IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI, JAMES E. PETERS and GARY A. MOHRMAN; CARRIE L. FOWLER and SARAH C. BRAUN; and DARCI JO BOHNENBLUST and JOLEEN M. HICKMAN,	)	
Plaintiffs,	)	Case No. 14-CV-2518-DDC-TJJ
v.	)	
SUSAN MOSIER, M.D., in her official capacity as Interim Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas county), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), NICK JORDAN, in his official capacity as Secretary of the Kansas Department of Revenue, LISA KASPAR, in her official capacity as Director of the Kansas Department of Revenue's Division of Vehicles, and MIKE MICHAEL, in his official capacity as Director of the State Employee Health Plan,	)	
Defendants.	)	

REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS AND MOTION OF DEFENDANTS TO DISMISS AMENDED COMPLAINT

Plaintiffs' Response to Defendants' Suggestion of Mootness and Motion to Dismiss (Doc. 122) fails to establish the existence of an ongoing dispute between the parties to this lawsuit that could be remedied by the issuance of any of the relief requested. The decision of the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), has already provided everything that any order issued by this Court could possibly achieve. Continued litigation of this case serves no legitimate purpose; it must be dismissed.

Summary of Reply

Continuation of this lawsuit is barred by the Eleventh Amendment because Plaintiffs no longer allege an ongoing violation of federal law. Plaintiffs' Response does not even attempt to overcome Defendants' Eleventh Amendment immunity, and the case may be dismissed for that reason alone.

This Reply next addresses the issue of standing, which the Court's Minute Order of July 9, 2015 (Doc. 121), specifically directed Plaintiffs to brief. Even though most of the persons named as Plaintiffs in the Amended Complaint have never had even the appearance of standing to sue, all of them have now lost whatever artificial semblance of standing they may once have had. The named Plaintiffs have failed to meet their burden to prove that they have standing to sue any of the State Officials named as Defendants for the relief they request here. Because continuation of this lawsuit could achieve no relief for any of the named Plaintiffs, this Court has no subject matter jurisdiction to proceed.

Only after the Court has determined that these Plaintiffs have standing to pursue the relief they seek does the issue of mootness become relevant. Once it becomes apparent that prospective injunctive relief will not address any grievance alleged by Plaintiffs Marie-Brown, Wilks-DiTrani, Peters-Mohrman, Fowler-Braun or Bohnenblust-Hickman, and the declaratory relief has already been issued by another court of superior jurisdiction, there is nothing left for a federal court to do but to dismiss the case without prejudice for lack of subject matter jurisdiction under the rules of law set forth in *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010); *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 729-30 (10th Cir. 1997); and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48-49 (1997). The Response mentions none of these on-point authorities which control disposition of this Motion in

Defendants' favor.

The question posed by Defendants' Suggestion of Mootness and Motion to Dismiss is not whether some other persons who are not parties may have issues to litigate against one another in some other forum at some other time. This is not a class action proceeding. It is not a lawsuit against the State of Kansas itself. Nor is that even possible, given the Eleventh Amendment. Neither does this lawsuit seek remedies that are nowhere mentioned in the Pretrial Order, such as repeal of Article 15, Section 16 of the Kansas Constitution.[1] Every remedy available to these Plaintiffs in this Court has already been given to them without the need for the entry of a judgment for either declaratory or injunctive relief. The lawsuit is now moot and must be dismissed for lack of jurisdiction, both under Article III and under the Eleventh Amendment to the U.S. Constitution.

ARGUMENTS AND AUTHORITIES

I. The Eleventh Amendment Requires Dismissal of this Lawsuit.

As argued in Defendants' Suggestion of Mootness and Motion to Dismiss, Eleventh Amendment immunity prohibits the continuation of a federal lawsuit against state officials when there is no longer an ongoing unlawful practice that can be remedied by future injunctive or declaratory relief. *See Green v. Mansour*, 474 U.S. 64 (1985). Plaintiffs' Response entirely fails to address, and hence concedes, Defendants' Eleventh Amendment immunity argument. Dismissal is required.

[1] Moreover, not all of Article 15, Section 16, was at issue in this lawsuit. For example, while the provision defining marriage solely as a union between man and woman was invalidated by *Obergefell*, the provision defining marriage as the union only of two people – as opposed to more than two people – was not at issue in *Obergefell* or here.

