UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, et al.,

Plaintiffs,

vs. **Case No.: 4:14-cv-00107-RH-CAS**

RICK SCOTT, et al.,

Defendants.

SLOAN GRIMSLEY, et al.,

Plaintiffs,

vs. **Case No.: 4:14-cv-00138-RH-CAS**

RICK SCOTT, et al.,

Defendants.

BRENNER PLAINTIFFS' RESPONSE TO DEFENDANT'S OPPOSITION TO THE *GRIMSLEY* PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS AS MOOT (DOC. 118)

The Defendants, in their responsive pleading to the *Grimsley* Plaintiffs' Motion for Summary Judgment, argue that this case should be dismissed on mootness grounds due to lack of a live controversy and move this Court to grant such a dismissal. The *Brenner* Plaintiffs have not yet sought summary judgment from this Court, because this Court does not have jurisdiction to rule on a summary judgment motion while the case is pending appeal in the

Eleventh Circuit. However, given the fact that the Defendants have moved for dismissal while the *Brenner* Plaintiffs still seek a permanent injunction and attorney's fees, this Court should decline to rule on the Defendant's Motion to Dismiss, due to lack of jurisdiction, or failing that, deny the Motion in light of the fact that the Defendants' cessation of unconstitutional conduct was not voluntary and the attorney's fees issue still remains to be determined.

I. The Procedural History of this Case Demonstrates That Defendants Have Not Voluntarily Lifted Florida's Ban on Same-Sex Marriage.

The factual crux of Defendants' arguments in support of their Motion to dismiss is that they have voluntarily lifted Florida's ban on same-sex marriage. However, even a cursory look at the proceedings throughout the course of this litigation reveals that this basic assumption, on which all of their arguments for dismissal rely, is untrue. In fact, despite the Defendants' voluntary cessation claims, the ban on Florida's same-sex marriage remains lifted today only because of the orders of this Court, and in spite of the Defendants' unending attempts at every level of the federal judiciary to circumvent this Court's preliminary injunction and enforce the state's ban on same-sex marriage.

On February 28, 2014, *Brenner* Plaintiffs Stephen Schlairet and Ozzie Russ sued, among others, the Clerk of Court seeking a preliminary injunction mandating that the Clerk of Court issue them a marriage license. Plaintiffs amended their complaint on March 18, 2014 to include John H. Armstrong in his official capacity as the Surgeon General and Secretary of Health for the State of Florida. This amended complaint requested, among other things, that the Department recognize same-sex marriages including the out-of-state marriage of Brenner Plaintiffs, James Brenner and Charles Jones.

On April 25, 2014 the *Grimsley* Plaintiffs moved for a preliminary injunction holding the state's ban on same-sex marriage constitutional. On May 12, 2015 The Defendants responded to this motion, not by voluntarily ceasing the constitutionally defective conduct, but by arguing that the state ban on same-sex marriage was constitutional and moving to dismiss the case. (Doc. 49, 50). On August 21, 2014, this Court granted the Plaintiffs' request for a preliminary injunction. (Doc. 74). In its Order, this Court found that the state's ban on same-sex marriage violated both the Equal Protection and Due Process Clauses of the United States Constitution. *Id.* Consequently, it issued an injunction requiring the Defendants to recognize the Plaintiffs' out-of-state marriages and issue a marriage license to Plaintiffs Steve Schlairet and Ozzie Russ. *Id.* Furthermore, the court enjoined the Defendants from enforcing the state statutory and constitutional bans on same-sex marriage. *Id.* It also issued a stay of enforcement on the injunction that expired on January 5, 2015. *Id.*

Even though this Court determined that the state ban on same-sex marriage violated the Constitution, the Defendants used every procedural mechanism available to them to delay enforcement of this Court's order. On October 24, 2014, Defendants filed a motion to extend the stay (Doc. 92). This Court denied all motions to alter the stay in any way. (Doc. 95). On November 18, 2014, Defendants filed a motion to extend the stay in the Eleventh Circuit. That motion was denied on December 3, 2014, without dissent, by a three judge panel of that court. Finally, on December 15, 2014, Defendants filed a petition directed to Justice Clarence Thomas, asking that Justice Thomas issue a stay. On December 19, 2014 the Supreme Court denied that application. *Armstrong v. Brenner*, 135 S. Ct. 890 (2014).

Having exhausted all avenues to prolong the enforcement of the preliminary injunction, and with the stay soon set to expire, the Defendants adopted a new litigation strategy of attempting to narrow the scope of the injunction through Motions for Clarification. On December 23, 2014, the Defendant the Washington County Clerk of Court filed an Emergency Motion for Clarification, arguing that the state's clerks of court could not issue marriage licenses to other same-sex couples because issuing such licenses was a crime under Florida law. (Doc. 113) On January 5, 2015, this Court granted the motion for clarification, stating that the criminal provision did not apply and that denying marriage licenses to same-sex couples violated the Constitution. (Doc. 109).

