

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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JAMES OBERGEFELL, et al., : CASE NO. 1:13cv501
:
Plaintiffs, : Cincinnati, Ohio
:
- v - : Wednesday, October 30, 2013
: 1:30 p.m.
CAMILLE JONES, et al., :
:
Defendants. : **MOTION TO DISMISS**

- - -

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TIMOTHY S. BLACK, JUDGE

- - -

APPEARANCES:

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Court Reporter: Jodie D. Perkins, RMR, CRR

1 AFTERNOON SESSION, Wednesday, October 30, 2013

2 (Proceedings commenced at 1:30 p.m.)

3 THE COURT: Good afternoon, ladies and gentlemen.

4 Here on the record in the open courtroom in the case of James

5 -- I'm terrible on pronunciation -- Obergefell, et al.,

6 versus -- and I'll be bipartisan in mispronouncing -- Jones, et
7 al.

8 We're set for oral argument on -- here we go --

9 Defendant, Doctor Theodore Wymyslo's motion to dismiss.

10 I would like the attorneys to enter their appearances
11 for the record. Help me with who is present with you and then
12 we'll proceed to oral argument.

13 Who appears on behalf of the plaintiffs?

14 MR. GERHARDSTEIN: Good afternoon, Judge. Al
15 Gerhardstein for the plaintiff. And with me is James
16 Obergefell, Robert Grunn, who are plaintiffs.

17 And Jackie Martin, co-counsel.

18 And behind me is Adam Gerhardstein, admitted in the
19 State of Minnesota and will be taking the Ohio Bar in due
20 course.

21 THE COURT: Congratulations across the board. Welcome
22 on behalf of the plaintiffs.

23 Who appears on behalf of the defendants?

24 MS. COONTZ: Good afternoon, Your Honor. Bridget
25 Coontz with the Ohio Attorney General's Office. Also with me

1 is Zack Keller with the Ohio Attorney General's Office.

2 THE COURT: Good afternoon to both of you.

3 MR. HERZIG: Good afternoon, Your Honor. Aaron Herzig
4 for the City of Cincinnati.

5 THE COURT: Good afternoon, Counsel.

6 Ms. Coontz, I sort of regret dragging you down from
7 Columbus for 15 minutes of oral argument, but I think I gave
8 you the option to appear by phone and, in the spirit of full
9 disclosure, I'm actually grateful and comfortable that you're
10 here live.

11 MS. COONTZ: Thank you, Your Honor.

12 THE COURT: I would say this to anyone in any civil
13 case: Mr. Obergefell, on behalf of the Court and the
14 community, I express my condolences upon your loss.

15 We're here for oral argument. Typically, the Court
16 hears first from the movant, who gets to go first and last.

17 I've asked that you try and limit your arguments to
18 15 minutes. I've identified three issues I would like to hear
19 argued in part. You're welcome to argue whatever you choose.
20 If you go longer than 15 minutes, so be it.

21 On behalf of the movant, do you wish to be heard?

22 MS. COONTZ: Yes, Your Honor. Thank you.

23 THE COURT: Very well.

24 MS. COONTZ: Good afternoon, Your Honor.

25 May it please the Court, Mr. Gerhardstein, Counsel.

1 The Court has asked us here today to answer three questions.
2 And the first is whether the Court can consider plaintiff's
3 declaration in this facial challenge to standing. And the
4 simple answer is no.

5 No one can dispute that the plaintiff has to plead
6 standing with specificity, but Mr. Grunn did not do that in the
7 second amended complaint, and he admits that he didn't.

8 On page five of his response to the defendant's motion
9 to dismiss, he states that he could not allege specific facts
10 that demonstrate standing because the specific facts did not
11 exist at the time the second amended complaint was filed. And
12 that's not only telling, but it is dispositive of his claim
13 because the plaintiff has to have standing at all stages of
14 this litigation. And he's admitting that he didn't have it
15 when the complaint was filed.

16 THE COURT: That's interesting. I was prepared to
17 launch on you. I have a Supreme Court case that says that the
18 court, in its discretion, can ask for an amendment of the
19 pleadings or affidavits to clarify standing.

20 MS. COONTZ: And certainly, the Court does have the
21 discretion to request amendments to pleadings and the plaintiff
22 has the ability --

23 THE COURT: It talks about affidavits too.

24 MS. COONTZ: The Court does talk -- is the Court
25 referring to *Warth versus Seldin*?

1 THE COURT: Yes, a Supreme Court case.

2 MS. COONTZ: And in *Warth versus Seldin*, what the
3 Court said is that affidavits can be offered in a factual
4 challenge to standing to offer further particularized
5 allegations of standing. Further particularized allegations of
6 fact to support standing presupposes that there are some
7 allegations in the complaint supportive of standing, and we
8 simply don't have that in this situation.

