

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

HAL F. B. BIRCHFIELD and  
PAUL G. MOCKO, on behalf of  
themselves and all others  
similarly situated,

Plaintiffs,

*versus*

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

KENNETH JONES, in his official  
capacity as State Registrar of  
Vital Statistics for the State of  
Florida,

Defendants.

CASE NO.

---

---

**CLASS ACTION COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiffs HAL F. B. BIRCHFIELD (“Hal”) and PAUL G. MOCKO (“Paul”) (collectively “Named Plaintiffs”), and the members of the Plaintiff Class (collectively, with the Named Plaintiffs, “Plaintiffs”), by and through their attorneys, file this Class Action Complaint against Defendants JOHN H. ARMSTRONG, in his official capacity as Surgeon General and Secretary of Health for the State of Florida, and

KENNETH JONES, in his official capacity as State Registrar of Vital Statistics for the State of Florida (collectively “Defendants”), and allege as follows:

### **INTRODUCTION**

1. Hal and Paul, both are Florida residents, are gay men who are widowers. In violation of the U.S. Constitution, Defendants disregarded the lawful marriages that Hal and Paul each entered and refused to recognize those marriages or the status of Hal and Paul as surviving spouses on the death certificates for their respective deceased husbands. Hal and his husband, James Merrick Smith (“James”), shared a committed, intimate relationship for more than forty years. Hal and James legally married in New York in 2012. James passed away in 2013. Paul and his husband, William Gregory Patterson (“Greg”), shared a committed, intimate relationship for twenty-six years. Paul and Greg legally married in California in 2014. Greg passed away suddenly, four months after marrying Paul, in 2014. Because Florida unconstitutionally refused to recognize Hal and James’ marriage or Paul and Greg’s marriage at the time James and Greg died, James’s and Greg’s death certificates fail to list them as having been

married at the time of their respective deaths and do not recognize Hal and Paul as their respective surviving spouses.

2. Since the Supreme Court issued its decision in *Obergefell v. Hodges* in June 2015, Hal and Paul have each attempted to seek amendments to their respective husbands' death certificates to ensure that their marriages will be recognized in death, even though Florida unconstitutionally refused to do so while their respective husbands were still alive and at the time of their respective husbands' deaths. Florida statutes empower Defendants to correct errors and omissions on death certificates upon the receipt of relevant documentary evidence. Notwithstanding having such power, and even though it was Defendants' unconstitutional actions that caused the discriminatory erasure of marriages of same-sex couples from these vital records in the first instance, Defendants unconstitutionally insist that all surviving same-sex spouses incur the expense, delay, and burden of individually obtaining court orders before Defendants will correct the erroneously listed marital status of their respective spouses and the omission of their names as surviving spouses on their respective spouses' death certificates.

3. Despite clear pronouncements from both the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and this Court in *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), *order clarified*, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. Jan. 1, 2015), that a state's refusal to recognize a lawful marriage between same-sex spouses on a death certificate – which effectively erases the marriage for all time – violates the Fourteenth Amendment's promises of due process and equal protection, Defendants still refuse to remedy their unconstitutional actions. Rather, Defendants seek to additionally burden those surviving spouses against whom they have already unconstitutionally discriminated, ignoring clear judicial pronouncements of the constitutional imperative to remedy the wrongful omission of lawful same-sex spouses from vital records.

4. The refusal by Defendants to issue amended death certificates to Hal, Paul, and other surviving same-sex spouses, absent them incurring the expense, delay, and burden of individually obtaining court orders, deprives these widows and widowers of the dignity, legitimacy, security, and protections available upon death to surviving

different-sex spouses, and compounds the discrimination they have already faced at the hands of the State.

5. The refusal by Defendants to issue amended death certificates to Hal, Paul, and other surviving same-sex spouses, absent them incurring the expense, delay, and burden of individually obtaining court orders, violates the due process guarantee of the United States Constitution by unconstitutionally infringing on the liberty interests of Hal, Paul, and other surviving same-sex spouses embodied in the fundamental right to marry, including family privacy, integrity, and association.

6. Defendants' refusal also violates the equal protection guarantee of the United States Constitution by discriminating against same-sex spouses in the exercise of a fundamental right and on the basis of their sexual orientation, sex, and status as members of same-sex couples, all without adequate justification.

