

Case No. 15-13836

The United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Paul Hard,

Plaintiff-Appellee,

v.

Patricia Fancher,

Intervenor Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Alabama, Northern Division

APPELLANT'S PETITION FOR REHEARING EN BANC

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May 11, 2016

Case No. 15-13836-C
Hard v. Fancher

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellant PAT FANCHER certifies that the following is a complete list of the persons and entities known to have an interest in the outcome of this case:

Matthew Kidd, Counsel for Appellant

Foundation for Moral Law, Inc.

Samuel Wolfe & Daniel Dinielli, Counsel for Appellees

Southern Poverty Law Center, Inc.

Jim Davis, Counsel for Defendant Luther Strange

Luther Strange, Attorney General, State of Alabama

Gov. Robert Bentley, State of Alabama

Catherine Donald, State Registrar of Vital Statistics

Richard Lohr, Administrator of the Estate of Charles David Fancher

Rick Morrison, Attorney for Executor Lohr

Hon. Keith Watkins, U.S. District Judge, U.S. Middle District of Alabama

Paul Hard, Plaintiff-Appellee

Case No. 15-13836-C
Hard v. Fancher

Pat Fancher, Intervenor Defendant-Appellant

Scott D. McCoy, additional counsel for Plaintiff-Appellee.

/s/ Matthew Kidd

Attorney of Record for Appellant

RULE 35 STATEMENT

Pursuant to Federal R. App. P. 35(b)(1) and 11th Cir. R. 35-5(c), undersigned counsel for Appellant makes the following statement regarding this petition:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Powell v. McCormack*, 395 U.S. 486 (1969); *Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698 (11th Cir. 2014).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: whether *Obergefell v. Hodges*, 576 U.S. ____ (2015) moots estate tort damages disputes by retroactively applying the views expressed in that opinion to facts and circumstances years before the *Obergefell* case. The panel's decision presumes that *Obergefell* is retroactive in this case and therefore affirms relief to the Appellee while denying relief to Appellant without articulating this new rule or explaining why this rule supersedes clear state precedent regarding the vesting of tort collection rights.

/s/ Matthew Kidd
Attorney of Record for Appellant

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STATEMENT OF THE ISSUES

Whether *Obergefell v. Hodges* moots estate tort damages disputes by retroactively applying the views expressed in that opinion to facts and circumstances years before the *Obergefell* case thereby circumventing the conventional time for vesting the rights of heirs.

STATEMENT OF THE CASE

1. In May of 2011, Appellee Hard and David Fancher, both male, were issued a marriage certificate from the Commonwealth of Massachusetts.¹ A: 2. At that time only six states recognized same-sex marriages as legally binding.²
2. After the May 20, 2011 ceremony, Fancher and Hard lived at separate residences in Alabama, one of 39 states whose law specifically declined recognition of two-male marriages at that time. [Ala. Code § 30- 1-19 (1975); Ala. Const. (1901) Art. I, § 36.03]. Less than three months later, on August 1, 2011, David was involved in a fatal traffic accident while traveling on I-65 North toward Birmingham. A:2. Subsequently, the administrator of Fancher's estate filed a wrongful death action against United Parcel Service (UPS). A:2.

¹ Citations ("A:") are to the addendum provided of this petition

² Appellant's Reply at 21-22; See also, *Research Guides: Same-Sex Marriage Laws*, available at: <http://moritzlaw.osu.edu/library/samesexmarriagelaws.php>; see also *State Policies on Same-Sex Marriage Over Time*, available at: <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>

