

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

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL.

PLAINTIFFS

VS.

CIVIL NO. 3:14CV818-CWR-LRA

PHIL BRYANT, IN HIS OFFICIAL CAPACITY  
AS GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.

DEFENDANTS

**ARGUMENT ON MOTION TO REOPEN**

BEFORE THE HONORABLE CARLTON W. REEVES  
UNITED STATES DISTRICT JUDGE  
JUNE 20TH, 2016  
JACKSON, MISSISSIPPI

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

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Jackson, Mississippi 39201  
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FOR THE PLAINTIFFS:

- MS. ROBERTA A. KAPLAN
- MR. JOSHUA D. KAYE
- MR. ROBERT B. MCDUFF
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- MR. JACOB TABER

FOR DEFENDANTS ATTORNEY GENERAL JIM HOOD:

- MR. JUSTIN L. MATHENY

FOR DEFENDANT GOVERNOR PHIL BRYANT:

- MR. TOMMY GOODWIN

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1 (COURT CALLED TO ORDER)

2 THE COURT: You may be seated.

3 (PAUSE)

4 THE COURT: I apologize. I was trying to get my  
5 computer to come on. I apologize. You may call the case.

6 STAFF ATTORNEY: Before the court is Campaign for  
7 Southern Quality, et al., v. Phil Bryant, et al., case number  
8 3:14cv818-CWR-LRA. And the motion today is docket number 39,  
9 Plaintiff's Motion to Reopen Judgment, File Supplemental  
10 Pleading, and Modify the Permanent Injunction.

11 THE COURT: Now, good morning.

12 (ALL RESPONDED "GOOD MORNING")

13 THE COURT: Are we ready to proceed with this motion?  
14 I will just ask people to please do not talk while the hearing  
15 is in process because the court reporter can hear you and that  
16 interferes with her ability to be able to transcribe the record  
17 properly. But with that having been said, who's here for the  
18 plaintiffs?

19 MS. KAPLAN: Roberta Kaplan, your Honor. I'm here  
20 with my colleagues Josh Kaye, Jacob Taber and Zachary Dietert.  
21 And of course you know Mr. McDuff.

22 THE COURT: And who's next to you? Is that --

23 MS. KAPLAN: Josh Kaye, your Honor.

24 THE COURT: Oh, okay. Thank you. All right. For the  
25 State.

1 MR. MATHENY: Your Honor, Justin Matheny for defendant  
2 Attorney General Hood.

3 MR. GOODWIN: And, your Honor, Tommy Goodwin here on  
4 behalf of Governor Bryant.

5 THE COURT: Okay. Thank you. Are we ready to  
6 proceed, Ms. Kaplan?

7 MS. KAPLAN: I am, your Honor.

8 THE COURT: All right.

9 MS. KAPLAN: So, your Honor --

10 THE COURT REPORTER: I'm sorry. There's a button on  
11 the right. If you'll lower that a little bit.

12 THE COURT: The podium will --

13 (COMPLIED WITH REQUEST)

14 MS. KAPLAN: Oh, that's great. Thank you. I wish I  
15 had this at home.

16 THE COURT: One advantage Mississippi has over  
17 New York.

18 MS. KAPLAN: One of many, your Honor. In fact, on  
19 that note, your Honor, I can't help but note that not too long  
20 ago we stood in this courtroom, many of the same people, and we  
21 heard counsel for then Hinds County Clerk Ms. Dunn say that it  
22 would be a cold day in Mississippi before marriage licenses  
23 were ever issued to gay and lesbian couples.

24 Standing here as an adopted New Yorker but an original  
25 Clevelander, I can say that for 53 years people have been

1 saying it would be a very long time before a professional  
2 sports team from the city of Cleveland ever won a national  
3 championship. So I'm here to say that that's changed as well,  
4 your Honor.

5 THE COURT: But it's hot today.

6 MS. KAPLAN: It is hot. It is hot.

7 THE COURT: And it's going to get hotter before the  
8 end of the week.

9 MS. KAPLAN: It is.

10 THE COURT: All right.

11 **ARGUMENT BY THE PLAINTIFFS**

12 MS. KAPLAN: I want to begin just by kind of noting --  
13 kind of setting the stage by noting how really minimal,  
14 frankly, what plaintiffs are seeking in this proceeding. On  
15 one thing we totally agree with the State defendants and which  
16 is that there is no point in litigating an issue and spending  
17 the time and money to pursue an issue unless there's really an  
18 issue.

19 And so the question as of July 1st whether any clerks  
20 in the 82 counties -- one of the 82 counties in Mississippi,  
21 one or more, will seek to recuse themselves we don't know the  
22 answer to today. And the point of the relief that we're  
23 seeking here for now is to find out whether that, in fact,  
24 happens and, if it does, to see if there's been any  
25 constitutional violations.

1           If -- you know, who knows? If for some reason no  
2 clerks in the state of Mississippi seek to recuse themselves,  
3 then we won't be back in front of your Honor on this. That's  
4 really the point of this relief. And in a certain way what  
5 we're seeking is akin to discovery. But the problem is -- and  
6 you even see with it Barbara Dunn -- clerks change.

7           You could do discovery now and find out that no clerks  
8 were recusing. A clerk could change in a county and it could  
9 change the position. So the reason we want to kind of  
10 incorporate it into injunctive relief is to make sure that we  
11 get this information and that this information becomes  
12 publicized at least as long as this law is in effect.

13           So let me start with the issue that your Honor raised  
14 in connection with the parties' supplemental pleadings; and  
15 that is whether, as I understood it, the current injunction,  
16 the permanent injunction in CSE I, applies both to clerks and  
17 the state registrar. As your Honor knows, your order said that  
18 the order applied to the State of Mississippi and all of its  
19 agents, officers, employees and subsidiaries.

20           Let me begin with the clerk issue because I think the  
21 State has essentially conceded the registrar issue. So let me  
22 start with the clerks.

23           In our view, your Honor, that issue is very much  
24 determined I think definitively by the *Echols* case that we cite  
25 in our papers. *Echols* involved a county official from -- I

1 want to get the county right -- Sunflower I think.

2 (COUNSEL EXAMINED DOCUMENT)

3 MS. KAPLAN: Yeah, Sunflower, Mississippi -- arguing  
4 that for purposes of the issue in that case the official was a  
5 county official and was not a state official. And the State  
6 made essentially the same argument they're making here.

7 What the Fifth Circuit held -- and this is good law  
8 still -- is that if the county official's enforcing state law,  
9 which would be true here both with respect to HB 1523 and the  
10 marriage laws in general, and the state official is sued -- or  
11 the county official is sued in his official capacity, then for  
12 purposes of this kind of injunctive relief he is considered to  
13 be a state officer.

14 The court explained in that case that a county  
15 official can wear two hats. If you're enforcing kind of county  
16 policy, county regs, county ordinances, you're acting as a  
17 county agent; but if you're enforcing state law, you're acting  
18 as an agent for the State.

19 THE COURT: But aren't all county officials at some  
20 point in time enforcing state law, some state law, I mean, any  
21 kind of state law no matter what it is? I mean, the mere fact  
22 that they're county officials or municipal officers or someone  
23 else, how does that transpose them into state officials?

24 MS. KAPLAN: Well, I think the answer is what their  
25 duties are and whether those -- that particular duty is a duty



1 to enforce state law. Though, frankly, the court in *Echols*  
2 wasn't that specific, I think that's the right clarification.  
3 So here the duty of the clerk that we're talking about is the  
4 duty to issue marriage licenses to duly authorized couples.  
5 That is a function of state law, not county law.

6           So when they are doing that job, they are for purposes  
7 of injunctive relief -- and that's all we're talking about  
8 here -- they are acting as state officers regardless of who  
9 pays them. They may well be paid by the county. But  
10 regardless of who pays them -- and that's precisely the issue  
11 that the court said in *Echols*.

12           Indeed, the court said in that case -- and I'm  
13 quoting -- The State cannot dissociate itself from actions  
14 taken under its laws by labeling those it commands to act as  
15 local officials. A county official pursues his duties as a  
16 state agent when he is enforcing state law or policy. He acts  
17 as a county agent -- this is to your Honor's question -- when  
18 he is enforcing county law or policy.

19           So, you know, I'm not as familiar with county law in  
20 New York, but in New York City we have parks that are generally  
21 city law or county law. If you're dealing with the parks in  
22 New York under this logic, you would be acting as a county  
23 official. If you're dealing with -- New York is a bad example  
24 because a lot of New York City law is state law, but that's a  
25 totally different issue. But if you're dealing with a state

1 law -- enforcing marriage licenses is, for example, in  
2 New York, you're acting as a state official.

3           So I think *Echols* answers the question. As I said,  
4 before it's good law. I haven't heard a response from the  
5 State on that. And the words of Justice Wisdom in the *United*  
6 *States v. Jackson* case, the clerks here add muscle, bone and  
7 sinew to the marriage laws in doing what they do either in  
8 providing marriage licenses and/or if that happens to be --  
9 what happens comes to pass, in seeking recusals.

10           THE COURT: So with the current state of the case, a  
11 closed case where you have asked to reopen it for purposes of  
12 including I assume these circuit clerks, how would the court go  
13 about doing that?

14           MS. KAPLAN: Yeah. We don't think the court needs to.  
15 We think they're already covered by the injunction. They're  
16 acting as state officers and agents pursuant to the injunction,  
17 and they're under the court's authority. I will turn next to  
18 whether the court had authority to do that. I think you  
19 clearly did.

20           We think, in any event, as under the Rule 65, they  
21 clearly had notice. There's no question here that clerks in  
22 Mississippi know they're supposed to be issuing marriage  
23 licenses to gay couples. And the State tellingly has not come  
24 forward with any affidavit from any clerk in any of the 82  
25 counties saying, *I didn't know about -- you know, I want*

1 notice. I didn't know about this. That's clearly not the  
2 case.

3 But if as in other places -- and the best example is  
4 Alabama where the -- it's a -- kind of a -- it's a not a clerk  
5 who does the marriage licensing. It's an elected state judge.  
6 They -- the people made the -- the other side made this  
7 argument for these reasons. They created a defendant class of  
8 those individuals. We'd be perfectly happy to do that if  
9 that's required. I don't think it's required for the reasons I  
10 just said.

11 One of the reasons we don't want to do it, though, is  
12 it kind of tests what the State's really saying here is in that  
13 case presumably then the clerks need to retain counsel. They  
14 need to spend money. I don't understand what arguments they  
15 would have that could possibly be different in that situation.  
16 And so we were trying in part to avoid all that by doing it  
17 this way.

18 But if for some reason either your Honor or the State  
19 insists, we'd be willing to pursue that route. We think it's  
20 burdensome. We think it's costly both for us and, frankly, for  
21 the clerks, and we think it's unnecessary.

22 Under Rule 65(d)(2), a court is entitled to issue  
23 injunctive relief; and the person bound by that injunctive  
24 relief can be the parties; can be under (b) the parties,  
25 officers, agents, servants, employees and attorneys, which is

1 exactly -- almost exactly the language your Honor used; and as  
2 well, can be other persons in active concert or participation  
3 with them, again, as long as they had actual notice.

4 And I don't really see here, again, any -- how I  
5 should put it? -- any viable argument from the State, any  
6 realistic argument from the State for letting --

7 THE COURT: Let me ask -- let me ask you this. And I  
8 apologize for cutting across you. But when the court entered  
9 its injunctive order back in I guess that was last July, I  
10 guess the court did not solicit any language from the parties  
11 jointly. But what did the plaintiffs believe that that order  
12 meant?

13 MS. KAPLAN: We did exactly -- to be honest, your  
14 Honor, we did exactly the research that we've kind of put forth  
15 now in answer to your supplemental questioning of last week.  
16 And we concluded that your language was okay because under  
17 *Echols* and under the state law that the county clerks would be  
18 covered as agents and officers of the state. So we didn't ask  
19 for any amendment to that order for that reason. I think  
20 tellingly, though, I think your Honor --

21 THE COURT: Did you need any clarification about -- or  
22 I see -- I hear you say you didn't ask for an amendment. But  
23 was there in the plaintiffs' view a need to clarify what the  
24 injunction actually said?

25 MS. KAPLAN: You know, I think it would have come up,

1 it could have come up in that period last summer, July,  
2 remember, when there was a question about whether some clerks  
3 were going to follow this court's injunction after *Obergefell*.  
4 Our client Campaign for Southern Equality made efforts to call  
5 various clerks and then it kind of went away over a weekend.  
6 If any of the clerks had persisted in that intransigence, it  
7 may have come up then. It did not. They complied with the  
8 order.