9 What we have is a plaintiff who filed a defective
10 complaint who later went out and established the facts in order
11 to support his standing, filed declarations after the fact to
12 try to somehow amend the complaint without getting leave from
13 the court to do so --

14 THE COURT: Well, leave to amend the complaint is
15 freely granted if justice so requires it. I can just grant him
16 leave to amend the complaint.

17 MS. COONTZ: Well, at this point, the Court can
18 certainly grant leave to amend the complaint if the Court is so
19 inclined. But the plaintiff offers no authority for the
20 proposition that he can file the complaint, get the facts to
21 support standing after the fact, file the declarations and
22 essentially use the complaint as a placeholder. That's not
23 what the complaint is.

24 THE COURT: And that's the piece that's now caught my
25 attention. You're telling me that at the time that the second

1 amended complaint was filed, he didn't have the factual basis
2 for standing, went out and created it thereafter, and put it in
3 an affidavit explaining what has now occurred?

4 MS. COONTZ: On page five of his response, plaintiff
5 alleges that he could not allege the specific facts to
6 demonstrate standing because the specific facts did not exist.
7 The specific facts present in the declarations did not exist
8 when the second amended complaint was filed.

9 THE COURT: And under that theory, what newly
10 developed facts now exist, post-filing of the complaint?

11 MS. COONTZ: The facts as stated in the declaration is
12 moot. It is the relationship between Mr. Arthur and Mr. Grunn,
13 the funeral director, and the client relationship that are set
14 forth in the declarations. Which, even if the Court considers
15 the declarations, are insufficient to confer standing.

16 Which takes us to the Court's second question, which
17 goes to the -- whether a close relationship exists between
18 Mr. Grunn and the parties whose rights he's trying to
19 vindicate.

20 So even if the Court considers these declarations in
21 conjunction with this complaint, they still don't establish
22 this close relationship.

23 And, you know, the Sixth Circuit has not looked
24 favorably upon third-party standing, which is why prospective
25 and hypothetical relationships are insufficient to sustain

1 third-party standing.

2 Mr. Grunn does not allege that he has a close
3 relationship with anyone whose rights he's trying to vindicate,
4 much less this hypothetical class of clients that he purports
5 to represent, because that's essentially what this is. This is
6 an end run around Civil Rule 23, an end run around class
7 certification.

8 If Mr. Grunn went for class certification, he would
9 have to prove numerosity, and he can't do that when he can't
10 even identify one client with whom he has this close
11 relationship.

12 What he's really asking for is relief that's broad and
13 narrow. He wants it narrow, because he wants it to apply to
14 him, but he wants it broad because he wants it to apply to all
15 of this hypothetical class of clients that he purports to
16 represent.

17 THE COURT: Who better to raise this issue as to the
18 death certificate of the same-sex couple than a funeral
19 director who services, in large part, the gay community?

20 MS. COONTZ: The individual plaintiffs who are
21 applying for the death certificate.

22 THE COURT: So you do it one by one. As people die,
23 they rush into court within 24 hours and that's the only way we
24 can surface whether or not -- what presents presents?

25 MS. COONTZ: And I think the Court's question goes to

1 two different issues: The prudential limitations on standing
2 and pleading those facts with specificity. And that's the
3 issue that we have here is -- if the Court's position is that
4 Mr. Grunn is in the best position to represent --

5 THE COURT: I'm asking.

6 MS. COONTZ: Is he in the best position to represent
7 those interests? No, and he has not alleged that he is in the
8 complaint.

9 Third-party standing requires not only this close
10 relationship and, again, in this situation we're talking about
11 hypothetical clients --

12 THE COURT: Speculative future clients.

13 MS. COONTZ: -- speculative future clients.

14 THE COURT: Like the lawyer cases.

15 MS. COONTZ: Correct, like the lawyer cases.

16 But what's notably absent from both the declarations,
17 as well as the complaint, is any allegation of hinderance. The
18 close relationship alone is not enough. And the declarations
19 and the complaint and the attempt to fix this third-party
20 standing problem are all geared toward this relationship, which
21 is why the plaintiff cites *Craig* and cites the cases in which
22 close relationship is found.

23 But if we look at the *Smith versus Jefferson County*
24 *Board of Commissioners* case from the Sixth Circuit, where the
25 teachers were found to have a close relationship with the

1 students whose rights they were attempting to vindicate, but
2 the failure to allege or assert or prove or provide any factual
3 basis for establishing that those students or parents had any
4 hindrance, there was any obstacle, to prevent them from
5 vindicating their own rights, was fatal to the claim of
6 third-party standing. And that's the situation that we have
7 here.

8 The declarations that were filed after the fact are an
9 obvious attempt to fix this third-party standing problem, but
10 they still don't address the hindrance.

11 THE COURT: The hindrance? I mean, I respect you. I
12 mean, aren't you -- a person who has a spouse die and needs a
13 death certificate, within 24 hours or so, faces no hindrance if
14 the only way to get an accurate one is to come to court within
15 those 24 hours during a period of intense grief?