3. Alabama's wrongful-death laws provide that awards from any wrongful death suit are distributed under the laws of intestate succession. A:3 (citing Ala. Code § 6-5-410). Under Alabama law, any and all beneficiaries of wrongful death awards are determined and fixed at the moment of one's death. (Appellant's Br. at 2).³
4. After the *Obergefell v. Hodges* opinion was published by the U.S. Supreme Court, Mr. Hard petitioned the Middle District of Alabama to re-open the case and grant judgment in his favor.⁴ While Mrs. Fancher was preparing a response to Mr. Hard's motion, Defendant Attorney General Strange moved for the case to be dismissed alleging it was moot.⁵ (Appellant's Br. at 4). A few hours later, and without time for Mrs. Fancher to respond, the district court granted the dismissal and ordered disbursement of the disputed funds to Mr. Hard. The next day, Mrs. Fancher moved for the district court set aside its order dismissing the case.⁶ On July 29, 2015, without addressing the merits of Appellant's arguments, the district court entered its final judgment dismissing the case.⁷

³ See also Appellant's Reply Br. at 8 (quoting *Lowe v. Fulford*, 442 So. 2d 29, 31 (Ala. 1983); *Mordecai v. Scott*, 320 So. 2d 642, 644 (Ala. 1975); *Williams v. Overcast*, 155 So. 543, 545 (Ala. 1934); *Crosby v. Corley*, 528 So. 2d 1141, 1143 (Ala. 1988); *Steele v. Steele*, 623 So. 2d 1140, 1141 (Ala. 1993)).

⁴ Pl.'s Mot. to Lift Stay and Enter Judgment (Doc 79).

⁵ Def.'s Mot. to Dismiss (Doc. 87).

⁶ Intv. Def.'s Mot. to Set Aside Order (Doc. 90).

⁷ (Doc. 97).

5. On April 20, 2016, a Panel of this Court affirmed the judgment of the district court holding that the dispute was moot and that Mr. Hard was the de facto recipient of the large-sum settlement in dispute during this case. A:9.

REASONS FOR GRANTING THE PETITION

I. The Panel's holding creates intercircuit conflict.

In upholding the district court's dismissal of this case for mootness, this Court has departed from several other opinions concerning the same question of law and has created a circuit split. The American Civil Liberties Union made a similar argument in *Aaron-Brush v. Strange*, case no. 16-10028, a case also arising out of Alabama now pending before the Eleventh Circuit. In that case, the Attorney General of Alabama also moved to dismiss for mootness a same-sex marriage case against him involving state issued drivers' licenses and joint tax returns, incidental benefits of marriage, on the basis of the *Obergefell* ruling. Like this case, the dismissal for mootness was granted. Because of the dismissal, the district court found that the plaintiffs were not entitled to attorney's fees. However, the ACLU, in its initial brief on appeal, points out that "*Obergefell* did not declare that [Alabama's same-sex marriage laws] were unconstitutional."⁸ Instead, the ACLU recognizes that "[t]he Supreme Court in *Obergefell* invalidated the same-sex marriage bans in Michigan, Kentucky, Ohio, and Tennessee—not in any other

⁸ *Aaron-Brush v. Strange*, case no. 16-10028 (2016), *Appellant's Initial Br.* at 5.

states.” *Id.* 5–6. The ACLU then cites in its brief several cases from multiple circuits demonstrating this point, including *Conde-Vidal v. Rius-Armendariz*, No. 14–2184 (1st Cir. July 8, 2015) (final judgment still necessary after *Obergefell*); *Campaign for S. Equal. v. Bryant*, 791 F.3d 625 (5th Cir. 2015) (same); *Jernigan v. Crane*, 796 F.3d 976 (8th Cir. 2015) (*Obergefell* did not invalidate Arkansas’ gay marriage ban); *Waters v. Ricketts*, 798 F.3d 682 (8th Cir. 2015) (nor Nebraska’s ban); *Rosenbrahn v. Daugaard*, 799 F.3d 918 (8th Cir. 2015) (nor South Dakota’s ban); *Taylor v. Brasuell*, No. 1:14-CV-00273-REB, 2015 WL 4139470, at *7 (D. Idaho July 9, 2015) (*Obergefell* did not invalidate Idaho’s ban). *Id.* at 6. Even after a favorable outcome at the district court level, the ACLU acknowledges that *Obergefell* did *not* afford the Alabama plaintiffs in that case, a gay couple, the relief that they sought. *Id.*

