UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY *et al.*,	§	
Plaintiffs,	§	
vs.	§	**CIVIL ACTION NO. 3:15-cv-578-DPJ-FKB**
The MISSISSIPPI DEPARTMENT OF HUMAN SERVICES *et al.*,	§	
Defendants.	§	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

MCDUFF & BYRD

767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs Donna Phillips and Janet Smith, and Kathryn Garner and Susan Hrostowski, (collectively, the "Parent Plaintiffs"), respectfully submit this Reply Memorandum of Law in further support of their Motion for a Preliminary Injunction.

PRELIMINARY STATEMENT

Plaintiffs and Defendants actually agree on many, if not most, of the core issues presented by this case. There is no dispute that the Miss Code. Ann. § 93-17-3(5) (the "Mississippi Adoption Ban") states in plain English that "couples of the same gender cannot adopt." There is no dispute that the Plaintiffs, as lesbian couples, are categorically prohibited from adopting as a result of this statutory language. And there is no dispute that, if Plaintiffs had taken the time-consuming and expensive steps necessary to actually file adoption petitions, the Mississippi Adoption Ban, on its face, would require that those petitions be summarily rejected based solely on the Plaintiffs' sexual orientation.

Other than arguing that the Court should not grant a preliminary injunction based on the same meritless technical and procedural arguments raised by Defendants in their Motion to Dismiss,[1] Defendants really advance only two main arguments on the merits for why Plaintiffs' preliminary injunction should be denied. First, Defendants urge this Court to take a specious view of recent, binding Supreme Court precedent. Thus, notwithstanding the clear emphasis on the equal dignity of gay people, their families, and their children articulated repeatedly throughout the Supreme Court's decisions in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell* v. *Hodges*,

[1] Defendants' arguments based on standing, immunity and abstention are fully addressed and rebutted in Plaintiffs' Opposition to Defendants' Motions to Dismiss and are not repeated here, D.E. #58. They do not in any way undermine Plaintiffs' ability to bring an equal protection challenge to a statute that specifically targets them for discrimination against the state officials and agencies charged with enforcing that statute. *See* Pl.s' Opp. to Defs.' Mots. to Dismiss at 7-31 ("Pls.' Opp. to MTD").

135 S. Ct. 2584 (2015), Defendants contend that those cases should be narrowly and artificially read to apply only to marriage licenses and their logic should not be "over-extended" to apply to adoption petitions—as if gay couples were entitled to equal protection of the laws only up to the point of getting married, but not with respect to having children or anything else. But Defendants' tortured interpretation of *Windsor* and *Obergefell* could hardly be more misguided. The Supreme Court has explicitly held that, without formal legal recognition of their families, "children suffer the stigma of knowing their families are somehow lesser . . . [and are] relegated to a more difficult and uncertain family life." *Obergefell*, 135 S.Ct. at 2590. That is exactly what the Mississippi Adoption Ban does to the children of the Plaintiff Parents here and why this motion should be granted.

Second, Defendants seek to justify the Mississippi Adoption Ban on the theory that "dual-gender parenting is preferable and should be encouraged where possible by prohibiting adoption by same-gender couples." Exec. Defs.' Opp. to Prelim. Inj., D.E. #21, at *15, 18 ("Exec. Defs.' Opp. to PI"). However, as explained in the Reply Affidavit of University of Indiana Professor Brian Powell submitted herewith, the view that straight parents are "preferable" to gay parents, or that a child is better off with a male and female parent (as opposed to two loving, supportive parents), is disproven by decades of mainstream social science research and therefore lacks any basis in rationality. *See* Powell Aff. ¶ 9-13. It certainly cannot satisfy the showing required to meet the heightened scrutiny now applied to laws that discriminate against gay people. *See Obergefell*, 135 S. Ct. at 2608; *Windsor*, 133 S. Ct. at 2696–97.

