

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

NYKOLAS ALFORD and STEPHEN
THOMAS; and ACLU OF MISSISSIPPI

PLAINTIFFS

V.

CIVIL ACTION NO. 3:16-CV-350-CWR-LRA

JUDY MOULDER, in her official capacity
as MISSISSIPPI STATE REGISTRAR OF
VITAL RECORDS

DEFENDANT

**DEFENDANT’S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO STAY**

Judy Moulder, in her official capacity as Mississippi State Registrar of Vital Records (“Moulder”), files this reply memorandum in support of her motion to stay pending appellate resolution in *Campaign for Southern Equality, et al. v. Phil Bryant, et al.*, No. 16-60477 and *Campaign for Southern Equality, et al. v. Bryant, et al.*, No. 16-60478.

I. Introduction

It is well-settled that incidental to a district court's inherent power “to control the disposition of the causes on its docket is the power to stay proceedings.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976). This power is best utilized through the “exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 254–55. “Granting a stay is within the court's discretion and a stay is appropriate when it serves the interests of judicial economy and efficiency.” *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp.2d 537 (S.D. Miss. 2006) (citing Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866, at 612

(3d ed. 1998 & Supp. 2004). The Fifth Circuit reviews a stay for abuse of discretion. *McKnight v. Blanchard*, 667 F.2d 477 (5th Cir. 1982); *see also PASI of LA, Inc. v. Harry Pepper & Associates, Inc.*, 2016 WL 2993199 at *2 (S.D. Miss. May 23, 2016) (granting stay) (“[T]he district court's discretionary authority to issue a stay is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

This case presents just the type of circumstance in which the exercise of the Court's inherent authority to stay a proceeding is both warranted and appropriate. Both *CSE IV* and *Barber* are on appeal to the Fifth Circuit, the resolution of which will unquestionable impact this case with respect to Plaintiffs' challenge to Section 3 (8)(a) of HB 1523. In that light, Moulder respectfully advocates that litigating this case on the merits while related HB 1523 is pending appellate review would be an immoderate use of the resources of this Court, counsel and litigants.

II. Additional Developments in the Related Cases Warranting a Stay

Since Moulder filed her motion to stay on August 8, 2016 [Dkt. 24], two additional developments in related HB 1523 litigation warrant the granting of a stay. At the time Moulder filed her motion to stay she was subject to this Court's preliminary injunction in *CSE IV* and *Barber* as a defendant and remains so today; Moulder is the sole defendant in this case. Under the terms of this Court's preliminary injunction in *CSE IV* and *Barber*, Moulder is “preliminarily enjoined from . . . enforcing HB 1523.” *Memorandum Opinion and Order, CSE IV and Barber*, [Dkt 35], p. 60 (“Opinion”).

On August 12, 2016, the Fifth Circuit denied defendants' motions to stay the preliminary injunction pending appeal in the consolidated appeals in *CSE IV* and *Barber*. *See Orders*

Denying Stay Pending Appeal, No. 16-60477, **Ex. A** and No. 16-60478, **Ex. B**. Thus, this Court's preliminary injunction, to which Moulder is presently subject to with respect to enforcement of HB 1523, shall remain in effect during the pendency of the appeals in *CSE IV* and *Barber*. Plaintiffs will suffer no prejudice resulting from a stay of this case.

Next, on September 1, 2016, this Court entered an Agreed Order in *Campaign for Southern Equality, et al. v. Phil Bryant, et al.*, Civil Action No. 3:14-cv-00818-CWR-LRA ("*CSE I*"), **Ex. C**. The September 1, 2016 Agreed Order recognizes that "HB 1523 remains enjoined *in its entirety* pending resolution of the merits of the consolidated appeals in Fifth Circuit Cause No. 16-60477." *See Ex. C*, p. 2 (emphasis supplied). The Agreed Order also provides that "[w]ithin thirty (30) days of the Fifth Circuit's issuance of its mandate in the consolidated appeals in Cause No. 16-60477, the parties will meet and confer and submit to the Court a proposal for how to proceed in this action. . . ." *CSE I*, Agreed Order, [Dkt. 52]. Thus, all other district court litigation related to HB 1523 has been stayed. The result in this case should be no different.

