UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, et al.,

Plaintiffs,

Case No. 4:14-cv-107-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

SLOAN GRIMSLEY, et al.,

Plaintiffs,

Case No. 4:14-cv-138-RH-CAS

v.

RICK SCOTT, et al.,

Defendants.

GRIMSLEY PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AS MOOT

The *Grimsley* Plaintiffs ("Plaintiffs") respond to Defendants' motion to dismiss these consolidated cases as moot, (Doc.[1] 118 ("Defendants' Opposition to *Grimsley* Plaintiffs' Motion for Summary Judgment and Defendants' Motion to Dismiss as Moot")).

In their motion, Defendants advance five arguments: (1) the case is moot following *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); (2) the Eleventh Amendment bars any relief; (3)

[1] All docket citations are to the consolidated, *Brenner* docket, except where otherwise noted.

the Court otherwise lacks jurisdiction; (4) injunctive relief is unwarranted; and (5) declaratory relief is inappropriate. (*See generally* Doc. 118). Defendants' arguments all fail for the same reason—Defendants have not demonstrated that the unconstitutional conduct "could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 189-90 (2000).

Defendants argue that because they "have committed to follow *Obergefell*," (Doc. 118 at 2), the case is moot, the Eleventh Amendment bars any relief against them, and declaratory and injunctive relief are inappropriate. The Eighth Circuit recently rejected this identical argument made in marriage cases pending before that court. It held that the Supreme Court's decision in *Obergefell* did not moot pending challenges to marriage bans in Nebraska, Arkansas, or South Dakota because the Court only "invalidated laws in Michigan, Kentucky, Ohio, and Tennessee," not marriage bans in Nebraska, Arkansas, or South Dakota, and those states have not repealed the challenged laws. *Waters v. Ricketts*, --- F.3d ----, No. 15-1452, 2015 WL 4730972, at *1 (8th Cir. Aug. 11, 2015) (petition for *en banc* review pending); *Jernigan v. Crane*, --- F.3d ----, No. 15-1022, 2015 WL 4731342, at *1 (8th Cir. Aug. 11, 2015); *Rosenbrahn v. Daugaard*, --- F.3d ----, No. 15-1186, 2015 WL 4730871, at *1 (8th Cir. Aug. 11, 2015).

The same is true here. While *Obergefell* is clearly controlling precedent that dictates the outcome of this case, the Supreme Court did not declare Florida's marriage ban unconstitutional, and the ban has not been repealed. The fact that Florida's marriage ban remains on the books in Florida distinguishes this case from all of the Eleventh Circuit cases cited by Defendants. In those cases, the challenged law or policy was no longer in effect. In *Jacksonville Prop. Rights Ass'n, Inc. v. City of Jacksonville*, 635 F.3d 1266 (11th Cir. 2011), the city passed legislation amending the city code to remove the unconstitutional ordinances. And in *Christian Coal. of Ala.*

v. Cole, 355 F.3d 1288 (11th Cir. 2004), the Judicial Inquiry Commission withdrew the challenged advisory opinion. *See also Troiano v. Supervisor of Elecs.*, 382 F.3d 1276 (11th Cir. 2004) (challenge to failure to accommodate disabled voters at election mooted by provision of complete accommodation).[2]

Not only does the marriage ban remain on the books, but Defendants continue to refuse to fully recognize the marriages of same-sex couples. As the Florida Department of Health ("DOH") has acknowledged, it continues to refuse to list the female spouses of women who give birth on their children's birth certificates pursuant to Fla. Stat. § 382.013(2)(a), even though it will list male spouses whether or not biologically related to the child, which has resulted in separate litigation in this Court (*Chin v. Armstrong*, No. 4:15-cv-399-RH-CAS (N.D. Fla., filed Aug. 13, 2015)). Defendants assert that this denial of marriage recognition does not affect the mootness analysis because that statute is "concerned with '[p]aternity' providing that a birth mother's 'husband' is listed as the 'father' on a birth certificate," (Doc. 118 at 5). This position highlights Defendants' apparent belief that laws that provide for benefits or obligations of marriage using gendered terms such as husband and wife can be limited to different-sex spouses. This is in direct conflict with *Obergfell*'s specific recognition of birth certificates as one of the benefits states confer on married couples and its mandate that civil marriage be available to same-sex couples "on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S. Ct. at 2605.[3]

---

[2] *Haas v. S.C. Dep't of Motor Vehicles*, No. 6:14-cv-04246-JMC, 2015 WL 4879268 (D.S.C. Aug. 13, 2015) is distinguishable for the same reason. That case involved a challenge to an executive agency policy, which had been changed by the defendant agency.

