians who seek to legally marry, including gay men and lesbians, will be protected under this new "recusal" system.

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[4] "This is not the first time that we have seen discriminatory responses to historic moments of progress for our nation." Loretta E. Lynch, Attorney Gen. of the U.S., Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), *available at* https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint. The statements of Defendant Bryant and Senator Cochran cited above are eerily reminiscent of statements made by Mississippi officials after the United States Supreme Court decided *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). "U.S. Senator James Eastland of Mississippi, for example, upon learning of the ruling [in *Brown*], immediately issued a written statement affirming that "[t]he South will not abide by nor obey this legislative decision by a political court." Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 Tul. L. Rev. 2207, 2212 (2004). Moreover, following *Brown*, national associations of Southern Baptists, Methodists, and Presbyterians endorsed the ruling and issued statements opposing segregation. Mississippi churches revolted and threatened to break with their national governing bodies. *See* Carolyn Renee Dupont, *Mississippi Praying: Southern White Evangelicals and the Civil Rights Movement, 1945-1970* 63–65 (2013). Thus, for example, "Reverend R. L. McLaurin of Oakland Heights Presbyterian Church in Meridian defended segregation as the will of God: 'I am opposed to and think that the recent Supreme Court decision is in violation and contradiction to the Scripture teachings on segregation.'" *Id.* at 74.

Following the passage of HB 1523, Plaintiffs made inquiries of the relevant Mississippi authorities as to how the constitutional rights of gay and lesbian Mississippians to marry would be protected under HB 1523. Specifically, Plaintiffs wrote a letter to Defendants on April 25, 2016 (the "April 25 Letter") requesting certain information, including a list of all individuals who had filed notices of recusal and the steps being taken to ensure that these recusals would not "impede or delay" the licensing of gay or lesbian marriages. Ex. 1. No substantive response was received until May 4, 2016, when MDH's Office of Vital Records sent a letter (the "May 4 Letter") arguing that it is somehow not "subject to the Permanent Injunction" despite the plain language of the Permanent Injunction because the "Office of Vital Records is not an agent, officer, subsidiary or employee of the only parties to [this] lawsuit, *i.e.*, Governor Phil Bryant, Attorney General Jim Hood, and the Circuit Clerk of Hinds County." Ex. 2 at 1. The Office of Vital Records further contended that it "does not have any responsibility under Mississippi law" to protect Plaintiffs' right to marry, and that HB 1523 does not require any state official other than the clerks who have filed recusals "to take any steps to ensure that anyone is not impeded or delayed when seeking to marry in the relevant county." *Id.* at 2 (internal quotation marks omitted). Finally, the Office of Vital Records—the only state agency required under HB 1523 to keep a record of recusals—maintained that it "is under no obligation" to provide "continuing information" regarding recusals to Plaintiffs or anyone else. *Id.*

ARGUMENT

Section 3(8) of HB 1523 deliberately circumvents the Permanent Injunction, which Defendants have chosen to read as narrowly as possible. But since "[a] right without a remedy is hollow indeed," *United States* v. *Ashley*, Crim. No. 05-60018, 2007 WL 4570895, at *6 n. 7 (W.D. La. Nov. 30, 2007), Plaintiffs have filed the instant motion to create an

enforcement mechanism to ensure that their constitutional right to marry will be adequately protected.

I. The Court Should Reopen the Case Pursuant to Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure permits a court to reconsider a final judgment or order for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Here, Plaintiffs seek to modify the Permanent Injunction so as to ensure that the State of Mississippi and its agents do not impede or delay Plaintiffs' exercise of the fundamental right to marry.

"The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *Brown* v. *Plata*, 131 S. Ct. 1910, 1946 (2011). As the Fifth Circuit recently reaffirmed, this includes the power to reopen a closed case in order to modify a permanent injunction to reflect changed circumstances. *Cooper* v. *Tex. Alcoholic Beverage Comm'n*, --- F.3d ----, 2016 WL 1612753, at *1–3 (5th Cir. Apr. 21, 2016) (permitting a defendant-intervenor to reopen a 25-year-old case in order to seek modification of the district court's injunction of a Texas state law). This is so because Rule 60(b) "is a grand reservoir of equitable power to do justice in a particular case that may be tapped by the district court in the sound exercise of its discretion." *Seven Elves, Inc.* v. *Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (citations and internal quotation marks omitted).

