IN THE UNITED STATES DISRICT 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

JUDICIAL BRANCH DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Donna Phillips, Janet Smith, Kathryn Garner, and Susan Hrostowski ("movants") seek a preliminary injunction "enjoining the relevant government officials from enforcing Mississippi Code Section 93-17-3(5). The movants sued several State officials including Governor Phil Bryant, Attorney General Jim Hood, Richard Berry, Executive Director of the Mississippi Department of Human Services ("DHS"), and DHS ("executive branch defendants").

After the executive branch defendants moved to dismiss the original complaint, the Plaintiffs, including the movants, amended the complaint to sue the Tenth, Fourteenth and Twentieth District Chancery Courts. These three districts are comprised 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 sued in their official capacities. [Am. Compl., at ¶¶ 42-50, Docket No. 23] ("judicial branch defendants").

The movants have not and cannot prove the requisite elements for awarding injunctive relief in this case against the judicial branch defendants. The movants are not likely to succeed on the merits of their claims against the judicial branch defendants for a number of reasons. First, 1996 Congressional amendments to 42 U.S.C. allow injunctive relief against judicial officers in ***only*** two narrow circumstances, neither of which applies. Thus, injunctive relief is unavailable against the judicial branch defendants in this case. Further, a lack of Article III and prudential standing, and the judicial branch defendants' Eleventh Amendment immunity, require denying the movants' motion for preliminary injunction.[1]

The movants' burden of proving the remaining equitable factors justifying preliminary injunctive relief against the judicial branch defendants likewise cannot be satisfied against the judicial branch defendants. Enjoining the judicial branch defendants would not alleviate the movants' alleged irreparable harms. Moreover, the balance of harms and the public interest weigh heavily against preliminarily enjoining the judicial branch defendants. The judicial branch defendants, as judges, are neutral arbiters of cases presented to them. Allowing them to remain as defendants in this lawsuit, much less enjoining them, does serious and potentially

[1] The judicial branch defendants do not address the purported merits of the plaintiffs' hypothetical constitutional challenge to Miss. Code Ann. § 93-17-3(5) which, as sitting judges, they may be called upon to adjudicate in the future. As set forth, *infra*, this is the precise reason why the plaintiffs lack standing to sue the judicial branch defendants in the first instance as they are not adversaries, but judges who adjudicate the law in individual cases. *See Bauer v. Texas*, 341 F.3d 353 (5th Cir. 2003) ("[B]ecause determinations made under [the state statute] are within a judge's adjudicatory capacity, there is no adversity between the [plaintiff] and [judge]. . . ."). 341 F.3d at 361. Further, "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.*

irreparable damage to the neutrality the judicial branch must maintain. For these reasons, and those asserted in the judicial branch defendants' motion to dismiss, the Court should deny the movants' request for preliminary injunctive relief.

FACTS

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 statute the plaintiffs seek to challenge in this Court.

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]. Other than listing the names of the judicial branch defendants, there are no specific allegations against them beyond paragraphs 42-50.[2] Each of the referenced paragraphs contains the same averments as to each Chancellor. [Am. Compl., ¶¶ 42-50]. These same paragraphs also allege that each Chancellor was and is acting under the color of state law at all relevant times.[3] The plaintiffs do not allege any of the judicial branch defendants have adjudicated any adoption suits in the past or that any such suits are pending.

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].

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

[2] 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.*].

[3] The description proffered by the plaintiffs regarding the Chancellor's role in adoption proceedings is their own summary. To the extent that the plaintiffs seek to attach any legal significance to their description of the Chancellor's judicial 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.

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 as to any other steps, if any, Garner and/or Hrostowski have ever taken to pursue an adoption in Mississippi.

Plaintiffs Harbuck and Rowell allege they are not married, are engaged to be married and plan to wed 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.

On August 28, four individual plaintiffs – Phillips, Smith, Garner and Hrostowski (the "movants") – moved for a preliminary injunction claiming Section 93-17-3(5) must be interpreted as unconstitutional "as applied" to them in potential future adoption suits in Mississippi chancery courts. The movants seek a preliminary injunction prohibiting the defendants from "enforcing" Section 93-17-3(5) in those potential future adoption proceedings. [Mot. Prelim. Inj., Docket No. 13; Mem. Supp. Mot. Prelim. Inj., Docket No. 14].

With their motion, movants Smith and Hrostowski submitted sworn declarations reiterating and verifying their complaint allegations. [Smith Decl., Docket No. 13-1; Hrostowski Decl., Docket No. 13-2]. Smith and Hrostowski each assert a desire to adopt their spouses' biological child through a future "stepparent adoption" proceeding. Smith is a lifelong Mississippian and, on August 1, 2013, she and Phillips married in Maryland. [Smith Decl., at ¶¶ 2 & 5, Docket No. 13-1]. In 2007, Phillips gave birth to HMSP, now eight years old, whom Smith wants to adopt. [*Id.* at ¶¶ 6 & 12]. Smith does not allege she has ever filed an adoption petition regarding HMSP in any Mississippi chancery court at any time. However, she believes that obtaining a home study is the first step towards adopting HMSP. [*Id.* at ¶ 13].

