IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DORMER BRENNER, *et al.,*

Plaintiffs,

v.. **Case No. 4:14-cv-107-RH/CAS**

RICK SCOTT, in his official capacity as Governor of Florida, et al.,.

Defendants.

SLOAN GRIMSLEY, *et.al.,*

Plaintiffs,

v.. **Case No. 4:14-cv-138-RH/CAS**

RICK SCOTT, in his official capacity as Governor of Florida, *et al.,*

Defendants.

BRENNER PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The *Brenner* Plaintiffs, pursuant to Rule 56, move this Court to enter summary judgment against defendants and declare Florida's ban on same-sex marriage, as well as Florida's refusal to recognize out-of-state same-sex marriages unconstitutional, and permanently enjoin enforcement of said bans, and in support thereof states as follows:

A. Undisputed Material Facts

Brenner Plaintiffs James Brenner and Charles Dean are residents of Leon County Florida who were lawfully married in Alberta, Canada on September 3, 2009. Doc. 10 at ¶ 5. *Brenner* Plaintiffs Stephen Schlairet and Ozzie Russ who, at the time of the filing of this lawsuit were in

a long-term relationship with one another and sought to marry in the state of Florida. Doc. 10 at ¶ 21. Both of these Plaintiff's brought suit in this Court to overturn a set of statutes and constitutional provisions banning same-sex marriage in Florida. *See, e.g.*, Art. 1, § 27 Fla. Const (defining marriage as "the legal union of only one man and one woman as husband and wife"); §741.04(1) Fla. Stat. (2015) (prohibiting issuance of marriage licenses to same sex couples; § 741.212(1)–(3) Fla. Stat. (2015) (prohibiting recognition of out-of-state same sex marriages).

As a result of these provisions, the *Brenner* Plaintiffs were unable to marry or have their out-of-state marriages recognized by the state of Florida, and were thus denied not only their constitutional rights, but myriad state-created rights that flow from a lawful marriage. For instance, Plaintiff Brenner, as an employee of the State of Florida, was unable to designate Plaintiff Jones as his lawful husband, spouse, or joint annuitant for the purposes of allowing Plaintiff Jones to receive Plaintiff Brenner's retirement benefits should Plaintiff Brenner pass away. Doc. 10 at ¶ 9–11. Further, Plaintiff Schlairet and Russ were not able to own their home as tenants by the entirety, qualify for Florida's homestead exemption, or have healthcare coverage under each other's insurance plan, since the State of Florida prohibited them from marrying. Doc. 10 at ¶¶ 24–27.

B. Relevant Procedural Background

On February 28, 2014, the *Brenner* Plaintiffs filed this action asserting that Florida's ban on same-sex marriage violated their constitutional rights, and also moved to enjoin enforcement of the provisions they challenged. Doc. 1 & 2. On August, 21, 2014 the court granted the *Brenner* Plaintiff's motion, however the court initially stayed enforcement of the injunction. Doc. 74. On January 5, 2015, after litigation in the Eleventh Circuit and United States Supreme Court, this Court lifted its stay and legalized same-sex marriage in the state of Florida. (Doc. 95). Following

this court's lifting of the stay, the *Brenner* Plaintiffs were able to obtain marriage licenses, have their out-of-state marriages recognized, and inure themselves to the marriage benefits they were denied when Florida's same-sex marriage laws were in place.

The Defendants took an interlocutory appeal of this Court's order granting a preliminary injunction. Following briefing on the merits, the Eleventh Circuit held the consolidated appeals in abeyance pending the Supreme Court's decision in *Obergefell v. Hodges*, 135 S.C.t 2071 (2015). Doc. 111-4. Following the Court's decision in *Obergefell*, the Defendants moved to voluntarily dismiss their appeal in the Eleventh Circuit alleging that the controversy was now moot in light of the Supreme Court's holding. Doc. 111-7. On August 4, 2015, the *Grimsley* Plaintiffs filed a Motion for Summary Judgment. Doc. 11. The Defendants incorporated a motion to dismiss in their Response to the *Grimsley* Plaintiffs' Motion, alleging that the controversy between the parties was now moot in light of the Supreme Court's ruling. Doc. 118. As such, all parties are in agreement that Florida's ban on same-sex marriage violates the constitution and that there are no pending factual disputes to be resolved in this case.

C. Argument

The Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. at 2607, that same-sex couples may exercise the fundamental right to marry in all states. It further held that there is no lawful basis for a state to refuse to recognize a lawful, out-of-state marriage of a same-sex couples. *Id.* Under this binding precedent, Florida's same-sex marriage ban certainly cannot stand. The Defendants here do not contest this proposition, and in both their motion to dismiss their appeal and motion to dismiss this case, they have conceded that the *Obergefell* is controlling precedent here. *See* Doc. 111-7 at 11-12 (seeking dismissal of their Defendants'' appeal because "no issues remain pending"); Doc. 118 at 1-2 ("In light of the Supreme Court's decision, the laws challenged

in these cases . . . no longer prohibit defendants from issuing same-sex marriage licenses or recognizing existing same-sex marriage licenses when applying Florida's laws").

