IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JAMES DOMER BRENNER et al.,

Plaintiffs,

v. CASE NO. 4:14cv107-RH/CAS

RICK SCOTT, etc., et al.,

Defendants.

_____/

SLOAN GRIMSLEY et al.,

Plaintiffs,

v. CASE NO. 4:14cv138-RH/CAS

RICK SCOTT, etc., et al.,

Defendants.

_____/

ORDER GRANTING SUMMARY JUDGMENT

The initial issue in these consolidated cases was the constitutionality of Florida's refusal to allow same-sex marriages or to recognize same-sex marriages lawfully entered elsewhere. The remaining issue is whether the case is moot in

light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This order holds that the case is not moot. The order renders summary judgment on the merits for the plaintiffs.

The defendants are two state officials—the Surgeon General and the Secretary of the Department of Management Services—and the Clerk of Court of Washington County. The Surgeon General is the head of the Department of Health, whose responsibilities include issuing birth and death certificates. The Department of Management Services administers employee benefits that can be affected by marital status. The Clerk of Court issues marriage licenses.

Ten years ago the Eleventh Circuit described its approach to this issue by saying it

> has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated. In the absence of any such evidence, there is simply no point in allowing the suit to continue and we lack [the] power to allow it to do so.

Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1285 (11th Cir. 2004). More recent cases have shown that such cases are sometimes moot, sometimes not. *Compare, e.g.*, *Jacksonville Property Rights Ass'n, Inc. v. City of Jacksonville, Fla.*, 635 F.3d 1266 (11th Cir. 2011) (holding the case moot), *with Rich v. Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (holding the case

not moot). The question here is whether the defendants have "unambiguously terminated" their enforcement of the ban on same-sex marriage.

A "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000). A case becomes moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 189 (internal quotation marks and citations omitted). The Eleventh Circuit places an initial burden on the defendant in determining whether a governmental entity has unambiguously terminated an allegedly illegal practice. *See Troiano*, 382 F.3d at 1285. The defendant "bears a heavy burden of demonstrating that his cessation of the challenged conduct renders the controversy moot." *Rich*, 716 F.3d at 531.

A court must first determine whether the defendant has met the initial "heavy" burden of showing that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1268 (11th Cir. 2010). If so, the government is granted a "rebuttable presumption" that the illegal activity will not be resumed. *Troiano*, 382 F.3d at 1283. "This presumption is particularly warranted in cases where the government repealed or amended a challenged statute or policy—often a clear indicator of unambiguous termination." *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014).

But "the government is—and always has been—required to justify application of the presumption before benefiting from it." *Id.* at 1323.

Courts consider at least three factors in determining whether a defendant has unambiguously terminated the challenged conduct. First, courts consider the timing and content of the decision to terminate the conduct. *Rich*, 716 F.3d at 532. Second, courts consider whether the change in conduct was the result of substantial deliberation or was instead an attempt to manipulate the court's jurisdiction. *Id*. And third, courts consider whether the new policy has been consistently applied. *Id*. If the defendant establishes unambiguous termination, the controversy is moot, "in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1285 (11th Cir. 2004).

As these cases make clear, a government ordinarily cannot establish mootness just by promising to sin no more. The defendants in this case emphasize the Eleventh Circuit's decision in *Jacksonville Property Rights*, but an important difference in that case is that the defendant city affirmatively repealed the challenged ordinance. Here the Florida Legislature has refused to budge; the challenged statutes remain on the books. That result is fully consistent with the defendants' approach to this case all along. There has been nothing voluntary about the defendants' change of tack.

The state defendants defended this case from the outset with vigor. They gave no sway to the United States Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). When 18 successive federal decisions in district and circuit courts said that, under *Windsor*, states could not ban same-sex marriage, the defendants were undeterred. My order granting a preliminary injunction was the 19th federal decision in a then-unbroken progression.

The United States Supreme Court and federal courts of appeals had stayed similar rulings in other cases. I stayed the preliminary injunction while those stays were in effect and for 91 more days—long enough to allow the defendants to seek a further stay in the Eleventh Circuit and, if unsuccessful there, in the United States Supreme Court. The defendants did that. They lost. The United States Supreme Court vacated its stays in other cases and allowed the preliminary injunction in this case to take effect.

