

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 SUPPORTING PLAINTIFFS’ MOTION FOR
CONSOLIDATION OF HEARING ON MOTION FOR
PRELIMINARY INJUNCTION WITH DISPOSITION OF THE MERITS

Plaintiffs have moved this court for an order, pursuant to Fed.R.Civ.P. 65(a)(2), consolidating the adjudication of their pending motion for a preliminary injunction with the court’s disposition of the merits of this lawsuit, so as to permit this case to be concluded at the hearing scheduled for October 4, 2019.¹ In support of this motion, plaintiffs, noting that the Virginia attorney general publicly effectively conceded the case, respectfully submit as follows:

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, sets forth in detail the woeful history of racism and discrimination giving rise to

¹Plaintiffs are contemporaneously filing a motion for summary judgment to the same end.

this statutory command, and to 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.²

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.³ 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 label themselves by race in order to get a marriage license – something they seek 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. Citing case law

²None of the defendants was sued by name, only by title, plaintiffs believing that none of them supports the statutory scheme that they are nevertheless bound to serve by reason of their oaths of office.

³Since 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). As noted, plaintiffs have also filed for summary judgment.

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 provide information about his or her race would raise serious constitutional questions." Exhibit J at 2.

The instant motion is being filed one business day following the issuance of the attorney general's directive. In support of this motion plaintiffs incorporate by reference their previously-filed motion for a preliminary injunction and the documentary appendix submitted in support thereof.

This Court Should Complete What the Attorney General Has Started

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, Exhibit J, is a welcome immediate first step, particularly appreciated by Ms. Rogers and Mr. Churchill in light of their upcoming nuptials. Yet it is only a first step, given that the attorney general notes:

[T]here is an available interpretation of Code §32.1-267 that would permit a clerk to accept a marriage license even though one or both of the applicants declines to identify his or her race, and I have accordingly adopted that interpretation.

Exhibit J at 3. The attorney general's construction suffers from three serious infirmities that

cannot be interpreted out of the offending statute:

1. The attorney general’s “available interpretation” of the statute at issue cannot change what it says in so many words. The law expressly requires that racial identification be provided to the state registrar by circuit court clerks “*based on the information obtained under oath or by affidavit from the parties to be married.*” Va. Code Ann. §32.1-267(B) (emphasis added).⁴ The attorney general’s “reading” of this law amounts to suppression, by fiat, of what it plainly states.⁵ This prophylactic “reading” has no basis in law, logic or the English language. Either the statute requires the collection of racial labels, as it says it does, or it cannot do so because it is unconstitutional and cannot be enforced. Since the attorney general has punted on the issue, the constitutionality of this requirement is presented to this court, the attorney generals “available interpretation” notwithstanding.⁶

2. There is a second infirmity in the attorney general’s proposed attempt to avoid a constitutionally based decision: his action appears to violate Art. I §5 and Art. III §1 of the Virginia constitution, as a breach of the separation of powers that characterizes our state government. *See generally Taylor v. Worrell Ent. Inc.*, 242 Va. 219, 409 S.E.2d 136 (Va. 1991); *see also “Constitutional Nondefense in the States,”* 114 Colum. L. Rev 213 (March 2014) and

⁴Pending a change in the law or its nullification in pertinent part, a clerk of court might be subject to a *mandamus* petition requiring the approval only of applicants including a racial identification, as flatly required by §32.1-267.

⁵The attorney general’s directive elides the problem for his “reading” caused by Section (B), as though that provision did not exist.

⁶Is there also an “available interpretation” to nullify what is required in so many words by the Virginia Administrative Code at 12 Va. Admin. Code §5-550-130: “The record of marriage *** *shall contain* the following items: [itemization of other required entries,] *race*, [itemization of other required item]”? (Emphasis added.)

“Annual Survey of 2006: Commentary: Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General,” 41 U. Rich. L. Rev. 43 (2006). While as a practical and moral matter the attorney general’s action relative to this ignoble statutory provision may be applauded, as a legal matter his action amounts to dictating that the mandate of the General Assembly be ignored by the very state officials charged by oath to enforce it. This he may not do – at least not short of a frank declaration that the provision is unconstitutional and therefore cannot be lawfully enforced. The attorney general has left it to this court so to declare.

3. Finally, what an incumbent attorney general may “read” out of a statute, a successor may “read” back in – particularly when the unambiguous words are already there. One need look no further than the revocation by the current United States attorney general of many policies and procedures enacted by his predecessors under an earlier administration. The Virginia attorney general’s strained construction of a clear statutory mandate merely puts it into a zombie status eligible to do mischief in the future.⁷

Conclusion

The racial labeling requirement of §32.1-267 needs a mercy killing, not a side-step or avoidance lacking justification in law or the English language. 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, and those

⁷The General Assembly can revoke the racial labeling requirement. But it meets annually beginning on the second Wednesday in January, for 60 days in even-numbered years and for 30 days in odd-numbered years. People get married in October, November, December and early January.

elaborated in plaintiffs' memorandum in support of their preliminary injunction motion, the court should declare the race-labeling provision at issue unconstitutional, and enter a permanent injunction: (1) barring defendants and their privies from requiring racial identification as a condition of receiving a license to marry and (2) requiring them to prepare and use marriage license application forms that do not request one's race.⁸

Respectfully submitted,

SOPHIE ROGERS, *et al.*,

By counsel

Dated: September 16, 2019

Counsel for Plaintiffs:

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⁸It 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 16th day of September 2019, I electronically filed the foregoing Memorandum Supporting Plaintiffs' Motion for Consolidation of Hearing on Motion for Preliminary Injunction with Disposition of the Merits 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
authorized recipient of process
Rockbridge Circuit Court
20 South Randolph Street, #101
Lexington, VA 24450-2552

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