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-DPJ-FKB**
	§	
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 SUPPORT OF PLAINTIFFS' MOTION TO CONSOLIDATE RELATED CASES

Plaintiffs the Campaign for Southern Equality ("CSE") and The Rev. Dr. Susan Hrostowski respectfully request that, pursuant to Federal Rule of Civil Procedure 42(a), this Court consolidate this action ("*CSE III*") with a related action, *Barber* v. *Bryant*, Civil Action No. 3:16-cv-417-TSL-RHW ("*Barber*"), for all purposes or, in the alternative, for hearing. The *Barber* Plaintiffs agree that the requested relief would be the sensible and efficient course of action and join in this motion. Defendants do not.

While Defendants' objection is presumably based on the burdens on them in terms of the briefing schedule and the Court's desire to render a decision before July, in order to mitigate those burdens, the *CSE III* Plaintiffs would consent to a schedule in which Defendants

would (1) file a brief on June 20 addressing only the cases or arguments in the *CSE III* brief not addressed in the *Barber* briefs; (2) simply file their brief in the normal course on June 27, 2016, after the hearing in this matter, or (3) both. That way, all the evidence and testimony in these related cases can be submitted in one consolidated hearing, which would clearly be most efficient for the parties and the Court.

APPLICABLE STANDARD

Rule 42(a) of the Federal Rules of Civil Procedure provides that when "actions before the court involve a common question of law or fact," the court may consolidate the actions for all purposes, join the actions (or matters therein) for hearing or trial, or "issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). "Consolidation is warranted where 'two or more district court cases involve common questions of law and fact and the district judge finds that consolidation would avoid unnecessary costs or delay.'" *Entergy Miss., Inc.* v. *Marquette Transp. Co., LLC*, Civil Action No. 5:11-cv-49, 2013 WL 3778436, at *1 (S.D. Miss. July 17, 2013) (quoting *Mills* v. *Beech Aircraft Corp., Inc.*, 886 F.2d 758, 761–62 (5th Cir. 1989)). This Court has "broad discretion in determining whether and to what extent to consolidate cases." *Achari* v. *Signal Int'l, LLC*, Nos. 1:13-CV-222, 1:13-CV-318, 1:13-CV-319, 2013 WL 5705660, at *2 (S.D. Miss. Oct. 18, 2013); *see also Ctr. for Biological Diversity, Inc.* v. *BP Am. Prod. Co.*, 703 F.3d 413, 432 (5th Cir. 2013) ("The trial court's managerial power is especially strong and flexible in matters of consolidation.").

Courts should be "especially" inclined to exercise their discretion to consolidate cases "when doing so will avoid unnecessary costs or delay or will eliminate unnecessary repetition or confusion." *Branch Banking & Trust Co.* v. *Price*, Nos. 2:11-cv-23, 3:11-cv-59, 2011 WL 5403403, at *3 (S.D. Miss. Nov. 8, 2011); *see also Achari*, 2013 WL 5705660, at *2

(granting motion to consolidate where "considering the cases together will result in judicial economy."); *Baudoin* v. *Stogner*, Civil Action Nos. 2:11-cv-16, 2:11-cv-17, 2012 WL 315976, at *1 (S.D. Miss. Feb. 1, 2012) ("Consolidation of these cases will serve to reduce the costs and expenses of all parties. Likewise, by eliminating duplicate motions on the same issues and eliminating multiple hearings and trials, consolidation will conserve judicial time and resources.").[1]

ARGUMENT

I. The *Barber* and *CSE III* Cases Involve Common Issues of Law and Fact

Plaintiffs in both *CSE III* and *Barber* bring a pre-enforcement Establishment Clause challenge to HB 1523. (Compl. ¶¶ 8, 113–14; Compl. ¶ 36, *Barber*, Dkt. No. 1.) These actions were brought against the same four defendants and seek the same relief under the same legal theory. Plaintiffs in both cases specifically argue that Section 2 of HB 1523 violates the Establishment Clause of the First Amendment by singling out and granting special protection to only certain religious beliefs that plaintiffs and many other religious persons do not hold. (*Compare* Compl. ¶ 8 (alleging that HB 1523 "identif[ies] particular sectarian religious beliefs for special treatment and impo[ses] a statutory scheme that systematically advances those beliefs"), *with* Compl. ¶ 29, *Barber*, Dkt. No. 1 ("H.B. 1523 provides a number of protections exclusively for people and religious organizations who subscribe to the religious beliefs and moral convictions set forth in Section 2.").)

