Memorandum

To: **Florida County Court Clerks**

From: **National Center for Lesbian Rights and Equality Florida**

Date: **December 23, 2014**

Re: **Duties of Florida County Court Clerks Regarding Issuance of Marriage Licenses to Same-Sex Couples Beginning January 6, 2015 In Light of *Brenner v. Scott***

This memorandum[1] explains why—notwithstanding advice provided to the Florida Association of County Clerks ("Clerks Association") in legal memoranda from a private law firm dated July 1, 2014 and December 15, 2014—Florida county court clerks are compelled and certainly permitted to issue marriage licenses to same-sex couples beginning January 6, 2015, in light of the ruling of U.S. District Judge Robert L. Hinkle in *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1286 (N.D. Fla. 2014), declaring that Florida's laws excluding same-sex couples from marriage violate the federal Constitution.

I. Under Federal Rule of Civil Procedure 65 And The Terms Of The Federal Injunction, The Injunction Binds Anyone Acting In Concert With Named State Officials, Including County Clerks.

Federal law provides that U.S. district court injunctions bind not only the parties named in a lawsuit, but also all other "persons who are in active concert or participation" with any of the named parties or with any of their officers, agents, servants, or employees. Fed. R. Civ. P. 65(d)(2)(C). Judge Hinkle's order similarly provides:

> The [state defendants] must take no steps to enforce or apply these Florida provisions on same-sex marriage: Florida Constitution, Article I, § 27; Florida Statutes § 741.212; and Florida Statutes § 741.04(1). . . . The preliminary injunction binds the Secretary, the Surgeon General, and their 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.

Brenner, 999 F. Supp. 2d at 1293 (emphasis added).

Section 382.003(7) of the Florida Statutes provides that the Department of Public Health ("Department"), headed by the Surgeon General, must "[a]pprove all forms used in . . . carrying out the purposes of . . . chapter [382]," which includes recording of marriages, and that "and no other forms shall be used other than those approved by the department." Under the terms of Rule

[1] This memorandum is not intended to provide and does not provide legal advice to any person or entity. It is instead a communication addressed to public officials.

65, Judge Hinkle's injunction, and Section 382.003(7), all county clerks must use forms in connection with the licensing and recording of marriages that are inclusive of same-sex couples beginning January 6, 2015.

Florida statutes make clear that county clerks are "persons who are in active concert or participation" with the Department within the meaning of Rule 65 in connection with marriage.[2] The Department, for instance, has enforcement authority over all issues "involving the department's powers and duties." Fla. Stat. § 381.0012(1). The Florida Vital Statistics Act gives the Department power to direct and control the "complete registration of all vital records in each registration district," which includes marriage records. Fla. Stat. § 382.003(2). The Department must approve all forms used in connection with marriage records and ultimately controls and records the "marriage certificates . . . received from the circuit and county courts." Fla. Stat. § 382.003(7). County clerks are required to report directly to the Department regarding all marriage records. Fla. Stat. § 382.021. And county clerks must use specific forms for marriage records provided by the Department. Fla. Admin. Code r. 64V-1.0131(5). Thus, Florida law is structured such that county clerks and the Department act in concert to administer key aspects of Florida's marriage laws. It is therefore simply not the case that only the named defendants in *Brenner v. Scott* are subject to Judge Hinkle's order, contrary to the advice given by legal counsel to the Clerks Association.

Moreover, because Judge Hinkle's order ruled that Florida's laws excluding same-sex couples from marriage are facially invalid—that is, there are no circumstances under which they can constitutionally be applied to same-sex couples who are otherwise qualified to marry—the laws are void and unenforceable. *See, e.g., Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004) (ruling that an unconstitutional statute is void under state law and "can have no effect whatsoever") (internal citations and quotations omitted); *Penn v. Atty. Gen. of State of Ala.*, 930 F.2d 838, 841 (11th Cir. 1991) (stating that an unconstitutional law is void); *see also Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied to anyone.") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 698–99 (7th Cir.2011). All governmental officials have a duty to stop enforcing and applying laws that violate the federal Constitution. *Cf. Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) ("[I]t can be assumed that if the court declares the statute or regulation unconstitutional then the responsible government officials will discontinue the statute's enforcement.").