On June 26, 2015 the Supreme Court held that state bans on same-sex marriage violated the Equal Protection Clause and Due Process Clause of the Constitution, affirming what this Court had already held in its Order granting the Plaintiff's preliminary injunction. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2014). With controlling authority from the United States Supreme Court against their position, the Defendants adopted a new strategy of attempting to terminate the litigation as soon as possible before the courts could award attorney's fees or grant a permanent injunction. On July 17, 2016 the Defendants filed a motion to dismiss their appeal in the Eleventh Circuit without prejudice. Since the Defendants no longer wanted to appeal their case, the *Brenner* Plaintiffs filed their own motion to remand on the issues of attorney's fees and the permanent injunction, so that these issues would remain pending in the event that the Eleventh Circuit granted a dismissal. However, the Defendants opposed the motion to remand, arguing that the case should be dismissed outright.

More recently, the Defendants once again attempted to narrow the scope of the preliminary injunction on August 24, 2014, when Defendant the Florida Department of Health filed a motion for Clarification, seeking to deny married same-sex couples birth certificates because the statute used gendered terminology that was inapplicable to same-sex couples. (Doc. 113). Finally, on August 26, 2015 the Defendants again, in their latest attempt to exit the litigation they had protracted without paying for it, filed motions in this Court and the Eleventh Circuit, arguing that the case was now moot because they had voluntarily "committed" to lift Florida's ban on same-sex marriage. (Doc. 118).

II. This Court Presently Is Without Jurisdiction to Rule on a Motion for Summary Judgment, or a Motion to Dismiss, While the Case Is Pending Before the Eleventh Circuit.

First, irrespective of the merits of the *Grimsley* Plaintiffs' and Defendants' positions, their Motion for Summary Judgment and Motion to Dismiss are premature, given that this Court lacks jurisdiction to hear them while the case is pending appeal. Ordinarily, a federal district court and federal circuit court of appeals should not attempt to assert jurisdiction over a case simultaneously. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 57 (1982). The filing of a notice of appeal is an event of jurisdictional significance, which confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. *Id.* Once a party has filed a notice of appeal to the Eleventh Circuit, the district court retains only the authority to act in aid of the appeal, to correct clerical mistakes, or to aid in the execution of a judgment that has not been superseded. *Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990). Furthermore, a motion to dismiss is wholly outside the jurisdiction of a lower court

pending an appeal, because granting such a motion would moot the proceeding in the appellate court while the appeal is still pending. *See*, *In Re Norris Gran Co.*, 167 B.R. 258 (1994) (finding bankruptcy proceeding was without power to grant motion to dismiss while appeal in adversary proceeding was pending in the Eleventh Circuit, because of the effect such a motion would have in the Eleventh Circuit proceeding).

In this case, while the Defendants have sought to dismiss their appeal in the Eleventh Circuit, the circuit court has yet to grant that motion. Therefore, this case's pending appeal before the Eleventh Circuit continues to divest this Court of jurisdiction. Furthermore, granting a motion for summary judgment or a motion to dismiss would have the effect of ending the litigation while the Eleventh Circuit is still considering the Defendants' motion to dismiss. Given these concerns, this Court should decline to rule on either the *Grimsley* Plaintiff's Motion for Summary Judgment or the Defendants' Motion to Dismiss until after the Eleventh Circuit has remanded the case.

III. This Case Presents a Live Controversy, Notwithstanding the *Obergefell* Decision.

Should this Court determine that it has jurisdiction to hear Defendant's motion, it must nevertheless be denied because several live controversies remain in this case. Defendants contend that because they have "voluntarily" stopped enforcement of Florida's ban on same-sex marriages, this case should be dismissed for want of a live controversy. However, these arguments do not justify dismissal for three reasons. First, none of the Eleventh Circuit precedent that the Defendants cite apply to the current procedural posture, where the Defendants have ceased their violative conduct *as the direct result of this Court's order granting Plaintiff's requested preliminary injunction.* Second, the presumption of dismissal

that the Eleventh Circuit applies for government actors who voluntarily cease unconstitutional conduct does not apply here because the Defendants actions were not voluntary. Dismissal is not warranted under a voluntary cessation rational, particularly because the Defendants continue to file motions to clarify this Court's preliminary injunction. Third, even holding aside the fact that the Plaintiffs have a live controversy in their request for a permanent injunction, the issues in this case are not moot because the *Brenner* Plaintiffs still seek attorney's fees.

