

By its Order dated June 6, 2016, this Court asked the parties to respond to the following two questions: (1) under existing state and federal law, does the Permanent Injunction apply to circuit clerks outside of Hinds County; and (2) is the Registrar of Vital Records an agent, officer, employee, or subsidiary of the State of Mississippi. Dkt. No. 47. As discussed further below, under existing state and federal law, this Court's Permanent Injunction applies to all Circuit Clerks in Mississippi. It further applies to the State Registrar of Vital Records, who is also an agent of the State of Mississippi.

1. The Permanent Injunction Binds All of Mississippi's Circuit Clerks

As an initial matter, the circuit clerks in each of Mississippi's eighty-two counties fall within the scope of this Court's Permanent Injunction, which explicitly covers "the State of Mississippi and all its *agents, officers, employees, and subsidiaries.*" Dkt. No. 34 (emphasis added). Both state and federal courts have held that Mississippi circuit clerks are "officers" of the counties in which they preside. *See United States v. Harris*, 2007 WL 2028948, at *3 n.2 (S.D. Miss. 2007) ("Mississippi law considers circuit and chancery clerks to be officers of the county in which they are elected."); *Cook v. State*, 43 So. 618, 620 (Miss. 1907) (referring to sheriff, chancery clerk, and circuit clerk as being the three highest ranking county officers); *see also* Miss. Const. art. V, § 138. The Mississippi Code, in turn, consistently refers to a county as an "instrumentality of the state."¹

When a circuit clerk fulfills her duties with respect to marriage by issuing marriage licenses and reporting marriages to the State Registrar of Vital Records, she does so as an agent of the state pursuant to Mississippi state law. *See* Miss. Code. Ann. §§ 41-57-48, 93-1-

¹ *See, e.g.*, Miss. Code Ann. § 11-46-1(1) ("Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including . . . any county . . . or other instrumentality of the state. . . ."); Miss. Code Ann. § 19-31-31 ("The state and all public officers, any county, municipality or other subdivision or instrumentality of the state. . .").

5; *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990). Indeed, the United States Court of Appeals for the Fifth Circuit has made it clear that “[a] county official pursues his duties as a *state agent* when he is enforcing state law or policy.” *Echols*, 909 F.2d at 801 (emphasis added). And, of course, prior to entry of the Permanent Injunction, circuit clerks acted as state agents when they unconstitutionally denied gay couples the right to marry pursuant to Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2).

Nor is there any question that the authority to issue the Permanent Injunction against all of Mississippi’s circuit clerks—the state agents who were charged with enforcing Mississippi’s discriminatory marriage policy—was squarely within the scope of this Court’s remedial powers in a lawsuit seeking to vindicate the constitutional rights of gay couples to marry. This Court clearly has the power—pursuant to the All Writs Act, 28 U.S.C. § 1651(a)—to issue an injunction that applies to nonparties in a lawsuit when those persons “are in a position to frustrate the implementation of a court order or the proper administration of justice . . . and encompasses even those who have not taken any affirmative action to hinder justice.” *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) (citations omitted). *See also United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (holding that “[c]ourts of equity have inherent jurisdiction to preserve their ability to render judgment...”); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1228 (N.D. Tex. 1990), *aff’d in part, rev’d in part*, 960 F.2d 1286 (5th Cir. 1992) (holding that the court can issue an injunction “that restrains nonparties and parties who have not yet appeared or not yet been served”); *King Lincoln Bronzeville Neighborhood Ass’n v. Blackwell*, 448 F. Supp. 2d 876, 879-80 (S.D. Oh. 2006) (“[T]his Court has the inherent power to issue an order directly upon the county boards of elections, even though they are not actual parties to this litigation.”).

