

DISTRICT COURT, ADAMS COUNTY
STATE OF COLORADO

Adams County Justice Center, 1100 Justice
Center Drive, Brighton, Colorado 80601

Plaintiffs: Rebecca Brinkman and Margaret
Burd

v.

Defendants: Karen Long, in her official
capacity as Clerk and Recorder of Adams
County and the State of Colorado

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Case No.: 2013CV032572

Response to Defendant Clerk and Recorder's Motion to Excuse

Now come the Plaintiffs Rebecca Brinkman and Margaret Burd, by and through their attorneys Wilcox & Ogden, P.C. and Prof. Thomas D. Russell, and file this response to Defendant Clerk and Recorder's Motion to Excuse.

Plaintiffs are a bit confused about the motion, because counsel have never heard of anything like it. Defendant Clerk and Recorder does not seek to be removed as a party to this litigation. Defendant appears not to want to participate.

The Defendant Clerk and Recorder has cited no legal authority in support of her motion as required by C.R.C.P. 122, 1-15(1)(a) (“[A]ny motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion except for a motion pursuant to C.R.C.P. 56.”) and C.R.C.P. 122, 1-15(3) (“If the moving party fails to incorporate legal authority into the motion or fails to file a brief with a C.R.C.P. 56 motion, the court may deem the motion abandoned and may enter an order denying the motion.”).

Plaintiffs know of no legal authority that supports the Defendant Clerk and Recorder’s motion. The Defendant is properly sued. Opinion and Order, *Bishop v. U.S. ex rel. Holder*, --- F.Supp.2d ----, 2014 WL 116013 (N.D.Okla.,2014) at 29-30. (“The Court has also satisfied itself that Smith is properly sued. The Bishop couple may seek relief from Smith under *Ex parte Young*, 209 U.S. 123 (1908), which permits suits where a plaintiff is “(1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief.”). Plaintiffs properly served the Defendant. C.R.C.P. 5. Defendant has answered. C.R.C.P. 8. Defendant has not filed C.R.C.P. 12 motions seeking to be removed as a party. No Rule permits a Defendant to be excused.

There are at least several options if the Defendant Clerk and Recorder wishes to limit her participation in this lawsuit. First, the Defendant could reverse the posture that she took in her Answer and instead agree with the Plaintiffs that Colorado’s statutory and constitutional bans on same-gender marriage are unconstitutional and should be overturned. Recently, the Attorney General for the Commonwealth of Virginia reversed the position that the Commonwealth had taken in *Bostic v. Rainey*, a marriage equality case. The Attorney General explained that supporting rather than opposing marriage equality was 1) consistent with his oath of office; 2) would not unbalance the argument in the case because a group of clerks opposed to marriage equality remained as parties; and 3) put the Commonwealth on the right side of history. The Attorney General’s Notice of Change in Legal Position by Defendant Janet M. Rainey is attached hereto as an Exhibit.¹

Another option if the Defendant Clerk and Recorder wishes to limit her participation in this lawsuit is for her, through the County Attorney, to simply join the briefing of the Colorado Solicitor General now that the State of Colorado is a party to the lawsuit.

¹ On February 13, 2014, United States District Court for the Eastern District of Virginia overturned the Commonwealth’s prohibitions on same-gender marriage. *Bostic v. Rainey*, --- F.Supp.2d ----, 2014 WL 561978 (E.D.Va.).

A third option would be that the Defendant Clerk and Recorder could default. C.R.C.P. 55.

Plaintiffs are concerned that the Defendant Clerk and Recorder wants to be excused from costs and perhaps fees in the event plaintiffs prevail. The Defendant Clerk and Recorder is the office that denied plaintiffs' request for a marriage license. If the Plaintiffs prevail, the only way the Court can afford the Plaintiffs complete relief is to issue an injunction against the Defendant Clerk and Recorder, ordering her to issue a marriage license to them. The Defendant Clerk and Recorder is thus an essential party to this litigation, even even though she may wish to be excused. And if plaintiffs prevail, the Defendant Clerk and Recorder may be liable for attorneys fees and costs pursuant to 42 U.S.C. section 1988 and the general rule that prevailing parties are entitled to costs.

Wherefore the Plaintiffs respectfully pray the Court deny the Defendant Clerk and Recorder's motion to be excused.

Respectfully submitted this 17th day of February, 2014.

By /s/ Thomas D. Russell
Prof. Thomas D. Russell, #34771
Attorney for the Plaintiffs

Certificate of Service

I certify that this response and the plaintiffs' proposed order was served on all other counsel of record by ICCES this 17th day of February, 2014.

/s/ Thomas D. Russell