9 I think tellingly, though, your Honor, and -- there's  
10 a real issue here -- is that the State didn't seek to clarify  
11 the language. I'm trying to put this in respectful terms. But  
12 call my crazy; you know, if an injunction is issued against my  
13 client and I believe that it doesn't cover certain parties who  
14 are clearly within the ambit of the order, then I believe as an  
15 attorney and an officer of the court that it's incumbent upon  
16 me --

17 THE COURT: But the State, to its defense, says that  
18 it only applies to Governor Bryant and Attorney General Mike  
19 Moore. And Mr. Teeuwissen is not here for Barbara Dunn who's  
20 since been replaced by Zach Wallace. So he -- I guess Barbara  
21 Dunn concedes it applies to her. There are 81 other circuit  
22 clerks who were not --

23 MS. KAPLAN: Right.

24 THE COURT: -- here.

25 MS. KAPLAN: Under its language, it applies to all

1 agents and officers of the State of Mississippi. And for the  
2 reasons that we've stated, including the statutory provisions  
3 that we cite in our brief, we believe that all clerks are  
4 agents or officers of the State of Mississippi when they are --

5 THE COURT: And the attorney general argues that it  
6 has no right or authority or obligation to represent the other  
7 81 circuit clerks, that they have their own county attorneys,  
8 they have their own budgets, and they go hire private counsel  
9 or do whatever and take whatever positions they might want to  
10 take. And I assume the State either supports them or would not  
11 support them in whatever position that they take.

12 MS. KAPLAN: Yeah. I don't think the question of who  
13 represents them or how they're represented really answers this.  
14 I think it's answered by the language of 65(d)(2)(B) and by the  
15 *Echols* case. I think it's clear under there. And, again,  
16 similar to the State not proposing language to your Honor  
17 to clar- -- if the State truly believed their position, then  
18 they should have submitted a black line to your Honor that  
19 summer striking out "officers, agents, employees of the State  
20 of Mississippi." They did not do that.

21 By the same token, the clerks, again -- this wasn't  
22 exactly a secret at the time. It was national, certainly  
23 statewide news. Any clerk in the State of Mississippi who for  
24 some reason thought that this law -- that this order didn't  
25 apply to them and they didn't have to comply could have sought

1 to intervene in the case. They did not. And I'm sure your  
2 Honor would have granted that intervention. They did not do  
3 that.

4 They, to use an old-fashioned term, sat on their  
5 hands. And the reason they sat on their hands is because, A,  
6 the injunction applied to them and, B, as the State concedes,  
7 they're clearly subject to *Obergefell*.

8 The argument that they're making now is that they're  
9 somehow only subject to *Obergefell* in some abstract sense but  
10 are not in -- are not bound by the order of this court as an  
11 agent and officer of the State, frankly, doesn't make any sense  
12 to me. And I don't think it can be squared either with the  
13 language of the federal rules or with the *Echols* case.

14 Let me move on. So assuming that they're the agents  
15 of the State, assuming as I believe that the court was well  
16 within its authority not only under Rule 65(d)(2) but under the  
17 *Hall* case issued by Judge Wisdom -- and, again, that case was  
18 very relevant because there he's talking about an order like  
19 this case because it was a desegregation order in the schools  
20 where the order applies to people well beyond the case.

21 And he said in those kinds of circumstances, this kind  
22 of injunctive relief is perfectly appropriate. It's very  
23 different than like a patent case, for example, where the  
24 injunction just applies between the parties to the patent  
25 dispute. And he makes that distinction quite clearly in the

1 *Hall* case.

2           So let me move on if I may, your Honor, to kind of  
3 getting to the relief, assuming we've established those two  
4 positions to the relief and why we believe it's necessary.

5           THE COURT: Well, let me ask you this. Could the  
6 court have -- and I'm asking you, and I know the State is  
7 listening because some of these same questions will be asked of  
8 the State.

9           After the law was signed into effect, because it was  
10 the court's injunction that the court entered, could the court  
11 have taken it up on its own, because I think the parties do  
12 cite cases where upon the request of parties but also on the  
13 court's own initiative it may seek to amend or do something  
14 with this injunction? In this instance, the plaintiffs came to  
15 court and moved to -- moved to amend or moved to reopen. Could  
16 the court have done that on its own?

17           MS. KAPLAN: Absolutely, your Honor. I believe the  
18 court always has in this kind of an order -- and I think  
19 there's cases we cite for that position -- inherent equitable  
20 authority when you're dealing with this kind of permanent  
21 injunction, especially a permanent injunction that affects the  
22 rights of so many parties, for the court to be able to amend as  
23 necessary on its own. Of course, you'd have to give notice to  
24 the parties and an opportunity to be heard, but I think your  
25 Honor would be completely entitled to that do that.



1           So the next question is whether this case should be  
2 reopened and whether the circumstances here satisfy the  
3 extraordinary circumstances standard under Federal Rule of  
4 Civil Procedure 60(b)(c) (*sic*). We don't really believe that  
5 there could be any real argument at this point that HB 1523  
6 and, in particular, the section of HB 1523 that deals with the  
7 clerks, which is section -- excuse me, your Honor.

8           (EXAMINED DOCUMENT)

9           MS. KAPLAN: 3-8. It is precisely the kind of change,  
10 extraordinary circumstances that was actually contemplated in  
11 the rule.

12           Before April 5th when this law was passed, there had  
13 previously been two rules, a statute and a constitutional  
14 amendment, that barred gay people from being married in the  
15 state. The court's permanent injunction enjoins those laws.  
16 Now HB 1523 purports to permit clerks to come in and refuse to  
17 comply with that order specifically only with respect to gay  
18 and lesbian couples and specifically only with respect to  
19 certain -- certain defined religious beliefs. We believe this  
20 is unconstitutional and we think it's -- it presents  
21 extraordinary circumstances.

22           But like I said before, your Honor, we're not seeking  
23 to do anything really at this point other than to find out  
24 whether there's a problem. We tried to do that voluntarily by  
25 asking the State whether they would give us this information

1 and then we wouldn't even need to bother your Honor, and the  
2 answer to that was no.

3 Using the state records law, public records law, is no  
4 remedy here because, theoretically, we'd have to submit state  
5 records requests every two weeks or every week because you  
6 never know when somebody's going to submit this. That,  
7 obviously, doesn't make any sense.

8 And as I said before, clerks not only change their  
9 minds, but clerks change positions. And so we needed a way to  
10 kind of put this information into a way where we've got it on a  
11 continual basis. And the way we thought to do that -- the most  
12 logical way was through the injunction.

13 THE COURT: Has the state created a particular form  
14 that's going to have to be filed by the circuit clerks? Does  
15 the plaintiff know that yet?

16 MS. KAPLAN: I do not, your Honor.

17 THE COURT: And/or in what form the recusal letter or  
18 recusal document will be?

19 MS. KAPLAN: All I think the act says is that the  
20 state registrar who shall keep a record of such recusal.  
21 That's all we have from the statute. And I -- unfortunately,  
22 your Honor, I have no other information as to how that's  
23 actually going to take practical form within the state.

24 THE COURT: So, theoretically, the clerk could call  
25 the state registrar's office, tell them, I -- the clerk could

1 say, *I'm not going to do any -- issue licenses to same-sex*  
2 *couples*, the registrar takes that information, plugs it into a  
3 computer or piece of paper and keeps it on file.

4 MS. KAPLAN: Exactly. And your Honor is exactly  
5 right. If that's not written down somewhere, we perhaps don't  
6 even get it in response to a public records request. The only  
7 other alternative we could do is do what we did in July of last  
8 summer where we respectively -- our client Campaign for  
9 Southern Equality called clerks in all 82 counties. But,  
10 again, that's not very practical. We'd have to constantly do  
11 that or we'd have to send couples in in all 82 counties.

12 I have to joke about this a little bit, your Honor. I  
13 thought New York was a big state. We only have 62 counties in  
14 New York state. 82 counties is a lot of counties. And so it  
15 really would be incredibly burdensome for us to have to figure  
16 this out on a continuous basis whether this is happening or  
17 not. And I don't think anyone's constitutional rights should  
18 be subject to that kind of a burden.

19 And, of course, the truly horrible consequence of this  
20 all could be is that some couple walks into a clerk's office  
21 somewhere with their family, all dressed up, with flowers, with  
22 gifts, thinking they're going to get a marriage license and  
23 they're told, *Sorry. We're not issuing marriage licenses to*  
24 *gay couples*, or there's some -- even if there's no impediment  
25 or delay, there's some obvious affront to their dignity. They

1 say, *You -- the gay couples, You've got to go over to the*  
2 *corner. Gay couples get married over here. Straight couples*  
3 *get married over there* (indicating), something like that, which  
4 is exactly what we're trying to avoid. And it's really unfair  
5 and unprincipled for the State to say that we have to wait  
6 until that happens to come to this court to seek this relief.

7 Let me move on. I don't think there's too much more.  
8 I want to add --

9 THE COURT: Part of what -- part of the relief that  
10 you also seek is if -- and you may -- you may be getting to  
11 this point. I don't know. But if a clerk decides to issue a  
12 notice of recusal, that that clerk would also be forbidden to  
13 issue licenses to opposite-sex couples. What would be the need  
14 of that?

15 MS. KAPLAN: Yes. So that's -- that goes to the  
16 core -- that, unlike the rest of our relief, really goes to the  
17 core constitutional problem here which is the one thing I think  
18 we can all admit. Whether or not anyone thinks that a clerk  
19 should have a right individually to recuse in a particular  
20 situation, the one thing that I think everyone can agree on is  
21 that there can't be separate but equal marriage. There can't  
22 be Jim Crow kind of gay marriage in the state of Mississippi.

23 So you can't have, as I said before, a clerk's office  
24 where there's a sign that says, *Gay couples get married here*  
25 *and straight couples over there.* That's exactly what cannot

1 happen. It's very clear the Supreme Court I think would agree  
2 with that. And so that part of our injunction is intended to  
3 deal with that. That, unlike the rest of it, is really not a  
4 discovery issue. That goes to the core constitutional issue.

5 We are not yet -- and I want to reserve on this. We  
6 are not yet contending that clerks do not have a right to  
7 recuse overall; they either have to do their job or not do  
8 their job. We're not raising that issue right now. We just  
9 want to find out first if there's a problem; and, two, as long  
10 as these recusals are happening, we want to make sure no gay  
11 couple is humiliated and has their dignity really be  
12 disrespected by having to go to a place where it says, you  
13 know, *Gays over here*.

14 THE COURT: Although the clerk as the registrar,  
15 according to the statute, would be -- would have to keep track  
16 of the forms that it receives, in our local counties public  
17 notices of all sorts are posted there on a bulletin board in  
18 the courthouse.

19 If the circuit clerk who decides that *Our office -- or*  
20 *I am recused. I will not issue same-sex marriage licenses,*  
21 just posted that notice on the bulletin board, is that -- would  
22 that be sufficient under the act? And is there -- is there on  
23 the county level -- I realize -- I mean, some people have  
24 notice of it right then. Would that be sufficient or is that  
25 okay?

1 MS. KAPLAN: I think that's more than the act  
2 requires. I think that's why actually we need relief from this  
3 court. All the act requires, as your Honor says, is that a  
4 clerk pick up the phone and tell the registrar. That's it.  
5 And there's absolutely no provision in the act whatsoever that  
6 I'm that aware of that notifies the public and notifies gay  
7 couples seeking to marry that a particular person in a  
8 particular place has sought to recuse. That's exactly the  
9 problem we're trying to avoid.

10 Now, the State's response to that is, *If you file*  
11 *public records requests constantly, we'll respond if it*  
12 *happens.* But that's not really an adequate solution, because  
13 as -- you know, we have a big law firm and we work really hard,  
14 but we could miss it at some point. I mean, between my public  
15 record request one and my public record request two, someone  
16 recuse and this could happen. And this is why we're trying to  
17 avoid it.

18 Whether as an alternative to the relief we're seeking,  
19 your Honor, we have a public website or something like that, it  
20 would be okay to have notice on the county bulletin board. I  
21 think that's fine as long there's public notice somewhere and  
22 people know how to find it. That's really the problem we're  
23 trying to avoid here. We want the gay couples in those  
24 counties to know who they shouldn't go to to get married, how  
25 to avoid this indignity, embarrassment, and how to make sure

1 they do get married.

2 THE COURT: Does the statute require the clerk to also  
3 post some sort of notice of who in that office might or who  
4 she -- who he or she has appointed to issue such licenses?

5 MS. KAPLAN: You see me shaking my head, your Honor.  
6 It doesn't do that either. And that maybe is in certain ways  
7 the most fundamental flaw -- there's plenty of flaws to this  
8 statute, but the most fundamental flaw to this subsection --  
9 which is there's no enforcement mechanism whatsoever. Not only  
10 does it have to be no notice of where this couple should go in  
11 order to get married and not suffer indignity, but there's no  
12 enforcement mechanism.

13 So let's assume a couple takes a position -- let's  
14 assume there's a county, Sunflower County -- I don't know where  
15 that is, but somewhere in the state there's three people or two  
16 people that work in the office --

17 THE COURT: We could probably use -- and I don't know  
18 this. So this is not direct evidence. All right? We could  
19 probably use Sharkey and Issaquena County as an example. It is  
20 one of our lowest populated counties. Probably has no more  
21 than one or two circuit clerks in the -- probably a clerk and a  
22 deputy clerk.

