

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson Division

NYKOLAS ALFORD and STEPHEN)
THOMAS; and ACLU OF MISSISSIPPI,)
)
 Plaintiffs,)
) Civil No. _____
 v.)
)
 JUDY MOULDER, in her official capacity as)
 MISSISSIPPI STATE REGISTRAR OF)
 VITAL RECORDS,)
)
 Defendant.)

COMPLAINT

INTRODUCTION

1. This is a pre-enforcement challenge to Mississippi House Bill 1523 the Protecting Freedom of Conscience from Government Discrimination Act (“HB 1523”).
2. In *Obergefell v. Hodges*, the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment “do[] not permit [a] State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.” 135 S. Ct. 2584, 2607 (2015).
3. On its face, HB 1523 violates the Fourteenth Amendment by subjecting the lawful marriages of same-sex couples to different terms and conditions than those accorded to different-sex couples. By creating a separate and unequal set of laws applying only to the marriages of same-sex couples, HB 1523 imposes a disadvantage, a separate status, and so a stigma upon all married same-sex couples in Mississippi.
4. Unless this Court issues an injunction, HB 1523 will become effective on July 1, 2016.

5. Plaintiffs seek declaratory relief that HB 1523 is unconstitutional on its face and as applied to Plaintiffs, and preliminary and permanent injunctions barring Defendant in her official capacity from enforcing the statute.

JURISDICTION AND VENUE

6. This action arises under the United States Constitution and 42 U.S.C. § 1983.

7. This Court has jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

8. Venue lies with this Court pursuant to 28 U.S.C. §§ 1391(b)(1)-(2), because the defendant resides in this District and a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

9. Plaintiffs Nykolas Allen and Stephen Thomas are residents of Lauderdale County, Mississippi.

10. Plaintiff ACLU of Mississippi is incorporated under the laws of Mississippi and has its principal place of business in Jackson, Mississippi.

11. The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Plaintiff, ACLU of Mississippi, is one of its state affiliates. The ACLU of Mississippi has approximately 1,000 members and continues to grow.

12. The ACLU and the ACLU of Mississippi advocate for the equal rights of lesbian, gay, bisexual and transgender (“LGBT”) people and the freedom to live openly in a fair and just

society. Through their litigation, advocacy, and lobbying efforts, they have ensured LGBT persons' freedom of expression and defended them against harassment. The ACLU and the ACLU of Mississippi plan to continue to defend the rights and liberties of the LGBT residents of Mississippi.

13. Defendant Judy Moulder is sued in her official capacity as Mississippi State Registrar of Vital Records. The Office of Vital Records is located at 222 Marketridge Drive in Ridgeland, Mississippi.

14. HB 1523 § 3(8)(a) provides that “any person employed or acting on behalf of the state government who has authority to authorize or license . . . may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction” that marriage is or should be recognized as the union of one man and one woman. HB 1523 § 3(8)(a) further provides that “[a]ny person making such recusal shall provide prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal.”

FACTUAL ALLEGATIONS

15. In *Obergefell*, the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment “do[] not permit [a] State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.” 135 S. Ct. at 2607.

16. As a result of *Obergefell*, Mississippi officials, in their official capacity, have been permanently enjoined from enforcing Section 263A of the Mississippi Constitution, which provides that “Marriage may take place and may be valid under the laws of this State only between a man and a woman.”

17. Mississippi's exclusion of same-sex couples from marriage was based on strong religious and moral opposition to homosexuality and same-sex relationships.

18. In *Obergefell* the Supreme Court acknowledged that many people have sincere religious or moral objections to the marriages of same-sex couples. The Court nevertheless held that "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." *Obergefell*, 135 S. Ct. at 2602.

19. Passed as a direct response to *Obergefell*, HB 1523 reenacts some individuals' religious or moral opposition to the marriages of same-sex couples as the law and public policy of Mississippi. Indeed, HB 1523 incorporates virtually the same language as Mississippi's defunct constitutional marriage ban. Whereas Section 263A of the Mississippi Constitution provided that "Marriage may take place and may be valid under the laws of this State only between a man and a woman," HB 1523 authorizes certain types of discrimination against same-sex couples based on the religious or moral conviction that "Marriage is or should be recognized as the union of one man and one woman."

20. HB 1523 thus targets precisely the same class of people that *Obergefell* protects. Although same-sex couples may now legally marry in Mississippi, HB 1523 identifies that subset of legal marriages and makes them unequal to all other types of legal marriages.

21. HB 1523 does not protect all religious or moral beliefs, or even all religious or moral beliefs related to marriage. Such beliefs already receive robust protections under

Mississippi's Religious Freedom Restoration Act ("RFRA"), which provides that any governmental burdens on an individual's "ability to act or the refusal to act in a manner that is substantially motivated by one's sincerely held religious belief" must be justified by a compelling governmental interest and be the least restrictive means of achieving that interest. MS Code. § 11-61-1(5)(b).

22. In contrast, HB 1523 provides complete immunity for certain individuals and organizations to act or refuse to act based on their religious or moral belief that marriage is or should be recognized as the union of one man and one woman. HB 1523 creates an absolute right for those individuals and organizations to act or refuse to act based on these particular religious or moral beliefs regardless of whether the burden on religious beliefs would otherwise be justified under Mississippi's RFRA. When acting or refusing to act based on such beliefs, HB 1523 immunizes those individuals and organizations from all legal liability, including liability through common law claims for torts or breaches of contract. Indeed, if a same-sex couple seeks to bring such an action, HB 1523 makes the same-sex couple liable for damages to the individual or organization that has discriminated against them.