In *Waters v. Ricketts*, the Eighth Circuit plainly states *Obergefell* did not invalidate Nebraska’s same-sex marriage laws and rejected the state’s argument that the case before it would be moot:

Nebraska suggests that *Obergefell* moots this case. But the Supreme Court specifically stated that “the State laws *challenged by Petitioners in these cases* are now held invalid.” *Id.* at 2605 (emphasis added). *Cf. United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 477-78, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (limiting relief to the parties before the Court and noting ‘we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants’). The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee--not Nebraska. *See Campaign Southern Equal. v.*

Bryant, 791 F.3d 625, 2015 WL 4032186, at *2 (5th Cir. July 1, 2015) (ordering district court to enter final judgment that Texas laws denying same-sex couples the right to marry are unconstitutional); *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. July 8, 2015) (judgment vacating and remanding district court judgment that dismissed challenge to law denying same-sex marriage). 798 F. 3d 682.

Thus, the Eleventh Circuit's ruling upholding the Middle District of Alabama's ruling that *Obergefell* moots this case creates an intercircuit conflict because it essentially holds that *Obergefell* invalidates Alabama's same-sex marriage laws in contravention to the holdings of other circuits on the same issue, demonstrating that this is a question of exceptional importance warranting a rehearing en banc.

II. The panel's ruling has significant practical implications because mootness cannot be decided in this case without engaging the questions of whether or not *Obergefell* is retroactive and whether or not it upends Alabama law as to pre-existing tort rights.

The Panel provided two basic reasons for its affirmation of the District Court's dismissal. First, the Panel said that Mrs. Fancher did not ask this Court to review the mootness question, thus requiring affirmation of the lower court's ruling. A:7. Further, it held that Hard received the relief he sought because David Fancher's certificate was posthumously amended by the registrar's office, *Searcy v. Strange* ___ F. Supp. 3d ___ (2015) and *Obergefell* declared Alabama's same-sex marriage ban was unconstitutional, and he was awarded the spousal share of

the wrongful death proceeds. A:7. From the outset the amended death certificate is invalid, for just after the issuance of the amended death certificate, the Alabama Supreme Court, the final arbiter of state law, clearly said that Alabama's same-sex marriage ban was still in effect.⁹ The *Searcy* ruling, like the *Obergefell* ruling, bound only the parties before it, including the Attorney General. The Panel held that Hard's request that Alabama's marriage laws be held unconstitutional was satisfied when "the Southern District of Alabama issued *Searcy* and the Supreme Court issued *Obergefell*." A:8. However, the district court disagrees noting in its order dismissing Governor Bentley as a party that, "[t]his court is not bound by *Searcy*."¹⁰ With *Searcy* out of the picture the only lawful way in which Paul Hard can have David Fancher's death certificate amended and receive settlement funds is if *Obergefell* demands that result. But *Obergefell* cannot moot this dispute and demand the amendment of a death certificate if *Obergefell* is not retroactive.

A. The case was never moot as to Mrs. Fancher, hence the reason for her appeal to the Eleventh Circuit of the lower court's dismissal for mootness.

Mootness is derived from Article III's case and controversy requirement. While it may be true that there was no longer a controversy as to Hard and Attorney General Strange, rendering the case between those two parties moot, there was

⁹ Appellant's Reply Br. at 13 (citing *Ex Parte State of Alabama ex rel. Alabama Policy Institute v. King*, case no. 1140460 (Ala. 2015)).

¹⁰ Memorandum Opinion and Order, Doc. 76, fn. 2.

certainly still a controversy in existence as to Hard and Mrs. Fancher, namely in the collection of a wrongful death award. As mentioned above, this case involves a wrongful death law dispute. In Alabama, wrongful death proceeds are distributed according to Alabama laws in place *at the time of one's death*.¹¹ On the first page of its opinion, the Panel noted that the marriage between Paul Hard and David Fancher was not recognized in Alabama when David died. A:2. Put simply, if there is no offspring or surviving spouse at the time of death, the settlement proceeds go to the surviving parents. *Hard v. Fancher*, presented this Court with a clear controversy: the disbursement of wrongful death proceeds based on Alabama intestacy laws in place at the time of the decedent's death. The money at stake is demonstrable evidence that the issue presented to this Court in this case is very much "alive." *See Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1, 8–9 (1978) (holding mootness cannot be present in disputes involving damages). Thus, the conflict between the remaining parties was not moot regardless of the Attorney General's motion to dismiss the case *as to him* for mootness. That order was granted, and from that order intervening defendant Pat Fancher appealed.