Rather, the Defendants have argued that summary judgment is improper, and that the case should be dismissed on mootness grounds, because no case or controversy exists between the parties in light of *Obergefell.* However, merely because binding precedent now makes the Defendant's position untenable, does not make the Plaintiffs' claims moot.[1] However, a "defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonable be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC),* 528 U.S. 167 (2000).

Indeed, courts hearing same-sex marriage challenges at the same procedural posture have denied mootness arguments raised by defendants and granted summary judgment in favor of the plaintiffs. *See*, *Waters v. Ricketts*, 8:14CV356; 2016 WL 447837 (D. Nebraska Feb. 4, 2015). In *Waters*,[2] the Plaintiffs obtained a preliminary injunction following a challenge to Nebraska's same-sex marriage ban. *Id.* at * 1. The defendants appealed the court's order to the Eighth Circuit, but the Eighth Circuit stayed the case pending the Supreme Court's decision in *Obergefell*. *Id.* On the day that *Obergefell* was decided, the defendants filed a suggestion of mootness with the Eighth Circuit and multiple documents stating that it would comply with the requirements of *Obergefell*. *Id.*

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[1] The *Brenner* Plaintiffs' response on the specific point of mootness is set out in further detail in their Response to the Defendant's Motion to Dismiss. Doc. 119.

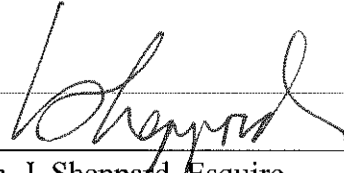
[2] *See also*, *Jernigan v. Crane*, 769 F.3d 976 (8th Cir. 2015) (noting that Arkansas' general assurances of compliance with the *Obergefell* decision did not moot the case and remanding to district court to determine the applicability of injunctive relief); *Marie v. Mosier*, 2015 WL 4724389 (D. Kan. Aug. 10, 2015) (finding that challenge to same-sex marriage ban was not moot in light of *Obergefell*, and issuing declaration that state law ban was unconstitutional).

The District of Nebraska granted summary judgment in favor of the Plaintiffs once the case was remanded, finding that the claims were not moot. *Id.* at *4. It noted that while *Obergefell* struck down the same-sex marriage bans specifically at issue in that case, no court had yet expressly declared that *Nebraska*'s specific same-sex marriage ban was unconstitutional. *Id.* Further, while the Defendants had urged that it would not enforce its same-sex marriage ban, the court found that they had failed to show that it was "absolutely clear that [plaintiffs] no longer ha[ve] any need of the judicial protection that they sought. *Id.* (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)). The court was persuaded by the fact that, despite Nebraska's promises, the state's ban on same sex marriage had not been repealed and was still published as part of Nebraska's constitution. *Id.* at *4. Further, the court also noted that the State Department of Health had refused to issue birth certificates to same-sex couples, but instead only listed the woman who had the baby as the only parent. *Id.* It found that the states position regarding the birth certificates gave plaintiffs cause to be concerned that other protections available to same-sex couples relating to the right to marry might be jeopardized should the court's injunction be lifted. *Id.*

The situation in *Waters* is identical to that at issue here. Like the state of Nebraska, Florida has not removed its same-sex marriage ban from Florida law, even when given an opportunity to do so. *See* Exhibit 1. Furthermore, like the state of Nebraska, the Defendants here have contested and still continue to litigate the issue of whether the state must issue birth certificates to same-sex couples. Doc. 113. The Defendants' strenuous attempts to narrow the scope of this Court's order and the *Obergefell* holding through litigation raises serious concerns that other benefits that flow from the right to marry will be stripped away once the preliminary injunction is lifted. While all parties agree it to be so, no court has yet issued a permanent declaration that Florida's ban on same-

sex marriage is unconstitutional. Plaintiffs contend that the time to issue such a declaration is now, and respectfully request this Court to enter an Order granting summary judgment in their favor.

Respectfully submitted,



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I HEREBY CERTIFY that on March 2nd, 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:

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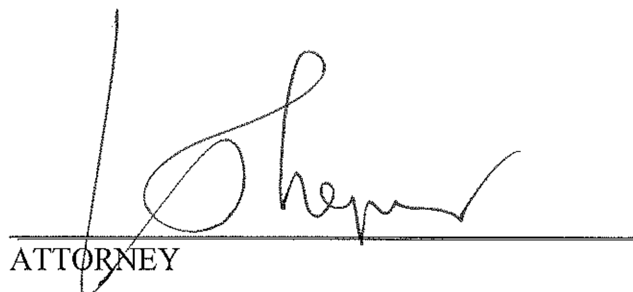

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EXHIBIT 1

News / Florida News

Florida lawmakers leave gay marriage ban on books

By DARA KAM A KAM
THE NEWS SERVICE OF FLORIDA

FEBRUARY 15, 2016, 7:50 PM | TALLAHASSEE

It's been more than a year since same-sex marriages became legal in Florida, but a state law banning the unions is still on the books, and a proposal to repeal it seems doomed.

Clearing the statutes of the gay-marriage ban is among a handful of measures dealing with LGBT issues either ignored by the Republican-controlled Legislature or fated to fade away before the 2016 session ends next month.

