

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

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**MEMORANDUM BRIEF IN SUPPORT OF MOTION TO STAY CASE**

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**INTRODUCTION**

Judy Moulder, in her official capacity as Mississippi State Registrar of Vital Records (“Moulder”), files this memorandum brief in support of her motion to stay this case pending appellate review in *Campaign for Southern Equality, et al. v. Phil Bryant, in his official capacity as Governor of the State of Mississippi, et al.*, No. 3:16-cv-442-CWR-LRA (“*CSE IV*”) and *Barber, et al. v. Phil Bryant, in his official capacity as Governor of the State of Mississippi, et al.*, No. 3:16-cv-417-CWR-LRA (“*Barber*”).<sup>1</sup>

The Court is familiar with the history of these cases challenging all or part of the “Protecting Freedom of Conscience from Government Discrimination Act” (hereafter “HB 1523”) passed by the Mississippi Legislature in the 2016 regular session and therefore, only those issues germane to the instant motion are addressed. Both *CSE IV* and *Barber* encompass the constitutional challenge raised by Plaintiffs in this case and Moulder is sued in her official

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<sup>1</sup> See *Barber, et al. v. Bryant, et al.*, No. 16-60477 and *Campaign for Southern Equality, et al. v. Bryant, et al.*, No. 16-60478.

capacity in *CSE IV*, *Barber* and in this case.<sup>2</sup> In order to promote judicial economy and avoid the unnecessary expenditure of judicial resources and that of the parties, Moulder seeks a stay in this case pending appellate review in *CSE IV* and *Barber*.<sup>3</sup> Requiring Moulder to litigate the merits of this case while preliminarily enjoined from carrying out any duties under HB 1523, and also while *CSE IV* and *Barber* are on appeal, is an unnecessary and immoderate use of the State's limited resources.

Moreover, because Moulder is currently subject to this Court's preliminary injunction in *CSE IV* and *Barber*, Plaintiffs in this case will not be prejudiced by a stay or suffer injury. In light of these circumstances and Plaintiffs' overlapping constitutional with *CSE IV* and *Barber*, Moulder respectfully submits that a stay of the proceedings in this case is justified and warranted.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiffs filed suit in this case challenging only Section 3 (8)(a) of HB 1523 under the Fourteenth Amendment's Equal Protection Clause seeking injunctive and declaratory relief. [Dkt. No. 1], p. 8. Plaintiffs Alford and Thomas, a same-sex couple, allege they plan to marry in the next three years. [Dkt. No. 1], ¶ 24. Plaintiff ACLU of Mississippi alleges that it currently has several members who are in a committed relationship with a same-sex partner and plan to marry within the next three years, including one member who plans to marry his or her partner in 2017. [Dkt. No. 1], ¶ 25. Plaintiffs in *Barber* challenged the constitutionality of HB 1523 in its

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<sup>2</sup> Plaintiffs identified this case as being "related" to *CSE IV* on the Civil Cover Sheet at the time they filed the Complaint. See **Exhibit A**.

<sup>3</sup> Prior to the Status Conference held with the Magistrate Judge on July 27, 2016, counsel for Moulder proposed that the parties enter into a Joint Agreed Order staying the case in light of the preliminary injunction entered by the Court in *CSE IV* and *Barber*. See Email from counsel for Moulder to Counsel for Plaintiff dated July 11, 2016, **Exhibit B**. Counsel for Plaintiffs advised they did not agree a stay was appropriate. See email from counsel for Plaintiffs to counsel for Moulder dated July 13, 2016, **Exhibit C**.

entirety under the Establishment Clause of the First Amendment and the Fourteenth Amendment's Equal Protection Clause. *See Barber*, [Dkt. No. 1]. *CSE IV* Plaintiffs challenged HB 1523 in its entirety under the Equal Protection Clause. *See CSE IV*, [Dkt. No. 1].

***Alford-Thomas/ACLU Litigation.*** On June 20, 2016 and after briefing by the parties, the Court entered an Order denying Plaintiffs' motion for preliminary injunction. [Dkt. No. 20]. In denying injunctive relief, the Court stated that "none of the plaintiffs are at imminent risk of injury because of § 3(8)(a). Alford and Thomas's injury, if one exists, would arise when they apply for a marriage license. But they declare that they will apply for their license sometime within the next three years. That is not imminent. The ACLU has the same problem. If a member of the ACLU intends to enter into a same-sex marriage in 2017, any injury is at least six months away." [Dkt. No. 20], pp. 3-4.