The Panel in this case did not cite one case or one law that stands for the proposition that Article III jurisdiction is determined upon whether or not the word

¹¹ Appellant's Br. at 28. *See also Lowe v. Fulford*, 442 So.2d 29, 31 (Ala. 1983); *Mordecai v. Scott*, 320 So.2d 642, 644 (Ala. 1975).

“moot” is mentioned. The Panel instead essentially created its own rule, one requiring eloquence and correct wording (though not specifying which wording other than “moot”) and then enforced this rule unilaterally against one party to this dispute. According to this Court’s precedent, however, “a case is moot ‘when it no longer presents a live controversy with respect to which the court can give meaningful relief.’”¹² “And this must be true from beginning to end, not just when the case is filed.” *Id.* “Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Thus, under this Court’s standard, a case cannot be moot until a court determines that a dispute between the parties does not exist or no longer exists. In order to determine whether a dispute existed in this case, the Court needed the answer the questions of law before it. It did not, instead dismissing the case on mootness grounds.

B. Mootness need not be plead with particularity; therefore, the Court should consider the appeal as one based on mootness even if it was not specifically stated.

As mentioned above, and consistent with U.S. Supreme Court precedent (e.g. *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975)), the legal standard for determining

¹² *Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F. 3d 698, 702 (11th Cir. 2014) (quoting *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1245 (11th Cir. 2003)).

whether or not a case is moot in this jurisdiction rests upon whether or not there is a live case and controversy between the parties. The standard is not that a party must plead review for mootness with particularity, as would be necessary in fraud for instance, nor is the standard one which requires the four letter word “moot” to appear in a brief. Furthermore, the Panel’s mysterious judgement as to mootness does not harmonize with procedural pleading standards.

Rule 28 (a)(D) of Appellate procedure requires, “A concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record... [and] a short conclusion stating the precise relief sought.” After presenting the panel with pages of heavily researched text from multiple sources of precedent in her brief, Mrs. Fancher complied with the rules in concluding with a precise request for relief:

Appellant prays this Court will conclude that the district court erred in granting dismissal of the case at least in that its final order dispersed of funds rightfully due to Appellant under the law. If the case should be dismissed, the order governing the disbursement of the funds should follow the laws in effect at the time of David's death and vest in his mother, Appellant Fancher. (Appellant’s Br. at 30).

The district court did not dismiss the case for any reason other than a belief that the dispute was moot and Mrs. Fancher specifically and repeatedly requested review from this Court regarding that conclusion from the district court. Her

principal brief was wholly dedicated to demonstrating exactly why the case was alive and how the dispute was remedial in order that a higher court could undertake review of whether or not the dispute had at any time become moot.

In its April 20, 2016 ruling, the Panel declined to address the issue whether *Obergefell* should be applied retroactively, claiming Appellant Fancher had failed to raise the issue of mootness. A: 7. The Court noted that the term "moot" appears nowhere in Appellant Fancher's brief. *Id.* However, the entire essence of Appellant Fancher's argument is that there is a live controversy that *Obergefell* did not resolve, i.e., whether *Obergefell* must be applied retroactively to revive a marriage that was invalid under Alabama law when contracted and invalid under Alabama law when it was ended by David Fancher's death, in order to pay substantial wrongful death settlement benefits to an alleged surviving spouse.