7. Hal and Paul now bring this action on behalf of themselves and the Plaintiff Class, asking this Court to (1) declare unconstitutional Defendants' omission of all lawful same-sex spouses from death certificates issued by the State of Florida – including those issued prior

to this Court's preliminary injunction ruling in *Brenner* and the Supreme Court's ruling in *Obergefell*; (2) enjoin Defendants from requiring that surviving same-sex spouses obtain a court order as a prerequisite to remedying Defendants' unconstitutional non-recognition of these lawful marriages and spouses on death certificates; and (3) require Defendants to issue corrected death certificates to surviving same-sex spouses upon request without charging these surviving spouses any fees that would otherwise be required to obtain an amended death certificate.

### **JURISDICTION AND VENUE**

8. Named Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the United States Constitution.

9. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

10. This Court has the authority to enter a declaratory judgment and to provide permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

11. This Court has personal jurisdiction over Defendants because they are domiciled in the State and/or have otherwise made and established contacts with the State sufficient to permit the exercise of personal jurisdiction over them.

12. Venue is proper in this district and division under 28 U.S.C. § 1391(b) because all Defendants reside within the State of Florida, Defendants reside and/or have offices within the district and division, and/or because a substantial part of the events that gave rise to Plaintiffs' claims occurred, and will occur, in this district and division.

## **PARTIES**

### **A. Named Plaintiffs**

13. Hal F. B. Birchfield, age 70, lives in Miami, Florida and is the surviving spouse of James Merrick Smith. Hal is harmed by his omission from James's death certificate as James's lawful spouse and by Defendants' refusal to remedy that omission without a court order.

14. Paul G. Mocko, age 71, resides in Fort Lauderdale, Florida and is the surviving spouse of William Gregory Patterson. Paul is

harmed by his omission from Greg's death certificate as Greg's lawful spouse and by Defendants' refusal to remedy that omission without a court order.

## **B. Defendants**

15. Defendant John H. Armstrong ("Surgeon General Armstrong") is sued in his official capacity as Surgeon General and Secretary of Health for the State of Florida. Pursuant to Fla. Stat. §§ 20.05(1)(a); 20.43, the Surgeon General is the head of the Department of Health ("DOH"), and must "execute the powers, duties, and functions" thereof. Pursuant to Fla. Stat. §§ 381.0011, 381.0204, 382.008, and 382.016, those functions include providing a vital statistics program throughout the state, establishing the official form for death certificates that includes a decedent's marital status and the name of a decedent's spouse, and changing a death certificate's marital information when a spouse has been omitted. Surgeon General Armstrong is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

16. Defendant Kenneth Jones ("State Registrar Jones") is sued in his official capacity as the State Registrar of Vital Statistics for the



State of Florida. State Registrar Jones directs the Office of Vital Statistics (“OVS”) which, pursuant to Fla. Stat. §§ 382.003(1) and 382.016, is a unit of DOH that is responsible for “the uniform and efficient registration, compilation, storage, and preservation of all vital records in the state,” including amendments thereto due to errors or omissions. State Registrar Jones is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint.

17. All of the above Defendants, and those subject to their supervision, direction, and/or control, intentionally performed, participated in, aided and/or abetted in some manner the acts alleged herein, proximately caused the harm alleged herein, and will continue to injure Plaintiffs irreparably if not enjoined.

### **C. Class Allegations**

18. Named Plaintiffs bring this action for themselves and, pursuant to Rules 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure, on behalf of the class of persons similarly situated (the “Class”).

19. Named Plaintiffs propose the following Class definition, subject to amendment as appropriate:

All surviving spouses who (i) entered into valid marriages with same-sex spouses in a jurisdiction that permitted them to marry, (ii) whose spouses died in the state of Florida on or before January 6, 2015, (iii) whose marriages were not recognized by the state of Florida on their spouses' death certificates and who were not listed as spouses on those death certificates, and (iv) who have not already obtained court orders to amend the death certificates for their deceased spouses in order to have their marriages and their statuses as spouses respected on those death certificates.

