

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
KANSAS CITY DIVISION**

KAIL MARIE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 14-cv-02518-DDC/TJJ
SUSAN MOSIER, M.D., in her official capacity as Interim Secretary of the Kansas Department of Health and Environment, <i>et al.</i> ,	)	
	)	
	)	
Defendants.	)	

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANT MOSER’S  
MOTION TO DISMISS AMENDED COMPLAINT**

On December 10, 2014, Defendant Moser moved to dismiss the First Amended Complaint (Doc. 52) that Plaintiffs filed on November 26, 2014. In the Argument section of the Motion, Defendant contends that – at least as to Dr. Moser – the Court should dismiss Plaintiffs’ First Amended Complaint on grounds of Eleventh Amendment immunity, the absence of a case or controversy, and mootness. Plaintiffs will address each of those arguments in turn, but first Plaintiffs will address the minimal effect Defendant Moser’s resignation has on this case.

**1. Dr. Moser’s resignation does not terminate Plaintiffs’ official capacity claims against the Secretary of KDHE.**

Defendant’s Motion to Dismiss initially notes that “Dr. Moser has resigned his position as Secretary of the Kansas Department of Health and Environment, effective November 30, 2014. Because he no longer holds any official position with the agency . . . the relief sought against him is unavailable as a matter of law.” Doc. 57, pp. 1-2. But the fact that Dr. Moser resigned effective November 30, 2014, does not require dismissal of the official capacity claims against the holder of the office of the Secretary of the Kansas Department of Health and Environment (“KDHE”). “An action does not abate when a public officer who is a party in an offi-

cial capacity . . . ceases to hold office while the action is pending.” Fed. R. Civ. P. 25(d). Instead, “[t]he officer’s successor is automatically substituted as a party,” *id.*, and the case continues. Although a district court “may order substitution at any time, . . . the absence of such an order does not affect the substitution.” *Id.*

Here, Susan Mosier, M.D., assumed the office as Interim Secretary of KDHE and was automatically substituted as the Defendant in this case after Dr. Moser’s resignation.<sup>1</sup> Automatic substitution of successor officials is proper where, as in this case, no claims have been made against an official in his individual capacity and “effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office.” Advisory Committee Notes, 1961 Amendment to Fed. R. Civ. P. 25(d)(1). *See also Society of Separationists v. Pleasant Grove City*, 416 F. 3d 1239, 1241, n.2 (10th Cir. 2005) (same). For these reasons, the Court should, at most, order Dr. Mosier substituted for Dr. Moser.<sup>2</sup>

## **2. Eleventh Amendment immunity does not apply.**

Defendant first argues that “[w]hen a claim for injunctive relief is brought against a state official who is not involved in the enforcement of an allegedly unconstitutional statute, Eleventh Amendment immunity applies and requires dismissal of the claim.” Doc. 57, p. 3. The unstated premise of this argument seems to be that Dr. Moser is no longer involved “in the enforcement of

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<sup>1</sup> According to the KDHE’s website, Dr. Mosier is now the Interim Secretary of KDHE in the wake of Dr. Moser’s resignation. *See* <http://www.kdheks.gov/administration/index.html> (last visited Dec. 15, 2014). As required by Fed. R. Civ. P. 25(d), Plaintiffs have substituted Susan Mosier, M.D., for Defendant Moser in the caption of this brief.

<sup>2</sup> The Affidavit of Timothy E. Keck, filed in support of Defendant Moser’s Motion to Dismiss, states that “Dr. Robert Moser resigned from his position as Secretary of the Kansas Department of Health and Environment effective November 30, 2014.” Doc. 57-2, ¶ 4. Thus, when Plaintiffs filed the First Amended Complaint on November 26, 2014, Dr. Moser was still the Secretary of KDHE and was properly named as an official capacity defendant in this case at that time.

an allegedly unconstitutional statute” because he has resigned his position as Secretary of KDHE. But, as noted above, Dr. Moser’s resignation does not mean that Plaintiffs’ official capacity claims against the Secretary of KDHE must be dismissed. It merely results in the automatic substitution of the current office-holder.

