

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

CAMPAIGN FOR SOUTHERN
EQUALITY, ET AL.

PLAINTIFFS

V.

CIVIL ACTION NO. 3:15-CV-00578-DPJ-FKB

MISSISSIPPI DEPARTMENT
OF HUMAN SERVICES, ET AL.

DEFENDANTS

**MEMORANDUM OF AUTHORITIES SUPPORTING THE JUDICIAL BRANCH
DEFENANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION AND FAILURE TO STATE A CLAIM**

INTRODUCTION

Nine current Mississippi Chancery Court Judges from three Chancery Districts (“the judicial branch defendants”) file this Memorandum of Authorities Supporting Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (“F.R.C.P.”). For the reasons below, the First Amended Complaint (“Amended Complaint”) against the judicial branch defendants should be dismissed with prejudice.

Having initially sued only the Mississippi Department of Human Services (DHS), Richard Berry, Executive Director of DHS, Governor Phil Bryant, and Attorney General Jim Hood (“executive branch defendants”), Campaign for Southern Equality, Family Equality Council, Donna Phillips, Janet Smith, Kathryn Garner, Susan Hrostoski, Jessica Harbuck, Brittany Rowell, Tinora Sweeten-Lunsford, and Lari Lunsford (“plaintiffs”), subsequently filed the Amended Complaint adding official capacity claims against the judicial branch defendants. [Am. Compl., Docket No. 23]. The Amended Complaint was filed only after the executive

branch defendants moved to dismiss the original complaint. [Mot. Dismiss, Docket No. 15]. The addition of the judicial branch defendants, however, does nothing to aid the plaintiffs' improvident federal court suit.

Though adding the judicial branch defendants, the Amended Complaint does not substantively alter the allegations or causes of action from the original complaint. In fact, other than identifying the judicial branch defendants in paragraphs 42-50, the plaintiffs do not make any specific claims against them. Notably absent from the Amended Complaint is a single allegation that any of the individual plaintiffs have filed adoption petitions in any of the three defendant chancery districts.

The Amended Complaint should be dismissed against the judicial branch defendants because the plaintiffs lack Article III standing and there exists no case or controversy as between the plaintiffs and the judicial branch defendants. The plaintiffs lack the requisite adversity against the judicial branch defendants for purposes of establishing a case or controversy for purposes of standing. Further, the judicial branch defendants are immune under the Eleventh Amendment for which no exception applies. Finally, the plaintiffs have failed to state a claim against the judicial branch defendants under 42 U.S.C. § 1983. For these reasons, more fully set forth below, the Amended Complaint against the judicial branch defendants should be dismissed with prejudice.

BACKGROUND AND FACTS

A. Background

Adoptions in Mississippi are governed by Title 9, Chapter 17 of the Mississippi Code, and commenced by filing a civil action in the appropriate state court. *See generally* Miss. Code Ann. § 93-17-1 *et seq.*; *see also* Miss. Const., art. 1, §§ 1 & 2, & art. 6, §159. Chapter 17 of the

Mississippi Code applies to all adoption proceedings, whether filed as a civil action in which a prospective adopting party or parties seek to adopt a non-foster care participant, or as a civil action in which a prospective adopting party or parties seek to adopt an individual currently in the foster care program.

Under Section 93-17-3, “any person may be adopted in accordance with the provisions of this chapter in term time or in vacation by an unmarried adult or by a married person whose spouse joins in the petition.” *See* Miss. Code Ann. § 93-17-3(4). A separate statutory provision, originally enacted by the Mississippi Legislature in 2000, states “[a]doption by couples of the same gender is prohibited.” *See* Miss. Code Ann. § 93-17-3(5). It is the latter statutory provision that the plaintiffs seek to challenge in this Court.

B. The Lawsuit

The plaintiffs initially filed suit on August 12, 2015, naming only the executive branch defendants, in their official capacities, challenging the constitutionality of Mississippi Code Annotated § 93-17-3(5). [Compl., Docket No. 1]. According to plaintiffs, Section 93-17-3(5) violates the Equal Protection and Due Process Clauses of the United States Constitution. On September 11, 2015, and after the executive branch defendants moved to dismiss the Complaint for lack of jurisdiction, the plaintiffs filed the Amended Complaint to include the judicial branch defendants. [Am. Compl., Docket No. 23].

C. The Plaintiffs

1. Campaign for Southern Equality and Family Equality Council

Campaign for Southern Equality and Family Equality Council are advocacy groups that conduct legal clinics, provide resources and support, engage in litigation, and publicly advocate LGBT/LGBTQ rights in Mississippi and elsewhere. [*Id.*, at ¶¶ 7-9]. The individual plaintiffs

include married and unmarried women alleging they want to pursue an adoption action under Mississippi law at some point in the future. None of the individual plaintiffs claim to have ever filed an adoption proceeding in any Mississippi state court. *See generally*, [Am. Compl., Docket No. 23].