In *United States v. Hall*, a civil rights action concerning school desegregation, the Fifth Circuit affirmed entry of an injunction of conduct by a certain activist, who was not a party to the underlying action, as a proper exercise of the district court's "inherent jurisdiction to preserve [its] ability to render judgment," because the activist was interfering with school desegregation efforts in Florida. 472 F.2d 261, 265 (5th Cir. 1972). Writing for the Fifth Circuit in that case, Judge Wisdom explained that "the plaintiffs were found to have a constitutional right to attend an integrated school" and "[t]he defendant school board had a corresponding constitutional obligation to provide them with integrated schools and a right to be free from interference with the performance of that duty." *Id.* Noting that "the judgment in a school case, as in other civil rights actions, inures to the benefit of a large class of persons, regardless of whether the original action is cast in the form of a class action," *id.* at 266, the court explained that the injunction of conduct by non-parties was proper because such conduct, if not enjoined, would "negate the plaintiffs' constitutional right and the defendant's constitutional duty," *id.* at 265. As a result, the Fifth Circuit held that the "courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment." *Id.* at 266.

These same principles, of course, apply here as well. In this case, it is clear that, without compliance by all circuit clerks state-wide who actually enable gay couples to marry by issuing them marriage licenses, the Court's judgment granting gay couples the right to marry would have been illusory. *Hall* is still good law in this Circuit and has not been overruled or criticized on this point in any subsequent Fifth Circuit or Supreme Court case.²

² Although courts in this circuit and elsewhere have consistently recognized that, as in *Hall*, a court may enjoin non-parties in extraordinary circumstances under the All Writs Act, they have been reluctant to find such extraordinary circumstances in cases, unlike this one, that do not involve vindicating plaintiffs' constitutional rights and enforcing defendants' constitutional obligations. See *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d

In addition to the inherent authority applied in *Hall*, Federal Rule of Civil Procedure 65(d) separately authorizes courts to enjoin conduct by non-parties including parties’ “officers, agents, servants, employees, and attorneys,” and also “other persons who are in active concert or participation” with any of them. Here, as explained above, the circuit clerks are “in active concert or participation” with the other defendants (including Governor Bryant and Attorney General Hood) and their agents because they implement the State’s policy with respect to marriage. Indeed, as the Fifth Circuit explained in *Hall*, “Rule 65(d), as a codification rather than a limitation of courts’ common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment.” *Hall*, 472 F.2d at 267.

Here, of course, the circuit clerks clearly had the requisite notice of the injunction under Fed. R. Civ. P. 65(d). The Attorney General issued an official statement that directly implicated their job duties after the Fifth Circuit affirmed this Court’s preliminary injunction: “Mississippi’s laws prohibiting same sex marriage are now officially declared unconstitutional and unenforceable by the Federal Court. This ruling makes clear that marriage licenses should be issued to same sex couples.” Press Release, Attorney General of the State of Mississippi, Fifth Circuit Lifts Stay in Same-Sex Marriage Case, (July 1, 2015).³ And, of course, the

1390, 1396 (Fed. Cir. 1996) (finding no “extraordinary” circumstance in patent case to justify enjoining sale of allegedly infringing products by non-parties); *Power-One, Inc. v. Artesyn Techs., Inc.*, 2008 WL 1746636, at *2 (E.D. Tex. 2008) (denying injunction against a nonparty in a patent infringement case, but noting that the nonparties “will be subject to contempt proceedings to the extent that they are in fact the ‘successors in interest’ to [defendant], or to the extent they are working ‘in active concert’ with [defendant] to violate the terms of the injunction.”).

³ If the Court concludes that it is necessary for every circuit clerk in Mississippi to be a party to this action to be subject to injunction, Plaintiffs would request leave to move to add those clerks as a defendant class. See *Strawser v. Strange*, 307 F.R.D. 604 (S.D. Ala. 2015) (certifying class of all country probate judges in Alabama for enforcement of gay and lesbian marriage rights). Plaintiffs do not, of course, think that such a burdensome step is necessary to enable the Court to grant Plaintiffs the necessary relief. To the extent that this issue has arisen in other states, no court has ever concluded that the federal court lacked the authority to grant complete relief for the plaintiffs. For example, in Alabama, the plaintiffs who sought to overturn Alabama’s unconstitutional ban on gay marriage first obtained preliminary relief against the Attorney General of Alabama. *Strawser v. Strange*, No. 1:14-cv-424 (S.D. Ala. Jan. 26, 2015), Dkt. No. 29. Due to the structure of Alabama’s government, in which the officials issuing marriage licenses were county probate judges and not necessarily subject to an injunction against the Attorney General and his “officers, agents, and employees,” the plaintiffs then obtained relief against an individual

