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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JONELL EVANS, STACIA IRELAND, MARINA GOMBERG, ELLENOR HEYBORNE, MATTHEW BARRAZA, TONY MILNER, DONALD JOHNSON, and CARL FRITZ SHULTZ, Plaintiffs, v. STATE OF UTAH, GOVERNOR GARY HERBERT, in his official capacity; and ATTORNEY GENERAL SEAN REYES, in his official capacity, Defendants.	**DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND MEMORANDUM IN SUPPORT** Case No. 2:14-cv-00055-DAK Judge Dale A. Kimball

MOTION

Defendants the State of Utah, Governor Gary Herbert, and Attorney General Sean Reyes, ("Defendants" or the "State" or the "State of Utah") by and through counsel, Joni J. Jones and Kyle Kaiser, Assistant Utah Attorneys General, and Parker Douglas, General Counsel and Chief of Staff, hereby move for partial dismissal of Plaintiffs' Complaint. In particular, Defendants move to dismiss the First Cause of Action as it seeks relief based on Utah constitutional or statutory law, and because the Utah constitution plainly and clearly prohibits such relief. Defendants also Move to Dismiss Plaintiffs' Third Cause of Action, based on a state court rule of procedure and is not applicable in federal court. Assuming that Plaintiffs may continue to maintain a cause of action pursuant to a state rule of procedure, they have not fulfilled the prerequisites, and their claim also fails because Plaintiffs have another adequate remedy—the claim for injunctive relief asserted in their Second Cause of Action. Defendants move to dismiss the Fourth Cause of Action because a request for declaratory judgment is a remedy and not a separate claim for relief. Accordingly, Plaintiffs First, Third, and Fourth causes of action fail to state a claim, and the State's Motion to Dismiss should be granted.

MEMORANDUM

INTRODUCTION AND BACKGROUND

The following facts, drawn from Plaintiffs' Complaint or taken from sources that may be judicially noticed, form the basis of the State's motion.

1. Plaintiffs are four same-sex couples who obtained marriage licenses and had their marriage solemnized in Utah between December 20, 2013 and January 6, 2014. (Pls.' Compl. ¶¶ 1, 46, 59, 72, 83.)

2. The marriage licenses were issued because on December 20, 2013, U.S. District Judge Robert Shelby ruled that same-sex couples have a fundamental right to marriage under the Federal Constitution. (*Id.* ¶¶ 10–11); *see also* *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874, at * 30 (D. Utah Dec. 20, 2013). The court order declared Article I, § 29 of the Utah Constitution, and Utah Code §§ 30-1-2 and 30-1-4.1, unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and enjoined the state from enforcing those provisions and any statutes and regulations so related. (Pls.' Compl. ¶¶ 10–11, ¶16.)

3. To ensure compliance with the Court's ruling, county clerks in Utah either chose to, or were instructed to, issue marriage licenses to same-sex couples. (Pls.' Compl. ¶ 12, 19, 20, 22.)

4. The State of Utah appealed the district court's ruling, and repeatedly requested orally and in writing a stay of the ruling on the date of its issue. (Pls.' Compl. ¶¶ 13, 15, 16, 17, 21).

5. On December 31, 2013, the State filed a request for stay with the United States Supreme Court. *See* Docket, *Herbert v. Kitchen*, 13A-687 (Dec. 31, 2013), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a687.htm (last visited Feb. 26, 2014). Pursuant to Supreme Court rules, the motion for stay was filed with Justice Sotomayor, who referred the motion to the entire Court. On January 6, 2014, the Supreme Court issued a stay, stating:

> Application for stay presented to Justice SOTOMAYOR and by her referred to the Court granted. Permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13-cv-217, on

> December 20, 2013, stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

Application Granted by the Ct., *Herbert v. Kitchen*, No. 13A-687, 2014 WL 30367 (orders Jan. 6, 2014).