In order to seek prospective injunctive relief against enforcement of Kansas’s unconstitutional ban on same-sex marriage, Plaintiffs sued Dr. Moser only in his *official capacity* as the Secretary of KDHE. Plaintiffs did not sue Dr. Moser in his individual capacity. “By proceeding on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state itself, the *Ex parte Young* [209 U.S. 123 (1908)] doctrine enables ‘federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.’” *Guttman v. Khalsa*, 669 F. 3d 1101, 1126 (10th Cir. 2012), quoting *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir.2011). In granting Plaintiffs’ motion for a preliminary injunction on the marriage license issue, this Court has already rejected Defendants’ Eleventh Amendment defense. *See* Memorandum and Order, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), Doc. 29, p. 16. And the fact that Dr. Moser is no longer the Secretary of KDHE does nothing to change that result. For the reasons set forth in the Court’s earlier preliminary injunction decision, Defendant’s Eleventh Amendment arguments lack merit.

### **3. The First Amended Complaint presents a justiciable case or controversy.**

Defendant observes that “Dr. Moser no longer has any official capacity relating to the preparation and distribution of Kansas marriage forms. If plaintiffs seek to amend to sue him in his individual capacity for past acts, he will be protected by qualified immunity.” Doc. 57, p. 3. Defendant then argues that “[d]eclaratory relief is not appropriate against him in these proceed-

ings, because plaintiffs have repeatedly claimed (and the Court has apparently agreed) that existing precedents of the Tenth Circuit Court of Appeals control the outcome.” *Id.*

Defendant seems to advance two arguments. First, he contends that he is no longer subject to federal court jurisdiction because he has resigned his office. Second, he seems to argue that this case has already over. These contentions are both wrong and beside the point. As explained above, Plaintiffs have sued the incumbent of the Office of the Secretary of KDHE in that person’s official capacity in order to obtain prospective injunctive relief against enforcement of Kansas’s unconstitutional ban on same-sex marriage. Plaintiffs have no intent to sue Dr. Moser in his individual capacity. Dr. Moser’s resignation from the Office of Secretary of KDHE effectively drops him from this litigation. But his resignation does not mean the claims against the current office holder – Interim Secretary of KDHE Susan Mosier, M.D. – fail for want of a proper case or controversy. Moreover, this case has not yet reached final judgment, and no other court has held that the Kansas laws banning same-sex marriage violate the United States Constitution. Thus, this is not a case where Plaintiffs are going to the well repeatedly for a declaration that a state law is unconstitutional. This is the first case to raise these issues.

The Secretary of KDHE is a proper Defendant for some of Plaintiffs’ marriage recognition claims. In its decision granting a preliminary injunction against enforcement of the Kansas ban on same-sex marriage for purposes of marriage licensing, the Court found that “Kansas law shows that Secretary Moser is significantly involved with the recognition of marriage in Kansas.” Memorandum and Order, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), Doc. 29, p. 10 n.6. The Court went on to note that the Secretary of KDHE is responsible for supervising the registration of all marriages (K.S.A. § 23-2507), supplying marriage certificate forms to district courts (K.S.A. § 23-2509), and maintaining an index of marriage records and providing cer-

tified copies of those records on request (K.S.A. § 23-2512). The Court further found that “Secretary Moser’s records play an important role in the recognition aspect of plaintiff’s claims.” *Id.*, Doc. 29, p. 11. The Court then held that “[g]iven Secretary Moser’s responsibility for marriage-related enabling and registration functions, he has a sufficiently prominent connection to the relief sought by the Complaint to justify including him as a defendant.” *Id.*, Doc. 29, p. 12. These official duties apply to the Office of the Secretary of KDHE, not to any particular incumbent. Thus, Interim Secretary of KDHE Mosier is also a proper defendant in this action, and the Defendant’s Motion to Dismiss based on an alleged absence of a case or controversy lacks merit.

#### **4. Plaintiffs’ claims against the Secretary of KDHE are not moot.**

Defendant argues that the claims asserted against the Secretary of KDHE are moot because, “Dr. Moser clearly had the discretion under Kansas law to distribute gender-neutral [marriage license] forms, and he exercised that discretion shortly before he left office. There is no reason to assume that his successors will recall the new forms.” Doc. 57, p. 4.