Moreover, regardless of whether it would be rational in light of *Windsor* and *Obergefell* for a state or local government to endorse or promote a preference for "dual-gender" parenting, the two couples seeking this preliminary injunction *already* have children whom they have raised since birth. Donna and Jan's daughter, H.M.S.P., and Kathy and Susan's son, H.M.G., currently have two fully-functioning parents. Since both children have biological mothers who are lesbians, under no circumstances is there a scenario where either child will be getting a parent of the opposite sex. As a result, the only impact that the Mississippi Adoption Ban has on them is to pointlessly introduce stigma, pain and uncertainty into their daily life. To say—in 2015—that it is somehow rational to destabilize married couples with children and to weaken the bonds between parent and child by barring married gay couples from adopting, defies not only logic and common sense, but the Fourteenth Amendment to the United States Constitution.

ARGUMENT

In order to obtain a preliminary injunction, Plaintiffs must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest." *Valley* v. *Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997); *see also* Exec. Defs.' Opp. to PI, at *7; Jud. Defs.' Opp. to Prelim. Inj., D.E. #54, at *7 ("Jud. Defs.' Opp. to PI"). As discussed below, there can be no serious question that the Parent Plaintiffs, Donna Phillips and Janet Smith, and Kathryn Garner and Susan Hrostowski, meet that standard here.

I. Likelihood of Success on the Merits

The Mississippi Adoption Ban unconstitutionally discriminates against the Parent Plaintiffs by barring them from adopting their own children based solely on the fact that they are a "couple of the same gender." Miss. Code. Ann. § 93-17-3(5). The Defendants do not dispute that the Mississippi Adoption Ban does exactly what it says it does: discriminate against gay couples based solely on their sexual orientation.

A. ***Windsor* and *Obergefell* Control the Result Here**

Conceding that the statute discriminates, the Executive Branch Defendants argue that the Supreme Court's recent decisions in *Obergefell* and *Windsor* somehow permit Mississippi to continue to discriminate against married gay couples who wish to adopt. According to the Executive Branch Defendants, it "would be entirely inappropriate" to "over-extend[]" *Windsor* and *Obergefell* to strike down the Mississippi Adoption Ban because those decisions hold that "federal and state governments must recognize valid same sex marriages, and states must license them," but do not explicitly cover adoption. Exec. Defs.' Opp. to PI, at *15-16.

This argument, however, makes no more sense than it did when Mississippi and other Southern states argued many years ago that racial segregation and discrimination remained permissible after the Supreme Court's ruling in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In *Evers* v. *Jackson Municipal Separate School District*, for example, the Jackson Municipal School District contended that, even in light of the Supreme Court's decision in *Brown*, "instead of being injured by separate schools for the members of the Negro and white races, such schools were advantageous to the pupils of both races." 232 F. Supp. 241, 242 (S.D. Miss. 1964); *see also McCain* v. *Davis*, 217 F. Supp. 661, 663 (E.D. La. 1963) (noting that the City of New Orleans

argued that a statute forbidding "white hotels to provide accommodation for Negroes" was constitutional); *Browder* v. *Gayle*, 142 F. Supp. 707, 711 (M.D. Ala. 1956) (Chief of Police of Montgomery argued that "segregation of privately owned buses within cities within the State of Alabama is in accordance with the laws of the State of Alabama and the City of Montgomery" (internal quotation marks omitted)).

Just as *Brown* was grounded in the now obvious principle that racial segregation violates the U.S. Constitution, *Windsor* and *Obergefell* are premised on the similarly broad proposition that gay and lesbian Americans must be granted the same equal protection of the laws as straight Americans. In reaching this result, there can be no question that the Supreme Court relied heavily on exactly the factors and circumstances at issue here—namely, the close ties between marriage, family, and childrearing for gay people as well as straight people. *Obergefell*, 135 S.Ct. at 2608; *see also Windsor*, 133 S.Ct. at 2696. Thus, the Supreme Court found that a "basis for protecting the right [of gay people] to marry is that marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education." *Obergefell*, 135 S.Ct. at 2600. And it recognized that "[b]y giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Id.* (quoting *Windsor*, 133 S.Ct at 2694). Given these clear statements of the Supreme Court, it would not be "over-extending" the Supreme Court's decisions in *Windsor* and *Obergefell* to apply their logic to the adoption of children by married gay parents.