III. Plaintiffs' Response in Opposition to a Stay.

A. Plaintiffs' Suit is not Dissimilar to *CSE IV* and *Barber* and is Limited in Scope as to HB 1523 and as to a Single Defendant.

Plaintiffs argue that "staying the case now before the merits are decided would leave the Plaintiffs unprotected for a critical period of time if the Fifth Circuit overturns the existing preliminary injunctions in [*CSE IV* and *Barber*]." [Dkt. 26], p. 2. Plaintiffs' argument misses the point entirely. Should the Fifth Circuit, as Plaintiffs suggest, vacate the existing preliminary injunction, the Court's decision and reasoning will necessarily impact this case. In its Opinion, this Court was fully cognizant of this with respect to severance stating that "[s]ince § 2 was enjoined, the entire bill was rendered inoperable. Movants' theory may apply in the future,

though, *depending on the appellate court's ruling and reasoning.*" See *Barber*, [Dkt. 54], p. 5 (emphasis supplied). This reasoning is no less applicable to Plaintiffs' challenge of Section 3 (8)(a). Moulder respectfully submits that staying this case to await Fifth Circuit's ruling and the rationale therefore, would be an appropriate utilization of resources of the Court, the litigants and counsel as opposed to forging ahead on the merits in this case without the benefit of the appellate court's analysis.

Certainly appellate review in *CSE IV* and *Barber* will have a direct bearing on this case, one way or another. In granting a stay in *Greco v. National Football League*, 116 F. Supp.3d 744 (N.D. Tex. 2015), the district court applied this rationale stating that "[t]he issues in the [related case] will very likely bear on this case." *Id.* at 761. The court concluded that "the interests of the parties and the appropriate conservation of judicial resources, weigh in favor of granting the stay." *Id.* The same holds true for this case.

Plaintiffs contend that this case is distinct from *Barber* and *CSE IV* in two ways: (1) Plaintiffs' pre-enforcement challenge to HB 1523 alleges violations of both Due Process and Equal Protection;¹ and (2) Plaintiffs' standing claim is based on different injuries than those claims in *CSE IV* and *Barber*. [Dkt. 26], p. 8. Plaintiffs further suggest that "[t]he declaratory relief Plaintiffs seek—that the entirety of HB 1523 is unconstitutional on its fact and as applied to Plaintiffs—is therefore plead on meaningfully distinct, and possibly more robust, theories of harm and imminence." *Id.* at 8.

Plaintiffs' argument that their complaint presents "possibly more robust" claims than those asserted in *CSE IV* and *Barber* is at odds with their complaint. The scope of the facial

¹ While the *CSE IV* plaintiffs' claims arise under the Establishment Clause and the *Barber* plaintiffs' claims arise under both the Equal Protection Clause and the Establishment Clause, both suits challenge Section 2 of HB 1523 which identifies "sincerely held religious beliefs or moral convictions" applicable to HB 1523. Plaintiffs in this case do not challenge Section 2.

challenge is clear in that Plaintiffs name only Moulder as a defendant. Any broader claim for relief beyond a challenge to Section 3 (8)(a) is simply inconsistent with naming only Moulder as a defendant as the State Registrar's only connection to HB 1523 is Section 3 (8)(a). The Supreme Court has held that "our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Moreover, any suggestion by Plaintiffs that invalidating Section 3 (8)(a) on its own would invalidate HB 1523 in its entirety is error. *See Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 211 (5th Cir. 2011) ("[I]f one provision of a statute is invalid, the remaining provisions can still be given effect in the absence of the invalid provision. If so, the invalid provision will be severed."). This Court noted the limited scope of Plaintiffs' challenge to HB 1523 stating that "[t]he plaintiffs contend that HB 1523 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Their legal briefs, and arguably their choice of defendant, limit the scope of their motion for injunctive relief to § 3(8)(a) of the bill." [Dkt. 20], p. 1.