16 MS. COONTZ: Well, that's certainly not what the
17 complaint alleges and that's certainly not what the
18 declarations -- what the declarations allege.

19 Is it a tough time period? Absolutely. Is it a time
20 of grief? Yes. But there's no allegation in the complaint and
21 there's no allegation in the declarations that these
22 individuals whose rights Mr. Grunn is attempting to vindicate
23 can't do that. And the existing plaintiffs in this case
24 demonstrate that they can.

25 THE COURT: Well, Mr. Obergefell could do it because

1 his partner was dying slowly from a terminal disease and they
2 could see it coming and they had time to plan it and they went
3 out and hired a lawyer and they brought it to the Court's
4 attention.

5 The new plaintiff, the only reason he was able to do
6 what he did was the case was in place. The hindrance argument
7 doesn't cause me a great deal of pause. The close
8 relationship, I'm working on.

9 MS. COONTZ: And the close relationship -- whether the
10 Court focuses on the close relationship or the hindrance, both
11 are problematic for the plaintiffs in their ability to provide
12 or to demonstrate third-party standing because the Sixth
13 Circuit is specific. It's not hypothetical future clients.

14 And I think the courts -- the Eastern District of
15 Michigan decision from October of 2012, the *Suciu versus*
16 *Washington* case, is very instructive on this point. In that
17 situation, you had attorneys who were challenging, on a
18 constitutional basis, the Michigan's prison system's new
19 restricted hours on visiting inmates, and the allegation was
20 this violated their First and Sixth Amendment rights.

21 And what the court said, focusing on *Kowolski*, is the
22 fact that there were no existing clients. Just like Mr. Grunn,
23 the attorneys in the *Suciu* case did not identify any existing
24 client with whom they had to -- with whom they had a close
25 relationship whose rights they had to vindicate.

1 And the Court specifically held that a close
2 relationship exists only between the plaintiffs and existing
3 clients. And without those existing clients, the plaintiffs
4 had failed to demonstrate third-party standing.

5 We have an identical situation in this particular
6 case. The plaintiff does not allege that there's a close
7 relationship with anybody whose rights he has to vindicate.
8 He's attempting to vindicate these rights in the abstract and
9 the Sixth Circuit demands more.

10 THE COURT: So we never get to the issue?

11 MS. COONTZ: It's not that we'll never get to the
12 issue, it's that the Court should restrain from getting to this
13 issue in a situation, in this particular case, in the abstract
14 where there is no close relationship.

15 It is not that no one will ever get to this issue.
16 It's that we can only reach this issue when the close
17 relationship exists. And the plaintiff has failed to plead
18 anything with specificity to demonstrate that that close
19 relationship exists.

20 THE COURT: But you're never going to have a close
21 relationship with a funeral director except at the moment of
22 death.

23 MS. COONTZ: But if that's what's required for
24 standing, then that is what is required for standing. As harsh
25 as it may sound, if that's what the Sixth Circuit requires,

1 that close relationship, as opposed to the hypothetical
2 relationship. You know, it is harsher than in the context of
3 an attorney-client relationship, and I'm cognizant of that
4 fact. It's hard to say that somebody has to die before that
5 existing close relationship exists. But that's, I believe,
6 what the Sixth Circuit has set out for us with respect to the
7 close relationship.

8 THE COURT: And then you have to act on it within 24
9 hours and find the lawyers capable of drafting pleadings to
10 that effect in that period of time, and a judge who responds
11 that quickly?

12 MS. COONTZ: For prudential limitations on standing,
13 yes, for that close relationship --

14 THE COURT: Okay.

15 MS. COONTZ: -- to exist.

16 The Court's other question that the Court wanted -- or
17 that you asked the parties to address today relates to whether
18 Mr. Grunn can state a first-party 1983 claim based on his own
19 rights. And he can't in this situation. He has no Article III
20 first-party standing because he's not alleged an injury in
21 fact. Mr. Grunn does not allege in the second amended
22 complaint that he fears prosecution. He alleges in the
23 declarations that he fears prosecution. And he states that he
24 fears he'll be prosecuted by Doctor Wymyslo for listing
25 same-sex couples as married.

1 This statement is still insufficient for two reasons:
2 Number one, Doctor Wymyslo is not responsible for prosecuting
3 violations of the section of Ohio law that Mr. Grunn fears
4 being prosecuted under.

5 THE COURT: You have to find a county prosecutor
6 willing to do it.

7 MS. COONTZ: Exactly.

8 THE COURT: And you think that would be a challenge?

9 MS. COONTZ: Whether it would be a challenge is not
10 necessarily an issue for Doctor Wymyslo. It is not something
11 that he's ever, to my knowledge, referred anybody for
12 prosecution. A county prosecutor would have the ability to
13 prosecute this case -- prosecute such a violation independent
14 of Doctor Wymyslo.