II. Lack of Article III Standing Defeats Subject Matter Jurisdiction.

Plaintiffs' Response fails to direct this Court to any evidence of an imminent injury to any Plaintiff's federally protected rights, without which there is no subject matter jurisdiction to seek relief against state officials. Mere emotional opposition to a statute or constitutional provision that a plaintiff finds objectionable is not enough to create standing. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Because Plaintiffs have the burden of proof to establish standing, their failure is fatal to their claims and the lawsuit must be dismissed for lack of subject matter jurisdiction.

This is not the first case where a plaintiff has sought declaratory and injunctive relief based solely on abstract offense at the mere existence of a law. Judge Julie A. Robinson of this District was recently confronted by just such a lawsuit, and resolved it by concluding that plaintiffs who suffer no concrete and imminent injury from the law lack standing to sue to block the law. Her opinion in the case of *Brady Campaign to Prevent Gun Violence v. Brownback*, No. 14-CV-2327, __F. Supp 3d__, 2015 WL 3572049 (D. Kan. June 5, 2015), thoroughly and exhaustively analyzes the application of Article III standing principles in cases where the plaintiff is not suffering demonstrable harm resulting from impairment of a federally protected right due to the existence of the challenged statute. Her analysis includes the following instructive comments:

> The Supreme Court has found the "irreducible constitutional minimum of standing" to contain three elements: First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." To establish standing for prospective injunctive relief, "a plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the

> future." (quoting from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).
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> For an asserted injury to be imminent, it must be real and immediate—not remote, speculative, conjectural, or hypothetical. Though the Supreme Court has described the concept as "somewhat elastic," it has cautioned that imminence "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." Thus, the Supreme Court has stated: "[W]e have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be certainly impending to constitute injury in fact." (quoting from *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013))
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> To meet this standard . . . the plaintiff must set forth "concrete plans" to perform, in the near future, the conduct that would subject him to the threatened injury. Where a plaintiff alleges mere "'some day' intentions" to engage in certain conduct, without "any specification of when the some day will be," any future harm that might flow from that conduct is necessarily conjectural or hypothetical rather than imminent. (quoting from *Clapper*, 133 S. Ct. at 1147).

See Brady Campaign to Prevent Gun Violence, 2015 WL 3572049, at *4,*7, *11.

Judge Robinson dismissed the lawsuit challenging the constitutionality of the Second Amendment Protection Act on the pleadings because it involved no plaintiff with a concrete plan to perform any act that would be adversely affected by the challenged Kansas statute. In doing so she never reached the merits of the constitutional challenge because even a facial constitutional challenge to a state law can only be pursued by plaintiffs who have Article III standing.

None of the ten named Plaintiffs in this case claims that he or she will suffer an imminent injury affecting a federally protected right if the declaratory and injunctive relief they have requested from this Court is denied to them. As acknowledged in the Response, the basis for continuing this lawsuit is nothing more than the insult they perceive from the mere existence in the statute books of Kansas laws containing wording that on its face appears to limit marriage to opposite sex couples. But since June 26, when the United States Supreme Court decided *Obergefell*, that limit is invalid and cannot be enforced. Even before *Obergefell*, since November, marriage licenses have been available to these Plaintiffs and other same-sex couples in Kansas

including those in Johnson County pursuant to the Kansas Supreme Court's order in *State ex rel. Schmidt v. Moriarty*, notwithstanding the state statutory and constitutional wording that appeared to limit marriage to one man and one woman. The original four unmarried Plaintiffs in this case still refuse to marry one another even though no act of any Defendant prevents them from marrying. Similarly, the married Plaintiffs are free to change the names on their drivers' licenses, to obtain spousal health insurance through their state university employers, and to file joint income tax returns if they so desire. They would suffer no impairment of any federally protected right if the Court denies the relief requested. The ten named Plaintiffs offer no affidavits or argument to the contrary.

If this lawsuit was really about remedying the perceived injuries to these named Plaintiffs, they would already have taken advantage of the opportunity to exercise their rights. Instead they insist on litigating rather than availing themselves of the relief readily available to them. Any alleged injury is solely traceable to the choices of these Plaintiffs and their counsel, not to the actions of any of the six State Officials named as Defendants.

III. Mootness Prevents the Grant of the Relief Requested.

Even if one of Plaintiffs had standing at the time of the Amended Complaint, this case is now moot. No plaintiff can continue to litigate a claim that is no longer a live controversy, seeking relief that will not remedy any federal grievance belonging to that plaintiff. If a similar lawsuit were to be filed today there is no question that a federal court would not entertain jurisdiction because there would be no case or controversy to decide. When a material change of circumstances makes it plain that there is no longer a controversy between the parties that the Court can resolve consistent with Article III and the Eleventh Amendment, continuation of the lawsuit is not optional; rather, it is barred.