Smith contends that she and Phillips contacted social work agencies, and two private licensed clinical social workers, on unidentified past dates. [*Id.*]. According to Smith's declaration, those unidentified persons told her and Phillips a home study would be "'useless' because of" Section 93-17-3(5) and "several social workers told us that they would not even consider performing a home study for us because they feared it would endanger the organizations' standing with the State of Mississippi." [*Id.*].

Hrostowski is a Mississippi resident and, on June 17, 2014, she and Garner married in Washington, D.C. [Hrostowski Decl., at ¶ 6, Docket No. 13-2]. Fifteen years ago, Garner gave birth to HMG, whom Hrostowski wants to adopt. [*Id.* at ¶¶ 7 & 10]. Hrostowski does not claim she has ever filed an adoption petition regarding HMG in any Mississippi chancery court at any time. Instead, Hrostowski asserts she and Garner consulted an attorney approximately fifteen years ago and "were advised that, because of [Section 93-17-3(5)], it would be impossible for me to adopt HMG under Mississippi law." [*Id.*, at ¶ 12].

ARGUMENT

Preliminary injunctive relief is extraordinary, and must be supported by a clear entitlement to the relief sought when it would alter the status quo. *Exhibitors Poster Exch. Inc. v. National Screen Serv. Corp.*, 441 F.2d 560, 561-62 (5th Cir. 1971). The movants have the burden to prove each of the following elements:

> (1) a substantial likelihood they will prevail on the merits; (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted; (3) their substantial injury outweighs the threatened harm to the party to be enjoined; and (4) granting the preliminary injunction will not disserve the public interest.

Texas Med. Providers Performing Abortion Servs. v. Lakey 667 F.3d 570, 574 (5th Cir. 2012) (internal citation omitted).

I. No substantial likelihood of prevailing on the merits.

A. Injunctive relief is not available against the judicial branch defendants in this Section 1983 Action.

Prior to 1996, judicial officers were not immune from suits seeking injunctive relief. Relief of that nature was available under Section 1983 against state court judges acting in their judicial capacity. *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984). In 1996, however, Congress passed the Federal Courts Improvement Act of 1996 ("FCIA") amending Section 1983 to

provide that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief ***shall not be granted*** unless a declaratory decree was violated or declaratory relief is unavailable." 42 U.S.C. § 1983. *Allen v. Normand*, 2009 WL 2448253 (E.D. La. Aug. 7, 2009) (emphasis supplied). Absent those enumerated circumstances in the statute, injunctive relief against judicial officers is not available.

The FCIA statutorily overruled *Pulliam* as to the availability of injunctive relief against a state judge in his or her official capacity. *Id.* (citing *Guerin v. Higgins*, 2001 WL 363486, at * 1 (2d Cir. Apr. 11, 2001); *Green v. District Attorney Ofc.*, 2009 WL 651132, at *5 (E.D. La. Mar. 10, 2009); *Nollet v. Justices*, 83 F. Supp. 2d 204, 210 (D. Mass. 2000); *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) (The 1996 amendment to Section 1983 limits the relief available against a federal judge to declaratory relief.). The plaintiffs have not nor can they meet either of the enumerated exceptions for granting injunctive relief against judicial officers, *i.e.*, that "a declaratory decree was violated or declaratory relief is unavailable." Therefore, the plaintiffs request for preliminary and ultimately permanent injunctive relief cannot lie against the judicial branch defendants and should be denied accordingly.

B. No Article III case or controversy exists with respect to plaintiffs' claims against the judicial branch defendants.

A preliminary injunction is never appropriate when the movants lack Article III standing. *See, e.g., Prestage Farms, Inc. v. Board of Sup'rs of Noxubee County, Miss*., 205 F.3d 265, 267-68 (5th Cir. 2000), *reh'g en banc denied*, 216 F.3d 1081 (vacating preliminary injunction for lack of standing and remanding for dismissal). The judicial branch defendants have previously moved to dismiss the Amended Complaint due to plaintiffs' lack of standing. To make out the required case or controversy, federal plaintiffs' claims 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 failure to establish any one of the elements deprives the court of jurisdiction to hear the lawsuit. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for Better Env't* 523 U.S. 83, 94 (1998) (internal quotations omitted).

1. 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).

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)).

Based upon the allegations in the Amended Complaint, 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 actually filed an adoption proceeding in any Mississippi court at any time. Instead, plaintiffs' describe their alleged injury as a generalized intent to pursue an adoption decree at some point in the future and a belief 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) (holding plaintiffs who had not initiated adoption proceedings lacked standing to challenge Florida's adoption prohibition).

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 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.' *Valley Forge Christian College [v. Americans United]*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed2d 700 [(1982)]. 'Prudential standing limitations help courts identify proper questions of judicial adjudication, and further define the judiciary's role in the separation of powers.' *Ruiz v. Estelle*, 161 F.3d 814, 829 n.22 (1988)." *Id.* at 411.