2. The Individual Plaintiffs

Plaintiffs Phillips and Smith allege they are married, and that Phillips is the biological mother of an eight year old daughter. [*Id.* at ¶¶ 10, 13]. They allege they want Smith to adopt Phillips' eight year old daughter, and the daughter wants to be adopted by Smith. [*Id.* at ¶ 17]. Phillips and Smith do not allege they have filed an adoption petition in State court. Rather, they complain they have been unable to secure a home study to facilitate the adoption. [Am. Compl. at ¶ 18].

Plaintiffs Garner and Hrostowski allege they are married, and that Garner is the biological mother of a fifteen year old son. [*Id.* at ¶ 19]. They allege that Hrostowski wants to adopt Garner's fifteen year old son, and the son wants to be adopted by Hrostowski. [*Id.* at ¶ 25]. They claim that they consulted an attorney about an adoption approximately fifteen years ago – around the time of Garner's son's birth, before the original version of Section 93-17-3(5) went into effect in 2000, and when essentially no state in the country legally recognized same sex marriages – and were told adoption was not possible under Mississippi law. [*Id.* at ¶ 22]. The Amended Complaint is silent regarding other steps, if any, Garner and/or Hrostowski have ever taken to pursue a Mississippi adoption.

Plaintiffs Harbuck and Rowell allege they are not married, are engaged to be married and plan to be married in January 2016. [*Id.* at ¶ 26]. They allege that, once married, they hope to jointly adopt children through Mississippi's foster care system. [*Id.* at ¶ 27]. Harbuck or Rowell

do not allege they have taken any affirmative steps to become a foster care resource parent or initiated any adoption proceedings, or specify any particular time in the future they might attempt to do so.

Plaintiffs Sweeten-Lunsford and Lunsford allege they are married, and want to adopt children through foster care. [*Id.* at ¶ 31]. They do not claim to have ever submitted an application to participate in the foster care program. However, they allege both attended a past DHS training session for potential foster care resource parents, spoke with an unidentified social worker, and were told they could not participate in the foster program or adopt foster children. [*Id.* at ¶ 32]. Their allegations do not identify when any such conversation or training session took place. Additionally, the Amended Complaint's only new factual allegations assert that "on or about July 1, 2015" Sweeten-Lunsford called an unidentified DHS employee on the telephone. [*Id.* at ¶ 34]. According to the amended pleading, the unnamed employee allegedly spoke with Executive Director Berry, and advised Sweeten-Lunsford that Section 93-17-3(5) precluded Sweeten-Lunsford and Lunsford from participating in the foster program or adopting through the program. [*Id.*].

D. The Judicial Branch Defendants

The Tenth, Fourteenth, and Twentieth District Chancery Courts are comprised of the courts of Forrest, Lamar, Marion, Pearl River, Perry, Chickasaw, Clay, Lowndes, Noxubee, Oktibbeha, Webster, and Rankin Counties. [*See* Miss. Const., art. 6, § 152; Miss. Code Ann. §§ 9-5-3, 9-5-35, 9-5-43, 9-5-57]. Judges Dawn Beam, M. Ronald Doleac, Deborah J. Gambrell, Johnny L. Williams, Kenneth M. Burns, Dorothy W. Colom, Jim Davidson, John Grant, and John C. McLaurin, Jr. are the current Chancery Judges for the Tenth, Fourteenth, and Twentieth

Chancery Districts, [see Miss. Code Ann. §§ 9-5-36, 9-5-45, 9-5-58], and are sued in their official capacities. [Am. Compl., at ¶¶ 42-50, Docket No. 23].

Other than naming the judicial branch defendants, there are no specific allegations against them beyond paragraphs 42-50. Moreover, all of the referenced paragraphs contain the same averments as to each Chancellor. See, e.g., ¶ 42 (“Chancellor Beam has the responsibility for resolving matters related to adoption petitions in Forrest County and is one of the judicial officers charged with approving adoptions in that county. Miss. Code Ann. § 93-17-3”). These same paragraphs also allege that each Chancellor was and is acting under the color of state law at all relevant times.¹ The plaintiffs do not allege any of the judicial branch defendants have adjudicated any adoption suits by them in the past or that any such suits are pending.

ARGUMENT

I. Standard of Review

A. Rule 12(b)(1)

Dismissal based on Rule 12(b)(1) is proper when it appears certain that plaintiffs cannot prove any set of facts in support of their claim which would entitle them to relief. *Pan-American Life Ins. Co. v. Bergeron*, 82 Fed. Appx. 388 * 1 (5th Cir. 2003)(citing *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir.1995)). A court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* (citing *Ynclan v. Department of the Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991)). The burden of proof on a Rule 12(b)(1)

¹ This description proffered by the plaintiffs mischaracterizes the true nature of a Chancellor’s adjudicatory role in adoption proceedings. To the extent that the plaintiffs seek to attach any legal significance to their summary of the Chancellor’s adjudicatory role in adoption proceedings, the judicial branch defendants reject the characterization and rely on the totality of the adoption code set forth in Sections 93-17-1 through 93-17-31 of the Mississippi Code.

motion to dismiss is on the party asserting jurisdiction. *Id.* (citing *Ramming v. United States*, 281 F.3d 158, 160 (5th Cir.1996)).

