UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, et al.,

Plaintiffs,

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

v.

RICK SCOTT, et al.,

Defendants.

SLOAN GRIMSLEY, et al.,

Plaintiffs,

Case No. 4:14-cv-138-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

APPLICATION OF AMICI CURIAE EQUALITY FLORIDA INSTITUTE, INC. AND THE NATIONAL CENTER FOR LESBIAN RIGHTS TO FILE A MEMORANDUM IN RESPONSE TO THE EMERGENCY MOTION OF THE CLERK OF COURT OF WASHINGTON COUNTY FOR CLARIFICATION; PROPOSED MEMORANDUM OF POINTS AND AUTHORITIES

APPLICATION OF AMICI CURIAE TO FILE

MEMORANDUM OF POINTS AND AUTHORITIES

Amici Curiae Equality Florida Institute, Inc. and the National Center for Lesbian Rights ("Amici") hereby seek leave to file this memorandum in response to the Emergency Motion for Clarification filed by the Clerk of Court of Washington County (Doc. 99) ("Motion"), asking whether this Court's order dated August 21, 2014 (Doc. 74) ("Order") requires the Clerk to issue marriage licenses to all eligible same-sex couples or only to the named plaintiffs in the case. Motion at 1-2. For the reasons stated below, Amici respectfully ask this Court to clarify that, based upon the language of the Order, Federal Rule of Civil Procedure 65, and controlling case law, the Court's Order prohibits all state and local officials involved in administering Florida's marriage laws in concert with each other, including all 67 of Florida's county court clerks, from enforcing the provisions of those laws that this Court declared to be invalid.

Counsel for Plaintiffs and for the Clerk of Court of Washington County have informed counsel for Amici that they do not object to the filing of this memorandum. As of the time of the filing of this Application, Counsel for Defendants Secretary of the Florida Department of Health and Secretary of the Florida Department of Management Services have not responded to an inquiry from Amici's counsel as to whether those Defendants consent to the filing of this Memorandum.

STATEMENT OF INTERESTS

Equality Florida Institute, Inc., is the state's largest civil rights organization dedicated to securing full equality for Florida's lesbian, gay, bisexual, and transgender (LGBT) community. The organization has many members throughout the state. Since its inception, the organization has represented the interests of LGBT Floridians through public education, coalition-building,

advocacy, and grassroots organizing. Equality Florida Institute also coordinates public education campaigns and events for policymakers, LGBT people, and the public at large on issues affecting the LGBT community. Equality Florida Institute's members include many same-sex couples throughout Florida who wish to marry in this State and many who are lawfully married and wish to have their marriages recognized by the State. Equality Florida Institute is a plaintiff in *Pareto v. Ruvin*, in which a Florida state trial court ruled that Florida's exclusion of same-sex couples violates the federal Constitution. That case is now pending before the Florida Court of Appeals (3rd DCA Case No. 3D14-1783).

Founded in 1977, the National Center for Lesbian Rights (NCLR) is a national non-profit legal organization dedicated to securing equality for lesbian, gay, bisexual, and transgender people and their families. NCLR has extensive experience litigating marriage equality cases and has represented same-sex couples seeking the freedom to marry in many cases across the country, including in California, Florida, Idaho, New Mexico, North Dakota, Tennessee, South Dakota, and Wyoming. NCLR is counsel for six same-sex couples and Equality Florida Institute in *Pareto v. Ruvin.* NCLR has a strong interest in ensuring that same-sex couples in Florida and other states enjoy the same constitutional freedoms and protections as others, including the freedom to marry and to have their lawful marriages recognized by their state of residence.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Under Federal Rule of Civil Procedure 65 And The Terms Of This Court's Order, The Injunction Binds Anyone Acting In Concert With Named State Officials, Including County Clerks, And Therefore Requires All Florida County Clerks To Issue Marriage Licenses To Eligible Same-Sex Couples.

Federal law provides that U.S. district court injunctions bind not only the parties named in a lawsuit, but also all other "persons who are in active concert or participation" with any of the named parties or with any of their officers, agents, servants, or employees. Fed. R. Civ. P. 65(d)(2)(C). This Court's Order similarly provides:

> The [state defendants] must take no steps to enforce or apply these Florida provisions on same-sex marriage: Florida Constitution, Article I, § 27; Florida Statutes § 741.212; and Florida Statutes § 741.04(1). . . . The preliminary injunction binds the Secretary, the Surgeon General, and their officers, agents, servants, employees, and attorneys—*and others in active concert or participation with any of them*—who receive actual notice of this injunction by personal service or otherwise.