Mootness resulting from a defendant's voluntary compliance with the demands of plaintiffs was discussed comprehensively in the Tenth Circuit case of *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010). In that case the lower court refused to dismiss a lawsuit seeking injunctive and declaratory relief based on a contention of mootness even though the administrative actions that triggered the original controversy had been replaced by other administrative orders that were not subject to the same objections. The Tenth Circuit reversed the Order refusing to dismiss the case and dismissed for lack of subject matter jurisdiction. The Opinion concluded that "[t]here is no point in ordering an action that has already taken place." *Id*. at1112 (quoting *Southern Utah Wilderness Alliance*, 110 F.3d at 728). The Panel also determined that declaratory relief would be inappropriate because the claim of future injury was too speculative. *Id.* at 1112.

Significantly the finding of mootness in *Rio Grande Silvery Minnow* acknowledged that the voluntary cessation of the challenged practices was motivated at least in part by the issuance of a preliminary injunction, and that the agency had not declared its abandonment of the narrow legal interpretation that caused it to take the action that spurred the lawsuit. *Id.* at 1118-19. What mattered most was the absence of any declared intention by the defendant to revert to the challenged practice once the lawsuit was dismissed. *Id.* at 1117-18.

Plaintiffs offer no evidence that plausibly suggests that Defendants who are already performing all of the acts allegedly required of them will begin violating any Plaintiff's legal rights once this lawsuit is dismissed. It is undeniable that Defendants are already doing for Plaintiffs everything that the Court would ever order them to do and that they will continue to do so into the future. No existing principle of Kansas law (and no existence of a printed law in the bound editions of the Kansas Statutes Annotated including in the Kansas Constitution), has

prevented them from giving the Plaintiffs everything they have demanded, in light of the *Obergefell* decision. Further litigation will not produce a prospective remedy for any of the named Plaintiffs.

The suggestion that this lawsuit cannot be moot because the offending laws are still on the books is plainly incorrect. The test of mootness does not require that defendants voluntarily supply plaintiffs with relief that no court could ever order, much less relief that the named defendants have no ability to offer. This Court would not have the authority to require the voters of Kansas to repeal Article 15, Section 16, of the Kansas Constitution, nor could it direct the Kansas Legislature to vote to repeal existing Kansas marriage laws. At most the Court would enjoin the named defendants from enforcing these sources of law to the extent that they operate to prevent same sex couples from obtaining the status of lawfully married persons, without expunging the objectionable legal provisions completely from the law books. That relief has already been granted unilaterally by the defendants without the need for an order of this Court.

The suggestion that there have been no confirmatory instructions issued by state officials of undeniable authority is clearly mistaken. Kansas Attorney General Derek Schmidt has already informed the Kansas Supreme Court that there is no longer any legal basis to refuse to issue marriage licenses to same-sex couples in his Notice of Dismissal in *State ex. rel. Schmidt v. Moriarty*, provided to this Court as Doc. 120-4, wherein he advised the Kansas Supreme Court that "[t]he United States Supreme Court's decision in *Obergefell v. Hodges*, . . . which, *inter alia*, expressly overruled the previously controlling precedent in *Baker v. Nelson*, 409 U.S. 810 (1972), has resolved the only justiciable legal controversy remaining between the parties. . .." Governor Sam Brownback has also issued an Executive Order expressly acknowledging the "recent imposition of same sex marriage by the United States Supreme Court," thus confirming that

Kansas executive agencies are bound by the United States Supreme Court's decision resolving the legal controversy over same-sex marriage laws. Exec. Order 15-05, issued July 7, 2015, available at https://www.governor.ks.gov. As is already present in the record in this case (Doc 59-6), the Kansas Supreme Court issued its Order permitting same-sex marriages last November in *State ex rel. Schmidt v. Moriarty*. There are no state officials with higher authority on these issues than the Kansas Supreme Court, the Governor, and the Attorney General. Plaintiffs offer only speculation to suggest that their rights will be denied in the future which is an insufficient basis for federal jurisdiction under well established law, including *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and its progeny. The parties have known all along that only a decision of the United States Supreme Court could provide a final resolution. That decision has been made. No more is needed from this Court.