Finally, Judge Hinkle's express orders in the *Brenner* case make clear that they were intended to provide "complete relief." When Judge Hinkle dismissed the Governor and the Attorney General from the case, for instance, he did so only because those officials were "redundant official-capacity defendants" and, "as the state defendants acknowledge, an order directed to the [state officials] will be sufficient to provide *complete relief*." *Brenner*, 999 F. Supp. 2d at 1286 (emphasis added).

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[2] *See*, *e.g.*, *Estate of Kyle Thomas Brennan v. Church of Scientology Flag Serv. Org., Inc.*, 2010 WL 4007591 (Oct. 12, 2010, M.D. Fla.). ("The phrase 'in active concert or participation' stands in Rule 65 in the ordinary and usual sense and means a purposeful acting of two or more persons together or toward the same end, a purposeful acting of one in accord with the ends of the other, or the purposeful act or omission of one in a manner or by a means that furthers or advances the other.")

Notably, in other states in which federal district courts have struck down state laws excluding same-sex couples from marriage, county officials throughout the state have relied on district court rulings to issue marriage licenses throughout the state. *See*, *e.g*., *Evans v. Utah*, 21 F. Supp.3d 1192 (D. Utah 2014) (describing statewide issuance of marriage licenses to same-sex couples in Utah following district court ruling invalidating Utah's marriage ban); John Bacon and Richard Wolf, "PA Governor Won't Appeal Ruling Legalizing Gay Marriage," USA TODAY, May 21, 2014 (noting statewide issuance of marriage licenses to same-sex couples in Oregon and Pennsylvania following the district court decisions in *Geiger v. Kitzhaber*, 994 F. Supp.2d 1128 (D. Ore. 2014), and *Whitewood v. Wolf*, 992 F. Supp.2d 410 (M.D. Pa. 2014)).[3]

In sum, pursuant to Rule 65(d) and the terms of Judge Hinkle's order, all Florida county clerks are required to cease enforcing Florida's unconstitutional laws excluding same-sex couples from marriage. Indeed, county clerks and their employees could be subject to personal liability for damages if they continue to enforce Florida's unconstitutional marriage laws. *See, e.g., Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999) (holding that officials are stripped of sovereign immunity if they choose to enforce unconstitutional laws) (internal citation and quotations omitted); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring) ("The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.").

II. Government Officials Properly May Choose To Follow A Federal District Court Ruling That A Challenged Law Is Unconstitutional Even If Those Officials Are Not Parties To The Case.

For the reasons described above, Judge Hinkle's order is binding on all of Florida's county clerks. But even if the order were binding *only* on the Washington County Clerk and state officials who are defendants in the case, other clerks in Florida properly may *choose* to follow Judge Hinkle's ruling that the marriage ban is unconstitutional. That is, even if other clerks were not *obligated* to follow Judge Hinkle's order, controlling precedent shows that they are *permitted* to do so.

Unfortunately, the legal memoranda to the Clerks Association do not address this important question. The December 15 Memo states: "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 statue unconstitutional. However such cases do not state that non-party officials are *bound* by a trial court's order." *See* Dec. 15 Memo at 3, fn.2 (emphases added). For the reasons stated above, that analysis is incorrect because it fails to acknowledge that, pursuant to Rule 65(d), such a ruling also binds all "persons who are in active concert or participation" with any of the parties. In addition, and of equal concern, that analysis ignores the question whether non-party government officials may lawfully and properly *choose* to follow a federal court order declaring state laws violative of the federal Constitution, even if those officials are not bound by that order.

Case law addressing that latter question indicates that the answer is "yes." Both the Supreme Court and the Eleventh Circuit repeatedly have stated that government officials may abide by a federal district court's ruling that a law is invalid even if those officials are not parties in the case.

[3] Contrary to the legal advice provided by counsel to the Clerks Association, the district court ruling in *Brenner v. Scott* does bind all county clerks even in the absence of an appellate ruling.