Only one piece of legislation --- aimed at giving lesbians the opportunity to be named as a "parent" instead of a "father" on birth certificates --- has even a chance of passing this session, and that chance is extremely thin.

The birth certificate measure, the proposed repeal of the ban on gay marriage and a third bill that would allow pastors to refuse to marry same-sex couples --- something already guaranteed under the First Amendment --- are byproducts of court decisions striking down same-sex marriage bans as unconstitutional.

A closely divided U.S. Supreme Court in June ruled that same-sex couples have a fundamental right to marry. The decision came nearly a year after a federal judge in Tallahassee struck down Florida's voter-approved ban on gay marriage as unconstitutional.

U.S. District Judge Robert Hinkle's ruling went into effect in January 2015, nearly six months before the high court decision, but Hinkle has yet to issue a final order in the case. An appeals court in October dismissed Florida's legal fight about same-sex marriage and said Hinkle should consider questions about whether the state is required to pay fees for the plaintiffs' attorneys, who are seeking $455,000 for their work on the case.

"I just want the door closed permanently in the state of Florida, by the state of Florida, with respect to the statutes and the constitutional amendment," Jim Brenner, a plaintiff in the Florida case, told The News Service of Florida on Monday. "We need a final order from Judge Hinkle."

The "pastor protection" act, which religious conservatives contend is needed to protect minsters and churches that refuse to marry same-sex couples, is headed to the House floor for a full vote and is slated

for a final Senate committee vetting this week.

In contrast, an attempt to remove the same-sex marriage prohibition from state statutes has not been heard by a single committee in either chamber.

For Republicans, the issue could be too controversial to even debate, especially in an election year.

"A lot of people still feel firmly that the Supreme Court overstepped its bounds and that it is a states' rights issue that we should be able to decide who, what, where and when marriages happen within our state boundaries," House Rule Chairman Ritch Workman, R-Melbourne, said in an interview.

Changing the state Constitution, amended by voters to include the gay marriage ban in 2008, would require a statewide vote. But, for many Floridians, leaving the ban in legislatively written statutes carries more than a symbolic threat.

Rep. Alan Williams, who filed the measure to repeal the law, said he wanted to amend Florida's statutes to reflect the Supreme Court decision and to provide assurances to clerks of court, some of whom initially balked at Hinkle's ruling, based on advice from their lawyers.

"Obviously, this is one of the most polarizing issues of our time in the Legislature, and in the country. This decision by the Supreme Court has begun to swing doors wide open for individuals that otherwise didn't have that," Williams, D-Tallahassee, said. "As an African-American, I understand all too well the significance of being able to have equal rights under the law."

For Rep. David Richardson, the sponsor of the measure dealing with birth certificates, the issue is even more personal. The Miami Beach Democrat is the only openly gay member of the Legislature.

Richardson tried to get Workman to include the repeal of the gay-marriage ban in what is known as a "reviser" bill, passed by lawmakers annually to clean up state statutes.

But Workman said reviser bills are supposed to correct errors such as punctuation and grammar and aren't intended to deal with policy issues.

Richardson said he understands that Republicans control the agenda in Tallahassee, but he called the repeal of an unconstitutional law a "no-brainer."

"It just shows you how far the majority party feels they must go because they don't want to take a vote on something that may be controversial," he said. "What they're saying is that, even in a situation where the Supreme Court has determined that a law is unconstitutional, we don't want to take it off our books because we don't want to take the risk that someone's going to have to vote on it and a member may be

punished at the polls."

When asked if legislators should repeal the statute, Gov. Rick Scott said the "law is already clear."

"The Supreme Court has made that decision," Scott told the News Service late last week.

Richardson's plan to change birth certificates to reflect the Supreme Court decision (HB 1151) received unanimous approval from a House committee earlier this month after he amended the measure to ensure that documents will still label husbands as "father."

But the measure has two more committee stops before it is scheduled to go to the House floor, and a Senate companion bill has not received a hearing. Richardson remains hopeful that he can tack his bill onto another piece of legislation, but time is running out.

Meanwhile, the issue may be settled in court if lawmakers don't act.

Two female couples and an advocacy group are asking a federal judge to require the Florida Department of Health to list both spouses on birth certificates of children born into same-sex marriages --- as the department typically does when married parents are a man and a woman. The plaintiffs in the Brenner marriage case are also asking Hinkle to sort out the issue.

Lawyers for the state argue that the department lacks the authority to change the rule without legislative approval.

Florida is one of only four states that have not changed the language on birth certificates to reflect the high court ruling, according to Richardson, but Florida's laws regarding agency rule making may be more restrictive.

Changing the statute about birth certificates would save women in same-sex marriages --- now forced to go to court to have their parentage legally recognized, unless they are the birth mother --- thousands of dollars in legal fees, Richardson said.

"There's a presumption in state law that in a marriage, when a woman has a baby, the husband is presumed to be the father, unless that's challenged. Same-sex couples want to enjoy the same benefit. ... Even though we know biologically that is not possible, legally they want to have the same benefit," he said.

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