**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**NORTHERN DIVISION**

**CAMPAIGN FOR SOUTHERN EQUALITY, ET AL.** **PLAINTIFFS**

**VS.** **CIVIL ACTION NO. 3:14cv818-CWR-LRA**

**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** **DEFENDANTS**

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**ATTORNEY GENERAL HOOD'S AND GOVERNOR BRYANT'S MEMORANDUM BRIEF SUPPORTING THEIR RESPONSE IN OPPOSITION TO "MOTION TO REOPEN JUDGMENT, FILE SUPPLEMENTAL PLEADING, AND MODIFY THE PERMANENT INJUNCTION"**

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If the plaintiffs Campaign for Southern Equality, and Mesdames Bickett, Sanders, Pritchett, and Webb (collectively "the Campaign") have any proof that the defendants have violated this Court's permanent injunction, then they should file a motion, subject to their counsel's obligations under the federal rules, seeking contempt relief. If the Campaign wants to pre-emptively attack the 2016 Mississippi Legislature's House Bill 1523 based on hypothetical future events, then it should file a new lawsuit against whomever it believes are the proper parties. But, whether the Court considers the Campaign's tactical ploy here under federal Rules 60(b)(6), 15(d), or otherwise, it should not be allowed to manufacture and summarily litigate an entirely new lawsuit within this closed one. The Campaign's motion should be denied, and this closed case should remain closed.

## FACTS

In October 2014, the Campaign filed this now closed lawsuit against Mississippi Governor Phil Bryant, Attorney General Jim Hood, and then-Hinds County Circuit Clerk Barbara Dunn,[1] in their official capacities, and simultaneously moved to preliminarily enjoin the named defendants from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2). [Complaint, Dkt. 1; Pl. Mot. P. Inj., Dkt. 4]. On November 25, 2014, the Court granted the Campaign's motion, entered a preliminary injunction against the defendants, and temporarily stayed the injunction allowing the defendants to seek appellate relief. [Order, Dkt. 30]. Governor Bryant and Attorney General Hood appealed. [Notice of Appeal, Dkt. 31]. The Fifth Circuit extended the stay pending resolution of the appeal. ***Campaign for Southern Equality v. Bryant***, 773 F.3d 55 (5th Cir. 2014).

On June 26, 2015, the United States Supreme Court issued its opinion in ***Obergefell v. Hodges***, 135 S.Ct. 2584 (2015). Shortly thereafter, on July 1, 2015, the Fifth Circuit recognized ***Obergefell*** dictated the outcome of Governor Bryant's and Attorney General Hood's appeal:

> While this appeal was under submission, the Supreme Court decided ***Obergefell v. Hodges***, No. 14-556, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015). In summary, the Court declared that
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> "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. ***Baker v. Nelson*** [409 U.S. 810 (1972),] must be and

[1] After the case was closed, in January 2016, Zack Wallace replaced Barbara Dunn as the duly-elected Hinds County Circuit Clerk.

> now is overruled, and the State laws challenged by petitioners in these cases 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."
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> ***Id.*** at *41-42. "It follows that the Court must also hold–and it now does hold–that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." ***Id.***, at *50.
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> Having addressed fundamental rights under the Fourteenth Amendment, the Court, importantly, invoked the First Amendment, as well:
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> "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."
>
> ***Id.*** at *48-49.

***Campaign for Southern Equality v. Bryant***, 791 F.3d 625, 626-27 (5th Cir. 2015).

Then, the Fifth Circuit specifically held that

> ***Obergefell***, in both its Fourteenth and First Amendment iterations, 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. We express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them,

***Id.***, at 627 (footnote omitted), affirmed this Court's preliminary injunction, and

remanded the case with instructions to "enter final judgment on the merits . . . by July 17, 2015, and earlier if reasonably possible." ***Id.***

In the evening after the Fifth Circuit's opinion issued, this Court entered its permanent injunction followed by a final judgment closing this case. The permanent injunction states:

> 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 enjoin the enforcement of Mississippi's same sex marriage ban. Accordingly,
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> 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).

