GREENBERG TRAURIG

MEMORANDUM

To: FACC

From: Fred Baggett, Esq.
John Londot, Esq.
Hope Keating, Esq.
Michael Moody, Esq.

Date: December 15, 2014

Re: Addendum to July 1, 2014 Memorandum

Background

On July 1, 2014 our firm provided you with a memorandum, pursuant to your request, detailing the obligations of Florida's clerks of court in light of the possibility that either Florida's state courts or the United States District Court for the Northern District of Florida would find Florida's same-sex marriage ban unconstitutional. A copy of our July 1, 2014 memorandum is attached hereto.

In the memorandum, we concluded that "[t]he likelihood of a near-future invalidation of Florida's same-sex marriage ban, as set forth in sections 741.212 and 741.04(1), Florida Statutes, and article I, section 27 of the Florida Constitution, appears strong." We further concluded:

> Clerks who are not named defendants in the litigation would not technically be bound by a decision of the Northern District of Florida, or by the circuit courts. While such Clerks might feel public pressure to follow the guidance of the decision of a court of competent jurisdiction (but no precedential authority), Florida's same-sex marriage ban would still be in place unless they were named parties in one of the lawsuits striking the ban. Thus, issuing same-sex marriage licenses would place them at risk of criminal violation of Florida's same-sex marriage ban – if and until the ban is invalidated by a Florida district court of appeal (absent inter-district conflict), the Florida Supreme Court, or the U.S. Supreme Court.

Our conclusion was based on rules of law that a person who is not a party to the litigation cannot be bound by a trial court's order or injunction, and that a federal district court's order (or a Florida circuit court's order) does not have binding precedential effect on other courts, state or federal.

In the memorandum we specifically discussed the consolidated cases of *Grimsley v. Scott,* Case No. 4:14-cv-00107-RH/CAS, and *Brenner v. Scott,* Case No. 4:14-cv-138-RH/CAS, which were then pending in the United States District Court for the Northern District of Florida. On August 21, 2014, Judge Hinkle entered his *Order Denying Motions to Dismiss, Granting a Preliminary Injunction, and Temporarily Staying the Injunctions* ("Order"). In the Order, Judge Hinkle held "marriage is a fundamental right as that term is used in cases arising under the Fourteenth Amendment's Due Process and Equal Protection Clauses, that Florida's same-sex marriage provisions thus must be reviewed under strict scrutiny, and that, when so reviewed, the provisions are unconstitutional." Judge Hinkle awarded injunctive relief, in pertinent part, directing that the Washington County Clerk issue a marriage license to the two un-wed plaintiffs, as follows:

> The defendant Clerk of Court of Washington County, Florida, must issue a marriage license to Stephen Schlairet and Ozzie Russ. The deadline for doing so is the later of (a) 21 days after any stay of this preliminary injunction expires or (b) 14 days after all information is provided and all steps are taken that would be required in the ordinary course of business as a prerequisite to issuing a marriage license to an opposite-sex couple. The preliminary injunction set out in this paragraph will take effect upon the posting of security in the amount of $100 for costs and damages sustained by a party found to have been wrongfully enjoined. The preliminary injunction binds the Clerk of Court and his officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

Order, ¶ 6. Thus, while the Order declares Florida's same-sex marriage ban unconstitutional, the injunctive relief granted by Judge Hinkle was specific to the parties before the court.

Judge Hinkle entered a stay of the injunction pending appeal, but the stay expires at the end of the day on January 5, 2015. In light of the pending expiration of the stay, you have now requested that we specifically address the Order and the scope of its application. Our evaluation of this issue requires an analysis of (1) whether Judge Hinkle's injunctive relief applies to clerks of court who were not a party to the Northern District case, and (2) whether other courts in Florida are bound by Judge Hinkle's ruling so as to prevent the prosecution of non-party clerks of court. Significantly, unlike other states that have imposed bans on same-sex marriage, Florida imposes criminal penalties specifically on clerks of court who issue same-sex marriage licenses.

Analysis

Scope of Injunctive Relief

It is a general principle of law, derived from federal and state due process requirements, that a person is not bound by a trial court's judgment in litigation in which he or she is not designated as party or to which he or she has not been made a party by service of process.

