Obergefell et al v. Kasich et al Doc. 30

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES OBERGEFELL, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 13-CV-501**
	:	
v.	:	**Judge Timothy S. Black**
	:	
JOHN KASICH, et al.,	:	
	:	
Defendants.	:	

DEFENDANT GOVERNOR JOHN KASICH'S MOTION AND OHIO ATTORNEY GENERAL MIKE DeWINE'S CONTINGENT MOTION TO DISMISS

Defendants Governor John Kasich and Ohio Attorney General Mike DeWine are not proper parties in this case. The Governor respectfully moves this Court to dismiss him from this lawsuit. The Attorney General asks to be dismissed *only if* an appropriate State official is added as a defendant. Such a defendant must be one with duties related to Plaintiffs' alleged constitutional harms[1]. Any proper State defendant would be represented by the Attorney General, and the presence of such a defendant will ensure that the Attorney General will be present as counsel to defend Ohio's Constitution and statutes. (Because his motion to dismiss is contingent, the Attorney General also files an answer today.) Although the Attorney General is willing to remain a defendant to ensure the State's presence, the better route is to dismiss him. Instead, he can defend just as vigorously in his role as counsel to a proper defendant.

[1] Plaintiffs' harms relate to the issuance of death certificates. Ohio Department of Health Director, Dr. Theodore Wymslo is in charge of Ohio's system of vital statistics, and is the only state actor responsible for the registration of deaths and the issuance of death certificates. Ohio Rev. Code § 3705.02.

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Neither the Governor nor the Attorney General is a proper defendant because Plaintiffs cannot obtain from them the relief they purport to seek. Although this is an *as applied* challenge, Plaintiffs do not allege that the Governor or the Attorney General has applied or might apply anything to them. That is, while Plaintiffs challenge the application of Ohio's marriage amendment and statute (Ohio Revised Code Section 3101.01(C) and Article XV §11 to the Ohio Constitution) in the context of the issuance of a death certificate, their Amended Verified Complaint for Temporary Restraining Order and Declaratory And Injunctive Relief, Doc. No. 24, ("Am. Complaint") does not allege that either State Defendant is responsible for, or is otherwise involved with, issuing death certificates or accepting them for filing. Thus, Plaintiffs have not pleaded the requisite connection between the Defendants and the alleged harms to properly state claims against them or to overcome Eleventh Amendment Immunity. This Motion does not seek to dismiss the *case*, but only to ensure that the law is followed by proceeding against the right *defendant.*

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs challenge the constitutionality of Ohio's statutory and constitutional provisions prohibiting recognition of same-sex marriages. Plaintiffs describe themselves as (1) a same-sex couple married in another State (Am. Compl. ¶¶ 9-14), and (2) the surviving partner of such an out-of-state marriage (*Id.* ¶¶ 15-21). They allege that Ohio's refusal to recognize their out-of-state marriages has injured them by preventing them from obtaining death certificates reflecting their marriage.[2] Plaintiffs, purportedly in an effort to remedy this injury, seek declaratory and injunctive relief against Ohio's Governor and Attorney General under 42 U.S.C. § 1983. That effort is mistaken, because "enjoining" the Governor or the Attorney General would not remedy their injury, because those officers simply do not issue, approve or process death certificates.

Indeed, Plaintiffs do not dispute that fact; they fail to allege that there is any connection between the Governor or the Attorney General and the alleged constitutional harms. Instead, in their only reference to the Governor, Plaintiffs state that he is being sued in his official capacity because he is "empowered to ensure that the laws of the State are faithfully executed." (Am. Compl. ¶ 6.) Equally vague and overbroad is their allegation that the Attorney General is being sued in his official capacity because he is Ohio's "chief legal officer" who "advis[es] state and local officials on questions of Ohio law…." (*Id.* ¶ 7.). Such general allegations are not enough.

While the Governor and the Attorney General may be important state officers with broad general duties, they cannot be sued for anything and everything involving State laws. To the contrary, the law is clear: An invocation of a state official's general enforcement power is not

[2] For brevity, Plaintiffs'out-of-state marriages will be referred to simply as marriages herein, although they are not recognized in Ohio.

enough to overcome Eleventh Amendment Immunity, and state officers can only be enjoined regarding laws they specifically enforce.

Because neither the Governor nor the Attorney General enforces the laws Plaintiffs challenge, or administers the benefits that they claim they were or will be denied, Plaintiffs cannot show that an injunction against either State defendant will redress their claimed injuries. The lack of connection to the challenged laws renders both the Governor and the Attorney General improper parties.

