IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

HAL B. BIRCHFIELD and PAUL G. MOCKO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v. CASE NO. 4:15-cv-00615-RH/CAS

JOHN H. ARMSTRONG, in his official capacity as Surgeon General and Secretary of Health for the State of Florida, and KENNETH JONES, in his official capacity as State Registrar of Vital Statistics for the State of Florida,

Defendants.
_____/

ORDER CERTIFYING A CLASS

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held unconstitutional state laws prohibiting or refusing to recognize same-sex marriages. Prior to that time, Florida law prohibited same-sex marriages in Florida and did not recognize same-sex marriages lawfully entered in other jurisdictions. As a result, when a party to a same-sex marriage that was lawfully entered in

another jurisdiction died in Florida, the death certificate omitted any reference to the marriage and surviving spouse.

The State of Florida now has acquiesced in *Obergefell*, including by listing same-sex spouses on death certificates. But the State still refuses to correct any pre-*Obergefell* death certificate unless the surviving spouse obtains an individual court order approving the correction. In this action, the plaintiffs—survivors of same-sex spouses who died in Florida before the state recognized same-sex marriages—challenge the State's insistence on individual court orders.

I

The plaintiff Hal Birchfield lawfully married James Merrick Smith in New York in 2012. Mr. Smith died in Florida in 2013. The plaintiff Paul Mocko lawfully married William Gregory Patterson in California in 2014. Mr. Patterson died in Florida later that year.

At the time of those deaths, the Florida Constitution and Florida Statutes provided that marriage was a relationship between one man and one woman, that no same-sex marriage could be entered into in Florida, and that no same-sex marriage entered into elsewhere could be recognized in Florida, even if the marriage was lawful where entered. *See* Fla. Const. art. I, § 27; Fla. Stat. § 741.212; Fla. Stat. § 741.04(1).

Death certificates are issued in the jurisdiction where a person dies. As required by the later-invalidated Florida provisions that were then in effect, the death certificates for Mr. Smith and Mr. Patterson did not refer to their marriages and surviving spouses.

Prior to *Obergefell*, lower-court decisions called into question the constitutionality of the Florida same-sex-marriage provisions. *Obergefell* then settled the issue; the provisions are unconstitutional. Had Mr. Smith and Mr. Patterson died after *Obergefell*, the state would have issued death certificates noting their marriages and listing the surviving spouses. But the deaths occurred and death certificates were issued earlier. When the surviving spouses who were omitted from the certificates, Mr. Birchfield and Mr. Mocko, sought to have the death certificates corrected, the state said it could not correct a previously issued death certificate without an individual court order addressing the specific certificate.

Mr. Birchfield and Mr. Mocko filed this action on behalf of themselves and all others similarly situated. They named as defendants two state officials—first, the Surgeon General, who also holds the title of Secretary of Health, and second, the State Registrar of Vital Statistics. The Surgeon General is the head of the Department of Health, whose responsibilities include issuing death certificates.

The State Registrar directs the Office of Vital Statistics, a unit of the Department of Health responsible for preservation of vital records, including death certificates.

The plaintiffs have moved to certify a class and for summary judgment. This order certifies a class. A separate order grants summary judgment.

II

In certifying a class, a trial court must conduct a "rigorous analysis" to determine whether the requirements of Federal Rule of Civil Procedure 23 are satisfied. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The factual record, as opposed to "sheer speculation," must demonstrate that each requirement of Rule 23 has been met. *Vega*, 564 F.3d at 1267. A court must find that the class satisfies all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997).

III

The "burden of establishing each element of Rule 23(a)" rests with the party who moves to certify a class. *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 696 (S.D. Fla. 2004) (*citing London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003)). The Rule 23(a) elements are commonly referred to as "numerosity, commonality, typicality, and adequacy of representation." *Babineau*

v. Fed. Express Corp., 576 F.3d 1183, 1190 (11th Cir. 2009) (*quoting Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1187-88 (11th Cir. 2003)).

The numerosity element requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here the plaintiffs have submitted expert testimony that there are approximately 886 putative class members—surviving spouses of same-sex marriages in the period before January 2015. The expert based this conclusion on a detailed analysis of statistical and Census data on same-sex households. The count is not precise, but precision is not required. This number is in the ballpark.

To be sure, some of the surviving same-sex spouses are not affected by the challenged state policy. First, some may already have obtained individual court orders calling for correction of the relevant death certificate. But the number for whom this is true is probably small—and if it were large, the defendants could and surely would have provided the number. Second, some of the surviving spouses counted by the plaintiffs may not wish to have the relevant death certificate corrected or may not bother to apply for a correction, even if provided the opportunity. Even so, common sense suggests that many will apply if allowed to do so.

Whether the number of surviving same-sex spouses who will seek to correct a death certificate is 886 as the plaintiffs say or 500 or 100, the number is

sufficient. That number of affected individuals, coupled with their dispersion across the state of Florida, renders joinder of all members impracticable. *See, e.g.*, *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (affirming certification of a class of at least 31 known and other unknown geographically dispersed members); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. Unit A 1981) ("In order to satisfy his burden with respect to this prerequisite, a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.").

The commonality element requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This case is the paradigm of a case meeting that requirement. The case presents only a legal issue that equally affects every member of the proposed class.

The typicality element requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Here the plaintiffs' claims are typical of, and indeed identical to, the claims of the class.

The final 23(a) requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The record shows that Mr. Birchfield, Mr. Mocko, and their attorneys will fairly and adequately protect the interests of the class. The plaintiffs have no conflicting

interests with class members. And the attorneys have extensive experience with constitutional class actions and with claims of same-sex couples and other gay and lesbian individuals. *See* Fed. R. Civ. P. 23(g) (describing the standard for appointing class counsel).

The plaintiffs satisfy all of the 23(a) requirements.

IV

The analysis now turns to Rule 23(b). A court may certify a class when a plaintiff meets the requirement of any one of the 23(b) subsections; a plaintiff need not meet all three. Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This case is a paradigm of a (b)(2) class action. The defendants have refused to issue a corrected death certificate to any class member without an individual court order directing correction of the specific certificate. The basis of the defendants' position is a state statute and rule that apply to every class member in precisely the same way. The Supreme Court has said civil-rights cases of this kind are "prime examples" of (b)(2) class actions. *See Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

V

For these reasons,

IT IS ORDERED:

1. The motion to certify a class, ECF No. 22, is granted.

2. The named plaintiffs Hal Birchfield and Paul Mocko are designated as class representatives of a Rule 23(b)(2) class defined as follows:

> Each person (i) who entered into a valid marriage with a same-sex spouse in a jurisdiction that permitted the marriage, (ii) whose spouse died in Florida on or before January 6, 2015, (iii) for whose spouse a Florida death certificate was issued that did not recognize the marriage and list the surviving spouse, and (iv) who has not already obtained a court order to amend the death certificate to recognize the marriage and identify the surviving spouse.

3. Attorneys Karen Loewy, Stephanie Silk, Tara Borelli, and David Draigh are designated as class counsel.

SO ORDERED on March 23, 2017.

s/Robert L. Hinkle
United States District Judge