20. Named Plaintiffs represent and are members of the Class.

21. The requirements of Federal Rule of Civil Procedure 23(a) are satisfied in that:

a. The Class is so numerous that joinder of all members is impracticable. Although Named Plaintiffs do not know the exact number of members in the Class, upon information and belief, there are tens of thousands of same-sex couples in Florida, hundreds of whom, at

a minimum, married in jurisdictions that permitted them to do so, and significantly more than forty of whom faced the tragedy of the death of one of the spouses prior to Florida's marriage ban being declared unconstitutional. Upon information and belief, Defendants have refused to issue amended death certificates to any surviving same-sex spouses that remedy Defendants' unconstitutional non-recognition of these spouses' respective marriages in the absence of the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order. Disposition of the claims in a class action will provide substantial benefit to the parties and to the Court by avoiding a multiplicity of identical suits.

b. There are questions of law or fact common to the class.

Such questions include:

i. Whether the refusal by DOH to issue amended death certificates to remedy its unconstitutional non-recognition of decedents' marriages to same-sex spouses absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order violates the due process guarantee of the Fourteenth Amendment of the United States Constitution by unconstitutionally

infringing on the liberty interests of married same-sex couples in the fundamental right to marry; and

ii. Whether the refusal by DOH to issue amended death certificates to remedy its unconstitutional non-recognition of decedents' marriages to same-sex spouses absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order violates the equal protection guarantee of the Fourteenth Amendment of the United States Constitution by discriminating against married same-sex couples in the exercise of a fundamental right and on the basis of their sexual orientation, sex, and status as members of married same-sex couples, all without adequate justification.

Defendants are expected to raise common defenses to these claims.

c. The claims of Named Plaintiffs are typical of those of the Class, in that they arise from the same policy and practice of Defendants to refuse to issue amended death certificates to remedy their unconstitutional non-recognition of the marriages of same-sex couples absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order, and are based on the same theories of law.

d. Named Plaintiffs can and will fairly and adequately protect the interests of the Class and do not have any interests antagonistic to the Class. Named Plaintiffs and the Class all seek a declaration that Defendants' refusal to remedy their unconstitutional non-recognition of the marriages of same-sex couples on previously issued death certificates absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order is unconstitutional, as well as injunctive relief requiring Defendants to issue amended death certificates recognizing the marriages of same-sex couples upon request by the surviving spouse without requiring the spouse to pay amendment fees.

22. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications, resulting in some surviving spouses having streamlined access to corrected death certificates, and others not. In addition, prosecution of separate actions by individual members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests.

23. This case also may be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants' challenged policy and practice apply generally to the Class by precluding all Class members from obtaining an accurate death certificate for his or her respective same-sex spouse absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order. The final declaratory and injunctive relief sought is appropriate respecting the Class as a whole.

### **STATEMENT OF FACTS**

24. Named Plaintiffs both are residents of Florida. The relationship of each Named Plaintiff to his respective same-sex spouse has been erased for all time by Defendants' unconstitutional refusal to recognize each of the Named Plaintiff's marriages on his respective spouse's death certificate.

#### **Hal Birchfield**

25. Hal F. B. Birchfield is a gay man who was in a loving, committed relationship with James Merrick Smith for more than forty years. Hal and James legally married in Rye, New York on October 11, 2012.

26. Hal is a third generation Floridian. He grew up in Tallahassee, and earned degrees in architecture and design from the University of Florida.

27. Hal and James were partners in both life and work. Both accomplished interior designers, they shared a successful business until they both retired in 2002. After their retirement, they spent their time traveling and continuing to enjoy being together.

28. Hal and James married in order to secure their committed relationship legally and to ensure that they would have the same protections all other committed couples have. Because they could not marry in their home state of Florida, they traveled to New York, where the exclusion of same-sex couples from marriage had already ended. They obtained a marriage license from the clerk of Rye, New York and were married by a friend and former client, who was also a minister.

29. In September 2013, James became ill and was hospitalized, where he was diagnosed with cancer of the pancreas and liver. Given that James was 94 years old, the doctor advised that standard cancer treatments were inappropriate. She suggested that James remain in

the hospital for a few days to regain some strength, while Hal prepared for hospice care in the couple's home.

30. While James was in the hospital, Hal was respected as James's spouse in every way. The white board in James's room listed Hal as a spouse along with his contact information. The medical staff provided Hal with information and complied with his requests regarding James's care.

