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.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE COURT'S ORDER

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Introduction

Defendants' response – not an "opposition" – to plaintiffs' motion to enforce the court's order of October 11, 2019 is notable – and laudable – for its *procedural* candor. Defendants do not undertake to justify what appears to be Virginia's last remaining Jim Crow statute by "defending a requirement that ... a question [seeking racial identification] be asked." Response memo [ECF 58] at 1. Rather, noting that they seek "to fulfill their obligations under both state law and the Constitution," *id.,* and that they would "happily omit any inquiry about race from the [marriage license application] form, *id.* at 4, they join plaintiffs in asking the court to clarify the scope of its order of October 11, 2019 "either by expressly stating that continued use of the September 13 revised form complies with the Constitution or entering the order proposed by the plaintiff." *Id*. at 5. While defendants' uncertainty about their legal obligations seems odd, their declining to defend a statutory provision ruled unconstitutional by this court is appreciated. In this reply memorandum, plaintiffs will spell out why there is in fact no doubt about defendants' obligations. The short answer lies in (1) this court's analysis and conclusions regarding Va. Code. Ann. §32.1-267(A) set forth in its memorandum order – an adverse analysis and conclusions that defendants do not engage in their response, and (2) in Article VI, Clause II of the United States Constitution, *i.e.,* the supremacy clause.

Plaintiffs' motion to enforce was filed because defendants continue to use a marriage license application that requests an applicant's race but provides for a refusal to answer, which option is supposed to save the statute's constitutionality. Yet, as plaintiffs' motion to enforce the court's September 11, 2019 order [ECF 55] points out, the statute provision requesting racial labeling, *notwithstanding defendants' "optional" gloss previously submitted to the court ,* has

been ruled unconstitutional in pertinent part as violative of the Fourteenth Amendment of the United States Constitution. A United States district judge has so ruled, and that ruling concludes this matter, short of appeal.

Defendants' Position is Impermissibly
in Derogation of This Court's Ruling

This case was decided on an uncontested record consisting of the plaintiffs' verified complaint and authenticated exhibits, and numerous declarations and authenticated scholarly articles and attestations regarding the racially discriminatory history of the race-based inquiry at issue and the inaccuracy and disutility of conventional racial labeling. Defendants offered solely a mootness defense in their briefs and oral argument, the court having confirmed at the beginning of the October 4 hearing that no material facts remained in dispute.[1]

The only basis the defendants have ever claimed to justify the continued use of racial categorization on marriage applications is their theory that §32.1-267(A) requests but does not require applicants to label themselves by race. But this interpretation was rejected by the court as being "expressly at odds with its plain meaning." Mem. Order at 16. Thus, as this court has ruled, for a marriage license to be in compliance with the statutory requirements governing the issuance thereof, "applicants for marriage licenses still must disclose their race in order to be issued a marriage license." *Id*. Defendants do not – they cannot – claim that there is anything "unclear" about this ruling. Moreover, they have conceded that there is no legitimate

[1]An issue was momentarily raised as to whether all six plaintiffs had in fact applied for marriage licenses. Once this was established – *see* the complaint [ECF 1] at ¶64 and the plaintiffs' declarations appearing as Exhibit K to plaintiffs' motion for summary judgment [ECF 18-2] – the matter was resolved in plaintiffs' favor.

government interest served in asking the racial inquiry they propose to preserve. *See* Mem. Op. at 17 ("When asked by this Court at oral argument whether there was *any* state interest in this racial data, Defendants conceded there was not").

Despite the court's declaring the statutorily mandated racial inquiry unconstitutional, despite its sordid history and embarrassing continuing presence on Virginia's books, despite the conceded absence of any legitimate governmental interest in the requested data, and despite the absence of any authority other than §32.1-267(A) that the court has declared unconstitutional in pertinent part, defendants profess doubt as to whether they must delete the racializing question at issue from their marriage license applications. This very doubt, implicating defendants' willingness to place the continuing imprimatur of governmental legitimacy on a malign classification system conceded to be devoid of utility, effectively treats this court's October 11, 2019 ruling as a matter of inconsequence.[2] This is impermissible.