Thus, a court may reconsider a final judgment whenever "extraordinary circumstances" require it to do so. *Batts* v. *Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995). Here, Defendants have attempted to circumvent this Court's Permanent Injunction by purporting to authorize clerks to refuse to issue marriage licenses to gay or lesbian couples without any effective mechanism for protecting the constitutional rights of LGBT Mississippians. This extraordinary circumstance was not contemplated by the parties or the Court when the Permanent Injunction was issued less than a year ago and has rendered the

current language of the Permanent Injunction insufficient to fully protect Plaintiffs' rights. The deliberate attempt to evade the plain meaning of *Obergefell* and subvert the Court's Permanent Injunction is precisely the sort of "extraordinary circumstance" that justifies reopening a closed case under Rule 60(b)(6). *See, e.g.*, *Yesh Music* v. *Lakewood Church*, 727 F.3d 356, 363 (5th Cir. 2013) (holding that the district court did not abuse its discretion in permitting plaintiff to reopen a voluntarily dismissed case after the defendant violated an agreement made in open court).

Such relief is also appropriate here under Rule 60(c) because Plaintiffs have acted "within a reasonable time." Fed. R. Civ. P. 60(c). HB 1523 was enacted on April 5, 2016, approximately one month ago. And, on May 4, 2016, Defendants replied to Plaintiffs' written request for information by disclaiming any responsibility for ensuring compliance with the Permanent Injunction. Ex. 2. It is Defendants' recent actions that have triggered Plaintiffs' need to reopen this case.

II. Plaintiffs Should Be Permitted to Supplement the Complaint to Add a Defendant Pursuant to Rule 15(d)

Rule 15(d) of the Federal Rules of Civil Procedure provides that upon the filing of a motion, a court may permit a party "to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). The rule "makes liberal allowance for . . . supplemental pleadings." *Camilla Cotton Oil Co.* v. *Spencer Kellogg & Sons, Inc.*, 257 F.2d 162, 167 (5th Cir. 1958). A supplemental complaint may be filed even after entry of final judgment. *Raduga USA Corp.* v. *U.S. Dep't of State*, 440 F. Supp. 2d 1140, 1151 (S.D. Cal. 2005) (citing *Griffin* v. *Cnty. Sch. Bd.*, 377 U.S. 218 (1964)). "Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course,

that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Griffin* v. *Cnty. Sch. Bd.*, 377 U.S. 218, 228 (1964).

A court's discretion in granting a motion to file a supplemental pleading "is to be guided by several factors: i) undue delay, bad faith or dilatory motive on the part of the movant; ii) undue prejudice to the nonmoving party; and iii) futility of supplementation." *Ennis Family Realty I, LLC* v. *Schneider Nat'l Carriers, Inc.*, 916 F. Supp. 2d 702, 717 (S.D. Miss. 2013). "In general, an application for leave to file a supplemental pleading is addressed to the discretion of the court and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." *Henderson* v. *Stewart*, 82 F.3d 415, 415 (5th Cir. 1996) (per curiam) (quoting 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1505 (2d ed. 1990)).

Moreover, a party may be joined in an action if the right to relief asserted against him or her arose out of the same occurrence, or series of occurrences, as the current defendant, and any question of law or fact common to all will arise in the action. Fed. R. Civ. P. 20(a)(2). "Under the Rules, the impulse is towards entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Acevedo* v. *Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966)). Alternatively, a party who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined if the joinder is necessary to "accord complete relief among existing

parties." Fed. R. Civ. P. 19(a)(1)(A). Rule 21 provides that parties may be added, on just terms, by order of the court at any stage of the litigation. Fed. R. Civ. P. 21.