23 MS. KAPLAN: Right. So if you had that kind of an  
24 office somewhere -- and it sounds like you already do in  
25 Mississippi -- and the clerk decides -- you know, calls up

1 Ms. Moulder or sends her an e-mail and says he's recusing, and  
2 the deputy clerk says, *You know what? I don't want to do this*  
3 *either. I'm recusing as well, you've got a real problem.*

4 Now, they actually talked about this in the  
5 legislative history that we submitted to your Honor in  
6 connection with the issues to be heard on Thursday and Friday.  
7 If you look at the March 30, 2016, senate debate, there's some  
8 discussion.

9 And Senator Branning, who is one of the chief sponsors  
10 of this law, says in that kind of a case, if it is too much of  
11 an imposition for that clerk to hire additional staff, is what  
12 she's suggesting, if that happens, or whatever it may take,  
13 then the clerk may need to second-guess whether that recusal is  
14 going to -- is going to be worth it for that office financially  
15 or just feasible from a day-to-day operation standpoint.

16 The problem is there's no -- so let's assume that that  
17 happens. Let's assume that the clerk decides to recuse. Let's  
18 assume that his deputy decides to recuse. And let's assume  
19 that he does nothing to make sure that gay couples in that  
20 particular county, a very low population county, could get  
21 married. What are the gay couples supposed to do? That's the  
22 real problem here. One argument could be they have to go to  
23 another county. That's clearly I think inconsistent with  
24 *Obergefell*.

25 The statute says no impediment or delay, but it's got



1 no mechanism whatsoever to enforce that. And one of the  
2 reasons we want to incorporate that language in your Honor's  
3 injunction is to essentially create enforcement so that if in  
4 fact that happens, that person would be in contempt and we  
5 could come back to your Honor and figure out a solution for  
6 that county. But given the way it's drafted now, there is no  
7 solution. I don't know what kind of a case you would bring.

8 THE COURT: But filing a motion for contempt and  
9 getting a hearing and all that adds delay. If the people  
10 wanted to get married tomorrow, there's no guarantee that you  
11 could get to court.

12 MS. KAPLAN: Right. Well, so this is what's -- that's  
13 what we're saying. They have to tell us -- what we're  
14 recommending is they have to tell us somehow who's recusing  
15 and, two, they have to tell us what their plan is, that's if  
16 there is no -- what their nec- -- all necessary plans to make  
17 sure there's no impediment or delay. They need to publicize  
18 somehow what those plans are, as your Honor said, by saying, *So*  
19 *and so will marry*, by saying, *Sorry*. *No one in this office is*  
20 *marrying*. *You've got to go 150 miles next door*.

21 People need to know what that alternative is so they  
22 know whether there's a problem. If we see a county,  
23 for example, where no one in the office is doing it, then,  
24 presumably, there would be some kind of legal action taken.  
25 But we need to know whether that's a problem.

1           THE COURT: But a clerk could not make a deputy clerk  
2 do it at -- consistent with the deputy clerk's right to be  
3 opposed to -- you know, religiously opposed to issuing the  
4 license. Right?

5           MS. KAPLAN: Even worse than that, your Honor. If a  
6 senior clerk under 1523 -- I think this is -- I'm going to look  
7 at my colleagues. They can correct me if I get it wrong. If a  
8 senior clerk makes a deputy clerk do it, ordered someone to do  
9 it, and even though he had the sincerely held religious  
10 beliefs, that senior clerk could be sued by the deputy clerk.  
11 He could be subject to an injunction. He could be subject to  
12 damages from the state if that happens.

13           That's what 1523 is about. It's an all-time, complete  
14 pass that if something is against your sincerely held religious  
15 belief, including that marriage should be between a man and a  
16 woman, there is nothing anyone could do to make you take  
17 whatever action is contemplated, in this case give marriage  
18 licenses to the clerks.

19           So that's exactly right, your Honor. And that's why  
20 we're trying to seek this kind of what we think very moderate,  
21 minimal relief at this point to see if there's actually a  
22 problem. But there's no question that under 1523 no one could  
23 order I think a deputy clerk to do so.

24           THE COURT: Under the statute could the -- well, not  
25 under the statute. Well, I'm not sure if under the statute.

1 But does the clerk have the power to deputize a person, someone  
2 who's not employed by the clerk's office, deputize a person, a  
3 lawyer in town, somebody who can give an oath in town, anybody,  
4 anybody outside of the office to sort of handle -- you might  
5 run into the problem of treating gay couples differently, but  
6 handle any cases where persons are -- have submitted recusals?

7 MS. KAPLAN: You know, that's clearly -- I don't -- I  
8 don't have the answer under Mississippi law, to be honest, your  
9 Honor; but that's clearly what Senator Branning is talking  
10 about here in this legislative history. She's contemplating  
11 that someone would be hired maybe just to do this in a  
12 particular county. I don't think --

13 THE COURT: But according to what you read, hired if  
14 the county can afford it.

15 MS. KAPLAN: Correct.

16 THE COURT: I mean, if the county can't afford a  
17 special person for that reason, then feasibility is used to  
18 trump your religious view, if I heard you correctly.

19 MS. KAPLAN: That's correct. And, your Honor, I don't  
20 know -- we will -- we will submit a letter to you by the end of  
21 the day today. I just don't have the answer under Mississippi  
22 statutory law whether somebody could be kind of seconded or --  
23 for lack of a better term, to be able to do this. I just don't  
24 have enough about the Mississippi Code to answer that question,  
25 but we will get you an answer.

1 THE COURT: Okay.

2 MS. KAPLAN: The other issue that the parties have  
3 raised is whether or not -- this argument that we should have  
4 brought a separate case now that 1523 is in place. We think  
5 the *Neely* case, which isn't even binding on this court -- it's  
6 from the Ninth Circuit -- is completely distinguishable. Not  
7 only was that about something that happened many years -- four  
8 years later, but the statute there was actually passed,  
9 ironically the opposite of this, to try to comply with the  
10 Supreme Court decision there on abortion.

11 This is actually the opposite, obviously. 1523 was  
12 not passed in order to comply with *Obergefell*. It was passed  
13 at best, being chartable to the State, as a way to evade  
14 *Obergefell*.

15 Moreover, this court dealt with a very similar issue  
16 not too long ago. Last year I believe, your Honor, in the  
17 Rankin County School District case and the contempt proceedings  
18 that were filed there, also a -- an establishment clause issue  
19 about additional issues of establishment clause violations that  
20 occurred after your court's order in connection with the Rankin  
21 County schools.

22 And there the State again made an almost identical  
23 argument -- Rankin County -- excuse me -- made an almost  
24 identical argument that they needed to start a new proceeding;  
25 and the court said that you were going to reject that argument,

1 that it's the same case, it's part of the original cause and  
2 there's no reason that the court should have to start from  
3 scratch and institute a new civil action.

4 Yes, it was a consent order in Rankin County. We  
5 don't think the difference between a consent order and the  
6 injunction makes any difference. There's all kinds of  
7 authorities saying that they are treated the same for these  
8 purposes. And, obviously, the situation is very analogous.

9 THE COURT: If the same-sex couple had come to you and  
10 said, *We believe we've been discriminated against in some other*  
11 *way, adoption, or, We've been discriminated against in some*  
12 *other way. We're married. We've been married, or We were*  
13 *issued a license, but we tried to hold our reception at a state*  
14 *venue and were denied because of that, and the officer who's*  
15 *over the state venue is not the governor or the attorney*  
16 *general, would you have to file a new action in that case or*  
17 *could you proceed with reopening this case because this*  
18 *injunction, according to you, applies to state officers --*  
19 *according to the court, applies to state officers, agents and*  
20 *subsidiaries and some other?*

21 MS. KAPLAN: I think the answer to that question, your  
22 Honor, is that my actions speak louder than my words, because  
23 that's exactly what we did. This proceeding to reopen only  
24 relates to the clerks. We brought a new proceeding last Friday  
25 I believe under -- under the entire statute on a wide array of

1 different contracts -- context arguing establishment clause  
2 violations.

3           Similar for equal protection. We've reserved on that  
4 issue. If we brought a kind of equal protection challenge  
5 about the rest of the statute, about adoption or counseling or  
6 there's kind of facts practically everywhere, like going to the  
7 restaurant, going to a hotel, getting flowers, we would have  
8 brought that -- or we will bring that if necessary as a new  
9 action. This is only about --

10           THE COURT: Then why -- if the injunction itself, it  
11 applies to state officers, why should that injunction not be  
12 read to preclude state officers from treating same-sex couples  
13 differently?

14           MS. KAPLAN: It could be, your Honor. I'm not saying  
15 that we are necessarily -- I just thought it would strain -- I  
16 didn't want to put that kind of procedural strain on those  
17 authorities for reopening cases. And given that your Honor's  
18 injunction really applied to the issuance of -- issuing  
19 marriage licenses to gay couples, we thought that the provision  
20 of the statute that dealt specifically with that was the  
21 appropriate place to come back to you at the outset to do that.

22           I'm not saying I couldn't have. I'm thinking but I  
23 also always have the right to bring a new action, and it seems  
24 to us the logical way to divide it up was to divide it in that  
25 way.

1           The only other case that I think -- I talked about the  
2    *Neely* case, the Ninth Circuit case. They also cite a Fifth  
3    Circuit case in *Morrow*, which was a prison rights case  
4    challenging prison conditions. There -- the difference there  
5    was that they were actually -- the defendants were actually  
6    trying to address the constitutional issues that had been  
7    raised. And so they were working on it and trying to do it.

8           This is actually a very different case here because  
9    these are lawyers that say they haven't -- you know, they're  
10   doing their duty in defending this thing, but the State here  
11   isn't trying to comply with *Obergefell* and your Honor's -- the  
12   implication of your Honor's decision. They're trying to, at  
13   best, get around it.

14           Let's see if there is anything else. One second, your  
15   Honor. I'll see if my colleagues tell me I got anything wrong  
16   or I missed anything.

17           THE COURT: All right.

18           (COUNSEL CONFERRED)

19           MS. KAPLAN: Again, your Honor, you know, my colleague  
20   just reminded me that, really, the case that we brought, it was  
21   really about the right to marry. When we brought the adoption  
22   case is a good example because Mississippi after your Honor's  
23   ruling still had a statute on the book that was being enforced  
24   saying that gay couples couldn't adopt. We brought that as a  
25   separate case. That was litigated before Judge Jordan down the

1 hallway. We've brought the establishment clause claims in a  
2 separate case.

3 But we think that what your order pertained to last  
4 summer was that gay couples throughout Mississippi had a right  
5 to go to a clerk's office and get marriage licenses. And we  
6 don't think -- and what we're seeking today is what we think  
7 really the minimal remedy necessary to make sure that, A, gay  
8 couples in Mississippi are not put at the jeopardy of not  
9 knowing when they show up whether someone's recusing or not;  
10 knowing -- if someone's recusing or not, knowing what they do,  
11 as your Honor pointed out, to whom they go through to; and,  
12 three, making sure that there's not kind of separate but  
13 equal -- separate swimming pool, separate school for gay  
14 couples at these offices, that if you're not going to -- if  
15 you're going to recuse, you've got to get out of the marriage  
16 business altogether and that we don't have different signs in  
17 clerks' offices that say, *Gay couples go here. Straight*  
18 *couples go there.*

19 THE COURT: But in the existing case, the existing  
20 closed case, the only parties were Barbara Dunn, the governor,  
21 and the attorney general. The registrar was not a party. So  
22 why should the court, you know, reopen a closed case that's  
23 been closed for almost a year, reopen a closed case to add a  
24 party who was not a party in the original case?

25 MS. KAPLAN: I'm not sure you need to, your Honor. As



1 we said in our papers, we really did that out of an excess of  
2 caution because they were taking the position that she had not  
3 been involved. They concede that she is an officer of the  
4 state, Ms. Moulder. So she is clearly subject to your  
5 injunction. And I'm not sure you need to open the case to do  
6 so.

7 We really did that kind of as a precautionary measure  
8 because there was this new person involved and they were taking  
9 the position that she was somehow out of it. But as -- under  
10 Rule 65(d), I don't think you need to do that necessarily.

11 THE COURT: The Fifth Circuit case that came -- that  
12 dealt with CSE I and the Fifth Circuit issued its decision and  
13 then remanded it to this court and then this court issued its  
14 injunction, in reading *Obergefell* and reading the Fifth Circuit  
15 decision and then reading the injunction -- I heard what you  
16 said about the limited view that the plaintiffs had taken of  
17 the case because you were only trying to seek licenses, but  
18 that Fifth Circuit case also spoke to same-sex couples not  
19 being treated differently anymore.

20 So if you read it in that way, does "state officer" as  
21 defined in the injunction apply to more than just the governor  
22 and the attorney general?

23 MS. KAPLAN: No question, your Honor. There's no --  
24 no one could read your Honor's decision pre-*Obergefell*, read  
25 *Obergefell*, then which -- in which Justice Kennedy says that

1 gay couples have to be permitted to marry under the same terms  
2 and conditions as straight couples, then read Jerry Smith's  
3 decision in the Fifth Circuit and come to any other conclusion.  
4 Absolutely.