(Doc. 74 at 31 (emphasis added).)

Florida's marriage laws are unitary and require that county clerks work in concert with the Department of Public Health ("Department"), including the Defendant Surgeon General, to administer those laws in a uniform manner across the state. The Department has enforcement authority over all issues "involving the department's powers and duties." Fla. Stat. § 381.0012(1). The Florida Vital Statistics Act gives the Department power to direct and control the "complete registration of all vital records in each registration district," which includes marriage records. Fla. Stat. § 382.003(2). The Department must approve all forms used in connection with marriage records and ultimately controls and records the "marriage certificates . . . received from the circuit and county courts." Fla. Stat. § 382.003(7). County clerks are required to report directly to the Department regarding all marriage records. Fla. Stat. § 382.021.

And county clerks must use specific forms for marriage records provided by the Department. Fla. Admin. Code r. 64V-1.0131(5).

Florida statutes thus make clear that county clerks are "persons who are in active concert or participation" with the Department within the meaning of Rule 65 and this Court's Order in connection with marriage. As such, not only the Washington County Clerk but all of Florida's county clerks are bound by this Court's Order to "take no steps to enforce or apply [the] Florida provisions on same-sex marriage." (Doc. 74 at 31.)

The unitary nature of Florida's marriage laws also requires county clerks to work in concert *with one another*, as well as with the Department, to ensure the uniform administration of those laws. The Florida statues make clear that the duties of county clerks with respect to marriage are purely ministerial, and that every county clerk must follow the same statewide statutory rules regarding information that must be included on marriage license forms, information that must be obtained in the form of a written affidavit from the parties before issuing a marriage license, standardized fees that must be charged for marriage licenses, the circumstances under which the three day waiting period to obtain a marriage license may be waived, and the recording of marriages and the transmission of those recordings to the Department. *See* Fla. Stat. §§ 741.01 et seq. Moreover, a marriage license issued in one county is valid throughout the state and may be used by a couple to marry in any other county. *See* Florida Marriage Guide, http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=30 (last visited Dec. 29, 2014). Thus, for example, a license issued by the Washington County Clerk may be presented to a county clerk or other authorized officiant in any other Florida county for solemnization of the couple's marriage and must be accepted as a valid license in that jurisdiction. Fla. Stat. § 741.07. In other words, the Florida marriage statutes expressly

contemplate that the county clerks work in concert with one another to ensure that the statutory requirements for marriage are uniformly administered and that couples who obtain a license in any county may legally marry anywhere in the state.

Florida statutes thus demonstrate that county clerks throughout the State of Florida are "persons who are in active concert or participation" with the Washington County Clerk within the meaning of Rule 65 in connection with marriage. Accordingly, for that reason, as well as because of their active concert with the Department, all of Florida's county clerks are bound by this Court's Order barring enforcement of Florida laws barring same-sex couples from marriage.

II. Application Of This Court's Order To All County Clerks And To All State Officials Involved In Administering Florida's Marriage Laws Is Necessary To Provide Complete Relief.

This Court's Order expressly states the Court's intention to provide "complete relief." (Doc. 74 at 14.) When this Court dismissed the Governor and the Attorney General from the case, for instance, this Court did so because those officials were "redundant official-capacity defendants" and, "as the state defendants acknowledge, an order directed to the [state officials] will be sufficient to provide *complete relief*." *Id*. (emphasis added). As explained above, Florida's marriage laws are unitary and expressly contemplate that all state and local officials involved in administering those laws work in concert to ensure that they are uniformly enforced throughout the state. Accordingly, the only way to provide the complete relief sought by the plaintiffs in this case is for this Court's declaration that Florida laws barring same-sex couples from marriage, and refusing to recognize their valid marriages, are unconstitutional and this Court's order enjoining their enforcement to apply to all Florida officials who otherwise would be involved in administering those unconstitutional restrictions.

