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

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

Plaintiffs,

versus

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.

CASE NO. 4:15-cv-00615

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Hal F. B. Birchfield and Paul G. Mocko, pursuant to Federal Rule of Civil Procedure 23 and Northern District of Florida Local Rule 23.1, respectfully move for an Order certifying this case as a class action under Federal Rules of Civil Procedure 23(b)(1)(A) and 23(b)(2), and appointing undersigned counsel to represent the certified class under Rule 23(g).

INTRODUCTION

The state of Florida refuses to take the simple step of amending death certificates, issued before Florida began to recognize marriage for same-sex

couples, to make them correct. The state unconstitutionally denies recognition to the Plaintiffs' and putative class members' lawful marriages to their same-sex spouses, as well as their status as surviving spouses, on the death certificates of their late spouses, unless those Plaintiffs and class members incur the burden and expense of obtaining individual court orders. These state officials persist in this position despite that both the United States Supreme Court and this Court have squarely concluded that a state's disrespect for the marriages of same-sex couples – both in general and specifically in the context of death certificates – violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), the Supreme Court held that laws barring same-sex couples from marriage both "burden the liberty of same-sex couples, and . . . abridge central precepts of equality," expressly rejecting the notion that a state may permissibly disregard a couple's marriage in death. In *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281, 1290 (N.D. Fla. 2014), *order clarified*, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015), this Court rejected the arguments made by Florida officials, including Defendant Armstrong, that Florida laws barring recognition of the marriages of same-sex couples survived constitutional review, holding that they violate the Due Process and Equal Protection Clauses and recognizing them as "an obvious pretext for discrimination" against same-sex couples.

Defendants refuse to remedy that discrimination, however, insisting that the burden to do so must be borne by those whose constitutional rights the state has already infringed. Yet it is Defendants who bear the responsibility for correcting their own actions in erasing Hal Birchfield's marriage to James Smith for all time, in listing Greg Patterson's spouse as "none" despite his lawful marriage to Paul Mocko, and in imposing on all surviving same-sex spouses the stigma and injury of unconstitutional discrimination against their marriages.

Defendants' refusal to amend these death certificates denies to surviving same-sex spouses across Florida the dignity and equality promised to them by the Constitution. This refusal is part and parcel of Defendants' "history of resistance" to clear judicial proclamations of the unconstitutionality of Florida laws denying equal recognition to the marriages of same-sex couples and demonstrates that Defendants have not "voluntarily brought [themselves] into compliance with *Obergefell*." *Brenner v. Scott*, No. 4:14cv107-RH/CAS, Order Granting Summary Judgment at 7-8 (N.D. Fla. Mar. 30, 2016). In light of these widespread harms, this Court should grant Plaintiffs' Motion for Class Certification because (1) the class is easily ascertainable by objective criteria; (2) the putative class consists of over 800 members; (3) there are questions of law or fact common to the class; (4) Plaintiffs' claims are typical—indeed identical—to the claims of absent class

members; and (5) Plaintiffs and class counsel will more than adequately represent the interests of the class.

The Court should certify a class under Rule 23(b)(1)(A) because, if the issues are litigated in more than one lawsuit, various courts might reach different conclusions with respect to the constitutional claims alleged and relief sought, yielding inconsistent outcomes, and there is no dispute that Plaintiffs seek only equitable relief. Similarly, the Court should certify a class under Rule 23(b)(2) because Plaintiffs seek only injunctive and declaratory relief to remedy the same constitutional wrong committed against the entire class.

FACTUAL BACKGROUND

Plaintiff Hal Birchfield and his husband, James Merrick Smith, shared a committed relationship for more than forty years (ECF No. 22-1 at 2, Declaration of Hal F. B. Birchfield). Hal and James legally married in New York in 2012 (*id.*). James passed away in 2013 (*id.* at 3). Similarly, Plaintiff Paul Mocko and his husband, William Gregory Patterson, shared a devoted relationship for twenty-six years (ECF No. 22-2 at 2, Declaration of Paul G. Mocko). Paul and Greg legally married in California in 2014 (*id.*). Greg passed away suddenly, only four months after their marriage, in 2014 (*id.* at 3). Because Florida refused to recognize the couples' marriages at the time of James's and Greg's death, their death certificates

do not identify them as having been married when they died, and do not identify Hal and Paul as surviving spouses (ECF No.22-1 at 3, 8; ECF No. 22-2 at 4, 10).