31. On Friday, September 13, 2013, Hal was returning to the hospital after making preparations at home for James's homecoming when he received the call that James had died.

32. James had made most of the arrangements for his cremation in advance with the Neptune Society. Hal provided the Neptune Society with additional information, including that he and James were married.

33. Hal received James's death certificate in the mail. Designated as Florida State Document No. 2013127156, it lists James' marital status as widowed, based on his prior marriage to a woman in the 1950's, and in the section for spouse, it states "none." James's death



certificate names Hal as the “informant” who provided the information for the certificate and it states his relationship to James as “partner.”

34. This death certificate, which erased Hal’s role as James’s spouse, was demeaning to Hal and to his marriage to James, and felt inauthentic to Hal. Having his marriage disregarded makes Hal feel like a second-class citizen.

35. As further described below, when Hal requested an amended death certificate from the State Registrar at the Department of Health, his application was rejected because he had not obtained a court order.

### **Paul Mocko**

36. Paul G. Mocko is a gay man who was in a loving, committed relationship with Greg Patterson for twenty-six years. Paul and Greg legally married in San Francisco, California on April 28, 2014.

37. Paul and Greg moved to Fort Lauderdale in 2009 after decades of living in San Francisco. They moved in order to care for Greg’s mother, who was going to come live with them and preferred a warmer climate than San Francisco.

38. The move to Fort Lauderdale was financially very difficult for Paul and Greg. They had owned a condo in which they lived in San

Francisco, the value of which had decreased dramatically due to the crash of the financial markets. They lost all of the equity in their home and nearly 60% of the value of their investments during the crash. The bank ended up foreclosing on the condo, and Paul and Greg had to declare bankruptcy. Even after emerging from bankruptcy, Paul and Greg remained financially vulnerable, with limited income from Social Security and other benefits to support them.

39. Paul and Greg married because they wanted their relationship to be considered equal to everyone else's. Because they could not marry in their domicile state of Florida, they traveled to California, where the exclusion of same-sex couples from marriage had already ended after the Supreme Court's ruling in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). They also continued to feel attached to San Francisco as their home town and they wanted to celebrate their marriage where their relationship had begun. They obtained a marriage license from the San Francisco clerk and were married by a Deputy Marriage Commissioner at the top of the grand staircase in San Francisco City Hall surrounded by close friends. Paul and Greg considered their wedding day to be the greatest day of their lives.

40. By the time Paul and Greg married, Greg had already been diagnosed with stage four lung cancer. Greg was treated successfully with an experimental drug for a period of months, but then the drug stopped working, and he had to wait to be approved for another medication.

41. On Sunday morning, July 6, 2014, while waiting for the new medication, Greg had a heart attack. Paul and Greg were at home, and Paul was in the kitchen making coffee when he heard Greg collapse in the bedroom. Paul performed CPR until an ambulance arrived. Greg was taken to Holy Cross Hospital in Fort Lauderdale, where medical staff attempted to revive him, but, after consultation with Paul about Greg's wishes, they did not attempt further resuscitation and Greg passed away.

42. Paul made arrangements with Kraeer-Fairchild Funeral Home in Fort Lauderdale, Florida for Greg's cremation. He provided the staff there with copies of their marriage license and certificate, but the staff told him that their hands were tied for purposes of the death certificate because "the State of Florida does not recognize gay marriages."

43. Paul received Greg's death certificate from the funeral home. Designated Florida State Document No. 2014096174, it lists Greg's marital status as "never-married," and in the section for spouse, it states "none." Greg's death certificate names Paul as the "informant" who provided the information for the certificate and it states his relationship to Greg as "executor."

44. Paul found this death certificate that erased his role as Greg's spouse deeply demeaning. Having his twenty-six year relationship disregarded when different-sex couples who have not been together anywhere near that long have their marriages automatically recognized is degrading to Paul, disrespectful of his marriage to Greg, and profoundly inequitable.

45. Without accurate death certificates, surviving same-sex spouses face additional hurdles in accessing or winding up matters relating to their spouses' property, benefits, and insurance. Paul has had to present this death certificate that erased his marriage to Greg to several government agencies, including the Internal Revenue Service and the Social Security Administration, for purposes of seeking spousal protections. Paul also presented the death certificate to Greg's

employer for purposes of accessing Greg's life insurance. That request was denied.