Taylor v. Sturgell, 553 U.S. 880, 884 (2008); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd,* 484 U.S. 97, 104 (1987). In other words, a trial court does not have jurisdiction or power over a non-party. An injunction binds only parties to a proceeding, the parties' officers, agents, servants, employees, and attorneys, and other persons acting in concert or participation with the parties with regard to property that is the subject of the injunction. *Alderwoods Grp., Inc. v. Garcia,* 682 F.3d 958, 971-72 (11th Cir. 2012); *Le Tourneau Co. of Ga. v. N.L.R.B.,* 150 F.2d 1012, 1013 (5th Cir. 1945)[1]; Fed. R. Civ. P. 65(d)(2). Notably, it has been specifically held that an injunction against a single state official sued in his official capacity does not enjoin all state officials. *Dow Jones & Co., Inc. v. Kaye,* 256 F.3d 1251, 1255 n.3 (11th Cir. 2001) ("An injunction against a single state official sued in his official capacity does not enjoin all state officials from the prohibited conduct.").

Additionally, every injunction must state in specific terms and reasonable detail the conduct it restrains or requires. *Garrido v. Dudek,* 731 F.3d 1152, 1159 (11th Cir. 2013); Fed. R. Civ. P. 65(d)(1). "The specificity requirements of Rule 65(d) are designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Garrido,* 731 F.2d at 1159.

In *Grimsley* and *Brenner,* the only clerk of court who was a party to the case in the Northern District, and over whom Judge Hinkle had jurisdiction, was the Washington County Clerk. In this regard, Judge Hinkle specifically enjoined only the Washington County Clerk with regard to the issuance of marriage licenses to same-sex couples. While we recognize that there is case law suggesting that a government official may abide by an order of a federal district court issued in a case to which he or she was not a party, we have uncovered no case law stating that a non-party official, or any other non-party, is bound by such order.[2] Therefore, we do not

[1] Decisions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent for courts of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[2] Cases have been cited by others for the proposition that government officials who are not parties to an action are obligated to abide by a trial court's ruling declaring a statute unconstitutional. However, such cases do not state that non-party officials are bound by a trial court's order. Nor do the suggested cases involve a statute – like the statute at issue here – that specifically criminalizes the conduct involved. *See Made in the USA Found. v. United States,* 242 F.3d 1300, 1309-11 (11th Cir. 2001) (in analyzing plaintiffs' standing, which involved question of whether the President could be ordered to take certain acts, and in finding standing appropriate because lower executive branch officials would be bound by decision, the court observed in dicta "we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though <u>they would not be directly bound by such determination.</u>") (quoting four Justices in *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (emphasis added) (*and see Franklin*, 505 U.S. at 825 expressly disagreeing with the four

interpret the Order to mean that any clerk other than the Clerk of Washington is bound by it or obligated to abide by it.

Also, we do not believe any clerk other than the Washington County Clerk would be clearly protected by the preemptive effect of the Order from criminal prosecution in another court. As set forth below, the greater weight of authority shows that the Order is not binding precedent on any other court.

Justices' view that an "'authoritative interpretation of the census statute and constitutional provision' rendered by the District Court will induce the President to submit a new reapportionment") (Scalia, J., partially concurring)); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 758 n.16 (10th Cir. 2010) (holding that partial relief is enough to afford standing where complete relief is unavailable, and noting in dicta, "In any event 'we may assume it is substantially likely that [other] officials would abide by an authoritative interpretation of the…provisions…even though they would not be directly bound by such a determination.'") (emphasis added) (citing *Utah v. Evans*, 536 U.S. 452, 460 (2002)); *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (affirming decision that the Los Angeles County Bar Association had standing to pursue constitutional challenge to a statute prescribing the number of judges in Los Angeles County stating that "[w]ere this court to issue the requested declaration, we must assume that it is substantially likely that the California legislature, although its members are not all parties to this action, would abide by our authoritative determination.") (emphasis added) (citing *Franklin,* 505 U.S. at 803). In each of the cited cases, the courts' assumption that other non-party officials would comply with the trial courts' orders involved officials with the ability or discretion to lawfully comply, which is not the case here.

Similarly, other suggested cases describing plaintiff class qualifications do not provide protection to non-parties faced with criminal liabilities. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) (holding that certifying the plaintiff class was appropriate because the case presented an as-applied constitutional challenge, but observing in dicta that a plaintiff class may not be required where a statute is challenged as facially unconstitutional and assuming that if the court declares the statute or regulation unconstitutional the enforcing government officials will discontinue the statute's enforcement); *Soto-Lopez v. New York City Civil Serv. Comm'n*, 840 F.2d 162, 168-69 (2d Cir. 1988) (holding that after Supreme Court had declared a statute unconstitutional, it was appropriate to grant injunctive relief to prohibit enforcement of the statute against other non-party plaintiffs without the requirement of the filing of a class action lawsuit against the defendants) (citing *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958), which confirmed that the prior Supreme Court precedent of *Brown v. Board of Education*, 347 U.S. 483 (1954), could not be defied by state officials); *Mills v. Dist. of Columbia*, 266 F.R.D. 20, 22 (D.D.C. 2010) (denying a motion for class certification in a facial challenge where enforcement authority was the defendant).