[Perm. Inj., Dkt. 34]. The final judgment states:

> Pursuant to the Supreme Court's ruling in ***Obergefell v. Hodges***, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015), as well as the permanent injunction issued in this case, *see* Docket No. 34, this case is due to be closed. Accordingly,
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> IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Campaign for Southern Equality, Rebecca Bickett, Andrea Sanders, Jocelyn Pritchett, and Carla Webb, and against Phil Bryant, Jim Hood, and Barbara Dunn, all in their official capacities.

[Final Judgment, Dkt. 35].

Less than eighteen hours later, on July 2, the Campaign filed a letter alleging that "clerks in at least four Mississippi counties are still not issuing marriage licenses to same-sex couples," apparently based upon random telephone calls to Circuit Clerks' Offices (but without supplying any actual evidence that any local Clerk had denied anyone a marriage license). [July 2, 2015 Letter, Dkt. 38]. The Campaign explained

that "Plaintiffs do not seek an order of contempt against any individual or entity at this time. Instead, we seek only to ensure that there is no doubt as to the scope of this Court's permanent injunction so that compliance can proceed without delay." [*Id.*]. The Campaign also submitted a "Proposed Order Clarifying Application of Permanent Injunction" proposing to specifically add and name the four allegedly offending local Clerks to the injunction order and compel Attorney General Hood to give the clerks notice they had been summarily added to the order. [Proposed Order, Dkt. 38-1].

On July 3, Attorney General Hood responded by pointing out the obvious:

> As counsel for the Mississippi Attorney General, we are in receipt of plaintiffs' counsel's below email, attached letter, and attached proposed order – also filed via the Court's ECF system. The correspondence fails to conform with Local Rule 7, and, more importantly, the proposed order seeks new relief without sufficient evidentiary or legal foundations, and that targets four county circuit clerks who are non-parties to this lawsuit. The defendant parties to this lawsuit are the Governor, the Attorney General, and the Circuit Clerk of Hinds County. The four county circuit clerks referenced by plaintiffs are not parties to this lawsuit; are not the officers, agents, servants or employees of any of the three defendants; nor are they in active concert with the named defendants. Plaintiffs' letter and proposed order improperly assumes the Governor and/or the Attorney General are legally responsible for the actions of the four targeted county circuit clerks, or any county circuit clerks, for that matter. Circuit clerks are independent elected county officials who are represented by their own counsel and are entitled to notice and an opportunity to be heard. If the Court intends to take any action in response to the letter and proposed order, the Attorney General respectfully requests that the Court set a telephonic conference, provide reasonable notice of the conference to the parties to this lawsuit, and require plaintiffs to provide advance notice of the conference to the four non-party circuit clerks targeted by their new relief, so that all counsel may be heard.

[July 3, 2015 10:35 AM Email, Ex. "1" to Response]. After an exchange of further email correspondence between counsel and the Court over the next few days, [*see* July 3, 2015 1:58 PM Email, Ex. "2" to Response; July 7, 2015 10:00 AM Email, Ex. "3" to Response;

July 7, 2015 10:33 AM Email, Ex. "4" to Response], the alleged issues regarding the four non-party clerks were resolved. On July 10, 2015, the Campaign reported to the Court:

> As per our emails below of earlier this week, and 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.

[July 10, 2015 6:02 AM Email, Ex. "5" to Response].

During the post-final judgment back-and-forth between the parties in early July 2015, no evidence surfaced that any Mississippi Circuit Clerk's Office actually failed, at any time, to properly issue a marriage license to any same-sex couple who applied. Likewise, to this day, nobody – whether a party to this now closed lawsuit or not – has ever come forward with any allegations, much less any proof, that the defendant Hinds County Circuit Clerk's Office, or anyone in any non-party Mississippi Circuit Clerks' Offices have ever impeded, delayed, or otherwise failed to properly and timely process and issue a marriage license to any same-sex couple.