46. As described below, when Paul sought an amended death certificate, he was informed that he would not be able to obtain an amendment without a court order.

### **History of Florida's discrimination against married same-sex couples**

47. At the time of both James's and Greg's deaths, Florida law prohibited recognition of their respective marriages to Hal and Paul, under Fla. Const. Art. I, § 27 (which provided that, "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.") and Fla. Stat. § 741.212 (which barred recognition of the marriages or other spousal relationships of same-sex couples for any purpose, including by "[t]he State, its agencies, and its political subdivisions") (collectively, the "marriage ban").

48. Florida's marriage ban has been conclusively held unconstitutional by multiple courts. As a result, Defendants are well

aware that their refusal to recognize the marriages of same-sex couples on vital records like death certificates is unconstitutional.

49. In *Brenner*, this Court concluded that Florida’s marriage ban violates the Due Process and Equal Protection Clauses. In addressing the constitutional harms of the marriage ban, *Brenner* recognized the standing of a surviving spouse to challenge the marriage ban’s erasure of her marriage from her deceased wife’s death certificate, stating at 999 F. Supp. 2d at 1285, “The death certificate says Ms. Goldwasser was ‘never married’ and, in the blank for listing a spouse, says ‘none.’ That a spouse would find this offensive and seek to have it changed is neither surprising nor trivial.” In refusing to stay that portion of its decision requiring the State to correct the death certificate, the Court concluded at 999 F. Supp. 2d at 1292 that, “There is no good reason to further deny Ms. Goldberg the simple human dignity of being listed on her spouse’s death certificate. Indeed, the state’s refusal to let that happen is a poignant illustration of the controversy that brings us here.”

50. More broadly, in *Obergefell*, the Supreme Court definitively held that state laws, like Florida’s marriage ban, prohibiting same-sex

couples from marrying and denying recognition of same-sex couples' lawful marriages contracted in other jurisdictions violate the promises of liberty and equality embodied in the Fourteenth Amendment. Recognizing that marriage embodies a love that may endure even past death, the Court struck down state marriage bans that require married same-sex couples to remain strangers even in death, noting the urgency of preventing the state from erasing James Obergefell's marriage to John Arthur, in the Supreme Court's words, "for all time."

51. Constitutional rulings like *Obergefell* apply retroactively, which means that Florida's marriage ban has always been unconstitutional and was improperly enforced by Defendants.

52. Defendants' refusal to recognize Plaintiffs' marriages and to list Plaintiffs as spouses on their respective spouses' death certificates pursuant to the marriage ban was unconstitutional at the time they issued the death certificates and is unconstitutional now.

#### **Efforts to obtain amended death certificates**

53. Since the Supreme Court's ruling in *Obergefell*, both Hal and Paul have taken steps to obtain amended death certificates for their spouses that recognize their lawful marriages.

54. On September 16, 2015, counsel for Hal sent a letter to Defendant Jones and to DOH counsel requesting an amended death certificate for James. Attached thereto were a certified copy of James's inaccurate death certificate, a completed Application for Amendment to Florida Death or Fetal Death Record, a signed and notarized affidavit from Hal in support of the Application for Amendment, copies of Hal's passport and driver's license, a certified Transcript of Marriage for Hal and James, and two checks—one for the \$20 amendment fee and one for \$16 for additional copies. The letter requested that DOH return the check for the amendment fee given that the omission of Hal from James's death certificate was unconstitutional.

55. On or about September 21, 2015, DOH Deputy General Counsel Janine Myrick advised Hal's counsel that the request was under review, but regardless of the legal analysis about the implications of the *Obergefell* ruling, DOH would likely require Hal to obtain a court order to amend the death certificate. She further stated that, while DOH had been recognizing same-sex spouses on death certificates after the date the stay of this court's order in *Brenner* was lifted, it was DOH's position that the only death certificate DOH was obligated to



alter prior to that date was the one death certificate specifically at issue in *Brenner*.

56. On or about September 24, 2015, Attorney Myrick confirmed with Hal's counsel that DOH would not amend James's death certificate without a court order.