15 This is a situation that's very analogous to the *COAST*
16 case in the Sixth Circuit where the Ohio Elections Commission
17 would refer violations, upon a finding of probable cause, to
18 the county prosecutor for prosecution.

19 Doctor Wymyslo has only the authority to refer
20 violations to the county prosecutor. And absent that county
21 prosecutor, as in the *COAST* case, there is no injury in fact.
22 There is no credible threat of prosecution in this particular
23 case.

24 THE COURT: But in the *COAST* cases, one of which
25 originated out of my courtroom, the folks were not saying that

1 they were going to file false statements, they weren't going to
2 violate the statute.

3 Here, Mr. Grunn said outright, I believe, that if he
4 has a same-sex couple come to him, he's going to list that
5 they're married and list the surviving spouse. Doesn't that
6 distinguish it?

7 MS. COONTZ: But I think the Court's question raises
8 some interesting issues within the context of this particular
9 statute. There are no annotations analyzing this particular
10 statute as to whether the activity that Mr. Grunn intends to
11 engage in is a violation of that particular statute. And
12 that's a decision for the county prosecutor to make. This is a
13 section of Ohio law that has not been enforced against anyone,
14 to the State's knowledge.

15 THE COURT: Has anybody been violating it?

16 MS. COONTZ: Has anybody -- I can't answer that
17 question, Your Honor. I simply don't know the answer.

18 THE COURT: Mr. Grunn says he's done it.

19 MS. COONTZ: Has Mr. Grunn done it? Yes. Has he been
20 prosecuted for it? Not to my knowledge. He has not.

21 So the interpretation of Ohio law -- he's interpreting
22 this to be a violation of Ohio law. Is it a violation of Ohio
23 law? That's for the county prosecutor to decide, not for
24 Doctor Wymyslo to decide.

25 THE COURT: Is the State in the position to disavow

1 the intention to prosecute people if they say that a gay
2 couples' surviving spouse is their gay partner?

3 MS. COONTZ: That's not Doctor Wymyslo's decision.
4 Doctor Wymyslo doesn't have the authority to prosecute someone
5 criminally for that. I can't answer for the 88 county
6 prosecutors.

7 THE COURT: Could the Attorney General answer that
8 question?

9 MS. COONTZ: In an opinion?

10 THE COURT: Yeah.

11 MS. COONTZ: An Attorney General Opinion could be
12 sought with respect to that issue.

13 THE COURT: I mean, the State does not disavow any
14 intent to criminally prosecute.

15 MS. COONTZ: The Attorney General doesn't have the
16 authority to prosecute. Doctor Wymyslo doesn't have the
17 authority to prosecute.

18 Can the State affirmatively disavow any intent to
19 refer anybody for a violation of 3705.29? No, the State cannot
20 disavow any such intention.

21 THE COURT: Very well.

22 MS. COONTZ: So going back to why Mr. Grunn has failed
23 to state a first-party claim based on his own right, the mere
24 possibility of a criminal sanction does not amount to a case of
25 controversy, and that's essentially what we have, is Mr. Grunn

1 saying that I fear that I'm going to be criminally prosecuted
2 in this situation.

3 Again, there's no authority for the proposition that
4 this is something that a county prosecutor would actually take
5 up and prosecute. That is not a decision that Doctor Wymyslo
6 has the authority to make. That is not a decision that Doctor
7 Wymyslo controls.

8 There is, as I'm sure the Court is aware, a long chain
9 of speculative events listed in the plaintiff's brief that
10 would have to happen for Mr. Grunn to be prosecuted for the
11 facts that he's alleged in the complaint.

12 But because he's not alleged a credible threat of
13 prosecution by Doctor Wymyslo, and that's what he has to
14 allege, that the defendant is going to take some action against
15 the litigant to demonstrate an injury in fact. And that is
16 from *Morrison versus Board of Education of Boyd County* from the
17 Sixth Circuit. There is no allegation that the defendant, that
18 Doctor Wymyslo, is going to take any action against Mr. Grunn,
19 in the complaint or in the declarations.

20 Because he's not alleged that Doctor Wymyslo is going
21 to take any action against him -- excuse me. He's not alleged
22 that Doctor Wymyslo is going to take any action against him.
23 And in his reply, he actually admits that prosecution is
24 certainly not impending.

25 And again, the Sixth Circuit demands more, demands

1 credible threat of prosecution. When the plaintiff is
2 admitting that prosecution is certainly not impending, he can't
3 demonstrate first-party injury in fact.

4 Finally --

5 THE COURT: Moreover, he doesn't allege any
6 constitutional violation of his own.

7 MS. COONTZ: Correct. Correct. And that's the next
8 point that I'm going to get to with respect to the equal
9 protection claim and the possibility of an equal protection
10 claim. Mr. Grunn doesn't state any sort of equal protection
11 claim in the complaint, in the declarations, or anywhere,
12 because he doesn't allege that he's being treated differently
13 from anyone.