HB 1523 requires recusing clerks to submit a written notice of recusal "to the State Registrar of Vital Records who shall keep a record of such recusal." § 3(8)(a). But the law does not require Ms. Moulder or the Office of Vital Records to make this information—which is necessary for guaranteeing that gay and lesbian Mississippians are not impeded or delayed from exercising their constitutional right to marry—available to Plaintiffs or to this Court, and Ms. Moulder, in fact, has refused to do so. In their May 4, 2016 letter, MDHS—in an apparent misreading of this Court's clear and unambiguous order—asserts that its Office of Vital Records is not subject to the Permanent Injunction because it "is not an agent, officer, subsidiary or employee of the only parties to [this] lawsuit, *i.e.*, Governor Phil Bryant, Attorney General Jim Hood, and the Circuit Clerk of Hinds County." Ex. 2 at 1.

By its terms, however, the Permanent Injunction covers "the State of Mississippi and all its agents, officers, employees, and subsidiaries," Dkt. No.34, including the Department of Health. *See, e.g.*, *Ellis* v. *Miss. State Dep't of Health*, No. 4:04CV287, 2006 WL 2473987, at *1 (N.D. Miss. Aug. 25, 2006) ("The Mississippi State Department of Health is an agency of the state of Mississippi[.]"). In order for the Court to ensure that Plaintiffs continue to receive the complete relief provided for in the Order, the Court must be able to order the Office of Vital Records to comply with federal law. Although Plaintiffs maintain that the Office of Vital Records and all Mississippi state agencies and employees are *already* within the scope of the Permanent Injunction, for the avoidance of doubt and out of an abundance of caution, Plaintiffs respectfully request leave to join Ms. Moulder, in her official capacity as State Registrar of Vital

Records, as a defendant and for the Court to direct service of process upon her. A proposed supplemental complaint is attached hereto as Exhibit 5.

Because Plaintiffs' need to reopen the case stems directly from the State's recent enactment of HB 1523, again, there is no undue delay, bad faith, or dilatory motive. *Issaquena & Warren Cntys. Land Co., LLC* v. *Warren Cnty., Miss. Bd. of Supervisors*, No. 5:07-cv-106-DCB-JMR, 2011 WL 6092450, at *2 (S.D. Miss. Dec. 7, 2011). To the contrary, requiring Plaintiffs to institute a new action to bring these claims would expose the parties to needless expense and delay. And in light of this Court's clear Order holding that the State may not exclude gay and lesbian Mississippians from the institution of marriage, it is certainly not futile to allow supplementation at this time. *See Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d at 926.

III. This Court Should Modify the Permanent Injunction

Federal courts have long used their equitable power to protect citizens' constitutional rights against violation by state governments and agencies. *See, e.g.*, *United States* v. *City of New Orleans*, 32 F. Supp. 3d 740 (E.D. La. 2014) (modifying consent decree reforming unconstitutional conduct in New Orleans Police Department); *Jones* v. *Gusman*, 296 F.R.D. 416 (E.D. La. 2013) (approving consent judgment imposing requirements on Orleans Parish Prison, including appointment of a monitor to oversee implementation); Consent Decree, *United States* v. *Harrison Cnty.*, Civ. No. 1:95-cv-00005, Dkt. No. 2 (S.D. Miss. Jan. 12, 1995) (bringing the Harrison County Adult Detention Center under Federal oversight pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997 et seq.).

In the context of injunctions issued by the federal courts, it is clear that this power does not end when the injunction is first issued. In fact, it is undisputed that "[t]he power of a federal court that enters an equitable injunction is not spent simply because it has once spoken.