57. Defendants returned Hal's submission, absent the letter from his counsel, with a Receipt/Packing Slip from Betty Shannon, Program Administrator, Records Amendments for the Bureau of Vital Statistics. The Packing Slip stated in the comments, "Your request is being returned. Please resubmit this application once you have obtained the court order to amend the death record."

58. Paul also looked into having Greg's death certificate amended. First, he contacted the funeral home, who told him he had to speak with someone at Broward County, which Paul understood to mean the coroner's office.

59. The coroner's office told Paul that he had to contact the DOH Bureau of Vital Statistics.

60. Someone at the DOH Bureau of Vital Statistics directed Paul back to the funeral home because they had handled the initial paperwork for the original death certificate.

61. The staff at the funeral home then told Paul that he would have to obtain a court order from the Circuit Court in order to get an amended death certificate for Greg.

**Defendants' authority to remedy their unconstitutional non-recognition of same-sex spouses on death certificates**

62. Defendants not only have the authority to remedy errors and omissions on death certificates, but the obligation. Fla. Stat. § 382.016 provides: “The department, upon receipt of the fee prescribed in § 382.0255; documentary evidence, as specified by rule, of any misstatement, error, or omission occurring in any birth, death, or fetal death record; and an affidavit setting forth the changes to be made, shall amend or replace the original certificate as necessary.”

63. Specifically, Fla. Stat. § 382.016(2) allows Defendants to amend the name of the surviving spouse on a death certificate when it has been omitted, without obtaining a court order.

64. Defendants' insistence on Plaintiffs' obtaining a court order to remedy Defendants' unconstitutional non-recognition of their

marriages and omission of their names as surviving spouses on their spouses' death certificates purportedly stems from Defendants' application of Fla. Admin. Code 64V-1.007 ("the regulation") to Plaintiffs.

65. The regulation allows amendments to death certificates upon the submission of an application, supporting affidavit, and documentary evidence supporting the change.

66. Specifically with regard to marital status and surviving spouses, Fla. Admin. Code §§ 64V-1.007(3)(e), (3)(f), and (5) state that the application, affidavit, and documentary evidence will suffice to support a "[c]hange to marital status as long as the surviving spouse item is not affected by the change" or a "[c]hange to name of the surviving spouse if a misspelling or an omission as long as marital status is not affected by the change[,]" but that DOH may not otherwise change the name of the surviving spouse absent an order from a court of competent jurisdiction. .

67. Defendants apparently are applying the regulation to require Plaintiffs to obtain a court order because remedying Defendants' unconstitutional non-recognition of Plaintiffs' marriages

and Defendants' unconstitutional omission of Plaintiffs as surviving spouses requires changes to both marital status and the names of the surviving spouses.

68. Obtaining a court order to amend a death certificate requires the filing of a petition to the Circuit Court. The petition must be accompanied by a filing fee of \$401. The filing fee for a petition to amend a death certificate can only be waived upon a determination of civil indigent status.

69. In addition to the burden of paying hundreds of dollars to seek a court order, the process may not be easily understandable or accessible for *pro se* parties. Upon information and belief, there are no forms or models for a petition to amend a death certificate provided by either the Florida judiciary or the Florida Bar Association to enable a petitioner easily to proceed *pro se*.

70. Requiring Plaintiffs to obtain a court order to remedy Defendants' unconstitutional erasure of their marriages from their spouses' death certificates causes both tangible and intangible harms.

71. Requiring Plaintiffs to pay filing fees and hire attorneys to file petitions in the Circuit Court causes them financial harm. This

harm is particularly acute for surviving spouses like Paul who are experiencing significant economic distress from the loss of their deceased spouses' income. Paul has not been able to secure Social Security survivor benefits because of the short duration of their marriage. As a result, Paul is experiencing tremendous financial stress from the loss of half the income that had covered household expenses. His rent consumes all but \$78 per month of his own Social Security benefits. The financial costs of remedying the harm inflicted by the unconstitutionally issued death certificates may pose an insurmountable barrier for many surviving spouses.