Plaintiffs moved for reconsideration, [Dkt. No. 21], which the Court denied. [Dkt. No. 23]. Plaintiffs did not appeal the denial of the preliminary injunction. Thereafter, the Magistrate Judge conducted a status conference with the parties and at the conclusion instructed counsel for Moulder to file its motion for stay. *See* Minute Entry dated July 27, 2016.

***CSE IV and Barber Litigation.*** On June 23 and 24, 2016 and after briefing by the parties, the Court conducted a two-day preliminary injunction hearing taking witness testimony and hearing arguments of counsel.<sup>4</sup> *See* Minute Entry dated June 23, 2016 and June 24, 2016. On June 30, 2016, the Court issued its Memorandum Opinion and Order ("Opinion") [Dkt. No. 35], granting the *CSE IV* and *Barber* Plaintiffs' motion for preliminary injunction. *Id.* In its Opinion, the Court held:

**IT IS HEREBY ORDERED** that the defendants; their officers, agents, servants, employees, and attorneys; and any other persons who are in active

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<sup>4</sup> The Court consolidated *CSE IV* and *Barber* for purposes of the preliminary injunction hearing. *See* Order in *Barber*, [Dkt. No. 24].

concert or participation with the defendants or their officers, agents, servants, employees, or attorneys; are hereby preliminarily enjoined from enacting or enforcing HB 1523.<sup>5</sup>

*Id.*, p. 60.

On July 7, 2016, counsel for Governor Bryant filed a Notice of Appeal and a Motion to Stay Preliminary Injunction Pending Appeal in both *CSE IV* and *Barber*. *CSE IV*, [Dkt. Nos. 41-43]; *Barber*, [Dkt. Nos. 45-47]. On July 8, 2016, counsel for John Davis, Executive Director of the Mississippi Department of Human Services, filed a Notice of Appeal and Motion to Stay Preliminary Injunction Pending Appeal in both *CSE IV* and *Barber*. *CSE IV*, [Dkt. Nos. 45, 46, & 48]; *Barber*, [Dkt. Nos. 50-51]. On August 1, 2016 this Court entered orders in both *CSE IV* and *Barber* denying the motions to stay preliminary injunction pending appeal. *CSE IV*, [Dkt. No. 51]; *Barber*, [Dkt. No. 54].

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).

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<sup>5</sup> The Court characterized Moulder's involvement with HB 1523 as follows:

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for "carry[ing] into effect the provisions of law relating to registration of marriages." *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523, § 3(8)(a).

Opinion, [Dkt. No. 35], p.5.

Moreover, Plaintiffs Alford and Thomas will not be prejudiced by a stay in this case as both have testified in affidavits that they intend to get married within the next three years. *See* Alford Decl. ¶ 8; Thomas Decl. ¶ 8. As to the ACLU Plaintiffs, this Court stated in its Order denying the preliminary injunction that “[i]f a member of the ACLU intends to enter into a same-sex marriage in 2017, any injury is at least six months away.” [Dkt No. 20], p. 4.

More import than the potential timing of any Plaintiffs’ future marriage plans is that, as the status quo currently stands, even if Plaintiffs sought a marriage license immediately, the Court’s preliminary injunction in *CSE IV* and *Barber* prohibits Moulder from carrying out Section 3(8)(a). Opinion, [Dkt. No. 35], p. 60. Thus, there will be no harm or prejudice to Plaintiffs in staying this case pending appellate resolution of *CSE IV* and *Barber*.

### **ARGUMENT**

#### **A. Under Supreme Court and Fifth Circuit Precedent a Stay is Warranted.**

A district court has “discretionary power to stay proceedings before it in the control of its docket and in the interests of justice.” *In re Beebe*, 56 F.3d 1384, 1995 WL 337666, at \* 2 (5th Cir. 1995) (citing *Landis v. North American Co.*, 299 U.S. 248 (1936)). In *Landis*, the Supreme Court recognized that incidental to a district court's inherent power “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants” is “the power to stay proceedings.” *Id.* at 254.