The federal courts have always affirmed their equitable power to modify any final decree that has prospective application." *Cooper* v. *Tex. Alcoholic Beverage Comm'n*, --- F.3d ----, 2016 WL 1612753, at *2 (5th Cir. Apr. 21, 2016) (quoting *League of United Latin American Citizens, Dist. 19* v. *City of Boerne*, 659 F.3d 421, 436 (5th Cir. 2011)). *See also, e.g.*, *Baden Sports, Inc.* v. *Kabushiki Kaisha Molten*, No. C06-210MJP, 2008 WL 356558 (W.D. Wash. Jan. 29, 2008) (modifying permanent injunction in response to new evidence of defendants' infringement of plaintiff's patent); *Portland Feminist Women's Health Ctr.* v. *Advocates For Life, Inc.*, Civ. No. 86-559-FR, 1990 WL 21401, at *1 (D. Or. Mar. 2, 1990) (granting plaintiffs' motion to modify a preliminary injunction to reflect the fact that plaintiffs' clinic had relocated to a new address). Indeed, "the Supreme Court held that amendment of a consent decree can be justified 'where there were no factual or legal changes other than recognition of the fact that the initial remedy had failed.'" *United States* v. *City of New Orleans*, 32 F. Supp. 3d 740, 743 (E.D. La. 2014) (quoting *League of United Latin American Citizens, Dist. 19* v. *City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011) (citing *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968))).

This Court has already permanently enjoined the enforcement of existing state laws that excluded gay and lesbian couples from marriage in the State of Mississippi. *See* 64 F. Supp. 3d at 914–16; Dkt. No. 34. In crafting the Permanent Injunction, this Court obviously could not have reasonably anticipated that, merely ten months following its decision, the State of Mississippi would enact new legislation (HB 1523) that permits clerks and deputy clerks, among others, to "recuse" themselves from issuing marriage licenses to gay and lesbian couples and provides no mechanism to protect the right of gay and lesbian Mississippians.

Accordingly, Plaintiffs request that this Court modify the Permanent Injunction in the following manner: (a) require that neither the State of Mississippi nor its agents, officers, employees, and subsidiaries shall impede or delay the authorization and licensing of any legally valid marriage between a same-sex couple; (b) order that the MDH and the State Registrar of Vital Records provide any recusal notice submitted under Section 3(8) of HB 1523 to CSE and to this Court within one week of receipt; (c) order that any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, who submits a notice of recusal must simultaneously submit to CSE and this Court a plan identifying the steps that he or she will take to ensure that the authorization and licensing of legally valid marriages will not be impeded or delayed in the relevant county as a result of his or her recusal; (d) order that MDH post all such recusal notices to a prominent place on its website; and (e) order that any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, who recuses himself or herself from issuing marriage licenses because of a "sincerely held religious belief" that gay people should not be able to marry shall desist from issuing marriage licenses to any other couples, including straight couples.

These modifications, intended to safeguard Plaintiffs' constitutional right to marry, will provide the information needed to make sure that no constitutional violations have taken place as a result of Section 3(8) of HB 1523 and will help to facilitate a remedy for constitutional violations if and when they occur. Specifically, incorporating the language of HB 1523 into a federal court order—that "the authorization of any legally valid marriage is not impeded or delayed"—affords couples affected by recusals the ability to pursue federal

remedies, such as a contempt motion, for the violation of their rights under the United States Constitution. As explained above, no such remedy is afforded under HB 1523 or elsewhere under state law. The requirement that any individual seeking to recuse themselves from issuing marriage licenses file a plan demonstrating that their action will not adversely impact the ability of gay and lesbian Mississippians to marry will allow this Court to ensure that the rights of LGBT Mississippians are not violated. Similarly, the provision requiring that individuals recusing themselves desist from issuing any and all marriage licenses will prevent the very equal protection violation that this Court sought to remedy in its Preliminary Injunction Order. In the wake of this Court's ruling of November 25, 2014, and the Supreme Court's decision in *Obergefell*, Defendants should not be permitted to impose a "separate, but (un)equal" system of marriage for gay and lesbian couples in Mississippi. *See* 64 F. Supp. 3d at 948–49; *see also Obergefell*, 135 S. Ct. at 2605.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court reopen the case, grant Plaintiffs leave to file their supplemental complaint, and modify the Permanent Injunction so as to prevent Defendants from impeding or delaying Plaintiffs' exercise of the fundamental right to marry.

Dated: May 10, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on May 10, 2016, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing.

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