At its 2016 Regular Session, the Mississippi Legislature passed House Bill 1523. The bill's Section 3, (8)(a), set to become law on July 1, 2016, effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages. Word for word, Section 3, (8)(a) provides 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, may seek recusal from

> authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. Any person making such recusal shall provide a prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall 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.

[Mississippi House Bill 1523, Regular Session 2016 at Section 3, (8)(a), Ex. "6" to Response]. Section 3, (8)(a) of the enactment (as is true of all other provisions of House Bill 1523) does not purport to authorize any government official to violate federal law, or to insulate any government official from liability for any conduct prohibited by federal law.

On April 25, 2016, the Campaign transmitted a letter referencing this closed case to defendants Governor Bryant, Attorney General Hood, and non-party Judy Moulder, the State Registrar of Vital Records. [April 25, 2016 Letter, Ex. "7" to Response at pp. 6-8]. The Campaign requested copies of

> (1) notices of any individual who has filed recusal notices pursuant to HB 1523; (2) a full and complete explanation of all steps that each individual seeking recusal (or any person acting on behalf of that individual, including in a supervisory capacity) will take to ensure that gay and lesbian couples are not impeded or delayed when seeking to marry in the relevant county; and (3) whether the individual seeking recusal intends to continue issuing marriage licenses to straight couples, while at the same time refusing to participate in issuing licenses to gay and lesbian couples.

[*Id.*, at p. 7]. The Campaign also demanded that the Office of Vital Records consider its inquiry as a perpetual request obligating Vital Records to provide updated responses if any information becomes available in the future. [*Id.*].

On May 4, after pointing out that the Office of Vital Records is not a party to the

Campaign's closed lawsuit, but it would respond consistent with its obligations under the Mississippi Public Records Act, the agency fully answered the Campaign's three queries:

> Response to (1). The Office of Vital Records does not have any notices which have been filed pursuant to House Bill 1523. House Bill 1523 does not take effect until July 1, 2016.
>
> Response to (2). The Office of Vital Records has no information responsive to your request number (2). House Bill 1523 does not require the Office of Vital Records to take any steps to "ensure" that anyone is not "impeded or delayed when seeking to marry in the relevant county." The Office of Vital Records does not have any responsibility under Mississippi law regarding the manner in which marriage licenses are issued by local county official to anyone. Mississippi Code Ann. § 41-57-48 requires only that, after a license is issued, copies of the statistical record of marriage are to be filed with the Office of Vital Records, and that the Office of Vital Records maintain copies of the statistical record.
>
> Response to (3). The Office of Vital Records has no information responsive to your request number (3) because it has no control over the issuance of marriage licenses to anyone, and cannot speculate as to what any "individual seeking recusal" under House Bill 1523 may or may not do in the future. See also Response to request number (2) above.

[May 4, 2016 Letter at p. 2, Ex. "8" to Response]. Vital Records further correctly noted that, while it has no obligation to respond to records requests on a continuing basis, the agency can and would provide available information if and when the Campaign, or anyone else, properly submits a future request. [*Id.*].

On May 10, the Campaign filed its "Motion to Reopen Judgment, File Supplemental Pleading, and Modify the Permanent Injunction." The Campaign asks the Court to restart the case, allow it to file what amounts to a new complaint asserting new claims and adding Judy Moulder, in her official capacity as the State Registrar of Vital Records, as a defendant. [Pl. Mot. Dkt. 39]. The Campaign would also have the Court

summarily issue new injunctive relief against Ms. Moulder, obligating the Office of Vital Records to (1) perpetually produce any future notices of recusal filed by anyone pursuant to House Bill 1523 Section 3, (8)(a), and (2) publicly post any such notices on the agency's website. [*Id.*, at p. 17]. The proposed new injunctive relief would further apparently command any of Mississippi's eighty-two Circuit Clerks, and their employees, who files a recusal notice in the future to (1) comply with House Bill 1523 Section 3, (8)(a)'s recusal requirements, (2) draft and submit recusal compliance plans to the Campaign and the Court, and (3) cease and desist from issuing any marriage licenses to anyone. [*Id.*].