B. Rule 12(b)(6)

In considering a motion under Rule 12(b)(6), the “court accepts ‘all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *Virginia College, LLC v. Martin*, 2012 WL 2873888 * 1 (S.D. Miss. July 12, 2012)(citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir.2004)). “To overcome a Rule 12(b)(6) motion, [p]laintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

“‘Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).’” *Id.* at 555 (citations and footnote omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556).

It follows that “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not ‘show[n]’ — that the pleader is entitled to relief.” *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). “This standard ‘simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of’ the necessary claims or elements.” *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir.2008) (citing *Twombly*, 550 U.S. at 556).

II. The Plaintiffs Lack Standing to assert Claims against the Judicial Branch Defendants.

To make out the required case or controversy, the plaintiffs must meet each of three separate elements for standing:

- (1) the plaintiff[s] 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;
- (2) there is 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 the independent action of some third party not before the court; and
- (3) 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). The plaintiffs, as the parties seeking to invoke the court’s jurisdiction, have the burden of proof. *Id.* at 561. “The court must evaluate each plaintiff’s Article III standing for each claim; ‘standing is not dispensed in gross.’” *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). A failure to establish every standing element deprives the court of jurisdiction over the claim at issue. *See Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

A. The plaintiffs lack a real and threatened injury-in-fact.

The plaintiffs must delineate, and ultimately establish, an injury-in-fact that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. They cannot simply rely on allegations that some injury will occur at some indefinite point in time. Instead they must show “a real and immediate threat of future injury in order to satisfy the ‘injury in fact’ requirement.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983) (holding that because injunctions regulate future conduct, a party has standing to seek injunctive

relief only if he alleges a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury).²

To meet the standing requirement when suit is brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the plaintiffs must establish “actual present harm or a significant possibility of future harm.” *Bauer v. Texas*, 341 F.3d 353 (5th Cir. 2003) (citing *Peoples Rights Org. v. City of Columbus*, 152 F.3d. 522, 527 (6th Cir. 1998). “An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Id.* (citing *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972).

The “‘actual controversy’ required under 28 U.S.C. § 2201(a) ‘is identical to the meaning of ‘case or controversy’ for purposes of Article III.’” *Id.* at 358 (citing *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997)). The plaintiffs have failed to demonstrate a real and immediate threat of future injury-in-fact to sustain their standing against the judicial branch defendants. None of the plaintiffs alleges they have filed an adoption proceeding in any Mississippi court at any time. In fact, Harbuck and Rowell are not yet married and only state that they “hope to adopt through the foster care system” at some unidentified point in the future. [Am. Compl., ¶ 27].

Instead, the plaintiffs’ claim their alleged injury as a generalized intent to pursue an adoption decree at some unspecified time in the future and a belief their effort will be unsuccessful. These generalized allegations do not constitute a threat of future injury-in-fact supporting standing. *See Lofton v. Butterworth*, 93 F. Supp.2d 1343, 1347 (S.D. Fla. 2000)

² The issue of standing “bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention.” *Warth v. Sedlin*, 422 U.S. 490, 499 n.10 (1975). “Ripeness often overlaps with standing, ‘most notably in the shared requirement that the injury be imminent rather than conjectural or hypothetical.’” *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) (quoting *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2nd Cir. 2006)).

(holding plaintiffs who had not initiated adoption proceedings lacked standing to challenge Florida's adoption prohibition). Given their lack of a real and immediate threat of injury at the hands of the judicial branch defendants, plaintiffs' claims should be dismissed.

Based on established Fifth Circuit precedent, the plaintiffs do not have standing to sue the judicial branch defendants in this case. In *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003), plaintiff brought a federal declaratory judgment action against the presiding Texas probate court judge in his official capacity under 42 U.S.C. § 1983. *Id.* at 354. The plaintiff alleged that a provision of the Texas probate code regarding appointment of temporary guardians violated her due process and equal protection rights and thus, was unconstitutional. *Id.* at 355. At the time of plaintiff's federal declaratory judgment action, there were no guardianship proceedings in state court. *Id.* at 357. The court, in considering plaintiff's Article III standing, first addressed the question of prudential standing:

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Prudential standing limitations help courts identify proper questions of judicial adjudication, and further define the judiciary's role in the separation of powers.

