

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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| JAMES OBERGEFELL and | : | Case No. 1:13-cv-501 |
| JOHN ARTHUR, et al, | : | |
| | : | Judge Timothy S. Black |
| Plaintiffs, | : | |
| | : | <u>MOTION TO AMEND</u> |
| vs. | : | <u>COMPLAINT</u> |
| | : | |
| JOHN KASICH, et al, | : | |
| | : | |
| Defendants. | : | |
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Pursuant to Fed.R.Civ.Proc. 15(a) (2), Plaintiffs respectfully move to amend the complaint to add as a plaintiff funeral director Robert Grunn, to dismiss the elected state officials as defendants without prejudice and to add as a defendant the director of the Ohio Department of Health.

MEMORANDUM

Plaintiffs move to amend the complaint to add licensed funeral director Robert Grunn as a plaintiff. Plaintiffs also seek to replace Governor John Kasich and Attorney General Mike DeWine as defendants with Theodore E. Wymyslo, M.D., Director of the Ohio Department of Health. The case schedule agreed to by the parties should not be disturbed as a result of this motion. This motion and amended complaint are the result of an extended dialogue between counsel for the state defendants and the undersigned. While productive, the parties were unable to come to an agreement regarding all issues related to the case going forward. Nonetheless this motion and amended complaint further streamline the case and should make it easier to focus on the merits and not get sidetracked with procedural issues.

The attached second amended complaint narrows the case to the death certificate issue. Given recent changes in federal tax policy it may not be possible to determine state income tax rights and obligations for same sex married couples within the time frame set in this case. Therefore, that issue has been eliminated from the case. Further, in order to avoid motion practice regarding the status of the defendant state elected officials, they have been replaced by as a defendant by the Director of the Ohio Department of Health who has statewide responsibility for death certificates. Finally, Robert Grunn has been added as a plaintiff. He is a licensed funeral director in Ohio and he has same-sex clients who have been married in other jurisdictions where same-sex marriage is authorized and who need death certificates in Ohio. Among his duties as an Ohio funeral director, Mr. Grunn collects the personal and statistical information of decedents and reports them to the local registrar of vital statistics. Ohio Rev. Code § 3705.16(B). In fulfilling this duty, funeral directors are prohibited from “purposely mak[ing] any false statement.” Ohio Rev. Code § 3705.29(A)(1). A violation of this prohibition could lead a funeral director to be fined up to ten thousand dollars or incarcerated for up to five years, or both. Ohio Rev. Code § 3705.99. This same concern for criminal prosecution based on alleged inaccurate reporting regarding same sex marriages was cited by Defendant Jones as a basis for her desire to see this Court issue a Declaratory Judgment. *See* Response to Motion for Temporary restraining Order, Doc. 10. Thus, both in his own right and as a third party asserting the rights of his clients; Mr. Grunn has standing in this case. By approaching the issue through his perspective, there will be no potential mootness argument that could stop the litigation upon the death of John Arthur. Plaintiffs of course do not concede that the litigation would be moot upon Mr. Arthur’s death but Mr. Grunn at least adds a parallel claim that stands independent of the other plaintiffs and in that sense eliminates a battleground that may otherwise be present.

Rule 15 of the Federal Rules of Civil Procedure provides that leave of the Court to amend a pleading “shall be freely given when justice so requires.” Reasonable requests to amend should be viewed with favor by the Court. *See* Wright and Miller, *Federal Practice and Procedure*, §1484, p.417 and cases cited therein. Leave to amend should normally be granted unless the moving party is guilty of undue delay, bad faith, dilatory motive, or the proposed amendment will be futile or cause undue prejudice to the opposing party. *Forman v. Davis*, 371 U.S. 178, 182; 83 S.Ct. 227 (1962). This amendment will not disturb the schedule set by the Court in this case. At all times in this action Plaintiff has acted in good faith and without delay. No prejudice will be experienced by any opposing party.

The Plaintiff respectfully requests that the motion to amend be granted.

Respectfully submitted,

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| <p>Lisa T. Meeks (0062074) Newman & Meeks Co., LPA 215 E. Ninth Street, Suite 650 Cincinnati, OH 45202 phone: 513-639-7000 fax: 513-639-7011 lisameeks@newman-meeks.com <i>Attorney for Plaintiffs</i></p> | <p><u>/s/ Alphonse A. Gerhardstein</u> Alphonse A. Gerhardstein # 0032053 <i>Trial Attorney for Plaintiffs</i> Jennifer L. Branch #0038893 Jacklyn Gonzales Martin #0090242 Gerhardstein & Branch Co. LPA Attorneys for Plaintiffs 432 Walnut Street, Suite 400 Cincinnati, Ohio 45202 (513) 621-9100 (513) 345-5543 fax agerhardstein@gbfirm.com jbranch@gbfirm.com jgmartin@gbfirm.com <i>Attorneys for Plaintiffs</i></p> |
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2013, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein # 0032053