First, Defendants cite two Eleventh Circuit cases, *Jacksonville Property Rights Assoc. v. Jacksonville*, 635 F.3d 1266 (11th Cir. 2011) and *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288 (11th Cir. 2004), which they claim supports their contention that a Supreme Court ruling in Plaintiffs' favor warrants dismissal on mootness grounds. (Doc 118 at 2). However, these cases are inapposite, given the present procedural posture of the instant case. In both *Jacksonville Property Rights Association* and *Christian Coalition of Alabama*, the defendants voluntarily ceased the challenged action by withdrawing or rewriting the laws that were the subject of the plaintiffs' challenge. *Jacksonville Property Rights Assoc.*, 635 F.3d at 1273–74 9 (dismissing on mootness grounds where defendants rewrote unconstitutional ordinance); *Christian Coalition of Alabama*, 355 F.3d at 1291 (dismissing on mootness grounds where defendants withdrew unconstitutional advisory opinion). In *Jacksonville Property Rights Association*, for example, the defendants completely rewrote the ordinance that was the subject of the plaintiff's challenge during the pendency of an appeal in order to bring the ordinance into compliance with the First Amendment, which it claimed at trial was only constitutionally defective due to a scrivener's error. 635 F.3d at 1273. The court in that

case was persuaded by the fact that amending the ordinances was a time consuming process and that the city would be unlikely to jump through bureaucratic hoops again to reinsert constitutionally defective provisions. *Id.* at 1275. Furthermore, even in *Jacksonville Property Rights Association*, the lynchpin of the Defendants' entire legal argument, the court remanded jurisdiction back to the district court to consider the issue of attorney's fees. *Id.* at 1275 n. 20.

By contrast, here the Defendant's claim they "voluntarily" ceased enforcing Florida's ban on same-sex marriage, not by any conduct of their own, but because the *Obergefell* decision somehow automatically rendered Florida's same-sex marriage ban unconstitutional. First, in making their argument for voluntary cessation, the Defendants seem to forget that they have been bound to the terms of this Court's preliminary injunction since before the *Obergefell* decision was rendered. Indeed, the Defendants did everything within their power to escape the preliminary injunction by seeking stays in this Court, the Eleventh Circuit, and the Supreme Court. For this reason alone, no action that the state has taken thus far can be said to be voluntary.

None of the Eleventh Circuit cases that the Defendants cite involve defendants who were already judicially compelled to obey the Constitution through a preliminary injunction. Indeed, the only reason why the Plaintiffs in this case were able to obtain marriage licenses, was because this Court ordered Defendants to issue them *after* litigation. (Doc. 74). Furthermore, unlike in *Jacksonville Property Rights Association* and *Christian Coalition of Alabama*, the unconstitutional provisions remain codified in both the Florida statutes and the Florida Constitution. Indeed, the 2015 version of the Florida Statutes currently states that "the term marriage means only a legal union between one man and one woman as husband and

wife." Fla. Stat. 741.212 (2015). While the Defendants claim that this section is no longer operative because of the Supreme Court's holding, they have not instituted any rule-making procedure or taken any action whatsoever to bring Florida law in compliance with the constitution. Consequently, there are no bureaucratic hoops that the Defendants would need to jump through in order to re-implement the ban on same-sex marriage. They need only apply Florida law as it is currently written. Furthermore, both the Washington Clerk of Court and the Florida Department of Health have filed motions for clarification in this Court asserting that statutory provisions prohibit them from complying with this Court's order. Since the departments of the State of Florida responsible for enforcing marriage laws are either unwilling or unable to look past the text of Florida law where it conflicts with the constitution, the fact that Florida has done nothing to amend its laws strongly indicates that they will continue to enforce provisions of the ban on same-sex marriage if the case is dismissed.

Additionally, this case should not be dismissed because injunctive relief is still necessary to ensure compliance with the *Obergefell* decision. As the Defendants note, the Eighth Circuit recently ruled against a group of defendants making identical arguments to those raised here at an identical procedural posture. *Waters v. Ricketts*, ---F.3d---, No. 15-1022, 2015 WL 4731342 (8th Cir. Aug. 11, 2015). In *Waters*, like the instant case, Nebraska was in the process of appealing a preliminary injunction when the Supreme Court announced the *Obergefell* opinion. *Id.* at *1. Similarly, in that case, Nebraska took no voluntary action to remedy its constitutional violation other than waiting for the Supreme Court to render its order. *Id.* The Eighth Circuit found "Nebraska's assurances of compliance with *Obergefell* [did] not moot the case." *Id.* at *2. It noted specific language in the *Obergefell* holding, "the state laws

challenged by Petitioners in these cases are now held invalid" left a live controversy open for plaintiffs in other states seeking to lift same-sex marriage bans. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2605). Furthermore, it also noted that the *Obergefell* case did not specifically consider the state benefits incident to marriage that the plaintiffs had raised in the Eighth Circuit. *Id.*

