No.: 14-14061-AA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES D. BRENNER, et al.,

Plaintiffs-Appellees,

vs. Case No.: 14-14061-AA

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CIVIL ACTION NO.: 4:14-cv-00107-RH-CAS

BRENNER APPELLEES' RESPONSE TO STATE APPELLANT'S SUGGESTION OF MOOTNESS AND NOTICE OF DISTRICT COURT FILING CONCERNING MOOTNESS

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The Appellants have filed a Suggestion of Mootness, arguing that the case should be dismissed because the appellants have "committed" to following the holding of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Appellants have also filed a motion in the Northern District of Florida asserting the same arguments, even though this Court retains jurisdiction over the case. However, despite the Appellants' mootness arguments, two issues remain live in this case. First, the *Brenner* Appellee's still seek attorney's fees for their work obtaining a preliminary injunction, defending the Appellee's appeal in this Court, and seeking a stay of the preliminary injunction before the United States Supreme Court. Second, the Plaintiffs are still entitled to permanent injunctive relief, the scope of which has yet to be decided by the district court. Because these live controversies remain, the proper action is, as the *Brenner* Appellee's have previously requested, to transfer this case to the district court for consideration of attorney's fees and remand the case on the issue of granting the Appellees permanent injunctive relief.

I. This Case is Not Moot Because the *Brenner* Appellees Still Seek Attorney's Fees

First, outright dismissal of this case is plainly inappropriate given the fact that the *Brenner* Appellees have not received attorney's fees. Even where a defendant voluntarily ceases the offending conduct, a case will not be rendered moot if there is

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 26.1-1, Appellants, James D. Brenner, *et al.*, furnish a complete list of the following persons that have an interest in the outcome of this case:

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

16 Scholars of Federalism and Judicial Restraint, Amicus Curiae

Joyce Albu, Plaintiff-Appellee

Helen M. Alvare, Amicus Curiae

Alliance Defending Freedom, Amicus Curiae

American College of Pediatricians, Amicus Curiae

Ryan Anderson, Amicus Curiae

Carlos Andrade, Plaintiff-Appellee

Arent Fox, LLP, Amicus Curiae

Arnold & Porter, LLP, Amicus Curiae

John H. Armstrong, Defendant-Appellant

Harold Bazzell, Defendant-Appellant

The Beckett Fund for Religious Liberty, Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

David Boyle, Amicus Curias

James Domer Brenner, Plaintiff-Appellee

Anthony Citro, Amicus Curiae

Bob Collier – Plaintiff-Appellee

Concerned Women for America, Amicus Curiae

Leslie Cooper, Esquire, Counsel for Plaintiffs-Appellees

Bryan E. DeMaggio, Esquire, Counsel for Plaintiffs-Appellees

Debevoise & Plimpton, LLP, Amicus Curiae

John Fitzgerald, Plaintiff-Appellee

Florida Family Action, Inc., Amicus Curiae

Florida Conference of Catholic Bishops, Inc., Amicus Curiae

Thomas Gantt, Jr., Plaintiff-Appellee

Gary J. Gates, Amicus Curiae

Robert P. George, Amicus Curiae

Arlene Goldberg, Plaintiff-Appellee

Carol Goldwasser, Plaintiff-Appellee

James Goodman, Jr., Esquire, Counsel for Defendant-Appellant

Sloan Grimsley, Plaintiff-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

Eric Hankin, Plaintiff-Appellee

Juan Del Herro – Plaintiff-Appellee

Hon. Robert L. Hinkle, U.S. District Judge

Historians of Antigay Discrimination, Amicus Curiae

Howard University School of Law Civil Rights Clinic, Amicus Curiae

Denise Hueso, Plaintiff-Appellee

Sarah Humlie – Plaintiff-Appellee

Chuck Hunziker, Plaintiff-Appellee

Samuel S. Jacobson, Esquire, Counsel for Plaintiffs-Appellees

Jenner & Block, LLP, Amicus Curiae

Charles Dean Jones, Plaintiff-Appellee

Maria Kayanan, Esquire, Counsel for Plaintiff-Appellees

Kramer Levin Naftalis & Frankel, LLP, Amicus Curiae

Lambda Legal, Amicus Curiae

The Lighted Candle Society, Amicus Curiae

Robert Oscar Lopez, Amicus Curiae

Robert Loupo, Plaintiff-Appellee

Manatt, Phelps & Phillips, LLP, Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

