IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION

KAIL MARIE, *et al.*, Plaintiffs, v. SUSAN MOSIER, M.D., in her official capacity as Interim Secretary of the Kansas Department of Health and Environment, *et al.*, Defendants.	)))))))))))	Case No. 14-cv-02518-DDC/TJJ

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS AMENDED COMPLAINT FILED BY DEFENDANTS HAMILTON AND LUMBRERAS

On December 10, 2014, Defendants Hamilton and Lumbreras ("Defendant Court Clerks") moved to dismiss the First Amended Complaint (Doc. 52) that Plaintiffs filed on November 26, 2014. Those Defendants contend that the Court should dismiss Plaintiffs' First Amended Complaint on grounds of "lack of standing, including Eleventh Amendment immunity, lack of an Article III case or controversy and mootness." In the alternative, these Defendants claim that Plaintiffs have failed to join indispensable parties – the chief judges of the Douglas County and Sedgwick County District Courts – so that the claims against the Defendant Court Clerks must be dismissed. Doc. 59, pp. 1-2.

This latest motion to dismiss, and the companion motion filed by Defendant Moser, are just the latest in a series delay tactics that Defendants have used for the past two months to frustrate the ability of these Plaintiffs and other same-sex couples in Kansas to exercise their clearly established constitutional rights. As with Defendants' previous delay tactics, Defendants' latest set of frivolous argument should be rejected as well.

1. Defendants' Eleventh Amendment and "case or controversy" arguments lack merit.

Defendants' arguments regarding Eleventh Amendment immunity and the case or controversy component of standing are perfunctory. *See* Doc. 59 at 6. In its earlier decision granting a preliminary injunction against enforcement of the Kansas laws that prohibit same-sex marriages for licensing purposes, the Court ruled that Plaintiffs have standing to sue Defendant Court Clerks. Memorandum and Order, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), Doc. 29, p. 9. Because nothing has changed to deprive Plaintiffs of standing to sue Defendant Court Clerks, Defendants' cursory arguments regarding standing constitute an untimely and improper motion to reconsider the Court's non-dispositive order. *See* D. Kan. R. 7.3(b) (motion to reconsider non-dispositive order must be filed within 14 days and must be based on a change in the law, new evidence, or clear error). Plaintiffs respectfully request that – for the reasons set forth in its earlier preliminary injunction decision – this Court once again reject Defendants Eleventh Amendment and standing arguments.

2. Plaintiffs' claims against Defendant Court Clerks are not moot.

Defendant Court Clerks' primary argument is that Plaintiffs' marriage licensing claims are moot because "the relief Plaintiffs initially sought from these Clerks, a license, is readily available; the Clerks (because of Orders of their respective Chief Judges) have made licenses available to Plaintiffs for the mere asking; there is no further relief to get or that this Court can give." Doc. 59, p. 8. Defendants essentially claim that the Administrative Orders issued by the chief judges of the Douglas County and Sedgwick County District Courts in the wake of this Court's preliminary injunction constitute a change of circumstances that has mooted Plaintiffs' marriage licensing claims against the Defendant Court Clerks. *Id.* at 9-10. Defendants further contend that Plaintiffs' "failure to go to the office to request issuance of a license [since the pre-

liminary injunction took effect is] a self-inflicted injury." *Id*. at 10.As an initial matter, Defendants' argument is structured around a critical error regarding which party bears the burden of proof in showing mootness. Defendants assert that because the Plaintiffs bear the burden of establishing standing, they bear the burden for showing why the case should not be dismissed as moot. Doc. 59, p. 8. That is wrong. Defendants have "confused mootness with standing, and as a result placed the burden of proof on the wrong party." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (internal quotation marks and citations omitted). Once the plaintiff has established standing at the outset of the case, the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of Earth, Inc. v. Laidlaw Environ. Serv., Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). Moreover, as a result of that change in who bears the burden of proof, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*, 528 U.S. at 190.

In particular, it is well established that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case[.]" *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc.,*, 528 U.S. at 190. "The burden is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In cases like this one, furthermore, "a public interest in having the legality of the practices settled[] militates against mootness." *Id*. at 632. *See also Commitee for the First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir. 1992) (claim of mootness "must be weighed against the possibility of

recurrence and the public interest in having the case decided"). Dismissal "on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand*, 528 U.S. at 224.

In this case, Defendant Court Clerks have not made any attempt to carry their "formidable burden of showing" that their enforcement of Kansas's laws prohibiting same-sex couples from marrying would not recur if this case were dismissed as moot, and the public interest in having the constitutionality of Kansas's laws banning same-sex marriage weighs heavily against a finding of mootness.