5 And to be honest, your Honor, I think one of the  
6 reasons why we've brought a separate case is because right now  
7 we're going with the establishment clause arguments; and that  
8 is different than the kind of equal protection theory that we  
9 used in CSE I.

10 This case, this proceeding -- this isn't this case.  
11 What we're here now, we're here on equal protection grounds.  
12 We're here on separate but equal, same terms and conditions  
13 grounds. And that's why it's totally appropriate. We don't  
14 need to start a new case.

15 It's totally appropriate for your Honor if you want to  
16 add Ms. Moulder to reopen the case. But even if you don't,  
17 it's totally appropriate for your Honor to give us the limited  
18 relief that we're seeking to make sure that the dignity of gay  
19 and lesbian couples in Mississippi in getting marriage  
20 licenses, which is exactly what the Supreme Court was concerned  
21 about in *Obergefell*, is preserved.

22 THE COURT: Would the plaintiff find it sufficient if  
23 the court brought in Ms. Moulder and sort of crafted a way in  
24 which the notices are publicized, for example, a website or --  
25 I guess a website might be the -- a good way. Is that the best

1 way with, you know, people in Mississippi, many of whom don't  
2 have access to computers?

3 MS. KAPLAN: That's a good point, your Honor.

4 THE COURT: I mean, so is the website the most  
5 efficient way? Or do you make the governor put it on his  
6 website? Do you make the attorney general put it on his  
7 website? Is there -- I mean, what other ways in which could  
8 the public be placed on notice?

9 MS. KAPLAN: I think soliciting the input of the State  
10 and Ms. Moulder is an excellent idea. That's actually why we  
11 originally reached out kind of voluntarily by letter to see if  
12 we could get cooperation. I always think that that's a good  
13 idea when a court is crafting injunctive relief.

14 In terms of recommending the website, we actually  
15 asked our client Joce Pritchett what she thought would make  
16 sense. She lives down here in Mississippi. But Joce  
17 Pritchett, as your Honor pointed out, has computers and access  
18 to the web; and that may not be true of all gay couples in the  
19 state. So I think soliciting that input would be an excellent  
20 idea.

21 And that's really -- we're not kind of hung up on any  
22 particular way to do it. We just want it to be done is the way  
23 I would -- is the way I would put it, your Honor.

24 THE COURT: Thank you, Ms. Kaplan.

25 MS. KAPLAN: Thank you.

1 THE COURT: Mr. Matheny, do you -- oh, Gina, do you  
2 need a break? We're going to take a ten-minute break right now  
3 to give the court reporter a break, because we may be with you  
4 for a minute. All right. Court's in recess.

5 (RECESS)

6 THE COURT: You may be seated. Mr. Matheny.

7 **ARGUMENT BY THE DEFENDANTS**

8 MR. MATHENY: Your Honor, I have to confess something.  
9 After our phone calls and after these other cases were filed in  
10 the past couple of weeks and it became pretty clear that  
11 Ms. Kaplan's other case and Mr. McDuff's other case and that  
12 other case is lingering out there, when I was told that we were  
13 going to be having a hearing in this case too, it had occurred  
14 to me that if things go according to what the plaintiffs'  
15 believe that they should go in those other cases, that all this  
16 stuff that we're talking about here today about clerk recusals  
17 and the recusal provisions of the statute along with everything  
18 else in the statute would be -- would not go into effect. So I  
19 knew that that was obvious to the court.

20 I wanted to point it out and it had brought to mind  
21 something that I saw recently. Attorney -- famous attorney and  
22 State Representative Willie Bailey had an argument over at the  
23 Mississippi Supreme Court several weeks ago, and he firmly  
24 believed that his case was moot. So when he got up, he started  
25 his argument by asking the chief justice and the other judges,

1 he said, *I just want to make sure that I'm clear on why we're*  
2 *here today because I don't know, and I hope the court will*  
3 *issue an opinion saying why we're here.* And he kept repeating  
4 that and repeating that. And that was basically all his  
5 argument.

6 That's not all my argument here today, your Honor.

7 THE COURT: Okay.

8 MR. MATHENY: Representative Bailey, though, the point  
9 being was that I do have some questions about why we're here.  
10 And I think some of your questions and some of the arguments  
11 that Ms. Kaplan presented help explain that. And so I want to  
12 go through in kind of a nontraditional order and answer some of  
13 the points she raised, answer your question, but start with  
14 this. And I think this is the most important thing, your  
15 Honor.

16 It's very important to look at exactly what this one  
17 provision of this bill that we're here about today actually  
18 says. It answers some of the small questions that were raised  
19 earlier; and I think that it answers some big questions too,  
20 because the central thrust of this is that if a clerk decides  
21 that he or she or a clerk's employee decides that he or she  
22 needs to recuse himself or herself based upon the sincerely  
23 held religious beliefs that are set out in the statute, if the  
24 clerk decides to do that, the bill provides that that person  
25 shall take all necessary steps to ensure that the authorization

1 and licensing of any legally valid marriage is not impeded or  
2 delayed as a result of any recusal.

3           So, you know, I know that their response to this is,  
4 *Well, there's no enforcement mechanism.* But this is the point.  
5 If somebody does recuse themselves -- and that is not clear at  
6 this point whether anybody will; but if somebody does, then  
7 it's on them to make sure that none of these horrible things  
8 that I kept hearing after *Let's assume this. Let's assume*  
9 *that. Let's assume that,* if any of those things occur, then  
10 the clerk that recused himself or herself has probably violated  
11 federal law, arguably.

12           And one of the things we're arguing about is whether  
13 or not that would violate the court's injunction or potentially  
14 a future injunction that would come under that. But they're  
15 also violating the very bill itself that purports to allow them  
16 to do the recusal.

17           So that's one of the reasons why I have such a hard  
18 time assuming that all these hypothetical problems and all of  
19 this -- I mean, it's easy to win a case if I can make up all  
20 the facts that existed in the case, but that's kind of what I'm  
21 hearing is that all these bad things are going to happen  
22 because all these clerks are going to be recusing themselves  
23 and they're going to be denying marriage licenses or delaying  
24 marriage licenses or they -- bad things will happen in the  
25 clerks' offices. But that's not what the statute that the

1 legislature passed allows them to do.

2 Now, I understand that it's easy to sit back and  
3 pretend like, *Well, if I was a legislator and I was looking at*  
4 *this bill and I need to figure out, you know, what problem*  
5 *could come up, let me address this, let me address that,* that  
6 other people -- I mean, probably you poll 100 people, they  
7 might have written it differently if you had to make a  
8 provision in there about what a clerk shall do after recusing  
9 themselves to make sure there's no problems that arise.

10 But the point being is -- the salient point is that  
11 all these things that they forecast would not be protected by  
12 the statute. It wouldn't be authorized by the statute. And so  
13 I wanted to make that point clear, because I think --

14 THE COURT: So what would -- if a clerk failed to do  
15 under the statute -- if a clerk failed to have a backup or  
16 failed to make sure that the license is not issued without any  
17 undue delay, or however the terms are, does not impede -- I  
18 mean, "impede" is not necessarily defined. I mean, is a person  
19 entitled to have their license immediately? I mean, people go  
20 into the clerk's office, they apply for their license I think,  
21 and they get it, right then. Right then.

22 MR. MATHENY: Well, there's a process. I mean, it  
23 takes the paperwork and the standing in line if lots of people  
24 are there and so forth.

25 THE COURT: And assuming there's nobody in line --

1 MR. MATHENY: Right.

2 THE COURT: -- they get it. What does "impede" mean?  
3 What is "delay" -- what does "delay" mean? And the -- it looks  
4 like the state is pushing down -- the obligation down to the  
5 clerk, again, to decide who is going to be married. And so  
6 if -- I'm just trying to figure out -- the statute says that  
7 the clerk shall do everything in its power and the clerk  
8 ultimately will be held responsible.

9 Does "responsible" mean liable under state law? Well,  
10 what -- I mean, what -- what penalty does the clerk face if the  
11 clerk does not have a procedure in place?

12 MR. MATHENY: Well, I'll take one of their  
13 hypotheticals for that. Okay? Ms. Kaplan went into a big deal  
14 about how that if a deputy clerk recuses himself or herself,  
15 that the -- that the head -- that the elected circuit clerk,  
16 the head of the office, couldn't take action against that  
17 deputy clerk. But if the deputy clerk's not following the  
18 statute and doesn't have the protections of the statute, I  
19 don't see how the statute would stand in the way of the circuit  
20 clerk disciplining him --

21 THE COURT: If this deputy clerk says, *My religious*  
22 *view is just as strong as yours. We go to the same First*  
23 *Baptist Church or First Methodist Church here in town. We sit*  
24 *in the same Sunday school class. We read from the same Bible.*  
25 *I believe just as you are. I am not going to do this, because*



1 *I believe just like you. You can't force me, madam or sir*  
2 *circuit clerk, to issue the license.*

3 MR. MATHENY: Well, that's an issue of forcing the  
4 clerk to do it. What I'm saying is, if the clerk -- the deputy  
5 clerk in that example recuses himself or herself but then does  
6 not ensure that the authorization and licensing of legally  
7 valid -- any legally valid marriage is not impeded or delayed  
8 as a result of recusal --

9 THE COURT: So -- so --

10 MR. MATHENY: -- the clerk doesn't have the -- the  
11 deputy clerk doesn't have the protection of the statute.

12 THE COURT: So it is the responsibility in the office,  
13 according to the State, that the lowest level person must go  
14 out and find someone? Because I think what you're saying here  
15 is that the circuit clerk can recuse. The deputy circuit clerk  
16 can recuse as well, but the deputy is responsible for finding  
17 someone else to sit in -- to stand in his or her shoes if she  
18 recuses.

19 And if that person also is a member of that same  
20 Sunday school class and -- you know, because sometimes these  
21 circuit clerk's offices are very small in these counties and I  
22 can imagine all of them going to the same church. You mean to  
23 tell me the lowest level person, the last person who submits a  
24 recusal is the first person who's responsible for making sure  
25 that a license is issued?

1           MR. MATHENY: No. And, first of all, the problem with  
2 that kick-the-can analogy, if you will, I think is that, number  
3 one, the clerk's office is going to be responsible for having  
4 to make sure that they are issuing marriage licenses to  
5 everyone. I mean, that's -- that's the clerks' offices general  
6 responsibility under the law whether this statute is in place  
7 or not.

8           But the point that I was getting at was that if  
9 recusals, whether it's through a -- six of them in an office do  
10 it or one of them in the office do it, then the responsibility  
11 is going to be there on that office and on those persons  
12 recusing themselves to make sure that they don't violate this  
13 provision of state law and then, obviously, that they don't  
14 violate any -- any provisions of federal law or clearly  
15 established law, as we point in our briefs, that, of course,  
16 you know, same-sex couples are now -- we're over -- how long  
17 ago? Since June of 2015 that's been the law. That's clearly  
18 established law.

19           And as we pointed out in our papers, you know, this --  
20 the e-mail correspondence and things that went back and forth  
21 to the court around the 4th of July, after that there's been  
22 noth- -- not even an allegation, which is all what those were,  
23 that any circuit clerk's office has ever failed in its duty to  
24 issue a marriage license to anybody that properly meets the  
25 qualifications, same-sex couples or straight couples, since

1 then.

2           So I guess I would boil it down to this. It hasn't  
3 been a problem for the past year. I don't think that it's fair  
4 to assume that if somebody actually recuses themselves, which  
5 is in doubt, that there's going to be any problem in the  
6 future --

7           THE COURT: But now the state, as codified through  
8 1523, has given the circuit clerks' offices a greater license,  
9 if you will, because there are other statutes that are already  
10 on the book, Mississippi's welfare statute, for example, but  
11 now 1523 says, *Hold on. Invoke your seriously held religious*  
12 *beliefs and send a notice to -- give notice the state*  
13 *registrar.*

14           MR. MATHENY: Written notice.

15           THE COURT: Written -- oh, written notice. *Give*  
16 *written notice to the state registrar. Send them an e-mail.*  
17 *Send them a letter. Send something, and that's all you have to*  
18 *do, and find someone below you, I assume, who is going to do*  
19 *it.*

20           Now, again, it sounds like what you've said, though,  
21 is, yes, the office is responsible, but the circuit clerk will  
22 have done what he or she needs to do, that is, send a written  
23 notice. That person will then tell one of his deputy clerks,  
24 *You are responsible for issuing same-sex marriage licenses.*

25           That person has the right just like the circuit clerk

1 under the statute to send his or her notice to the registrar's  
2 office or give it to the circuit clerk, I guess. And then you  
3 say that that person then must be responsible for having -- for  
4 putting somebody in his place because -- and he turns to  
5 somebody in his -- somebody below him.