Both State Defendants therefore respectfully ask this Court to dismiss Plaintiffs' claims against them, with the Attorney General's motion contingent, as noted in the Motion itself, on the presence of a proper State Defendant. That is, this Motion does not seek to end the case, but to ensure that the law is followed and a proper defendant is named. To the extent that Plaintiffs' allege constitutional harms related to death certificates, the proper State party is instead the Director of the Ohio Department of Health, the official responsible for managing the system of vital statistics in Ohio. Defendants' counsel has advised Plaintiffs' counsel that they will work with them to facilitate appropriate substitution of parties.

I. BACKGROUND

Plaintiffs, invoking 42 U.S.C. § 1983, sued the Governor, the Ohio Attorney General, and the Registrar of the Cincinnati Health Department Office of Vital Statistics challenging Ohio's statutory and constitutional prohibition against recognizing same-sex marriage as applied to them. (Am. Compl. ¶ 39.) Specifically, Plaintiffs challenge the Ohio statute limiting marriage to opposite-sex couples, Ohio Revised Code § 3101.01(C)(2):

> Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having

> no legal force or effect in this state and shall not be recognized by this state.

Ohio Rev. Code § 3101.01(C)(2). And Plaintiffs challenge the Ohio constitutional provision that does the same, Ohio Const. Art. XV,§ 11:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const. Art. XV, § 11.

Plaintiffs James Obergefell and John Arthur allege they were lawfully married in Maryland, but that their marriage is not recognized in Ohio as a result of the challenged statute and constitutional amendment. (Am. Compl. ¶¶ 1, 22, 25-27.) Specifically, Plaintiffs claim that the death certificate of Mr. Arthur – who suffers from amyotrophic lateral sclerosis (ALS) – would not record his marital status as "married" and would not identify Mr. Obergefell as the "surviving spouse" as a result of this constitutional and statutory ban on recognition of same-sex marriage. (*Id.*. ¶ 32.)

Plaintiff David Brian Michener similarly asserts that his same-sex marriage, obtained in Delaware, should be recognized in Ohio by issuing a death certificate that lists the name of the man to whom he was married in Delaware as his surviving spouse. (*Id*. ¶¶ 1, 15-18, 33.) The Amended Complaint alleges that Mr. Michener was married to William Ives until Mr. Ives died unexpectedly of natural causes on August 27, 2013. (*Id*. ¶¶ 15-18.)

Plaintiffs' Amended Complaint cites no other example of the State's failure to recognize their marriages. That is, Plaintiffs name both the Governor and Attorney General as Defendants in this lawsuit, but do not allege that either is responsible for the issuance of death certificates.

Their sole allegation with respect to the Governor consists of the following: "Defendant John Kasich is the Governor of the State of Ohio. In that capacity, he is empowered to ensure that the laws of the State are faithfully executed. Defendant Kasich is sued in his official capacity." (*Id.* ¶ 6.) They make no other factual or legal reference to the Governor. Similarly, Plaintiffs' sole mention of the Attorney General appears in Paragraph 7 of the Amended Complaint, wherein they allege that, as Ohio's chief legal officer, the Attorney General has the duty to "advise state and local officials on questions of Ohio law." (*Id.* ¶ 7.) Alleging that the Attorney General provides legal advice to State officials does not state a cause of action or relate to the harms claimed by plaintiffs.

II. LAW AND ARGUMENT

A. Plaintiffs fail to state any cognizable claim against the Governor or the Attorney General.

1. Plaintiffs' claims against the Governor and the Attorney General Mike DeWine are barred by the Eleventh Amendment.

Plaintiffs' claims against the Governor and the Ohio Attorney General must be dismissed under the Eleventh Amendment to the United States Constitution. Under the Eleventh Amendment, federal courts lack jurisdiction to hear suits by private citizens against a State unless the State unequivocally consents to suit or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate state immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Because Plaintiffs' attempt to sue the Governor and the Attorney General in their respective official capacities is an attempt at pleading a claim against the State of Ohio, such a suit is barred by the Eleventh Amendment. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008).

2. Plaintiffs fail to allege any facts demonstrating a connection between the Governor Kasich and/or the Attorney General and the harm alleged.

The U.S. Supreme Court has recognized one pertinent exception to this jurisdictional bar: a suit challenging the constitutionality of a state official's action in enforcing state law is not considered to be against the State, and therefore Eleventh Amendment Immunity does not apply. *See generally Ex parte Young*, 209 U.S. 123 (1908). The *Young* exception applies, however, only where the officer being sued *has a sufficient connection to enforcement of the challenged act*:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

Ex parte Young, 209 U.S. at 157; *see also Floyd v. Cnty. Of Kent*, 454 F. App'x 493, 499 (6th Cir. 2012) (for the *Young* exception to apply, the state official sued "must have, by virtue of the office, some connection with the alleged unconstitutional act or conduct of which the plaintiff complains").