Moreover, the fact that the word "moot" was not used in no way prejudiced Appellee, and it could not possibly have confused this Court as to the relief Appellant sought. Increasingly, courts look to substance rather than form in determining whether to dismiss a case on procedural grounds and deprive the parties of a ruling on the merits of the case. In *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938), the Supreme Court held that an amended complaint should not be dismissed as untimely when the same basic grounds were covered by the timely original complaint. Speaking for the Court, Justice Black stated at 201-02,

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. ... Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment.

Conley v. Gibson, 355 U.S. 41 (1957), reached a similar conclusion. Citing *Maty*,

Justice Black held for the Court:

Following the simple guide of Rule 8(f) that ‘all pleadings shall be so construed as to do substantial justice,’: we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.¹³

Appellant clearly presented the issues in this case regarding whether or not the case was moot by stating in issue 1: “The issue is whether *Obergefell* compels the Eleventh Circuit to revive an illegal same-sex marriage and give that union retroactive effect so as to overcome both the Sanctity Laws of Alabama in place during the time in question and Alabama’s laws of intestate succession which govern the distribution of wrongful death damages in favor of the decedent’s mother.” (Appellant’s Br. at 1). Furthermore, Appellant clearly asked this Court to

¹³*Conley* was overruled in part by *Bell At. Corp. v. Twombly*, 550 U.S. 544, 563 (2007), limiting *Conley* so as to exclude cases in which no grounds could possibly grant relief. That limitation obviously does not apply to the case at hand, as this case clearly involves a substantial issue as to whether *Obergefell* should be applied retroactively to allow Appellee Hard to collect a substantial wrongful death settlement and prevent Appellant Fancher from collecting the same settlement.

review the district court's finding for mootness stating in issue 2: "Whether the district court erred in granting Defendant Strange's motion to Dismiss and issuing its Final Order concerning the distribution of funds." *Id.* The following thirty-one pages of Appellant's brief explained exactly what the live dispute between the parties concerns.

The Panel's conclusory reason for affirming the lower court stated, "Even assuming Pat Fancher did not abandon her challenge to the district court's mootness determination, however, the district court committed no error in dismissing the case as moot. That is because Hard had received the relief he sought." A: 7. Yes, Hard had received the relief he sought, but Fancher did not receive the relief she sought. In a request for injunctive relief dated August 26, 2015, Mrs. Fancher asked the district court to afford assurance to Mrs. Fancher that if the lawsuit's damages were safeguarded in the event that they could be repaid to her in the event that this Court reversed the order dispersing the funds to Hard. Doc. 99.

In support of this peculiar holding, the Panel cited *Reich v. Occupational Safety & Health Review Comm'n*, 102 F. 3d 1200, 1201 (11th Cir. 1997): "A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." A:7. However, in *Reich*, this Court determined that the case was not moot and vacated the Administrative Law Judge's

order dismissing the case and remanded the case for further proceedings. Similarly, Appellant Fancher still has a cognizable interest in the settlement funds. If this Court were to determine that she is entitled to the settlement funds, Appellee Hard could be required to return them to the executor for payment to Appellant. Even if Appellee Hard has disposed of the settlement funds and is unable to return them, that does not render this case moot. In *Reich* cited above, this Court observed in fn. 3:

At oral argument, we asked counsel for JSI [Jacksonville Shipyards, Inc.] whether he was aware of a decision which had considered a money claim to have become moot as a result of the defendant's own acts. He responded, '*I do not know of any such cases which hold that, your Honor. We searched, and we could not find any.*'

This Court's decision in *Reich* supports Appellant's contention that the present case is not moot.

C. Even if the case were moot as between Paul Hard and Attorney General Strange, Mrs. Fancher's unique legal interest in the wrongful death proceeds, completely separate from the Attorney General's interest in the case, put Mrs. Fancher's claim squarely into one exception to mootness—the doctrine of collateral legal consequences.