The Supreme Court has made it clear that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000). The Court has insisted that "a plaintiff must demonstrate standing separately for each form of relief sought." *Id.* Thus, Plaintiffs' suggestion that by suing a single defendant [Moulder] connected to only a single

provision of HB 1523 [Section 3 (8)(a)] translates into a challenge of 1523 in its entirety, both facially and as applied, is simply incongruent with Supreme Court precedent.²

B. Litigating this Case on the Merits Will Involve More than Pleadings.

Plaintiffs also posture that this case will simply involve “[l]itigating . . . the merits on the pleadings [and] would require *de minimus* expenditure of resources. . . .” [Dkt. No. 26], p. 9. This is incorrect as Moulder has challenged Plaintiffs’ standing, and thus subject matter jurisdiction in this litigation, [Dkt 13, First and Eighth Defenses] which would likely necessitate discovery. “Standing cannot be inferred argumentatively from averments in the pleadings, but rather, it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” *Bryant v. Holder*, 809 F. Supp.2d 563, 566 (S.D. Miss. 2011).

It is well settled that, in the context presented here, “the issue of standing is one of subject matter jurisdiction.” *Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006). “When subject matter jurisdiction is challenged, a court has authority to resolve factual disputes, and may devise a method to . . . mak[e] a determination as to jurisdiction, ‘which may include considering affidavits, **allowing further discovery**, hearing oral testimony, [or] conducting an evidentiary hearing.’” *Turner Bros. Crane & Rigging, L.L.C v. Kingboard Chem. Holding Ltd.*, 2007 WL 2848154, at *2 (M.D. La. Sept.24, 2007) (emphasis supplied) (quoting *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994)).

² A plaintiff seeking an injunction in an as-applied challenge has the burden to allege enough facts for the court to decide the constitutional claim while avoiding “‘premature interpretation of statutes’” requiring speculation or conjecture on a “‘factually barebones record.’” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008)); *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014).

IV. The Court should grant the Stay.

In light of Plaintiffs' challenge to Section 3(8)(a), which overlaps with the *CSE IV* and *Barber* Plaintiffs' challenge to HB 1523, and further given that this Court has preliminarily enjoined those covered by the preliminary injunction (including Moulder) from enacting or enforcing HB 1523, Moulder requests that this case be stayed pending appellate resolution in *CSE IV* and *Barber*. Unlike this case, *CSE IV* and *Barber* involve a challenge to HB 1523 in its entirety and this Court enjoined the application of HB 1523 by any person covered by the preliminary injunction *in toto* and thus, appellate resolution in *CSE IV* and *Barber* will necessarily and directly impact Plaintiffs' singular challenge to Section 3(8)(a).

Staying this case also avoids the potential for inconsistent decisions between the district court and Fifth Circuit. For instance, if this Court renders a decision on the merits in this case as to the constitutionality of Section 3(8)(a) prior to appellate resolution in *CSE IV* and *Barber*, there exists the potential for inconsistent results which could necessitate additional appeals. If the Fifth Circuit vacates the preliminary injunction in its entirety or that portion of the preliminary injunction related to Moulder regarding Section 3(8)(a), the reasoning of the Fifth Circuit will have a direct bearing on the issues in this case.

As provided in the Agreed Order entered by the Court in *CSE I*, the parties in this case can likewise within thirty (30) days of the Fifth Circuit's issuance of its mandate in the consolidated appeals in *CSE IV* and *Barber* meet and confer and submit to the Court a proposal for how to proceed in this action. In order to advance the interest of economy of time and effort for itself, for counsel, and for litigants, the Court should stay this case pending appellate resolution of *CSE IV* and *Barber*.

CONCLUSION

For these reasons Judy Moulder, in her official capacity as the State Registrar of Vital Statistics, respectfully requests that the Court exercise its inherent authority and stay this case pending appellate resolution in *CSE IV* and *Barber* pending in the Fifth Circuit.

This the 6th day of September, 2016.

Respectfully Submitted,

JUDY MOULDER, in her official capacity as
MISSISSIPPI STATE REGISTRAR OF VITAL
RECORDS

BY: JIM HOOD, ATTORNEY GENERAL STATE OF
MISSISSIPPI

BY: /s/ Douglas T. Miracle
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CERTIFICATE OF SERVICE

I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing pleading with the Clerk of this Court using the ECF system which transmitted a copy to all counsel of record

This the 6th day of September, 2016.

