

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

JAMES DOMER BRENNER, et al.,

Case No. 4:14-cv-107-RH-CAS

Plaintiffs,

v.

RICK SCOTT, et. al.,

Defendants.

SLOAN GRIMSLEY, et al.,

Plaintiffs,

Case No. 4:14-cv-00138-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

**AMICUS FLORIDA FAMILY ACTION, INC.'S MEMORANDUM OF LAW
IN RESPONSE TO DEFENDANT CLERK OF COURT'S
EMERGENCY MOTION FOR CLARIFICATION**

AMICUS CURIAE, Florida Family Action, Inc., (“FFAI”), by and through counsel, respectfully submits the following Memorandum of Law in Response to the Emergency Motion for Clarification (Doc. 99 (the “Clerk’s Motion”)), filed by Defendant Clerk of Court of Washington County, Florida (the “Clerk”). FFAI submits this Memorandum of Law pursuant to the Court’s Order entered December 24, 2014 (Doc. 101 (the “Procedures Order”)) establishing procedures for responding to the Clerk’s Motion by December 29, 2014, and the Court’s Order entered April 24, 2014 (Doc. 40) allowing FFAI “to file a timely amicus memorandum on any legal issue submitted by the parties.”

STATEMENT OF COMPLIANCE WITH F.R. App. P. 29(c)(5)

No party's counsel authored this Memorandum in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Memorandum; and no person other than Amicus Curiae FFAI, its members, or its counsel contributed money that was intended to fund preparing or submitting the Memorandum.

QUESTIONS PRESENTED

The Washington Clerk seeks clarification as to whether the Clerk is bound by the Court's Order entered August 21, 2014 (Doc. 74 (the "Preliminary Injunction")) to issue marriage licenses to any same-sex couple other than Stephen Schlairet and Ozzie Russ, who are plaintiffs in this case. (Clerk's Mot. at 1-2.) The Court posed the related question of whether the Preliminary Injunction binds a Florida clerk of court not to take *any* action (including the issuance of marriage licenses) based upon Florida's constitutional and statutory prohibitions against same-sex marriage. (Procedures Ord. at 3-4.)

In this Memorandum, FFAI addresses the specific question of whether the Preliminary Injunction binds any Florida clerk of court, other than the Washington Clerk, to issue marriage licenses to same-sex couples. As shown below, the answer is *no*. In addition, **this Court cannot revise the Preliminary Injunction to expand its scope because the Court lacks personal jurisdiction over non-party clerks, and the Court lacks subject-matter jurisdiction over the Preliminary Injunction while an appeal from that injunction is pending at the Eleventh Circuit.**

LEGAL ARGUMENT

I. THE PRELIMINARY INJUNCTION DOES NOT AND CANNOT BIND ANY FLORIDA CLERK, OTHER THAN THE WASHINGTON CLERK, TO ISSUE MARRIAGE LICENSES TO SAME-SEX COUPLES.

A. The Preliminary Injunction, on its face, binds only the Washington Clerk with respect to the issuance of marriage licenses.

The Preliminary Injunction, on its face, binds the Washington Clerk to issue a marriage license to Plaintiffs Schlairet and Russ. (Prelim. Inj. at 32, ¶ 6.) It also, on its face, preliminarily enjoins the Florida Secretary of Management Services (the “Secretary”) and the Florida Surgeon General, as head of the Florida Department of Health (the “Surgeon General”), and “their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them,” from enforcing several Florida laws concerning same-sex marriage, specifically Florida Constitution Article I, § 27, and Florida Statutes §§ 741.04(1) and 741.212. (Prelim. Inj. at 31, ¶ 4.)

None of the foregoing provisions of the Preliminary Injunction, however, bind any Florida court clerk, other than the Washington Clerk, to issue marriage licenses to same-sex couples. **Neither the Secretary nor the Surgeon General has any authority to issue marriage licenses**; that authority is expressly reserved to circuit court clerks and county judges by Fla. Stat. § 741.01(1). While the Surgeon General, as head of the Department of Health, has the express duty and authority to receive and maintain records of marriages as part of the Department’s vital records function, and the necessary, related authority to dictate how marriage license applicants’ information is collected on the forms used by circuit clerks for issuing marriage licenses, *see* Fla. Stat. §§ 382.003(1), (2), (7), 382.021, 382.022, **the Surgeon General’s authority in no way reaches into or**

alters a clerk's duty or authority to issue marriage licenses in accordance with Fla. Stat. §§ 741.01(1) and 741.04(1). Thus, with respect to issuing marriage licenses, circuit clerks are neither agents of, nor acting in concert with, the Surgeon General.¹