B. Heightened Scrutiny Applies

Although Defendants concede that the Mississippi Adoption Ban discriminates against Plaintiffs based on their sexual orientation, they contend that heightened scrutiny does not apply because married gay couples do not constitute a "suspect class" for equal protection purposes. Exec. Defs.' Opp. to PI, at *16-17. But in *Campaign for Southern Equality* v. *Bryant*, Judge Reeves stated only last year that "gay and lesbian Mississippians are a discrete minority group that lacks political power and has long been subject to discrimination, warranting heightened scrutiny." 64 F. Supp. 3d 906, 928 (S.D. Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015). Moreover, the Supreme Court itself applied some form of heightened scrutiny in *Windsor* and *Obergefell* to strike down laws that discriminate against gay people, as have numerous other courts. *See Obergefell*, 135 S. Ct. at 2608; *Windsor*, 133 S. Ct. at 2696-97; *see also SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) ("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."); *Windsor* v. *United States*, 699 F.3d 169, 185 (2d Cir. 2012) ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny."); *Love* v. *Beshear*, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014); *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1016 (W.D. Wis. 2014); *Whitewood* v. *Wolf*, 992 F. Supp. 2d 410, 430 (M.D. Pa. 2014); *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013).

The two cases relied on by Defendants—*Lofton* v. *Secretary of Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) and *Johnson* v. *Johnson*, 385 F.3d 503 (5th Cir. 2004)—were both decided before *Windsor* and *Obergefell* and have now been rendered obsolete as a result. *Lofton*, a non-binding

Eleventh Circuit case, as discussed below, is no longer good law. And *Johnson* did not hold that gay people do not constitute a suspect class. Rather, the *Johnson* court merely noted—as was true in 2004—that "[n]either the Supreme Court nor this Court has recognized sexual orientation as a suspect classification," 385 F.3d at 532, and held that the discrimination at issue against the gay plaintiff was improper as it did not even survive rational basis scrutiny. *Id.* ("[A] state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims.").[2] But heightened scrutiny is clearly the appropriate standard today, since many courts have now explicitly held that gays and lesbians constitute a suspect or quasi-suspect class entitled to heightened scrutiny. *See*, *e.g.*, *Windsor*, 699 F.3d at 183 ("[H]omosexuals compose a class that is subject to heightened scrutiny . . . We further conclude that the class is quasi-suspect."); *Love*, 989 F. Supp. 2d at 547 ("This Court finds that homosexual persons constitute a quasi-suspect class . . . given intermediate scrutiny."); *Whitewood*, 992 F. Supp. 2d at 430 ("Having concluded that classifications based on sexual orientation are quasi-suspect, we proceed to apply intermediate scrutiny.").

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[2] The issue has arisen in only three other Fifth Circuit decisions, all pre-*Obergefell,* and those offer Defendants no more support: (1) *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985), which this Court, in *Saldano* v. *Roach*, 363 F.3d 545, 552 (5th Cir. 2004), explicitly acknowledged as abrogated by the Supreme Court, (2) *James* v. *Hertzog*, 415 F. App'x 530, 532 (5th Cir. 2011), an unpublished and non-precedential case that again observed, in nonbinding dicta and without analysis, that the Supreme Court had not previously recognized sexual orientation as a suspect class, and (3) *Shelby* v. *Dupree*, 574 F. App'x 397, 398 (5th Cir. 2014), an unpublished and non-precedential case that incorrectly cited *Johnson*, in nonbinding dicta and without analysis, for the proposition that sexual orientation is not a suspect class (*Johnson* did not say sexual orientation could not be suspect, it merely observed that the Supreme Court and Fifth Circuit had not previously so held). The latter two cases were brought by prisoners and were all easily disposed of without reaching the question of the appropriate level of scrutiny for sexual orientation discrimination—in *Shelby* and *James*, there was no evidence that sexual orientation was even a factor in the prisoners' treatment. *Shelby*, 574 F. App'x at 398; *James*, 415 F. App'x at 532.

