

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KARI L. CHIN, et al.,

Plaintiffs,

Case No. 4:15-cv-00399-RH-CAS

v.

JOHN H. ARMSTRONG, in his official
capacity as Surgeon General and Secretary
of Health for the State of Florida, and
KENNETH JONES in his official
Capacity as State Registrar,

Defendants.

DEFENDANTS' SUGGESTION OF MOOTNESS

Defendants, Dr. Celeste Philip, M.D. in her official capacity as the Interim State Surgeon General and Interim Secretary of the Florida Department of Health¹ and Kenneth Jones in his official capacity as the Registrar for the State of Florida, by and through undersigned counsel, respectfully suggest that Plaintiffs claims have become moot and should therefore be dismissed, and state as follows:

1. This action arises from the United States' Supreme Court's recent ruling *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples may not be excluded from civil marriage on the same terms and conditions as opposite-sex couples, and the application of *Obergefell* to section 328.013(2), Florida Statutes, which states that if a woman is married at the time of birth, the name of her husband will be entered into the birth record.

¹ Dr. Philip was named Interim Surgeon General and Secretary of Health for the State of Florida on March 11, 2016.

2. Defendants have been sued in their official capacity in relation to their actions on behalf of the Florida Department of Health, a state executive agency.
3. This Court in *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014) granted a preliminary injunction instructing the Surgeon General to take no steps to enforce section 741.212, Florida Statutes, and Article I, section 27 of the Florida Constitution (exempting same-sex couples from the definition of marriage).
4. Defendants filed a Motion for Clarification as to the scope of the preliminary injunction and Defendants' authority to issue birth certificates to married same-sex couples.
5. Defendants have unequivocally stated that they will comply with this Court's determination as to the scope of the *Obergefell* ruling at issue in the *Brenner* suit.
6. On March 30, 2016, this Court in *Brenner v. Scott, et al.*, Case No. 4:14-cv-00107-RH-CAS, entered an Order Granting Summary Judgment ("Order") declaring section 741.04(1), Florida Statutes (denying marriage licenses to same-sex couples), section 741.212, Florida Statutes, and Article I, section 27 of the Florida Constitution unconstitutional and also entered an injunction instructing the Surgeon General to take no steps to enforce these provisions of Florida law.
7. This Court's Order provided clarification that the "statutory reference to 'husband' [in section 328.013(2), Florida Statutes] cannot prevent equal treatment of a same-sex spouse" and that "in circumstances in which the Surgeon General lists on the birth certificate an opposite-sex spouse who is not the biological parent, the Surgeon General must list a same-sex spouse who is not a biological parent." *See, Order, Brenner v. Scott, et al.*, Case No 4:15-cv-00399-RH-CAS (N.D. Fla. March 30, 2016). This ruling in *Brenner* resolves the issues raised in this suit.

8. Following the *Brenner* Order, Defendants initiated rulemaking, as mandated by Chapter 120, Florida Statutes, to modify the vital statistics forms to allow the designation of mother, father, or parent on the birth record. *See*, Exhibit 1, Declaration of Kenneth Jones.
9. Additionally, Defendants directed agency staff to list same-sex spouses on birth records using the existing birth record form. *See*, Exhibit 1, Declaration of Kenneth Jones.
10. Defendants are compliant with this Court's Order in *Brenner*, and the Order resolves all of the issues in this suit. Therefore, there is no need for further proceedings here.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO DISMISS AS MOOT**

INTRODUCTION

This case arises in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) which held that state bans on same-sex marriages are unconstitutional, but left open questions as to the implication of this ruling on state-conferred benefits related to marriage such as the vital statistics statute at issue in the instant suit. Defendants, sued in their official capacity in relation to actions on behalf of the Department of Health, an executive agency, lacked the authority to invalidate or declare unconstitutional the legislation in effect. *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987).

The scope of the *Obergefell* ruling was at issue in another action pending before this Court, *Brenner v. Scott, et al.*, Case No. 4:14-cv-00107-RH-CAS. Defendants requested clarification and guidance in the *Brenner* matter on the scope of the ruling in *Obergefell* and its implications on the interpretation of section 382.013, Florida Statutes. The Order entered by this Court in *Brenner* has provided the guidance requested and Defendants are presently following *Obergefell* as clarified in *Brenner*. As a result, there is no need for further proceedings in the instant case.

I. Following this Court's Order in *Brenner*, This Case Is Moot.

Article III of the United States Constitution limits federal jurisdiction to “actual cases or controversies.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation marks omitted). When a case becomes moot, a court lacks jurisdiction to proceed and must dismiss the case. *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1364 (11th Cir. 2006).