The Surgeon General, hypothetically, could dictate that a clerk's marriage license form accommodate two male or two female names as applicants pursuant to the Department's vital records form approval authority under Fla. Stat. § 382.003(7), or that the forms used by a clerk to report completed marriages accommodate two male or two female names as spouses pursuant to the Department's prescriptive form authority under Fla. Stat. § 382.021. Notwithstanding these proper exercises of the Surgeon General's authority on matters concerning marriage, however, **the Surgeon General has no constitutional or statutory authority to compel a clerk to issue a marriage license to a same-sex couple, even if the license form could accommodate same-sex applicants.** To the extent a clerk can ever be deemed to be acting as an agent of, or in concert with, the Surgeon General concerning marriage, such agency or active concert would necessarily be limited to the Surgeon General's proper scope of authority, which does not include the issuance of marriage licenses. Thus, the Preliminary Injunction, on its face, does not bind any Florida clerk outside Washington County to issue marriage licenses to same-sex couples.

If Plaintiffs were correct in their contention that the Preliminary Injunction binds all Florida clerks to issue marriage licenses as supposed agents of the Secretary or Surgeon General, Plaintiffs would not have needed to sue the Washington Clerk.

¹ Likewise, no person authorized to solemnize a marriage under Fla. Stat. § 741.07 is acting as an agent of or in concert with the Department of Health with respect to the act of solemnization because the Department itself has no constitutional, statutory, or other authority over the act.

Plaintiffs, however, **did** sue the Washington Clerk, presumably because they understood that there was no other means or mechanism for this Court to require the Washington Clerk to issue Plaintiffs a marriage license. The Washington Clerk has an independent statutory duty to issue marriage licenses to qualified applicants, and the only available means for judicially expanding that duty to include issuance of a marriage license to Plaintiffs was to bring the Washington Clerk before this Court. The same is true for every other Florida clerk in the other sixty-six counties, whom Plaintiffs did not name in their suit and who are therefore not properly before this Court.

B. The Preliminary Injunction is not binding on any Florida clerk not before the Court with respect to the issuance of marriage licenses.

An injunction binds only parties to the proceeding, and the parties' officers, agents, servants, employees, and attorneys, and other persons acting in concert or participation with the parties with regard to property that is the subject of the injunction. *See Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 971-72 (11th Cir. 2012); *Le Tourneau Co. of Ga. v. N.L.R.B.*, 150 F.2d 1012, 1013 (5th Cir. 1945); Fed. R. Civ. P. 65(d)(2). Because the foregoing persons include no Florida clerk other than the Washington Clerk (*see* section I.A, *supra*), the Preliminary Injunction is not binding on any Florida clerk not before the Court. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd*, 484 U.S. 97, 104 (1987). To be sure, an injunction against a single state official sued in his official capacity does not enjoin all state officials. *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1255 n.3 (11th Cir. 2001).

Furthermore, a federal district court's ruling that a Florida statute is unconstitutional is not binding on any Florida state court which may acquire jurisdiction over a clerk. *See, e.g., Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003) ("The only

federal court whose decisions bind state courts is the United States Supreme Court”); *cf. Merck v. State*, 124 So. 3d 785, 803 (Fla. 2013); *Roche v. State*, 462 So. 2d 1096, 1099 n.2 (Fla. 1985); *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *Bradshaw v. State*, 286 So. 2d 4,6-7 (Fla. 1973) (“It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a state.”).

Thus, whether on its face or by operation of law, the Preliminary Injunction does not bind any Florida clerk outside Washington County with respect to the issuance of marriage licenses.

C. Enforcing the Preliminary Injunction within its legal boundaries will not deprive any Plaintiff of complete relief.

Although these consolidated cases include twenty-two plaintiffs, only two—Plaintiffs Schlairet and Russ—seek the **issuance** of a marriage license. In that respect, the provisions of the Preliminary Injunction directed to the Washington Clerk provide those two Plaintiffs complete relief, irrespective of whether any Florida clerk outside Washington County, or even the Washington Clerk, is bound to issue marriage licenses to other same-sex couples not before the Court. If Plaintiffs Schlairet and Russ desired to compel the issuance of marriage licenses to other same-sex couples who are not plaintiffs, in addition to suing any of the other sixty-six Florida court clerks (*see* section I.A, *supra*), they could have brought their claims as a class action on behalf of similarly situated same-sex couples. Plaintiffs, however, did not sue other clerks, did not file this case as a class action, and did not seek to certify a class.