The fact that the Defendants have not to date dismissed the pending appeal of the preliminary injunction also does not prevent this case from being moot. Plaintiff's Response cites no authority for the proposition they urge. Further, the three issues raised in appeal no. 14-3246 do not go to the merits of same-sex marriage, but rather argue that the preliminary injunction was improperly issued for reasons of lack of jurisdiction for lack of standing, Eleventh Amendment immunity and the *Rooker Feldman* Doctrine, as well as the bar on preliminary injunctive relief against judicial officers under 42 U.S.C. § 1983. A copy of the issue page of the Appellant's Brief is attached hereto.

Plaintiffs, not Defendants, are looking for excuses to contend that the *Obergefell* Decision has not already nullified the Kansas laws that they have challenged. The mandate stated in the Majority Opinion in *Obergefell* unambiguously applies to *all states*, not just the states involved in that case:

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry *in all States*. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Obergefell, 135 S. Ct. at 2607-08 (emphasis added). Obviously the State of Kansas is included within the class of "all states" to which the Opinion refers. The *Obergefell* Decision nullifies not only laws in Michigan, Ohio, Kentucky, and Tennessee, but also similar laws in Kansas. If any doubt remained about the operation of the Supreme Court's Decision in *Obergefell* on the Kansas statutory and constitutional provisions that were at issue in this case, Chief Justice Roberts in dissent further clarified the meaning the majority opinion: "Today . . . the Court takes the extraordinary step of *ordering every State* to license and recognize same-sex marriage. . .. As a result, the Court *invalidates the marriage laws* of more than half the States . . .." *Obergefell*, 135 S. Ct. at 2612 (emphasis added) (Roberts, C.J., dissenting). The ruling was expressly intended to establish a uniformly applicable constitutional right, not a variable right that was to be subject to further litigation from state to state. Therefore *Obergefell* has already granted the declaratory relief sought in this case.

A similar issue confronted a federal district court in Oklahoma in *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *aff'd on other grounds sub nom*. *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014). In that case a challenge to the federal Defense of Marriage Act was included in the complaint but the relief sought was mooted by *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013). Because the *Windsor* Case controlled the declaratory issue, any similar declaration by a lower court would have achieved nothing, rendering the issue moot under *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010):

> As a general rule, where a law has been declared unconstitutional by a controlling court, pending requests for identical declaratory relief become moot. *Thayer v. Chiczewski*, 705 F.3d 237, 256–57 (7th Cir. 2012) (claim for declaratory and injunctive relief moot in light of Seventh Circuit's invalidation of challenged law in another case); *Longley v. Holahan*, 34 F.3d 1366, 1367 (8th Cir. 1994) (claim moot where challenged statute was declared unconstitutional in companion case); *Eagle Books, Inc. v. Difanis*, 873 F.2d 1040, 1042 (7th Cir. 1989) (claim moot where state supreme court had declared challenged statute unconstitutional); see also *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004) (claim moot where challenged statute was repealed). Because Section 3 has already been declared unconstitutional by the Supreme Court, an identical declaration by this Court will have no further impact on the United States' actions.

Bishop, 962 F. Supp. 2d at 1269-70. The same is true here. *Obergefell* invalidated same-sex marriage bans in all states, rendering this lawsuit moot.

Plaintiffs' unfounded speculation that some future officeholder might attempt to defy *Obergefell* does not prevent this case from being moot. As the Tenth Circuit explained in *Rio Grande Silvery Minnow*:

> [T]he "[w]ithdrawal or alteration of administrative policies can moot an attack on those policies." *Bahnmiller v. Derwinski*, 923 F.2d 1085, 1089 (4th Cir. 1991); *see, e.g.*, *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue."). And the "mere possibility" that an agency might rescind amendments to its actions or regulations does not enliven a moot controversy. *Ala. Hosp. Ass'n v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983). A case "cease[s] to be a live controversy if the possibility of recurrence of the challenged conduct is only a 'speculative contingency.'" *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975) (quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969)).

