UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY and THE REV. DR. SUSAN HROSTOWSKI,	§	
Plaintiffs,	§	
vs.	§	**CIVIL ACTION NO. 3:16-cv-442-CWR-LRA**
PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; JOHN DAVIS, in his official capacity as Executive Director of the Mississippi Department of Human Services; and JUDY MOULDER, in her official capacity as Mississippi State Registrar of Vital Records,	§	
Defendants.	§	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EXHIBITS CSE-2, CSE-5, CSE-6, CSE-7, CSE-8, AND CSE-9

Plaintiffs the Campaign for Southern Equality and The Rev. Dr. Susan Hrostowski submit this Memorandum of Law in opposition to Defendants' Objections to Plaintiffs' Exhibits CSE-2, CSE-5, CSE-6, CSE-7, CSE-8, and CSE-9.

INTRODUCTION

This Court should deny Defendants' meritless objection to strike Plaintiffs' exhibits marked CSE-2, CSE-5, CSE-6, CSE-7, CSE-8, and CSE-9. These exhibits are constitutional, or legislative, facts, not adjudicative facts. As courts have long recognized, the formal rules of evidence do not apply to constitutional facts, because to do so would misunderstand the character of constitutional litigation.

Defendants request to strike a letter from the Bishop of Mississippi to members of the Episcopal Church in Mississippi, as well as four resolutions from the Union of Reform Judaism and one resolution from the Central Conference of American Rabbis, all offered to illustrate that certain religious denominations do not hold the Preferred Religious Beliefs at issue in this litigation.

To adopt what Defendants seemingly believe to be the rules of evidence in constitutional litigation would have damaging effects on a court's ability to decide rules of constitutional law. It would require that courts determine constitutional issues, such as the Establishment Clause questions before this Court, on a record that is confined to the statements that both parties are able to present in court via individuals who are willing to sit and provide expert testimony. Our nation's constitution, however, should not be interpreted solely by what experts testify to—however invaluable that may be. A court should also be able to rely on constitutional or legislative facts that will shed light on the issues at hand. The evidence that Plaintiffs seek to introduce is not meant to circumvent expert evidence; rather, these exhibits will

be introduced through *fact* witnesses and will underline the rule of constitutional law that Plaintiffs believe should govern.

Even if this Court finds that these are adjudicative facts, the exhibits are still not hearsay because they are statements of intent and plan under Federal Rule of Evidence 803(3). At a minimum, these exhibits should be admitted for the fact that they were said, if not for the truth of the matter asserted.

ARGUMENT

I. The Exhibits are Constitutional Facts and are Not Subject to Formal Rules of Evidence

Constitutional facts, also known as "legislative facts," are facts that "have relevance to legal reasoning and the lawmaking process." Fed. R. Evid. 201, advisory committee's note. As one court put it, adjudicative facts are "facts germane to a specific dispute, which often are best developed through testimony and cross-examination," while constitutional facts are "facts relevant to shaping a general rule, which . . . more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires." *Indiana Harbor Belt R.R. Co.* v. *Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). Constitutional facts "go to the justification for a statute," *Daggett* v. *Comm'n on Gov'tal Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1990).

The advisory committee's notes to Federal Rule of Evidence 201 underscore the rationale for placing constitutional, or legislative, facts outside the scope of the formal evidentiary rules:

> [T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.

Fed. R. Evid. 201, advisory committee's note (quotation marks omitted). The justification is particularly potent when constitutional questions are being litigated. "In constitutional litigation . . . appellate courts and courts of first instance have the ability to go beyond the formal rules of evidence and examine what may be described as 'legislative facts.'" *Democratic Party of the U.S.* v. *Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 830 (E.D. Pa. 1983), *aff'd in part and rev'd in part sub nom. Fed. Election Comm'n* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). Under this principle, courts "may examine scholarly articles not formally submitted or may guide its conclusions by reasonable exercise of its deductive powers." *Id.*

The Fifth Circuit may have been the most persuasive in explaining why "[t]he writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court." *Dunagin* v. *City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983). To require that only live, expert testimony be considered would create the anomalous result where a court in one jurisdiction hears from an expert in a subject and decides according to what that expert says, but a court in a second jurisdiction hears from an expert who says the exact opposite and rules according to *that* expert's opinion. This is precisely what the Fifth Circuit confronted when it asked, and answered in the negative, "Should identical conduct be constitutionally protected in one jurisdiction and illegal in another?" *Id.*

II. Plaintiffs' Exhibits are Textbook Examples of Constitutional Facts

It is beyond dispute that the exhibits Plaintiffs seek to introduce go to issues of constitutional fact, and therefore are not bound by the evidentiary rules Defendants cite. Unlike the adjudicative facts in this case—for example, that Dr. Hrostowski is an Episcopalian—the constitutional facts that Plaintiffs seek to admit do not go to any of the *adjudicative* factual issues

in this case. Rather, this evidence goes to issues of pure constitutional fact: whether the Episcopal Church of Mississippi has a view on same-sex marriage, whether the Union of Reform Judaism has a view on transgender rights, and so forth. Courts often rely on constitutional facts when constitutional issues are being litigated, *see, e.g., Central Soya Co., Inc.* v. *United States*, 15 C.I.T. 35 (Ct. Int'l Trade 1991), and this Court should do the same in the instant case.

III. The Exhibits are Not Hearsay Because They are Statements of Intent and Plan Under Rule 803(3) and are Also Admissible for the Fact That They Were Said

Even if this Court finds that these are adjudicative facts, they are still not hearsay under Federal Rule of Evidence 803(3). Rule 803(3) excludes from the rule against hearsay, among other things, any "statement of the declarant's then-existing state of mind (such as . . . intent, or plan) . . . ." Fed. R. Evid. 803(3). The evidence Plaintiffs seek to introduce here are plainly statements that show the intent and plan of the Bishop of Mississippi and Jewish organizations regarding respect for same-sex marriage and transgender rights.

At a minimum, this Court should consider these statements, if not for the truth of the matter asserted, then for the fact that they were said.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' objections.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 23, 2016, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing.

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