[3] DOH's policy regarding birth certificates has not changed as a result of *Obergefell*, and it admits that is has no intention of changing its policy absent judicial intervention. (Doc. 113

Moreover, there are numerous incidents of marriage under Florida law that use gendered terms. *See, e.g.*, Fla. Stat. § 742.11 (child born within wedlock who has been conceived by artificial insemination is irrebuttably presumed to be the child of the husband and wife if they have both consented in writing to the insemination); § 63.213(2)(c) (discussing consequences to putative surrogate mother if "intended father and intended mother terminate the agreement before final transfer of custody"). Given Defendants' apparent position that such laws are not affected by *Obergefell*, absent judicial intervention, Plaintiffs and same-sex couples across the State are at risk of seeing their marriages disrespected by the State not only in the context of birth certificates but in other circumstances.

Defendants have not met their burden of demonstrating that Plaintiffs "no longer ha[ve] any need of the judicial protection that is sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).[4]

Finally, Defendants' contentions concerning Article III jurisdiction and standing, (Doc. 118 at 6-8), are similarly unavailing. It is no barrier to judicial resolution that the *Grimsley* Plaintiffs' circumstances do not themselves completely encompass the thousands of ways that

---

("Motion for Clarification") at 2). Interestingly, the DOH recognizes the conflict between § 382.013(2)(a) and *Obergefell*, (Doc. 113 at 3 ("In light of the conflict between section 382.013, Florida Statutes, pertaining to vital statistics records, the Order of this Court, and the decision in *Obergefell* . . ."), yet it nevertheless refuses to recognize the marriages of same-sex couples in that context absent intervention by the Court. And even if ordered by the Court to cease excluding female spouses from birth certificates of children born to their wives, DOH admits that it will not immediately comply but will instead "initiate rulemaking." (*Id.* at 2).

[4] Unlike standing, where the burden is on the plaintiff at the outset of the case to demonstrate that absent litigation, the defendant's injurious conduct will likely occur or continue, when a defendant claims that its voluntary compliance moots a case, it bears the burden of showing that the conduct will not happen again. *Friends of the Earth*, 528 U.S. at 189-90; *see also Adarand*, 528 U.S. at 221 (reversing dismissal of case as moot, noting that the lower court "placed the burden of proof on the wrong party").

local, state, and federal laws and policies diminish the right of same-sex couples to marry and have their marriages recognized on the same terms as different-sex couples. Were that the rule, *Obergefell* would have to have come out the other way, but the Supreme Court rejected such an approach: "Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." 135 S. Ct. at 2606. Plaintiffs are seeking full recognition of their marriages, which provide a broad range of protections over the course of the lifetime and at the time of death. (*Grimsley* Doc. 16 (First Amended Complaint), ¶¶ 1-2, 7). They are not merely seeking particular incidents of marriage in one moment in time.

Florida's marriage ban has not been repealed. And the State of Florida has failed to demonstrate that it has ceased its unconstitutional refusal to recognize the marriages of same-sex couples. The DOH—headed by Defendant John Armstrong—has itself explicitly stated that it will not do so unless this Court issues an order directing it to do so. (Doc. 113 at 2 (with respect to issuing birth certificates for children of same-sex spouses, DOH said "[t]he Department will initiate rulemaking . . . *should this court find that outcome is compelled* . . ") (emphasis added)). This case is ready for final judgment. [5]

Date: Wednesday, September 9, 2015

Certificate of Service: Today, I electronically filed this document with the Clerk of Court using CM/ECF, which automatically serves all counsel of record who have appeared.

[5] An appeal from an order granting a preliminary injunction does not divest this Court of jurisdiction to proceed with the action on the merits. *See, e.g., Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995); *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F. 2d 1219, 1229 (8th Cir. 1986); *accord* 11A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 2962 (3d ed.).

Respectfully submitted,

/s/ Daniel B. Tilley
Daniel B. Tilley
Florida Bar No. 102882
Nancy G. Abudu
Florida Bar No. 111881
ACLU Foundation of Florida
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(786) 363-2714
DTilley@aclufl.org / NAbudu@aclufl.org

Stephen F. Rosenthal
Florida Bar No. 131458
Podhurst Orseck, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
(305) 358-2800
SRosenthal@podhurst.com

Leslie Cooper
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627
LCooper@aclu.org

ATTORNEYS FOR PLAINTIFFS