14 He also does not allege that he actually fits into the
15 classification at issue, that is, the same-sex couples married
16 in other jurisdictions that recognize same-sex marriage.

17 What he's asking the Court for is actually an order
18 that allows him to be treated differently than any other
19 funeral director in the state of Ohio. He's asking for an
20 order that allows him to write down same-sex marriages on death
21 certificates but is not asking that that be granted to any
22 other funeral director.

23 THE COURT: I thought he was asking that all funeral
24 directors in Ohio be directed to do that.

25 MS. COONTZ: In the complaint, what he's asking for is

1 declaratory judgment.

2 THE COURT: Okay.

3 MS. COONTZ: So you know, we have some issues there
4 with respect to the merits brief which, admittedly, I have not
5 gotten all the way through since having received it yesterday,
6 and the complaint, because in the complaint, this is a
7 declaratory judgment action and he's not asking for injunctive
8 relief. But in the merits brief, he seems to be asking for
9 some form of injunctive relief.

10 But what he wants is an order that says any same-sex
11 couple that comes to his funeral home can get something that no
12 one else in the state can be afforded.

13 And just to re-affirm, the plaintiff has to plead
14 standing with specificity and he hasn't done so in this case.
15 That's why these declarations were filed. He cannot fix -- he
16 cannot file an after-the-fact declaration to fix the many
17 problems within his complaint. And this Court should decline
18 to allow him to file these declarations after the fact and
19 grant the motion to dismiss.

20 THE COURT: And what happens if the Court grants the
21 motion to dismiss? What happens to this litigation? Does it
22 die along with Mr. Arthur?

23 MS. COONTZ: No, it does not.

24 THE COURT: What happens?

25 MS. COONTZ: Plaintiffs' merits brief was filed

1 yesterday. The defendant has the intention to respond and,
2 obviously then, if there's any additional responsive briefing.
3 But this case will still be very much alive and pending in this
4 courtroom.

5 THE COURT: The question will be whether the Court's
6 order becomes a permanent injunction as to these two couples?

7 MS. COONTZ: Correct. At this point, we're just at
8 the temporary injunctive relief phase.

9 THE COURT: And, you know, the death certificate
10 becomes an issue pursuant to the Court's order.

11 MS. COONTZ: In my knowledge, it has never happened.
12 But it is my understanding that by Ohio law, death certificates
13 are amendable. I'm not saying that that would happen. I'm not
14 aware of any situation in which that has happened.

15 But I stood before this Court back in July and made
16 the argument that a death certificate is amendable. And
17 because that's the position that the State has, and that's what
18 Ohio law provides for, Mr. Arthur's death does not affect the
19 future of this litigation.

20 THE COURT: Very well. I don't know whether I'm
21 allowed to say it, but you're a good lawyer.

22 MS. COONTZ: Thank you, Your Honor.

23 THE COURT: Very well. Do you want some rebuttal
24 time, having chewed up 22 minutes?

25 MS. COONTZ: Twenty-two? Wow.

1 THE COURT: Perhaps?

2 MS. COONTZ: Perhaps.

3 THE COURT: Let see how much the other lawyer chews
4 up. It's been helpful to the Court. I'm glad you came.

5 MS. COONTZ: Thank you, Your Honor.

6 MR. GERHARDSTEIN: Good afternoon, Judge.

7 THE COURT: Good afternoon.

8 MR. GERHARDSTEIN: Counsel.

9 Judge, let me start with first-party standing, the
10 issue that chewed up probably ten of those minutes.

11 THE COURT: Okay.

12 MR. GERHARDSTEIN: Because there really is a fear of
13 prosecution that's real and immediate. And forget the extra
14 affidavits that were filed. Let's just go with the complaint.

15 Paragraphs 41 and 47 say that Mr. Grunn is a licensed
16 funeral director. And under 3705.16(B), the complaint goes on
17 to say he has the duty to obtain personal information. He's a
18 statutory recorder.

19 And under Paragraph 46, it says that includes whether
20 the decedent is married and who his surviving spouse is.

21 Paragraph 42, we say that he has to sign the death
22 certificate.

23 Paragraphs 43 to 45, we say that he has served
24 same-sex couples who are married in the past and that he will
25 do so in the future.

1 Paragraph 49, he says that he's going to be listing
2 these couples as married and listing their surviving spouses by
3 name.

4 Paragraph 39, he says that when this identical issue
5 arose with respect to the death of William Ives, Defendant
6 Jones, and I'll quote, requested through her counsel that she
7 be given direction from this Court on how to respond. The
8 Court subsequently issued the temporary restraining order.

9 And then, not to bring in things outside the
10 complaint, but she did admit that allegation when she answered
11 in document 36.

