

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**SUSAN WATERS and SALLY
WATERS, et al.,**

Plaintiffs,

v.

**PETE RICKETTS in his official
capacity as Governor of Nebraska, et al.,**

Defendants.

Case No. 8:14-CV-356

**SUPPLEMENTAL BRIEF IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

COME NOW State Defendants and present their final arguments regarding the Court's ultimate disposition of this case.

INTRODUCTION

The thrust of this supplemental brief is simple: the Court should declare Article I, § 29 of the Nebraska Constitution unconstitutional in light of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). However, given the uncontroverted evidence of Nebraska's immediate, concrete, and comprehensive compliance with *Obergefell* in the wake of that ruling, the Court need not provide permanent injunctive relief. No injunction is necessary at this stage, nor would it benefit any Plaintiff in any measurable way. This is consistent with the Eighth Circuit's direction to this Court to "consider Nebraska's assurances and actions and the scope of any injunction, based on *Obergefell* and Federal Rule of Civil Procedure 65(d)." Filing 78 at 5 (8th Cir. per curiam opinion).

The foregoing applies with equal force to Plaintiffs' belatedly introduced birth certificate issue. Even assuming, *arguendo*, that the birth certificate issue is validly

presented by the instant Plaintiffs and actually encompassed by their Amended Complaint (Filing 9),¹ Nebraska has initiated the regulatory amendment process to provide that a child born in Nebraska to a mother or father then married to a person of the same sex will have both the biological parent and the biological parent's same-sex spouse listed on the child's certificate of live birth. *See* Declaration of Courtney Phillips (attached). The amendments Director Phillips has directed to be promulgated will provide for birth certificates showing that a child born in Nebraska to a mother or father married to a person of the same sex will have both the biological parent and the biological parent's same-sex spouse listed on the child's certificate of live birth. *See id.*

ARGUMENT

1. The Court should declare Nebraska's marriage provision unconstitutional, pursuant to *Obergefell*.

This is now an uncontested issue. The Supreme Court has now held that the Fourteenth Amendment requires states to license a marriage between two people of the same sex and recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. *Obergefell*, 135 S. Ct. at 2607-2608. In light of that ruling and the Eighth Circuit's rejection of State Defendants' suggestion of mootness (Filing 78 at 4), this Court must formally declare Article I, § 29 of the Nebraska Constitution unconstitutional.

¹ And further assuming, *arguendo*, that Nebraska's existing statutory and regulatory vital records scheme would fail to pass constitutional muster under *Obergefell*, a point State Defendants do not and need not concede.

Beyond providing such declaratory relief, however, the Court need not go further. Before the Court is State Defendants' index of evidence in opposition to Plaintiffs' motion for summary judgment. *See* Filings 74 through 74-8. This evidence, described in detail in previous briefing (Filing 73 at 22-30), established the State of Nebraska's immediate, concrete, and comprehensive compliance with *Obergefell*. To wit:

- The Governor, a named Defendant, has indicated the State will respect the *Obergefell* ruling and follow the law. Filing 74-6 at ECF p. 6.
- The Attorney General, a named Defendant, has confirmed that the State of Nebraska will comply with the ruling of the Supreme Court. Filing 74-3, ¶ 5. He has further declared that Nebraska officials will not enforce any Nebraska laws that are contrary to *Obergefell*. *Id.*
- The Acting Tax Commissioner has rescinded a prior Revenue Ruling which prohibited same-sex couples from filing their returns “married filing jointly” and issued a new Revenue Ruling which not only expressly provides for same-sex married couples to have the same filing status options as heterosexual married couples, but also permits such couples to file amended tax returns for any “open” tax year. Filing 74-5.
- The Director of the Nebraska Public Employees Retirement System (NPERS) has declared that in any retirement plan administered by NPERS, any public employee married to a same-sex spouse shall not be distinguished from or treated differently than any public employee married to an opposite-sex spouse. Filing 74-7.

- The Department of Administrative Services has informed all State employees that a same-sex spouse now meets the spouse eligibility requirements for employee health benefit plans. Filing 74-6 at ECF p. 4.
- The Nebraska Department of Health and Human Services, whose Chief Executive Officer, Courtney Phillips, is a named Defendant in this case, has promulgated a new “Nebraska Marriage Worksheet” which, in addition to entries for “husband” and “wife” now provides for “Party A” and “Party B.” Filing 74-8 (Marriage Worksheet). As determined by *Obergefell*, HHS must recognize marriages of same-sex couples, and thus, will accept and maintain records of same-sex couples.

Moreover, several of the Plaintiffs have specifically obtained the marriage benefits they sought with this lawsuit. Plaintiffs Gregory Tubach and William Roby, who previously alleged they were prevented from marrying in Nebraska, Compl. ¶¶ 30-33 (Filing 9), successfully obtained a marriage license the day *Obergefell* was decided. *See* Riley Johnson, *Nebraska to follow law, officials say, as gay marriage commences*, LINCOLN JOURNAL STAR, Jun. 26, 2015, <http://bit.ly/1MiKns6>. Plaintiff Jason Cadek, husband of Plaintiff Nickolas Kramer, was previously barred from jointly adopting their daughter, A.C.-K. Compl. ¶ 20 (Filing 9). According to Mr. Kramer himself, Mr. Cadek has now successfully completed a Nebraska second-parent adoption of A.C.-K. *Compare* Nickolas Kramer, *Omaha dad: ‘No longer will my husband be a legal stranger to his daughter’*, OMAHA WORLD-HERALD, Jun. 26, 2015, <http://bit.ly/1iiv3YQ>, with Nickolas

Kramer, *Gay couple 'finally' become fathers to adopted daughter*, OMAHA WORLD-HERALD, Oct. 19, 2015, <http://bit.ly/1ROhUzt>.