6 He looks around. There is nobody below him. What is  
7 he to do? What is she to do? Or even if there is someone  
8 below them, that person still has the right to send a notice  
9 just like the two supervisors or two co-employees or whatever  
10 to the registrar's office. And that person looks to his left  
11 or right and there's nobody else in the office. At some point  
12 in time, you know, who -- who does it in the office if each of  
13 them have a right to object?

14 MR. MATHENY: Well, I think the key thing about your  
15 hypothetical -- and I take it to mean a "what if the entire  
16 office recuses themselves" type hypothetical -- every person  
17 that recused themselves has the obligation under the statute to  
18 ensure, as I've said --

19 THE COURT: How can -- Mr. Matheny, if that is the  
20 case -- I'm just trying -- this is not an attack on you or the  
21 argument, but I'm thinking about what the legislature has done  
22 in this instance. If it's the lowest level employee, you  
23 have -- the attorney general, for example, assigns these cases  
24 to the assistant attorney generals. At what point can they  
25 have the assistants shed off to someone else, that

1 person shed -- you get what I'm saying?

2 I mean, at some point in time it's going -- you're  
3 going to run out of people you can go to. And the attorney  
4 general will say, *Mr. Matheny does not have the right to employ*  
5 *anyone else, to force anyone else to do anything for this*  
6 *office.* So was the legislature thinking about about that?

7 I mean, the lowest level person in the circuit clerk's  
8 office has no ability to hire someone else to do a job he  
9 refuses to do whether because of religious beliefs or something  
10 else. Wouldn't you agree? I understand how the statute reads,  
11 and you're telling me exactly how the statute reads.

12 MR. MATHENY: That's right. And I appreciated the  
13 analogy to cases being kicked to assistant attorney generals,  
14 because with all these cases being kicked -- your Honor, as the  
15 attorney general has said in the paper, we are running out of  
16 lawyers. But I appreciate that very much.

17 But I think -- and I'm sorry if I'm not understanding  
18 the court's question correctly or I'm not -- it seems that I'm  
19 not being responsive, but my point is --

20 THE COURT: No, no. I think you're being very  
21 responsive. You're telling me exactly what the statute says.  
22 The statute says that the person who -- I think. And I may be  
23 hearing you wrong. But the statute says, if I'm clear, that  
24 the person who recuses him or herself has the responsibility  
25 for making sure that his recusal does not impede or undue delay

1 the issuance of a license.

2 MR. MATHENY: Right. And I'm saying that in this --  
3 in the hypothetical that we're operating under here is where  
4 there's a chain of recusals, so to speak, the responsibility to  
5 make sure that there's no impediment or delay falls on each of  
6 those persons that recuses themselves. I don't think that you  
7 read this as, *Well, I kicked this responsibility to the next*  
8 *person. They kicked it to the next person. They kicked it to*  
9 *the next person.*

10 I mean, if I'm the clerk and I'm the first person to  
11 recuse myself, if I want the protections of this statute, then  
12 it's going to be on me to make sure that everybody that comes  
13 in is not impeded or delayed as a result of my recusal. So --

14 THE COURT: The circuit clerk could not, for example,  
15 make someone in the office set aside their religious beliefs  
16 and say that you are the designated recusal person. Can't do  
17 that. Right?

18 MR. MATHENY: I don't think so under the bill; but I  
19 would say, you know, in this hypothetical situation, what was  
20 probably envisioned was that this is something the clerk would  
21 have to solve. They'd have to go get an independent  
22 contractor. They'd have to hire some people -- sorry -- have  
23 to hire some people.

24 THE COURT: And the state would not give them the  
25 money for that. Right?

1 MR. MATHENY: Oh, no. The state doesn't give us any  
2 money --

3 THE COURT: Absolutely.

4 MR. MATHENY: -- in the AG's office either. So let  
5 me -- let me do this. Let me move on to some of the -- some of  
6 the issues raised by Ms. Kaplan and some of the questions that  
7 were raised by the court.

8 I want to talk about this. I mean, at the beginning  
9 she said that this was essentially a need for discovery. And I  
10 want to be real clear about what actually happened; and this is  
11 in evidence in the case, you know, submitted as exhibits to the  
12 motion filings here.

13 Ms. Kaplan sent a letter to the governor and the  
14 attorney general and Judy Moulder, the state registrar, and  
15 asked three questions. And the first question was, *Please give*  
16 *us any copies of notices of recusal.* Judy Moulder's answer was  
17 *No. There are none. We don't have any copies of notices of*  
18 *recusal to give you.*

19 Since the answer to that letter and, as I understand  
20 it, all the way up until Friday, perhaps as of this morning,  
21 there are no recusal notices that have been filed. All right.  
22 That's what in connection with defending her in the cases in  
23 which she's already a party in our office has been able to  
24 determine. There are no recusals that have been filed.

25 THE COURT: Has she heard of any that were going to be

1 filed July 1?

2 MR. MATHENY: Unh-unh (indicating no). It is my  
3 understanding that there has been no communication from any  
4 clerks to her office about filing recusals.

5 THE COURT: Has her office prepared a form or  
6 instructed the circuit clerks in what way it intends to  
7 implement this statute?

8 MR. MATHENY: No, and -- they have not. And as I  
9 understand it, the statute and my reading of it is doesn't  
10 place any obligation upon Judy Moulder to prescribe a form. It  
11 just requires prior written notice.

12 So that may leave it open, like your Honor is saying,  
13 in terms of whether an e-mail or a letter or scribbling  
14 something out on a piece of paper would suffice. But that's  
15 her only duty under this statute, receive the written notices  
16 and she puts it in a file. But that's all that it requires.  
17 That's all that it requires. But the point being is she has  
18 none.

19 And, you know, given that -- I did this the other day,  
20 your Honor. My little daughter was born six months ago and I  
21 needed to get a birth certificate from Judy Moulder. I sent in  
22 a form and requested a copy of the birth certificate. Her  
23 office -- and she sent it to me promptly. Her office deals in  
24 public records. That's what she does.

25 She's not trying to hide any public records from



1 anyone. And there's no reason why if anybody makes a request  
2 under the Public Records Act -- and it can be as simple as  
3 e-mailing. That's all that they did was sent an e-mail to her  
4 with a letter. That's all you have to do to get this  
5 information. You don't need a federal court injunction to  
6 compel her to provide notices of recusals that are filed at  
7 some point in the future, because they can get that information  
8 under Mississippi law otherwise.

9 THE COURT: So I understand they could get it for  
10 birth certificates, death certificates and all that stuff,  
11 because they might want to get a passport and all that stuff.  
12 But what about the person who wants the information because  
13 they want to find out *whether I can get married in the county*  
14 *in which I live, whether I'm going to be impeded or unduly*  
15 *delayed to get to be married, to get a license in the -- in the*  
16 *county where I live?* Is there any restriction on where one can  
17 receive the marriage license? I'm not -- I'm asking that  
18 question.

19 MR. MATHENY: Your Honor, as I appreciate it, no,  
20 there's not, going backward with the comments. No, I don't  
21 think that there's a restriction on where anybody can go. It's  
22 not a you have to be a resident of the county.

23 THE COURT: Okay.

24 MR. MATHENY: And I'll tell you why. You know, when  
25 they took away the blood test requirement several years ago, a

1 reason they did that was that people, you know, go to Natchez  
2 or someplace and have their wedding down there and they want to  
3 get the marriage license there. I don't think there's a  
4 residency requirement at all.

5 I don't think that -- and this was embedded in the  
6 comments there. I don't think that you can assume that because  
7 someone recuses themselves that there will be an impediment or  
8 delay. But to go to the specific issue about how to find out  
9 if your clerk recuses himself or herself or not, anybody can do  
10 what Ms. Kaplan did. Send an e-mail with a letter.

11 They -- like I said, they process these things really  
12 quickly when they get public information requests. I got my  
13 daughter's birth certificate it felt like the day that I mailed  
14 the thing. But this is what they do. And they will respond  
15 promptly to any request.

16 So I don't understand why -- I mean, let me make sure.  
17 I understand why they want that relief; but I don't understand  
18 why that relief is necessary at this stage given everything we  
19 know, all these other cases that are out there, all the issues  
20 about 1523. As we sit here today, I don't know why it's  
21 necessary to have a federal court order pulling Ms. Moulder  
22 into this lawsuit and requiring her under pain of an injunction  
23 to do her job to produce public records. So --

24 THE COURT: Well, I think they want more than just  
25 production. They want announcement of what's on file. I mean,

1 you know, the statute says she's to retain the records. I  
2 think what they're requesting in their injunction is that she  
3 post some kind of way, that she announce to the world the  
4 clerks who -- who are recusing themselves so that -- so that,  
5 one, a couple can go on and see that *The clerk in Tishomingo*  
6 *County, the county where I live, does not do it. So I need to*  
7 *think about -- rather than going through the hassle of trying,*  
8 *I'll just get my license at the county next door.*

9 Of course, we run into all sorts of problems with that  
10 notion, with persons having to leave and go from their home  
11 county to somewhere else to get a marriage license. So they're  
12 asking for additional relief I think not only for what's --  
13 what's in your file, but announce what's in your file.

14 MR. MATHENY: And I was just focusing on that first  
15 component, but your Honor is entirely correct. They also want  
16 to know basically perpetual updates. And I think the  
17 discussion that I heard earlier was about if there are recusal  
18 notices and -- another hypothetical. If there are recusal  
19 notices and the state registrar does get the records, then how  
20 does that information get out to the public about who's recused  
21 and who's not.

22 Well, I think that that's something that's a "cross  
23 that bridge if we got there" sort of situation in the sense  
24 that, you know, if there's a recusal notice and there's only  
25 one or two in the whole state, I think getting this information

1 out there would be pretty easy. If there are dozens or more  
2 recusal notices that get filed, the way that you would approach  
3 that issue may be totally different about how you put that out  
4 there.

5 But the point is that as we sit here today, we don't  
6 know if there will be any, we don't know who it will be, and we  
7 don't even know if this law is even going to be in effect come  
8 July 1 anyway. So I think awarding any of this relief against  
9 Ms. Moulder is entirely premature. And it's just underscored  
10 by the fact that on July 1 they could send a public records  
11 request and know if there are any out there.

12 THE COURT: Well, let me ask you this. You said that  
13 may or may not be in effect on July 1. Are you suggesting to  
14 the court that the court rule on the other cases first?

15 MR. MATHENY: Well, I think that it makes sense.

16 THE COURT REPORTER: Hold on, please.

17 MR. MATHENY: Oh, I'm sorry.

18 (PAUSE)

19 MR. MATHENY: I apologize, your Honor. I thought that  
20 the question was the other case is decided first.

21 THE COURT: Right. You sort of alluded to the fact  
22 that this issue -- you didn't say the word "moot," but this  
23 issue may not even come into play if the court were to -- you  
24 know, if this statute were not to come into effect on July 1.

25 MR. MATHENY: I don't think that that's a debatable

1 point. I think that that would be the case. I mean, the whole  
2 point of the calls that we've had over the past several -- I  
3 mean, we're talking about judicial economy and -- well, we  
4 pointed out in our brief with respect to Ms. Moulder. I mean,  
5 she's a defendant in the other cases.

6 Obviously, if there's no 1523 due to Mr. McDuff's case  
7 or Ms. Kaplan's other case, then I don't know that there's -- I  
8 guess -- I suppose that a clerk could send a recusal notice in,  
9 but that would be -- it would be a nullity, I mean. So, yeah,  
10 the short answer is, your Honor, it would be moot --

11 THE COURT: All right.

12 MR. MATHENY: -- I believe. So one reason not to have  
13 to cross this bridge until we get there, so to speak, like I  
14 said.

15 One thing that Ms. Kaplan brought up and I think it is  
16 important to address -- and I'll say this, it was kind of an  
17 insinuation, but I didn't take it personally and I completely  
18 understand -- but when the court was talking about the -- how  
19 to interpret the order and talking about prudent counsel would  
20 have advised this or that. Let me tell you how I interpret the  
21 order and that the Attorney General's Office has interpreted  
22 the order. Okay?

23 The injunction order says what it says, which is that  
24 the State of Mississippi and its officers, agents,  
25 subsidiaries -- I can quote it exactly if I need to, but we

1 know what it says, your Honor. And then it says, "and Circuit  
2 Clerk Barbara Dunn and her agents, officers" and so on.

3 All the time, whether we're on the telephone call --  
4 we did it here today. When the attorney general or the  
5 governor or sometimes, you know, redistricting case or  
6 something where the secretary of state's there or whoever, when  
7 state officials are there, you know, it's commonplace for the  
8 court or the parties to refer to the defendants before the  
9 court as "the State."

10 When I saw the order, I thought that the court was  
11 referring to the governor and the attorney general as the State  
12 of Mississippi and that's why it was in there. It certainly  
13 makes sense with -- when you consider things like *Ex parte*  
14 *Young* and what you have to do to be able to get into federal  
15 court and the Eleventh Amendment.