601 F.3d at 1117. Defendants here are fully complying with *Obergefell*, and so this case is moot.

There is no way to justify continued litigation in this case consistent with the controlling analysis of *Rio Grande Silvery Minnow*. None of the cases cited in Plaintiffs' Response prove otherwise. Plaintiffs cite cases from other courts allegedly entering final judgment in the wake of *Obergefell*, but they have not complied with Local Rule 7.6(c) by attaching copies of the decisions, which are not available electronically (e.g., via WESTLAW or LEXIS). Thus,

Defendants are unable to tell whether factors specific to those cases presented an ongoing controversy or whether the analysis of those courts is of any persuasive value. The Court should therefore ignore those citations. Other cases cited by the Plaintiffs merely state generic legal propositions such as the proposition that a case is not moot when there is a "reasonable expectation" that the challenged conduct will recur. *See Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir. 1992). Defendants agree with this statement of law, but here there is no reasonable expectation that Defendants will change course and defy *Obergefell* in the future. After all, Defendants have taken oaths to support the Constitution of the United States, *see* K.S.A. 54-106 and K.S.A. 75-4308, and after *Obergefell*, it is now clear that the Constitution requires states to recognize same-sex marriages. Plaintiffs' unfounded fears of future noncompliance are, at most, a "speculative contingency." *Rio Grande Silvery Minnow*, 601 F.3d at 1117.

Plaintiffs also attempt to argue that even if their request for injunctive relief is moot, their request for a declaratory judgment is not. This argument is foreclosed by *Rio Grande Silvery Minnow*, which held that "[d]eclaratory judgment actions must be sustainable under the same mootness criteria that apply to any other lawsuit." *Rio Grande Silvery Minnow*, 601 F.3d at 1109; *see also, Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) ("[I]f a case is otherwise moot, the existence of a prayer for declaratory relief does not keep the case alive."). In this case, the Plaintiffs no longer suffer any injury and thus a declaratory judgment will not "affect[] the behavior of the defendant toward the plaintiff" or have any "effect in the real world." *Rio Grande Silvery Minnow*, 601 F.3d at 1109-10.

IV. Individualized Review of Each Claim by Each Plaintiff against Each Defendant Confirms Both Lack of Article III Standing and Mootness.

Plaintiffs' Response does not analyze the specific claims made by these ten individual

Plaintiffs against the six State Officers named as Defendants. Such an analysis demonstrates that all Plaintiffs lack standing and that this lawsuit is moot.

A. Plaintiffs Marie, Brown, Wilks, and DiTrani lack Standing, and Their Claims are Also Moot.

As described in the summary judgment briefs previously filed, the four original Plaintiffs have asserted no claims for relief against any Defendants other than Court Clerks Doug Hamilton and Bernie Lumbreras and the KDHE Secretary. No new facts have been mentioned in the Response that bear on the claims of these Plaintiffs. These Plaintiffs lacked standing to pursue the claims set forth in the First Amended Complaint filed on November 24, 2014 (Doc. 52) because all of the conduct that supposedly aggrieved them had already ceased by virtue of Administrative Orders entered in November 2014 by Chief Judges Robert Fairchild and James Fleetwood, respectively, Administrative Order 14-17 (Doc. 59-1) and Administrative Order 14-08 (Doc. 59-3).

The same Plaintiffs who once told this Court that the only thing standing between them and licensed marriage was the conduct of Clerks Doug Hamilton and Bernie Lumbreras and, for some reason, Dr. Moser at KDHE, Plaintiffs Marie, Brown, Wilks and DiTrani, testified in deposition that they abandoned their plans to marry at or about the time the preliminary injunction was entered by this Court, and knew at the time the Amended Complaint was filed that they definitely did not plan to marry during the pendency of the lawsuit and any subsequent appeal, no matter what Clerks Hamilton and Lumbreras did. Marie Depo. (Doc. 115-9), at 37:9-38:13; Brown Depo. (Doc. 115-8), at 25:7-28:11; DiTrani Depo. (Doc. 115-10), at 24:8-25:15; Wilks Depo. (Doc. 115-11), at 53:15-59:21. Since they will undoubtedly receive a marriage license if and when they ever decide to return for one, and have already acknowledged in their sworn deposition testimony that licenses are available to them, the original four Plaintiffs have

conceded they have suffered no injury traceable to the current actions of Clerks Doug Hamilton or Bernie Lumbreras (or the KDHE Secretary for that matter). They have been free to obtain marriage licenses continuously since last November pursuant to Orders issued by the Chief Judges of the 7th and 18th Judicial Districts; they could also have traveled to Johnson County for a Kansas marriage license issued in response to the Kansas Supreme Court's November 18, 2014, Order in the *Moriarty* mandamus case. Because the unmarried Plaintiffs will not have to apply for a license again presuming they apply within the temporal window such applications are routinely kept on file at the district court clerk's office they need not even see the forms issued by KDHE, but if they do see those forms they will not be at risk of suffering offense by gender-based terminology because the forms were revised last year even before the Kansas Supreme Court granted authority to marry same-sex couples and even before the Amended Complaint was filed. Keck Affidavit (Doc 57.2.)