First, Defendants' decision to stop enforcing the marriage ban was entirely contingent on this Court's issuance of a preliminary injunction, and Defendants have provided no assurances – much less made an affirmative showing – that their enforcement of Kansas's unconstitutional marriage exclusions would not resume if the case were dismissed as moot and the injunction were dissolved. As shown by the plain language of the Administrative Orders issued by the chief judges of the Douglas County and Sedgwick County District Courts, the policy change resulted from the preliminary injunction, which compelled Defendant Court Clerks to begin issuing marriage licenses to same-sex couples. *See* Douglas Co. Dist. Ct. Admin. Ord. 14-17, attached to Aff. of Douglas Hamilton, Doc. 59-1; Sedgwick Co. Dist. Ct. Admin. Ord. 14-03, Doc. 59-3. The Douglas County Order expressly states that, "[i]n compliance with this preliminary injunction this court rescinds Administrative Order 14-17 and instructs the Clerk of the District Court to issue marriage licenses to all qualified applicants without regard to the gender of the applicant." Doc. 59-1, p. 3. Compliance with a preliminary injunction does not constitute "voluntary cessation" and does not moot a case. *Phillips v. Mabus*, 894 F. Supp. 2d 71, 84 (D.D.C. 2012); *Courthouse News Serv. v. Jackson*, Case No. H-09-1844, 2009 U.S. Dist. LEXIS 118351,

at *4 (S.D. Tex. Dec. 18, 2009). "[O]bedience to an injunction as long as it is in force is an expected norm of conduct. An enjoined party ought not be rewarded merely for doing what the court has directed." 11A Wright, Miller & Kane, *Federal Practice & Procedure*, § 2961 at 458 (2013). "Compliance is just what the law expects." *Walling v. Harnischfeger Corp*., 242 F.2d 712, 713 (7th Cir. 1957).

Moreover, the conduct of Defendants and other state officials since the entry of the preliminary injunction shows that from the Defendants' point of view the dispute over the constitutionality of the Kansas ban on same-sex marriage is far from over. Without any hint of irony, Defendants argue that Plaintiffs' claims for injunctive relief are moot because "the outcome is already controlled by Tenth Circuit precedents." Doc. 59, p. 8. It is true that courts ordinarily presume governmental officials will cease enforcing laws that have been declared unconstitutional, but Defendants and other Kansas officials have shown time and again that they intend to continue enforcing Kansas's unconstitutional marriage laws unless an injunction specifically prohibits them from doing so. Defendants immediately appealed the preliminary injunction and requested an extended stay from both the court of appeals and the Supreme Court. Furthermore, State agencies not explicitly subject to the preliminary injunction continue to enforce the Kansas laws that prohibit the recognition of same-sex marriages. Specifically, the Kansas Department of Revenue and the State Employee Health Plan (a sub-division of KDHE) have refused to recognize same-sex marriages for purposes of changing names on drivers' licenses, allowing same-sex couples to file state income tax returns using a "married" status, and allowing state employees to add their same-sex spouses to their state health insurance coverage as eligible dependents. *See*

First Amended Complaint, ¶¶ 32-34, 40, 46, 47-48, & 68-70.[1] Where a defendant continues to argue that its actions are legal, voluntary compliance with a court order does not moot the case. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944). The facts of this case directly contradict the self-serving cries of these Defendants that the claims against them are moot.

Curiously, Defendants also accuse Plaintiffs Marie, Brown, Wilks, and DiTrani of bad faith, unclean hands, and slumbering on their rights because they have not obtained marriage licenses and married since the issuance of the preliminary injunction on November 4, 2014. Doc. 59, p. 11. In support of these accusations, Defendants cite cases in which plaintiffs never applied for and had never been denied the benefits or licenses they sought in litigation. *Id.* at 11 n.44. Here, Plaintiffs applied for marriage licenses and were denied based on Defendants' enforcement of the Kansas ban on same-sex marriage. The fact that Plaintiffs have not yet married does not deprive them of standing to sue.

Defendants' argument to the contrary appears to be based on the notion that, having obtained an injunction, Plaintiffs now have an obligation to marry immediately on Defendants' preferred timetable, unlike different sex couples in Kansas who are free to marry whenever they choose. This is not a case in which injury is only "conjectural or hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted), because of alleged indefinite intentions to marry "some day," "in the future," or "in this lifetime," *id.* at 564 & 564 n.2. Plaintiffs have already established their actual, non-conjectural intention to marry. Having established that non-conjectural intent, Plaintiffs are entirely within their rights in adjusting the timing of their marriage so that their claims do not become moot before final judgment is entered.

