UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN DOE, formerly known as JANE DOE, Plaintiff, v. MICHAEL PENCE, in his official capacity as Governor of the State of Indiana; GREGORY ZOELLER, in his official capacity as Attorney General for the State of Indiana; MYLA A. ELDRIDGE, in her official capacity as Marion County Clerk of Court; and LILIA G. JUDSON, in her official capacity as Executive Director of the Indiana Supreme Court Division of State Court Administration, Defendants.	)	No. 1:16-cv-02431-JMS-DML

REPLY SUPPORTING MOTION TO DISMISS

Doe claims standing to sue the Clerk because he says her office enforces Indiana's name-change statute, answers inquiries about what that law says, and "processes name-change petitions through a system in which non-citizens have no chance of success." Dkt. 58 at 1, 3. The first claim misstates the law. The second relies on an expansive and unsupported standing theory (and misstates his alleged injury). And the third all but sinks his standing claim by acknowledging that the Clerk already does the only thing Doe asks this Court to order her to do, confirming that his alleged harm does not derive from the Clerk's conduct.

Doe's mootness argument fares no better. He does not allege that the Clerk's Office has ever refused to accept and process name-change petitions from non-citizens. And he does not dispute that Clerk's Office policy requires processing all name-change petitions and forwarding

them to the Circuit Court for resolution. With no reasonable expectation that the Clerk will adopt a contrary policy, any claim Doe might have had is moot.

I. Doe has not carried his burden to establish standing.

A. The Clerk's Office does not enforce the name-change statute.

Doe concedes that a defendant in a constitutional challenge "must play some role in the enforcement of the challenged statute." Dkt. 58 at 5 (citing *Love v. Pence*, 47 F. Supp. 3d 805, 807 (S.D. Ind. 2014)). He repeatedly claims, without any legal support, that the Clerk has a duty to enforce the name-change statute and assists in enforcing it. Dkt. 58 at 1, 6, 8, 9, 11. Those claims fundamentally misstate the law.

Indiana law provides that circuit courts may legally change names in Indiana, not county clerks. *See* Indiana Code § 34-28-2-1. The Clerk's Office is no more responsible for enforcing the name-change statute than for deciding summary judgment motions or sentencing criminal defendants. Those tasks are entrusted to judges. Nor did the Clerk's Office play a role in enacting the challenged statute into law. The state's legislature and governor did that.

Doe's analogy to the marriage-equality cases underscores the fundamental flaw in his standing argument. *See* Dkt. 58 at 6-8 (citing *Harris v. McDonnell*, 988 F. Supp. 2d 603 (W.D. Va. 2013)). Doe correctly notes that the plaintiff in *Harris* had standing to sue a county clerk even though he never filed what would have been a futile marriage-license application. *Id.* at 7. But he ignores the dispositive distinction between his claim and the marriage-equality cases. In Virginia, as in Indiana, county clerks enforce the laws governing marriage licenses. Their official duties include reviewing applications and issuing licenses. *See Harris*, 988 F. Supp. 2d at 613 ("Because [the Staunton County, Virginia clerk's] official duties include issuing the very thing plaintiffs claim they have been unconstitutionally denied, their alleged injury is directly traceable

to him."). This case is different. Indiana law places no duty on county clerks to enforce the name-change statute, and it vests them with no authority to do so.

Another of Doe's authorities is also instructive. Dkt. 58 at 5 (*citing Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1153 (S.D. Ind. 2014)). The *Baskin* plaintiffs had standing to sue Indiana's attorney general because he has broad power to enforce criminal statutes against county clerks who issue marriage licenses that violate Indiana law. *Baskin*, 12 F. Supp. 3d at 1152-53. But this Court held that the plaintiff lacked standing to sue the governor, who had no role in enforcing those statutes. *Id.* at 1153.[1] Doe emphasizes that the *Baskin* plaintiffs had standing to sue a third defendant, the Commissioner of the Indiana State Department of Revenue, who required same-sex couples to file forms that opposite-sex couples did not have to file. *See id.* at 1153. But he does not, and cannot, allege that the Clerk's Office requires anything more of non-citizens than it requires of citizens. In fact, the Clerk requires nothing of applicants at all because it is not the decision-maker. It simply processes whatever petitions are filed and sends them to the circuit court for resolution. Dkt. 52-1 at ¶¶ 3-5.