6. Plaintiffs' First Cause of Action alleges a violation of Article I, Section 7—the Due Process Clause—of the Utah Constitution. (Pls.' Compl. ¶ 99.) It seeks, among other things, a declaration that Plaintiffs' marriages are "valid" under Utah law, that the State must "continue to recognize" Plaintiffs' marriages, and that the State "must in all respects treat [Plaintiffs] as married," and requests an injunction be issued affording Plaintiffs "with all of the protections and responsibilities given to all married couples under Utah law." (Pl.'s Compl. at 31–32 ¶¶ A, D.)

7. Plaintiffs Third Cause of Action seeks extraordinary relief pursuant to Utah Rule of Civil Procedure 65B. (Pls.' Compl. ¶¶ 123–24, 135.) Plaintiffs have not pleaded that they have filed an undertaking or provided notice of their claim to the Attorney General. *See* Utah R. Civ. P. 65B(c)(1).

8. Plaintiffs' Fourth Cause of Action asserts a separate claim for a Declaratory Judgment. Plaintiffs request that the Court declare that the State "must continue to recognize the marriages by all same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013 and January 6, 2014," that the State "must withdraw its Directive not to recognize the marriages…." and that "the reimplementation of Amendment 3 and [related laws] … does not retroactively strip recognition from the same-sex marriages entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014." (Pls.' Compl. ¶ 145(a)–(c).)

LEGAL STANDARD

The State moves to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In reviewing a 12(b)(6) motion to dismiss, the court assumes the truth of well-pleaded facts and draws reasonable inferences in a light most favorable to the plaintiff. *E.g.*, *Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011). Nevertheless, a claim survives only if "there is plausibility in the complaint." *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009) (citations and quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Likewise, a plaintiff's complaint must state a legally sufficient claim for relief which may be granted. *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 724 (10th Cir. 2011) (citations omitted).

In reviewing a motion to dismiss, the Court may rely on the facts as alleged in the complaint, but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed. *See* Fed. R. Civ. P. 10(c); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991). Published administrative rules and regulations are appropriate for judicial notice. *See, e.g.*, *City of Wichita, Kan. v. U.S. Gypsum Co*, 72 F.3d 1491, 1496 (10th Cir. 1996) (allowing OSHA regulations to be judicially noticed as "a social fact with evidential consequences").

LEGAL ARGUMENT

I. Plaintiffs' First Cause of Action Should Be Dismissed Because It Is Barred by the Plain Text of the Utah Constitution.

In their First Cause of Action, Plaintiffs seek recognition of their marriages alleging that their marriages are "vested rights" or liberty interests protected by the Due Process Clause of the Utah Constitution. But Utah's constitution is clear: "No other domestic union, [other than a marriage between a man and a woman], however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Utah Const. art. I § 29. The district court order declaring article I, section 29 unconstitutional pursuant to the federal constitution is on appeal, and the injunction prohibiting enforcement of the article I, section 29 has been stayed. Thus, the state of the law is that article I, section 29 is valid and enforceable. As such, its plain text defines the limits of the Due Process Clause of the Utah Constitution, and clearly demonstrates that Plaintiffs cannot state a claim for its violation.

Article I, Section 7, Utah's Due Process Clause, provides that "No person shall be deprived of life, liberty, or property, without due process of law." Utah Const. art. I, § 7. It was in the original Utah Constitution and has not been amended. JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 31 (1998). As with similar clauses, it prevents the deprivation of "vested rights," such as claims that have accrued, without due process. *See generally* *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663 (Utah 2002).

Yet the Due Process Clause cannot be read in isolation. Article I, Section 29 of the Utah Constitution provides that "(1) Marriage consists of only the legal union between a man and a woman," and "(2) No other domestic union, however denominated, maybe be recognized as a marriage or given the same or substantially equivalent effect." Utah Const. art. I, § 29. Though

a federal district court enjoined the enforcement of the provision as unconstitutional, that order is on appeal and the injunction has been stayed. The result of the stay is that the injunction is no longer in effect. *See* *Nken v. Holder*, 556 U.S. 418, 426–28 (2009) (recognizing that an appellate court may issue a stay to "hold an order in abeyance while it assesses the legality of the order" and that a stay "operates upon the judicial proceeding itself … by either halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability… [and] by temporarily suspending the source of the authority to act…" (citations and quotations omitted)); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 8 (1942) ("[I]t is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.").