Before *Obergefell* was decided, the Kansas Supreme Court had already declared that same-sex couples are not prohibited from marrying one another at the discretion of Kansas district court judges in its November 18, 2014 decision in the *State ex rel Schmidt v. Moriarty* mandamus proceeding. (Doc. 59-6). After *Obergefell*, Kansas Attorney General Derek Schmidt informed the Kansas Supreme Court that *Obergefell* mooted the mandamus action pending in that court and voluntarily dismissed those proceedings. A copy of that dismissal notice was submitted with Defendants' Motion. (Doc. 120-4). The *Moriarty* Orders prevent any plausible contention that a Kansas applicant for a marriage license will ever again be denied that license based on gender due to the language of the Kansas Constitution or present Kansas marriage laws. As Equality Kansas has stated in its own Internet posting touting the issuance of marriage licenses in all thirty-one (31) Judicial Districts in Kansas, "IT'S DONE," as per the attached.

The only reason the four original Plaintiffs Marie, Brown, Wilks and DiTrani have not obtained marriage licenses is their own free choice as they have admitted. Nobody has been preventing them from picking up the licenses they applied for last year. Their refusal to take advantage of their rights is not evidence of an ongoing deprivation of those rights. Their claims are moot.

B. No Plaintiff has Standing to Seek Relief about Income Tax Forms, and Any Such Claim would be Moot.

The sole claim concerning income tax forms has been made by married Plaintiffs Peters and Mohrman. Peters and Mohrman have never attempted to file a joint Kansas income tax return, not because Kansas officials were preventing them but because it is not in their financial self interest to do so. Mr. Peters confirmed that he and Mr. Mohrman filed single taxpayer forms for both tax year 2013 and 2014. Peters Depo. (Doc. 115-13), at 36:11-37:12, 43:4-46:6. None of the testimony of these two plaintiffs would support a contention that either of them has been harmed by KDOR Secretary Nick Jordan or by any KDOR practice of objecting to joint tax returns filed by same sex couples.

If Plaintiffs Peters and Mohrman ever had a federal grievance about joint tax returns, it is now moot because KDOR accepts joint income tax returns for all married couples. Affidavit of Nick Jordan, attached hereto. Plaintiffs have consistently denied that they seek any relief concerning the levying of taxes, and no such relief could be granted consistent with the Tax Injunction Act, 28 U.S.C. §1341. Their claims are moot.

C. No Plaintiff has Standing to Seek Relief about Drivers' License Name Changes, and Any Such Claim would be Moot.

Three of the four Plaintiffs named in the Amended Complaint as having a claim against Kansas DMV Director Lisa Kaspar have sought and been denied issuance of a new Kansas drivers' license with a new name, but the reasons for those denials had nothing to do with the respective Plaintiffs' marriage to a person of the same sex. Plaintiff Fowler relied on an Illinois

marriage license that made no reference to a new name to change her surname to Braun. Braun Depo. (Doc. 115-14), at 28:1-8; 25:10-25. Plaintiffs Bohnenblust (a.k.a. Pottroff) and Hickman (a.k.a. Spain) sought to reinstate their birth names using their Kansas marriage license; both admitted in deposition that they had not heard of others who had proceeded with that method of name restoration. Pottroff Depo. (Doc. 115-16), at 8:19-21, 47:10-14, 20-24; Spain Depo. (Doc. 115-17), at 15:4-17:21. None of these changes is authorized by Kansas law no matter what gender the applicant is. K.S.A. 2014 Supp. 23-2506 only permits certain new names to be approved, and does not authorize restoration of a former name using this method. When no new name appears on the marriage license the Division of Motor Vehicles demands a court order instead, no matter who the applicant may be.

There is no federal right, whether statutory or constitutional, to the issuance of a drivers' license in the name of the licensee's preference. *See Jorgensen v. Larsen*, No. 90-4048, 930 F.2d 922, 1991 WL 55457 (10th Cir. Apr. 12, 1991); *Brown v. Cooke*, No. 09-1144, 362 F. App'x 897, 2010 WL 227574 (10th Cir. Jan. 22, 2010). According to DMV Director Lisa Kaspar's Affidavit, the Division of Motor Vehicles is now issuing new licenses to married persons without regard to the gender of the two parties, so the dispute is moot. Even the Declaration filed with the Response from Matt Lauer concluded with the statement: "On Monday, July 13, 2015, I received a telephone call from the Division advising me that I am able to change my name on my Kansas driver's license to match my new married name." (Doc. 122-2, ¶ 6). There is no ongoing controversy within the jurisdiction of this Court.