Nor should this Court give any weight to the Executive Defendants' reliance on the artificial distinction that *Obergefell* was somehow a case only about the fundamental to right to marry and this case is instead about the fundamental right to adopt. Exec. Defs.' Opp. to PI, at *16. Contrary to the arguments expressed in the Executive Defendants' brief, the Plaintiffs here do not rely on a "fundamental right to adopt" because they are not seeking an order from this Court granting an adoption or an order directing that an adoption be granted. Under Mississippi law, the individual facts and circumstances presented by each adoption petition filed by married couples is carefully weighed to determine the best interests of the child. *See Albright* v. *Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). If the married couple who wishes to adopt happens to be gay, however, their petition is per se barred based solely on their sexual orientation. That is what Plaintiffs here contend is unconstitutional—the facial discrimination in the Mississippi Adoption Ban that unconstitutionally deprives married gay and lesbian couples of equal protection of the laws.

C. The Mississippi Adoption Ban Cannot Withstand Even Rational Basis Review

But even if this Court determines that heightened scrutiny does not apply, the Mississippi Adoption Ban still cannot withstand scrutiny under rational basis review. The Fifth Circuit has made it clear that, "[d]espite its deference, . . . the rational basis test is not a toothless one. A necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational." *Greater Hous. Small Taxicab Co. Owners Ass'n* v. *City of Hous., Tex.*, 660 F.3d 235, 239 (5th Cir. 2011) (internal quotations and citations omitted); *see also St. Joseph Abbey* v. *Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (The court will "insist[]" that the basis be "rational

. . . . [A] hypothetical rationale, even post hoc, cannot be fantasy," and cannot "include post hoc hypothesized facts."). Thus, the court's analysis "does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations." *St. Joseph Abbey*, 712 F.3d at 226. Defendants have not—and cannot—offer any non-hypothetical or sensible rationale that justifies the Mississippi Adoption Ban here.

In fact, the only rationale being offered by the Executive Defendants to justify the Mississippi Adoption Ban is that "the Mississippi Legislature has concluded that dual-gender parenting is preferable and should be encouraged where possible by prohibiting adoption by same-gender couples." Exec. Defs.' Opp. to PI, at *18. While that may well be an explanation for this overtly discriminatory law, it is not a rational one. There is simply no basis in fact to support the Executive Defendants' assertion (and purported rationale of the Mississippi Legislature) that "dual-gender parenting" is preferable. There is no evidence to suggest that the Mississippi Legislature actually reviewed or considered any reports or heard any testimony from qualified experts about the fitness of gay people as parents when it passed the Mississippi Adoption Ban in 2000.[3] Am. Compl. ¶¶ 63-66.

The Mississippi Legislature's failure to ground its enactment of the Mississippi Adoption Ban in some rational policy justification is not surprising. Decades

[3] What the public statements of legislators do show is the type of hostility toward or fear of gay people that the Supreme Court has made clear renders a statute unconstitutional. *See Windsor*, 133 S.Ct. at 2693-94. For example, State Representative Rita Martison said that "'[t]here is no way you can convince me that 'Joe has two mommies' is a value that we need to extend to the generation,'" Emily Wagster, *Bill to Ban Adoptions by Same-Sex Couples Advances*, Clarion-Ledger, Feb. 23, 2000, at 5B, and State Senator Ron Farris proclaimed that "'[a] homosexual relationship implies the exercise of illegal activities . . . and no child should be permitted to enter that type of setting,'" Gina Holland, *State Bans Adoption by Gay Couples, ACLU: Decision Likely to Bring Lawsuits*, Sun Herald, April 20, 2000, at A4.