The Defendants argue that this Court should instead follow the lead of the District Court of South Carolina in *Haas v. S.C. Dep't of Motor Vehicles*, Civ. A. No. 6:14-cv-04246-JMC, 2015 WL 4879268 (D.S.C. Aug 13, 2015), which dismissed a couple's challenge to part of South Carolina's same-sex marriage ban on mootness grounds. However, the situation in *Haas* is far different from the situation presented here. *Haas* did not involve a challenge to South Carolina's same-sex marriage ban as a whole, but rather, involved a lawsuit to enjoin the South Carolina Department of Motor Vehicles from refusing issue driver's licenses to same-sex couples with their married names. *Id.* at *1.

The court in *Haas* found that the issue in that case was moot because it had already struck down South Carolina's same-sex marriage ban in a different lawsuit one month after the plaintiffs' filed their complaint. *Id.* Specifically, in *Condon v. Haley*, 21 F. Supp. 3d 572, 589 (D. S.C. 2014) the same court issued a permanent injunction striking down South Carolina's same-sex marriage ban as a whole. Therefore, the court in *Haas* applied the mootness doctrine, not because the defendants voluntarily complied with *Obergefell*, but because the court itself had already ordered the remedy that the plaintiffs sought in a different case. *Haas*, 2015 WL 4879268 at *2. Here, by contrast the *Brenner* Plaintiffs seek the very relief that the South Carolina courts had already granted to the citizens of South Carolina in *Haas*, a permanent injunction striking down the state's same-sex marriage ban. Indeed, if the Defendants are keen

to follow South Carolina's example, a more analogous case from that court would be its disposition in the original challenge to its same-sex marriage ban, *Condon*, 21 F. Supp. 3d at 589, where the court granted plaintiffs a permanent injunction and later, attorney's fees after the *Obergefell* decision was rendered.

The Defendants fail to explain why the Eighth Circuit's reasoning does not apply in this case, where the Defendants' argument and the procedural posture are identical, rather than a district court opinion decided on a set of facts completely different than those present here. Instead, they argue that the reasoning of the Eighth Circuit is inapplicable because the Eleventh Circuit employs a presumption of mootness when a government actor *voluntarily* ceases the challenged conduct. *Jacksonville Property Rights Assoc. v. Jacksonville*, 635 F.3d 1266, 1274 (11th Cir. 2011). However, the Defendants make no argument as to why this presumption should apply to the instant case when the Defendants have taken no voluntary action at all, and only halted their constitutionally defective conduct under court order, and in fact, vigorously challenged that order by seeking stays and continuing to seek clarification to narrow the injunction's scope.

Indeed, even where a government defendant ceases challenged conduct, the presumption does not apply where that cessation is involuntary or ambiguous. *National Assn of Boards of Pharmacy v. Board of Regents in the University System*, 633 F.3d 129, 1310 (11th Cir. 2011). To determine if voluntary cessation by a government entity warrants dismissal, courts look to three factors. *Id.* First, whether the government entity's termination of the offending conduct was unambiguous. *Id.* Second, whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to

manipulate jurisdiction. *Id.* Third, whether the government has consistently applied a new policy or adhered to a new course of conduct. *Id.* If a government action fails to meet these criteria, its voluntary cessation of constitutionally defective conduct will not moot a controversy, irrespective of any claimed presumption of mootness for government defendants. *Id.*

Here, the Defendants' inaction arguably fail all three factors. First, their conduct is far from unambiguous. The Eleventh Circuit has noted that short of repealing a statute, if a government entity decides in a clandestine or irregular manner to cease challenged behavior, courts will consider the termination of that behavior to be ambiguous. *Harrell v. The Florida Bar*, 608 F.3d 124, 1267 (11th Cir. 2010). Furthermore, a defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, while cessation that occurs late in the game will make a court skeptical of voluntary changes. *Id.* at 1266.

In the instant case, the Defendants complied with a bare minimum of what this Court has already ordered them to do, and have not instituted any rule-making procedures to ensure compliance with *Obergefell* once the preliminary injunction has been lifted. Furthermore, the fact that the Defendants' promises to permanently lift the ban on same-sex marriage and comply with *Obergefell* come only in a motion to dismiss the case, also raises suspicion. Even if a promise to follow the law by the Defendants in their Motion to Dismiss was genuine, such a promise is simply too clandestine to carry the force of law in Florida, and too late in the game to be considered unambiguous.

