

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

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 3:14cv818-CWR-LRA

**PHIL BRYANT, in his official capacity as DEFENDANTS
Governor of the State of Mississippi; ET AL.**

RESPONSE TO JUNE 6, 2016 SUPPLEMENTAL BRIEFING ORDER

Named defendants Attorney General Hood and Governor Bryant do not contend, and have never contended, that they, any Mississippi Circuit Clerks, or any Mississippians acting under color of state law, are not bound to act consistent with the United States Supreme Court's holdings in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and the Fifth Circuit's admonition that "*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit[] and should not be taken lightly by actors within the jurisdiction of this Court." *CSE v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) (footnote omitted).

The Court's request for supplemental briefing addresses an entirely distinct matter. Both of the Court's questions involve the legal issue of whether particular persons who are not parties to this closed lawsuit, separately and apart from those persons' (and every Mississippi state actor's) obligations under now clearly established federal law, are also subject to the Court's contempt powers by virtue of being "permanently enjoined from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2)." [Permanent Injunction, Dkt. 34]. Keeping the foregoing in mind, Attorney General Hood and Governor Bryant respond as follows:

RESPONSE TO QUESTION ONE. As the facts stand today, the Court’s permanent injunction does not apply to non-party Mississippi Circuit Clerks. The legal reasons why are cut-and-dry. “Rule 65 controls injunctions and restraining orders issued by federal courts; specifically, it describes the required content and enumerates the individuals bound by the injunction.” *State Indus. Products Corp. v. Beta Technology, Inc.*, 575 F.3d 450, 457 (5th Cir. 2009) (citing Fed. R. Civ. P. 65(d)(1) & (2)). In particular, “[u]nder Rule 65, an injunction binds the parties as well as the parties’ officers, agents, servants, employees, attorneys, and ‘other persons who are in active concert or participation’ with any of the previously listed persons—so long as the persons claimed to be bound received ‘actual notice of [the injunction] by personal service or otherwise.’” *Id.* (quoting Fed. R. Civ. P. 65(d)(2)) (modification in original).

Aside from the Hinds County Circuit Clerk, none of Mississippi’s other eighty-one Circuit Clerks qualifies as a “party” here under Rule 65. Indisputably, the only three party defendants to this closed case are Attorney General Hood, Governor Bryant, and the Hinds County Circuit Clerk. Treating anyone, other than the three named defendants, as currently subject to the Court’s injunction as a “party” would violate Rule 65 and those non-parties’ constitutional due process rights. *See Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 110-11 (1969) (injunction does not bind non-party to lawsuit merely by being named in the order without affording it due process); *Lincoln General Ins. Co. v. U.S. Auto Ins. Servs., Inc.*, 787 F.3d 716, 732-33 (5th Cir. 2015) (non-party to injunction cannot be bound as a party absent due process compliance); *Speetjens v. Larson*, 401 F.Supp.2d 600, 611 (S.D. Miss. 2005) (“Pursuant to Rule 65 of the Federal Rules of Civil Procedure, this Court does not have

the authority to enjoin one who is not a party to the action.”).

The absent eighty-one Circuit Clerks and their employees also do not fall within the scope of the Court’s injunction as one of the three named defendants’ “officers, agents, servants, employees, [or] attorneys.” Fed. R. Civ. P. 65(d)(2)(B).¹ Additionally, none of the non-party Mississippi Circuit Clerks or their employees is a person with “actual notice” who has acted in “concert or participation” with any of the parties and violated the Court’s injunction. Fed. R. Civ. P. 65(d)(2)(C). Before any particular non-party Clerk could be held subject to the injunction under this mechanism, the Campaign would have to prove, by clear and convincing evidence, (1) a bona fide violation of the injunction, and (2) that the non-party Clerk, with actual notice, participated in the violation in concert with a named defendant. *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961-62 (5th Cir. 1995); *see also Zenith Radio*, 395 U.S. at 112 (under Rule 65(d), “a nonparty with notice cannot be held in contempt until shown to be in active concert or participation” with an enjoined party). There is no proof before the Court that meets this high standard, much less any proof that any of the non-party eighty-one Mississippi Circuit Clerks’ Offices, has ever failed to timely and properly issue marriage licenses to gay couples. It is pure speculation to assume any non-party Clerk will ever