After the Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that a state's refusal to recognize a lawful marriage between same-sex spouses, including on a death certificate, violates the Fourteenth Amendment rights of due process and equal protection, Plaintiffs sought to have the state of Florida amend their husbands' death certificates to accurately reflect their lawful marriages (ECF No. 22-1 at 4; ECF No. 22-2 at 5-6). Defendants, however, insisted that all surviving same-sex spouses—before the state will correct their dead spouses' death certificates to accurately identify their marital status and surviving spouses—must incur the expense, delay, and burden of obtaining individual court orders (ECF No. 18 ¶ 2).

Thus, Plaintiffs filed this action against John 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, seeking declaratory and injunctive relief on behalf of themselves and the proposed class to remedy these constitutional violations. Plaintiffs seek to vindicate their rights, and the rights of all similarly situated Florida same-sex couples and surviving spouses, by (1) declaring unconstitutional Defendants' omission of all lawful same-sex spouses from death certificates issued by the State

of Florida before this Court's preliminary injunction took effect in *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), (2) enjoining Defendants from requiring that surviving same-sex spouses obtain a court order as a prerequisite to remedying Defendants' unconstitutional non-recognition of these lawful marriages and spouses on death certificates, and (3) requiring Defendants to issue corrected death certificates to surviving same-sex spouses upon request, without charging any fees that would otherwise be required to obtain an amended death certificate.

Plaintiffs propose the following class:

> All surviving spouses who (i) entered into valid marriages with same-sex spouses in a jurisdiction that permitted them to marry, (ii) whose spouses died in the state of Florida on or before January 6, 2015, (iii) whose marriages were not recognized by the state of Florida on their spouses' death certificates and who were not listed as spouses on those death certificates, and (iv) who have not already obtained court orders to amend the death certificates for their deceased spouses in order to have their marriages and their statuses as spouses respected on those death certificates.

For the reasons shown below, the Court should grant Plaintiffs' Motion for Class Certification.

ARGUMENT

The Court should certify this case as a class action under Federal Rules of Civil Procedure 23(a), 23(b)(1)(A), and 23(b)(2). As shown below, the requirements of Rule 23(a) are met because: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact

common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. This action should be certified as a class action under Rules 23(b)(1) and 23(b)(2) because Plaintiffs seek only injunctive and declaratory relief, and the prosecution of separate actions would create a risk of inconsistent adjudications.

I. THE PROPOSED CLASS IS EASILY ASCERTAINABLE

As a threshold matter, Plaintiffs satisfy Rule 23's implicit requirement that the proposed class be "adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). A proposed class is sufficiently definite if its members can be ascertained by reference to objective criteria. *See Bush v. Calloway Consolidated Gro. River City, Inc.*, 2012 WL 1016871, at *4 (M.D. Fla. March 26, 2012). Such is the case here, where the proposed class is defined as:

> All surviving spouses who (i) entered into valid marriages with same-sex spouses in a jurisdiction that permitted them to marry, (ii) whose spouses died in the state of Florida on or before January 6, 2015, (iii) whose marriages were not recognized by the state of Florida on their spouses' death certificates and who were not listed as spouses on those death certificates, and (iv) who have not already obtained court orders to amend the death certificates for their deceased spouses in order to have their marriages and their statuses as spouses respected on those death certificates.

(ECF No. 1 ¶ 19). This proposed class is neither "amorphous [n]or imprecise," *Bush*, 2012 WL 1016871, at *4, and members of the class easily can be ascertained by reference to the objective factors in the class definition. Thus, Plaintiffs "have sufficiently described the class to be certified." *Pottinger v. City of Miami*, 720 F. Supp. 955, 957 (S.D. Fla. 1989).

A class also is ascertainable when class members can be "identified in an administratively feasible way," through a "manageable process that does not require much, if any, individual inquiry." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) (quotation omitted). In fact, class members could be identified very simply by their providing to the Department both the original erroneous death certificate and a certified copy of the couple's marriage certificate. These two vital records would provide all of the information necessary to demonstrate membership in the class: the existence of a valid marriage between same-sex spouses, a date of death prior to January 6, 2015, and lack of recognition for the marriage and same-sex spouse on the original death certificate. Furthermore, these certified documents are the type of authenticated government records that the Department itself both issues and accepts for purposes of correcting erroneous death certificates. *See* Florida Department of Health, *Instructions for Correction of Certificate of Death,* http://www.floridahealth.gov/certificates/certificates/Amendments-Corrections/_documents/DH_670_

Instructions.pdf, at 2. In other words, not only is there an administratively feasible method for class members to demonstrate their membership in the class, but it would not require the Bureau to examine anything other than the documents it already accepts to amend death certificates. "That task does not become more administratively complex simply because some of those couples are of the same sex." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 395 (D. Mass. 2010) (*aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012)). Thus, the proposed class is ascertainable.