[1] Uniform Local Rule 42 provides in pertinent part: "In civil actions consolidated under Fed. R. Civ. P. 42(a), the action bearing the lower or lowest docket number will control the designation of the district or magistrate judge before whom the motion to consolidate is noticed; the docket number will also determine the judge before whom the case or cases will be tried." *See also Wilburn* v. *City of Southaven*, Civil Action Nos. 3:15-cv-168, 3:15-cv-176, 2015 WL 7289476, at *1 (N.D. Miss. Nov. 16, 2015) (holding that the case with the "lower docket number of the two" "will serve as the lead case"). *Barber* bears the lowest docket number, and so *CSE III* should be consolidated with *Barber*.

Plaintiffs in both cases further argue that HB 1523 violates the Establishment Clause because it was enacted with the impermissible purpose of advancing and endorsing religion. (*Compare* Compl. ¶¶ 46, 60, *with* Compl. ¶ 31, *Barber*, Dkt. No. 1 ("H.B. 1523 was clearly enacted for religious purposes . . . .").) Finally, Plaintiffs in both cases argue that HB 1523 violates the Establishment Clause by imposing significant burdens upon people who do not adhere to the religious beliefs favored in Section 2, including gay and lesbian Mississippians. (*Compare* Compl. ¶ 80, *with* Compl. ¶ 33, *Barber*, Dkt. No. 1). It is plain that *CSE III* and *Barber* involve common questions of law and fact.

II. Consolidating the Cases Will Avoid Unnecessary Cost or Delay

Consolidating the cases will serve the Court's and the parties' interest in efficiency and judicial economy in several ways. First, because the cases "will utilize many of the same witnesses and records," "consolidation will conserve judicial time and resources" by "eliminating multiple hearings." *Baudoin*, 2012 WL 315976, at *1. Requiring the *CSE III* and *Barber* plaintiffs to present their overlapping evidence and duplicative testimony in support of their respective motions for a preliminary injunction would create additional costs for this Court as well as for Defendants, who would be forced to present essentially the same case at two separate hearings. Consolidating the cases and holding just one hearing on these motions will save time and reduce unnecessary redundant expenditures.

Second, should this case proceed to discovery, consolidating the cases will enable the Court to coordinate discovery and minimize the burden on Defendants, ultimately saving money for Mississippi taxpayers. *See Washington* v. *Univ. of Miss. Med. Ctr.*, Civ. Action Nos. 3:11-cv-484, 3:11-cv-485, 2011 WL 5117129, at *1 (S.D. Miss. Oct. 25, 2011) ("Consolidation of these cases will reduce the costs and expenses of all parties . . . [and] conserve judicial time

and resources.") And perhaps more importantly, in the very likely event of an appeal to the Fifth Circuit, consolidating the cases will create one streamlined record to facilitate appellate review.

Finally, Plaintiffs are aware of and not unsympathetic to the burdens that defending HB 1523 has placed on the Attorney Generals' office. *See* Larrison Campbell, *Attorney General's Office Drowning in Anti-1523 Lawsuits*, Mississippi Today, June 13, 2016, https://mississippitoday.org/2016/06/13/attorney-generals-office-drowning-in-anti-1523-lawsuits/. While we believe that consolidation would reduce the overall burden not only on the Court but also on Defendants, to the extent an accelerated briefing schedule would burden Defendants, Plaintiffs would consent to Defendants submitting: (1) an opposition brief addressing only the arguments and cases that are unique to CSE's papers and/or (2) if Defendants wish, submitting additional briefing in opposition to *CSE's* motion for a preliminary injunction on June 27, when it would otherwise be due under Local Rule 7(b)(4), even if that takes place after the preliminary injunction hearing. As the Court and parties are aware, the *CSE III* Plaintiffs have waived their opportunity to file a reply brief.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant motion to consolidate.

Dated: June 14, 2016

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**Pro hac vice* application forthcoming

CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 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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