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.	§	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO REOPEN JUDGMENT, FILE SUPPLEMENTAL PLEADING, AND MODIFY THE PERMANENT INJUNCTION

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PRELIMINARY STATEMENT

When Plaintiffs commenced this action in 2014, there were two provisions in Mississippi law—Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2)—that stood between gay and lesbian Mississippians and their fundamental right to marry. By striking down those provisions as unconstitutional and entering the Permanent Injunction, this Court elevated gay and lesbian Mississippians from what the Court aptly characterized as "second-class citizenship," *Campaign for S. Equal.* v. *Bryant*, 64 F. Supp. 3d 906, 913 (S.D. Miss. 2014) ("*CSE I*") (at least in the realm of their ability to get married), and awarded them the equal protection of the laws guaranteed by the Fourteenth Amendment. This Court held, and the Fifth Circuit affirmed, that Defendants are required to issue marriage licenses to gay and lesbian Mississippians on the same terms and conditions as to straight couples.

The instant motion seeks to do no more than restore that constitutionally-mandated parity between gay and straight couples established by this Court's Permanent Injunction by addressing recent changes in Mississippi's marriage licensing system impacted by HB 1523, which was enacted less than one year after the issuance of the Permanent Injunction. That HB 1523 does, in fact, disrupt the *status quo* left by the Permanent Injunction is beyond dispute. Defendants actually concede in their papers that HB 1523 "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law." (Opp. Br. at 6.) Defendants' concession in this regard is hardly a surprise since under HB 1523, any Mississippi Circuit Clerk, based on a religious belief that "[m]arriage is or should be recognized as the union of one man and one woman," § 2(a), can simply refuse to issue marriage licenses to a gay or lesbian couple. Even worse, once they do so, there is absolutely no remedy under Mississippi state law permitting that couple to exercise their fundamental right to marry on the same terms as any other couple, without any impediment or delay. Thus, this case presents

precisely the types of "extraordinary circumstances" that warrant the relatively modest relief sought here requiring state officials to provide Plaintiffs and this Court with necessary information about recusals and alternative arrangements put in place to protect gay Mississippians' constitutional rights.

At its core, Defendants' argument in opposition to re-opening this case and amending the injunction seems to be that, going forward, gay and lesbian Mississippians who wish to marry should not have the full benefit of the Permanent Injunction entitling them to marriage licenses on the same terms and conditions as all other couples. Rather, Defendants contend that gay couples seeking to marry in Mississippi should instead quietly abide the stigmatic injury of once again being relegated to second-class citizenship and live with the uncertainty of not knowing whether the Circuit Clerk in the county where they live and whose salary their tax dollars help to pay will stand in the way of their constitutional right to marry.

But the time has now passed for gay and lesbian Mississippians in each of Mississippi's eighty-two counties to have to "wait and see" if their constitutional right to marry will once again be violated before having their day in court. In fact, gay and lesbian Mississippians have already had their "day in court"—and they *won*. The right of gay and lesbian couples to marry in Mississippi has been unequivocally recognized by this Court, *CSE I*, 64 F. Supp. 3d at 954, by the United States Supreme Court, *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), and by the United States Court of Appeals for the Fifth Circuit, *Campaign for S. Equal.* v. *Bryant*, 791 F.3d 625 (5th Cir. 2015). The State of Mississippi cannot be permitted to constantly erect new legal barriers—such as HB 1523—to chip away at the constitutional rights of gay and lesbian Mississippians that have already been recognized by the federal courts.

To be clear, Plaintiffs do not seek to add a new claim or new cause of action. HB 1523 interferes with the same exact rights that were the subject of Plaintiffs' original complaint. By creating a segregated system of marriage licensing, it frustrates for gay and lesbian couples their fundamental right to marry that was recognized by this and many other courts. These circumstances warrant, and the Federal Rules of Civil Procedure clearly authorize, precisely the relief that Plaintiffs seek here.