of social science research supports the conclusion that gay and lesbian couples are equally capable and caring as parents as straight couples. Indeed, as Professor Brian Powell explains in his Reply Declaration in Support of Plaintiffs' Motion for Preliminary Injunction, D.E. #60, "the scholarly consensus in the social scientific community" is that children and adolescents raised by gay couples are as successful psychologically, emotionally, and socially as children and adolescents raised by straight couples. *Id.* at ¶ 9. Numerous studies of youths raised by gay and lesbian parents conducted over the past twenty-five years and published in peer-reviewed academic journals confirm this conclusion; the level of scholarly agreement is "overwhelming." *Id.* at ¶ 11–13.[4] This evidence has only gotten stronger and more forceful in the fifteen years since the Mississippi Adoption Ban was enacted.[5] In other words, Defendants "would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, regardless of whether those parents are of the same sex, than she would by having only one parent." *D.M.T.* v. *T.M.H.*, 129 So.3d 320, 344 (Fla. 2013).

Certainly, the Eleventh Circuit's decision in *Lofton* provides no support for Defendants' proffered rationale that "dual-gender" parenting is preferable. Exec.

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[4] The "very few" studies that conflict with the consensus view suffer from severe methodological flaws, including researchers' failure to actually analyze children raised by same-sex parents and/or control for variables that affect children's well-being, such as family instability or divorce. *Id.* at ¶ 15–16. Once these methodological issues are addressed, the data upon which these studies rely actually show that "the profile of children from same-sex households is similar to that of . . . children from intact biological families." *Id.* at ¶ 16.

[5] In the last fifteen years, there have been dozens of additional studies, covering hundreds of families, published in peer-reviewed academic journals concluding that children raised by same-sex parents fare just as well as children raised by opposite-sex parents. *See* Powell Aff. ¶¶ 11 & 11 n.2. This research includes studies employing a variety of research methods on both large- and small-scale samples and encompasses data drawn from hundreds of participants. *Id.* Thus, an evaluation of the social science research on same-sex parenting published in the last fifteen years has determined that there is an "overwhelming" consensus view among social scientists that children raised in same-sex households perform just as well as children raised in different-sex households across a variety of developmental metrics. *Id.* at ¶ 14.

Defs.' Opp. to PI, at *17 (citing *Lofton*, 358 F.3d at 818-19). *Lofton* is an outdated relic of the pre-*Windsor* and pre-*Obergefell* era when it was widely considered to be perfectly constitutional to deny gay and lesbian couples the benefits and responsibilities of marriage. The adoption ban at issue in *Lofton* is almost four decades old—it was passed at the behest of Anita Bryant back in 1977, when gay people had virtually no rights or protections whatsoever anywhere in the United States and it was thought to be entirely acceptable to criminalize gay relationships. *See Lofton*, 358 F.3d at 806-07; *see also Lawrence* v. *Texas*, 539 U.S. 558, 570-71 (2003); *Campaign for S. Equal.*, 64 F. Supp. 3d at 918-19. Although the Court in *Lofton* premised its decision on the fact that gay couples, unlike straight couples, could not marry, *Lofton*, 358 F.3d at 818-20, when *Lofton* was decided in 2004, no state in the country permitted gay couples to marry; today, such marriages are constitutionally required in every state. *Obergefell*, 135 S. Ct. at 2604-05.

Although *Lofton* was not explicitly overruled by the Eleventh Circuit, it has been rendered moot as a result of a 2010 decision of a Florida state court in *Florida Department of Children and Families* v. *Adoption of X.X.G. and N.R.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010), when state officials declined to appeal a ruling that found that the Florida statute prohibiting adoption by gay people violated their equal protection rights and those of their adoptive children under the Florida Constitution.[6] Accordingly, the American Law Reports article on "Adoption of Child by Same-Sex Partners," cites *Lofton* with "caution." 61 A.L.R. 6th 1 (Orig. Pub. 2011). And the holding in *Lofton* itself was explicitly rejected by a different Florida state court considering the same issue:

[6] Indeed, as a result of this decision by the Florida state government, Mississippi became the last state in the nation to have an operative law on its books banning adoption by gay parents.