16 So that's how I interpreted the order back then was  
17 that it was enjoining, just like consistent with Rule 65(d),  
18 because that's something that's important too. You have to  
19 read every injunction in conjunction with Rule 65(d). In other  
20 words, if your Honor hadn't included anything about agents,  
21 officers, successors in there, that would have been there  
22 automatically per the terms of Rule 65(d). You didn't have to  
23 put that in there.

24 But reading all that together and taking into account  
25 that the court separately referred to Barbara Dunn, you know,

1 since she was a named defendant, I read it as enjoining the  
2 named defendants and, consistent with Rule 65(d), agents,  
3 officers and so on.

4 And here's why I don't think it's a problem. And I  
5 appreciated that the court sent the supplemental briefing  
6 notice, because I'll tell you, when I got that supplemental  
7 briefing notice, although it was a little hard to do it in less  
8 than 36 hours or whatever it was, your Honor, but I was glad  
9 that the court asked the question because that issue had never  
10 really been teed up and framed up in all of the back and forth  
11 that we'd had on the case up to that point.

12 But I think what's important about it is is that --  
13 and I want to make sure that I get -- the court asked the two  
14 questions about the clerks and then the Judy Moulder issue. I  
15 think what's important about it is -- it's right up at the  
16 beginning of our response to the supplemental briefing, your  
17 Honor, not the part about answering the questions but up at the  
18 top.

19 The injunction in this case applies to the three  
20 defendants, everyone who are agents, officers, servants,  
21 employees and attorneys of the three defendants, and other  
22 persons that have actual notice, not constructive notice, not,  
23 *Oh, everybody had to have heard about this*, but actual notice,  
24 in active concert with them who act -- violate an injunction.

25 What it means is that everyone that's in that group

1 that's right here (indicating), your Honor, everyone that's in  
2 that group of people that are subject to the injunction are  
3 subject to the injunction and they're within the larger group  
4 of people, which is everybody that's subject to *Obergefell*,  
5 subject to the Fifth Circuit's admonition. I mean, Judge  
6 Smith's admonition couldn't have been any clearer about the  
7 *Everyone who falls within the jurisdiction of this court, law*  
8 *of the land*. Everyone falls within that -- the clearly  
9 established law. But the injunction is here (indicating).

10 And so the problem that I have with their  
11 interpretation of the injunction is it makes those two circles  
12 the same. It means everybody's subject to the injunction and  
13 everybody's subject to *Obergefell*. I don't think that it's  
14 needed to interpret it that way.

15 I mean, obviously, as I said before, we haven't had  
16 any problems with any denied marriage licenses in any clerk's  
17 office that I'm aware of. And I'm pretty sure if it had  
18 happened, then the folks in this room at least would have all  
19 known about it. There haven't been any of those.

20 And, like I say, I don't think it's fair to assume  
21 that based upon just because the statute says what it says that  
22 there's going to be any problem with it in the future. But my  
23 reading of it is just -- just as I said, that it's the three  
24 defendants, that it's the Rule 65(d) language as to those three  
25 defendants, and then the active concert and violating the



1 injunction language in there.

2 THE COURT: With respect to the injunction,  
3 hypothetical, the day after the court entered the injunction,  
4 July of 2015, a couple goes to Hinds County -- same-sex couple  
5 goes to Hinds County, gets a license. Barbara Dunn graciously  
6 gives it to them, because she was pretty -- signing them off --

7 MR. MATHENY: I think that was on Facebook, your  
8 Honor, that hypothetical.

9 THE COURT: Okay. The person wants to celebrate their  
10 new engagement or their -- either post engagement or  
11 premarriage or either post marriage and say that I want to use  
12 the Ag Museum for a venue for a reception for the wedding. The  
13 state officer there does not agree. Says, *I'm not going to do*  
14 *it because Obergefell and the injunction that the court*  
15 *issued* -- and this is not casting aspersions on Cindy  
16 Hyde-Smith, I believe, who is the Department of Ag -- over  
17 the --

18 MR. MATHENY: Depending on the facility, sir.

19 THE COURT: Right, depending on the facility. Suppose  
20 they say that *I'm not doing it because that statute or that*  
21 *injunction does not apply to me because I was not a named -- I*  
22 *was not the state officer named in the complaint*. Would the  
23 victims of that have to file a new lawsuit, or could they argue  
24 that the injunction that the court entered actually applies to  
25 all state officers and not just those -- not just Governor

1 Bryant, not just Attorney General Hood, because those are the  
2 only two state officers named in CSE I?

3 So doesn't -- I mean, is there -- is there any  
4 credible argument that that injunction in light of the Fifth  
5 Circuit's reading or rule -- words saying civil marriages on  
6 same terms and conditions as opposite-sex couples -- seems to  
7 me that the Fifth Circuit said civil marriages on terms and  
8 conditions as the same as other marriages. Is that broad  
9 enough to include all state officers in treating same-sex  
10 couples differently no matter what the issue is? Wouldn't it  
11 be covered in the injunction is the question that I have.

12 MR. MATHENY: And I would start with this, your Honor.  
13 When and if the issue ever arises in some other context, my  
14 position is certainly going to be that a new action would be  
15 more appropriate than proceeding under the injunction here. So  
16 all the talk you heard earlier about why we filed a new -- a  
17 new case about the adoption statute but didn't go back in this  
18 one, I'm setting that aside.

19 I think that -- two things. First, the situation that  
20 you fall under is exactly like what I was saying where you have  
21 the defendants here and *Obergefell* and clearly established law  
22 there (indicating), and that it would fall in the bigger pool  
23 but not in the smaller one.

24 And here's the thing. You know, I appreciate all the  
25 talk about judicial economy and, *Oh, it would be cumbersome to*

1    *have to go do this and have to go do that.* Remediating that  
2    problem either way, as you described it, is going to require a  
3    trip to court. The difference is whether or not it's going to  
4    be a 1983 case or a contempt action subject to all the  
5    standards for a contempt action. But in either -- either way,  
6    the couple that says that they are aggrieved in your  
7    hypothetical is going to have to go to court.

8                So I think that that's important because I think it  
9    blunts the idea that it just makes things so much easier for it  
10   to be one way than the other. But --

11               THE COURT: What remedy does one have under 1983 to go  
12   after the state officers?

13               MR. MATHENY: To go after the state officers?

14               THE COURT: A state officer under 1983. You mentioned  
15   1983.

16               MR. MATHENY: Well, you would have your *Ex parte Young*  
17   action, I mean.

18               THE COURT: To sort of enjoin them?

19               MR. MATHENY: To solve the problem that would be  
20   presented there, which would be --

21               THE COURT: Prospective --

22               MR. MATHENY: -- prospective relief requiring the  
23   state officer to let you use that facility.

24               THE COURT: But nothing for monetary damages for  
25   having been denied.

1 MR. MATHENY: The attorneys' fees. But just like -- I  
2 mean, that would be the same. I'm assuming that attorneys'  
3 fees would be at issue in an injunc- -- in a contempt case or  
4 a -- or otherwise.

5 But here's the thing that struck me with your  
6 hypothetical, and I think that it -- actually, this supports my  
7 argument, because this is one of the cases that they mentioned.  
8 But they were talking about the *United States v. Hall* case.  
9 And I think that the *Hall* case has some nice features that are  
10 important to point out here in the sense that here's -- here's  
11 the facts of what actually happened there.

12 The district court ordered the desegregation of the  
13 Jacksonville schools, Jacksonville, Florida, Jacksonville  
14 Florida schools. That was ordered and the local officials were  
15 required to go out and desegregate the schools. There was some  
16 actual problems, not hypothetical ones but actual problems. As  
17 we know, there were many actual problems back in the day with  
18 those situations. But there were actual problems that  
19 occurred.

20 And so the local officials went back to the court and  
21 said, *Your Honor, we need an order that helps preserve order at*  
22 *this school that's being integrated.* And they named Eric Hall  
23 from *U.S. v. Hall* in their petition when they went to seek that  
24 order. They got the order from the judge ex parte. And then  
25 Eric Hall was personally served with that order, and he still

1 showed up at the school and walked up to a U.S. marshal and  
2 said, *I'm here to violate the court's injunction.*

3 So the issue that was at play in *United States v. Hall*  
4 was issuing a new injunction to protect the court's original  
5 desegregation order. But it wasn't that the court had done all  
6 of this at the very beginning and enjoined all these nonparties  
7 from the very beginning of the case. I hope you're following  
8 me there because it's -- the facts are a little bit tough to  
9 follow.

10 But my point would be this. *Hall* might stand for the  
11 proposition that if the court entered a new injunction  
12 naming -- or obligating -- I'm sorry -- naming or obligating  
13 clerks, naming or obligating Judy Moulder or anybody else, if  
14 the court issued a new injunction based upon actual facts like  
15 there were there that it was necessary, then *Hall* might stand  
16 for the proposition that new injunction was okay.

17 But my point is that absent all those things that had  
18 occurred that led to the court's order, which, by the way, I  
19 think toward the end of the opinion it didn't even have to  
20 comply with 65(d) or it was diminished because it was actually  
21 a temporary restraining order that was issued in that case --  
22 but you have to look at that very carefully I because that's  
23 how Judge Wisdom distinguished that case from a case where an  
24 injunction was no good when it enjoined all the residents of  
25 Colquitt County, Georgia.

1           But with that little footnote or caveat on that, my  
2 point being is, your Honor, is that we aren't anywhere like  
3 where *Hall* was when that actual order that was in that contempt  
4 action was at issue. We're still back at right now the court's  
5 original injunction and what the scope of that was and why  
6 that, frankly, your Honor, doesn't need to be disturbed or --

7           THE COURT: Could the court modify the existing  
8 injunction? I realize we talked about open and closed cases.  
9 But could the court -- based on what it's been hearing and what  
10 it's read in the briefs, could the court on its own modify it  
11 to say that civil marriages shall be enforced by state officers  
12 on the same terms and conditions as opposite-sex couples,  
13 something -- something like that that sort of says -- tracks  
14 the language of either *Obergefell* or the Fifth Circuit --  
15 because I think the Fifth Circuit was fairly clear about how it  
16 labeled it. It said civil marriage on same terms and  
17 conditions as opposite-sex couples -- and apply that to all  
18 state officers?

19           Because, you know, it seems to me it would not be  
20 efficient and economic for us -- for persons to wait or seek to  
21 enjoin state officials who know what the law is, who are  
22 advised by the same Attorney General's Office to violate the  
23 law in some ways. For example, the head of MEMA is a state  
24 officer I presume, I guess, I assume. Suppose there's a  
25 tornado in some small town. Tornadoes tend to skip houses.

1 You don't try to give relief to the house of a same-sex couple  
2 because that was that same-sex couple's punishment by God.  
3 Don't provide any assistance to that couple. In the eyes of  
4 *Obergefell* that would be wrong I think, and in the eyes of the  
5 Fifth Circuit that would be wrong.

6 But what I'm hearing, it may be wrong; but it may not  
7 be unlawful because the injunction does not in its current  
8 form -- if it's read restrictively, does not apply to that  
9 state officer. Is that a fair statement?

10 MR. MATHENY: I would think that that's fair in its  
11 current form. That's how I'm reading it. Your Honor's example  
12 and question brings up several things that I would like to  
13 respond to, though.

14 THE COURT: Please.

15 MR. MATHENY: First off, I'm not in any way conceding  
16 that the facts here exist that would justify changing the  
17 injunction. As we pointed out in our brief, there are things  
18 like -- I know that they don't like it. They think it's off  
19 base to use principles like federalism; but I think principles  
20 like federalism come into play here where, you know, because  
21 you are dealing with state officers, they get every chance to  
22 comply voluntarily and do right before the federal court takes  
23 the extraordinary step of coming in and regulating a state  
24 official's, you know, day-to-day duties and performance of  
25 their duties. So you've got those two things that are there.

1           So, like I said, I'm not conceding that the facts  
2 exist to do this; but if your Honor had the right facts, if --  
3 if every clerk in the state or many, many, many, many clerks --  
4 I'm sorry. I didn't mean to sound like Donald Trump there.  
5 Many, many, many -- if many, many clerks -- if many, many  
6 clerks recuse themselves and it actually resulted in  
7 impediments and delays, then I would have to agree that you  
8 would be -- it would be like *Hall*.

9           You would have to be able to go back and address the  
10 problem. And one way you would do it would be, say, under the  
11 All Writs Act, like they pointed out. In order to issue an  
12 injunction under the All Writs Act, there's several standards  
13 that you have to meet, I think findings that need to be made.  
14 But those findings and those facts don't exist as we sit here  
15 today. So I don't think that that sort of injunction is  
16 appropriate.

17           I hope that my briefs were helpful and I would like  
18 to --

19           THE COURT: Let me ask you this one question about the  
20 question that the court posed to the parties, agents,  
21 subsidiaries, officers. Why would the circuit clerk not be an  
22 agent of the state under the existing law at the time that the  
23 injunction was entered when the state had given the circuit  
24 clerk and only the circuit clerk the obligation to issue  
25 licenses?