Bauer, 341 F.3d at 357 (internal quotation marks and citations omitted). The court, noting that there were no on-going guardianship proceedings at the time the federal suit was filed, held that the plaintiffs lacked standing to seek prospective relief against judges where the likelihood of future encounters is speculative. *Id.* at 358 (citing *Adams v. McIlhany*, 764 F.2d 294, 299 (5th Cir. 1985); *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283 (5th Cir. 1992)).

Particularly relevant to this case was the cautionary note sounded by the Fifth Circuit in *Bauer* that in this circumstance, "there is a danger that excessive superintending of state judicial functions 'would constitute a form of monitoring of the operation of state court functions that is

antipathetic to established principles of comity.” *Id.* (citing *O’Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 678, 38 L.Ed.2d 674 (1974)). Concluding, the court said,

[b]ecause there is no ongoing injury to Bauer and any threat of future injury is neither imminent nor likely, there is not a live controversy for this court to resolve and a declaratory judgment would be inappropriate. *Even assuming, arguendo, that the requirements of Article III standing in this respect are minimally met, prudential standing considerations similarly dictate the impropriety of declaratory relief for those reasons.*

Id. at 358-59 (emphasis supplied).

As in *Bauer* where there were no on-going guardianship proceedings, there are no ongoing adoption proceedings before any of the judicial branch defendants, nor have the individual plaintiffs alleged anything other than a generalized desire to commence adoption proceedings in the future. Any number of circumstances could vitiate plaintiffs’ subjective intentions to pursue adoption proceedings in the future which have nothing whatsoever to do with the judicial branch defendants.

Thus to allow the plaintiffs to by-pass state court adoption proceedings on their unilateral belief their efforts will be futile creates the very type of federal court monitoring of state judicial functions found by the Fifth Circuit to be antithetical to established principles of comity. *See also Metropolitan Life Ins. Co. v. White*, 972 F.2d 122 (5th Cir. 2002) (there is no federal law of domestic relations, which is primarily a matter of state concern); *Gras v. Stevens*, 415 F. Supp. 1148 (S.D. N.Y 1976) (“[D]omestic relations law is an area where federal courts should be especially careful to avoid unnecessary or untimely interference with the State’s administration of its domestic policies.”).

B. No adversity exists for purposes of Article III case or controversy between plaintiffs and judicial branch defendants.

The plaintiffs must also demonstrate the existence of adversity between themselves and the judicial branch defendants for purposes of establishing a case or controversy. Here, the plaintiffs lack the requisite adversity to demonstrate the existence of a case or controversy as found by the Fifth Circuit and other circuit and district courts. *See Bauer*, 341 F.3d at 358-59; *see also In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 22-24 (1st Cir. 1982); *Mendez v. Heller*, 530 F.2d 457 (2nd Cir. 1976); *Gras v. Stevens*, 415 F. Supp. 1148, 1150 (S.D. N.Y. 1976).

In *Bauer*, the Fifth Circuit rejected plaintiff's federal challenge against the presiding state court judge in a challenge to the constitutionality of Texas' temporary guardianship statute. *Id.* at 359. The court stated that "[t]he case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendant have adverse legal interests. *Id.* (citing *Aetna Life. Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). Importantly, the court held that "[t]he requirement of a justiciable controversy *is not satisfied when a judge acts in his adjudicatory capacity.*" *Id.* at 359 (emphasis supplied) (citing *Mendez*, 530 F.2d at 458; *Klein v. University of Kan. Med. Ctr.*, 975 F. Supp. 1408, 1413 (D. Kan. 1997)).

The *Bauer* Court reasoned that "because determinations made under [the state statute] are within a judge's adjudicatory capacity, *there is no adversity between the [plaintiff] and [judge]. . . .*" *Bauer*, 341 F.3d at 361 (emphasis supplied). Therefore, "no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Id.* (citing *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d at 19). Relying on the First Circuit's decision in *Puerto Rico*, the Fifth Circuit reiterated that:

[J]udges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. Second, almost invariably, they have played no role in the statute's enactment. Third, they have not initiated its enforcement. Finally, they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made.

Bauer, 341 F.3d at 361 (citing *Puerto Rico*, 695 F.2d at 19) (internal quotation marks omitted).

The *Bauer* Court concluded that because of the requirements under Texas' guardianship statute, the judge did not and could not have initiated temporary guardianship proceedings against the plaintiff. *Id.* at 360.

The requirements of the Texas probate statute required the judge to be presented with evidence, that an application be filed, notice be given, and a hearing be held, showing that the judge was acting in his adjudicatory capacity in appointing a temporary guardian. *Id.* The same holds true in this case as the plaintiffs (not the Chancellors) would have to initiate an adoption proceeding by filing a petition in the appropriate state court. At that time, the Chancellor would, acting in an adjudicatory role, enter a final decree with respect to the petition. *See* Miss. Code Ann. § 93-17-13.

