

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.

**GRIMSLEY PLAINTIFFS' RESPONSE TO
EMERGENCY MOTION FOR CLARIFICATION**

The *Grimsley* Plaintiffs (“Plaintiffs”) file this response to Defendant Washington County Clerk’s (“Clerk”) Emergency Motion for Clarification (*Brenner* Doc. 99) (“Motion”) in accordance with the Court’s December 24, 2014, order (*Brenner* Doc. 101 at 4, ¶ 3). In her¹ Motion, the Clerk asks whether the Court’s August 21, 2014, order granting a preliminary injunction (*Brenner* Doc. 74) (“Order”) means that she must grant marriage licenses to all otherwise eligible same-sex couples or only to the couple specifically named in the Court’s injunction. Motion (*Brenner* Doc. 99) at 1-2. Plaintiffs believe the Court’s Order makes clear that the Clerk, like all county clerks in Florida, must grant marriage licenses to all eligible same-sex couples.

I. This Court’s injunction requires county clerks to issue marriage licenses to all eligible same-sex couples because they are acting in concert or participation with State defendants.

By the very terms of the Court’s injunction, clerks must issue licenses to all eligible same-sex couples. Paragraph 4 of the Order’s relief section states that “[t]he defendant Secretary of the Florida Department of Management Services and the defendant Florida Surgeon General² 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),” and that “[t]he preliminary injunction binds the Secretary, the Surgeon General, and their officers,

¹ Although the named clerk defendant is Harold Bazzell, Mr. Bazzell was replaced by Lora Bell as the Washington County Clerk in the November 2014 elections. *See* Carol Kent, *Lora Bell sworn in as Clerk of Court*, WASHINGTON COUNTY NEWS, available at <http://www.chipleypaper.com/news/local/lora-bell-sworn-in-as-clerk-of-court-1.401138> (accessed Dec. 29, 2014).

² Defendant John Armstrong was sued in his official capacity as Surgeon General and Secretary of Health for the State of Florida.

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.” Order (*Brenner Doc. 74*) at 31.³

Florida law specifically requires the “active concert or participation”⁴ of county clerks with the State defendant Secretary of Health with respect to marriages. Clerks issue marriage licenses, but the Department of Health is tasked with “uniformly enforc[ing] the law throughout the state” with respect to vital records, including marriages. Fla. Stat. §§ 382.003(3), 382.002(5) and (16). The Department is also charged with “adopt[ing] and enforc[ing] all rules necessary for the acceptance, use, production, issuance, recording, maintenance, and processing of” vital records, including marriages. Fla. Stat. § 382.003(10). Clerks are required to use Department of Health-approved forms for certifying marriages and to send marriage records to the Department. Fla. Stat. § 382.003 (“The department shall: . . . (7) Approve all forms used in registering, recording, certifying, and preserving vital records, or in otherwise carrying out the purposes of this chapter, and no other forms shall be used other than those approved by the department. The department is responsible for the careful examination of the certificates received monthly from the local registrars and marriage certificates and dissolution of marriage reports received from the circuit and county courts. A certificate that is complete and satisfactory shall be accepted and given a state file number and considered a state-filed record. If any such certificates are

³ All of Florida’s county clerks have received notice of the injunction. They were served via U.S. mail by counsel for the *Brenner* Plaintiffs. See *Brenner Doc. 100* (“Plaintiffs’ Certificate of Actual Notice”).

