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

DR. CELESTE PHILIP, in her 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. 4:15-cv-00615

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Hal F. B. Birchfield and Paul G. Mocko ("Named Plaintiffs"), on behalf of themselves and all others similarly situated, submit the following brief in support of their motion for summary judgment.

INTRODUCTION

This case involves Florida officials' refusal to remedy their unconstitutional discrimination against married same-sex couples at one of the most vulnerable times in a person's life – after the death of a spouse. Named Plaintiffs are surviving spouses whose marriages Defendants did not recognize at the times of their husbands' deaths and presently refuse to recognize on their spouses' death certificates unless ordered to do so by a court. Named Plaintiffs have brought suit for themselves and on behalf of a putative class of similarly situated surviving same-sex spouses whom Defendants unconstitutionally refused to recognize on their spouses' death certificates (collectively, "Plaintiffs").

Both the United States Supreme Court and this Court have squarely concluded that a state's disrespect for the marriages of same-sex couples – overall and in the specific context of death certificates – violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), the Supreme Court held that laws barring same-sex couples from marriage both "burden the liberty of same-sex couples, and … abridge central precepts of equality," expressly rejecting the notion that a state may permissibly disregard a couple's marriage in death. In response to James Obergefell's asking "whether Ohio can erase his marriage to John Arthur for all time," *id.* at 2606, by issuing a death certificate that failed to recognize their lawful

marriage, the Court responded with a resounding, "no." In *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014), *order clarified*, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015), this Court rejected the arguments made by Florida officials, including Defendant Philip's predecessor in office, that Florida laws barring recognition of the marriages of same-sex couples survived constitutional review, holding them to violate the Due Process and Equal Protection Clauses and recognizing them as "an obvious pretext for discrimination" against same-sex couples. 999 F. Supp. 2d at 1290. *Brenner*, too, directly addressed Florida's unconstitutional erasure of a same-sex couple's marriage from a spouse's death certificate, and in refusing to stay that portion of its decision requiring the State to correct the death certificate, this Court concluded, "There is no good reason to further deny [the surviving spouse] 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." *Id.* at 1292.

Despite these clear pronouncements, however, Florida state officials continued to resist fully complying with both the letter and spirit of this Court's prior rulings and *Obergefell*, as this Court recognized in granting summary judgment to the *Brenner* plaintiffs. *Brenner v. Scott*, No. 1:14-cv-107-RH/CAS,

Order Granting Summary Judgment at 5-8, ECF No. 144 (Mar. 30, 2016) ("*Brenner* Summary Judgment Order").

Defendants continue to resist the applicability of these unequivocal rulings to their unconstitutional treatment of surviving same-sex spouses whose loved ones died before Florida began recognizing their marriages. Defendants refuse to remedy that discrimination, insisting that the burden to do so must be borne by those whose constitutional rights the state has already infringed. Defendants 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 spouses' death certificates. Yet it is Defendants who bear the responsibility for correcting their own actions in erasing Hal Birchfield's marriage to James Smith for all time, in listing Greg Patterson's spouse as "none" despite his lawful marriage to Paul Mocko, and in imposing on all surviving same-sex spouses the stigma and injury of unconstitutional discrimination against them by refusing to recognize their lawful marriages.

Plaintiffs' complaint raises two claims: that Defendants' erasure of their marriages from their spouses' death certificates and Defendants' subsequent refusal to remedy that erasure absent Plaintiffs' incurring the expense, delay, and burden of obtaining a court order (1) infringes on Plaintiffs' fundamental right to

marry and other liberty interests secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and (2) denies Plaintiffs equal protection under the law by discriminating against them on the basis of their sexual orientation, sex, and status as same-sex spouses, and with regard to their exercise of a fundamental right, in violation of the Fourteenth Amendment to the United States Constitution. The parties in this case agree that there are no facts in dispute and that these claims can and should be resolved as a matter of law on summary judgment. In light of Defendants' ongoing violation of Plaintiffs' constitutional rights, Named Plaintiffs seek summary judgment on both claims as to all Defendants.

PROCEDURAL HISTORY

Named Plaintiffs filed this action on December 21, 2015. (Dkt. 1). Defendants filed an Answer to the Complaint on February 15, 2016. (Dkt. 18).

On April 4, 2016, Plaintiffs filed a motion for class certification, seeking systemic relief for all surviving same-sex spouses 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 prior to the effective date of the preliminary injunction in *Brenner*. (Dkt. 22). Defendants' obligation to respond to Plaintiffs' class certification motion has been tolled, but Plaintiffs have this same

day filed a motion for an order requiring Defendants to respond thereto in order that the Court might consider both motions simultaneously.

STATEMENT OF FACTS

The Named Plaintiffs are gay men who were in loving, committed relationships with their respective husbands for decades, and were legally married prior to their husbands' deaths. Declaration of Hal F.B. Birchfield in Support of Plaintiffs' Motion for Summary Judgment, attached hereto as Ex. A ("Birchfield Decl.") ¶¶ 2-3; Declaration of Paul G. Mocko in Support of Plaintiffs' Motion for Summary Judgment, attached hereto as Ex. B ("Mocko Decl.") ¶¶ 2-3.

