

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

SOPHIE ROGERS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case # 1:19-cv-1149 (RDA/IDD)
	)	
VIRGINIA STATE REGISTRAR, <i>et al.</i> ,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT

This lawsuit challenges the constitutionality of Va. Code Ann. §32.1-267(A), requiring racial labeling of applicants for marriage licenses in Virginia. One week after receiving a copy of the complaint, the Virginia attorney general publicly affirmed that the requirement of racial labeling raises “serious constitutional questions,” and took an initial, if insufficient, action to nullify the immediate practical impact of that requirement on one plaintiffs’ couple planning to marry in a few weeks. Seeking to conclude this litigation as promptly and efficiently as possible, and having filed motions for preliminary and permanent injunctive relief with the court, plaintiffs move this court for summary judgment on their claim that the provision mandating labeling by race on marriage license applications is unconstitutional. The provision at issue deserves a rapid mercy killing.<sup>1</sup>

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<sup>1</sup>The undersigned recognizes that this request for summary judgment comes very early in the lawsuit. There are three reasons supporting this request: First, as discussed below, it seems clear that the defense has, properly, conceded the case. Second, there would appear to be no useful purpose served by dragging this case through discovery, with the costs and

### Background

This lawsuit seeks to rid Virginia of what may be the last vestige of Jim Crow in its laws: Va. Code Ann. §32-1-267(A) requiring persons seeking to marry in this state to label themselves by race in order to get a license to do so from their circuit court clerk. The complaint, supported by 19 exhibits and nine sworn declarations, sets forth in detail the woeful history of racism and discrimination giving rise to this statutory command, and its functional disutility as well. The suit seeks declaratory and injunctive relief against three state officials whose duties include ensuring compliance with the terms of this statute: the state's registrar and two clerks of court responsible for issuing marriage licenses.

The complaint was filed on September 5, 2019 and served on all defendants the next day, with courtesy copies contemporaneously delivered to Virginia's governor and attorney general. Together with the complaint, plaintiffs filed and served a motion for a temporary restraining order or preliminary injunction.<sup>2</sup> This motion was intended to meet the needs of one of the three plaintiff couples, Sophie Rogers and Brandyn Churchill, whose wedding is scheduled to take place on October 19, 2019. Unlike the case for the other two plaintiff couples, immediate relief was necessary for Ms. Rogers and Mr. Churchill, as they, like the other plaintiffs, declined to

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inconveniences attendant thereon. Third, Virginia does not need a legal struggle over this racial labeling. It needs quickly to lay the provision at issue to rest, without benefit of clergy.

<sup>2</sup>Since the complaint had not yet been served when the motion was filed, the undersigned thought it prudent to call it one for a temporary restraining order or for a preliminary injunction, while also noting that it seemed properly construed as one for a preliminary injunction. Given that all defendants were served the day after filing, with abundant time for response, the motion is properly adjudicated as one for a preliminary injunction under Fed.R.Civ.P. 65(a)(1).

label themselves by race in order to get a marriage license – something they require in time for their planned wedding.

One week after service of the complaint and motion, the attorney general effectively conceded the case in a directive to State Registrar Janet Rainey, one of the defendants in the lawsuit. A copy of the publicly released directive is attached hereto as Exhibit J.<sup>3</sup> Citing case law set forth in plaintiffs’ motion for a preliminary injunction, the directive astutely notes: “At a minimum, any statute requiring a governmental official to deny a marriage license to an applicant who declines to prove information about his or her race would raise serious constitutional questions.” Exhibit J at 2.

Agreeing with the attorney general, plaintiffs seek to bring this case to a close as rapidly and efficiently as possible, by moving for summary judgment on their claim that the statute at issue is, in pertinent part, unconstitutional. There is no need to drag this case out, and abundant good reason to bring it to as speedy a conclusion as possible.<sup>4</sup>

#### Statement of Undisputed Material Facts

The complaint, including 19 exhibits, is supported by nine sworn declarations filed in conjunction with plaintiffs’ pending motion for preliminary injunction: one from each movant

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<sup>3</sup>For ease of reference, plaintiffs’ newly named exhibits continue the number sequence begun in the documentary appendix submitted in support of the previously-filed motion for preliminary injunction.