Bauer, 341 F.3d at 357. The court noted that there were no on-going guardianship proceedings at the time suit was filed and that it has held that plaintiffs lack 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)).

The *Bauer* Court cautioned that "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 its standing analysis, the court said

> Because 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. To permit the plaintiffs to by-pass state court adoption proceedings on their unilateral belief such will be futile creates just the type of federal court monitoring of state court functions found to be antithetical to established principles of comity expressed by the Supreme Court in *O'Shea* and applied by the Fifth Circuit in *Bauer*. *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."). This principle applies with equal force in this case and the plaintiffs' claims against the judicial branch defendants should be dismissed with prejudice.

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

The movants must also demonstrate the existence of adversity between themselves and the judicial branch defendants for purposes of a justiciable 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, as well as 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 suit 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)). The court stated that "[t]he requirement of a justiciable controversy *is not satisfied when a judge acts in his adjudicatory capacity*." *Id.* at 359 (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*. The requirements of that 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.* at 361. The same holds true in this case as the movants (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 statute and a litigant who attacks the constitutionality of that statute. *Puerto Rico*, 695 F.2d at 21. The court again 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.* The attendant harm caused by allowing plaintiffs to sue the judicial defendants in this case was squarely addressed:

> 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. 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 court 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.

Particularly relevant in the context of this case – since 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). This is precisely what the plaintiffs have done in this case. 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.* 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 holding that the plaintiffs lacked the necessary adversity with the judicial defendants, 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 lack the necessary adversity with respect to the judicial branch defendants for purposes of establishing 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 case or controversy.

3. 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).[4]

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 expressly recognized that state court judges are also 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.[5]

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[4] 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).

[5] *Green*, 474 U.S. at 73 (holding that Eleventh Amendment precluded issuance of a declaratory judgment because "[t]here [was]s 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

(a) 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 subsequent decision, 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 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 *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).

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").

(i) 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 purse 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 state law for purposes of *Ex Parte Young* – they adjudicate the 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.*

The court noted that the Puerto Supreme Court had the inherent disciplinary power to discipline attorneys for causes other than those contained in the statute. *Id.* at 24. The court also found that the Supreme 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.*

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.

4. The Tenth, Fourteenth and Twentieth Chancery Court Districts are immune 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.

5. The Plaintiffs have failed to state a claim under 42 U.S.C. § 1983.

Finally, and in addition to the lack of Article III and prudential standing and no 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, it was reluctant to rest its decision entirely on Article III standing where the case could be resolved on non-constitutional 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 statue." *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)(unpubished)).

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.

II. No equitable factors justify the movants' requested preliminary injunctive relief.

A. No threat of irreparable injury in the absence of preliminary injunctive relief against the defendants.

Assuming the movants could prove a substantial likelihood of success on the merits, which they cannot, they still must independently demonstrate they will be irreparably harmed if the Court does not enter a preliminary injunction against the defendants. As the Court in *Mendez*, supra, noted that 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).

This is precisely what the movants have done in this case. The Mendez Court continued stating 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.*

B. The balance of harms weighs against awarding movants' requested preliminary injunctive relief targeting the defendants.

As set forth, *supra*, the First Circuit in *Puerto Rico* spoke directly to the harm caused by allowing the judicial branch defendants to be named in a federal lawsuit challenging the constitutionality of a state statute. "To require the Justices to unnecessarily 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 [state laws] would be to 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 responsibility place them in a neutral posture." 695 F.2d at 25.

Moreover, Congress has spoken to the very limited circumstances in which injunctive relief shall lie against a judicial officer – circumstances which here are lacking. Thus, granting injunctive relief against the judicial branch defendants is antithetical to the clear language of Section 1983. Compared to the lack of any alleged irreparable harm the movants face due to the defendants conduct, the potential harm to defendants due to the movants' sought after injunction cuts against awarding a preliminary injunction. Thus, the movants request for preliminary relief against the judicial branch defendants should be denied.

C. A preliminary injunction would disserve the public interest.

As to the final factor, it is true that, assuming the movants are somehow likely to succeed on the merits here, "[g]enerally, the public interest is served by enjoining the enforcement of a law that likely violates the Constitution." *Colorado Christian Univ. v. Sebelius*, 51 F.Supp.3d 1052, 1064 (D. Colo. 2014), *appeal docketed*, No. 14- 1329 (10th Cir. Aug. 19, 2014) (citing *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010)). Nevertheless, federal courts still "should pay particular regard for the public consequences" when "employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

For similar reasons set forth above, a preliminary injunction against the judicial branch defendants would disserve the public interest. As the First Circuit said in Puerto Rico "[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 – a harm that appeal would come too late to repair." *Puerto Rico*, 695 F.2d at 25.

CONCLUSION

For the reasons set forth, the judicial branch defendants request that the Court deny movants motion for preliminary injunction.

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, ATTORNY 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