RELEVANT FACTUAL BACKGROUND

Defendants argue that this Court's Permanent Injunction is sufficient to protect Plaintiffs' fundamental right to marry because, since July 2015, "no evidence surfaced that any Mississippi Circuit Clerk's Office actually failed . . . to properly issue a marriage license to any same-sex couple who applied." (Opp. Br. at 6.) But this statement mischaracterizes the factual record both in terms of this Court's post-judgment role in enforcing its Permanent Injunction and the indisputable change in the landscape wrought by the enactment of HB 1523.

First, but for the diligent efforts of Plaintiffs' counsel and the attention of this Court—*after* the Permanent Injunction was entered and the case was closed—gay couples in Mississippi would, in fact, have been denied marriage licenses. Through what Defendants flippantly dismiss as "random telephone calls to Circuit Clerks' Offices," (Opp. Br. at 4), Plaintiff the Campaign for Southern Equality ("CSE") learned last summer that clerks in at least four Mississippi counties were flouting this Court's Permanent Injunction by refusing to make marriage licenses available to gay and lesbian couples. (Dkt. No. 38.) Yet in response to Plaintiffs' letter informing them of these issues, Defendants made then exactly the same argument they are making here—namely, that to enforce the Permanent Injunction last summer was effectively seeking "new relief without sufficient evidentiary or legal foundations" and that neither Defendants nor this Court had any authority to compel the recalcitrant clerks to obey the

law. (Ex. 1 to Opp. Br.) It was only after this Court expressed a willingness to intervene on July 7, 2015, that the recalcitrant clerks relented and complied with the Permanent Injunction. (Ex. 3 to Pls.' Br. ("Please advise whether the plaintiffs believe there is still a need to have a call. If so, the Court will schedule one for tomorrow morning."); Ex. 4 to Pls.' Br.)

Second, although the diligent efforts of Plaintiffs and the threat of intervention from this Court have, until now, been sufficient to protect Plaintiffs' rights with respect to marriage, there can be no question that HB 1523 has materially altered the legal landscape. Indeed, Defendants themselves concede that HB 1523 "effectively amends" clerks' "marriage licensing obligations under state law" by granting clerks permission to deny marriage licenses to gay and lesbian couples. (Opp. Br. at 6.) Nor have Defendants rebutted Plaintiffs' assertion that HB 1523 lacks "any effective mechanism for protecting the constitutional rights of LGBT Mississippians." (Pls.' Br. at 11.) When HB 1523 goes into effect a month from now (on July 1, 2016), it is highly likely that some clerks will unlawfully refuse to issue marriage licenses to gay and lesbian couples. Indeed, it has been reported that it was Circuit Clerks who specifically lobbied for the statutory "right" to refuse to comply with this Court's injunction in the first place. Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted out of State*, Mississippi Today (May 17, 2016), https://mississippitoday.org/2016/05/17/mississippis-religious-freedom-law-drafted-out-of-state/ ("[Forest Thigpen] also said he knew that [Representative] Gunn's office heard from . . . circuit clerks in the state.").

ARGUMENT

I. This Court Has Discretion Under Rule 60(b) to Reopen the Case and Modify the Permanent Injunction to Address the Extraordinary Circumstance of the Enactment of HB 1523

A. HB 1523 Has Changed Circumstances Warranting Relief Under Rule 60(b)

Defendants do not and cannot dispute that HB 1523 changes the law with respect to marriage in the State of Mississippi. Indeed, they concede that HB 1523 "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law." (Opp. Br. at 6.) Nor do they challenge the simple truth that the amendment to the marriage licensing obligations effectuated by HB 1523 purports to enable Circuit Clerks, once again, to treat same-sex couples differently than other couples solely because of their sexual orientation. Clearly, the impact of HB 1523 on marriage licensing constitutes precisely the type of "changed circumstances" contemplated by Fed. R. Civ. P. 60(b). *See, e.g.*, *Cooper* v. *Tex. Alcoholic Beverage Comm'n*, --- F.3d ----, 2016 WL 1612753, at *6 (5th Cir. Apr. 21, 2016) ("The party seeking relief has the burden of establishing that changed circumstances warrant relief, but once the party has done that, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.'") (quoting *Horne* v. *Flores*, 557 U.S. 433, 447 (2009)); *Yesh Music* v. *Lakewood Church*, 727 F.3d 356, 363 (5th Cir. 2013) (finding that relief under Rule 60(b)(6) was warranted when defendant reneged on its agreement with plaintiffs—a changed factual circumstance—after judgment had been entered); *see also Batts* v. *Tow-Motor Forklift Co.*, 66 F.3d 743, 748 n.6 (5th Cir. 1995) (holding that a change in law can constitute extraordinary circumstances under Rule 60(b)(6), and collecting cases).