Marriage Law Foundation, Amicus Curiae

Paul McHugh, Amicus Curiae

Horatio G. Mihet, Esquire, Counsel for Amicus Curiae

Richard Milstein, Plaintiff-Appellee

Morrison & Forester, LLP, Amicus Curiae

Leslie Myers, Plaintiff-Appellee

NAACP Legal Defense and Education Fund, Inc., Amicus Curiae

National Center for Lesbian Rights, Amicus Curiae

National Women's Law Center, Amicus Curiae

Sandra Newson, Plaintiff-Appellee

Craig J. Nichols, Defendant-Appellant

North Carolina Values Coalition, Amicus Curiae

Joseph B. Rome, Amicus Curiae

Ropes & Gray, LLP, Amicus Curiae

Stephen F. Rosenthal, Counsel for Plaintiffs-Appellees

Ozzie Russ, Plaintiff-Appellee

Scholars of the Institution of Marriage, Amicus Curiae

Stephen Sclairet, Plaintiff-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

Wm. J. Sheppard, Esquire, Counsel for Plaintiffs-Appellees

Charles A. Stampelos, U.S. Magistrate Judge

Daniel B. Tilley, Esquire, Counsel for Plaintiff-Appellee

Christian Ulvert, Plaintiff-Appellee

U.S. Conference of Catholic Bishops, Amicus Curiae

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Wilmer Hale, Amicus Curiae

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Amanda J. Woods, Esquire, Counsel for Plaintiffs-Appell

BRENNER APPELLEES' RESPONSE TO STATE APPLLANT'S SUGGESTION OF MOOTNESS AND NOTICE OF DISTRICT COURT FILING CONCERNING MOOTNESS

The Appellants have filed a Suggestion of Mootness, arguing that the case should be dismissed because the appellants have "committed" to following the holding of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Appellants have also filed a motion in the Northern District of Florida asserting the same arguments, even though this Court retains jurisdiction over the case. However, despite the Appellants' mootness arguments, two issues remain live in this case. First, the *Brenner* Appellee's still seek attorney's fees for their work obtaining a preliminary injunction, defending the Appellee's appeal in this Court, and seeking a stay of the preliminary injunction before the United States Supreme Court. Second, the Plaintiffs are still entitled to permanent injunctive relief, the scope of which has yet to be decided by the district court. Because these live controversies remain, the proper action is, as the *Brenner* Appellee's have previously requested, to transfer this case to the district court for consideration of attorney's fees and remand the case on the issue of granting the Appellees permanent injunctive relief.

I. This Case is Not Moot Because the *Brenner* Appellees Still Seek Attorney's Fees

First, outright dismissal of this case is plainly inappropriate given the fact that the *Brenner* Appellees have not received attorney's fees. 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* Appellees still seek attorney's fees for the substantial amount of work they have performed obtaining 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 Appellants contend, their commitment to following the *Obergefell* holding remedies the Appellee's injuries, 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 primary cases on which the Appellee's motion to dismiss in the district court relied, 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.

In both of their motions to dismiss, the Appellants have made no argument as to why the *Brenner* Appellees' request for attorney's fees does not present a live controversy. In fact, they have neglected to mention this important remaining issue in either of their filings. Even if this Court or the Northern District 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

Appellants' 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* Appellee's fees. This is especially true since at earlier stages in the litigation, the Appellants have fought vehemently to resist the district court's preliminary injunction, by appealing its order before this Court, moving the Supreme Court to stay the injunction, and filing multiple motions for clarification in the district court to escape their constitutional obligations while the case has been pending appeal here.

Regardless of the Appellants' intentions in seeking dismissal, given that a request for attorney's fees may prevent an otherwise past violation from becoming moot and that even mooted cases may be remanded for the consideration of attorney's fees, an outright dismissal here is inappropriate. Furthermore, the *Brenner* Appellees have not, as the Appellants state, consented to dismissal of the case. Rather, for the reasons stated above, the *Brenner* Appellee's seek this court to transfer this case to the district court to consider the issue of attorney's fees.

II. This Case is Not Moot Because the Plaintiffs Still Seek a Permanent Injunction

Appellants 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. First, none of

the Eleventh Circuit precedent that the Appellants cite apply to the current procedural posture, where the Appellants have ceased their violative conduct under order of a 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. This is especially true given the fact that the Appellants have moved the district court for clarification multiple times in attempt to enforce portions of Florida's ban on same-sex marriage. Finally, the *Brenner* Appellee's have standing to seek a permanent injunction to prevent their marriage benefits from being restricted by the Appellants.

First, in their motion to the district court, the Appellants 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 Appellees' favor warrants dismissal on mootness grounds. (Doc 118 at 2). However, these cases are inapposite, given 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.