For example, in *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1309-11 (11th Cir. 2001), the Eleventh Circuit cited with approval language from a U.S. Supreme Court decision declining to decide whether a federal district court had authority to enjoin the President of the United States, in a case about the constitutionality of the Secretary of Commerce's allocation of overseas federal employees to the States. The Supreme Court held that it need not decide that question because it was sufficient "to conclude that the injury alleged is likely to be addressed by declaratory relief against the Secretary alone" because "*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 they would not be directly bound by such determination*." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (emphasis added). In other words, the Supreme Court recognized that even if officials were not parties in the case, they properly could choose to follow the district court's ruling that the challenged policy was unconstitutional. Accordingly, both *Franklin* and *Made in the USA Foundation* strongly support the proposition that all of Florida's clerks similarly may follow the district court's ruling in this case even if "they would not be directly bound by such determination." *Id.*

Other federal appellate decisions similarly conclude that non-party government officials may follow court decisions holding that laws are unconstitutional. *See, e.g.*, *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010); *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992). Those decisions, like *Franklin* and *Made in the USA Foundation*, note that such reliance by non-party officials is not only proper, but also so likely to occur that courts may *assume* that non-party officials will respect decisions holding that a law is unconstitutional. In *Chamber of Commerce*, the Tenth Circuit—citing U.S. Supreme Court precedent—concluded: "'[W]e 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.'" 594 F.3d at 758 n. 16 (citing *Utah v. Evans*, 536 U.S. 452, 460 (2002)). Similarly, in *Los Angeles County Bar Association*, the Ninth Circuit stated: "Were this court to issue the requested declaration, we must assume that it is substantially likely that the California legislature, though its members are not all parties to this action, would abide by our authoritative determination." 979 F.2d at 701.

Other cases cited to in the memoranda of legal counsel to the Clerks Association also simply reinforce the principle that non-party government officials may—and in most cases will—follow court decisions holding that challenged laws are unconstitutional. *See* Dec. 15 Memo at 3-4, fn. 2. In *Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977), the Seventh Circuit held that "where a statute is challenged as facially unconstitutional," a court may "assum[e] that if the court declares the statute or regulation unconstitutional the enforcing government officials will discontinue the statute's enforcement." That is the situation here. The plaintiffs in *Brenner* brought a facial challenge to Florida's marriage ban, and Judge Hinkle entered an order declaring the ban to be facially invalid and enjoining its enforcement. Therefore, county clerks may—and should—respect that judgment and discontinue the ban's enforcement, even if they are not actually bound by the judgment.

Finally, the memoranda of legal counsel to the Clerks Association fail to give adequate weight or consideration to the decisions by the Eleventh Circuit and the U.S. Supreme Court not to stay Judge Hinkle's ruling. In many cases, when a federal district court holds that a state law is unconstitutional, that ruling is stayed pending appeal, so that the issue presented here never arises. But in this case, both the Eleventh Circuit and the U.S. Supreme Court have concluded that no stay

of Judge Hinkle's decision is warranted and that the ruling should go into effect while that decision is being considered on appeal. Under these circumstances, it is especially appropriate for state and local officials, including county clerks, to follow that federal court ruling and cease to enforce or administer a law that a federal court has declared unconstitutional.

III. **Clerks Who Have A Good Faith Belief That They Are Bound By Or May Follow Judge Hinkle's Ruling Do Not Face A Realistic Possibility of Criminal Liability For Following That Ruling.**

Citing Florida Statutes Section 741.05, the legal memoranda to the Clerks' Association concludes that county clerks who follow Judge Hinkle's ruling "are subject to Florida's criminal penalties for the issuance of marriage licenses to same-sex couples." *See* Dec. 15 Memo at 6. But laws that are unconstitutional are void and unenforceable. Moreover, reasoned analysis of the relevant law compels the conclusion that any attempted criminal prosecution of a clerk who relied in good faith on Judge Hinkle's order would fail.