Hal F.B. Birchfield ("Hal") and James Merrick Smith ("James")

Hal, who is 70 years old and resides in Miami, Florida, is a third generation Floridian. Birchfield Decl. ¶¶ 2, 4. Hal shared his life with James for more than 40 years. They were partners in both their personal and professional lives, sharing a successful interior design business until they retired in 2002, after which they traveled and simply enjoyed their time together. Hal describes them as "inseparable." *Id.* ¶ 3, 5.

Hal and James legally married in Rye, New York on October 11, 2012. Like countless other couples, they married in order to secure their devoted relationship

in law and to be able to access the legal protections marriage provides. Because they could not marry in Florida, they traveled to New York, where the exclusion of same-sex couples from marriage had ended. They obtained a marriage license and were married by a friend and former client. *Id*. ¶¶ 3, 6.

In September 2013, when James was 94 years old, he was diagnosed with cancer of the pancreas and liver. He was hospitalized, and Hal began to prepare for hospice care to come to their home. On September 13, 2013, as Hal was returning to the hospital, he received a call telling him that James had died. *Id*. ¶¶ 7, 8. James had planned for his cremation, and Hal worked with the Neptune Society to finalize arrangements, including informing them of their marriage for purposes of the death certificate. *Id*. ¶ 9.

When Hal received James's death certificate in the mail, it listed James's marital status as widowed, based on a prior marriage to a woman, and in the section for spouse, it stated "none." It named Hal as the "informant" and characterized his relationship to James as "partner." *Id*. ¶ 10, Ex. A (Florida State Doc. No. 2013127156). Receiving a death certificate that erased his status as James's spouse was demeaning to Hal and to his marriage to James, and made Hal feel like a second-class citizen. *Id*. ¶ 11.

Paul G. Mocko ("Paul") and William Gregory Patterson ("Greg")

Paul is 72 years old and lives in Fort Lauderdale, Florida. For 26 years, he shared his life with Greg. They moved to Fort Lauderdale from San Francisco, California in 2009 to care for Greg's mother, who planned to live with them in Florida's warmer climate. Mocko Decl. ¶¶ 2-4.

Moving to Fort Lauderdale caused Paul and Greg significant financial hardship. Their condominium in San Francisco lost its value dramatically in the crash of the financial markets, resulting in loss of their equity; at the same time they lost nearly 60% of the value of their investments. The bank foreclosed on their property, and they had to declare bankruptcy. They remained financially vulnerable even after emerging from bankruptcy, relying on limited income from Social Security and other benefits to support them. *Id.* ¶ 5.

Paul and Greg were legally married in San Francisco, California on April 28, 2014. They married in order to have their loving, committed relationship considered equal to everyone else's. They could not marry in Florida at the time, but traveled to California, where the exclusion of same-sex couples from marriage ended with the Supreme Court's ruling in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). They also felt attached to San Francisco and wanted to marry in the place their relationship had begun. They obtained a marriage license and were married

surrounded by close friends. Paul and Greg considered their wedding day to be the greatest day of their lives. *Id*. ¶¶ 3, 6.

By the time Paul and Greg married, Greg had already been diagnosed with stage four lung cancer. He was treated successfully for a time with an experimental drug, and while waiting for approval for another, Greg had a heart attack in the couple's home on Sunday, July 6, 2014. Paul performed CPR until an ambulance arrived to take them to the hospital, where, after unsuccessful attempts to revive him, Greg passed away. *Id*. ¶¶ 7-8.

Paul arranged for Greg's cremation with Kraeer-Fairchild Funeral Home in Fort Lauderdale, providing staff with copies of their marriage license for purposes of the death certificate. The staff told Paul that their hands were tied, but he could not be listed as a spouse because "the State of Florida does not recognize gay marriages." *Id*. ¶ 9.

Paul received Greg's death certificate from the funeral home. It listed Greg's marital status as "never-married," and in the section for spouse, it stated "none." Greg's death certificate named Paul as the "informant" and stated his relationship to Greg as "executor." *Id*. ¶ 10, Ex. A (Florida State Doc. No. 2014096174). To Paul, receiving a death certificate that erased his role as Greg's spouse was deeply demeaning. Having his 26-year relationship disregarded – particularly in the face of the automatic recognition of different-sex couples whose

relationships were nowhere near as long – feels degrading to Paul, disrespectful of his marriage to Greg, and profoundly unequal. *Id.* ¶ 11.

Without an accurate death certificate, Paul faced additional hurdles in winding up Greg's financial affairs and accessing spousal benefits. He had to present the death certificate, reflecting no hint of his legal relationship with Greg, to several government agencies in seeking spousal protections. Paul was deeply pained by having to present a document saying he and Greg were never married. *Id.* ¶ 12.

<u>Defendants</u>

Defendant Celeste Philip is sued in her official capacity as Surgeon General and Secretary of Health for the State of Florida. Answer ¶ 15. The Surgeon General is the head of the Department of Health ("DOH"), and must "execute the powers, duties, and functions" thereof. Fla. Stat. §§ 20.05(1)(a), 20.43. Those functions include providing a statewide vital statistics program, establishing official forms for death certificates, and amending death certificates containing errors and omissions. Fla. Stat. §§ 381.0011, 381.0204, 382.008, 382.016.