1 Nobody else could issue a marriage license. You had  
2 to go to a circuit clerk. There was no recusal mechanism and  
3 all that under the time that the injunction was entered. Why  
4 couldn't the court deem the circuit clerk an agent of the  
5 state, because it's carrying out the assigned duty that the  
6 state has given it and nobody else had that duty or  
7 responsibility?

8 Could "agent" be read broadly to include a circuit  
9 clerk who I understand, who I know is a duly elected official  
10 on the county level, but has the sole exclusive responsibility  
11 to issue a state license or county -- is a marriage license a  
12 state or county license?

13 MR. MATHENY: I think they say State of Mississippi,  
14 County of Hinds.

15 THE COURT: Okay. So why wouldn't the circuit clerk  
16 be an agent of the state in that regard?

17 MR. MATHENY: Well, I think that a matter of --  
18 technically, you're looking at agency law or, I don't know,  
19 Civics 101, How does government work? And, I mean, they cite  
20 the *Echols* case for this idea. And I think that it -- in a  
21 vacuum it addresses the situation, you know.

22 The proposition that a county clerk or a sheriff's  
23 deputy or somebody else on the local level, you know, is  
24 enforcing state law or acting under a state law, there -- there  
25 may be, given the right facts, where you could say that, yeah,

1 that's an agent, officer, employee of the State of Mississippi.  
2 They may be participating in PERS like all other state  
3 employees, for example.

4 But I think that the problem here -- and I don't know  
5 any other way to break this down easier as this relates to this  
6 case, your Honor, is that the attorney general and the governor  
7 and Barbara Dunn were the defendants. And to enter a judgment  
8 against them and then issue an injunction against the State of  
9 Mississippi and all of its officers, servants, agents, so on,  
10 using the Rule 45(d) (*sic*) language, the problem is, as I  
11 pointed in my brief, the State of Mississippi has a  
12 constitutional right not to be sued here in the first place.  
13 And they can't -- and the State of Mississippi can't be sued  
14 under 1983.

15 So to say that the governor and the attorney general  
16 are here for purposes of being the defendants, but then when it  
17 comes to the relief, we're going to go and enjoin, again, on  
18 the front end, not after making all the kind of findings that  
19 were necessary in cases like *Hall* to be able to do it, but on  
20 the very front end reach up to the State of Mississippi and  
21 thereby reach out and encompass everybody that could ever  
22 possibly be considered, you know, a state officer, employee and  
23 so on and so forth, I think that that's what the problem with  
24 the reading of the injunction and the interpretation of it is.

25 THE COURT: But in this context, because the circuit

1 clerk -- there's 82 of them -- may have the sole responsibility  
2 of issuing licenses to opposite-sex or same-sex couples,  
3 only -- for each county they had that responsibility under the  
4 law that existed when the injunction was entered, then why  
5 would the circuit clerk not be viewed -- circuit clerk who was  
6 not a party not be viewed as an agent of the state for the  
7 purpose of issuing a license?

8           Only the circuit clerk had that duty and  
9 responsibility and authority. Only the -- and so if you read  
10 the injunction to say the state, its agents and officers,  
11 subsidiaries -- and I realize there's a separate clause that  
12 says "and Barbara Dunn and her agents, officers and  
13 subsidiaries," but couldn't the circuit clerks be viewed as  
14 agents of the State of Mississippi for purposes of issuing  
15 licenses?

16           MR. MATHENY: And I just want to make clear that -- I  
17 mean, I don't agree that that's what the effect of the  
18 injunction is. I'm not conceding that at all. But I'm saying  
19 if you assume that all you're looking at is does it say "State  
20 of Mississippi and all its officers, agents," then under the  
21 facts of issuing a marriage license, it may not -- it may not  
22 be if the clerk is executing some kind of local county policy.  
23 But when it's -- when it's following state law, I think that's  
24 what the *Echols* case said.

25           My point is this is not the *Echols* case. This is not

1 a situation where that -- where you can go from State of  
2 Mississippi and all its officers, because it shouldn't be  
3 interpreted to mean the State of Mississippi that way. It  
4 means the defendants, consistent with Rule 65 and the other  
5 arguments I made.

6 That -- I know that that's a little long way of  
7 getting at it; but I'm saying, yeah, if you assume I'm wrong,  
8 then you're right.

9 THE COURT: The part of -- one specific area of relief  
10 that they've asked for that I don't think you've had an  
11 opportunity to address I don't think is this notion that, *In*  
12 *addition, Judge, you should bar the circuit clerks for those --*  
13 *if the statute comes into play and there are recusal notion --*  
14 *recusals filed, that those persons who filed the recusals*  
15 *should be barred from issuing licenses to opposite-sex couples*  
16 I think that's part of the relief that they sort of lumped into  
17 their request for --

18 MR. MATHENY: I think that's number 5, your Honor, of  
19 the things that they're asking for.

20 THE COURT: Right.

21 MR. MATHENY: A few things about that. First thing is  
22 that I think that that would fall along the lines of everything  
23 else in terms of what a clerk is going to do and how a clerk  
24 who recuses himself or herself is going to treat their duties  
25 going forward if they recuse themselves. It falls into this

1 hypothetical, we don't know what they're going to do yet.

2 I would say this, that my understanding of what they  
3 would be supposed to do would be to just get out of having  
4 involvement with marriage licensing, period, based upon the  
5 statute. In other words, I think recusal from one is recusal  
6 from all under the statute.

7 But, you know, assuming that facts develop that that's  
8 not -- you know, you have a clerk recuse, that they're treating  
9 it as, *Well, I'm just recusing from same-sex couples but not*  
10 *straight couples*, assuming that you had to address that issue,  
11 I think that that's -- that feeds into my new claim argument.  
12 I mean, that's -- we would have to get into whether that's  
13 required under *Obergefell* or the Fourteenth Amendment. And I  
14 think that the Campaign has that case pending in North Carolina  
15 about what -- North Carolina's similar recusal case. It may  
16 not be the Campaign. I don't mean to overstep with that. But  
17 I know that that issue is being litigated there about what is  
18 it -- what all do you have to recuse yourself from.

19 But I think that that's just another telling sign,  
20 that this is something that would be a new lawsuit and  
21 something that would have to be brought up separately. But I  
22 would also say I think, as the court observed and as we've --  
23 as all the back and forth has been centered upon here, that  
24 relief like the rest of it may be moot if the bill doesn't --  
25 doesn't take effect on July 1 due to decisions in our other

1 cases.

2 Your Honor, I hope I've answered all the court's  
3 questions, and I'll be glad to answer any others. But I'd also  
4 hope that my briefs were good and helpful to the court.

5 THE COURT: No, the arguments were -- I mean, the  
6 written arguments and briefs were quite effective. And the  
7 court appreciates the parties for that. So I've given the  
8 attorney general the opportunity to respond orally --

9 MR. MATHENY: With one -- with one note, and I promise  
10 I'll shut up after this. I did want to make sure that the  
11 record reflected that the attorney general does object to  
12 things that are outside the record of our proceeding here in  
13 Civil Action 818 as being considered as evidence and relevant  
14 to these issues. And that would include the newspaper articles  
15 cited as authorities or facts in the briefs and so on and so  
16 forth. But that's just a note for the record. I want to make  
17 sure Ms. Morris got that down as my objection to those --

18 THE COURT: I don't know if -- you're speaking about  
19 newspaper articles, but I do know that there -- you know,  
20 Mississippi does not have legislative -- formal legislative  
21 history, but MC has done a great job of recording legislative  
22 debate; and it's posted out there for public information.

23 Does the attorney general disagree that the court  
24 should be able -- and I don't know if it's come up in 818, but  
25 it's certainly a part of the other cases. So maybe we

1 should -- I don't know if anything about the citations were  
2 used in this case and if it -- and if there have been citations  
3 to the legislative debate, does the attorney general disagree  
4 that that -- that the court ought to be able to look at that?

5 MR. MATHENY: Your Honor, if that comes up in the  
6 other cases, I don't want to overstep my bounds on my --  
7 whatever objections my client and colleagues would have with  
8 respect to that in the other proceedings.

9 As to the legislative debate, I think, you know, if  
10 you can satisfy authenticity and other things, which is  
11 important to be able to do, then it may be relevant and the  
12 court may consider it. And the court may -- it also depends on  
13 the context because when you're proceeding on a PI, you're  
14 looking at stuff different than you are under other sense.

15 Let me do this just to make myself clear about what I  
16 was talking about. The last brief that the Campaign filed  
17 referenced a newspaper article that had talked about -- it  
18 sounded like -- I don't know. I couldn't count the levels. It  
19 sounded like about quadruple or quintuple hearsay that was  
20 relayed in the article about clerks lobbying for this  
21 provision.

22 My point was simply this. My point was simply this.  
23 Just like one of the many famous footnotes in your original  
24 opinion in this matter that said newspapers articles aren't  
25 evidence and neither are argument of counsel, I just wanted to

1 make sure my objection was clear so that the facts here are the  
2 facts here and the newspaper articles and the argument of  
3 counsel are not.

4 THE COURT: For the benefit of the court, could you  
5 give me some of the famous footnotes? Just teasing.

6 MR. MATHENY: I don't want to wear Ms. Morris out any  
7 further.

8 THE COURT: Thank you, Mr. Matheny. I appreciate your  
9 argument. This is one thing that I do want to ask, and it does  
10 come from the public record. At some point in time I do think  
11 the attorney general did say that he would evaluate these cases  
12 on a case-by-case basis on whether the state -- whether he as  
13 attorney general would defend them. If I'm not -- if I'm not  
14 mistaken, I think I saw that on the news. I think I did.

15 And I presume so far the attorney general has taken a  
16 position that these cases ought to be duly defended, you know,  
17 because I do know the attorney general has within its power to  
18 punt if it is not something that he thinks is constitutional.  
19 Right? Does he have the authority?

20 MR. MATHENY: Well, there's a statute, at least one,  
21 that obligates the attorney general to defend state officers  
22 and officials in federal court. There is also, as I understand  
23 it, you know, just like any lawyer, if a lawyer disagrees with  
24 what a client wants, then there should be a way to not have to  
25 do that just, if for nothing else, from a matter of ethical



1 stuff. Obviously, the discussions about those kind of issues  
2 are attorney-client privilege and I can't -- I can't raise any  
3 of that sort of thing. But I would like to point this out.

4 Part of the problem with being able to evaluate that  
5 issue is that in so many of these cases -- and I think this  
6 case is a good example of it here today -- it's not just issues  
7 of great importance to people that are in favor of same-sex  
8 marriage or opposed to same-sex marriage, but so many issues  
9 that are critical to, you know, how federal courts work and  
10 what you can -- I mean, today is a good example.

11 I mean, we're talking about an injunction and  
12 injunctive powers of the court and what should or should not be  
13 done. If I wasn't here arguing this, I don't know who it would  
14 be, whether it would be Mr. Wallace or whoever else would come  
15 in and do it. And the attorney general wouldn't have a say in  
16 something that's so important as to, you know, what is  
17 permissible and what's not permissible about how far a court  
18 should go.

19 And so that's something that -- and this is just me  
20 saying this. That's something that's kind of a theme  
21 throughout the cases that whether or not the attorney general  
22 has decided to defend the law or not, which at this point he  
23 is, you know, important issues come up where the attorney  
24 general and -- we'd need to have his input on that. So sorry  
25 for the random thought, your Honor. I just --

1           THE COURT: I appreciate that. I mean, one of the  
2 things that other states were facing last year, the public saw  
3 on the back end the enormous amount of attorneys' fees that the  
4 states, Tennessee, Michigan I think, and all the other states.  
5 In this instance, the original CSE case, the plaintiffs waived  
6 their right to seek attorneys' fees. And they may have done so  
7 in the CS -- the adoption case, the CSE II case. But I don't  
8 think the parties in some of these cases are actually waiving  
9 that right. And at some point the legislature -- this is just  
10 commentary -- must also consider that, I think.

11           MR. MATHENY: If there's nothing else, your Honor, I  
12 will cede the rest of the time to Ms. Kaplan.

13           THE COURT: All right. Thank you, Mr. Matheny. I  
14 appreciate you. I guess Mr. Goodwin didn't have anything on  
15 behalf of the governor I guess.

16           MR. GOODWIN: Yes, your Honor. Nothing further. I  
17 believe Mr. Matheny did an excellent job and covered everything  
18 that needed to be covered.

19           THE COURT: Okay. Thank you. Ms. Kaplan.

20                           **REBUTTAL ARGUMENT BY THE PLAINTIFFS**

21           MS. KAPLAN: Thank you, your Honor. So I think as  
22 with many things in the law we need -- let me do this down  
23 thing again.

24           We need to start with the language in this case of  
25 your Honor's injunction. The injunction says -- and I have it

1 in front of me. "It is hereby ordered that the State of  
2 Mississippi and all its agents, officers, employees and  
3 subsidiaries, and the Circuit Clerk of Hinds County and all her  
4 agents, officers and employees are permanently enjoined from  
5 enforcing Section 26" -- "263A of the Mississippi Constitution  
6 and Mississippi Code Section 93-1-1, subsection 2."

