IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHARELLE LODER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:11-CV-979-WKW
	)	[WO]
STEVEN L. REED, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Charelle Loder and Jack Doe hope to marry.

They filed this lawsuit to challenge an alleged policy and practice of Defendant Steven Reed, the probate judge of Montgomery County, regarding marriage licenses. According to the amended complaint, Judge Reed will not issue a marriage license to a couple unless both of them can provide proof of lawful immigration status. Because Mr. Doe cannot meet that requirement, he and Ms. Loder believe they cannot wed. (That belief is unsupported, however, by a failed attempt to obtain a license from Judge Reed.)

Judge Reed moves to dismiss, and his motion is due to be granted.

I. JURISDICTION AND VENUE

Subject matter jurisdiction is exercised pursuant to 28 U.S.C. §§ 1331, 1343, and 2201–02. Personal jurisdiction and venue are uncontested.

II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) may assert either a factual attack or a facial attack to jurisdiction. *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007); Fed. R. Civ. P. 12(b)(1). In a facial attack, the court examines whether the complaint "sufficiently allege[s] a basis of subject matter jurisdiction." *Id.* As when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, on a Rule 12(b)(1) facial attack the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pleaded facts in the complaint as true. *Id.*

III. FACTUAL BACKGROUND

Plaintiffs Charelle Loder and her fiancé Jack Doe want to get married. But they do not think Defendant Steven L. Reed, the probate judge of Montgomery County, will allow it. According to the complaint, Judge Reed's office has a policy of denying marriage licenses to couples when one or both would-be spouses lack proof of legal presence in the United States. That means Mr. Doe, a Haitian national who lacks proof of legal presence in this country, cannot get a marriage license in Montgomery County.

But Judge Reed says he is willing to issue a marriage license to Ms. Loder and Mr. Doe – all they have to do is submit a proper application. Judge Reed denies that

his office requires proof of immigration status before it issues marriage licenses, and he says Ms. Loder and Mr. Doe would know that if they had applied for one.

Judge Reed moves to dismiss the claims against him for lack of standing.

IV. DISCUSSION

Although the parties disagree on quite a few points of law and fact, the court will only address one: Judge Reed says Ms. Loder and Mr. Doe lack standing to sue him for refusing to issue them a marriage license because they never applied for one in the first place.

And he is right. Federal courts are only empowered to decide "cases" and "controversies." U.S. Const. art. III, § 2. At an irreducible constitutional minimum, that means a plaintiff cannot maintain a lawsuit in federal court unless she can show, among other things, that she has "suffered an injury in fact." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quotations omitted). In the context of lawsuits challenging official policies, that means a plaintiff must "submit to the challenged policy before pursuing an action to dispute it." *Davis v. Tarrant Cnty.*, 565 F.3d 214, 220 (5th Cir. 2009); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–71 (1972) (holding that a plaintiff who had never applied for membership lacked standing to challenge fraternal organization's discriminatory membership policies). All this to say, Ms. Loder and Mr. Doe must actually apply for

a marriage license before they can sue Judge Reed for denying their application; otherwise, they have not suffered an injury in fact.

The amended complaint does not allege that Ms. Loder and Mr. Doe applied for a marriage license, and they admit they have not. They argue instead that they should not have to apply because application would be futile.

That argument has worked once before during this litigation. When Plaintiffs filed this lawsuit, Judge McKinney (Judge Reed's predecessor, and the original named defendant) had an official policy of requiring non-citizens who wanted a marriage license to "provide proof of legal presence in the United States." (Doc. # 1 ¶ 44.) Under that policy, the court concluded that Ms. Loder and Mr. Doe had "adequately pleaded that applying for marriage licenses would have been a futile gesture and ha[d] sufficiently demonstrated that the failure to apply should be properly excused." (Doc. # 32 at 12.)

That conclusion, however, was "[b]ased on the plain reading of [Judge McKinney's] policy." (Doc. # 32 at 12.) That policy has since been repealed, and its language is nowhere to be found in the amended complaint. The basis of the court's ruling on the first motion to dismiss has no bearing here, and the amended complaint (the one Judge Reed now moves to dismiss) is notably devoid of any facts that suggest

application for a marriage license would be futile.[1]

If Ms. Loder and Mr. Doe apply for a marriage license and are denied one because Mr. Doe lacks proof of lawful presence in the United States, they might have a federal cause of action. Until then, and absent any factual allegations demonstrating the futility of such an application, they have not suffered an injury in fact fairly attributable to Judge Reed.

V. CONCLUSION

It is therefore ORDERED that Judge Reed's motion to dismiss (Doc. # 59) is GRANTED and that the claims of Plaintiffs Charelle Loder and Jack Doe are DISMISSED for lack of standing.

This order does not affect the claims Plaintiffs Julie and Jonathan Doe have against Defendant Leon Archer, the Probate Judge of Tallapoosa County.

DONE this 11th day of June, 2013.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

[1] The amended complaint does allege, without elaboration, that "[i]t would be futile for Plaintiffs Charelle Loder and Jack Doe to request a marriage license in Montgomery County." (Doc. # 51 ¶ 57.) But that statement amounts to little more than a legal conclusion, one that finds no support in any of the amended complaint's factual allegations.

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov
Effective on April 9, 2006, the new fee to file an appeal will increase from $255.00 to $455.00.

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C.§ 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1 365, 1 368 (11th Ci r. 1 983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(c).

(b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). Williams v. Bishop, 732 F.2d 885, 885- 86 (11th Cir. 1984). A judg ment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S.196, 201, 108 S.Ct. 1717, 1721-22, 100 L .Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions . . ." and from "[i]nterlocutory decrees . . . determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5**: The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing**: The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).