In *Puerto Rico*, the First Circuit in a decision written by then Judge Breyer, held that no case or controversy existed between a judge who adjudicates claims under a state statute and a litigant who attacks the constitutionality of that statute. *Puerto Rico*, 695 F.2d at 21. The court held that “[j]udges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. They are sworn to uphold the Constitution of the United States. They will consider and decide a claim that a state or Commonwealth statute violates the federal constitution without any interest beyond the merits of the case.” *Id.* at 21. The opinion noted that “[o]ne typically does not sue the court or the judges who are supposed to adjudicate the

merits of the suit” *Id.* Here, the Chancellors would be required to adjudicate the merits of an adoption petition presented to them in accordance with Mississippi’s adoption statutes.

The First Circuit was particularly concerned with the attendant harm caused to the judiciary by allowing plaintiffs to sue the judicial defendants in a federal suit challenging the constitutionality of a state statute:

To require the Justices unnecessarily to assume the role of advocates or partisans would tend to undermine their role as judges. To encourage or even force them to participate as defendants in a federal suit attacking Commonwealth laws would require them to abandon their neutrality and defend as constitutional the very laws that the plaintiffs insist are unconstitutional – laws as to which their judicial responsibilities place them in a neutral posture. Indeed a public perception of partiality might well remain even were the Justices to take no active part in the litigation. *The result risks harm to the court’s stance of institutional neutrality – harm that appeal would come too late to repair.*

Puerto Rico, 695 F.2d at 25 (emphasis supplied). The plaintiffs’ suit in this case causes the precise harm that the court in *Puerto Rico* warned against – that is – to place neutral judges who adjudicate cases in the role of having to defend the very law the plaintiffs have challenged.

In *Mendez*, the Second Circuit rejected plaintiff’s federal suit against a state court judge in a challenge to New York’s durational residency requirement for obtaining a divorce. 530 F.2d at 458-59. The Second Circuit affirmed the district court’s dismissal for want of a justiciable controversy stating that the plaintiff “[p]roceed[ed] on the assumption that a complaint for divorce would be rejected on jurisdictional grounds by the State courts, [and] turned to the federal courts apparently expecting them to be more favorably disposed toward her contention that the [state statute] is unconstitutional.” *Id.* at 458. Adopting the reasoning of the district court, the Second Circuit said,

The court below held that none of the named defendants had a legal interest sufficiently adverse to [plaintiff] to create a justiciable controversy. This

conclusion rested in substance upon its findings that, if a divorce action were commenced, defendant Heller, a Justice of the New York Supreme Court, would be called upon to determine the constitutional validity of the [state statute] and, in doing so, would be acting in a judicial capacity. *In this adjudicatory role, Justice Heller could not take any position on the merits of [plaintiff's] claim prior to his ruling thereon; hence, his posture would be that of an entirely disinterested judicial officer and not in any sense the posture of an adversary to the contentions made on either side of the case.*

Mendez, 530 F.2d at 459 (emphasis supplied).

Particularly relevant in the context of this case – as the plaintiffs have never availed themselves of the State’s adoption proceedings – is the *Mendez* Court’s admonition that the plaintiff “cannot base her federal suit on the rejection of her divorce complaint for failure to meet statutory requirements, for she made no attempt to secure a divorce.” *Mendez*, 530 F.2d at 459 (citations omitted).

As in *Mendez*, the plaintiffs have never attempted to secure an adoption in Mississippi. Continuing, the *Mendez* Court stated that “[a]ppellant’s position rests on the *hypothetical assumption* that, if she sued for divorce, her complaint would be rejected pro forma, without consideration of the constitutional issues presented here. We are unwilling, nor are we constitutionally able, to speculate that this would be the response of the State Courts.” *Id.* (emphasis supplied). The plaintiffs have followed the same path rejected by the court in *Mendez*. The judicial defendants respectfully request that this Court likewise reject plaintiffs’ hypothetical contention.

In *Stevens*, the plaintiff challenged the constitutionality of a provision of New York’s domestic relations law which allowed a wife in a divorce proceeding to apply for an order requiring the husband to pay for the wife to “carry on or defend the action or proceedings” but the statute had no reciprocal provision allowing for the husband to apply the same order. 415 F.

Supp. at 1150. The defendants were, *inter alia*, the presiding justice of the appellate division of the New York Supreme Court and all the justices of the New York Supreme Court. *Id.*

While not raised by the parties, the court said “[we are] bound to consider whether there is the ‘*exigent adversity*’ which is an essential condition precedent to federal court adjudication.” *Id.* (emphasis supplied) (citing *Poe v. Ullman*, 367 U.S. 497, 506, 81 S.Ct. 1752, 1757, 6 L.Ed.2d 989, 997 (1961)). The *Stevens*’ Court relied on the Second Circuit’s decision in *Mendez* stating that “[w]e find guidance in the Second Circuit’s discussion of a rather similar attempt to invoke the declaratory judgment and injunctive powers of federal courts in an action challenging the two-year durational residency requirements for instituting an action for divorce under [New York law].” In concluding the plaintiffs lacked the necessary adversity with the judicial defendants for purposes of case or controversy, the district court stated:

The portion of the opinion of the Court of Appeals concerning the inappropriateness of designating Justice Heller as a defendant in that case applies equally to the designation of Presiding Justice Stevens of the Appellate Division of the New York Supreme Court, and all the Justices of the New York Supreme Court in this one. Action which any of these Justices may take on an application by [plaintiff] under [state law] will be in their capacity as judges who, like us, have taken an oath or affirmation to support the Constitution of the United States article IV. If [plaintiff] is right in thinking that [state law] offends the equal protection clause of the Fourteenth Amendment, they are as bound to strike it down as we are.