By contrast, here the Appellants claim that they "voluntarily" ceased enforcing Florida's ban on same-sex marriage, not by any conduct of their own, but because the *Obergefell* decision automatically rendered Florida's same-sex marriage ban unconstitutional. First, in making their argument for voluntary cessation, the Appellants seem to forget that they have been bound to the terms of the district 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 the district court, this Court, 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 Appellants cite involve defendants who were already judicially compelled to obey the Constitution through a preliminary injunction. Indeed, the only reason why the Appellees in this case were able to obtain marriage licenses, was because the district ordered Defendants to issue them. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014). Furthermore, unlike in *Jacksonville Property Rights Association* and *Christian Coalition of Alabama*, the unconstitutional provisions here remain codified in the Florida statutes. Consequently, there are no bureaucratic hoops that the Appellants 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 the district 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. 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 that the doctrine of voluntary cessation did not moot the case, because the *Obergefell* holding did not address same-sex marriage bans in other states and did not address the specific marriage benefits that Nebraska had deprived same-sex couples. *Id.* at *2.

The Appellants argue in their Motion to Dismiss 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* Appellees 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.

The Appellants fail to explain why the Eighth Circuit's reasoning does not apply in this case, where the Appellants' 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 Appellants make no argument as to why this presumption should apply to the instant case when the Appellants have taken no voluntary action at all, and only halted their constitutionally defective conduct under court order.

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, the court looks to 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, the court looks to 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 the Eleventh Circuit's presumption of mootness for government defendants. *Id.*

Here, the Appellants' 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 Appellants complied with a bare minimum of what the district court had 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 Appellants' 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 and Florida, and too late in the game to be considered unambiguous.

Second, the Appellants 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 Appellants 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 defendant 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 Appellants have planted their feet on the ground in defiance at every opportunity available to them. When the district court issued its preliminary injunction, Appellants sought to prolong the case by appealing. Additionally, they petitioned the Supreme Court to extend the stay on the injunction past the date set by the district court. Furthermore, when the stay on the district court's preliminary injunction was lifted, the Appellants argued in the district court that the state's Clerks of Court could not issue marriage licenses to any same-sex couples other than the Appellants, because Florida's criminal laws prevented them from doing so.

Additionally, the Appellants have just recently sought clarification from the district court to determine whether Florida law prohibits them from issuing birth certificates to the children of married same-sex couples. If the Appellants 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, the mere fact that the *Brenner* Appellees have now obtained a marriage license does not rob them of standing to seek a permanent injunction, since the district Court must still determine the scope of relief that they are entitled to under the *Obergefell* decision and the district 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 Appellants claim that the Appellees 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. However, this argument ignores the fact that the *Brenner* Appellees 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." 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 Appellants 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* Appellees do not intend to seek relief for an upper hand in a future suit. They seek relief now. Furthermore, the fact that

[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.

the Appellants even make this argument seems to contradict their earlier position on the voluntary cessation issue, since if the Appellants' promises to comply with *Obergefell* are sincere, there should be no future litigation over Florida's same-sex marriage ban.

The Appellants also claim that the denial of marriage benefits issue is moot because the State of Florida is not currently denying the Appellees any marriage benefits. This argument is misleading on two grounds. First, the state of Florida *is* currently denying same-sex couples marriage benefits, because the *Brenner* Appellees 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* Appellees 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, Appellants 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.

Second, the argument that the Appellees lack standing because the state currently provides them with marriage benefits is essentially a rehash of the Appellants' flawed voluntary cessation argument. While it is true that Florida may currently provide the Appellees 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 the district court's 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.

Because the Appellants have not voluntarily taken any action to lift Florida's same-sex marriage ban, there is no guarantee that they will not immediately revert to denying marriage benefits to the Appellees and other same-sex couples once this Court's preliminary injunction is lifted. While the Appellants' arguments for mootness are indeed creative, they are not supported by the law. Under their conception of mootness, courts would never issue attorney's fees or convert a preliminary injunction into a permanent injunction, since defendants could always simply argue voluntary cessation and move to dismiss the case. For these reasons, the Appellants' arguments to dismiss because of voluntary cessation must fail.

III. The Eleventh Amendment Does Not Bar Relief

Despite their claims in their motion to dismiss, The Eleventh amendment does not bar relief against Appellants merely because they have promised to refrain from enforcing the challenged laws in the future. The Appellants claim that the relief that Appellants 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 Appellants' 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 Appellants 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 Appellant'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 Appellees' claims.

CONCLUSION

The Appellants' promise to follow the *Obergefell* decision is an improper ground to dismiss this case. Because their cooperation with the Constitution's

requirements was compelled by the district 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* Appellees still seek a permanent injunction defining the scope of their remedy and attorney's fees. Accordingly, the Appellants' Suggestion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 2015, I electronically filed the foregoing with the Clerk of the Court by using PACER/ECF System which will send a notice of electronic filing to the following:

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