<sup>4</sup>Counsel has noticed this motion for the October 4, 2019 hearing date set for a hearing on plaintiffs’ requested injunctions, as the summary judgment motion implicates no new facts or law than those already before the court on the pending motions. The instant motion for summary judgment is intended to provide an additional procedural basis, if needed, for this court to dispose of this case promptly, as it does not appear that material matters remain in dispute.

for preliminary injunction, one from the undersigned counsel attesting to the documentary submissions made with the complaint, two from prominent human geneticists, three from prominent historians, and one from a former director of the United States Census Bureau. Plaintiffs remit herewith the additional sworn statements of plaintiffs Ashley Ramkishun, Samuel Sarfo, Amelia Spencer and Kendall Poole as Exhibit K. These couples did not join in the motion for preliminary injunction, as their wedding dates are not imminent as is that of plaintiffs Sophie Rogers and Brandyn Churchill. Between them, the sworn declarations confirm the accuracy of the discrete numbered averments set forth in the complaint addressing:

- \* The history of the racial classifications at issue,
- \* The implementation of racial classifications in Virginia,
- \* The practical and scientific disutility of conventional racial classification, and
- \* The circumstances and actions of the plaintiffs at issue.

Against the backdrop of the history and science set forth in the complaint, plaintiffs submit as their principal undisputed material facts (1) the offending statute and (2) the attorney general's response to this lawsuit published September 13, 2019. (Exhibit J.)

The code section at issue is simple and clear:

A. For each marriage performed in the Commonwealth, a record showing personal data, including but not limited to the age and race of the married parties, the marriage license, and the certifying statements of the facts of marriage shall be filed with the State Registrar as provided in this section.

B. The officer issuing a marriage license shall prepare the record based on the information obtained under oath or by affidavit from the parties to be married.

Va. Code Ann. §32.1-267.

The attorney general’s directive effectively – and correctly – concedes the case. The attorney general’s directive reflects his admission that: “*At a minimum*, any statute requiring a governmental official to deny a marriage license to an applicant who declines to provide information about his or her race would raise serious constitutional questions.” Exhibit J at 2 (emphasis added). That assessment, coupled with the attorney general’s directive that marriage licenses be issued even if an applicant’s race is not stated, constitutes evidence admissible, under Fed. R. Evid. 801, as an admission of a party opponent.<sup>5</sup> Plaintiffs respectfully submit that it is dispositive of the matters at bar. The lawsuit should stop now, rather than continuing to the same end pursuant to the usual pattern of civil litigation in this court.

#### Conclusion

The racial labeling requirement of §32.1-267 needs a mercy killing, not a side-step. If our state government is not prepared flatly to concede what is implicit in the attorney general’s directive – that the provision at issue is unconstitutional – it falls to this court to do so. For these reasons, the court should grant summary judgment to the plaintiffs, declare the race labeling provision at issue unconstitutional, and enter a permanent injunction barring defendants and their privies from requiring racial identification as a condition of receiving a license to marry and

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<sup>5</sup>Any attempt by the attorney general to argue that he has not found the racial labeling provision of the statute unconstitutional – an argument unlikely to be made to this court – will be in vain. His “available interpretation” of the statute’s terms amounts to suppression, by fiat, of what the statute plainly states. It likely violates the Virginia constitution as a breach of the separation of powers. And it cannot and does not guarantee that a successor attorney general will not “read” what he has read out of the statute – particularly when the unambiguous words are already there. These points are elaborated more fully in plaintiffs’ motion for a permanent injunction filed herewith.

requiring them to prepare and use marriage license application forms that do not request one's race.<sup>6</sup>

Respectfully submitted,

SOPHIE ROGERS, *et al.*,

By counsel

Dated: September 16, 2019

Counsel for Plaintiffs:

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<sup>6</sup>It is insufficient for the racial identification inquiry to remain but be labeled as “optional.” Virginia could just as well re-institute separate water fountains for “white” and “colored” but mark the designations as “optional.”

Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 16<sup>th</sup> day of September 2019, I electronically filed the foregoing Memorandum in Support of Plaintiffs' Motion for Summary Judgment with the clerk of the court, and served defendants as indicated below:

Via Overnight Courier:

Virginia State Registrar  
c/o Janet Rainey, State Registrar, or  
authorized recipient of process  
Virginia Department of Health  
OIM - Division of Vital Records  
2001 Maywill Street  
Richmond, VA 23218

Clerk, Arlington Circuit Court  
c/o Paul F. Ferguson, Clerk, or  
authorized recipient of process  
Arlington Circuit Court  
1425 North Courthouse Road, #6700  
Arlington, VA 22201

Clerk, Rockbridge Circuit Court  
c/o Michelle M. Trout, Clerk, or  
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Rockbridge Circuit Court  
20 South Randolph Street, #101  
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