23. HB 1523 does not authorize discrimination against any marriage of a different-sex couple based on religious or moral objections. Many individuals and organizations have strong religious and moral objections to interfaith marriages. Many individuals and organizations have strong religious and moral objections to recognizing a second marriage following a civil divorce. Some individuals and organizations continue to have strong religious and moral objections to marriages between people of different races. But HB 1523 does not provide any authorization for those individuals and organizations to act or refuse to act based on those religious or moral beliefs.

24. Plaintiffs Nykolas Alford and Stephen Thomas are a same-sex couple in a committed long-term relationship who are engaged to be married. They plan to marry within the next three years, after they complete their undergraduate education and obtain bachelor's degrees. They plan to marry within the next three years even if one of them is unable to finish his undergraduate education by then as a result of some unforeseen circumstance.

25. The ACLU of Mississippi currently has several members who are in committed relationships 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.

26. As a result of HB 1523, Plaintiffs, ACLU of Mississippi members, and other same-sex couples seeking to marry after July 1, 2016, will be subject to a separate and unequal set of rules that do not apply to different-sex couples.

27. Different-sex couples who wish to marry in Mississippi may obtain a marriage license from any county clerk's office in the State, and in each of those clerk's offices, the employees have no legal right to recuse themselves from issuing marriage licenses to a different-sex couple based on religious beliefs or moral convictions.

28. In contrast, once HB 1523 goes into effect, Defendant will receive written notices from governmental employees who wish to recuse themselves from issuing marriage licenses to same-sex couples, and Defendant will keep a record of all recusals. In effect, Defendant has a duty under the statute to maintain a "no same-sex couples allowed" list of governmental officials who provide the same licenses to every other type of couple entering into a legal marriage but refuse to provide marriage licenses to Plaintiffs, ACLU of Mississippi members, and other same-sex couples. Same-sex couples are thus relegated to a more limited set of governmental employees willing to issue them marriage licenses.

29. Defendants' maintenance of a "no same-sex couples allowed" list inflicts constitutional injury on Plaintiffs, ACLU of Mississippi members, and other same-sex couples even if the recusals do not impede or delay their ability to obtain marriage licenses. Creating a separate and unequal set of laws applying only to same-sex couples imposes a disadvantage, a separate status, and so a stigma upon all married same-sex couples.

30. The stigma is further enhanced by the fact that the Registrar's "no same-sex couples allowed" list is just one part of a comprehensive legal regime created by HB 1523 that will continue to impose separate and unequal treatment on Plaintiffs, ACLU of Mississippi members, and other same-sex couples over the course of their lives. Whenever Plaintiffs celebrate their anniversary, for-profit businesses will have an absolute right to refuse to provide them goods and services. If Plaintiffs seek to adopt a child out of foster care, adoption agencies have an absolute right to turn them away because they are a same-sex couple. If Plaintiffs seek counseling or fertility services, any hospital employee from the receptionist to the obstetrician may refuse to interact with them because they are a same-sex couple. If Plaintiffs have a child, the school guidance counselor could tell their child that his or her parents' marriage is an abomination or refuse to provide any counseling services to their child at all. Through these sweeping exclusions, HB 1325 subjects same-sex married couples in Mississippi to a lifetime of potentially humiliating denials of ordinary assistance and places a badge of inferiority upon their marriages each time they celebrate one of the ordinary incidents of family life.

31. As a result of this separate and unequal regime, HB 1523 places Plaintiffs, ACLU of Mississippi members, and other same-sex couples in an unstable position of being in a second-tier marriage. Even if no discrimination actually occurs, the second-tier status tells all persons

with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.

CLAIM FOR RELIEF

Fourteenth Amendment to the United States Constitution

32. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, States must allow same-sex couples access to civil marriage on the same terms and conditions as different-sex couples.

33. HB 1523 singles out the marriages of same-sex couples for a unique set of burdens that are not inflicted on marriages of different-sex couples.

34. On its face, HB 1523 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

35. HB 1523 is unconstitutional in all its applications.

36. If HB 1523 goes into effect, Defendant will enforce the statute by collecting and recording notices of recusal from governmental employees who refuse to authorize or license lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman.

37. Enforcing HB 1523 by maintaining a list of governmental employees who will issue marriage licenses to different-sex couples but not same-sex couples would make marriage available to Plaintiffs on different terms and conditions than different-sex couples. The injury from the differential treatment is compounded by the stigma that HB 1523 imposes on Plaintiffs, ACLU of Mississippi members, and other same-sex couples.

38. HB 1523 is unconstitutional as applied to Plaintiffs.

39. Under 42 U.S.C. § 1983, Defendant, in her official capacity, is liable for declaratory and injunctive relief to prevent Defendant from violating Plaintiffs' Fourteenth Amendment rights under color of state law.

40. Declaring HB 1523 unconstitutional and enjoining Defendant from enforcing it would redress Plaintiffs' injury.

REQUEST FOR RELIEF

For the foregoing reasons, the plaintiffs respectfully request that the Court grant the following relief:

A. A declaration that HB 1523 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment;

B. Preliminary and permanent injunctions against Defendant in her official capacity, prohibiting her from enforcing HB 1523;

C. Plaintiffs' reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and

D. Such other relief as the Court deems just and proper.

Dated: May 9, 2016

Respectfully submitted,

Joshua A. Block*
Leslie Cooper*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, Floor 17
New York, New York 10004
212-549-2627
jblock@aclu.org
lcooper@aclu.org

Oliver Diaz, Esq.
416 East Amite Street
Jackson, MS 39201
769-280-3881
oliver@oliverdiazlaw.com

Paloma Wu*
AMERICAN CIVIL LIBERTIES UNION OF
MISSISSIPPI FOUNDATION
233 East Capitol Street
Jackson, Mississippi 39201
601-354-3408
pwu@aclu-ms.org

Counsel for Plaintiffs

** Motion for admission pro hac vice to
follow*