In seeking to dismiss this case as moot, however, it is not enough for Defendant to assert that “there is no reason to assume” a successor in office would not resume enforcing Kansas’s unconstitutional exclusion of same-sex couples from marriage. Defendant must carry the “formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of Earth, Inc. v. Laidlaw Environ. Serv., Inc.*, 528 U.S. 167, 190 (2000). “The burden is a heavy one.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In cases like this one, furthermore, “a public interest in having the legality of the practices settled[] militates against mootness.” *Id.* at 632. *See also Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10<sup>th</sup> Cir. 1992) (claim of mootness “must be weighed against the possibility of recurrence and the public interest in having the case decided”). Dismiss-

sal “on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.” *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

In arguing that Plaintiffs’ claims against the Secretary of KDHE are moot, Defendant Moser focuses exclusively on the Secretary’s obligation to make forms available to the Kansas district courts to facilitate the marriage licensing process. *See* K.S.A. § 23-2509. Defendant makes no mention of the Secretary’s responsibilities for supervising the registration of marriages (K.S.A. § 23-2507) or for maintaining an index of marriage records and providing certified copies of those records on request (K.S.A. § 23-2512). As the Court noted in its earlier ruling, those responsibilities “play an important role in the recognition aspect of plaintiffs’ claims.” Memorandum and Order, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), Doc. 29, p. 11.

Defendant has made no showing whatsoever to affirmatively establish that that Secretary Mosier will not resume using the old marriage forms if this case is dismissed as moot. But even if the Court were to ignore that deficiency, Defendant has also completely failed to address the Secretary’s other responsibilities for marriage license record-keeping. But for this Court’s preliminary injunction, there is every reason to believe that the Secretary of KDHE would refuse to register and index same-sex marriage records and would refuse to provide certified copies of those records on request because, in other contexts connected with the recognition of same-sex marriages, state agencies have continued to enforce the same-sex marriage ban and have refused to recognize same-sex marriages performed in Kansas and elsewhere. Specifically, the Kansas Department of Revenue and the State Employee Health Plan (a sub-division of KDHE) have refused to recognize same-sex marriages for purposes of changing names on drivers’ licenses, allowing same-sex couples to file state income tax returns using a “married” status, and allowing

state employees to add their same-sex spouses to their state health insurance coverage as eligible dependents. *See* First Amended Complaint, ¶¶ 32-34, 40, 46, 47-48, & 68-70.<sup>3</sup>

These actions clearly show that, but for the preliminary injunction, Kansas officials would immediately resume enforcement of the same-sex marriage ban and would refuse to recognize same-sex marriages performed in Kansas. Indeed, Defendant never even bothers to assert otherwise. There can be no question that a present determination of the issues in this case will have a significant “effect in the real world,” *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir.2000), and that plaintiffs continue to require injunctive and declaratory relief to protect their constitutional right to marriage. In these circumstances, this case is not moot.

#### Conclusion

For these reasons, Plaintiffs respectfully request that the Court deny Defendant Moser’s Motion to Dismiss and, at most, enter a formal order substituting Dr. Mosier for Dr. Moser pursuant to Fed. R. Civ. P. 25(d).

Respectfully submitted,

/s/ Stephen Douglas Bonney  
Stephen Douglas Bonney, KS Bar No. 12322  
ACLU Foundation of Kansas  
3601 Main Street  
Kansas City, MO 64111  
Tel. (816) 994-3311  
Fax: (816) 756-0136  
[dbonney@aclukansas.org](mailto:dbonney@aclukansas.org)

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<sup>3</sup> In reviewing a motion to dismiss, a federal court must take all factual allegations in the complaint as true. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

Mark P. Johnson, KS Bar #22289  
Dentons US, LLP  
4520 Main Street, Suite 1100  
Kansas City, MO 64111  
816/460-2400  
816/531-7545 (fax)  
[Mark.johnson@dentons.com](mailto:Mark.johnson@dentons.com)

Joshua A. Block [admitted pro hac vice]  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2593  
[jblock@aclu.org](mailto:jblock@aclu.org)

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I certify that, on December 22, 2014, the foregoing document was served on counsel for Defendants Moser, Hamilton, and Lumbreras by e-mail through the Court's ECF system, and by e-mail to Steve R. Fabert, Asst. Attorney General, [steve.fabert@ag.ks.gov](mailto:steve.fabert@ag.ks.gov) on behalf of the following defendants:

Nick Jordan, Secretary of Dept. of Revenue

Lisa Kaspar, Director  
Dept. of Revenue, Division of Vehicles

Mike Michael, Director  
State Employee Health Plan

/s/ Stephen Douglas Bonney\_\_\_\_\_