12 So, we have an allegation that was placed in the
13 second amended complaint because the funeral director is just
14 like Doctor Jones, which is something that Doctor Wymyslo has
15 totally failed to address. They're both -- Doctor Jones and
16 Mr. Grunn are both statutory reporters with duties set out in
17 3705.16.

18 And like Jones, Mr. Grunn is so concerned about the
19 tension between accurately reporting what his clients bring to
20 him -- we are married in another jurisdiction, I want my
21 marriage on the death certificate and I'm the surviving spouse,
22 I want my name there -- he's so concerned about accurately
23 serving his clients and the criminal penalties associated with
24 false reports, that he needs a court order to protect him from
25 prosecution.

1 And that is the same argument that Defendant Jones
2 made in her response to the original TRO request, and that's at
3 pages two and three of document 10.

4 So if a defendant views this problem as imminent
5 enough to require court direction, certainly another mandatory
6 reporter, the funeral director, has standing to raise the same
7 argument.

8 And that is just like *Babbitt*, a Supreme Court case
9 where the farm worker protesters said, well, we aren't really
10 intending to give false statements when we go out and protest,
11 but that's a pretty broad statute and we're not sure what to do
12 so we need court protection in order to make sure that we don't
13 have to face prosecution for exercising our rights. And as
14 long as --

15 THE COURT: How do you square that and these *COAST*
16 cases?

17 MR. GERHARDSTEIN: Well, I think there is a continuum
18 of the types of conduct that are involved.

19 But you actually asked the best question to sort that
20 out. And that is: Okay. Is the state going to disavow
21 prosecution? And while counsel was very careful to say that
22 you need 88 prosecutors to get onboard with that, the fact is
23 that under 3710.57, Director Wymyslo has the duty to institute
24 any criminal prosecution. So Director Wymyslo is the gate
25 through which any criminal prosecution gets.

1 THE COURT: How?

2 MR. GERHARDSTEIN: Well, it says -- 3710.57 says: Any
3 prosecutions, quote, shall be instituted by the director of
4 health.

5 I think that's more than just a referral. It's like,
6 you don't get to first base unless the director of health says
7 to one of those 88 prosecutors, we have a violation hearing.

8 And so he's the gatekeeper. And the director has
9 not -- let me go back to *Babbitt* because your question is how
10 do I parse that out with *COAST*. In *Babbitt*, the Supreme Court
11 said the state has not disavowed any intention of invoking the
12 criminal penalties. So it's like, well, if I have to err one
13 way or the other, I'll give it to the plaintiff who fears
14 prosecution because the other side is hiding the ball.

15 And here, Director Wymyslo, and you've just heard in
16 your dialogue with counsel, has similarly not disavowed any
17 intention of invoking, or of triggering, of instituting, to use
18 the words of the statute, any criminal prosecution.

19 And I think that settles it. And when you combine
20 that with Doctor Jones feeling the same way as another
21 mandatory reporter, as another statutory reporter? I mean,
22 we've had argument, we had 46 pages of briefing, and then we
23 had statements saying: Well, I guess we can't promise not to
24 prosecute. But it is speculative to think that it will ever
25 happen. Well, you can't have it all of those ways. And I

1 think that that does settle the issue of whether the
2 prosecution is imminent enough.

3 THE COURT: So you think that settles the question of
4 injury in fact?

5 MR. GERHARDSTEIN: Well, there's two other things we
6 have to establish: One is whether the marriage recognition ban
7 is the source of this fear of prosecution, and it is. Doctor
8 Jones agrees with that as well.

9 And then, third, we have to show that a court ruling
10 will solve the problem. And that's exactly what happened when
11 Mr. Ives died. Doctor Jones contacted counsel, went to the
12 court, said, well, I need protection, and the TRO was issued in
13 part because of that.

14 So -- so the Court ruling does solve the problem. It
15 does say that the marriage recognition ban will be declared
16 unconstitutional as applied to these movants and, therefore,
17 the TRO was issued.

18 So, yes, all three of those things together, the fear
19 of prosecution, the connection to the marriage recognition ban,
20 and the fact that a court ruling solves the problem, gives him
21 first-party standing.

22 THE COURT: Well, the problem with first-party
23 standing is not injury in fact, it is that he hasn't alleged
24 any constitutional violations as to him.

25 MR. GERHARDSTEIN: Well, he is, though, because the

1 combination of these statutes present him with a criminal
2 prosecution for something that is constitutionally protected,
3 that is, the right for same-sex couples' marriages to be
4 recognized.

5 So if he's going to be prosecuted by declaring that
6 right in the course of his duties, that's a constitutional
7 violation.

8 THE COURT: Forgive me, help me through it. What
9 constitutional right would be violated by being prosecuted
10 for --

11 MR. GERHARDSTEIN: Well, first of all --

12 THE COURT: -- unconstitutional --

13 MR. GERHARDSTEIN: -- he will be articulating that --
14 if we are pursuing this line, which I'm happy to do --

15 THE COURT: Well, we have to for first-party standing,
16 don't we?

17 MR. GERHARDSTEIN: Then he's saying that these
18 statutes are vague as applied to him because, in fact, he's got
19 a situation where he's told he has to provide accurate
20 information or he'll be prosecuted. And then he goes to do it
21 by submitting this accurate information about marriages in
22 another state and then he gets whacked.