Defendants' position amounts to a repackaging of the mootness argument they lost. The court has ruled that:

* §32.1-267(A) requires applicants to state their race,
* the attorney general's construction of this provision is wrong as a matter of law,
* there is no government interest served by asking this question, and
* the mandatory race question is an unconstitutional burden on the right to marry.

Defendants can no longer invoke §32.1-267(A) as a basis for the inclusion of a racial inquiry, whether or not on an "optional" basis. Rather, it is their obligation to honor this court's opinion

[2]Plaintiffs previously noted that what is apparently at issue here is not defendants' deliberate violation of the court's ruling, but their professed uncertainty as to their obligations under law.

by accepting this court's ruling on the unambiguous and mandatory requirement of racial labeling appearing in the statute, and removing it from their marriage license applications, as plaintiffs specifically requested in their complaint and in their motion for summary judgment that was granted. Defendants' professed uncertainty about what to do in light of the court's ruling lacks basis in law or logic. What they should do – what they are required to do in light of the supremacy clause – is strike the offensive inquiry from the application.

Defendants Are Acting *Ultra Vires* in
Adding an Optional Gloss to the Law

Defendants have offered, and can offer, no lawful basis for retaining the race-labeling question, optional or not. The entirety of their present position is that they are "simply three government officials who are doing the best they can to fulfill their obligations under both state law and the Constitution." *Id*. at 1. This seems odd, given this court's adjudication of the unconstitutionality of the provision at issue and defendants' concession that the inquiry lacks all utility. But accepting defendants' posited uncertainty at face value, plaintiffs address it squarely: On what lawful basis can they imprint an optional gloss, invented out of whole cloth, onto a perfectly clear requirement enacted by the legislature? The answer is that they cannot. Doing so is manifestly beyond the scope of their lawful authority – doubly so, indeed, where their attempt has already been rejected by this court as unconstitutional.

At issue is a well established principle. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), the Supreme Court considered a presidential executive order for seizure of the nation's steel mills to contend with an alleged threat to national security. Noting that the

president's authority to issue his executive order "must stem either from an act of Congress or from the Constitution itself," *id*. at 585, the court concluded that no statute explicitly or implicitly authorized the seizure, and voided the order.

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. *** And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States ***."

Id. at 587-88. In *Harmon v. Brucker*, 355 U.S. 579 (1959), the secretary of the army discharged two enlisted men on a less than honorable basis, relying on their pre-induction activities rather than on their performance of their duties while in the army. Observing that the district court had authority "to construe the statutes involved to determine whether the respondent [secretary] did exceed his powers," *id*. at 582, the Supreme Court concluded that he had done exactly that:

> We think the word 'records,' as used in the statute, means records of military service, and that the statute, properly construed, means that the type of discharge to be issued is to be determined solely by the soldier's military record in the Army.

Id. at 583. Finding that the secretary acted outside the bounds of his authority, the court remanded the case for the men to receive honorable discharges.

Like its federal counterpart, the Virginia Constitution directs the executive branch, including the governor and the departments under the governor's direction – including the State Department of Health, of which defendant State Registrar is an official – to "take care that the laws be faithfully executed." *Va. Constitution,* art. V, §7. The governor may propose legislation, *id*., art. V, §5, but " [t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates." *Id.,* Art. IV §1.

The defendants cannot escape the force of the decisions in *Harmon* and *Youngstown Sheet & Tubing* by acting in a manner inconsistent with the General Assembly's language in § 32.1-267(A), which is not only clear but confirmed in its clarity by this court.

Long-standing principles are at issue here. In *Little v. Barreme*, 6 U.S. 170 (1804), President John Adams directed the seizure of ships coming *from* France, whereas federal law authorized the seizure only of ships going *to* France. An American naval captain having captured a Danish ship coming from a French port, the question was whether he could rely on the president's instructions as a defense against liability for his otherwise unlawful seizure. Chief Justice Marshall explained that "the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id*. at 179. The court nevertheless held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id*. The officer's only defense was legality, not good faith, and the legality in question was established by the law, not by the president's construction thereof or gloss thereon.