"the Court finds that the depiction of existing research set forth in the 2004 *Lofton* panel opinion is, at minimum, not presently accurate. In view of [the expert's] testimony that the categorical ban [on gay adoption] is irrational and scientifically inexplicable, the Court is unable to discern any coherent explanation for its enforcement in 2008, other than a willingness to passively leave intact the ban against this politically-disfavored group." *In re Adoption of Doe*, 2008 WL 5070056, at *17 (Fla. Cir. Ct. Aug. 29, 2008). *See also Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 463-64 (Conn. 2008) (citing *Lofton* and noting that "[t]he cases on which the Appellate Court did rely are not persuasive because those cases . . . were predicated on precedent that has been overruled."); Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, DOJ 11-223 (Feb. 23, 2011) (citing *Lofton* as an example of a case relying on "claims regarding 'procreational responsibility' that the Department [of Justice] has disavowed . . . as unreasonable").

Indeed, in her dissent from the denial of petition for rehearing *en banc* in *Lofton*, Judge Rosemary Barkett made an observation about the Florida ban that is equally applicable to the Mississippi Adoption Ban at issue here and only underscores its utter irrationality:

> This provision finds, as a matter of law, hundreds of thousands of Florida citizens unfit to serve as adoptive parents solely because of constitutionally protected conduct. There is no comparable bar in Florida's adoption statute that applies to any other group. Neither child molesters, drug addicts, nor domestic abusers are categorically barred by the statute from serving as adoptive parents. In a very real sense, Florida's adoption statute treats homosexuals less favorably than even those individuals with characteristics that may pose a threat to the well-being of children.

Lofton v. *Secretary of Dep't of Children and Family Services*, 377 F.3d 1275, 1290 (11th Cir. 2004) (Barkett, J., dissenting). In other words, Defendants "have offered no rational

basis for their challenged rule, and, try as we are required to do, we can suppose none." *St. Joseph Abbey*, 712 F.3d at 227.

II. The Mississippi Adoption Ban Causes the Parent Plaintiffs Irreparable Harm

While Defendants argue that there is no substantial threat of irreparable harm, Exec. Defs.' Opp. to PI, at *18-20; Jud. Defs.' Opp. to PI, at *24, they do not refute the continuing stigmatic injury to the Parent Plaintiffs associated with the fact that their own home state of Mississippi irrationally prevents them from adopting their own children. Pls.' Mot. for Prelim. Inj., D.E. #14, at *3 ("Pls. Mot. for PI"). As this Court recently recognized in analogous circumstances, Mississippi laws discriminating against gay and lesbian couples "harm[] . . . children, by telling them they don't have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent." *Campaign for S. Equal.,* 64 F.Supp. 3d at 936 (quoting *Baskin* v. *Bogan*, 766 F.3d 648, 671 (7th Cir. 2014)). Nor do Defendants dispute the many practical harms associated with Donna and Jan, and Kathryn and Susan, having no legal protections or rights with respect to the children they have been raising since birth, including concerns about obtaining timely medical care to deep-seated uncertainty about what might happen if the other parent died or was badly hurt. Pls. Mot. for PI *3-*6.

Contrary to the Executive Defendants' arguments, Exec. Defs.' Opp. to PI, at *19 (quoting *Jackson Women's Health Org.* v. *Currier*, 878 F. Supp. 2d 714, 716 (S.D. Miss. 2012)), numerous courts across the country have consistently and repeatedly held that the denial of a constitutional right constitutes irreparable harm *per se*. *See Preston* v. *Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing

constitutional violation constitutes proof of an irreparable harm"); *Does* v. *City of Indianapolis*, No. 1:06-CV-865, 2006 WL 2927598, at *11 (S.D. Ind. Oct. 5, 2006) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law" (Young, J.) (quoting *Cohen* v. *Cohama County, Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992))); *Springtree Apartments, ALPIC* v. *Livingston Parish Council,* 207 F. Supp. 2d 507, 515 (M.D. La. 2001) ("It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law" (quoting *Elrod* v. *Burns*, 427 U.S. 347 (1976))). As described by this Court in *Campaign for Southern Equality*, the irreparable damage suffered by these gay Plaintiffs due to the legal non-recognition of their family is "profound and irreparable." 64 F. Supp. 3d at 949.