“Three exceptions to the mootness doctrine exist: (1) the issues are capable of repetition, yet evading review; (2) an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo; and (3) the trial court's order will have possible collateral legal consequences.” *Wakefield v. Church of Scientology*

of California, 938 F.2d 1226, 1229 (11th Cir. 1991) (citations omitted). “The collateral consequences exception may prevent a case from becoming moot even though some of the original relief requested may be moot.” *B & B Chemical Co., Inc. v. United States EPA*, 806 F. 2d 987, 990 (11th Cir. 1986). “The exception has been applied where the primary injury has passed, but there remains a ‘substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment’.” *San Diego County Office of Education v. Pollack*, 13-CV-1647-BEN (BLM) (S.D. Cal 2014) (citing *E.E.O.C. v. Fed. Exp. Corp.*, 558 F. 3d 842, 847 (9th Cir. 2008)). Where one of several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. *Powell v. McCormack*, 395 U.S. 486, 497 (1969). Thus, though the issues between Hard and Attorney General Strange may have been mooted, the issues between Hard and Pat Fancher, namely the proper distribution of David Fancher’s wrongful death proceeds, are still a live controversy, the very basis of this appeal from the district court’s order of dismissal for mootness. Mootness of a primary claim does not require mootness of all secondary claims. *Id.* at 500.

The denial of Mrs. Fancher’s proceeds from David’s death in accordance with Alabama law in place at the time of David Fancher’s death is clearly a collateral legal consequence of the district court’s dismissal of Attorney General

Strange's claim for mootness. On the other hand, intervening defendant Pat Fancher still had a very much live controversy before the court and a legal interest adverse to Hard's in the form of a wrongful death settlement. Neither the injunction against Attorney General Strange preventing him from enforcing Alabama's same-sex marriage ban, nor the Supreme Court's decision in *Obergefell*, nor the amended death certificate answered the question central to this appeal: whether or not David Fancher and Paul Hard were married in Alabama *at the time of David Fancher's death in 2011*, when Alabama's marriage laws were indisputably still in effect. This is a collateral legal consequence of the lower court's order that is not speculative; it is a real, live, and legal controversy in the form of wrongful death damages that pass pursuant to Alabama's intestacy laws in effect at the time of one's death, laws that have not been overruled by any court. For mootness purposes, a party satisfies the Article III case or controversy requirement by continuing to suffer collateral legal consequences of the action being appealed.¹⁴

CONCLUSION

Accordingly, Appellant Fancher respectfully requests this Court grant rehearing en banc, as this case presents several questions of exceptional importance that can only be properly resolved with a rehearing en banc.

¹⁴ See *Pub. Util. Comm'n of the State of Cal.*, 100 F. 3d 1451, 1460 (9th Cir. 1996).

Respectfully submitted,

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Certificate of Service

I hereby certify that fifteen copies of the foregoing petition for rehearing en banc were marked for delivery by the USPS on this 11th day of May, 2016. I also certify that the foregoing petition was electronically filed this same day with the Eleventh Circuit Court of Appeals and that one copy of said petition was mailed to opposing counsel at:

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ADDENDUM

Hard v. Attorney General, Ala.,

___ Fed. Appx. ___ 2016, WL 1579015

(11th Cir. April 20, 2016).

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13836
Non-Argument Calendar

D.C. Docket No. 2:13-cv-00922-WKW-SRW

PAUL HARD,

Plaintiff - Appellee,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,

Defendant,

PAT FANCHER,

Intervenor - Defendant -

Appellant,

Appeal from the United States District Court
for the Middle District of Alabama

(April 20, 2016)

Before JORDAN, JULIE CARNES and JILL PRYOR, Circuit Judges.

PER CURIAM:

Pat Fancher appeals the dismissal of this case and the distribution of proceeds from a wrongful death settlement from her son's estate to his spouse, Paul Hard. She argues that, because the State of Alabama declined to recognize her son's marriage to Hard at the time of her son's death, she is entitled to the remaining portions of the wrongful death settlement under Alabama law of intestate succession. Upon review of the record and consideration of the parties' briefs, we affirm.

I.

Paul Hard and David Fancher were married in Massachusetts on May 20, 2011. The couple returned home to Alabama after their wedding. At that time, Alabama refused to recognize same-sex marriages under the state's Sanctity of Marriage Amendment. Ala. Const. Art. I, § 36.03.