The instant case is *a fortiori* to *Harmon, Youngstown Sheet & Tubing,* and *Little.* As to the former two cases, defendants, who have admitted that the question at issue serves no legitimate governmental interest, cannot be heard even to believe that acting without such an interest would constitute a legitimate exercise of executive authority. And doing so with the effect of evading the judgment of an Article III court places such conduct on an even more untenable footing. As for *Little,* the instant case was never one for money damages, only about whether "the instructions of the executive could ... give a right." To that question this court, like Chief Justice Marshall, answered in the negative. This court has ruled that the law's racial

inquiry is (a) mandatory and (b) unconstitutional, and enjoined it. That is the end of the story, absent appeal.

The Court May, But Need Not, Reach Plaintiffs' Alternative Claims of Unconstitutionality

Plaintiffs respectfully submit that for the reasons set forth above, the court's ruling of October 11, 2019 is conclusive of the matter at hand, absent appeal which defendants are free to take if they see fit. The court did not reach, nor did it need to reach, any of plaintiff's alternative theories for contesting the race labeling requirements, since nothing has changed from the time it ruled on defendants' self-same submissions. In that connection, however, plaintiffs respectfully point out that defendants might lay their professed confusion to rest by considering the implications of the Thirteenth Amendment claim of plaintiffs Sarfo, Ramkishun, and Poole, none of whom is white.[3]

The provision of § 32.1-267 at issue reeks of its Jim Crow origins and is conceded by the defense to serve no purpose. As this court has summarized, "the statutory scheme is a vestige of the nation's and of Virginia's history of codified racialization." Mem. Order [ECF 50] at 6. It exemplifies the constitutionally offensive "badges and incidents of slavery," *Jones v. Alfred H.*

[3]Defendants' "understanding," response memo at 3, that plaintiffs "have abandoned (or at least elected not to pursue) any 'mere inquiry' theory," based on plaintiffs' characterizing that theory as "a mere distraction," has it upside-down, backwards and inside-out. It is *defendants' "mere inquiry" defense* that plaintiffs' styled "a mere distraction." What has been at issue in this lawsuit is not a lawyer's gloss on Va. Code Ann. §32.1-267(A), but the statute itself, which (as this court has confirmed) mandates racial identification. Given the court's ruling that the race labeling provision was mandatory and unconstitutional, plaintiffs' compelled speech and privacy claims – never addressed by defendants – remain alternative grounds for striking the requirement at bar, the "mere inquiry" defense notwithstanding.

Mayer, 392 U.S. 409, 431 (1968), which are to be extirpated from our laws and lives. It is unfortunate if this is not recognized for what it is, even by concededly well-meaning persons. "Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men." *Id.* at 445 (Douglas, J. concurring). The social stigma and constitutional offense engendered by defendants' imprimatur of racialization linked to the right to marry persists, regardless of whether the requirement to label oneself racially is mandatory or styled optional. The German government could just as well begin to offer optional yellow stars to be worn by Jews.

Conclusion

This court has ruled that the racial inquiry on Virginia's marriage license application is unconstitutional. Defendants, who would "happily omit any inquiry about race from the form," *id*. at 4, invite the court to consider entering plaintiffs' proposed order expressly mandating this result. *Id*. at 5. This court can – and, plaintiffs respectfully submit, should – make both defendants and plaintiffs – and many others – happy, by specifically directing that the Jim Crow provision here at issue be consigned to the legal dustbin. Plaintiffs' proposed order, or an alternative order of the court's own devising expressly directing that no racial inquiry appear on Virginia's marriage license application, should suffice.

Respectfully submitted,

SOPHIE ROGERS, *et al*.,

By counsel

Dated: October 25, 2019

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Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 25th day of October 2019, I electronically filed the foregoing Plaintiffs' Reply Memorandum In Support of Motion To Enforce Court's Order with the clerk of the court.

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