Completely ignoring these binding authorities in their papers, Defendants instead argue that the enactment of HB 1523 somehow does not constitute an "extraordinary circumstance" warranting the reopening of the case because "adequate legal remedies already

exist" to correct the constitutional harms created by the new law. (Opp. Br. at 15.) But not surprisingly, Defendants do not (and cannot) cite any authority in support of this novel proposition. Indeed, in both *Cooper* and *Yesh Music*, despite the fact that alternative legal remedies were available to the parties seeking relief, the Fifth Circuit nevertheless held that the district court would not abuse its considerable discretion by electing to reopen the case. *Cooper*, 2016 WL 1612753, at *6; *Yesh Music*, 727 F.3d at 363–64.[1]

Moreover, Defendants' suggested "adequate legal remedy" would be highly impractical and unduly burdensome in any event. Specifically, Defendants urge that in order to protect their rights, Plaintiffs must submit redundant and duplicative public records requests to the registrar on a weekly (or even daily) basis, and then presumably bring suit against each Circuit Clerk and their deputies in each of Mississippi's eighty-two counties where there is a recusal and failure to adequately protect gay couples' rights. (Opp. Br. at 15, 19.) But such an inefficient, time-consuming, and convoluted process would almost certainly result in the deprivation of Plaintiffs' constitutional rights as well as the considerable and unnecessary expenditure of Plaintiffs', Defendants', and this Court's resources. Further, pursuing this legal process would almost certainly do exactly what the text of HB 1523 says cannot happen—improperly "impede[] or delay[]" the exercise of gay and lesbian Mississippians' fundamental right to marry. Such a course of action could not possibly further the interest of justice or the mandates of the Constitution.

In an effort to sidestep these issues, Defendants repeatedly mischaracterize Plaintiffs' motion as a "new civil action" seeking "new relief." (Opp. Br. at 9, 12, 16.) What Defendants neglect to mention, however, is that they have advanced this argument in this

[1] In *Batts*, (Opp. Br. at 10), the Court of Appeals ultimately concluded that the district court abused its discretion in reopening a case due to a narrow exception (related to the *Erie* doctrine) not relevant here. 66 F.3d at 748.

proceeding before: as noted above, shortly after the Permanent Injunction went into effect, Defendants similarly characterized Plaintiffs' successful efforts at enforcement as seeking "new relief," too. (Opp. Br. Ex. 1.) But the relief sought by Plaintiffs today is no more "new" than the relief sought by Plaintiffs in the weeks following entry of the Permanent Injunction last July. Then and now, Plaintiffs merely seek to ensure that the rights guaranteed by the Permanent Injunction are actually meaningful for gay couples in Mississippi.

Plaintiffs brought this action to secure the right of gay couples who wish to marry to be treated equally with straight couples and that is all Plaintiffs seek with the instant motion. Plaintiffs do not seek "new relief" simply because they ask the Court to address a new statute enacted by Defendants that *interferes with the same rights that were the subject of the original complaint*. Plaintiffs' complaint targeted Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2) because, at that time, those were the only two provisions in Mississippi law that stood between gay and lesbian couples and their right to marry under the Equal Protection and Due Process clauses of the Fourteenth Amendment. This Court granted Plaintiffs' requested relief not because of any particulars of those provisions, but rather because of their broad effect: barring gay and lesbian couples from marrying and thus impermissibly relegating them to "second-class citizenship." *CSE I*, 64 F. Supp. 3d at 913.

