UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

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

MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE AND CORRECT ORDER

Plaintiffs, by counsel, have moved this court to enforce the court's memorandum order dated September 11, 2019 and to correct an error in the order. Defendants have advised that they take no position on the issue of correcting the error, but they have stated their intent to continue using a marriage license application form that requests – although it no longer requires – applicants to label themselves by race. In support of this motion, plaintiffs respectfully represents as follows:

Background

Plaintiffs brought suit challenging retention of Virginia's state-sanctioned racial categorizations in relation to the issuance of marriage licenses. Plaintiff's motion for summary judgment concluded with the following request for relief:

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

ECF 18 at 5-6 (emphasis added). On September 11, 2019, the court adjudicated both defendants' motion to dismiss this case and plaintiffs' motion for summary judgment. Denying defendants' motion to dismiss, the court held, *inter alia,* as follows regarding Virginia's race labeling provision on marriage applications:

> The Court finds that Va. Code Ann. §32.1-267(A) is unconstitutional as it denies Plaintiffs their rights to due process under the Fourteenth Amendment of the United States Constitution. *** This court ENJOINS the enforcement of Va. Code Ann. §32.267(A) to the extent it burdens individuals' fundamental right to marry. It is SO ORDERED.

ECF 50 at 19.

While counsel are in agreement that the court's September 11, 2019 order has the force of a final order, a difference of opinion has arisen regarding what the order prohibits by way of state action that "burdens individuals' fundamental right to marry." Defendants have confirmed to the undersigned that they intend to continue using the marriage license application form, introduced one week after suit was filed, that requests the applicants to label themselves by race, albeit on an optional basis. Believing that this flies in the face of both the letter and spirit of the court's memorandum order, plaintiffs move to enforce that order.[1]

[1]A good faith difference of opinion being apparently at issue, plaintiffs have not requested an order for defendants to show cause why they should not be held in contempt of this court's September 11, 2019 order. The court's clarification of the matter should prove sufficient.

The dispute between the parties emerges in the following context:

* By not contesting plaintiffs' summary judgment motion except on grounds of mootness, defendants have stipulated to the facts alleged in plaintiffs' complaint and to plaintiffs' experts' declarations regarding the perverse history and practical disutility of Virginia's historical fixation on racial identity.
* As the court noted, Slip op. at 17, defendants have expressly conceded the lack of any state interest in receiving information on the racial identity of marriage license applicants.
* In the face of the uncontested record before it, the court has found, with manifest justification, that "the statutory scheme is a vestige of the nation's and of Virginia's history of codified racialization." Slip op. at 6.

In the face of this record, defendants propose to maintain the very request for racial information reflective of a perverse past and concededly having no utility, on the basis of a construction of the statute at issue by the attorney general that the court has found to be "expressly at odds with its plain meaning." Slip op. at 16. This court has ruled that the "optional" option is no option at all, since Code Va. Ann. §32.1-267(A) says what it says, not what the attorney general says it says. Defendants' position is thus doubly untenable: first because the "optional" option is a figment of defendants' imagination that has no business being foisted on the statute or future applicants for marriage licenses, and second because this court *has already ruled on the matter*. The heart of this court's memorandum opinion is that the statute requires racial labeling. This constitutional infirmity is not cured by pretending otherwise. Defendants' interpretation of this court's memorandum order parallels their unique

construction of §32.1-67(A): in each case defendants have arrogated to themselves the right to interpret law as they please, regardless of what was written. Yet just as the General Assembly passed the law it passed, not defendants' alternative version, so too did this court on September 11, 2019 conclude the dispute. As Chief Justice Marshall observed: "It is emphatically the duty of the Judicial department to say what the law is." *Marbury v. Madsion,* 5 U.S. 137 (1803). Defendants are free to appeal this court's decision should they see fit to do so – but they cannot ignore it or pretend that it does not mean what it says.

Why Virginia should insist on the continued solicitation of Walter Plecker's benighted categories, historically prejudicial to non-white people as they are, is a mystery,[2] although not one this court need address. And all this is without reference to the fact that plaintiffs Ramkishun, Sarfo and Poole, none of whom is white, also brought claims under the Thirteenth Amendment challenging the racial labeling as constituting "badges and incidents of slavery." *Jones v. Alfred H. Mayer* 392 U.S. 409, 439-41 (1968).[3]

Plaintiffs request that the court issue a final order making clear what may and may not be done in light of its September 11, 2019 ruling. A proposed order is submitted herewith for such use as the court may have for it.[4]

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[2]On defendants' theory, Virginia could just as well re-introduce separate drinking fountains and entrances for "white" and "colored" and mark the designations "optional."

[3]Having ruled dispositively on the basis of all plaintiffs' Fourteenth Amendment claims, the court had no need to reach, and expressly did not reach, their other claims, including but not limited to the Thirteenth Amendment claim of the non-white plaintiffs.

[4]In addition to filing its 19-page opinion, the court did not separately enter a final order, or direct the clerk to enter judgment pursuant to Fed.R.Civ.P. 58(a). The clerk's office has advised the undersigned that absent direction from the court, no judgment will be entered.

(continued...)

Plaintiffs' counsel takes this opportunity to alert the court to a dropped sentence fragment or other error at 4 of the court's September 11 slip opinion. There, the court writes that as of 1790, "only 'free white persons' and 'aliens of African nativity and ... persons of African descent" could become naturalized. The addition of "aliens of African nativity and persons of African descent" took place only in 1870, mandated by the passage of the Fourteenth and Fifteenth Amendments. Act of July 14, 1870, ch. 254 §7. *See*, Complaint [ECF 1] at ¶18 and n. 3 at 8, and Jacobson Dec.[ECF 9-6], ¶3. Given, especially, the significance of the court's opinion and the fact that it is likely to be cited in the event of litigation in the few additional states that have statutory requirements for racial labeling in marriage license applications, it seems appropriate to correct this error.

Conclusion

For these reasons, the court should enter a final order specifying that defendants may not utilize a marriage license application form that mentions the applicant's race, and also correct the historical error referenced above. A proposed order is submitted for the court's consideration. Plaintiffs waive a hearing on this motion.

Respectfully submitted,

SOPHIE ROGERS, *et al*.,

By counsel

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[4](...continued)
Decrees in equity are included within "judgments." *See generally*, 10 *Moore's Fed. Prac.* 3rd ed. ,§54.02[1] at 54-20.

Dated: October 17, 2019

Counsel for Plaintiffs:

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Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 17th day of October 2019, I electronically filed the foregoing Memorandum in Support of Motion to Enforce and Correct Order with the clerk of the court.

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