In sum, none of these cases support the proposition that a non-party Florida clerk does not remain subject to Florida's criminalization of clerks' issuance of marriage licenses to same-sex couples, pending binding appellate authority.

Precedential Value of a Federal District Court Holding a State Law Unconstitutional

The Florida Supreme Court has held on multiple occasions that a federal district court's ruling that a Florida statute is unconstitutional is not binding on a state court. *E.g., Merck v. State,* 124 So. 3d 785, 803 (Fla. 2013) (finding a federal district court's determination that Florida's death penalty procedures are unconstitutional was not binding on the Florida Supreme Court); *Roche v. State,* 462 So. 2d 1096, 1099 n.2 (Fla. 1985) (decision of federal district court that Florida statute relating to administrative searches of places of business and vehicles in the cause of agricultural inspections was unconstitutional was not binding on Florida state courts); *State v. Dwyer,* 332 So. 2d 333, 335 (Fla. 1976) (decision of federal court of appeals finding Florida's disorderly conduct statute unconstitutional was not binding on Florida trial court); *Bradshaw v. State,* 286 So. 2d 4, 6-7 (Fla. 1973) ("It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a state."), *cert. denied,* 417 U.S. 919 (1974). *See also Titus v. State,* 696 So. 2d 1257, 1262 (Fla. 4th DCA 1997) ("[A] Florida District Court of Appeal takes its direction on matters of federal constitutional law first from the United States Supreme Court and, in the absence of definitive precedent from that Court, from the Florida Supreme Court"), *approved,* 702 So. 2d 706 (Fla. 1998). As pointed out in our July 1 memorandum at footnote six, the Eleventh Circuit Court of Appeals has consistently upheld this rule of law. *See, e.g., Doe v. Pryor,* 344 F.3d 1282, 1286 (11th Cir. 2003) ("The only federal court whose decisions bind state courts is the United States Supreme Court") (citing *Glassroth v. Moore,* 335 F.3d 1282, 1302 n.6 (11th Cir. 2003) ("[S]tate courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal.") (citing *Arizonans for Official English v. Arizona,* 520 U.S. 43, 58 n.11 (1997))).

Furthermore, a decision of a federal district court judge is not binding precedent on either a federal district court in another jurisdiction, a federal district court or judge in the same jurisdiction, or even upon the same judge in a different case. *Camreta v. Greene,* 131 S.Ct. 2020, 2033 n.7 (2011); *Am. Elec. Power Co. v. Connecticut,* 131 S.Ct. 2527, 2540 (2011).

Therefore, because Judge Hinkle's decision is not binding on another court, state or federal, it unfortunately does not provide a clerk of court who was not a party to the case in the Northern District with protection from being criminally penalized in another court for issuing marriage licenses to same-sex couples.[3]

[3] Despite our conclusion regarding the non-binding precedential effect of Judge Hinkle's Order on other courts, as we pointed out in our July 1, 2014 memorandum, a Florida district court of appeal decision pertaining to the same-sex marriage ban would have considerable precedential value. If a Florida district court of appeal affirms a state court trial court's invalidation of the ban, we believe that such decision would bind all Florida trial courts in the absence of contrary precedent from another district court of appeal or the Florida Supreme Court. "The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme] Court. Thus, in the absence of interdistrict conflict,

Conclusion

We realize that it may seem to many that Judge Hinkle's federal district court ruling that Florida's same-sex marriage ban is unconstitutional and violates fundamental rights would permit all Florida clerks of court to lawfully issue marriage licenses to same-sex couples. However, as discussed above, our review of the law indicates that an order and injunction issued at the federal trial level is not binding on any person, including a clerk of court, who is not a named party in the action. Nor does such a ruling bind any other court.

Thus, we remain of the opinion that clerks of court who were not parties to the Northern District case are not bound by Judge Hinkle's Order – or protected by it. Clerks are subject to Florida's criminal penalties for the issuance of marriage licenses to same-sex couples. Until such time as there is a binding appellate ruling (*see* footnote 3, *supra*), we are constrained to advise that despite the Order, clerks remain exposed to Florida's apparently unique criminalization of the issuance of marriage licenses to same-sex couples.

district court [of appeal] decisions bind all Florida trial courts." *Pardo v. State,* 596 So. 2d 665, 666 (1992) (citing *Stanfill v. State,* 384 So. 2d 141, 143 (Fla. 1980)).