Because the Eleventh Amendment is an absolute bar to suit, "[c]ourts have not read *Young* expansively[,]" and have routinely dismissed state officials where, as here, the plaintiffs' complaint lacks allegations of the requisite enforcement nexus between the challenged statutes. *See, e.g., Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415-17 (6th Cir. 1996) (dismissing the Ohio Attorney General because she "has no connection to the enforcement of the [challenged] statute."); *Kelley v. Metro. Cnty. Bd. of Ed.*, 836 F.2d 986, 990 (6th Cir. 1987) (suit barred under Eleventh Amendment where state official defendants did not threaten to

enforce any unconstitutional act); *Confederated Tribes & Bands of the Yakama Nation v. Locke*, 176 F.3d 467, 469-70 (9th Cir. 1999) (dismissing the Washington Governor where the complaint "contain[ed] no allegations that the governor is charged with operating" the challenged statutes); *Akron Ctr. for Reproductive Health*, 633 F. Supp. 1123, 1129-30 (N.D. Ohio 1986) (suit against Ohio Governor and Ohio Attorney General dismissed pursuant to the Eleventh Amendment because they had no connection to the enforcement of the challenged abortion statute) (aff'd on other grounds, 854 F.2d 852 (6th Cir. 1988), rev'd on other grounds, 497 U.S. 502 (1990)).

While it is true that "at the motion-to-dismiss stage, [this Court] must accept all material allegations as true and construe them in light most favorable to the non-moving party," *Top Flight Entm't, Ltd. v. Schuette*, No. 12-2384, 2013 U.S. App. LEXIS 18579 (6th Cir. Sept. 6, 2013), citing, *New Albany Tractor*, 650 F.3d at 150, the Amended Complaint does not contain *any* material allegations regarding connection between the Governor, the Attorney General, and the injuries claimed. Equally absent is any allegation that an injunction against the Governor will redress any of the harms alleged. Plaintiffs fail to meet their burden of setting forth facts to overcome the Governor's and the Attorney General's Eleventh Amendment Immunity so those State Defendants must be dismissed.

The Sixth Circuit reaffirmed this principle in a decision issued just weeks ago. In *Top Flight Entm't, Ltd. v. Schuette*, 2013 U.S. App. LEXIS 18579, the Sixth Circuit affirmed the district court's decision to dismiss the Michigan Attorney General as a defendant to a lawsuit, as a different state office, not the Attorney General was the relevant enforcement officer. The Plaintiff there challenged the blanket denial of licenses permitting "millionaire parties" (gambling events sponsored by certain educational, religious, and other specified categories of organizations) to the plaintiff's adult entertainment club. *Id*. at *3. The Lottery Commissioner,

who possessed the statutory power to issue the millionaire-licenses and who allegedly adopted the challenged blanket policy with respect to the licenses, was an appropriate defendant in the court's view. *Id.* at *22. But the complaint failed to allege "a sufficient connection between [the Attorney General] and the alleged unconstitutional acts to sustain their claims against him in his official capacity." *Id*. at *23. In reaching this conclusion, the court emphasized that the complaint contained no allegation regarding "how Schuette, as Attorney General, was involved in the issuance of millionaire-party licenses or the enforcement of rules under the Bingo Act" or that "Schuette had knowledge of, or participated in, . . . [the] alleged policy of denying all millionaire-party license events at Flying Aces." *Id*. at *22-23. Accordingly, Attorney General Schuette was entitled to Eleventh Amendment Immunity. *Id*.

Plaintiffs' Amended Complaint similarly lacks any allegation as to how the Governor or the Attorney General is or will be involved in causing the harms alleged. Plaintiffs themselves have chosen to file an as-applied challenge, not a facial one. They attack Ohio's ban on recognizing their same-sex marriages only to the extent that the Defendants, the Governor and/or Attorney General, are applying or are threatening to apply the ban to the Plaintiffs specifically. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) ("In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation.") (citations and internal quotation marks omitted)). But the Plaintiffs do not allege that the Governor or the Attorney General is applying or is threatening to apply the challenged provisions to them *at all.*

The only claimed lack of recognition Plaintiffs have alleged with respect to either of their marriages relates to the issuance of death certificates. (Am. Compl. ¶¶ 32, 33.) In Ohio, the Director of the Department of Health is responsible for the "system of vital statistics," *i.e.*, the "registration, collection, preservation, amendment, and certification of vital records," including the death certificates. *See* Ohio Rev. Code §§ 3705.01(N) (defining "system of vital statistics"); 3705.02 ("The director of health shall have charge of the system of vital statistics, enforce sections 3705.01 to 3705.29 of the Revised Code, and prepare and issue instructions necessary to secure the uniform observance of such sections."). Plaintiffs do not allege that either State Defendant has any role with respect to the issuance of death certificates. Nor do they allege the Governor or the Attorney General has any specific authority for enforcing Ohio Rev. Code § 3101(C)(2) or Article XV, § 11.