First, under settled law, a person cannot be prosecuted for violating an unconstitutional law, which is void. As both the Eleventh Circuit and the U.S. Supreme Court have made clear: "An unconstitutional law is void . . . An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Penn v. Atty. Gen. of State of Ala.*, 930 F.2d 838, 841 (11th Cir. 1991) (quoting *Ex Parte Siebold,* 100 U.S. 371, 376–377, 25 L.Ed. 717 (1879)).

Moreover, that principle is equally well settled under state law. As the Eleventh Circuit has observed with respect to Florida law:

> There is no question that an unconstitutional statute is void under state law. *See Bhoola v. City of St. Augustine Beach,* 588 So.2d 666 (Fla.Dist.Ct.App.1991) (holding that a city ordinance passed in violation of law "is not voidable,—it is void"); *see also Josephson v. Autrey,* 96 So.2d 784, 789 (Fla.1957) (*en banc*) (stating that an unlawful ordinance "can have no effect whatsoever").

Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1334 (11th Cir. 2004).

The legal memoranda to the Clerks' Association fail to appreciate the significance of this well settled law. It is true, as the memoranda note, that Judge Hinkle's ruling that the marriage ban is unconstitutional is not binding on other courts acting in a judicial capacity. *See* Dec. 15 Memo at 5. County clerks, however, act ministerially, not in a judicial capacity, in issuing marriage licenses, and any clerk charged with a criminal offense for following Judge Hinkle's ruling could assert the unconstitutionality of the ban as a defense. In order to convict a clerk in such a case, the court would have to reach the merits of that constitutional challenge and to conclude—against the weight of the vast majority of federal and state courts to consider the issue in the past two years—that excluding same-sex couples from marriage is constitutionally permissible.

Second, any such attempted prosecution would face an additional, independent barrier. Both the U.S. Supreme Court and Florida courts have held that that in order to be prosecuted for crimes other than "minor offenses," a person must have a specific criminal intent. *See Morissette v. United States*, 342 U.S. 246 (1952); *Chicone v. State*, 684 So.2d 736 (Fla. 1996); *see also Carter v. State*, 710 So.2d 110

(4th DCA 1998) (affirming that there is no "strict liability" for crimes other than minor offenses under Florida law). In *Chicone*, the Florida Supreme Court specifically held that this well-established rule—requiring criminal intent—applies to a first degree misdemeanor, which is the same level of offense that the memoranda of the Clerks Association's counsel asserts is at issue here. 684 So.2d at 738.

Thus, even if a state attorney wished to bring criminal charges against a county clerk for following Judge Hinkle's ruling, one of the essential, prima facie elements of the underlying criminal offense—the required criminal intent—would not exist so long as the clerk had a reasonable, good-faith belief either that he or she was bound by Judge Hinkle's ruling or, alternatively, that he or she could properly follow the ruling even if not technically bound. In such a case, the clerk would not have the required specific criminal intent. Moreover, since county clerks are "in active concert and participation" with the named parties in *Brenner*, as explained in Section I above, clerks who fail to comply with that order may be held in contempt of court. *See, e.g., Regal Knitwear Co. v. N.L.R.B.,* 324 U.S. 9, 14 (1945) (holding that "persons in active concert or participation with [parties] in the violation of an injunction . . . . are, by that fact brought within scope of contempt proceedings by the rule of civil procedure"); *see also Federal Trade Commission v. Leshin*, 618 F.3d 1221, 1235-36 (11th Cir. 2010) (same).

CONCLUSION

For the reasons stated above, Florida county court clerks should follow Judge Hinkle's ruling and issue marriage licenses to same-sex couples beginning January 6, 2015. The advice provided to the Clerks Association in legal memoranda from a private law firm is incorrect in key respects, including in failing to acknowledge that: (1) a federal court order is binding not only on the parties to the case, but also on all "persons who are in active concert or participation with" any of the parties; (2) non-party government officials may choose to comply with a federal district court ruling that a law is unconstitutional, even when they are not technically bound by the ruling; (3) an unconstitutional law is void and unenforceable; and (4) county clerks who follow Judge Hinkle's ruling could not be held criminally liable for doing so because they would not have the required specific criminal intent.