As Plaintiffs argued in their opening brief, when this Court crafted its Permanent Injunction, it could not have anticipated that Defendants would enact yet another law discriminating against gay and lesbian couples related to the issuance of marriage licenses. (Pls.' Br. at 11–12.) Plaintiffs therefore seek a narrow modification of the Permanent Injunction to reflect this new statutory landscape and ensure that Plaintiffs are able to exercise their

fundamental right to marry—precisely the same relief that Plaintiffs were seeking when they instituted this action. (Compl. at 15–16, Dkt. No. 1.)

B. Plaintiffs Continue to Have Standing

Defendants' argument that Plaintiffs lack standing is similarly without merit—this Court has already found that Plaintiffs have standing to challenge Defendants' denial of their fundamental right to marry and to equal protection under the Fourteenth Amendment. *CSE I*, 64 F. Supp. 3d at 917–18. In *CSE I*, the Court expressly held that CSE has associational standing to represent the interests of its gay and lesbian members, including Mississippians with the present intent to marry after HB 1523 goes into effect this summer. *Id.* This Court further held that the denial of a marriage license is an injury in fact fairly traceable to laws permitting the denial of a marriage license and redressable by injunctive relief. *Id.* at 917. As in *CSE I*, it is irrelevant that a couple may be able to obtain a marriage license in a jurisdiction that does not restrict the issuance of marriage licenses to gay and lesbian couples. Then, as now, it was the denial of the marriage license itself that constituted the constitutionally cognizable injury in fact. *See Miller* v. *Davis*, 123 F. Supp. 3d 924, 936 (E.D. Ky. 2015) ("Even if Plaintiffs are able to obtain licenses elsewhere, why should they be required to? The state has long entrusted county clerks with the task of issuing marriage licenses.").

Defendants offer no reason for this Court to revisit its ruling, let alone a reason compelling enough to overcome the law of the case doctrine. *See Braswell* v. *Invacare Corp.*, No. 4:09–cv–00086–CWR–LA, 2011 WL 167461, at *1 (S.D. Miss. Jan. 19, 2011) ("[A] court will follow a ruling previously made unless the prior ruling was erroneous, is no longer sound, or would work an injustice." (quoting *Loumar, Inc.* v. *Smith*, 698 F.2d 759, 762 (5th Cir. 1983))). It is of no moment that standing must exist "for each claim." *Fontenot* v. *McCraw*, 777 F.3d 741, 746 (5th Cir. 2015). *Plaintiffs do not seek leave to add a new claim or cause of action*. As stated

above, CSE merely seeks a narrow modification of the Permanent Injunction so as to continue granting the relief this Court has already awarded.

Similarly unpersuasive is Defendants' argument that CSE should not be granted relief because HB 1523 has not yet gone into effect and so no one has yet suffered the humiliation of being turned away from a clerk's office without a marriage license because of HB 1523. This argument ignores the fact that under black letter law, cognizable harm can be either "actual *or imminent*." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). Indeed, in quoting *Lujan*, Defendants omitted language showing that injury in fact can be "actual or imminent." *Compare* Opp. Br. at 11 ("To establish constitutional standing, a plaintiff must prove 'an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) not conjectural or hypothetical[.]'"), *with Lujan*, 504 U.S. at 560 ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) '*actual or imminent*, not 'conjectural' or hypothetical[.]'" (internal citations omitted and emphasis added)).

It is axiomatic that a plaintiff need not wait for his or her constitutional rights to be actually violated before seeking the court's protection. *See, e.g.*, *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice [as an injury in fact] if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" (quoting *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013))). Here, there is a "substantial risk"—indeed, it is "certainly impending"—that one or more Circuit Clerks or their deputies will invoke the protections of HB 1523 and refuse to issue marriage licenses to Plaintiffs. *See Susan B. Anthony List*, 134 S. Ct. at 2341. At a minimum, it is highly likely that the same Circuit Clerks who lobbied for the enactment of HB 1523 Section

3(8) will exercise their new statutory right of "recusal." *See* Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted out of State*, Mississippi Today (May 17, 2016), https://mississippitoday.org/2016/05/17/mississippis-religious-freedom-law-drafted-out-of-state/.