## ARGUMENT

### I. The Court should not reopen this case and summarily award the Campaign's new injunctive relief.

The Campaign wants to transform this closed case into a new civil action, and perfunctorily adjudicate that new action by entering broad injunctive relief in favor of and against an unidentified, open-ended number of parties who are not before the Court. Reopening the case is unwarranted and the Campaign's proposed new relief should be denied.

Beyond its five specifically enumerated grounds for altering a judgment, Rule 60(b)'s catch-all provision authorizes reconsideration of a final decree for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). While "any other reason that justifies relief" sounds limitless, the rule must be applied in conformity with weighty policy concerns, including that "the desire for a judicial process that is predictable mandates caution in reopening judgments." ***Bailey v. Ryan Stevedoring Co., Inc.***,

894 F.2d 157, 160 (5th Cir. 1990). Accordingly, Rule 60(b)(6) is appropriate "*only* if extraordinary circumstances are present." ***American Totalisator Co. v. Fair Grounds Corp.***, 3 F.3d 810, 815-16 (5th Cir. 1993) (emphasis added); *see also* ***Batts v. Tow-Motor Forklift Co.***, 66 F.3d 743, 747 (5th Cir. 1995) (even though the Fifth Circuit has often "recognized that Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding [Rule 60] clauses," it has "also narrowly circumscribed its availability, holding that Rule 60(b)(6) relief will be granted only if extraordinary circumstances are present.") (citations and quotes omitted).

No "extraordinary circumstances" justify disturbing the Court's final judgment here. Reopening this closed case to entertain the Campaign's newly proposed claims and grant its pre-emptive injunctive relief would run afoul of well-established constitutional justiciability principles. It is axiomatic that "extraordinary circumstances" for relief from a final judgment do not exist where the plaintiff seeking that relief lacks standing to press the claims to be litigated if the case is reopened. *See*, *e.g.*, ***Crenshaw-Logal v. City of Abeline, Texas***, 436 Fed. Appx. 306, 309-10 (5th Cir. 2011) (affirming denial of Rule 60(b)(6) motion where plaintiff lacked standing to assert claims).

The Court's prior holding that the Campaign pled sufficient facts to support its standing for its original lawsuit is not a free pass to reopen this case and litigate new claims targeting a different state law. Federal plaintiffs must always prove their standing for every individual claim they seek to assert. ***Friends of the Earth v. Laidlaw Environmental Servs.***, 528 U.S. 167, 185 (2000) (movants must

demonstrate standing separately for each form of relief sought); ***Fontenot v. McGraw***, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'") (quoting ***Lewis v. Casey***, 518 U.S. 343, 358 n.6 (1996)); ***Tucker v. Phyfer***, 819 F.2d 1030, 1034 (11th Cir. 1987) ("[A]rticle III's command that a plaintiff have standing to assert his claim clearly mandates more than that the plaintiff and the defendant have a dispute over *something*; it means the plaintiff and defendant must have a justiciable dispute over the *specific claim* the plaintiff asserts.").

The lack of an Article III injury deflates the Campaign's new claims and injunctive relief targeting Mississippi Circuit Clerks and their employees who might exercise their state law rights under House Bill 1523 Section 3, (8)(a) in the future. 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," as well as "a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant[s], and not the result of some independent action of some third party not before the court," and "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560-61 (1991) (internal citations and quotations omitted).