Still the defendants resisted. The Clerk of Court said he would issue a single marriage certificate but that it would be a misdemeanor to issue any more; he asked for an explicit ruling whether he had to do so. The state defendants were given an opportunity to be heard but essentially stood mute, noting the narrow reach of the preliminary injunction and foregoing the opportunity to say they had lost the stay issue and would follow the injunction across the board. Same-sex marriages began in Florida only when I entered another order in response to the

Clerk's motion to clarify. The order noted the precise scope of the preliminary injunction and added:

> History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law. Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. There should be no debate, however, on the question whether a clerk of court *may* follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees.

ECF No. 109 at 3.

After entry of that order, most clerks around the state began to issue licenses for same-sex marriages. Still the state defendants in this case stood mute.

After the United States Supreme Court issued *Obergefell*, one might have expected immediate, unequivocal acceptance. And for all that appears in this record, the Clerk of Court did indeed accept the decision, as he was required to do. Not so for the State of Florida. The Surgeon General filed in this court a motion to clarify, essentially asserting that if he does what *Obergefell* plainly requires with respect to birth certificates, he will be violating a different state statute—a statute that has not explicitly been struck down. Thus the Surgeon General has filed a motion "to clarify." The motion asks whether, under the preliminary injunction

and *Obergefell*, he must issue birth certificates to married same-sex parents, even though Florida Statutes § 382.013(2)(a) requires that if a mother is married at the time of a birth, the name of the "father" must be entered on the birth certificate. According to the Surgeon General, this still-extant statute precludes some same-sex parents from being listed on the birth certificate.

The issue is not well presented in this case; so far as shown by this record, none of the plaintiffs are yet in this situation. *See* Order on the Scope of the Preliminary Injunction, ECF No. 109. But the answer should be easy. The statutory reference to "husband" cannot prevent equal treatment of a same-sex spouse. So, for example, in circumstances in which the Surgeon General lists on a birth certificate an opposite-sex spouse who is not a biological parent, the Surgeon General must list a same-sex spouse who is not a biological parent.

The Surgeon General apparently is still not issuing birth certificates as required by *Obergefell*. Two other lawsuits raising this issue are now pending in this court. The Surgeon General's approach casts doubt on whether the State of Florida has voluntarily brought itself into compliance with *Obergefell*. Indeed, *Obergefell* did not explicitly address *any* Florida statute. If the Surgeon General believes, as suggested by his motion to clarify, that he must comply with Florida same-sex marriage laws until explicitly struck down, then dismissal of this case as moot would leave him free to go back to where he was before the lawsuit was

filed. The same is true for the Secretary of the Department of Management Services: there are many requirements affecting state employment that turn on marital status, and many of those have not been explicitly addressed, either in *Obergefell* or even in this case.

Given the state defendants' history of resistance to earlier orders, the breadth of state employment and vital-records requirements, and the state defendants' insistence that state provisions remain in force until explicitly struck down, it cannot be said that the state defendants have unambiguously terminated their illegal practices. That the Legislature chose not to pass legislation to bring Florida law into compliance does not help the defendants. Like the only circuit court that has addressed the voluntary-cessation issue since *Obergefell*, I deny the motion to dismiss this case as moot. *See Jernigan v. Crane*, 796 F.3d 976 (8th Cir. 2015); *Waters v. Ricketts*, 798 F.3d 682 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 799 F.3d 918 (8th Cir. 2015).

On the merits, the plaintiffs are plainly entitled to summary judgment. The reasons are set out in the preliminary injunction and in *Obergefell*. This order thus enters a declaration and injunction against the Surgeon General and Secretary and directs the clerk to enter judgment. The judgment will be in favor of the plaintiffs against the Surgeon General and Secretary, will dismiss the claims against the Clerk of Court as moot, and will dismiss the claims against other defendants as set

out in the original order on their motions to dismiss. Judgment was not entered in favor of those defendants at that time under Federal Rule of Civil Procedure 54(b).

IT IS ORDERED:

1. The motion for clarification, ECF No. 113, is denied.

2. The motion to dismiss as moot, ECF No. 118, is granted in part and denied in part. The claims against the Clerk of Court are dismissed as moot. The claims against the Surgeon General and Secretary are not dismissed.

3. The plaintiffs' summary-judgment motions, ECF Nos. 111 and 138, are granted.

4. It is declared that these provisions are unconstitutional: Florida Constitution, Article I, § 27; Florida Statutes § 741.212; and Florida Statutes § 741.04(1).

5. The defendant Secretary of the Florida Department of Management Services and the defendant Florida Surgeon General 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).

6. This 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.

7. The clerk must enter judgment for the plaintiffs against the Secretary and Surgeon General and dismissing without prejudice the claims against all other defendants.

SO ORDERED on March 30, 2016.

s/Robert L. Hinkle
United States District Judge