III. The Order Binds All Officials Involved In Administering Florida's Marriage Laws, Including All County Clerks, Because This Court Held The Challenged Law To Be Facially Invalid.

Because this Court's Order ruled that Florida's laws excluding same-sex couples from marriage are facially invalid—that is, there are no circumstances under which they can constitutionally be applied to same-sex couples who are otherwise qualified to marry—the laws are void and unenforceable. *See, e.g., Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004) (ruling that an unconstitutional statute is void under state law and "can have no effect whatsoever") (internal citations and quotations omitted); *Penn v. Atty. Gen. of State of Ala.*, 930 F.2d 838, 841 (11th Cir. 1991) (stating that an unconstitutional law is void); *see also Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied to anyone.") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 698–99 (7th Cir.2011)). All governmental officials have a duty to stop enforcing and applying laws that violate the federal Constitution. *Cf. Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) ("[I]t can be assumed that if the court declares the statute or regulation unconstitutional then the responsible government officials will discontinue the statute's enforcement.").

In other states in which federal district courts have struck down state laws excluding same-sex couples from marriage, county officials throughout the state have relied on district court rulings to issue marriage licenses throughout the state. *See, e.g., Evans v. Utah*, 21 F. Supp.3d 1192 (D. Utah 2014) (describing statewide issuance of marriage licenses to same-sex couples in Utah following district court ruling invalidating Utah's marriage ban); John Bacon and Richard Wolf, *PA Governor Won't Appeal Ruling Legalizing Gay Marriage*, USA TODAY, May 21, 2014 (noting statewide issuance of marriage licenses to same-sex couples in Oregon and

Pennsylvania following the district court decisions in *Geiger v. Kitzhaber*, 994 F. Supp.2d 1128 (D. Ore. 2014), and *Whitewood v. Wolf*, 992 F. Supp.2d 410 (M.D. Pa. 2014)).

This outcome is consistent with the history of other civil rights movements and litigation, in which it has been understood that when brave plaintiffs come forward and successfully challenge a law as unconstitutional, the entire community can rely on and benefit from that ruling. For example, when particular plaintiffs challenged school segregation laws, the remedy was not simply that those plaintiffs could attend a different school. Rather, the remedy was that the unconstitutional segregation had to end—for all students. Similarly, given this Court's declaration that Florida's laws barring same-sex couples from marriage are unconstitutional, county clerks may not continue to engage in unlawful actions by denying marriage licenses to other same-sex couples. A federal judge's decree is supreme over an unconstitutional state law.

IV. County Clerks Who Comply With This Court's Order Cannot Be Criminally Prosecuted For Doing So.

Contrary to the suggestion of the Washington County Clerk, county clerks who issue marriage licenses to same-sex couples in reliance on this Court's Order cannot be criminally prosecuted. Under settled law, a person cannot be prosecuted for violating an unconstitutional law, which is void. As both the Eleventh Circuit and the U.S. Supreme Court have made clear: "An unconstitutional law is void . . . . An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Penn v. Atty. Gen. of State of Ala.*, 930 F.2d 838, 841 (11th Cir. 1991) (quoting *Ex Parte Siebold,* 100 U.S. 371, 376–377, 25 L.Ed. 717 (1879)).

Moreover, that principle is equally well settled under state law. As the Eleventh Circuit has observed with respect to Florida law:

> There is no question that an unconstitutional statute is void under state law. *See Bhoola v. City of St. Augustine Beach,* 588 So.2d 666 (Fla.Dist.Ct.App.1991) (holding that a city ordinance passed in violation of law "is not voidable—it is void"); *see also Josephson v. Autrey*, 96 So.2d 784, 789 (Fla.1957) (en banc) (stating that an unlawful ordinance "can have no effect whatsoever").

Coral Springs St. Sys., Inc., 371 F.3d at 1334.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court confirm that its Order declaring Florida's laws barring same-sex couples from marriage to be unconstitutional and granting Plaintiffs' requested injunction requires all of Florida's county clerks to issue marriage licenses to eligible same-sex couples and to honor those licenses.

DATED: December 29, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 29, 2014, I electronically filed this document with the Clerk of Court using CM/ECF, which automatically serves all counsel of record via electronic transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Mary B. Meeks
Mary B. Meeks