No plaintiff before the Court has been denied a marriage license, or been "impeded" or "delayed" in obtaining one, by any Mississippi Circuit Clerk's Office in the past. The Hinds County Circuit Clerk's Office, the only defendant clerk in this lawsuit, is not accused of violating any plaintiff's right to obtain a marriage license in the past. And

none of Mississippi's other eighty-one Circuit Clerk's Offices, who are not before the Court, has been credibly accused of such either.

The facts that House Bill 1523 Section 3, (8)(a) will go into effect on July 1, and employees in Mississippi Circuit Clerks' Offices might invoke its recusal provision, do not satisfy the Campaign's obligation to prove standing to obtain its new relief. A plaintiff "seeking injunctive relief must demonstrate a real and immediate threat that he will be subject to the behavior which he seeks to enjoin. It is not sufficient for the plaintiff to speculate that he will be subject to injurious conduct if the practice is continued or the law remains on the books." ***Gladden v. Roach***, 864 F.2d 1196, 1198 (5th Cir. 1989) (citing ***City of Los Angeles v. Lyons***, 461 U.S. 95 (1983)); *see also* ***Morgan v. Fletcher***, 518 F.2d 236, 240 (5th Cir. 1975) (pure conjecture does not establish irreparable injury or a right to federal injunctive relief), *reh'g denied*, 522 F.2d 1280. It is pure speculation that some unidentified non-party Mississippi Circuit Clerk employee might recuse himself from licensing marriages, and then violate House Bill 1523 Section 3, (8)(a) by impeding or delaying "the authorization and licensing of any legally valid marriage" of some unidentified non-party plaintiffs.[2]

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[2] The Campaign may incorrectly assert that the organizational plaintiff "Campaign for Southern Equality" can serve as a proxy for unidentified persons that could hypothetically suffer an alleged injury at the hands of a county Circuit Clerk in the future. That contention would fail, at a minimum, because to establish its organizational standing for such a claim, it would have to actually identify one of its members with more than merely a hypothetical theory that some unknown recused clerk will violate House Bill Section 3, (8)(a) by impeding or delaying the issuance of a marriage license in the future. To establish "associational standing," an organizational plaintiff must, *inter alia*, "include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association. . . . An organization lacks standing if it fails to adequately allege [] that there is a threat of [] injury to any individual member of the association and thus fails to identify even one individual member with standing. . . . To make this showing when seeking an injunction, the organization must show [an individual who] has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct, and the injury or threat of injury must be

In addition to standing problems, "extraordinary circumstances" are also lacking here since the Campaign's proposed new injunctive relief against every Mississippi Circuit Clerks' Office would directly contravene federalism and comity principles. Far more than sheer speculation that some state official might someday violate a citizen's rights is required before a federal court invokes its equitable powers to preemptively regulate state officials' future day-to-day conduct.

As the Fifth Circuit has recognized, federalism dictates that "[a]t the threshold, superintending federal injunctive decrees directing state officials are appropriate only when constitutional violations have been shown *and* when the state officials are demonstrably unlikely to implement the required changes without its spur." ***Morrow v. Harwell***, 768 F.2d 619, 627 (5th Cir. 1985) (emphasis in original). Neither of those threshold requirements is met here. There is no proof that the one Circuit Clerk's Office before the Court, or any of the other eighty-one Circuit Clerks' Offices not before the Court, have unconstitutionally failed to timely and properly issue a marriage licenses to any same-sex couple since ***Obergefell*** rendered same-sex marriage lawful in Mississippi and across the nation. More importantly, there is no basis for improperly assuming that any Circuit Clerk's Office will violate federal law, as established by ***Obergefell***, the Fifth Circuit, and this Court, or state law established by the Mississippi Legislature, in the absence of summarily-awarding the Campaign's requested

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both real and immediate, not conjectural or hypothetical." ***Funeral Consumers Alliance, Inc. v. Service Corp. Intern.***, 695 F.3d 330, 343-44 (5th Cir. 2012) (internal citations and quotes omitted, modifications in original).

superintending federal injunctive decree.[3]

Even assuming that the Campaign's new claims and relief do not have any justiciability defects, summarily adjudicating those claims to create new injunctive relief would still be improper. The Campaign may call it a "modification," but a brand new permanent injunction is actually at stake and can only be issued if the Campaign meets its burden of proof to justify it.