7 The State's interpretation that we just heard from  
8 Mr. Matheny of this injunction is akin -- your Honor, I can't  
9 help myself in doing this -- in terms of what Judge -- Justice  
10 Scalia did in his dissent in the *Romer* -- in the *Windsor* case.

11 As your Honor may recall his famous dissent in  
12 *Windsor*, he took some of the language from Justice Kennedy's  
13 opinion and sought to strike it out -- it's actually how the  
14 text is -- the dissent reads -- in order to make a point of  
15 what the implications of the decision were.

16 Essentially, the State is arguing the same thing here.  
17 What they would like to do is strike out the words after "The  
18 State of Mississippi," "and all its agents, officers, employees  
19 and subsidiaries." That language is in there and it was never  
20 struck out and the State never asked for it to be struck out.  
21 And I don't understand an interpretation of that language, it  
22 somehow writes it out of your Honor's order.

23 Similarly, with respect to the language -- with  
24 respect to Federal Rule of Civil Procedure 65(d) explicitly  
25 allows courts to issue injunctive relief beyond the parties.

1 If it didn't, you wouldn't need the language in 65(d) about the  
2 parties, officers, agents, employees and attorneys and other  
3 persons who are in active concert or participation with them.

4 THE COURT: But what about the State's -- if the State  
5 were to say, *Yes, it includes that, but let's turn to the*  
6 *language of the injunction itself?* It only enjoins the  
7 parties -- the defendants in that case -- from seeking to  
8 enforce the statute that was at issue in the case and the  
9 specific constitutional provision which was in issue. The  
10 language of the statute was whatever it was. The constitution  
11 was whatever it was.

12 So no state officer, agent and employee may seek to  
13 enforce what now is a dead statute and what is a dead  
14 constitutional provision. So anything else that grows out of  
15 treating same-sex couples differently is not pursuant to the  
16 statute or the constitution.

17 MS. KAPLAN: But, your Honor, what those -- what that  
18 constitutional provision said and what that statutory provision  
19 said -- and I don't have the language at hand. I can get it to  
20 you. But, essentially, both of them said the same thing, which  
21 is gay couples and lesbian couples in Mississippi cannot marry.

22 So by saying that they're enjoined from enforcing it,  
23 it's kind of a double negative -- litotes, when I studied  
24 Latin -- what you are saying is they have to allow gay couples  
25 to marry. You said they're -- you're enjoining the statutes

1 that prevent them from marrying, which means essentially that  
2 you're ordering them to marry. I think it's -- in common sense  
3 English it's the same thing.

4 Now, I think it's important to talk -- to think for a  
5 second about the implications of what the attorney general is  
6 arguing here. In the context of civil rights actions or,  
7 frankly, in the context of any action, what they seem to be  
8 suggesting is that when you have a case like this -- and  
9 because of *Ex parte Young*, you always name -- you can't name  
10 the state. You name the governor or the AG or other state  
11 official -- that unless every state official in a state is  
12 somehow named as a party in an action either individually or as  
13 part of a class, then there can be no injunctive relief against  
14 them when the case is decided.

15 That, again, is not only contrary to the language of  
16 Federal Rule of Civil Procedure 65, but would completely upend  
17 how we've litigated these cases in this country for many years.  
18 It just doesn't make sense that to bring a case -- a civil  
19 rights case about a particular issue in the state of  
20 Mississippi you have to name every single person working for  
21 the state government of Mississippi who might somehow have  
22 something to do with it. It would be cumbersome, it would be  
23 inefficient, it would be costly, and it's not what the rules  
24 explicitly contemplate.

25 Now, with respect to *Hall*, which I think is in a lot

1 of ways very, very relevant here, what's important to remember  
2 about *Hall*, even though it's called *United States v. Hall*, Hall  
3 was not a party to the lawsuit. That's why *Hall* is so  
4 important here. Like the other county clerks that we're  
5 talking about, Hall was not party to the lawsuit. And the  
6 court said, even though he wasn't a party, because this person  
7 who was totally really unrelated -- he wasn't even a state  
8 actor. He was an activist. Because this man was an activist  
9 and he did get notice, he could be bound by the statute.

10 Courts have since interpreted *Hall* to mean that it  
11 doesn't require service of process. The Second Circuit said --  
12 for example, in a case *Vuitton v. Carousel Handbags*,  
13 592 F.2d 126 at 129, cited *Hall* for the proposition that this  
14 rule codifies the long-settled principle that personal service  
15 of an injunction is not required so long as those whom  
16 plaintiffs seek to hold in contempt had actual notice of the  
17 decree.

18 Again, your Honor, I just don't think it's -- anyone  
19 can really argue here with a straight face that the clerks of  
20 Mississippi did not have notice either through the attorney  
21 general's public press release, through all the actions that  
22 have taken place since then, did not have actual notice that  
23 they were being ordered by the federal courts, including your  
24 Honor, to marry gay couples, gay and lesbian couples in  
25 Mississippi.

1           Now, I'd like to turn to another question. It's  
2 actually the question that Mr. Matheny began with which is "Why  
3 are we here?" And I have to apologize. I want to amend what I  
4 said during one of our phone calls. Another way he asked the  
5 question is, *Why is this -- Is this particular proceeding today*  
6 *necessary?*

7           And I think the answer to that, your Honor -- and I  
8 really hate to be someone that asks a federal court to do more  
9 work as opposed to less work; but I think the answer to that,  
10 your Honor, is I think with respect to the proceedings that are  
11 going to go forth at the end of the week, it is virtually  
12 inevitable that there will be appeals regardless of whichever  
13 side prevails. And it is virtually inevitable, as we've seen,  
14 that whichever side loses will ask the Fifth Circuit to stay  
15 whatever -- or change in some way whatever the ruling is in  
16 this case.

17           That could happen. It could not happen. I don't  
18 know. All I know is there will be further work down the line.  
19 And in the meantime, gay and lesbian couples suffer from this  
20 really concrete risk, immediate and concrete, imminent in the  
21 language of *Lujan*, risk that they could go into a county and  
22 try to get married when the stay applications are pending or if  
23 there are stays issued and not know that they're going to be  
24 facing this humility -- I mean this humiliation and indignity  
25 when they show up.

1           So with all respect again, I feel -- I hate asking the  
2 court to do this. I think it is necessary for there to be a  
3 ruling both here and in the case on Thursday and Friday even if  
4 the ruling on Thursday and Friday is to enjoin the statute  
5 overall.

6           Similarly -- I give a similar answer to your Honor's  
7 question -- earlier question about why we opened this case. I  
8 think your Honor actually has the authority to amend the  
9 injunction without reopening the case. I think it's cleanest  
10 for purposes of appeal if you reopen the case as well. But  
11 that would be my answer to that question as well. I think it  
12 would eliminate an appellate issue, but that's totally within  
13 your Honor's discretion.

14           Let me -- two more things. I want to talk about the  
15 letter from Ms. Moulder. I think the crucial part about  
16 Ms. Moulder's letter back to me -- and it's attached to our  
17 papers -- is that she does not acknowledge any continuing  
18 obligation to advise CSE, the court or anyone else, for that  
19 matter, of when recusal notices are filed. And I have to -- I  
20 have to correct myself. I said before that you could just call  
21 and do a recusal. You can't. The statute does require that it  
22 be written.

23           But to suggest that constant public records requests,  
24 continuous public records request is somehow a substitute for  
25 people in Mississippi -- gay and lesbian people in Mississippi



1 being actually on notice of what they might encounter when they  
2 show up to get married, I don't understand the logic of that  
3 argument.

4 And, indeed your Honor was concerned about whether the  
5 Internet might be sufficient, whether there are enough people  
6 in Mississippi -- and I'm sure that's true -- that don't have  
7 Internet access. So maybe an Internet notice isn't sufficient.  
8 To expect those same people to file their own public records  
9 request makes very little sense to me.

10 And, again, you constantly have the timing problem  
11 which is you could file a public records request on Monday, you  
12 could get an answer on Friday that there's no recusal, and the  
13 next Monday the clerk could recuse. I don't know how to solve  
14 that problem other than through some kind of injunctive relief  
15 with notice to people in Mississippi so that people really know  
16 things are happening in realtime.

17 THE COURT: So I guess a clerk could recuse once the  
18 clerk finds out that there is a same-sex couple that wants a  
19 license from the county?

20 MS. KAPLAN: Yeah. I mean, theoretically, the way the  
21 statute's written they could be in the outside room of the  
22 clerk's office. They could see them coming in. They could  
23 e-mail. You almost heard Mr. Matheny say you can e-mail a  
24 recusal and that would be the recusal. And it could apply to  
25 those couples as they're walking from the door to the clerk's

1 office to the desk, which, again, is the problem that we're  
2 trying to deal with.

3           Similarly -- and you talked about this at great length  
4 with Mr. Matheny -- the statute itself does have no enforcement  
5 mechanism. Let's be blunt here. The legislature and the  
6 government and the governor know how to put fines and  
7 enforcement mechanisms in statutes when they want to do so.  
8 They've been doing it for years. It's not a difficult thing to  
9 do.

10           There are, in fact, enforcement mechanisms for the  
11 rest of HB 1523 when someone tries to assert their rights not  
12 to be discriminated against. So the idea that we're somehow  
13 leaving it up to this clerk who has a sincerely held religious  
14 belief that gay and lesbian people shouldn't be entitled to  
15 marry to themselves enforce the no impediment or delay standard  
16 seems to me silly. It's really like the fox guarding the  
17 henhouse.

18           And we've seen that problem. We already saw it with  
19 Kim Davis. We saw what happened there. And that's precisely  
20 what we're trying to avoid here with respect to the relief  
21 we're requesting.

22           And looking at my -- oh, one more point, your Honor.  
23 We said before -- you asked, your Honor, before whether you  
24 could deputize someone to be deputy clerk. We looked quickly  
25 at the statutes during the break. We could be wrong about

1 this, but it looks like Section 9-7-123 allows the deputy clerk  
2 to be deputized, but it does require the posting of the bond.  
3 And for that person, as Mr. Matheny pointed out, there may be  
4 additional regulations that apply that we have not yet  
5 discovered.

6 And unless your Honor has any further questions,  
7 that's it for me.

8 THE COURT: Would the plaintiffs be satisfied if the  
9 court modified the injunction to say that it applies to state  
10 officers, that the court reach -- in issuing its injunction was  
11 issuing it in terms of what the Fifth Circuit said, that civil  
12 marriages are on the same terms and conditions as opposite-sex  
13 couples, and for that reason state officers are wrapped up in  
14 it? And could the court punt the idea of whether or not the  
15 other 81 circuit clerks --

16 MS. KAPLAN: Well, as long as the -- one question that  
17 we -- we talked about this driving over here -- is Ms. Moulder  
18 is clearly a state officer. Right? So as long as -- the one  
19 issue is she clearly needs to provide the notices. And I don't  
20 think there's any question about her being bound.

21 And as long as there's some provision that she has to  
22 tell people who's recusing -- I understand your problem with  
23 ordering the clerks to somehow provide a written plan of  
24 whether there's going to be no impediment or delay, what their  
25 plans are to solve that problem may pose a different issue.

1 But at a minimum we need to know who's recusing. And then, you  
2 know, we could try to follow up on our own or we could --  
3 people could inquire at the office to see what the plans are.

4 But the real problem is that we have this mystery with  
5 82 counties now where we don't know from day to day whether  
6 there's going to be a recusal or not. And that it seems to  
7 me -- it's clearly within Ms. Moulder's authority to respond  
8 to, and your Honor clearly has authority over Ms. Moulder to  
9 order her to do that.

10 THE COURT: Under the other cases or under this case?

11 MS. KAPLAN: Under this case.

12 THE COURT: Under this case? Because Ms. Moulder is a  
13 state officer?

14 MS. KAPLAN: Is a state officer, as conceded by the  
15 State.

16 THE COURT: Okay. Thank you so much, Ms. Kaplan.

17 MS. KAPLAN: Thank you, your Honor.

18 THE COURT: The court appreciates the argument of  
19 counsel today on these issues. The court is going to take  
20 these matters under advisement.

21 I do realize that we have argument slated for Thursday  
22 in -- well, counsel, I'm going to need to meet with you  
23 separately after this hearing, counsel involved in the cases  
24 next Thursday and Friday, just for logistics. I want to talk  
25 to you about some logistical things. But the court is going to

1 take these matters under advisement, and a ruling will come in  
2 due course.

3 Thank you so much for your -- the care and attention  
4 that you applied to your briefing as well as to your arguments.  
5 I really, really do appreciate the work that you all have put  
6 into this case and the, you know, expedient nature in which  
7 we've had to deal with it. So I understand the burdens on the  
8 parties and you all have done your clients well. Thank you so  
9 much.

10 Court's adjourned.

11 (PROCEEDINGS CONCLUDED)

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## CERTIFICATE OF REPORTER

I, MARY VIRGINIA "Gina" MORRIS, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 21st day of June, 2016.

s/ Gina Morris  
U.S. DISTRICT COURT REPORTER