On August 1, 2011, David Fancher was traveling on the interstate when his vehicle collided with a United Parcel Service ("UPS") tractor trailer. He died that day. Fancher's death certificate indicated that he was "Never Married," and the space for the name of the "Surviving Spouse" was left blank.

In 2012, David Fancher's estate filed a wrongful death lawsuit against UPS. Although David Fancher had named Hard as the sole beneficiary of his will,

Alabama law dictates that estates disburse wrongful death proceeds according to the laws of intestate succession regardless of whom the deceased named as beneficiaries. Ala. Code. § 6-5-410(c). If there are no children, but there is at least one surviving parent, a surviving spouse receives the first \$100,000 plus one half of the balance of the wrongful death proceeds. *See id.* § 43-8-41(2). If there is also no surviving spouse, the estate passes to the parents. *See id.* § 43-8-42(2).

In December 2013, Hard filed this lawsuit against various Alabama state officials and the administrator of David Fancher's estate seeking, among other relief: (1) a declaration that Alabama's laws prohibiting the recognition of lawful same-sex marriages was unconstitutional and an injunction requiring Alabama officials to recognize marriages of same-sex couples entered in other jurisdictions; (2) an injunction requiring Alabama to correct David Fancher's death certificate to reflect his marriage to Hard; and (3) an injunction ordering David Fancher's estate to distribute the spousal share of any wrongful death settlement to Hard. Pat Fancher sought to intervene in the case, arguing that, as David Fancher's mother, she was entitled to the full proceeds from the wrongful death settlement because Hard was not David Fancher's surviving spouse. The district court granted her unopposed motion to intervene.

In February 2014, the administrator of David Fancher's estate agreed to set aside the spousal share of any proceeds from the wrongful death suit until the

district court determined whether Hard was David Fancher's surviving spouse. Several months later, the estate settled with UPS. The estate's administrator paid about half of the wrongful death proceeds, after attorneys' fees, to Pat Fancher because neither party disputed that as David Fancher's mother she was due those proceeds under Alabama law. The administrator held in a private trust the settlement's spousal share, totaling over half a million dollars, pending the outcome of this lawsuit.

A district court in the Southern District of Alabama declared Alabama's same-sex marriage ban unconstitutional on January 23, 2015. *Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015). On February 9, 2015, the Alabama State Registrar of Vital Statistics issued an amended death certificate recognizing David Fancher's marriage to Hard. Shortly thereafter, the district court permitted the administrator of the estate to intervene in this case for the limited purpose of paying the disputed settlement proceeds from the private trust into the court's registry.

In March 2015, the district court stayed this case pending the United States Supreme Court's resolution of *Obergefell v. Hodges*, which considered the constitutionality of state bans on same-sex marriage. Three months later, the Supreme Court held that same-sex marriage is a fundamental right under the United States Constitution. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

After *Obergefell*, Hard moved to lift the stay of the case and to disburse to him the spousal share of the settlement proceeds. Shortly thereafter, the Alabama Attorney General moved to dismiss the case on the ground that the claims against him were moot. The Attorney General explained that Hard already had received the relief he sought against the Attorney General because (1) the Attorney General already was subject to (and complying with) an injunction that prohibited him from enforcing Alabama's same-sex marriage ban; (2) the Supreme Court's decision in *Obergefell* held that the Fourteenth Amendment required states to issue marriage licenses to same-sex couples; and (3) the State of Alabama had issued an amended death certificate reflecting David Fancher's marriage to Hard. In essence, the Attorney General argued, the district court could no longer enter any effective relief.

On July 15, 2015, the district court granted Hard's motion to lift the stay and to disburse the funds. At the same time, the district court granted the Attorney General's motion to dismiss the case for mootness and denied the pending motions for summary judgment without reaching the merits.