When governmental defendants cease challenged actions following decisions from the Supreme Court or the relevant circuit court, a challenge to those actions is moot. *See, e.g., Jacksonville Prop. Rights Ass'n, Inc. v. City of Jacksonville*, 635 F.3d 1266, 1275 (11th Cir. 2011) (city changed policy to comply Eleventh Circuit cases “declar[ing] similar [laws] unconstitutional”); *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1292–93 (11th Cir. 2004) (commitment not to bring ethics charges against judicial candidates in light of “changed . . . legal landscape,” including Supreme Court ruling on similar ethics provision); *Telo Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1231 (4th Cir. 1989) (state agency conceded that a Supreme Court decision invalidating a “similar” North Carolina law rendered Virginia’s law unenforceable). These cases recognize that when governmental defendants change their conduct to conform to developments in case law rendering similar laws unenforceable, there is no reasonable expectation that they will reverse course in the future. *See, e.g., Jacksonville Prop. Rights Ass'n*, 635 F.3d at 1275; *accord Troiano v. Supervisor of Elecs.*, 382 F.3d 1276, 1284 (11th Cir. 2004) (“only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated” does government’s cessation of conduct not moot a case). Indeed, a governmental defendant’s voluntary cessation of conduct may moot a case even after the district court has preliminarily enjoined the conduct during the litigation. *See*

Miller v. Mitchell, 598 F.3d 139, 146–47 (3d Cir. 2010) (post-injunctive oral representation by counsel that district attorney would not file charges mooted part of case). Pursuant to Eleventh Circuit precedent, Defendants’ compliance with this Court’s Order in *Brenner* resolves the issues at hand and renders this case moot.

The law at issue is section 382.013(2)(a), Florida Statutes, which provides that a birth mother’s “husband” is listed as the “father” on a birth certificate. This Court’s recent Order in *Brenner* has made it clear that the statutory reference to “husband” cannot be construed to prevent equal treatment of a same-sex spouse. The Department has initiated rulemaking to promulgate a new form which allows the designation of mother, father, or parent on the birth record. *See*, Exhibit 1, Declaration of Kenneth Jones. Additionally, the Department is listing same-sex spouses on the existing form, if requested. *Id.* The Department is unequivocally complying with this Court’s Order in *Brenner* which resolves all of the issues presented by this case. Accordingly, this case is moot and must be dismissed.

II. The Eleventh Amendment Bars Any Relief.

The Eleventh Amendment separately bars any relief against Defendants because they are in compliance with this Court’s Order in *Brenner*. The exception to Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1908), applies only when there is an “ongoing” violation of federal law by state officials; it is not enough that state officials have “violated [federal law] at one time or over a period of time in the past.” *Papasan v. Allain*, 478 U.S. 265, 278 (1986). The Defendants are issuing birth records which list both parents to same-sex married couples and will continue to do so. Refusal cannot reasonably be expected to recur.

III. Injunctive Relief Is Unwarranted.

Injunctive relief in the instant case is unwarranted and inappropriate. Defendants' actions in interpreting section 382.013, Florida Statutes, in accordance with existing Florida law was consistent with the limitation of authority vested in the Department of Health as an executive agency. The law has long been clear that agencies may not nullify or refuse to enforce statutes. *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958); *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987).

As detailed above, the holding in *Obergefell* did not dispositively address the question of the rights and privileges associated with marriage. In *Obergefell* the court noted:

Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession, spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support and visitation rules.

Obergefell at 2601.

The question regarding the impact of the *Obergefell* ruling on the rights and privileges associated with marriage was the crux of the issues before this Court in *Brenner*. The Summary Judgment Order in *Brenner* provided needed clarification. Defendants are listing same-sex spouses on the existing birth record form. *See*, Exhibit 1, Declaration of Kenneth Jones. Additionally, Defendants have initiated rulemaking to modify the birth record form to allow the designation of mother, father, or parent on the birth record. *Id.* The Defendants are complying with this Court's Order in *Brenner*, and therefore, there is no need for further proceedings here.

Moreover, success on the merits of the constitutional claim at issue in the *Brenner* suit, while dispositive as to the legal issue in the instant suit, does not automatically entitle Plaintiffs to injunctive relief. *Wooden v. Bd. Of Regents*, 247 F. 3d 1262, 1283 (11th Cir. 2001). Injunctive relief is drastic and extraordinary and may only be issued when all four equitable factors are satisfied. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, Plaintiffs cannot show that irreparable injury will occur absent the issuance of an injunction. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Defendants cannot, and will not, enforce laws that have been adjudicated invalid or found unconstitutional. No prospective harm is likely to occur as Defendants are complying with this Court's Order in *Brenner*. An injunction prohibiting Defendants from enforcing an invalid or unconstitutional law is nothing more than an impermissible injunction prohibiting Defendants from violating the law. *Elend v. Basham*, 471 F. 3d. 1199, 1209 (11th Cir. 2006) (injunction directing Secret Service to ensure no violation of the First Amendment occurred was impermissible). Therefore, Defendants respectfully request that this Court dismiss Plaintiffs' request for injunctive relief as unnecessary and improper.