II. THE PROPOSED CLASS MEETS THE CRITERIA OF RULE 23(a)

A. The Proposed Class Is Sufficiently Numerous

Rule 23(a)(1) requires that the class be "so numerous that joinder of all parties is impractical." Fed. R. Civ. P. 23(a)(1). Although there is no fixed number of putative class members necessary to satisfy numerosity, the Eleventh Circuit has indicated that a class of more than 40 is generally sufficient. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). Here, Plaintiffs have submitted expert testimony identifying approximately 886 putative class members, based on a detailed analysis of statistical and Census data on same-sex households (*see* ECF No. 22-3 at 6, Declaration of M.V. Lee Badgett). The large number of putative class members, coupled with their geographic diversity across the entire state of Florida, "renders joinder of all members impracticable," and

Plaintiffs easily meet the numerosity requirement of Rule 23(a)(1). *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996) (plaintiffs need only demonstrate "some evidence or reasonable estimate of the number of purported class members").

B. <u>There Are Questions of Law or Fact Common to the Class</u>

Rule 23(a)(2)'s commonality requirement "demands only that there be 'questions of law or fact common to the class.'" *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009). The "threshold for commonality is not high," *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003), and "[e]ven a single [common] question will do." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011).

The Complaint identifies questions of law or fact common to the class, including whether the refusal by DOH to issue amended death certificates to remedy its non-recognition of decedents' marriages to same-sex spouses absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order:

> (1) violates the due process guarantee of the Fourteenth Amendment of the United States Constitution by unconstitutionally infringing on the liberty interests of married same-sex spouses in the fundamental right to marry; and

> (2) violates the equal protection guarantee of the Fourteenth Amendment of the United States Constitution by discriminating against married same-sex spouses in the exercise of a fundamental right and on the basis of their sexual orientation, sex, and status as members of married same-sex couples, all without adequate justification.

(ECF No. 1 at 11-12). These issues will "generate common answers apt to drive the resolution of the litigation," and the injunctive and declaratory relief sought in this action will resolve the class claims "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The issues here are "susceptible to class-wide proof," and the commonality requirement is met. *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2011).

C. <u>Plaintiffs' Claims Are Typical of the Class</u>

For the same reasons, Plaintiffs meet Rule 23(a)(3)'s typicality requirement. *See Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir. 1985) ("The commonality and typicality requirements of Rule 23(a) tend to merge") (internal quotations marks omitted). Typicality requires "a sufficient nexus . . . between the claims of the named representatives and those of the class at large." *Vega*, 564 F.3d at 1275 (quoting *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008)). Specifically, "the claims of the class representatives must arise from the same events, practice, or conduct, and [be] based on the same legal theory as those of the other class members." *Grillasca v. Hess Corp.*, 2007 WL 2121726, at *11 (M.D. Fla. July 24, 2007) (citing *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.

1985)). Like commonality, the "test for typicality . . . is not demanding." *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996).

There is no question that Plaintiffs' claims are typical. Indeed, they align identically with those of the putative class members because they arise from Defendants' statewide policy and practice to refuse to issue amended death certificates to remedy the state's unconstitutional non-recognition of marriages of same-sex couples unless a surviving spouse incurs the expense, delay, and burden of obtaining a court order (*see* ECF No. 18 at 13-14). Plaintiffs' claims and the claims of absent class members also share the same legal foundation, namely that Defendants' conduct violates the Plaintiffs' and putative class members' due process and equal protection rights under the Fourteenth Amendment. Thus, Plaintiffs "possess the same interest and suffer the same injury as the class members." *Murray*, 244 F.3d at 811 (typicality is met where there is a "strong similarity of legal theories").

D. <u>Plaintiffs Adequately Represent the Class</u>

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), which "involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and of whether plaintiffs have

interests antagonistic to those of the rest of the class." *Griffin*, 755 F.2d at 1533. Both requirements are met here.