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[1] In reviewing a motion to dismiss, a federal court must take all factual allegations in the Complaint as true. *Leatherman v. Tarrant Co. Narcotics Intelligence & Coord. Unit*, 507 U.S.

Moreover, even if the Court were to accept Defendants' erroneous argument that Plaintiffs' claims have been rendered moot, this case would still fall within the exception to mootness for injuries that are "capable of repetition yet evading review" because Plaintiffs' injuries would recur again as soon as they once again seek to marry. *See Honig v. Doe*, 484 U.S. 305, 318-320 (1988). Significantly, as with the inquiry into whether a claim is moot, the inquiry into whether a claim is capable of repetition yet evading review is significantly more relaxed than the initial inquiry into standing. The courts' "concern in these cases, as in all others involving potentially moot claims, [i]s whether the controversy [i]s capable of repetition and not . . . .whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* at 318 n.6 (claim for denial of free and appropriate public education not moot even though plaintiff's counsel could not commit to specific timeframe for when plaintiff would seek to re-enroll).

3. Rule 19 does not require joinder of the chief judges.

In the alternative, Defendants argue that the chief judges of the Douglas County and Sedgwick County District Courts are necessary and indispensable parties to this litigation. Rule 19(a)(1) governs the required joinder of parties and provides as follows:

> (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

163, 164 (1993).

Kansas law requires that "[t]he clerks of the district courts shall do and perform all duties that may be required of them by law[,]" K.S.A. § 20-3102, and the Kansas marriage statutes specifically provide that "[t]he clerks of the district courts *or* judges thereof, when applied to for a marriage license by any person who is one of the parties to the proposed marriage and who is legally entitled to a marriage license, shall issue a marriage license[,]" K.S.A. 23-2505(a) (emphasis added). Under these statutes, district court clerks have an independent duty to issue marriage licenses to any applicant "who is legally entitled to a marriage license." They have no discretion in issuing marriage licenses and must comply with Kansas law. Thus, the Court can accord Plaintiffs complete relief in this case by enjoining Defendant Court Clerks from enforcing the Kansas laws that prohibit same-sex marriage. As such, the chief judges are not required parties within the meaning of Fed. R. Civ. P. 19(a)(1)(A).

Defendants also argue that the chief judges are indispensable parties to this suit and that the chief judges cannot be joined in this case because they are immune from injunctive relief and suit "under 42 U.S.C. § 1983 and under general principles of judicial immunity." Doc. 59 at 11. As a result, Defendants contend "the case must . . . be dismissed for failure to join indispensable parties as required by Fed. R. Civ. P. 19." *Id*. at 13.

Once again, the premise of Defendants' argument is wrong. When issuing marriage licenses, the chief district court judges are acting in their administrative capacity, not their judicial capacity, and would therefore not be immune from suit or injunctive relief. This Court has already held that "the issuance of marriage licenses under Kansas law is a ministerial act, not a judicial act." Memorandum and Order, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), Doc. 29, p. 14. "In determining whether an act by a judge is 'judicial,' thereby warranting absolute immunity, we are to take a functional approach, for such 'immunity is justified and defined

by the functions it protects and serves, not by the person to whom it attaches.'" *Bliven v. Hunt*, 579 F.3d 204, 209-10 (2d Cir. 2009) (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988))

"In determining whether absent parties are indispensable, the court must determine whether, in 'equity and good conscience,' the action can continue without the party. Fed.R.Civ.P. 19(b)." *Citizen Potawatomi Nation v. Norton*, 248 F. 3d 993, 1000 (10th Cir. 2001). In making that determination, "[t]he factors the court must consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder." Rule 19(b). Defendants have utterly failed to address these factors in their brief.

The chief judges are neither necessary nor indispensible parties to this action because the complaint in this case is – and any hypothetical complaint against the chief judges would be – against those officials in their official capacities as officers of the county district courts. "Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," and "the real party in interest in an official-capacity suit is the governmental entity and not the named official." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (internal quotation marks and citations omitted). As a result, naming the chief judges in their official capacities in addition to the clerks would be redundant.

Conclusion

For these reasons, Plaintiffs respectfully request that the Court deny the Motion to Dismiss filed by Defendant Court Clerks.

Respectfully submitted,

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Certificate of Service

I certify that, on December 22, 2014, the foregoing document was served on counsel for Defendants Moser, Hamilton, and Lumbreras by e-mail through the Court's ECF system, and by e-mail to Steve R. Fabert, Asst. Attorney General, steve.fabert@ag.ks.gov on behalf of the following defendants:

Nick Jordan, Secretary of Dept. of Revenue

Lisa Kaspar, Director
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