⁴ The phrase “in active concert or participation” in Rule 65 “means a purposeful acting of two or more persons together or toward the same end, a purposeful acting of one in accord with the ends of the other, or the purposeful act or omission of one in a manner or by a means that furthers or advances the other.” *Estate of Kyle Thomas Brennan v. Church of Scientology Flag Serv. Org., Inc.*, No. 809-CV-264-T-23EAJ, 2010 WL 4007591, at *2 (M.D. Fla. Oct. 12, 2010).

incomplete or unsatisfactory, the department shall require further information to be supplied as may be necessary to make the record complete and satisfactory.”); Fla. Stat. § 382.021 (county clerks required to transmit all marriage licenses to Department of Health on or before 5th of every month). The active concert of the clerks with the Department of Health is also reflected in other statutes. *See, e.g.*, Fla. Stat. § 382.002 (Upon receipt of a marriage license application, the clerk shall “collect and receive a fee of \$4 which shall be remitted to the Department of Revenue for deposit to the Department of Health to defray part of the cost of maintaining marriage records.”); *see also* State of Florida Department of Health, Office of Vital Statistics, Application for Marriage Record for Licenses Issued in Florida, available at http://www.floridahealth.gov/certificates/certificates/marriage/_documents/DH_261_App_Marriage.pdf (Department of Health form for obtaining marriage records notes that certificate of marriage must be recorded by the clerk of court) (accessed Dec. 29, 2014).⁵

The Court’s Order recognized this connection between county clerks and at least one of the enjoined state agencies concerning marriage licenses by enjoining the enforcement of Fla. Stat. § 741.04(1). Section 741.04(1) provides that *clerks and county court judges* may not issue marriage licenses to different-sex couples; it says nothing about the duties of any state agencies with respect to the restriction of marriage to different-sex couples. Its inclusion in the Order makes sense because clerks work in active concert with the Department of Health.

⁵ For its part, the Department of Health—in executing its responsibility to ensure that clerks use “satisfactory” marriage certificates, Fla. Stat. § 382.003(7), and in compliance with the injunction—must insist that all clerks use marriage forms that permit marriages of same-sex couples.

Thus, the Clerk is directly bound by the Court's injunction in Paragraph 4 of the Court's injunction to "take no steps to enforce or apply [the] Florida provisions on same-sex marriage." (*Brenner* Doc. 74 at 31).⁶

II. In addition to being bound by the Court's injunction, county clerks are required to issue marriage licenses to all eligible same-sex couples because this Court has held the marriage ban to be facially unconstitutional.

Even if county clerks were not subject to the injunction in Paragraph 4 of the Court's Order, (*Brenner* Doc. 74 at 31), they cannot enforce laws that this Court has held to be unconstitutional. In this facial challenge to the marriage ban, this Court explicitly held that "Florida's same-sex marriage provisions violate the Due Process and Equal Protection Clauses." Order (*Brenner* Doc. 74) at 24. "An unconstitutional law is void and is as no law." *Penn v. Att'y Gen. of the State of Ala.*, 930 F.2d 838, 841 (11th Cir. 1991); *see also Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 1991) ("There is no question that an

⁶ Defendants' prior filings in this litigation (filed jointly by the state defendants and the Washington County Clerk) recognize that the Court's injunction, when implemented, would not be limited to the issuance of just one marriage license to the unmarried plaintiff couple. *See, e.g.*, Defendants' Joint Motion to Continue Stay Pending Appeal and Opposition to Plaintiffs' Motions to Lift Stay (*Brenner* Doc. 92), at 5 ("If the Eleventh Circuit reverses, and if people married in the meantime, those new marriages would be subject to uncertainty."); Appellants' Motion to Extend Stay of Preliminary Injunctions Pending Appeal, and for Expedited Treatment of this Motion (*Brenner* Doc. 103-2), at 7 (PDF p.12) ("[T]hose who did marry based on the preliminary injunction[] would face uncertainty regarding their marital status if this Court reversed."); Application to Stay Preliminary Injunctions of the United States District Court for the Northern District of Florida Pending Appeal (*Brenner* Doc. 103-1), at 14-15 (PDF pp.22-23) (asserting that absent an extended stay, there would be a "rush to the marriage officiant" while the appeal is pending, and "those who did marry based on the preliminary injunction would face uncertainty regarding their marital status if this Court . . . vacates any affirmance by the Eleventh Circuit."). As Plaintiffs made clear in their opposition to the extension of the stay, even in the event of a reversal on appeal, there would be no uncertainty regarding the marital status of those who married while the injunction is in effect. *Brenner* Doc. 93 at 7. Plaintiffs reference these portions of Defendants' briefs simply to note their recognition of the scope of the injunction.