And, in any event, once HB 1523 goes into effect, gay and lesbian couples across the state will suffer the stigmatic injury of, once again, being relegated to second-class citizenship by living in a state where Circuit Clerks are empowered by state law to single them out for disparate treatment solely by reason of their sexual orientation.[2] As this Court has held, recognizing "the very real personal and professional consequences" caused by the stigma on same-sex couples who were denied the right to marry, "the government can be enjoined from enforcing laws which perpetuate the idea that same-sex couples are second-class citizens." *CSE I*, 64 F. Supp. 3d at 949. By empowering Circuit Clerks to deny marriage licenses to gay and lesbian couples and by providing *no* enforcement mechanism to ensure that licenses are made available without impediment or delay, HB 1523 not only creates a *segregated* system of marriage licensing for gay couples, but poses an "imminent" "invasion of a legally protected interest"—Plaintiffs' fundamental right to marry. *See Lujan*, 504 U.S. at 560. This injury in fact is clearly sufficient to give rise to standing here.[3]

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[2] To the extent Defendants have due process concerns regarding the Circuit Clerks who are already subject to the Permanent Injunction, Plaintiffs would be amenable to providing notice to all Circuit Clerks and allowing a reasonable amount of time for any objections, provided the Court has sufficient time to act prior to HB 1523 going into effect.

[3] Although Defendants purport to raise two additional barriers to justiciability—ripeness and the *Pullman* doctrine—in a footnote, (Opp. Br. at 14 n.3), both of these arguments lack merit. *First*, it is hardly "unknown" what steps clerks must take to comply with federal law—they have an obligation under the United States Constitution to provide marriage licenses to gay and lesbian couples "on the same terms and conditions" as all other couples. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015). *Second*, there is no state law ambiguity in the statute that a state court must resolve. As Defendants concede, Section 3(8)(a) unambiguously fails to provide any enforcement mechanism for ensuring that marriage licenses are provided without impediment or delay. (Opp. Br. at 8.)

Finally, although Defendants argue that under *Morrow* v. *Harwell*, 768 F.2d 619 (5th Cir. 1985), federalism concerns should preclude this Court from amending its Permanent Injunction, (Opp. Br. at 13), the *Morrow* Court's holding that "the court should limit its initial response to a grant of declaratory relief" was limited to instances in which "state officials have shown their readiness to meet constitutional requirements." *Morrow*, 768 F.2d at 627. *Morrow* thus places the burden on Defendants to produce evidence of "their readiness to meet constitutional requirements," not upon Plaintiffs to prove a negative. *Id.* at 627–28 ("The county officials [*i.e.*, defendants] have demonstrated that superintending injunctive relief was not necessary."). And in *Morrow*, mere words and assurances did not suffice. *Id.* at 628 (noting that the record was "clear on the efforts of the jail's administrators to remedy the asserted violations" and that defendants had "ma[de] dutiful progress to remedy the asserted problems"). Here, Defendants do not and cannot point to any actions that they have taken "to remedy the asserted violations" created by HB 1523 Section 3(8). To the contrary, Defendants Bryant and Hood have disclaimed any ability to control the actions of Circuit Clerks at all.[4] (*See* Opp. Br. Ex. 1.) Indeed, this "federalism" argument, if credited, would have applied with equal force to the existing Permanent Injunction, which is directed at "the State of Mississippi and all its agents, officers, employees, and subsidiaries," Dkt. No. 34, and was issued without evidence that state officials were "demonstrably unlikely to implement the required changes without its spur." *Morrow*, 768 F.2d at 627.

[4] Indeed, rather than express a "willingness to meet constitutional requirements," Governor Bryant recently stated in a public address that the "secular, progressive" opponents of HB 1523 "don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and savior, Jesus Christ." Emily Wagster Pettus, *Mississippi Governor: 'Secular' World Angry at LGBT Law*, The Clarion-Ledger (June 1, 2016), http://www.clarionledger.com/story/news/politics/2016/05/31/mississippi-governor-secular-world-angry-over-lgbt-law/85208312/.