To the contrary, the *sole* allegation in the Amended Complaint with respect to the Governor is that "he is empowered to ensure that the laws of the State are faithfully executed" in his official capacity as governor. (Am. Compl. ¶ 6.) Likewise, the Plaintiffs' only allegation with respect to the Attorney General is that he is responsible for *advising* on matters of Ohio law, not that he bears any responsibility for enforcing or executing it. (*Id.* ¶ 7). As court after court has repeatedly ruled, such an invocation of an official's general enforcement power does not suffice to abrogate the official's Eleventh Amendment Immunity. *See, e.g.*, *Children's Healthcare is a Legal Duty*, 92 F.3d at 1416 ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.") (citations omitted); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute."); *Mendez v. Heller*,

530 F.2d 457, 460 (2d Cir. 1976) (an attorney general's "duty to support the constitutionality of challenged state statutes" and his duty "to defend actions in which the state is interested" do not create sufficient connection to the statute in question).

Notably, courts have applied this rule to dismiss state officials even where the official has the power to appoint those who bear responsibility for the challenged conduct. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983) ("But, as the NAACP admits, the Governor's powers in this area are limited to making general policy and budget recommendations, as well as administrative appointments. . .Thus, the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by the NAACP."). Otherwise, no one would ever need to sue any of the myriad of state officers who are appointed by the Governor, as everyone could just sue the Governor instead. But the Governor is no more a stand-in for the right department head than a different department head would be; one cannot sue the director of health for complaints about taxes; one cannot sue the tax commissioner for complaints about the department of health; and one cannot sue the Governor for either of those department's acts just because the Governor is the top executive.

Indeed, Plaintiffs are internally inconsistent here, as they also sued the City of Cincinnati official who processes death certificates, but not her appointing authority. And Plaintiffs did not sue the city attorney, who represents and advises city officers. This is not just formalism with no purpose, as it goes to the heart of the legal principle at the root of the Eleventh Amendment and the *Ex Parte Young* exception. Plaintiffs' generic naming of the Governor and the Attorney General, coupled with a failure even to try alleging any connection between them

and the challenged conduct here, shows that Plaintiffs named these Defendants to find a surrogate for suing the State itself.

Plaintiffs are not suing either Defendant because either has committed or is about to commit an unconstitutional act; the Defendants are stand-ins for "the State". The Eleventh Amendment forbids this result. *Children's Healthcare is a Legal Duty*, 92 F.3d at 1416-17 ("Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State … as an entity, a step that Congress did not authorize when enacting 42 U.S.C. § 1983 and that the Eleventh Amendment does not permit in the absence of such authorization.") (internal quotations omitted); *Los Angeles Branch NAACP*, 714 F.2d at 953 ("It is obvious, therefore, that the purpose of joining the Governor as a defendant in this suit is not to remedy the effects of unconstitutional segregation since the Governor lacks the power to do so, but to use the Governor as a surrogate for the state, and thereby to evade the state's Eleventh Amendment Immunity. This the NAACP cannot do."). Because Plaintiffs' Amended Complaint is thus facially insufficient to sustain any claim against the Attorney General or the Governor, both should be dismissed from this lawsuit as specified above.

B. The Attorney General is immune from suit as named defendant, but in the absence of any other state defendant, prefers to remain in the case for the purpose of defending Ohio's definition of marriage.

Plaintiffs do not allege that the Governor or the Attorney General is connected to their asserted harms at all, let alone with a connection sufficient to overcome Eleventh Amendment Immunity. But if the State Defendants are both dismissed, as they should be, Dr. Camille Jones, an employee of the City of Cincinnati, will be the only remaining defendant unless a State official with duties related to Plaintiffs' alleged harms is further named. Dismissal of both Defendants, without a substitution of another State defendant, would leave no State Defendant

present to defend Ohio's marriage laws. Yet the Ohio Attorney General has the right to be heard in their defense. Ohio Rev. Code. § 2721.12(A). Thus, if the Court is inclined to grant both the Governor's and the Attorney General's motion, but if no other State Defendant is present, the Attorney General asks that this motion not be granted so that he may remain a party and defend the constitutionality of Ohio's marriage laws.

III. CONCLUSION

For the above reasons, Defendants Ohio Governor John Kasich, and Ohio Attorney General Mike DeWine with the contingency noted above, respectfully move this Court to dismiss them from this case.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on September 19, 2013. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ *Bridget E. Coontz*
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