Class counsel easily satisfies the adequacy requirement. Plaintiffs are represented by Lambda Legal Defense and Education Fund, Inc., and White & Case LLP. These organizations, and counsel involved in this case, have extensive experience litigating complex matters and class actions, including class actions challenging violations of federal constitutional law, and all have significant experience litigating on behalf of same-sex couples and gay and lesbian individuals seeking recognition of their civil rights at both the local, state, and federal levels (*see* ECF Nos. 22-4, 22-5, declarations and resumes of Plaintiffs' counsel). Plaintiffs' counsel also have expended significant time and resources identifying and researching Plaintiffs' claims in the case, and will continue to commit substantial resources to the representation of the class. (*see* ECF No. 22-4 ¶¶ 4, 9; ECF No. 22-5 ¶¶ 4-5). Thus, class counsel satisfies Rule 23(g), which requires the Court to appoint class counsel at the time of certification, and that the Court consider (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," (3) "counsel's knowledge of the applicable law," and (4) the "resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Plaintiffs also will be adequate class representatives. The adequacy of class representatives "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between [them] and the class; and (2) whether [they] will adequately prosecute the action." *Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 678-79 (S.D. Fla. 2007) (quoting *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)). Here, Plaintiffs have no interests in conflict with the class. Indeed, the injunctive and declaratory relief they seek will benefit the entire class in the same manner—granting recognition of their marriages and status as surviving spouses on their late spouses' death certificates. And Plaintiffs have a strong personal stake in the case, are deeply invested in the outcome, and are committed to participating actively in the litigation on behalf of all other similarly situated surviving spouses in Florida (*see* ECF No. 22-1 at 5; ECF No. 22-2 at 7). Thus, Plaintiffs satisfy the adequacy requirement.

III. THE CLASS SHOULD BE CERTIFIED UNDER BOTH RULES 23(b)(1)(A) AND 23(b)(2)

Rule 23(b)(1)(A) provides for class adjudication where there is a risk that inconsistent or varying judgments in separate lawsuits "would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Only actions seeking declaratory or injunctive relief can be certified under Rule 23(b)(1)(A). *In re Dennis Greenman Secs. Litig.*, 829 F. Supp. 1539, 1545 (11th Cir. 1987). This case is properly certified under Rule

23(b)(1)(A) because, if the issues are litigated in more than one lawsuit, various courts might reach different conclusions with respect to the constitutional claims alleged and relief sought, yielding inconsistent outcomes. And there is no dispute that Plaintiffs seek only equitable relief.

Similarly, Rule 23(b)(2) provides for class adjudication where "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). Such is the case here, where Plaintiffs seek only injunctive and declaratory relief to remedy the same constitutional wrong committed against the entire class. Moreover, the Supreme Court has noted that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination"—precisely the case here—are "prime examples" of the type of class envisioned by Rule 23(b)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

The Court should certify a class under both Rules 23(b)(1)(A) and 23(b)(2).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Class Certification and enter an order certifying the following class under Federal Rules of Civil Procedure 23(b)(1)(A) and 23(b)(2):

> All surviving spouses who (i) entered into valid marriages with same-sex spouses in a jurisdiction that permitted them to marry, (ii) whose spouses died in the state of Florida on or before January 6, 2015, (iii) whose marriages were not recognized by the state of Florida on their spouses' death certificates and who were not listed as spouses on those death certificates, and (iv) who have not already obtained court orders to amend the death certificates for their deceased spouses in order to have their marriages and their statuses as spouses respected on those death certificates.

DATED: April 4, 2016

Respectfully submitted,

/s/ David P. Draigh

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LOCAL RULE 7.1 CERTIFICATION OF ATTORNEY CONFERENCE

Pursuant to N.D. Fla. Local Rule 7.1(C), I hereby certify that Plaintiffs complied with the attorney-conference requirement of Local Rule 7.1(B) prior to the filing of this motion. The parties have conferred in good faith, and will continue to do so, concerning the possibility of an early resolution to this case. At this time, however, Defendants do not consent to the relief sought in this motion.

By: */s/ David P. Draigh*
David. P. Draigh

LOCAL RULE 7.1(F) CERTIFICATION OF WORD LIMIT

Pursuant to N.D. Fla. Local Rule 7.1(F), I certify that this memorandum of law is in compliance with the Court's word limit. According to the word processing program used to prepare this memorandum, the memorandum contains 3,424 words.

By: */s/ David P. Draigh*
David. P. Draigh

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System this 4th day of April, 2016, and thereby served on all counsel of record.

By: */s/ David P. Draigh*
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