D. No Plaintiff has Standing to Seek Relief about Employer Health Insurance, and Any Such Claim would be Moot.

Spousal health insurance was sought by two Plaintiffs, who were employed at Kansas University and Kansas State University respectively. Specifically, Plaintiffs Peters and

Bohnenblust (a.k.a Pottroff) sent emails inquiring about obtaining spousal coverage even though they acknowledged in their depositions that they had no financial reason to do so and their respective spouses had coverage under their preexisting separate policies of insurance. Pottroff Depo. (Doc. 115-16), at 57:18-24; Peters Depo. (Doc. 115-13), at 32:16-33:3. Because no applications were ever submitted and because no harm would have resulted from their denial, Plaintiffs Peters and Bohnenblust lack Article III standing.

Kansas law and practices now recognize same-sex marriages, whatever state the marriage was entered into, in accordance with the mandate of *Obergefell*. Applications of state employees for spousal health insurance under the state self insurance plan are now being accepted without regard to the state where the marriage was entered into and without regard to the gender of the employee and spouse according to the Affidavit of Mike Randol (Doc. 120-3). Plaintiffs' Response does not even attempt to controvert this or argue to the contrary. Plaintiffs' only argument is that a state health plan regulation refers to a "participant's lawful wife or husband, as recognized by Kansas law." K.A.R. 108-1-1(g)(1). Post-*Obergefell*, however, Kansas law now must recognize as lawful a same sex marriage as argued above herein. Plaintiffs Peters and Bohnenblusts' claims against Mike Michael concerning spousal health insurance under the state self insurance program are also moot.

CONCLUSION

Whether the Court grants the motions to dismiss previously filed or instead dismisses this case for lack of jurisdiction due to mootness or Eleventh Amendment immunity, there is nothing more that this Court can do consistent with Article III and the Eleventh Amendment rights of the Defendant State Officials. The Kansas Constitutional Provision and statutes the Plaintiffs wish to have declared invalid already has been so declared by the United States Supreme Court. The

practices and conduct by Kansas state agencies and officials that the Plaintiffs wish to have enjoined already have been abandoned or altered to comply with the Order of the United States Supreme Court. Nothing but the Plaintiffs' own decisions not to avail themselves of available relief now stands between them and all the relief they have requested. Within the confines of this case, these named Plaintiffs have obtained all they can from these named Defendants: No relief remains for this Court to grant. Under these circumstances, Article III and the Eleventh Amendment preclude this Court from continuing to entertain this lawsuit. This case must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of July, 2015, a true and correct copy of the above and foregoing was filed by electronic means via the Court's electronic filing system which serves a copy upon Plaintiffs' counsel of record, Stephen Douglas Bonney, ACLU Foundation of Kansas, 3601 Main Street, Kansas City, MO 64111 and Mark P. Johnson, Dentons US, LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, dbonney@aclukansas.org and Mark.johnson@dentons.com and Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 100004, jblock@aclu.org.

s/M.J. Willoughby
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Attorney for Defendants Hamilton and Lumbreras

IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI, JAMES E. PETERS and GARY A. MOHRMAN; CARRIE L. FOWLER and SARAH C. BRAUN; and DARCI JO BOHNENBLUST and JOLEEN M. HICKMAN, Plaintiffs, v. SUSAN MOSIER, M.D., in her official capacity as Interim Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas county), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), NICK JORDAN, in his official capacity as Secretary of the Kansas Department of Revenue, LISA KASPAR, in her official capacity as Director of the Kansas Department of Revenue's Division of Vehicles, and MIKE MICHAEL, in his official capacity as Director of the State Employee Health Plan, Defendants.	)	Case No. 14-CV-2518-DDC-TJJ

AFFIDAVIT OF NICK JORDAN

STATE OF KANSAS)
) **ss:**
COUNTY OF SHAWNEE)

NICK JORDAN, after being duly sworn upon his oath, states as follows:

1. I am Secretary of the Kansas Department of Revenue.

2. I am personally knowledgeable about the matters described in the first amended complaint filed in the above proceeding insofar as they relate to the role of the Kansas Department of Revenue in the handling of personal income tax returns for married taxpayers.
3. Kansas Department of Revenue is accepting tax returns for same sex married taxpayers for tax years 2014 and thereafter. For tax years 2014 and thereafter, KDOR will process returns for same sex married couples in the same manner as KDOR processes the state income tax returns of opposite sex married couples who file their tax returns using a married filing status. In accordance with the United States Supreme Court's decision in *Obergefell v. Hodges,* same sex married couples are treated the same as opposite sex married couples for state taxation purposes for tax years 2014 and thereafter.