Unable to dispute these concrete and stigmatic continuing harms, Defendants instead argue that they simply do not matter, asserting that "[a] preliminary injunction against the defendants would not remedy the movants' claimed injury." Exec. Defs.' Opp. to PI, at *19. But while the Parent Plaintiffs will certainly have to take additional steps to adopt once a preliminary injunction is granted, the issue here is the unconstitutional impediment to their applying to adopt in the first place. In other words, Defendants' argument is like saying that serving a plate of food to a starving person would not remedy his hunger because he would first have to move the food from the plate to his mouth, chew and then swallow.

III. The Threatened Harm if the Preliminary Injunction is Denied Outweighs Any Other Harm That May Result

Further defying logic and common sense, Defendants argue that the issuance of this preliminary injunction—which only seeks to bar the enforcement of an

unjust and unconstitutional law—would somehow cause more harm than good. Exec. Defs.' Opp. to PI, at *20-21; Jud. Defs.' Opp. to PI, at *24-25. Specifically, the Executive Branch Defendants contend that the issuance of the injunction "would put the defendants at risk of contempt," and the Judicial Branch Defendants argue that this lawsuit undermines their authority and role as judges. Exec. Defs.' Opp. to PI, at *21; Jud. Defs.' Opp. to PI, at *24. These arguments are completely without merit.

The Executive Branch Defendants' purported fear that the issuance of the requested injunction would "put the defendants at risk of contempt for the action or inaction of persons well-beyond their control" is patently absurd. Exec. Defs.' Opp. to PI, at *21. As discussed in Plaintiffs' Opposition to Defendants' Motion to Dismiss, each of the individual Executive Branch Defendants here is responsible for enforcing the Mississippi Adoption Ban within their respective capacities. *See* Pls.' Opp. to MTD, at *18-21. As such, any injunction preventing the enforcement of the Mississippi Adoption Ban by these Defendants would preclude any supposed actions for contempt. *See, e.g.*, *S. Scrap Material Co.* v. *Fleming*, No. Civ.A01-2554, 2003 WL 21920899, at *5 (E.D. La. Aug. 8, 2003) (contempt not warranted where "plaintiffs were prevented from substantially complying with the order of the Court by circumstances beyond their control").

With respect to the Judicial Branch Defendants, their arguments pertain merely to the supposed harm stemming from the alleged impropriety of maintaining an action against the state court judges in their official capacities—the Judicial Branch Defendants offer no specific arguments as to why an *injunction*, as opposed to the lawsuit itself, is improper. *See generally* Jud. Defs.' Opp. to PI.

In clear contrast to the lack of potential harm faced by the Defendants, it is beyond doubt that the Plaintiffs continue to suffer irreparable harm from the existence and operation of the Mississippi Adoption Ban. Without a preliminary injunction, Mississippi law will continue to "perpetuate the false notion of gay inferiority by . . . prohibiting gay and lesbian couples from adopting children together." *Campaign for S. Equal.*, 64 F. Supp. 3d at 939; *see also De Leon* v. *Perry*, 975 F. Supp. 2d 632, 664 (W.D. Tex. 2014) (Plaintiffs "will continue to suffer state-sanctioned discrimination and the stigma that accompanies it until they can enjoy the same rights as heterosexual couples"). The ongoing dignitary, economic, and social injuries that Plaintiffs suffer far outweigh any potential damage the requested injunction may cause to the State of Mississippi. *See Valley*, 118 F.3d at 1056. Thus, Mississippi is "in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks omitted); *see also Bassett* v. *Snyder*, 951 F. Supp. 2d 939, 971 (E.D. Mich. 2013) ("The balance of equities clearly favors the plaintiffs. Because there is a likelihood that [the statute] will be found unconstitutional . . . [it is] questionable whether [the state] has any 'valid' interest in enforcing it." (internal quotation marks omitted)).