Stevens, 415 F. Supp. at 1151.

Based on the holdings and rationales in *Bauer*, *Puerto Rico*, *Mendez*, and *Stevens*, the plaintiffs in this case lack the necessary adversity *vis-a-vis* the judicial branch defendants for purposes of a justiciable case or controversy. Moreover, and assuming *arguendo* that the any of the plaintiffs had filed adoption petitions before any of the judicial branch defendants, adjudication of adoption petitions by the Chancellors would be adjudicatory. *See Bauer*, 341 F.3d at 361 (where determinations made under the statute are within a judge’s adjudicatory

capacity, there is no adversity between the plaintiffs and judges). On this basis, the plaintiffs' claims against the judicial branch defendants should be dismissed with prejudice for lack of a justiciable case or controversy.

C. The judicial branch defendants are immune under the Eleventh Amendment.

The plaintiffs sued the judicial defendants in their official capacities seeking declaratory and injunctive relief. [Am. Compl., Docket No. 23]. According to the plaintiffs, each defendant Chancellor "was and is acting under the color of state law at all relevant times to this complaint." [Am. Compl., ¶¶ 42-50]. The judicial branch defendants are entitled to the immunity from suit provided by the Eleventh Amendment to the United States Constitution. *See Alden v. Maine*, 527 U.S. 706, 712-13 (1999). The Eleventh Amendment provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Absent waiver or a valid abrogation of the State's immunity by Congress, States may not be sued in federal court regardless of the relief requested. *Green v. Mansour*, 474 U.S. 64, 68 (1986); *Martinez v. Texas Dep't of Criminal Justice*, 300 F.3d 567, 573 (5th Cir. 2002).

Congress has not lawfully abrogated Eleventh Amendment immunity through 42 U.S.C. § 1983. *See e.g., Howlett v. Rose*, 496 U.S. 356, 364 (1990); *Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 314 (5th Cir. 1999); *Bryant v. Military Dept. of State of Miss. ex rel. Miss. Air Nat. Guard*, 381 F. Supp. 2d 586, 591 (S.D. Miss. 2005) (Lee, J.) ("[T]here has been no Congressional abrogation of state sovereign immunity as to claims under § 1983[.]") (citations omitted). Eleventh Amendment immunity extends to state agencies, departments and other arms of the state. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S.

139, 144 (1993); *Richardson v. Southern University*, 118 F.3d 450, 452 (5th Cir. 1997). It also extends to state officials acting within their official capacities. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-71 (1989); *Carter v. Mississippi Dep't of Human Servs.*, 2006 WL 2827691, at *2 (S.D. Miss. Sept. 29, 2006) (Wingate, J.).

The Fifth Circuit has recognized that state court judges are entitled to Eleventh Amendment immunity when sued in their official capacities. *See e.g., Davis v. Tarrant County*, 565 F.3d 214, 228 (5th Cir. 2009) (“Texas judges are entitled to Eleventh Amendment immunity for claims asserted against them in their official capacities as state actors.”); *Frey v. Bordis*, 286 Fed. App'x 163, 165 n.2 (5th Cir. 2008) (stating that the Eleventh Amendment bars claims against Mississippi judges sued in their official capacities). The Eleventh Amendment bars any suit against a state official that seeks any form of “retrospective relief,” whether declaratory or injunctive. *Green*, 474 U.S. at 68. Thus, a suit seeking a declaratory judgment that the past acts of a state official violated the Constitution or federal law will not lie.³

1. The *Ex Parte Young* exception does not apply.

To overcome the Eleventh Amendment, a plaintiff must show that his suit fits within the narrow exception carved out in *Ex parte Young*, 209 U.S. 123 (1908). Addressing the *Ex Parte Young* holding in a later case, the Supreme Court explained that “[t]his holding was based on a determination that an unconstitutional state enactment is void and that any *action by a state official* that is purportedly authorized by that enactment cannot be taken in an official capacity

³ *Green*, 474 U.S. at 73 (holding that Eleventh Amendment precluded issuance of a declaratory judgment because “[t]here [was] no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.”); *Puerto Rico Aqueduct*, 506 U.S. at 146 (The Eleventh Amendment “does not permit judgments against state officers declaring that they violated federal law in the past.”). In other words, the plaintiff must allege an “ongoing violation” of federal law and request prospective relief aimed at ending the violation. *K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013) (stating that Eleventh Amendment only permits suits “seek[ing] prospective, injunctive relief from a state actor, in her official capacity, based on an alleged ongoing violation of the federal constitution”).

since the state authorization for such action is a nullity.” *Papasan v. Allain*, 478 U.S. 265, 276 (1986) (emphasis supplied).