II. The Court Should Modify Its Permanent Injunction to Maintain the Status Quo and Protect Plaintiffs' Fundamental Right to Marry

Until now, the Permanent Injunction has succeeded in protecting the rights of gay and lesbian Mississippians precisely because, by its terms, it applies to "the State of Mississippi and all its agents, officers, employees, and subsidiaries," including all eighty-two Circuit Clerks and their deputies. (*See* Opp. Br. at 11–12.) That stands to change on July 1 when HB 1523 goes into effect and Circuit Clerks are purportedly empowered to once again discriminate against same-sex couples who wish to marry.

Even worse, Defendants have taken the position that they are under no legal obligation to ensure that Circuit Clerks acting under the ambit of HB 1523 do not impede or delay gay and lesbian couples who wish to marry. (Opp. Br. at 8.) Without this Court's intervention, there is more than a substantial threat that Plaintiffs will suffer an irreparable injury—the denial of their fundamental right to marry. *See Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Springtree Apartments, ALPIC* v. *Livingston Par. Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001) ("It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law.") (citing *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)).

Defendants attempt to brush this palpable threat aside, suggesting that Plaintiffs should wait to "have their day in court" until there has been a violation of their constitutional rights and only then sue *each* offending Circuit Clerk. This is hardly an adequate legal remedy. Plaintiffs cannot reasonably be expected to wait until their rights are violated in order to seek relief. This Court has already ruled that the State of Mississippi may not relegate gay and lesbian

couples to second-class citizenship. *CSE I*, 64 F. Supp. 3d at 913. Gay and lesbian couples in Mississippi should not have to suffer the uncertainty of not knowing whether their trip to the Circuit Clerk's office to obtain a marriage license will end in joy or the humiliation of being turned away because of their second-class status. It is for this reason that Plaintiffs sought the very modest remedy from this Court of requiring publication of information concerning the clerks who have elected to recuse themselves.[5]

III. This Court Should Grant Plaintiffs' Motion to File a Supplemental Complaint to Address Factual Developments Since July 2015, as Set Forth in Plaintiffs' Opening Brief

Defendants do not dispute that Rule 15(d) permits Plaintiffs to file a supplemental pleading even after this Court has entered a final judgment. (Opp. Br. at 16.) Rather than addressing the controlling Fifth Circuit and Supreme Court authority cited in Plaintiffs' opening brief that establishes that the Court should permit filing of a supplemental pleading, (Pls.' Br. at 12–14), Defendants dedicate three pages of their opposition brief to an out-of-Circuit per curiam opinion, *Planned Parenthood of Southern Arizona* v. *Neely*, 130 F.3d 400 (9th Cir. 1997) (per curiam), that ultimately does not contradict those authorities. Contrary to Defendants' assertion that the singular case they rely on is "strikingly similar," (Opp. Br. at 16), *Neely* is not like this case at all. *Neely* did not involve a Rule 60(b) motion. Here, by contrast, the Court is considering this motion against the backdrop of the "extraordinary circumstances" that warrant Rule 60(b)(6) relief.

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[5] Although Plaintiffs have not brought this suit (or this motion) to obtain monetary relief from recalcitrant clerks, even if they had, notwithstanding Defendants' assertions to the contrary (Opp. Br. at 15), HB 1523 purports to grant a Circuit Clerk sued in state court under 42 U.S.C. § 1983—or any other state or federal statute—absolute immunity from suit so long as he or she claims the sincerely held religious belief that "[m]arriage is or should be recognized as the union of one man and one woman." § 2(a). It does this by defining "state government" to include "[any] . . . court," and defining "discriminatory action" to include any action taken to "[i]mpose, levy, or assess a monetary fine, fee, penalty, or injunction." §§ 4(f), 9(2)(b). Thus, the statute's requirement that "state government shall not take any discriminatory action" against a clerk who recuses means that a state judge might be limited in imposing any penalty on that clerk in a § 1983 action. § 3(8)(a).