Plaintiffs are asking the Court to compel the State to "recognize," (*see* Pls.' Compl., ¶ 145(a)–(b)) or at least "give[] the same or substantially equivalent effect" to their marriages as to opposite-sex couples awarded marriage licenses in this period. Such a request is contrary to the plain language of Article I, Section 29.

Because Article I, Section 29 prohibits the State from recognizing any other civil union beyond an opposite-sex marriage, the Due Process clause in the Utah Constitution cannot require the state to recognize Plaintiffs' same-sex marriages. *Wadsworth v. Santaquin City*, 28 P.2d 161, 167 (Utah 1933); *see* *Sylvester v. Tindall*, 18 So. 2d 892, 900 (Fla. 1944) (quoting 11 AM. JUR. § 54, at 663) (emphasis added); *accord* *Jackson v. Dravo Corp.*, 603 F.2d 156, 157 (10th Cir. 1979) ("The general rule is that where an amendment to a constitution is in conflict or in anywise modifies a prior provision of the constitution, the amendment controls."); *see also* (Defs.' Mem. in Opp. to Mot. to Certify (doc. 21) at 6–10.) For these reasons, and those fully stated and based

on the authority cited in the State's Memorandum in Opposition to Certify Questions to the Utah Supreme Court (doc. 21), which are incorporated herein by reference, the Due Process Clause in the state constitution cannot be read to provide the vested rights Plaintiffs seek, given the unambiguous directive of the Amendment in Article I, Section 29. The First Claim for relief should be dismissed.

II. Plaintiffs' Third Cause of Action Fails Procedurally and Substantively.

Plaintiffs' Third Cause of Action seeks relief pursuant to Utah Rule of Civil Procedure 65B. Rooted in a Utah Rule of Procedure rather than a substantive statute, the claim should be dismissed as inapplicable in federal court. If the claim is allowed to survive now that the case has been removed,[1] it should still be dismissed, as it is procedurally and substantively infirm.

Rule 65B is Utah's rule providing a procedure to request "extraordinary relief." Utah R. Civ. P. 65B. Plaintiffs argue Rule 65B relief is appropriate under subpart (c) and subpart (d). Rule 65B(c) "is an oblique reference to [Utah]'s case law on the availability of a writ to compel a public official to perform their duty …." *Walker v. Weber Cnty.*, 973 P.2d 927, 989 (Utah 1998), *abrogated on other grounds by Burr v. City of Orem*, 2013 UT 57, ¶ 5, 311 P.3d 1035, 1037. Rule 65B(c) is equivalent to the common law writ and statutory right of action for quo warranto. *Cf. State v. Ryan*, 41 Utah 327, 125 P. 666, 668 (1912) (recognizing the statutory right of quo warranto, allowing a civil action against "a person who usurps, intrudes into, or unlawfully holds or exercises, a public office …."); *State v. Evans*, 735 P.2d 29, 29–31 (Utah 1987). Rule 65B(d)(2)(B) is similar to the common law writ of mandamus. *See State v. Barrett*, 2005 UT 88, ¶ 10, 127 P.3d 682, 685.

[1] Because Defendants removed the case, they would not object to a request by Plaintiffs for leave to amend to conform to any federal rules that may alternatively apply.

The rule has several prerequisites. First, a Rule 65B(c) action may only be brought by the attorney general, unless "the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim." Utah R. Civ. P. 65B(c)(1). Though Plaintiffs' counsel have communicated with the attorney general, Plaintiffs have not pleaded that they provided a notice of the claim sufficient to overcome Rule 65B(c)(1)'s procedural hurdle. Second, Rule 65B(c) requires that the petition "be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding." *Id.* No undertaking was filed, either in this Court or in the state court prior to removal. (*See* Docket, *Evans v. Utah*, attached hereto as Exhibit A.)

Even if Plaintiffs had complied with the procedural requirements of the Rule 65B, their Third Cause of Action should still be dismissed. Utah Rule of Civil Procedure 65B permits relief "[w]here no other plain, speedy and adequate remedy is available …." Utah R. Civ. P. 65B(a). Yet it is clear that another remedy is available in this case—a complaint for injunctive and declaratory relief, alleging that the State has violated Plaintiffs' due process rights.