FURTHER AFFIANT SAITH NAUGHT.

NICK JORDAN

BE IT REMEMBERED, that on this 21st day of July, 2015, before me, the undersigned, a Notary Public in and for the county and state aforesaid, came NICK JORDAN who is personally known to me as the same person who executed the within instrument of writing and such person duly acknowledged the execution of the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, on this the 21st day of July, 2015.

Billie Scarberry
NOTARY PUBLIC

My Appointment Expires: October 18, 2017

BILLIE SCARBERRY
NOTARY PUBLIC
State of Kansas
My Appt Expires 10/18/17

Case No. 14-3246

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D and DONNA DITRANI, Plaintiffs/Appellees,

v.

ROBERT MOSER, M.D. in his official capacity as Secretary of the Kansas Department of Health and Environment and
DOUGLAS A. HAMILTON, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County)
and BERNIE LUMBRERAS in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County)

On Appeal from the United States District Court
For the District of Kansas
The Honorable Daniel D. Crabtree
United States District Judge
Case No. 14-CV-02518-DDC/TJJ

JOINT OPENING BRIEF OF APPELLANTS

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ORAL ARGUMENT IS REQUESTED

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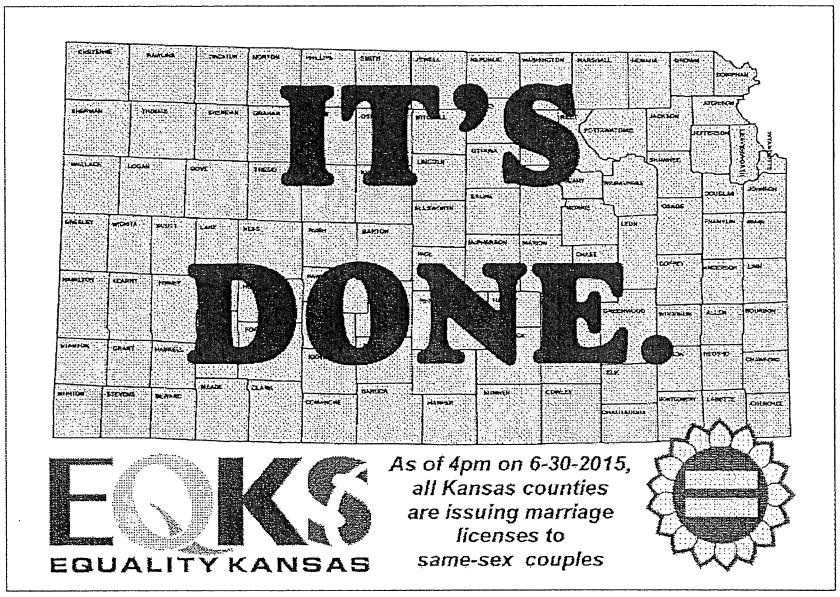
UPDATE: IT'S DONE. Marriage Equality Comes to All 105 Kansas Counties

Posted in Equality Kansas News by Equality Kansas on June 29, 2015 ***Read More***



BREAKING NEWS: IT'S DONE. Just before 4pm, we received confirmation that all judicial districts in Kansas are now issuing marriage licenses to same-sex couples.

Governor Brownback, it's your turn. It's time to drop the silly political games and recognize what every chief judge in Kansas has now acknowledged: Marriage equality is the law of the land, including Kansas. Period.

3:30pm June 30 UPDATE: BREAKING: The 25th Judicial District (Finney, Greeley, Hamilton, Kearny, Scott and Wichita counties) has now ordered the issuance of marriage licenses to same-sex couples! Our many thanks go to the judge who was kind enough to call our office with the news. **This leaves just one judicial district where we have no confirmation**: The 20th, which includes Barton, Ellsworth, Rice, Russell and Stafford counties.