Second, the Defendants cannot argue that their decision was the result of substantial deliberation. They rely heavily on *Christian Coalition of Alabama v. Cole*, 335 F.3d 1288,

1292–93 (11th Cir. 2004) to support their arguments because in that case the defendant's actions were prompted by a shift in the legal landscape caused by a United States Supreme Court decision. However, the court in that case believed the government's voluntary cessation argument, because the government had substantially deliberated the issue following the shift in the legal landscape, and decided to withdraw the advisory opinion at issue in that case. *Id.* Here, by contrast, the Defendants have neither deliberated nor acted, because all of their conduct thus far has been compelled by court order.

Third, the Defendants cannot argue that they have consistently applied their policy of issuing marriage licenses to same-sex couples. A government defendant who claims they have ceased offending conduct, but nevertheless equivocates on their position throughout the litigation, will not succeed on a mootness challenge. *See*, *National Assn of Boards of Pharmacy*, 633 at 1310–12. (Holding that where a state university announced that they had cancelled a university course containing infringing materials, but also made contradictory statements indicating they would retain the professor who taught the course and might want to do so again, there was no voluntary cessation of conduct). Here, the Defendants have planted their feet on the ground in defiance at every opportunity available to them. When this Court issued its preliminary injunction, Defendants sought to prolong the case by appealing it to the Eleventh Circuit. Additionally, they petitioned the Supreme Court to extend the stay on the injunction past the date set by this Court. Furthermore, when the stay on this Court's preliminary injunction was lifted, the Defendants attempted to argue that the state's Clerks of Court were could not issue marriage licenses to any other same-sex couple besides the plaintiff in this case, because Florida's criminal laws prevented them from doing so. (Doc. 99).

Moreover, the Defendants have just recently sought clarification from this Court to determine whether Florida law prohibits them from issuing birth certificates to the children of married same-sex couples. If the Defendants truly intended to apply a consistent policy to lift Florida's ban on same-sex marriage, they would have implemented these changes voluntarily, rather than invoke the machinery of the judiciary at every opportunity to try to escape their constitutional obligations.

Finally, even if the Defendants could show mootness on the injunction issue due to voluntary cessation of conduct, the controversy in this case remains live because the issue of attorney's fees remains. Even where a defendant voluntarily ceases the offending conduct, a case will not be rendered moot if there is still an outstanding claim for attorney's fees. *See*, *Rainey v. Jackson State College*, 481 F.2d 347, 349 (5th Cir. 1973). In this case, the *Brenner* Plaintiffs still seek attorney's fees for the substantial amount of work they have devoted to obtaining a preliminary injunction, defending their favorable ruling on appeal in the Eleventh Circuit and defending a motion to stay this Court's preliminary injunction before the United States Supreme Court. Even if, as the Defendants contend, the Plaintiffs' receipt of a marriage license moots the controversy over the preliminary injunction, the issue of attorney's fees is not mooted by the fact that the constitutional violation occurred in the past.

Furthermore, even where a controversy does become moot due to events that transpire after litigation commences, the court still retains jurisdiction to consider a claim for attorney's fees. *Thomas v. Bryant*, 614 F.3d 1288, 1294 (11th Cir. 2010). In *Thomas*, the plaintiff was an inmate who brought a challenge for injunctive relief against the Florida Department of Corrections for numerous constitutional violations that he suffered. *Id.* at 1295. The District

Court ruled in his favor, but the plaintiff died while the case was pending appeal, mooting his Eighth Amendment claim. *Id.* at 1294. The court found that since the plaintiff had clearly succeeded in obtaining relief sought before the district court, he was still a "prevailing party" for the purposes of receiving attorney's fees. It therefore held that even though the defendant's claim was moot, it was proper to vacate the district court's injunction and grant an order to resolve the plaintiff's motion for attorney's fees. *Id.*

The Eleventh Circuit has also allowed district courts to consider attorney's fees awards even where it has dismissed the case on mootness grounds following the defendant's voluntary cessation of the challenged conduct. For example, in *Kimbrough v. Bowman Transport, Inc.*, 929 F.2d 599, 599 (11th Cir. 199) the court vacated a judgment by the district court because the parties settled the case, but nevertheless remanded the case back to the district court for a determination of attorney's fees based on the settlement. Furthermore, in *Jacksonville Property Rights Assn, Inc. v. City of Jacksonville, FL*, 635 F.3d 1266, 1275 n. 20 (11th Cir. 2011), one of the two major cases that Defendants rely on in their voluntary cessation argument, the court noted that its decision to dismiss a case for lack of a live controversy did not deprive plaintiffs the opportunity to seek attorney's fees under § 1988.

Defendants have made no argument as to why the *Brenner* Plaintiffs' request for attorney's fees does not present a live controversy. In fact, they have neglected to mention this important remaining issue at all. Even if this Court accepted the legal conclusions of each of their arguments, the dismissal they seek would still be inappropriate because the attorney's fees issue remains to be decided. Indeed, the Defendants' claims that they have now committed to follow the *Obergefell* decision at this juncture sound particularly suspicious, since an

adjudication dismissing the case here would absolve them of any obligations to pay the *Brenner* Plaintiffs' fees. This is especially true since at earlier stages in the litigation, the Defendants have fought vehemently to resist the district court's preliminary injunction.