The exception in *Young* has been described as a narrowly construed, legal fiction that exists "as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, n.25 (1984) (quoting *Young*, 209 U.S. at 160). However, the Supreme Court has recognized "that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Id.* at 105.

Given these considerations, the Supreme Court has specifically limited the application of *Ex Parte Young*, stating that "[i]n accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal." *Papasan*, 478 U.S. at 277; see *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 (5th Cir. 2007) ("*Ex Parte Young* allows a plaintiff to avoid this bar by naming a state official for the purpose of enjoining the *enforcement* of an unconstitutional state statute.") (emphasis supplied).

(a) The judicial branch defendants adjudicate laws

For application of *Ex Parte Young*, it is not enough to show a defendant has some authority to enforce a challenged law. There also must be some credible threat the defendant will attempt to enforce the statute at issue for a plaintiff to take advantage of *Ex Parte Young*. See *Okpalobi v. Foster*, 244 F.3d 405, 417(5th Cir. 2001) (*Ex Parte Young* requires an ability to enforce a statute and demonstrated willingness to enforce it); see also *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (Eleventh Amendment barred suit, and not case or controversy existed where there was no threat that Attorney General would pursue or encourage other officials to pursue violations of California vehicle code challenged by plaintiff); *Kelley v.*

Metropolitan County Bd. of Education, 836 F.2d 986, 990-91 (6th Cir. 1987) (*Ex Parte Young* inapplicable to defendants not threatening to enforce challenged law), *cert. denied*, 487 U.S. 1206 (1988).

The plaintiffs cannot fit within the narrow *Ex Parte Young* exception because the judicial branch defendants do not enforce but adjudicate state law. *See Bauer*, 341 F.2d at 361 (“[N]o case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of a statute. In *Puerto Rico*, the court noted that “judges sit as arbiters without a personal institutional stake on either side of the constitutional controversy.” *Puerto Rico*, 695 F.2d at 21.

Puerto Rico is instructive on the distinction between adjudication and enforcement of law with respect to the judicial branch defendants. There, members of the Puerto Rico bar sued the Puerto Rico Bar Association (the “Colegio”), the Bar Association Foundation (the “Fundacion”) and the Justices of the Supreme Court of Puerto Rico over mandatory payment of dues and membership. 695 F.2d at 18. The dispute arose when the Colegio filed disciplinary complaints in the Commonwealth Supreme Court accusing a number of local attorneys, including three of the plaintiffs, of nonpayment of dues. *Id.* at 19.

By statute, both the Colegio and the Secretary of Justice could bring a complaint based on nonpayment of dues before the Puerto Rico Supreme Court. *Id.* at 21. The court noted that “[i]n deciding cases based on such complaints, the Justices act as they would in any other case based upon a Commonwealth statute: they sit as adjudicators, finding facts and determining law in a neutral and impartial judicial fashion.” *Id.*

Distinguishing between the Puerto Rico Supreme Court’s adjudicatory and enforcement roles, the court noted that the court had the inherent disciplinary power to discipline attorneys for

causes other than those contained in the statute. *Id.* at 24. Further, the court had the general power to initiate disciplinary proceedings itself, without the involvement of the Colegio or the Secretary of Justice. *Id.* The court said that “[i]nsofar as the plaintiffs direct their claims against the exercise of this disciplinary power, they are suing the Justices as ‘enforcers’ rather than as ‘adjudicators.’” *Id.* In the end, the First Circuit determined that as to the membership and bar dues claims, the Justices were acting in their adjudicatory capacity and not an enforcement role. Thus, in this very narrow set of circumstances, judicial officer could act in an enforcement rather than adjudicatory role.

There are two reasons why *Ex Parte Young* does not apply to the judicial branch defendants in this case. First, they have not and cannot “enforce” the statute the plaintiffs seek to challenge. This is similar to the case in *Bauer* where the court noted that the judge “did not, and could not have initiated temporary guardianship proceedings” *Bauer*, 341 F.3d at 361. Instead, the Texas probate statute required the judge to be presented with evidence, that an application be filed and that notice be given and a hearing held. *Id.* As a result, the judge’s actions were adjudicatory. *Id.*

Second, assuming *arguendo* that any of the plaintiffs file an adoption petition in the future, the judicial branch defendants would be acting as “adjudicators” not “enforcers” of the adoption laws. *Id.* The same holds true on this case. The judicial branch defendants do not initiate adoption petitions and only act within the statutory framework for adoption proceedings. Thus, *Ex Parte Young* does not apply and the Eleventh Amendment bars the plaintiffs’ claims against the judicial branch defendants.