In addition to the basic constitutionally-mandated requirements of serving targeted parties with sufficient process, and affording them due process, to grant a permanent injunction, every federal plaintiff must prove four elements: (1) actual success on the merits of the substantive claims; (2) a substantial threat that it will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage the injunction might cause the non-moving party; and (4) that the injunction will not disserve the public interest. ***Dresser-Rand Co. v. Virtual Automation, Inc.***, 361 F.3d 831, 847 (5th Cir. 2004). The Campaign's request before

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[3] Other justiciability and federalism-related problems would also undoubtedly crop up if the Court reopens this case and summarily adjudicates the Campaign's new claims. For example, it would be improper to issue an advisory opinion in the form of an injunction or otherwise governing what future steps unknown Mississippi Circuit Clerks must take, or policies they must promulgate, to ensure they comply with House Bill 1523 3, (8)(a) and federal law if they file a recusal. ***Texas v. United States***, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests on contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotes omitted); ***Preiser v. Newkirk***, 422 U.S. 395, 401 (1975) (Article III only empowers federal courts to "resolve a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (internal quotes omitted). Or, as another example, the Campaign's quarrels about the lack of specificity in House Bill 3, (8)(a) regarding clerks' obligations in the case of a recusal may more properly be resolved through the state court system rather than litigating its pre-emptive proposed new claims in federal court. ***Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.***, 283 F.3d 650, 653 (5th Cir. 2002) (federal courts should abstain from deciding federal constitutional claims where an unclear issue of state law exists, and if resolved, may render adjudicating the constitutional claims unnecessary).

the Court skips all those steps. There is no proof that any party before the Court, or not, has violated or will violate anyone's constitutional rights. There is no proof that any party or non-party here will suffer any irreparable injury if the Campaign's relief is denied, or any other proof bearing on whether the Campaign's new injunctive relief would be appropriate – other than that the public may suffer the harm of having an act of its Legislature impaired if new injunctive relief is granted.

"Extraordinary circumstances" for Rule 60(b)(6) relief are also lacking here for more basic reasons. More than adequate legal remedies already exist to remedy the hypothetical problems the Campaign pessimistically forecasts. If the Court does not pre-emptively enjoin the entire Mississippi Circuit Clerk system as requested, and should any Clerk's employee who exercises his new state law right of recusal fail to comply with state or federal law, any citizen whose rights have been violated – and the offending employee – would have their day in court, and the benefits of the due process protections attendant to the proceeding.

The Fifth Circuit has established that "***Obergefell***, in both its Fourteenth and First Amendment iterations, 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." ***Campaign for Southern Equality v. Bryant***, 791 F.3d 625, 627 (5th Cir. 2015). (footnote omitted). Just as any state actor who violates someone's constitutional rights, a Mississippi Circuit Clerk who actually violates a same-sex couple's constitutional right to marry would be liable to the aggrieved parties for monetary relief, injunctive relief, and attorneys' fees in state or federal court, under 42 U.S.C. § 1983 or otherwise. If the actual facts of that case prove a violation (as opposed to the hypothetical ones the

Campaign's proposed new civil action are founded upon), a remedy would be awarded. In the meantime, if for no other reason, the existence of that remedy proves the Campaign's request for a new permanent injunction should be denied.

## II. The Court should reject the Campaign's proposed "supplemental pleading."

In any case, allowing supplemental new claims is inappropriate under certain circumstances, such as, when it would create undue prejudice or the new claims would be futile. ***Chemetron Corp. v. Business Funds, Inc.***, 682 F.2d 1149, 1193 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983). The reasons explained above that the Campaign's Rule 60(b)(6) relief should be denied obviously likewise demonstrate why its attempt to utilize Rule 15(d) here should also be denied as unduly prejudicial or futile.