unconstitutional statute is void under state law.”); *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))) (emphasis and internal quotation marks omitted). Where a court rules that a state law is unconstitutional, government officials are expected to abide by that ruling. *See, e.g., Soto-Lopez v. New York City Civil Serv. Comm’n*, 840 F.2d 162, 168-69 (2d Cir. 1988) (“When a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute.”); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) (when statute is attacked as “facially unconstitutional . . . it can be assumed that if the court declares the statute or regulation unconstitutional then the responsible government officials will discontinue the statute’s enforcement”).⁷ Indeed, that is precisely what has happened in other states when federal district courts have declared those states’ marriage bans to be unconstitutional: marriage licenses were issued to all eligible same-sex couples because the court made clear what the law is, and government follows the law.⁸

* * *

⁷ The fact that an appeal is pending does not change the obligations of county clerks. The law is clear that absent a stay, a court’s decision is effective even if an appeal is pending. *See, e.g., Nat’l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982); *accord Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) (“[T]he vitality of th[e] judgment is undiminished by pendency of the appeal. Unless a stay is granted . . . , the judgment remains operative.” (citing *Hovey v. McDonald*, 109 U.S. 150, 161 (1883))).

⁸ *See, e.g.,* Lisa Baumann, *Judge overturns Montana same-sex marriage ban*, CHRISTIAN SCIENCE MONITOR, Nov. 19, 2014, available at <http://www.csmonitor.com/USA/Latest-News-Wires/2014/1119/Judge-overturns-Montana-same-sex-marriage-ban-video> (accessed Dec. 29, 2014); Mark Price, *Mecklenburg issued most same sex-marriage licenses in NC*, CHARLOTTE OBSERVER, Oct. 18, 2014, available at <http://www.charlotteobserver.com/2014/10/18/5250898/mecklenburg-led-in-issuing-same.html#.VIh1D003OUI> (accessed Dec. 29, 2014).

The Clerk's Motion raises a concern about criminal prosecution for issuing marriage licenses to same-sex couples beyond the plaintiff couple referenced in paragraph 6 of the injunction. Motion (*Brenner* Doc. 99) at 2, 3-4. But Section 741.04(1)'s prohibition against clerks issuing marriage licenses to same-sex couples (the violation of which is a criminal offense, *see* Fla. Stat. § 741.05) was held by this Court to be unconstitutional, and its enforcement was enjoined. Order (*Brenner* Doc. 74) at 24, 31. County clerks are therefore protected from criminal prosecution. And because, as discussed above, all government officials are expected to stop enforcing a law that has been declared unconstitutional, they are protected regardless of whether they are directly subject to the Court's injunction to cease enforcing the statute.

Moreover, the State, through two state officials sued in their official capacity, is a party to the case. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State" because official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent.") (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). Prosecuting clerks for issuing marriage licenses to same-sex couples would constitute enforcement of one of the invalidated provisions in violation of the Court's injunction. Indeed, the Attorney General, having succeeded in getting herself and the Governor dismissed from this litigation on the basis that full relief could be granted against the remaining state defendants, could not now permit prosecutions against clerks to proceed. *See* Fla. Stat. § 16.08 ("The Attorney General shall exercise a general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties, and whenever requested by the state attorneys, shall give them her or his opinion upon any question of law.").

For the above-stated reasons, Plaintiffs respectfully request that the Court confirm that its Order holding the marriage ban unconstitutional and granting Plaintiffs' requested preliminary injunction (*Brenner* Doc. 74) requires the Clerk, like all county clerks, to issue marriage licenses to all eligible same-sex couples.

Date: Monday, December 29, 2014

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Respectfully submitted,

/s/ Daniel B. Tilley

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