23 So, that's -- that's a vague statute. He shouldn't be
24 prosecuted under that. And while I have not briefed it in our
25 merits brief, if that's a central issue, I'm happy to, because

1 we're focused on marriage recognition. But you know, we can
2 certainly do that.

3 THE COURT: Well, can't we just proceed with third-
4 party standing and not get into that mess?

5 MR. GERHARDSTEIN: We can, but he has to be injured to
6 have third-party standing, and we have shown the injury. And
7 with respect to third-party standing, you know, he's on solid
8 footing.

9 THE COURT: I thought the law disfavored third-party
10 standing.

11 MR. GERHARDSTEIN: Well, it does. But this is just
12 the kind of situation where the doctrine got created. I also
13 do a lot of abortion cases, and this is reminiscent of that in
14 the sense that you have a core injured party that comes and
15 goes very quickly. A plaintiff who is in a crisis, has a need,
16 goes to the court to get that need satisfied, goes to a doctor
17 in that situation to get it satisfied, and then is gone. You
18 know, there's just no ongoing relationship.

19 Similarly, here you have to show three things for
20 third-party standing: That the person asserting the standing
21 was injured by operation of law, which we just did; there's a
22 close relationship; and then you have the hindrance.

23 Now, we certainly have a close relationship here. You
24 can't get a death certificate without going to somebody
25 recognized in the statute, and the funeral director is one of

1 those reporters, who will then -- he even has a special
2 database in his office provided by the State to provide the
3 personal information needed to get the death certificate.

4 And it's a close relationship, both in terms of the
5 way the statute is set up, but also in terms of the service
6 that's provided. It's regulated by the State because these
7 people are grieving.

8 THE COURT: But there's no existing vendor-vendee
9 relationship. There are no clients yet, so how can we have a
10 close relationship with a hypothetical client?

11 MR. GERHARDSTEIN: Well, it is not hypothetical. It
12 is certain to happen. He's had three experiences with this
13 already. He alleged in his complaint -- and I thought we had
14 notice pleading once upon a time -- so he alleges in the
15 complaint that he served same-sex couples in other states
16 before and that he's going to do it in the future, that should
17 be enough.

18 Just in case there was any question, yes, we did
19 provide additional information. Most of that, by the way, came
20 after our conference. And up until that telephone conference,
21 counsel had been getting along real well. And then we learned
22 that there's going to be a motion to dismiss one of the
23 plaintiffs that had been proposed, so, yes, we did provide
24 additional information before they ever filed their motion, in
25 the interest of getting as much information out there as

1 possible.

2 And one of those facts is, in fact, that he has
3 serviced same-sex couples in the past. There is no funeral
4 director in the state that's better situated to say he's going
5 to see this again. I mean, his place of business is in an old
6 gay bar that people had a great time in. He is gay himself.
7 He's well connected in the gay community. And Mr. Obergefell
8 is going to be referring him to all of his friends, and he
9 knows a lot of people who are married in other states, and
10 everybody dies.

11 So, at some point, we know this is going to happen.
12 It is not speculation, nothing like the lawyer-visiting cases.
13 You may never get another prisoner, that prisoner may never be
14 in that prison. You may not want to see him, you may want to
15 do everything by mail.

16 Everybody dies. Everybody needs a death certificate
17 and they need it now. They need it when they're in their
18 moment of crisis. So there's certainly a hindrance if you
19 don't have this figured out before people come in.

20 And the prospect of having every one of those
21 individual surviving spouses have to jump through a court hoop
22 in order to get this relief is outrageous. And that's why this
23 is a particularly appropriate third-party standing case.

24 And the other thing, I think we need to step back and
25 rather than deal with it as an algebra problem, also think

1 about what we're trying to do. We're trying to make sure that
2 the party in front of the Court is going to be a vigorous
3 advocate for this physician, that has enough stake in the
4 position that he's going to be a zealous advocate and do a
5 vigorous job.

6 Mr. Grunn certainly wants to do that, for his own
7 personal reasons as alleged originally in the complaint, and
8 for his business reasons. He wants to serve everybody
9 appropriately. He doesn't want to be the face of the State to
10 these people and say, by the way, you're going to have to wait
11 for a long time because I don't know what to do with you since
12 you were married somewhere else.

13 He's a perfect candidate to meet the purpose of
14 third-party standing. And in that sense, it is totally
15 appropriate.

16 You know, this whole case, Judge, is a situation that
17 we came to the Court in its equity status to solve what is
18 essentially a dynamic problem. We have two married same-sex
19 spouses that have died so far and found their way to the Court
20 to seek help with their death certificates. The orders of this
21 Court changed the last record of their life on this earth, and
22 but for the orders of this Court, the State of Ohio would be
23 forcing married couples to be treated as strangers with respect
24 to their deaths.