The Supreme Court in *Landis* noted that “how this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Id.* (citing *Kansas City Southern R. Co. v. United States*, 282 U.S. 760, 763 (1931); *see also McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982); *In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990) (“The stay of a pending matter is ordinarily within the trial court's wide discretion to

control the course of litigation, which includes authority to control the scope and pace of discovery.”). In *Bebee*, the Fifth Circuit stated that when considering a stay pending resolution of another case, “the court must carefully consider the time reasonably expected for resolution of the ‘other case,’ in light of the principle that ‘stay orders will be reversed when they are found to be immoderate or of an indefinite duration.’” *Bebee*, 1995 WL 337666, at \*3 (quoting *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983) (further quoting *McKnight* 667 F.2d at 479). A stay order must be “so framed in its inception that its force will be spent within reasonable limits, so far as they are susceptible of prevision and description.” *Bebee*, 1995 WL 337666, at \*3 (citing *Landis*, 299 U.S. at 257). However, “[t]here is nothing per se impermissible . . . about staying a lawsuit until after another related action has been tried.” *Id.* (citation omitted).

In *Greco v. v. National Football League*, 116 F. Supp.3d 744 (N.D. Tex. 2015), the district court recently addressed a stay pending a related appeal in the Fifth Circuit concluding that “[a] court is within its discretion to grant a stay when a related case with substantially similar issues is pending before a court of appeals.” *Id.* at 761 (citing *Trinity Indus., Inc. v. 188 L.L.C.*, No., 2002 WL 1315743, at \*3 (N.D. Tex. June 13, 2002)). In *Greco*, plaintiffs moved for a stay pending resolution of a “related case with nearly identical factual and legal issues.” *Greco*, 116 F. Supp.3d at 761. In seeking a stay, the plaintiffs in *Greco* argued that that “staying this case will save resources and time for the Court and parties.” *Id.*

The district court noted that many of the issues in the case were pending on appeal to the Fifth Circuit. *Id.* In granting the requested stay in *Greco*, the district court concluded that “the interests of the parties and the appropriate conservation of judicial resources, weigh in favor of granting the stay. The issues in the [related case] will very likely bear on this case.” *Id.* The

same holds true for this case. The same provision of HB 1523 challenged by Plaintiffs in this case (whether Section 3(8)(a) violates the Equal Protection Clause of the Fourteenth Amendment), is now before the Fifth Circuit in *CSE IV* and *Barber*. Appellate resolution of *CSE IV* and *Barber* will therefore impact Plaintiff's challenge to Section 3(8)(a) in this case.

Moreover, 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 necessitating further 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 Court could revisit the stay order at that time. In either event, judicial economy is advanced.

In its order denying the Governor Bryant's motion for stay of the preliminary injunction in *Barber* and *CSE IV*, the Court stated that "[l]astly, HB 1523 did not qualify for severance. Every section of the bill explicitly incorporated § 2. Since § 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. No. 54], p. 5. Thus, Moulder respectfully submits that the Court stay the proceeding pending the appellate court's "ruling" and "reasoning" in *CSE IV* and *Barber*.

**B. Plaintiffs Cannot Obtain Declaratory Relief by Reason of the Preliminary Injunction in *CSE IV* and *Barber*.**

Finally, given that this Court has preliminarily enjoined Moulder from taking any action under Section 3(8)(a), Plaintiffs are not entitled to declaratory relief under 28 U.S.C. §§ 2201 and 2202. The Supreme Court in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), quoting its decision in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273

(1941), stated that with respect to a declaratory judgment, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.” *MedImmune*, 127 S.Ct. at 771 (emphasis supplied).

Plaintiffs cannot show a substantial controversy of “sufficient immediacy and reality” necessary for declaratory relief because Moulder is currently subject to this Court’s preliminary injunction prohibiting her from carrying out any part of Section 3(8)(a). In the absence of such a controversy, Plaintiffs are not entitled to declaratory relief. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (“[F]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions.”).

As the Fifth Circuit in *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) held, “[b]ecause *there is no ongoing injury to [Plaintiffs]* and any threat of future injury is neither imminent or likely, there is not a live case or controversy for this court to resolve and a declaratory judgment would therefore be inappropriate.” *Id.* at 358 (emphasis supplied). At present there is no ongoing injury to Plaintiffs and thus no live case or controversy for the Court to resolve as Moulder is currently subject to this Court’s preliminary injunction in *CSE IV* and *Barber*.

### **CONCLUSION**

For these reasons Judy Moulder, in her official capacity as the State Registrar of Vital Statistics, moves the Court to stay this case pending appellate review in *CSE IV* and *Barber*.

This the 8<sup>th</sup> day of August, 2016.

Respectfully Submitted,

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



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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 document with the Clerk of this Court using the ECF system which transmitted a copy to all counsel of record

This the 8<sup>th</sup> day of August, 2016.

/s/ Douglas T. Miracle  
DOUGLAS T. MIRACLE