¹ State officials do not (and certainly Attorney General Hood or Governor Bryant do not) exercise any day-to-day control over the performance of Mississippi Circuit Clerks’ duties. Clerks are independent locally elected county officials. Miss. Const., art. 5, § 138 (county officials), art. 6, § 168 (local elections). They are responsible for hiring, firing, and managing their own employees and executing their duties, *see* Miss. Code Ann. § 9-7-121 *et seq.*, and operate on funds generated locally rather than legislative appropriations. *See* Miss. Code Ann. §§ 9-1-43, 9-7-129, 19-7-23, 25-7-13. County Circuit Clerks are represented by their own county-appointed counsel in litigation (as was the case for the Hinds County Clerk in this matter). Furthermore, unlike state officials and agencies, it is well-established that counties and county officials are not considered arms of the state. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) (“[L]esser governmental entities such as counties and municipalities are not considered arms of the state for purposes of Eleventh Amendment immunity.”).

fail in that duty in the future. In the meantime, as it stands today, Rule 65's "active concert or participation" provision is no grounds to consider any non-party Circuit Clerk subject to the Court's permanent injunction.

All the Mississippi Circuit Clerks who are not parties to this lawsuit, as they have for nearly a year without incident, must continue to abide by federal law. But they are required to continue to do so on account of clearly established federal law, not because the permanent injunction in this closed case applies to them.

RESPONSE TO QUESTION TWO. Judy Moulder, the State Registrar of Vital Records, is an officer and employee of the State of Mississippi. However, it does not follow that, by virtue of that fact, Registrar Moulder is properly considered subject to the permanent injunction pursuant to Rule 65(d)(2)(B) as the State's officer or employee.

"The State of Mississippi" is not a party, and never has been a party, to this closed lawsuit. As explained above, a non-party cannot be treated as a party bound to an injunctive decree, without affording the non-party due process in the first instance. *See Zenith Radio*, 395 U.S. at 110-11; *Lincoln General Ins.*, 787 F.3d at 732-33. The State of Mississippi has never been named as a party in any pleading. It has never been issued a summons, or ever properly served with process, or appeared in this closed case. It cannot be considered bound as a party to the permanent injunction simply by being named in the Court's order. *See LeTourneau Co. of Ga. v. N.L.R.B.*, 150 F.2d 1012, 1012-13 (5th Cir. 1945) ("[p]ersons who are not parties nor in law affected by an injunction cannot be brought within it by naming them in it").²

² The Court's injunction validly prohibits Attorney General Hood, Governor Bryant, and the Hinds County Circuit Clerk, and those parties' officers, agents, servants, employees, and attorneys, from enforcing Section 263A and/or Code Section 93-1-1(2). *See Fed. R. Civ. P.*

The due process problems arising from naming the State of Mississippi as a party in the permanent injunction are highly pronounced here since the Eleventh Amendment prohibits federal courts from exercising jurisdiction over claims against a State itself.

Alabama v. Pugh, 438 U.S. 781, 782 (1978); **Mohler v. State of Mississippi**, 782 F.2d 1291, 1292-93 (5th Cir. 1984). Moreover, as a matter of law, the Campaign could never have prosecuted the State for the 42 U.S.C. § 1983 claims in its complaint. **Will v. Michigan Dept. of State Police**, 491 U.S. 58, 71 (1989); **Payne v. Am. Correctional Ass’n**, 2011 WL 5872956, at *2 (S.D. Miss. Nov. 23, 2011).

The State of Mississippi cannot properly be considered a party to the permanent injunction. Attorney General Hood, Governor Bryant, and the Hinds County Circuit Clerk are the only three defendants in this closed lawsuit. Registrar Moulder is not an “officer, agent, servant, employee, or attorney” of any of them. Like every other state actor, she is bound to follow clearly established federal law. But she is not currently subject to the permanent injunction by mere virtue of her status as a state official.

THIS the 8th day of June, 2016.

65(d)(2). Clearly established federal law prohibits other persons acting under color of state law from enforcing those state laws. Attorney General Hood and Governor Bryant in no way dispute those facts. But the law is clear that the order naming the State of Mississippi, a non-party indisputably never properly served with process or having appeared here voluntarily, is ineffective to make it a party to the permanent injunction. *See, e.g., Thompson v. Deutsche Bank Nat’l Trust Co.*, 775 F.3d 298, 306 (5th Cir. 2014) (“If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside.”); *In re Prewitt*, 280 F.Supp.2d 548, 557 (N.D. Miss. 2003) (“a judgment is void if the court lacks personal or subject matter jurisdiction or denies any party due process”); *Wilgus v. Peterson*, 335 F.Supp. 1385, 1389 (D. Del. 1972) (“Before a court can place a person in a position where he is subject to a contempt citation, that person has a right to be heard. For this reason, injunctions are binding only on parties and their privies and, to the extent they purport to bind others, they are void.”) (collecting authorities).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify 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 8th day of June, 2016.

S/Justin L. Matheny
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