25 And we know that more married couples are going to

1 reach this point. I mean, everybody dies. So, they should not
2 have to file a federal lawsuit.

3 And that was an interesting exchange. I mean, counsel
4 basically admitted that everybody has to come to court
5 separately and file federal lawsuits in order to get an
6 adequate record of their life on earth. That can't be right.
7 We ought to be more creative, flexible and sensitive to the
8 needs of people at the point of their spouse's death to solve
9 this problem in a more comprehensive way. And recognizing the
10 standing of the plaintiff, Robert Grunn, is the solution to
11 that problem.

12 So, we would ask that you deny the motion to dismiss.

13 And whether you consider the affidavits or not, you
14 can deny their motion to dismiss, but I think you have
15 everything you need to do so.

16 THE COURT: You're a good lawyer, too. Thank you.

17 MR. GERHARDSTEIN: Thank you, Judge.

18 THE COURT: You came all the way from Columbus.
19 Typically, there is a brief rebuttal or reply, if you wish. If
20 not, so be it.

21 MS. COONTZ: Yes, Your Honor. And I will not chew up
22 much time.

23 THE COURT: All right.

24 MS. COONTZ: Not everyone has to come to court to be
25 able to sue in this context. But what Article III prudential

1 standing requires is that for an individual to assert
2 third-party standing, they need to do so with an existing
3 client with whom they have that close relationship -- not that
4 everybody has to come to court individually. It's that in
5 order for Mr. Grunn to have third-party standing, he has to
6 have an existing client.

7 THE COURT: But if they're going to get their death
8 certificate to reflect what they think the law should require,
9 they're going to have to come to court.

10 MS. COONTZ: Absolutely. And if Mr. Grunn is here --
11 either the individual plaintiffs come through court on the
12 first-party standing, or Mr. Grunn comes to court with an
13 existing client with whom he has that close relationship. And
14 we simply don't have that in this situation in this case.

15 THE COURT: So if you're not an existing client of
16 Mr. Grunn's, you have no recourse?

17 MS. COONTZ: Once you have the standing, once you have
18 the injury in fact, you have recourse. But we simply don't
19 have that in this situation with hypothetical future clients.

20 THE COURT: So after your spouse dies, if you get
21 hooked up with Mr. Grunn, then you can run to court in the 24
22 hours of immediate grief?

23 MS. COONTZ: Or the individual can come to court on
24 their own, yes.

25 THE COURT: What do you mean, pro se?

1 MS. COONTZ: No, in terms of on their own asserting
2 their first-party rights like the other plaintiffs in this case
3 have.

4 And I just wanted to briefly draw the Court's
5 attention to 3701.57 with respect to prosecution of these
6 offenses.

7 THE COURT: Yes.

8 MS. COONTZ: What that statute says is all
9 prosecutions and proceedings by the Department of Health -- and
10 it has a laundry list of violations of Ohio law -- not all of
11 those violations of Ohio law are criminal statutes. Some are
12 actually civil statutes.

13 And the interpretation of that is there can be a civil
14 prosecution for a Department of Health violation or Department
15 of Health rule. 3701.58 specifically says that the prosecuting
16 attorney shall prosecute violations of 3705.29. And the
17 specific is going to control the general.

18 And the reference to prosecution doesn't necessarily
19 mean criminal prosecution. It can mean civil prosecution, as
20 is evidenced by 3701.571, which talks about the director of the
21 Department of Health getting administrative fines from license
22 holders for individuals with violations of ODH rules.

23 And the statute says: On the request of the director,
24 the Attorney General shall bring and prosecute to judgment a
25 civil action.

1 So the use of the word "prosecution" doesn't mean
2 criminal prosecution in 3701.57. The specific statute
3 controls, and only the 88 county prosecutors have the authority
4 to prosecute 3705.29.

5 THE COURT: And forgive me, is your client prepared to
6 disavow any intention to refer to the county prosecutors'
7 events such as these?

8 MS. COONTZ: I have not asked my client that question,
9 Your Honor.

10 THE COURT: Very well.

11 MS. COONTZ: Thank you.

12 THE COURT: Thank you.

13 Well, oral argument actually has been very helpful.
14 It's helping me get focused. I am not going to have a decision
15 by 5 o'clock today but I will act expeditiously.

16 I think we've accomplished what we can do. It's been
17 of help to me. The Court prepares to recess.

18 THE COURTROOM DEPUTY: All rise.

19 (The proceedings concluded at 2:13 p.m.)

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C E R T I F I C A T E

I, Jodie D. Perkins, RMR, CRR, the undersigned,
certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

s/Jodie D. Perkins
Jodie D. Perkins, RMR, CRR
Official Court Reporter