IV. Declaratory Relief Is Inappropriate.

As detailed above, the legal issues at the heart of the instant matter are the same as those at the heart of *Brenner*. Since the dispositive ruling on the merits in the *Brenner* suit controls the instant suit, declaratory relief is unnecessary and improper. Here, the Plaintiffs have not and cannot show that there would be a reasonable expectation that the injury they suffered will continue or be repeated in the future. Absent such a likelihood of continued injury in the future, declaratory judgment is improper. *Malowney v. Fed. Collection Deposit Grp.*, 193 F. 3d 1342, 1347 (11th Cir. 1999). Moreover, the Eleventh Amendment prevents the issuance of declaratory relief related to

the lawfulness of a state official's past actions. *Green v. Mansour*, 474 U.S. 64, 73 (1985).
Therefore, Plaintiffs are not entitled to declaratory relief.

CONCLUSION

For the foregoing reasons, Defendants respectfully suggest that Plaintiffs' claims are moot. Defendants are complying with this Court's Order Granting Summary Judgment in *Brenner v. Scott, et al.*, Case No. 4:14-cv-00107-RH-CAS, and therefore, this case should be dismissed accordingly.

Respectfully submitted,

/s/ Jay Patrick Reynolds
Jay Patrick Reynolds
Chief Litigation Counsel
Fla. Bar No. 95291
Florida Department of Health
4052 Bald Cypress Way, Bin #A-02
Tallahassee, Florida 32399
Telephone : (850) 245-4005
Facsimile: (850) 413-8743
Email: patrick.reynolds@flhealth.gov
Trial Counsel for Florida Department of Health

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2016, I electronically filed the foregoing with the Clerk of the Court by using CM/ECF System which will send a notice of electronic filing to the following:

Mary B. Meeks Mary Meeks, P.A. P.O. Box 536758 Orlando, FL 32853 Email: marybmeeks@aol.com	Elizabeth Schwartz Elizabeth Schwartz, P.A. 690 Lincoln Road Suite 304 Miami Beach, FL 33139 E-mail: eschwartz@sobelaw.com
--	---

I HEREBY CERTIFY that on May 16, 2016, a true and correct copy of the foregoing document and the notice of electronic filing was sent via electronic mail to the following non-CM/ECF participants:

Shannon P. Minter*
Christopher F. Stoll*
Amy Whelan*
Catherine P. Sakimura*

National Center for Lesbian Rights
870 Market Street Suite 370
San Francisco, CA 94102
sminter@nclrights.org

*Admission to N.D. Fla. Pending

/S/ Jay Patrick Reynolds
Jay Patrick Reynolds

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KARI L. CHIN, et al.,

Plaintiffs,

Case No. 4:15-cv-00399-RH-CAS

v.

JOHN H. ARMSTRONG, in his official
capacity as Surgeon General and Secretary
of Health for the State of Florida, and
KENNETH JONES in his official
Capacity as State Registrar,

Defendants.

DECLARATION OF KENNETH JONES

Pursuant to 28 U.S.C. § 1746, Kenneth Jones makes the following declaration:

1. I am over the age of eighteen and competent to make this declaration.
2. I am employed by the Florida Department of Health, Bureau of Vital Statistics (the "Bureau"), where I have worked since 1983.
3. I currently serve as Bureau Chief and State Registrar of Vital Statistics. From my experience working in the Bureau, I am familiar with its operations, its compliance with various state and federal laws (particularly chapter 382, Florida Statutes) and its administrative procedures, rulemaking, and form promulgation.
4. The Department has initiated rulemaking pursuant to Chapter 120, Florida Statutes, to modify the Florida birth record form to allow the designation of mother, father, or parent on the birth record. *See*, Exhibit A, *Notice of Development of Rulemaking* (published on April 19, 2016 in the Florida Administrative Register, Vol. 42/76).
5. Same-sex couples may obtain a birth record listing both spouses on the current form

immediately. The Department will replace that birth record with the new form at no charge as soon as the new form is promulgated pursuant to the statutorily required rulemaking process. See, Exhibit B, *Memorandum Concerning Recent Communications Regarding Filing of Birth Records*.

6. The Department has instructed all birthing hospitals, birthing centers, midwives and others in Florida filing birth records to record the name of both same-sex spouses on the birth record using the existing form. If a same-sex couple prefers to wait for the new form, the Department has taken the name and telephone number of these individuals and will contact them once the new form is available.