72. Requiring Plaintiffs to obtain a court order to remedy Defendants' unconstitutional omission of their marriages and their spousal status from their spouses' death certificates also causes dignitary harms. Plaintiffs have already suffered both the loss of their respective spouses and Defendants' refusal to recognize their lawful marriages on the respective spouses' death certificates. State action that denies lesbians and gay men a fundamental right causes pain and humiliation, the substantial effects of which linger despite the marriage ban having been declared unconstitutional. Defendants' refusal to

provide a remedy for their illegal non-recognition absent the surviving spouse incurring the expense, delay, and burden of individually obtaining a court order compounds the constitutional injury Plaintiffs have already experienced.

73. While the preliminary injunction in *Brenner* specifically required amendment of only the one death certificate at issue in that case, the Constitution requires Defendants to amend all death certificates they issued that unconstitutionally erased the decedents' marriages and the Plaintiffs' statuses as their respective surviving spouses.

74. Defendants cannot offer any legitimate governmental purpose – let alone any compelling justification – for burdening Plaintiffs and Plaintiffs' rights in this way.

### **CLAIMS FOR RELIEF**

#### **COUNT I: Deprivation of Due Process U.S. Const. Amend. XIV (42 U.S.C. § 1983)**

75. Plaintiffs incorporate by reference and re-allege paragraphs 1-74 of this Complaint as though fully set forth herein.

76. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

77. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The Due Process Clause of the Fourteenth Amendment has a substantive component that provides heightened protection against government interference with fundamental rights and liberty interests.

78. The right to marry the unique and irreplaceable person of one’s choice and to direct the course of one’s life in this intimate realm without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Indeed, the essence of the fundamental right to marry is freedom of personal choice in selecting one’s spouse.

79. States’ refusals to recognize marriages lawfully entered by same-sex couples in other jurisdictions, including with regard to vital records like death certificates, inflict substantial and continuing harm

and infringe upon the rights of same-sex couples to the dignity, respect, and intimate association embodied in the fundamental right to marry.

80. Defendants' refusal to recognize Plaintiffs' marriages, and Defendants' duties and actions to apply and enforce Florida's discriminatory marriage ban, unconstitutionally burden Plaintiffs' fundamental right to marry and the rights protected under the Fourteenth Amendment to the United States Constitution to liberty, dignity, autonomy, family integrity, association, and due process.

81. Defendants' application of the regulation to Plaintiffs, who have already experienced unconstitutional discrimination at the hands of Defendants, compounds and recommits that unconstitutional burdening of the fundamental right to marry and the rights protected under the Fourteenth Amendment to the United States Constitution to liberty, dignity, autonomy, family integrity, association, and due process.

82. Defendants cannot satisfy the Due Process Clause's mandate that government's burdening of a fundamental right or substantial infringement of a liberty interest may be sustained only upon a showing



that the burden is narrowly tailored to serve a compelling governmental interest.

83. Defendants, acting under color of state law, are depriving Plaintiffs of rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

**COUNT II:  
Deprivation of Equal Protection  
U.S. Const. Amend. XIV  
(42 U.S.C. § 1983)**

84. Plaintiffs incorporate by reference and re-allege paragraphs 1-74 of this Complaint as though fully set forth herein.

85. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

86. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

87. The Supreme Court made plain in *Obergefell* that the denial to same-sex couples of the right to marry works a grave and continuing

harm. The Court stated in Obergefell that “The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.” The Court held that the Constitution prohibits States from excluding same-sex couples from marriage on the same terms accorded to different-sex couples, including with regard to the governmental rights, benefits, and protections that flow from marriage, such as death certificates recognizing the marital statuses and spouses of the deceased, and the rights of surviving spouses. The Court further held that “[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

88. Defendants’ refusal to recognize Plaintiffs’ marriages, and Defendants’ duties and actions to apply and enforce Florida’s discriminatory marriage ban, violated the equal protection guarantee of the Fourteenth Amendment both on its face and as applied to Plaintiffs.

89. Defendants’ refusal to recognize Plaintiffs’ marriages, and their duties and actions to apply and enforce Florida’s discriminatory

marriage ban violate the right of Plaintiffs to equal protection by discriminating impermissibly on the basis of Plaintiffs' sexual orientation and sex, and their status as married same-sex couples. Differential treatment on these bases subjects Defendants' conduct to heightened scrutiny, which Defendants' conduct cannot withstand.