/s/ Douglas T. Miracle
DOUGLAS T. MIRACLE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-60477

RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE
ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY;
SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT;
RENICK TAYLOR; BRANDILYNE MANGUM-DEAR; SUSAN MANGUM;
JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs - Appellees

v.

GOVERNOR PHIL BRYANT, State of Mississippi; JOHN DAVIS, Executive
Director of the Mississippi Department of Human Services,

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Mississippi

Before DENNIS, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

In 2016, the Mississippi Legislature passed the “Protecting Freedom of Conscience from Government Discrimination Act”, better known as House Bill 1523 (“HB 1523”). HB 1523 declares that its aim is “to provide certain protections regarding a sincerely held religious belief or moral conviction for persons, religious organizations and private associations.” The Act enumerates the beliefs as follows: “(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a

EXHIBIT - A

No. 16-60477

marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016).

Members of the clergy, organizations, and other citizens of the State of Mississippi are challenging HB 1523. They contend that it violates both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The district court determined that it should preliminarily enjoin the enactment and enforcement of HB 1523. The State has moved for a stay pending appeal.

I.

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks and citation omitted). In deciding whether to stay a preliminary injunction pending appeal, we consider four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 426. "The first two factors of the traditional standard are the most critical." *Id.* at 434. Also, "the maintenance of the status quo is an important consideration in granting a stay." *Dayton Board of Education v. Brinkman*, 439 U.S. 1358, 1359 (1978). *See also Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977). And "we do not decide the merits of the State's appeal from the lower court's injunction; instead, we consider only whether the district court's injunction should be stayed pending complete review." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

II.

No. 16-60477

This court has considered the State's motion on the basis of the briefs, the detailed opinion of the district court, and the applicable law. Mindful that we are considering only whether to grant a stay of a preliminary injunction pending appeal, and further considering that our decision maintains the status quo in Mississippi as it existed before the Legislature's passage and attempted enactment of HB 1523, the State's motion for stay pending appeal is DENIED, as is its motion to expedite this appeal. The State's motion to consolidate this case with 16-60478, *Campaign for Southern Equality, et al v. Phil Bryant, et al* (5th Cir. 2016) is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60478

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR
SUSAN HROSTOWSKI,

Plaintiffs - Appellees

v.

PHIL BRYANT, in his Official Capacity as Governor of the State of
Mississippi; JOHN DAVIS, in his Official Capacity as Executive Director of
the Mississippi Department of Human Services,

Defendants - Appellants

Appeals from the United States District Court
for the Southern District of Mississippi

Before DENNIS, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellant, Phil Bryant, for
stay pending appeal is DENIED.

IT IS FURTHER ORDERED that the opposed motion of appellant, Phil
Bryant, to expedite the appeal is DENIED.

EXHIBIT - B

IT IS FURTHER ORDERED that the opposed motion of appellant, Phil Bryant, to consolidate cases 16-60477 and 16-60478 is GRANTED.

IT IS FURTHER ORDERED that the opposed motion of appellant, John Davis, for stay pending appeal is DENIED.

IT IS FURTHER ORDERED that the opposed motion of appellant, John Davis, to expedite the appeal is DENIED.

IT IS FURTHER ORDERED that the opposed motion of appellant, John Davis, to consolidate cases 16-60477 and 16-60478 is GRANTED.

WHEREAS House Bill 1523 remains enjoined in its entirety pending resolution of the merits of the consolidated appeal in Fifth Circuit Cause No. 16-60477;

THEREFORE IT IS HEREBY ORDERED that this action is stayed.

Within thirty (30) days of the Fifth Circuit's issuance of its mandate in the consolidated appeals in Cause No. 16-60477, the parties will meet and confer and submit to the Court a proposal for how to proceed in this action, consistent with this Court's June 27, 2016 Order [Dkt. 52].

SO ORDERED, this 1st day of September, 2016

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

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