7. The Department has further instructed all Deputy Registrars to accept birth records listing both same-sex couples on the existing form and to replace that birth record at no charge once the new form becomes available.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 9, 2016

Kenneth Jones
Kenneth Jones

STATE OF **FLORIDA**
COUNTY OF **DUVAL**

SWORN AND SUBSCRIBED BEFORE ME THIS 9TH DAY OF May, 2016, BY KENNETH JONES

WHO IS PERSONALLY KNOWN OR PRODUCED IDENTIFICATION THAT HIS SIGNATURE IS TRUE AND CORRECT.

Marilyn D. Nevado
Signature of Notary Public



Stamp

Notice of Development of Rulemaking

DEPARTMENT OF HEALTH

Vital Statistics

RULE NOS.:RULE TITLES:

- 64V-1.001 Delayed Birth Registration Requirements; Fees
- 64V-1.002 Birth Certificate Amendments; Who May Apply; Fees
- 64V-1.0031 Birth Certificate Amendments by Adoption
- 64V-1.0032 Birth Certificate Amendments by Paternity Establishment/Disestablishment; Judicial and Administrative Process
- 64V-1.0033 Birth Certificate Amendment by Legal Change of Name; Judicial Process
- 64V-1.006 Birth Registration; Evidence Required for Births Occurring Outside of a Facility
- 64V-1.0061 Death and Fetal Death Registration
- 64V-1.007 Death and Fetal Death Certificate Amendments; Who May Apply; Fees; Documentary Evidence Requirements
- 64V-1.0131 Certifications of Vital Records; Information Required for Release; Applicant Identification Requirements
- 64V-1.016 Florida Putative Father Registry

PURPOSE AND EFFECT: The purpose and effect of these rule amendments is to update the requirements that must be met to allow the Department to issue certifications of vital records, to update forms and remove redundant rule language.

SUBJECT AREA TO BE ADDRESSED: The recording and reporting of vital statistics.

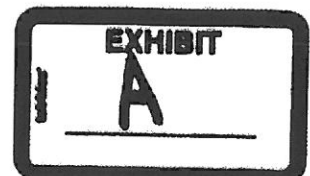
RULEMAKING AUTHORITY: 382.003(7), (10), (11), 382.019, 382.0255(1)(a), (3), 382.015(6), 382.016, 382.013, 382.008, 382.025, 382.026, 382.0085 FS.

LAW IMPLEMENTED: 382.003(7), (10),(11), 63.152, 382.015, 382.016, 382.017, 742.10, 742.16, 742.18(8), 409.256(11)(d), 68.07(4), 382.013, 382.025, 382.026, 382.0085 FS.

IF REQUESTED IN WRITING AND NOT DEEMED UNNECESSARY BY THE AGENCY HEAD, A RULE DEVELOPMENT WORKSHOP WILL BE NOTICED IN THE NEXT AVAILABLE FLORIDA ADMINISTRATIVE REGISTER.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE DEVELOPMENT AND A COPY OF THE PRELIMINARY DRAFT, IF AVAILABLE, IS: Ana Goold, Quality Assurance Manager, Bureau of Vital Statistics at (904)359-6900 or by email at Ana.Goold@flhealth.gov

THE PRELIMINARY TEXT OF THE PROPOSED RULE DEVELOPMENT IS NOT AVAILABLE.



Mission:

To protect, promote & improve the health of all people in Florida through integrated state, county & community efforts.



Rick Scott
Governor

Celeste Phillip, MD, MPH
Interim State Surgeon General

Vision: To be the Healthiest State in the Nation

DATE: May 6, 2016

TO: Hospitals, birthing centers, midwives, and other filing birth records

FROM: *Ken*
Ken Jones, State Registrar

RE: Recent communications regarding filing of birth records

As the Bureau of Vital Statistics has communicated to you in the past couple of days, the Bureau is accepting and filing birth records recognizing same-sex spouses as parents. The records are on the current form listing, "mother" and "father," but may be replaced, at the parents' request, after the on-going administrative rule process to create records accurately reflective of the same-sex parents.

To assist you in submitting accurate birth records, the Bureau will accept any filing with same-sex spouses in the "mother" and "father" fields. If there are no legal challenges to the rules the Bureau is promulgating for birth records for children of same-sex spouses, it is anticipated that the new form will be formally adopted in the Administrative Code sometime in July 2016.

Should you have questions, please call Betty Shannon of my staff at (904) 359-6990 or myself at (904) 359-6982.



Florida Department of Health
 Bureau of Vital Statistics
 P.O. Box 210 • Jacksonville, FL 32231-0042
 Phone: 904 • 359 • 6900
www.floridavitalstatisticsonline.com
FloridaHealth.gov