In addition, the Campaign's Rule 15(d) request presents other distinct problems warranting denial since this case has already proceeded to final judgment. As the Campaign points out, Rule 15(d) permits district courts discretion to allow "supplemental" pleading in ongoing lawsuits. And, in rare instances, federal courts have condoned additional pleading under Rule 15(d) after the Court has entered a final judgment. But those general propositions do not justify the Campaign's post-judgment pleading tactics in this case.

The case on point is the per curiam opinion in ***Planned Parenthood of Southern Arizona v. Neely***, 130 F.3d 400 (9th Cir. 1997), where the Ninth Circuit precisely addressed the same issues implicated by the Campaign's attempt to use Rule 15(d) here, in a strikingly similar set of factual circumstances. The ***Neely*** plaintiffs

successfully sued Arizona officials challenging the constitutionality of the state's parental consent abortion statute. ***Id.***, at 401. The district court eventually "entered a final order declaring the statute unconstitutional and issued a permanent injunction." ***Id.***, at 402. Subsequently, the Arizona Legislature amended and reenacted the parental consent statute, and the plaintiffs moved to file a supplemental complaint targeting the reenacted law. ***Id.*** The district court permitted the ***Neely*** plaintiffs to proceed, found the statute unconstitutional, and permanently enjoined the defendants from enforcing it. ***Id.***

The Ninth Circuit evaluated the district court's decision by recognizing that after a court enters final judgment, Rule 15(d) is not an appropriate vehicle to pursue a "separate, distinct and new cause of action." ***Id.*** It held that the district court abused its discretion in allowing the post-judgment amendment because

> The supplemental complaint filed by plaintiffs involved a new and distinct action that should have been the subject of a separate suit. Although both the original suit and the supplemental complaint sought to challenge Arizona's parental consent law, the supplemental complaint challenged a different statute than the one that had been challenged in the original suit. Additionally, a final judgment had been rendered in the original action four years prior to plaintiffs' request to supplement their complaint. That judgment was not appealed and in no way would be affected by plaintiffs' supplemental complaint. Nor did the district court retain jurisdiction after entering that order.

***Id.***

The Ninth Circuit's rationale should be applied to the virtually identical facts presented here to reach the same holding. In this case, the Court and the Fifth Circuit adjudicated the Campaign's original constitutional challenge to Section 263A of the Mississippi Constitution and Code Section 93-1-1(2). The Court entered a permanent

injunction prohibiting the defendants from enforcing those particular state laws, [Perm. Inj., Dkt. 34], and a final judgment issued, closing the case without retaining jurisdiction. [Final Judgment, Dkt. 35]. Now, as in ***Neely***, the Campaign seeks to file a supplemental pleading to set up a distinct new action.

Moreover, if anything, the Campaign's attempted maneuver is even further off-base than the ***Neely*** plaintiffs' rejected effort. In ***Neely***, the plaintiffs were suing the same defendants over the same state statute. Here, the Campaign seeks to add a new defendant (and implicitly add many others who apparently would not have any say in the matter), and summarily litigate a challenge to an entirely different legislative enactment. Those facts make the Campaign's maneuver even more inappropriate than the ***Neely*** plaintiffs' failed ploy. The Campaign should not be allowed to litigate its proposed new action within this closed case.[4]

Denying the Campaign's request to add a new party and claims would also serve Rule 15(d)'s goal of promoting judicial economy. *See* ***Neely***, 130 F.3d at 402-03; *see also* ***WRR Industries, Inc. v. Prologis***, 2006 WL 1814126, at *6 (N.D. Tex. Jun. 30, 2006); ***Seamon v. Upham***, 563 F.Supp. 396, 400-01 (E.D. Tex. 1983). Unless the