In sum, Doe's standing shortfall is not simply his failure to submit a petition. His problem is that the Clerk is the wrong defendant.

B. Telling someone what a law says, without playing any role in enforcing it, is not a cognizable harm establishing Article III standing.

Although Doe vaguely suggests that the Clerk has some duty to enforce the name-change statute, he all but concedes this is not actually true. Instead, he says the Clerk's Office somehow assists in its enforcement because it tells people what the law says if asked. *See* Dkt. 58 at 8. There are two problems with Doe's standing theory.

[1] In another case, this Court later concluded that the Governor did play a role in enforcing the marriage laws. But it was not because the governor told someone what the law says. It was because he sent directives to executive officials instructing them how to enforce the law. *See Love v. Pence*, 47 F. Supp. 3d 805 (S.D. Ind. 2014). It is undisputed that the Clerk's Office has no authority to instruct anyone how to enforce the name-change statute.

First, it is a dangerously expansive standing theory for which Doe provides no legal support (despite bearing the burden to establish standing). Under Doe's theory, he has standing to sue any government actor who "dissuades" him from doing something by telling him what the law says. But he points to no authority suggesting that learning what a law says amounts to a cognizable injury establishing Article III standing. Under Doe's theory, he also has standing to sue the Legislative Services Agency. It had no role in passing the law and cannot enforce it, but it is a government actor that dissuades non-citizens from petitioning for a name change by publishing the name-change statute in the Indiana code. That expansive and unsupported standing theory turns Article III's traceability and redressability requirements on their head.[2]

Second, Doe's own complaint belies his attempt to recast his injury. His amended complaint does not allege that knowing what the law says injured him. *Cf. Hodel v. Irving*, 481 U.S. 704, 733 (1987) (noting that citizens are "presumptively charged with knowledge of the law"). The alleged injury is his inability to change his name. *See* Dkt. 24 ¶¶ 71-73, 80-82, 87-89, 94-97. And the relief he seeks unsurprisingly addresses that harm. But he cannot trace that harm to the Clerk. The Clerk's Office already processes petitions and sends them to the court for a decision—the very thing Doe seeks in this lawsuit. *See* Dkt. 52-1 ¶¶ 3-5.

C. Doe concedes that the Clerk's Office already does what he asks this Court to order it to do.

Doe appears to acknowledge that the Clerk processes all name-change petitions and that the real problem is the state statute dooming his petition to failure after the Clerk sends it to the Circuit Court. Dkt. 24 ¶ 63 (conceding that the state's statute makes filing a name-change petition futile); Dkt. 58 at 1, 3 (noting that the Clerk "processes name-change petitions through a

[2] Consider, for instance, a public defender who tells his client what a procedural statute says. Never mind that she has no role in enforcing it. If learning what the law says dissuades the client from taking some action, the client would have standing to bring a declaratory judgment action against the public defender challenging the statute's constitutionality. This is not the law.

system in which non-citizens have no chance of success"). Put differently, his harm cannot be traced to the Clerk's Office, and a favorable decision as to the Clerk therefore would not remedy the alleged harm. *Cf. Hughes v. Chattem, Inc*, 818 F. Supp. 2d 1112, 1116 (S.D. Ind. 2011).