IV. The Eleventh Amendment Does Not Bar Relief

The Eleventh amendment does not bar relief against Defendants merely because they have promised to refrain from enforcing the challenged laws in the future. The Defendants claim that the relief that Plaintiffs seek falls within an exception to *Ex Parte Young*, 209 U.S. 123 (1908), which supposedly prevents courts from granting injunctive relief for claims asserting past constitutional violations. To support the existence of this exception, they quote a passage from *Papasan v. Allain*, 478 U.S. 265, 278 (1986), a passage which, when read in context of that case, does not support the Defendants' proposition. Rather, *Papasan* dealt with the well-known exception to *Young* announced in *Edelman v. Jordan*, 515 U.S. 651 (1974), which prohibits awarding an injunction against state officials that has the effect of depleting resources from the state treasury to compensate for past violations. Essentially, the *Edelman* exception only forbade plaintiffs from seeking *damages* indirectly using *Young* relief. Indeed, the plaintiffs in *Papasan* were seeking an injunction to obtain overdue trust income, a claim that fell directly into the heart of the *Edelman* holding. *Papasan,* 478 U.S. at 279.

The Defendants have made no arguments that the injunction sought by the plaintiffs will deplete the state treasury to compensate for past wrongs. Nor have they pointed to any Eleventh Amendment doctrine that denies relief where a defendant voluntarily ceases the violative conduct during the pendency of the litigation. The Defendant's arguments, to the

extent they have any, are rooted in Article III, standing concerns, not sovereign immunity. Therefore, the Eleventh Amendment does not bar Plaintiffs' claims.

IV. The Court Otherwise Has Jurisdiction to Grant Injunctive Relief under Article III

The Defendant's also argue that Plaintiffs lack standing to seek injunctive relief because they no longer suffer an injury from Florida's ban on same-sex marriage. Many of these arguments are directed at the *Grimsley* plaintiffs' motion for summary judgment. However, to the extent that those arguments may apply to the Defendants' Motion to Dismiss, nothing in Article III warrants such a dismissal. As an initial matter, the *Brenner* Plaintiffs certainly had standing to challenge § 741.041(1), Fla. Stat. (2014), since Plaintiffs Ozzie Russ and Steve Schlairet were denied a marriage license under that statute. Furthermore, while this Court has recognized that the Plaintiffs no longer have standing to challenge the provisions of this section, it has also recognized that the constitution compels the Defendants to issue marriage licenses to other same-sex couples who seek them. (Doc. 109 at 4) Additionally, the Defendants have provided no guarantee that the *Brenner* Plaintiffs' marriage will remain valid in the State of Florida if this Court does not grant permanent relief. Indeed, given that the Defendants Washington Clerk of Court and Florida Department of Health continue to issue marriage application materials with the terms "Bride" and "Groom", despite this Court's order striking down §741.041, Fla. Stat (2014) indicates a strong possibility that they will attempt to follow the statute if this case was dismissed.

Furthermore, the mere fact that the *Brenner* Plaintiffs have now obtained a marriage license does not rob them of standing to seek a permanent injunction, since the Court must still determine the scope of relief that they are entitled to under the *Obergefell* decision and this

Court's Order striking down Florida's ban on same-sex marriage. The *Obergefell* decision stated that states had shaped the fundamental character of marriage, by placing it within so many facets of the legal and social order, and that by doing so, states had excluded same-sex couples from "the constellation of benefits" linked to marriage. *Obergefell*, 135 S. Ct. at 126. By defining the right to marry this way, the Court held not only that the Equal Protection and Due Process clauses of the Fourteenth Amendment required states to issue marriage licenses to same-sex couples, but also that that the challenged laws were invalid to the extent that they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. *Id.* at 1265. In other words, *Obergefell* required states not just to issue marriage licenses to same-sex couples, but marriage benefits as well.

The Defendants claim that plaintiffs do not have standing to seek a permanent injunction prohibiting them from being denied marriage benefits, because such a remedy is "a collateral issue" only pertinent to a potential future case. (Doc. 118 at 8). However, this argument ignores the fact that the *Brenner* Plaintiffs did not bring this case simply to seek a marriage license. Rather, their Complaint alleged that that the Defendants deprived them of the "comprehensive network of legal protection that marriage provides, including the accrual of certain marital benefits." (Doc. 1 at 6). Therefore, the denial of marriage benefits is not a collateral issue only pertinent to a future case, but an essential issue to the present litigation.