Moreover, to the extent the other twenty plaintiffs seek to compel the Secretary or Surgeon General to **recognize** same-sex marriages occurring outside Florida, the provisions of the Preliminary Injunction directed to the Secretary and the Surgeon

General provide those Plaintiffs complete relief (preliminarily) with respect to matters within those officers' spheres of authority. Enforcing the Preliminary Injunction within its legal boundaries will not deprive any **Plaintiff** of complete relief. Plaintiffs' "complete relief" arguments are therefore without merit.

D. This Court lacks both personal and subject-matter jurisdiction to expand the Preliminary Injunction to bind non-party clerks, and such expansion would be a profound violation of due process.

In the Secretary's Response to Clerk's Emergency Motion for Clarification filed on the same date herewith (Doc. 103 (the "Secretary's Response")), the Secretary agrees with FFAI that Florida clerks are not agents of the Secretary or the Surgeon General for the purpose of issuing marriage licenses, and essentially agrees that the current Preliminary Injunction does not bind Florida clerks who are not before the Court. (Secretary's Resp. at 1-2.) The Secretary confirms that neither it, nor any of the other named defendants, have represented the interests of non-party clerks in this case. (*Id.* at 2) ("A clerk is not in privity with the DMS and Health Secretaries, represented by them, or subject to their control."). Without citing any authority, however, the Secretary remarkably suggests that the Court could now – after the fact – bind another Florida clerk, or all Florida clerks, simply by stating the Court's intention to do so with "additional specificity." (*Id.* at 1-2.) The Secretary's suggestion is not only wrong, but breathtaking. The Preliminary Injunction does not fail to bind non-party clerks simply because it lacks the right words, but also because the Court lacks the jurisdiction and authority to issue such relief.

First, **the Court has no personal jurisdiction over non-party clerks.** No "additional specificity" could legally extend the Preliminary Injunction to Florida clerks who have not even been subjected to the Court's jurisdiction through service of process,

let alone given the basic and indispensable opportunity to be heard on any matter covered by the Preliminary Injunction. Given the Secretary's admission and confirmation that neither it nor any other defendant has represented the interests of non-party clerks in these proceedings, (Secretary's Response at 2), it would be a profound violation of due process to subject any non-represented, non-party clerk to the requirements of the already-litigated Preliminary Injunction, by mere notice and "additional specificity" after the fact.

Second, **the Court has no subject-matter jurisdiction to revise or expand the Preliminary Injunction, which is now on appeal to the Eleventh Circuit.** "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, (1982). "[T]he filing of a notice of appeal deprives the district court of jurisdiction over all issues involved in the appeal." *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003). Once a preliminary injunction is appealed, the district court lacks subject-matter jurisdiction to expand or revise it. *See People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1322 (9th Cir.) *amended*, 775 F.2d 998 (9th Cir. 1985) ("The district court correctly held that TSR's notice of appeal deprived the district court of jurisdiction to grant the requested modifications" to a preliminary injunction.)

In sum, the Court may not expand the Preliminary Injunction as an after-thought, to afford relief that no one requested, benefiting persons who are not plaintiffs, at the expense of clerks who are not defendants.

CONCLUSION

For all of the foregoing reasons, the Preliminary Injunction does not and cannot bind any Florida clerk not before the Court to issue marriage licenses to same-sex couples.

Respectfully Submitted,

/s/ Horatio G. Mihet

Mathew D. Staver

Florida Bar No. 701092

Anita G. Staver

Florida Bar No. 611131

Horatio G. Mihet

Florida Bar No. 0026581

Roger K. Gannam

Florida Bar No. 240450

LIBERTY COUNSEL

P.O. BOX 540774

Orlando, FL 32854-0774

Telephone: (800) 671-1776

Telefacsimile: (407) 875-0770

Attorneys for *Amicus Curiae*,

Florida Family Action, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on December 29, 2014 via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/ Horatio G. Mihet

HORATIO G. MIHET

Attorney for *Amicus Curiae*,

Florida Family Action, Inc.