Furthermore, a writ compelling a government official to undertake an action as required by law, as permitted by Rule 65B(d)(2), is only issued when the government official's duty is "clear and certain," is "ministerial" and so "plainly defined" as to be "free from doubt," and no other remedy is available. *See Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (interpreting the standards applicable to mandamus of federal officials pursuant to 28 U.S.C. § 1361). The only thing "clear and certain" in this case is that Plaintiffs' marriage licenses were issued, contrary to Utah law, but pursuant to a federal judicial injunction, which has been stayed

and is on appeal. Whatever duty may exist, it is not "clear and certain," and Plaintiffs therefore cannot state a claim under subsection (d) of Rule 65B.

Plaintiffs' Rule 65B claim for extraordinary relief is procedurally and substantively barred. Furthermore, Plaintiffs' request, a quo warranto or mandamus-like writ, is not the proper vehicle to assert their claims for violation of their constitutional rights. Plaintiffs' Third Claim for Relief should be dismissed.

III. Plaintiffs' Fourth Cause of Action Should Be Dismissed Because Declaratory Judgments Are a Form of Relief, Not an Independent Cause of Action.

Plaintiffs' Fourth Cause of Action seeks a declaration that the State "must continue to recognize the marriages by all same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013 and January 6, 2014," that the State "must withdraw its Directive not to recognize the marriages…." and that "the reimplementation of Amendment 3 and [related laws] … does not retroactively strip recognition from the same-sex marriages entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014." (Pls.' Compl. ¶ 145(a)–(c).) This count should be dismissed because, under Utah and federal law, a request for a declaratory judgment is not a separate cause of action.

The purpose of both the federal Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., and the Utah Declaratory Judgment Act, Utah Code § 78B-6-401, was to "avoid the difficulties of the common-law rule that rights would not be adjudicated by a court unless there had been a violation for which relief could be granted, and to provide a means for resolving uncertainties and controversies before the trouble has developed or harm has occurred…." *Salt Lake Cnty. v. Salt Lake City*, 570 P.2d 119, 120 (Utah 1977); *accord* *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 692 (9th Cir. 1961) ("The purpose of the Declaratory Judgment Act is to afford an added remedy

to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit ….”). Though both acts created new remedies, neither act “create[s] a cause of action or grant[s] jurisdiction to the court where it would not otherwise exist.” *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983); *accord* *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671–72 (1950) (“Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.”); *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) (“[T]he [federal Declaratory Judgment Act] does not create an independent cause of action”). As such, courts within the Tenth Circuit dismiss plaintiffs’ attempts to articulate a request for a declaratory judgment as an independent cause of action. *See* *Alvidrez v. Ridge*, 311 F. Supp. 2d 1163, 1166 (D. Kan. 2004) (noting that plaintiff’s claims “cannot be separately maintained” under the Declaratory Judgment Act); *Pelletier v. United States*, No. 11-CV-01377-WJM-CBS, 2013 WL 425874 (D. Colo. Feb. 4, 2013) (dismissing an independent declaratory judgment claim and construing it as a request for declaratory relief under the plaintiffs’ substantive claims).

Regardless of their entitlement to declaratory judgment as a remedy for any of Plaintiffs’ substantive claims, Plaintiffs are not entitled to bring a separate cause of action for declaratory judgment. Plaintiffs’ Fourth Cause of Action should therefore be dismissed.

CONCLUSION

Because the plain language of Article I, Section 29 *forbids* the relief that Plaintiffs seek, they fail to state a claim that they are entitled to relief under the Utah Constitution. Plaintiffs’ Third Cause of Action is procedurally and substantively defective, and Plaintiffs’ Fourth Cause of Action is not a cause of action at all, but rather a remedy depending on their substantive claim.

Defendants therefore respectfully request that the Court grant their Motion for Partial Dismissal and dismiss Plaintiffs' First, Third, and Fourth Causes of Action, with prejudice.

DATED this 26th day of February, 2014.

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