The next day, Pat Fancher filed a Motion to Set Aside Order of Dismissal in which she argued that unless *Obergefell* applies retroactively, the amended death certificate was invalid. She contended that because Alabama law did not recognize David Fancher's marriage at the time of his death, she was entitled to the entirety

of the wrongful death settlement. The district court denied the motion and ordered the Clerk of Court to distribute the spousal share of the settlement proceeds to Hard. The district court then entered a final judgment. Pat Fancher appeals the final judgment and the orders dismissing the case, denying the motion to set aside the dismissal, and directing the disbursement of funds.

II.

We review *de novo* a dismissal for mootness. *See Nyaga v. Ashcroft*, 323 F.3d 906, 912 (11th Cir. 2003). We review a district court's denial of a motion for reconsideration for an abuse of discretion. *Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010). And we review the district court's decision to release funds held in the court's registry for an abuse of discretion. *See Zelaya/Capital Int'l Judgment, LLC v. Zelaya*, 769 F.3d 1296, 1300 (11th Cir. 2014) (reviewing for abuse of discretion the decision to allow a party to deposit disputed funds into the court's registry); *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 753 (11th Cir. 2002) (reviewing for abuse of discretion the denial of the release of funds pursuant to a preliminary injunction).

III.

Pat Fancher argues that the district court erred in dismissing the case because under Alabama law Hard was not legally married to her son at the time of his death. Specifically she contends that *Obergefell* is not retroactive and cannot

make a same-sex marriage that was illegal in 2011 legal for the purposes of a wrongful death settlement in 2014.

We need not address this argument. The district court dismissed the case on mootness grounds, yet Pat Fancher failed to raise any argument challenging this decision in her opening brief on appeal.¹ She did not “devote even a small part of [her] opening brief to arguing the merits of the district court’s” decision to dismiss the case on mootness grounds. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). In fact, the word “mootness” appears nowhere in her opening brief. Repeatedly, we have “refused to consider issues raised for the first time in an appellant’s reply brief.” *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004). Because Pat Fancher abandoned on appeal any argument that the district court erred in dismissing the case on mootness grounds, we affirm the dismissal.

Even assuming Pat Fancher did not abandon her challenge to the district court’s mootness determination, however, the district court committed no error in dismissing the case as moot. That is because Hard had received the relief he sought. *See Reich v. Occupational Safety & Health Review Comm’n*, 102 F.3d 1200, 1201 (11th Cir. 1997) (“A case becomes moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”

¹ We also note that she raised no challenge to the district court’s mootness decision in the district court, despite filing a Motion to Set Aside Order of Dismissal.

(internal quotation marks omitted)). Hard sought three forms of relief in his complaint. First, he sought a declaratory judgment that Alabama's same-sex marriage ban was unconstitutional and an injunction requiring Alabama state officials to recognize marriages of same-sex couples. He received that relief after the Southern District of Alabama issued *Searcy* and the Supreme Court issued *Obergefell*. Second, Hard sought an injunction requiring the State of Alabama to modify David Fancher's death certificate to reflect his marriage to Hard. Hard received that relief when the Alabama State Registrar of Vital Statistics issued an amended version of David Fancher's death certificate. Third, Hard sought to receive the spousal share of the wrongful death proceeds according to Alabama law. He received that relief when the district court ordered that the proceeds be distributed to him. Thus, the district court was left with no live controversy on which to rule.²

Pat Fancher also challenges the district court's order directing the Clerk of Court to disburse to Hard the spousal share of the wrongful death settlement. We conclude there was no abuse of discretion because the district court properly applied Alabama law of intestate succession pertaining to surviving spouses. Simply put, once the State of Alabama recognized Hard as the surviving spouse

² Similarly, there was no abuse of discretion when the district court denied Pat Fancher's Motion to Set Aside Order of Dismissal. Functionally a motion for reconsideration, the motion failed to explain why the case was not moot despite Hard's receipt of the relief he sought. Accordingly, we affirm the denial of that motion.

and the district court dismissed the case as moot, the court committed no abuse of discretion by disbursing the funds accordingly.

We affirm the district court's final judgment and orders dismissing the case, denying the motion to set aside the dismissal, and directing the disbursement of funds.

AFFIRMED.