Indeed, all of the cases that Defendants cite in support of their argument here deal with plaintiffs who sought a procedural advantage in anticipated future litigation, rather than

converting a temporary injunction into a permanent injunction.[1] Unlike in those cases, the *Brenner* Plaintiffs do not intend to seek relief for an upper hand in a future suit. They seek relief now. Furthermore, the fact that the Defendants even make this argument seems to contradict their earlier position on the voluntary cessation issue, since if the Defendant's promises to comply with *Obergefell* are sincere, there should be no future litigation over Florida's same-sex marriage ban.

The Defendants also claim that the denial of marriage benefits issue is moot because the State of Florida is not currently denying the Plaintiffs any benefits. This argument is misleading on two grounds. First, the state of Florida *is* currently denying same-sex couples marriage benefits, because the *Brenner* plaintiffs are still not able to obtain a marriage certificate without the terms "Bride and Groom" preceding their names and the state of Florida still refuses to issue birth certificates with the names of married same-sex couples. Additionally, the *Brenner* Plaintiffs did not receive the retirement benefits they demanded in their complaint until April, 2015, three-and-a-half months after the stay on the preliminary injunction was. Indeed, the Defendants have put forward no uniform plan to ensure that married same-sex couples will be afforded the multitude of benefits that the state currently provides opposite-sex couples.

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[1] In *Calderan v. Ashmus*, 523 U.S. 740, 742 (1998), for example, the plaintiff sought declaratory relief that his potential habeas petition was not time barred. The Court found that it could not grant him such relief since doing so would provide him a ruling on the availability of a defense to his habeas petition when he had not yet exhausted state remedies. *Id.* at 748–49. Additionally, *Miller v. FCC*, 66 F.3d 1140, 1145 (11th Cir. 1995) dealt with a group of plaintiffs sought declaratory relief on the constitutionality of an FCC regulation that did not apply to the plaintiff's conduct in that case.

Second, the argument that the Plaintiffs lack standing because the state currently provides them with marriage benefits is essentially a rehash of the Defendant's flawed voluntary cessation argument on the mootness issue discussed in Part I. While it is true that Florida may currently provide the Plaintiffs with some marriage benefits afforded to heterosexual couples, they only do so because depriving them of such benefits would subject them to contempt proceedings pursuant to this Court's preliminary injunction. This conduct cannot be said to be voluntary when it is compelled by a court Order and a decision by the United States Supreme Court. For these reasons, the Plaintiffs in this case undoubtedly have standing to seek permanent injunctive relief.

V. Injunctive Relief Is Necessary to Provide the Plaintiffs Adequate Relief and Ensure Compliance with the Constitution.

Injunctive relief is warranted in this case, because the Plaintiffs will suffer irreparable injury unless the injunction is issued, the Plaintiff's challenge is not a forbidden "obey the law" injunction, and failing to grant an injunction would allow the Defendants to defy the holdings of both this Court and the Supreme Court of the United States without facing contempt proceedings. First, the Defendants contend that injunctive relief is not appropriate because Plaintiffs will not suffer irreparable harm if injunctive relief is denied. To seek a permanent injunction, it is true that the Plaintiffs must show that irreparable harm that could not be compensated by monetary relief would occur absent the issuance of an injunction. However, this Court has already recognized that the ongoing deprivation of a fundamental right almost always constitutes irreparable harm. (Doc. 74 at 27). Furthermore, the *Obergefell* decision described the harms faced by same-sex couples denied the benefits of marriage at length, noting that in addition to excluding same-sex couples from the numerous economic benefits of

marriage laws, excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter. *Obergefell*, 135 S. Ct. at 2602.

Defendants argue that the irreparable injury requirement is not met by virtue of the fact that they have now committed themselves to follow the *Obergefell* decision. However, an injunction may still be issued even when the enjoined party agrees that their conduct violated the law. *See*, *Tracfone Wireless, Inc. v. Adams*, No.14–cv–24680; 2015 WL 1611310, *7–8 (S.D. Fla. April 9, 2015) (holding that permanent injunctive relief was appropriate where defendant admitted to his wrongdoing and agreed to stop violating plaintiff's trademark rights). Furthermore, even where constitutional violations have occurred only in the past, prospective injunctive relief is appropriate to prevent a substantial risk of serious injury from ripening into actual harm. *Thomas v. Bryant,* 614 F.3d 1288, 1318. In such circumstances, the irreparable-injury requirement may be satisfied by demonstrating a history of past misconduct, which gives rise to an inference that future injury is imminent. *Id.*

Here, there is a substantial risk that the Defendants may attempt to restrict marriage benefits from the Plaintiffs if this case is dismissed. Prior to this litigation, Florida's statutes and Constitution explicitly forbade same-sex couples from receiving any benefits of marriage. Furthermore, while the Defendants claim that the recent *Obergefell* decision clarified their constitutional errors, that clarity was conspicuously absent when Defendants sought to deny marriage licenses to other same-sex couples after this Court declared Florida's same-sex marriage ban invalid (Doc. 99) and sought to deny birth certificates to married same-sex couples after the *Obergefell* decision. (Doc. 113). Indeed, absent the threat of contempt of

court, it is entirely likely that the Defendants will simply enforce the Florida laws as they remain written once this litigation is terminated.