[4] The Campaign's motion relies on ***Griffin v. County School Board***, 377 U.S. 218 (1964) as an example of an instance where Rule 15(d) supplemental pleadings were permitted post-judgment. [Pl. Mot. at pp. 12-13, Dkt. 39]. ***Griffin*** was easily distinguished by the ***Neely*** court, and readily distinguishable from this matter as well. The ***Griffin*** case involved ongoing compliance with broad aspirational directives, and allegations that the defendants committed continued and persistent acts violating court orders. 377 U.S. at 222, 226. This court's orders do not involve broad aspirational objectives that have not been satisfied. The defendants in this case were enjoined from enforcing a state constitutional provision and a statute prohibiting same-sex marriage. Since the injunction issued and this case was closed, local Circuit Clerks have licensed an untold number of same-sex marriages, and nobody has ever demonstrated any Clerk's Office has failed to do so. Furthermore, while ***Griffin*** involved *proof of past acts* inconsistent with court orders, the Campaign's speculation that some unknown Circuit Clerks will file a recusal under House Bill 1523 3, (8)(a), and then fail to comply with state and federal law by impeding or delaying the licensure of any lawful marriage, is merely a conjectural belief.

Campaign is hiding some other reason(s) for including the State Registrar as a new defendant, it ostensibly claims that drastic step is appropriate to enable the Court to compel the Office of Vital Records to produce and publicize records of any future recusals filed pursuant to House Bill 1523 Section 3, (8)(a). But adding the State Registrar, and commencing a new lawsuit against her within this closed case, is not necessary for the Campaign to accomplish its stated purpose.

Whether the State Registrar is a party here, not a party here, subject to an injunction, or not subject to an injunction, her job is to produce records. She has an independent duty to produce the records the Campaign demands to anyone under the Mississippi Public Records Act upon a proper request. The State Registrar has already responded to such a request by the Campaign, and acknowledged she would do so again if asked in the future. [May 4, 2016 Letter at pp. 1-2, Ex. "8" to Response]. In fact, the Campaign has acknowledged that "we understand we could seek information under the Mississippi Public Records Act." [April 28 Letter at p. 1, Ex. "7" to Response]. Judicial resources are not required to compel the State Registrar to produce records. It follows that judicial economy would not be served by bringing her in as a new defendant simply to make her produce records – particularly given the complete absence of any proof the records would be unavailable absent a federal injunction.

Rejecting the Campaign's attempt to add the State Registrar would also best serve judicial economy given that she is the sole named defendant in a complaint and preliminary injunction motion filed in this Division regarding the Office of Vital Records' duties under House Bill 1523 Section 3, (8)(a), and the validity of the statute itself. *See* ***Alford v. Moulder***, USSD No. 3:16cv350-DPJ-FKB (Complaint, Dkt. 1, and

Preliminary Injunction Motion, Dkt. 2, filed May 9, 2016). The State Registrar has responded to the complaint and injunction motion. She would likely be prejudiced if forced to litigate overlapping issues in two separate lawsuits. For example, trying those issues simultaneously in two separate actions would run the risk of inconsistent findings, and possibly subject the State Registrar to inconsistent obligations. Meanwhile, the Campaign will suffer no prejudice if precluded from reopening this case and filing its new complaint. As explained above, no relief is needed from this Court to require the State Registrar to provide the Campaign copies of recusal notices filed in the future.

**CONCLUSION**

The Campaign should not be allowed to inappropriately, and premised on nothing but conjecture, reopen this closed case to commence a new action, against a new defendant, and summarily litigate the rights and obligations of countless individuals not before the Court. The Campaign's motion should be denied and this closed case should remain closed.

THIS the 24th day of May, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify the foregoing document has been filed with the Clerk of Court using the Court's ECF system and thereby served on all counsel of record who have entered their appearance in this action to date.

THIS the 24th day of May, 2016.

S/Justin L. Matheny
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