Supreme Court decision in *Obergefell* and the subsequent actions taken by the Fifth Circuit and this Court were no secret in Mississippi.⁴

2. The Registrar of Vital Records is an Agent of the State of Mississippi

Mississippi law makes it clear that the Registrar of Vital Records is also an agent of the State of Mississippi. The registrar is appointed by the Secretary of the State Board of Health and is tasked with the “duty to carry into effect . . . rules, regulations and orders of the State Board of Health,” which is itself authorized by state statute to formulate state policy. Miss. Code Ann. §§ 41-57-3; *see also id.* at §§ 41-3-15, 41-3-17; *Jordan v. Miss. State Dep’t of Health*, Civil Action No. 3:06-cv-233-WHB-LRA, 2007 WL 2344963, at *2 (S.D. Miss. Aug. 16, 2007). Mississippi law also grants the registrar the power to correct or alter incomplete or incorrect birth certificates, as well as the “discretion to determine these on a case-by-case basis.” Miss. Code Ann. § 41-57-21; *Dunn v. Miss. State Dep’t of Health*, 708 So.2d 67, 72 (Miss. 1998). The registrar is further authorized to accept service of process on behalf of the State Board of Health. Miss. Code Ann. § 41-57-23(1).

By enacting House Bill 1523, the State of Mississippi tasked the registrar with additional duties under state law, including maintaining a list of circuit clerks who seek to recuse themselves from marrying gay couples. *See* H.B. 1523 at § 3(8)(a). Just as the county official in *Echols* was found to be acting under “his duties as a state agent when he is enforcing state law or policy,” 909 F.2d at 801, so too is the Registrar of Vital Records acting as a state agent when tasked by state law with effectuating state “rules, regulations and orders.”

county probate judge. *Strawser v. Strange*, 44 F. Supp. 3d 1206 (2015). When there were subsequent objections as to whether the injunction applied to each Alabama county probate judge, plaintiffs then certified a class of all county probate judges in Alabama. *Strawser v. Strange*, 307 F.R.D. 604 (S.D. Ala. 2015). Ultimately, the plaintiffs obtained full marriage equality throughout Alabama.

⁴ *See, e.g.*, Geoff Pender, *Court Lifts Stay; Clerks Will Issue Same-Sex Licenses*, The Clarion Ledger (July 1, 2015), <http://www.clarionledger.com/story/news/politics/2015/07/01/guidance-clerks-issue-sex-licenses/29578875/>; Kate Royals, *Clerks Begin Issuing Same-Sex Marriage Licenses in Miss.*, The Clarion-Ledger (June 30, 2015), <http://www.clarionledger.com/story/news/2015/06/29/ag-oks-same-sex-licenses/29465835/>.

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**PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP**

By: /s/ Roberta A. Kaplan
Roberta A. Kaplan*
Lead Counsel
Andrew J. Ehrlich*
Jaren Janghorbani*
Joshua D. Kaye*
Jacob H. Hupart*
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
rkaplan@paulweiss.com
aehrlich@paulweiss.com
jjanghorbani@paulweiss.com
jkaye@paulweiss.com
jhupart@paulweiss.com

FISHMAN HAYGOOD, LLP

By: /s/ Alysson Mills
Alysson Mills
Bar No. 102861
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170
Tel: (504) 586-5253
Fax: (504) 586-5250
amills@fishmanhaygood.com

*Admitted *pro hac vice*

*Attorneys for Plaintiffs Campaign for
Southern Equality, Rebecca Bickett,
Andrea Sanders, Jocelyn Pritchett and
Carla Webb*

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2016, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing.

By: /s/Roberta A. Kaplan
Roberta A. Kaplan
Admitted pro hac vice
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
rkaplan@paulweiss.com