Additionally, while the Defendants do not specifically contest them, the Plaintiffs also clearly meet the other criteria for permanent injunctive relief. In addition to showing irreparable injury, plaintiffs must also show success actual on the merits of their claim, that the balance of harms between the parties weighs in favor of an injunction, and that the injunction would not be adverse to the public interest. *Thomas*, 614 F.3d at 1318. Defendants concede that in light of the *Obergefell* holding, the ban on same-sex marriage is unconstitutional. (Doc. 118 at 1–2). Furthermore, when granting the Plaintiff's preliminary injunction, this Court found that injunctive relief in this case is not adverse to the public interest and whatever damage such an injunction may cause to defendants would not outweigh the threatened injury to the plaintiffs. (Doc. 74 at 27).

Second, Defendants contend that the type of injunctions that the Plaintiffs seek is a generalized "obey the law" injunction. The crux of this argument is that the Plaintiffs have not specified exactly what they would want an injunction to say, but rather, are seeking a generalized order for the State of Florida to obey the *Obergefell* ruling. However, this argument ignores the fact that the *Brenner* Plaintiffs have, throughout this litigation, been explicit and precise in identifying the relief they seek. Quite simply, they seek to enjoin the application of § 741.212 Fla. Stat (2014) and Article I, Section 27 of the Florida Constitution from depriving them the same marriage benefits that the state affords to heterosexual couples. Additionally, the *Brenner* Plaintiffs have already identified the specific benefits that Florida law denied them in their original Motion for Preliminary Injunction. (Doc. 60 at 4–6).

Third, failing to grant a permanent injunction would allow the state to deny the *Brenner* plaintiffs any benefit that should flow from their legally recognized marriages without facing contempt of court. The *Obergefell* decision was clear in what it required: equal marriage between opposite- and same-sex married couples. Allowing the state to re-litigate each component of the right to marry in a piecemeal fashion would waste judicial resources and deprive the *Brenner* Plaintiffs of the relief that they brought this lawsuit to seek. The *Brenner* plaintiffs have fought for these benefits at every level of this nation's judiciary, from the Northern District of Florida to the United States Supreme Court. If, after all of this, the state seeks to deny them these benefits again, the proper remedy is not another lawsuit. It is a contempt proceeding. For these reasons a permanent injunction is necessary.

VI. Declaratory Relief is Appropriate

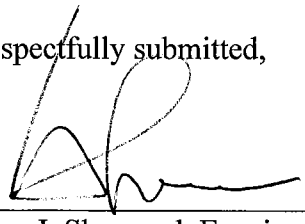
A court has discretion to grant a Declaratory Judgment in a case presenting an actual controversy within its jurisdiction. 28 U.S.C. § 2201(a) (2015). This provision should be construed liberally to accomplish its purpose of providing a speedy and inexpensive method of adjudicating legal disputes without invoking coercing remedies, and is not to be interpreted in a narrow or technical sense. *Sherwood Medical Industries, Inc., v. Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975); *See also, Allstate Ins. Co. v. Employers Liability Assur. Corp*, 445 F.2d 1278, 1280 (5th Cir. 1971). The Declaratory judgment is designed to be an all-purpose remedy to permit an adjudication wherever the court has jurisdiction, there is an actual case or controversy, and an adjudication would serve a useful purpose. *Allstate Ins. Co.*, 445 F.2d at 1280.

Here, there is a live controversy, over which the court has jurisdiction, as discussed in Parts II and IV. Furthermore, declaratory relief would be appropriate here to clarify the scope of this Court's Equal Protection and Due Process Clause holdings. This is especially true since the Defendants have twice sought clarification on the scope this Court's Order issuing a preliminary injunction. For these reasons, a declaratory judgment is an appropriate form of relief.

CONCLUSION

The Defendants' promise to follow the *Obergefell* decision is an improper ground to dismiss this case. Because the Defendant's cooperation with the Constitution's requirements was compelled by this Court's Order granting a Preliminary Injunction and the Supreme Court's decision in *Obergefell*, their actions cannot be said to be voluntary. Furthermore, the controversy in this case remains live because the *Brenner* Plaintiffs still seek a permanent injunction defining the scope of their remedy and attorney's fees. Accordingly, the Defendants' Motion to Dismiss should be denied.

Respectfully submitted,



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