In its opinion, the Eighth Circuit held that Nebraska's compliance steps did not moot this litigation, yet it specifically recognized that no permanent or ongoing injunction may be necessary. *See* Filing 78 at 5 (“These assurances may, however, impact the *necessity* of continued injunctive relief.” (emphasis added)). The Court of Appeals directed this Court to “consider Nebraska's assurances and actions and the scope of any injunction, based on *Obergefell* and Federal Rule of Civil Procedure 65(d).” *Id.*

State Defendants suggest that in consideration of the immediate and concrete steps taken by the State of Nebraska to comply with *Obergefell*, no permanent or ongoing injunctive relief is necessary or appropriate. A declaration that Article I, § 29 of the Nebraska Constitution unconstitutional is sufficient.

2. The birth certificate issue.

a. Plaintiffs have again failed to comply with the rules.

In their haste to toss the birth certificate issue into this litigation in its closing stages, Plaintiffs once again failed to comply with clear procedural rules. This is apparent given the absence of a statement of uncontroverted material facts (required by Fed. R. Civ. P. 56 and NECivR 56.1(a)(2)) purporting to set forth any facts relevant to birth certificates.

In the sole statement of material facts submitted by Plaintiffs in support of or in opposition to the cross-motions for summary judgment (Filing 77-1)², absolutely nothing is averred that is remotely relevant to birth certificates. Even the factual statement for Plaintiffs Jessica and Kathleen Kallstrom-Schreckengost speaks only to their desire to have their marriage recognized in Nebraska. Filing 77-1, ¶ 4. It says nothing about their speculative and later-raised birth certificate issue. Filings 87-7 and 87-8. Plaintiffs' summary judgment "supplement" (now on file with the Court's leave at Filing 87-1) contains no statement of material facts whatsoever.

The federal rule on summary judgment provides, in pertinent part, as follows:

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

....

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) *citing to particular parts of materials in the record*, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing *that the materials cited* do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56 (emphasis added).

² Which statement itself was only submitted *after* State Defendants' first raised the same rule violation (Filing 73 at 10-13) and which Plaintiffs failed to originally file because it, as they stated, "seemed unnecessary." Filing 77 at 2.

This Court's local summary judgment procedure rule expressly sets forth as follows:

(a) Moving Party.

(1) Statement of Material Facts. The moving party must include in the brief in support of the summary judgment motion a separate statement of material facts about which the moving party contends there is no genuine issue to be tried and that entitles the moving party to judgment as a matter of law. Failure to submit a statement of facts may be grounds to deny the motion.

(2) Form; Citation to Record. The statement of facts should consist of short numbered paragraphs, each containing pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials that support the material facts stated in the paragraph. A fact is "material" if pertinent to the outcome of the issues identified in the summary judgment motion. The statement of facts must describe the parties and recite all facts supporting the court's venue and jurisdiction. The statement must not contain legal conclusions. Failure to provide citations to the exact locations in the record supporting the factual allegations may be grounds to deny the motion.

NECivR 56.1(a)(1-2) (emphasis original).

Additionally, this Court instructs litigants as follows:

All judges enforce the local rules.

All judges enforce the local rules regarding summary judgment practice. See NECivR 7.1 and 56.1. If a lawyer fails to comply with local rules on summary judgment practice, every judge will, at a minimum, call that failure to the lawyer's attention in a written order and urge the lawyers to comply in the future. The judge may also impose harsher sanctions.

Judges Summary Judgment Practices, U.S. District Court for the District of Nebraska (accessed Oct. 28, 2015), <http://1.usa.gov/1eKAh9V>.

Given Plaintiffs' failure to provide the Court a factual statement on which to base findings on the birth certificate issue, they have clearly failed to comply with the foregoing rules. Accordingly, even assuming, *arguendo*, that the birth certificate issue is validly

presented by the instant Plaintiffs and actually encompassed by their Amended Complaint (Filing 9), the Court should deny their request for an injunction regarding birth certificates.

b. Even if an injunction Nebraska's marriage provision is entered, it should not specifically include birth certificates within its ambit.

Nebraska has initiated the regulatory amendment process to provide that a child born in Nebraska to a mother or father then married to a person of the same sex will have both the biological parent and the biological parent's same-sex spouse listed on the child's certificate of live birth. *See* Declaration of Courtney Phillips (attached).

174 Nebraska Administrative Code, Chapter 2, contains the Department of Health and Human Services' adopted regulations, including forms for recording the vital event of a birth or an adoption. Department regulations, under Nebraska law, can be promulgated only by following the statutory procedure set out by the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901.01 to 84-911, which include provisions at § 84-911 for challenges to the validity of regulations by a declaratory judgment action. The adopted regulations are to be filed with the Nebraska Secretary of State. In short, Nebraska law does not allow a vital statistics recording official to change the birth certificate forms or what may be listed on them by bureaucratic whim.

However, Director Phillips has directed that precisely those regulations be amended. *See* Declaration of Courtney Phillips, ¶¶ 3-4. The amendments Director Phillips has directed to be promulgated will provide for birth certificates showing that a child born in Nebraska to a mother or father married to a person of the same sex will have both the biological parent and the biological parent's same-sex spouse listed on the child's

certificate of live birth. *Id.* Accordingly, even if the Court does conclude it must issue a permanent injunction on the marriage issue (or simply make its current preliminary injunction at Filing 55 permanent), it should decline to add birth certificate-specific language.

CONCLUSION

For the reasons set forth herein, State Defendants request the Court deny Plaintiffs' motion for summary judgment to the extent it seeks any relief beyond a declaration that Article I, § 29 of the Nebraska Constitution unconstitutional.

Submitted November 3, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2015, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: s/ David A. Lopez