IV. The Grant of a Preliminary Injunction Will Not Undermine the Public Interest

Finally, and somewhat incredibly, Defendants, citing vague concerns about "unnecessary confusion and friction," contend that the issuance of an injunction preventing the enforcement of the clearly unconstitutional Mississippi Adoption Ban would somehow undermine the public interest. Exec. Defs.' Opp. to PI, at *21-22; Jud.

Defs.' Opp. to PI, at *25. But not only does this nebulous apprehension fail to override the Plaintiffs' constitutional rights, such undefined arguments about "confusion" were already explicitly rejected by this Court in the recent litigation concerning marriage equality. *See Campaign for S. Equal.*, 64 F. Supp. 3d at 953 ("The 'confusion' and 'practical difficulties' [the Defendants] claim[] will occur are speculative . . . . It is not credible to think that [Mississippi] would find itself unable to process a technical change which already has been implemented in over 30 states.").

As discussed above, Plaintiffs clearly will succeed on the merits, as the Mississippi Adoption Ban constitutes an unjust law that discriminates against gays and lesbians in violation of the Fourteenth Amendment of the Constitution as the Supreme Court has already held in *Windsor* and *Obergefell*. Thus, any consideration of the public interest only supports the issuance of an injunction, since injunctions protecting constitutional rights "are always in the public interest." *Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012); *see also Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *8 (M.D. Tenn. Mar. 14, 2014) ("Ultimately, it is always in the public interest to prevent the violation of a party's constitutional rights.").

CONCLUSION

For the foregoing reasons, Parent Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction.

Respectfully submitted,

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PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
By: /s/ Roberta A. Kaplan
Roberta A. Kaplan*
Lead Counsel
Andrew J. Ehrlich*
Joshua D. Kaye*
Jacob H. Hupart*
Alexia D. Koritz*
1285 Avenue of the Americas
New York, NY 10019-6064
Tel:(212) 373-3000
Fax:(212) 757-3990
rkaplan@paulweiss.com
aehrlich@paulweiss.com
jkaye@paulweiss.com
jhupart@paulweiss.com
akoritz@paulweiss.com

MCDUFF & BYRD
By: /s/ Robert B. McDuff
Robert B. McDuff
Bar No. 2532
Sibyl C. Byrd
Bar No. 100601
Jacob W. Howard
Bar No. 103256
767 North Congress Street
Jackson, Mississippi 39202
Tel:(601) 969-0802
Fax: (601) 969-0804
rbm@mcdufflaw.com
scb@mcdufflaw.com
jake@mcdufflaw.com

BRAZIL & BURKE, P.A.
Meghann K. Burke*
77 Central Avenue, Suite E
Asheville, NC 28801
Tel: (828) 255-5400
Fax: (828) 258-8972
meghann@brazilburkelaw.com

ELLIS LAW FIRM, PLLC.
Dianne Herman Ellis
Bar No. 102893
1145 Robinson Avenue,
Ocean Springs, MS 39564
Tel: (228) 215-0037
Fax: (228) 284-1889
diannernjd@aol.com

* Admitted *pro hac vice*

Attorneys for Plaintiffs Campaign for Southern Equality, Family Equality Council, Donna Phillips, Janet Smith, Kathryn Garner, Susan Hrostowski, Jessica Harbuck, Brittany Rowell, Tinora Sweeten-Lunsford, and Kari Lunsford.

CERTIFICATE OF SERVICE

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

THIS the 13th day of October, 2015.

By: /s/ Roberta A. Kaplan
Roberta A. Kaplan
Admitted *pro hac vice*
N.Y. Bar No. 2507093
Paul, Weiss, Rifkind,
Wharton & Garrison LLP
New York, NY 10019
Tel: (212) 373-3000
rkaplan@paulweiss.com