90. Defendants also discriminated against Plaintiffs based on sexual orientation and sex with respect to access to the fundamental right to marry and with respect to their liberty interests in dignity, autonomy, and family integrity and association. Differential treatment with respect to exercise of fundamental rights and liberty interests subjects Defendants' conduct to strict scrutiny, which Defendants' conduct cannot withstand.

91. Defendants' application of the regulation to Plaintiffs, who have already experienced unconstitutional discrimination at the hands of Defendants, compounds and recommits that unconstitutional denial of equal protection under the law protected by the Fourteenth Amendment to the United States Constitution. Defendants' actions are thus subject to heightened scrutiny, but cannot be justified under any level of review.

**DECLARATORY AND INJUNCTIVE RELIEF**

**28 U.S.C. §§ 2201 and 2202;**

**Federal Rules of Civil Procedure 57 and 65**

92. Plaintiffs incorporate by reference and re-allege paragraphs 1-74 of this Complaint as though fully set forth herein.

93. This case presents an actual controversy because Defendants' present and ongoing interference with fundamental liberties and denial of equal treatment to Plaintiffs subject them to serious and immediate harms, warranting the issuance of a declaratory judgment.

94. Plaintiffs seek permanent injunctive relief to protect their constitutional rights and avoid the injuries described above. A favorable decision enjoining Defendants would redress and prevent the irreparable injuries to Plaintiffs identified herein, for which Plaintiffs have no adequate remedy at law.

95. Defendants will incur no burden in remedying their prior refusal to recognize out-of-state marriages, whereas the hardship for Plaintiffs of being denied equal protection and liberty is severe, subjecting them to an irreparable denial of their constitutional rights.

The balance of hardships thus tips strongly in favor of Plaintiffs and warrants the equitable relief Plaintiffs seek.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Certifying this action to be a proper class action pursuant to Fed. R. Civ. P. 23, establishing a Class the Court deems appropriate, finding that Named Plaintiffs are proper representatives of the Class, and appointing the lawyers and law firms representing the Named Plaintiffs as Counsel for the Class;

B. Declaring unconstitutional Defendants' failure to recognize the marriages of same-sex couples on, and omission of all lawful same-sex spouses from, death certificates issued by the State of Florida – including those issued prior to January 6, 2015;

C. Permanently enjoining Defendants from requiring that surviving same-sex spouses obtain a court order as a prerequisite to remedying Defendants' unconstitutional non-recognition of these lawful marriages and spouses on death certificates;

D. Requiring Defendants to issue corrected death certificates to surviving same-sex spouses upon request and presentation of no more information than would be required in the ordinary course of business as a pre-requisite to listing a different-sex spouse on an original death certificate, and without charging surviving spouses any fees that would otherwise be required to obtain an amended death certificate;

E. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 42 U.S.C. § 1988 and any other applicable laws; and,

F. Granting such other and further relief as the Court deems just and proper.

DATED: December 21, 2015

Respectfully submitted,

/s/ David P. Draigh

---

David P. Draigh,

Florida State Bar No. 624268

Stephanie S. Silk,

Florida State Bar No. 0107412

Southeast Financial Center

200 South Biscayne Boulevard,

Suite 4900

Miami, Florida 33131

T: (305) 371 2700 | F: (305) 358 5744

[ddraigh@whitecase.com](mailto:ddraigh@whitecase.com)

[ssilk@whitecase.com](mailto:ssilk@whitecase.com)

Tara L. Borelli,

Georgia State Bar No. 265084

LAMBDA LEGAL DEFENSE AND

EDUCATION FUND, INC.

730 Peachtree Street NE, Suite 1070

Atlanta, GA 30308-1210

T: (404) 897-1880 | F: (404) 897-1884

[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)

Karen L. Loewy,

New York State Bar No. 5145883\*

LAMBDA LEGAL DEFENSE AND

EDUCATION FUND, INC.

120 Wall Street, 19th Floor

New York, NY 10005-3919

T: (212) 809-8585 | F: (212) 809-0055

[kloewy@lambdalegal.org](mailto:kloewy@lambdalegal.org)

ATTORNEYS FOR PLAINTIFFS

\*Motion for admission *pro hac vice* pending