That those actually tasked with enforcing the name-change statute may take actions allegedly violating his rights after the Clerk processes his petition does not confer standing to sue the Clerk. Doe's contrary standing theory finds no support in the law and would vitiate Article III's traceability and redressability requirements. *Cf. id.*

II. Doe's voluntary cessation argument cannot save moot claims.

Doe does not challenge the evidence showing that the Clerk's Office already accepts and processes name-change petitions from non-citizens. *See, e.g.*, Dkt. 58 at 10 (calling the Clerk's commitment "laudable"). But he argues that his request for an order requiring the Clerk to do that which she already does is not moot. Pointing to the voluntary cessation doctrine, he suggests the Clerk cannot "assure that it treats non-citizens the same as U.S. citizens in its communications to the public" and cannot claim that the name-change petitions it accepts from non-citizens will be treated on equal footing. *Id.* This argument fails too.

First, Doe invokes the voluntary cessation doctrine as it applies to cases between private parties but ignores our circuit's application of that doctrine to government defendants. The Seventh Circuit places greater stock in public officials' corrective actions as long as they appear genuine. *Fed'n of Adver. Indus. Reps., Inc. v. City of Chicago*, 326 F.3d 924, 929-30 (7th Cir. 2003). Otherwise, courts would have to presume that public officials acted in bad faith—something they ordinarily do not presume. *Id.* The Seventh Circuit has thus "repeatedly held" that the voluntary cessation doctrine does not save a moot claim absent evidence creating a "reasonable expectation" that the government will resume the challenged conduct. *Id.* Here, there

is no evidence—and no allegation—that the Clerk's Office has ever refused to accept and process name-change petitions from non-citizens. But even if it had at some point in the past, it is undisputed that it now accepts petitions from non-citizens. *See* Dkt. 52-1 ¶¶ 3-5.

Second, the Clerk can (and always has) treated citizens and non-citizens the same. *See id.* If asked, the Clerk's Office tells citizens and non-citizens alike what the law says. And it accepts and processes name-change petitions from citizens and non-citizens alike. Although Doe is correct that the Clerk cannot ensure what will happen to petitions after it accepts them, that fact highlights the problem with his claim against the Clerk. The clerk cannot provide such assurances for a simple reason. She plays no role in enforcing the challenged statute.

* * * * *

The Clerk does not belong in this case. She is not responsible for enforcing the name-change statute, had no role in its enactment, and already does the only thing Doe asks this Court to order her to do. If the state's law is constitutionally suspect, the state should defend it. The Marion County Clerk is not responsible for defending the state's law, and Marion County tax dollars should not be imperiled in its defense.

Although Doe may have a live controversy with one or more state officials, he has no live controversy with the Clerk. This Court therefore lacks subject-matter jurisdiction and should dismiss Doe's claims against the Clerk with prejudice.

Respectfully submitted,

/s/ Donald E. Morgan

Donald E. Morgan, No. 30776-49
Thomas J.O. Moore, No. 32079-53
OFFICE OF CORPORATION COUNSEL
200 East Washington Street, Suite 1601
Indianapolis, IN 46204
Telephone: (317) 327-4055
Fax: (317) 327-3968
E-mail: donald.morgan@indy.gov
E-mail: thomas.moore@indy.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was filed electronically on this 11th day of January, 2017. This filing will be served on the following counsel by operation of the Court's electronic case filing system, and parties may access this filing through the Court's system.

Barbara J. Baird
LAW OFFICE OF BARBARA J. BAIRD
bjbaird@bjbairdlaw.com

Matthew J. Barragan
Thomas A. Saenz
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
mbarragan@maldef.org
tsaenz@maldef.org

Ilona Turner
Shawn Thomas Meerkamper
TRANSGENDER LAW CENTER
ilona@transgenderlawcenter.org
shawn@transgenderlawcenter.org

Betsy M. Isenberg
Matthew Keith Phillips
OFFICE OF THE ATTORNEY GENERAL
Betsy.Isenberg@atg.in.gov
Matthew.Phillips@atg.in.gov

/s/ Donald E. Morgan
Donald E. Morgan
Chief Litigation Counsel