Defendants' reliance on *Neely* is misplaced in any event because Plaintiffs are not pursuing a "new civil action." (Opp. Br. at 16.) In *Neely*, the plaintiffs challenged a parental consent abortion statute and the court permanently enjoined the statute. Several years later, the legislature enacted an amended version of the statute that attempted to address the constitutional deficiencies the court had identified. Put simply, in *Neely* the inquiry was whether the amended statute cured the defects that the court had identified in the original unconstitutional statute. 130 F.3d at 402. Indeed, *Neely* distinguished *Griffin* v. *County School Board*, 377 U.S. 218, 226 (1964), the controlling Supreme Court decision—in which the Court affirmed the filing of a post-judgment supplemental complaint under Rule 15(d)—because "the actions of the defendants which the plaintiffs sought to challenge through supplemental pleading were alleged to be specific attempts by the defendants to contravene the courts' earlier rulings." 130 F.3d at 403. But this is *exactly* the allegation set forth in Plaintiff's opening brief: that HB1523 was a "deliberate attempt to evade the plain meaning of *Obergefell* and subvert the Court's Permanent Injunction." (Pls.' Br. at 12.) Thus, under *Neely*'s reading of *Griffin*, this is the very *type of case that Rule 15(d) was intended to address*. Indeed, the Advisory Committee Notes confirm that Rule 15(d) was enacted to assist plaintiffs who had been "needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief." Fed. R. Civ. P. 15.

Defendants also fail to address this significant difference in elapsed time. In *Neely* four years had passed between entry of judgment and plaintiffs' motion to file a supplemental complaint. *Neely*, 130 F.3d at 402. Here, the Permanent Injunction protecting the fundamental rights of gay and lesbian Mississippians to marry was issued less than a year ago. (Pls.' Br. at 6.) And even so, the Fifth Circuit recently held that a party had standing to reopen a

case more than twenty-five years after entry of a permanent injunction. *Cooper* v. *Tex. Alcoholic Beverage Comm'n*, ---F.3d ---, 2016 WL 1612753, at *1–3 (5th Cir. Apr. 21, 2016).

Moreover, although "undue prejudice to the nonmoving party" and "futility of supplementation" are important factors to be considered by courts in determining whether to grant leave to file a supplemental pleading, *Ennis Family Realty I, LLC* v. *Schneider Nat'l Carriers, Inc.*, 916 F. Supp. 2d 702, 717 (S.D. Miss. 2013), Defendants identify neither here. Instead, Defendants address a non sequitur, arguing that Ms. Moulder (and not any party presently before this Court) would be prejudiced by being added as a defendant because another action against her is currently pending in this district. (Opp. Br. at 19.) But denying Plaintiffs' motion would not preclude them from initiating a new action against Ms. Moulder at additional expense to the parties and to the Court. And Defendants have not articulated any reason why, simply as a matter of judicial economy, this Court, which is already well familiar with these issues both from the original preliminary injunction motion and the post-*Obergefell* enforcement proceedings, should not proceed to decide these issues in this case. *See Henderson* v. *Stewart*, 82 F.3d 415 (5th Cir. 1996) (per curiam) (holding that a Rule 15(d) motion "should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties").[6]

Finally, and somewhat incredibly, Defendants argue that Plaintiffs will not be prejudiced if their motion to file a supplemental complaint is denied. (Opp. Br. at 20.) Defendants utterly disregard the imminent threat of constitutional injury created by HB 1523.

[6] Plaintiffs would not have sought to add Ms. Moulder as a defendant had Defendants not taken the position that, notwithstanding the clear language of the Permanent Injunction and the Court's unambiguous guidance, the Permanent Injunction only binds parties to this litigation. (Ex. 2 to Pls.' Br. at 1.) Rather than contest this absurd position, out of an abundance of caution Plaintiffs agreed to address Defendants' stated concern and add Ms. Moulder as a defendant. Defendants can hardly claim to be prejudiced by a course of conduct that they themselves have necessitated.

(*See supra* Part I.) The State Registrar may have the power, and even the obligation, to eventually provide Plaintiffs with recusal information in response to burdensome public record requests, but Defendants continue to assert that the State Registrar has no power to prevent constitutional injury to Plaintiffs. (Opp. Br. at 19.) This Court alone can protect Plaintiffs' fundamental right to marry against impediment and delay.

CONCLUSION

Based on the foregoing as well as on Plaintiffs' opening brief, 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: June 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 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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