D. The Tenth, Fourteenth and Twentieth Chancery Court Districts are Immune from Suit under the Eleventh Amendment.

The plaintiffs also named the Tenth, Fourteenth, and Twentieth District Chancery Courts of Mississippi. [Am. Compl., ¶¶ 39-41]. In *Chaesez v. Powell*, the Fifth Circuit dismissed claims against various state entities, including the Chancery Court for the Eighth District of Mississippi pursuant to the Eleventh Amendment. 2008 WL 534783 *1 (S.D. Miss. February 22, 2008).

The Court held that “[a]ccepting all of Plaintiff’s allegations as true and applying the law above, it is clear that Plaintiff’s attempt to sue these Mississippi state agencies is barred by the Eleventh Amendment. Accordingly, the Court lacks subject matter jurisdiction over the State Defendants. . . .” *Id.* at *2.

Accordingly, the plaintiffs’ claims against the Tenth, Fourteenth, and Twentieth Districts of Mississippi should be dismissed for lack of subject matter jurisdiction pursuant to the Eleventh Amendment.

III. The Plaintiffs Failed to State a Claim against the Judicial Branch Defendants under 42 U.S.C. § 1983.

Finally, and in addition to the lack of Article III and prudential standing and the lack of a case or controversy, the plaintiffs have failed to state a claim against the judicial branch defendants under 42 U.S.C. § 1983. While the court in *Puerto Rico* found the reasoning of *Mendez* and *Gras* persuasive regarding Article III standing, the court was reluctant to rest its decision entirely on Article III standing where the case could be resolved on nonconstitutional grounds. 695 F.2d at 22 (citing *Hagans v. Lavine*, 415 U.S. 528, 547, 94 S. Ct. 1372, 1384, 39 L.Ed.1d 577 (1974); *Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936)).

The court said that “[w]e interpret *Mendez* and *Gras* as holding that under the circumstances present in those cases, judges were not proper parties in § 1983 actions challenging the constitutionality of state statutes.” 695 F.2d at 22. “In short, § 1983 does not provide relief against judges acting purely in their adjudicative capacity” *Id.* In reaching the conclusion the court reasoned that “we avoid the constitutional problems that might be raised by a more expansive application of the statute.” *Puerto Rico*, 695 F.2d at 23 (citing *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296 76 L.Ed. 598 (1932)). The court further explained that “[w]e avoid explicitly finding that Congress could not make judges proper parties in cases such as this one should it choose to do so, and we avoid the constitutional snares that might otherwise be posed by similar but distinguishable cases. *Id.*”

The First Circuit’s decision in *Puerto Rico* was subsequently followed by the Fifth Circuit in *Bauer* where the court said “[a] section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not a party in a section 1983 action challenging the constitutionality of a state statute.” *Bauer*, 341 F.3d at 359 (citing *Nollet v. Justices of Trial Court of Comm. of Mass.*, 83 F. Supp. 2d 204, 211 (D. Mass. 2000), *aff’d* by *Nollet v. Justices of the Trial Court*, 248 F.3d 1127 (1st Cir. 2000)(unpublished)).

Thus, the plaintiffs have failed to state a claim against the judicial branch defendants under Section 1983 where they have sued them solely for purposes of seeking federal court review of state law. This same maneuver was rejected by the courts in both *Puerto Rico* and *Bauer* and the judicial defendants respectfully urge this Court to do likewise. Because the plaintiffs have failed to state a claim against the judicial branch defendants under Section 1983, their claims should be dismissed pursuant to F.R.C.P. 12(b)(6) with prejudice.

CONCLUSION

For the reasons set forth, the Judicial Defendants move for dismissal of the Amended Complaint against them with prejudice.

THIS the 2nd day of October, 2015.

Respectfully submitted,

TENTH DISTRICT CHANCERY COURT OF MISSISSIPPI; FOURTEENTH CHANCERY COURT DISTRICT OF MISSISSIPPI; TWENTIETH DISTRICT CHANCERY COURT OF MISSISSIPPI; DAWN BEAM, in her official capacity, M. RONALD DOLEAC, in his official capacity, DEBORAH J. GAMBRELL, in her official capacity, JOHNNY L. WILLIAMS, in his official capacity, KENNETH M. BURNS, in his official capacity, DOROTHY W. COLOM, in her official capacity, JIM DAVIDSON, in his official capacity, JOHN GRANT, in his official capacity, JOHN C. McLAURIN, in his official capacity

By: JIM HOOD, ATTORNEY GENERAL, STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing document with the Clerk of this Court using the ECF system and sent a true and correct copy to counsel record.

THIS the 2nd day of October, 2015.

/s/ Douglas T. Miracle