Defendant Kenneth Jones is sued in his official capacity as the State Registrar of Vital Statistics for the State of Florida. The State Registrar directs the Office of Vital Statistics, a DOH unit 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. Fla. Stat. §§ 382.003(1), 382.016.

Florida laws regarding death certificates and marriage

Florida requires the filing of a death certificate for each death by means prescribed by DOH. Fla. Stat. § 382.008. DOH creates the forms for death certificates and promulgates rules to carry out these obligations. Fla. Stat. § 382.003; Fla. Admin. Code 64V-1.0061; *Brenner v. Scott*, No. 4:14-cv-107-RH/CAS, Ex. A to State Officials' Mot. to Dismiss and Inc. Memo. of Law Supporting Dismissal and Opposing Prelim. Inj. Mot., ECF No. 50-1 (May 12, 2014) (DH Form 512), attached hereto as Ex. C. DOH's form asks for the decedent's marital status and the name of the surviving spouse. *Id*. *See also* Fla. Stat. § 382.008(6) (death certificate must include decedent's marital status).

At the time of James's and Greg's deaths, Florida law defined marriage as "the legal union of only one man and one woman as husband and wife" and declared that "no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Fla. Const. Art. I, § 27. Moreover, Florida statutes prohibited recognition of "marriages between persons of the same sex entered into in any jurisdiction" for any purpose, directed state

agencies not to give the lawful marriages of same-sex couples any effect, and defined the terms "marriage" and "spouse" in all state statutes and rules to mean "only a legal union between one man and one woman as husband and wife" and "a member of such a union," respectively. Fla. Stat. § 741.212 (collectively with Fla. Const. Art. I, § 27, "the marriage ban"). The marriage ban applied to the terms "marriage" and "spouse" and to the determination of marital status in the death certificate statutes, rules, and forms created by DOH.

On August 21, 2014, the marriage ban was declared unconstitutional as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Brenner*, 999 F. Supp. 2d at 1290. This decision enjoined the Florida Surgeon General, and all DOH officers, agents, servants, employees, and attorneys from taking any steps to enforce or apply the marriage ban. *Id*. at 1293. The Court stayed the injunction for 91 days, with the exception of its requirement that the Surgeon General issue a corrected death certificate recognizing the decedent's marriage to her wife. *Id*. at 1293-94. The broader injunction went into effect on Jan. 6, 2015. On June 26, 2015, the United States Supreme Court struck down all remaining state laws barring recognition of lawful marriages of same-sex couples. *Obergefell*, 135 S. Ct. 2584.

Efforts to amend the discriminatory death certificates

After the *Brenner* and *Obergefell* rulings, both Hal and Paul sought amendments for their husbands' death certificates. Each was told he would have to obtain a court order for DOH to recognize his marriages. Birchfield Decl. ¶ 12; Mocko Decl. ¶ 16. Paul consulted the funeral home, coroner's office, and DOH Office of Vital Statistics and was told a court order was required for DOH to amend Greg's death certificate. Mocko Decl. ¶¶ 13-16. In September 2015, Hal, through his counsel, submitted to Defendant Kenneth Jones a request for an amended death certificate, with payment of fees, a completed "Application for Amendment to Florida Death or Fetal Death Record," a signed and notarized affidavit setting forth the needed changes, and other documentary support. Declaration of Karen L. Loewy in Support of Plaintiffs' Motion for Summary Judgment, attached hereto as Ex. D ("Loewy Decl."), ¶ 2, Ex. A. DOH counsel advised that, regardless of *Brenner* and *Obergefell*, DOH would not amend James's death certificate, and the only death certificate issued pre-*Brenner* DOH had to amend was the one at issue in *Brenner*. Loewy Decl. ¶¶ 3-4. DOH returned Hal's submission with instructions to resubmit it after obtaining a court order. Loewy Decl. ¶ 5, Ex. B (DOH packing slip); Answer ¶¶ 54-57.

Laws regarding amending death certificates

Fla. Stat. § 382.016 ("the statute") governs death certificate amendments. It states, in relevant part:

> The department, upon receipt of the fee prescribed in s. 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. … (2) Certificate of death amendments.-- *Except for a misspelling or an omission on a death certificate with regard to the name of the surviving spouse*, the department may not change the name of a surviving spouse on the certificate except by order of a court of competent jurisdiction.

Id. (emphasis added). DOH also promulgated a rule regarding death certificate amendments. Fla. Admin. Code 64V-1.007 ("the regulation") states that an 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. *Id*. at (3)(e), (3)(f), (5).

Harm to Named Plaintiffs from DOH's court order requirement

Having been told to obtain court orders before DOH would correct the exclusion of their marriages from their spouses' death certificates, Hal and Paul

learned they would need to file petitions in the Circuit Court and pay hundreds of dollars in court fees. Birchfield Decl. ¶ 12; Mocko Decl. ¶ 17. To Hal, this was adding insult to injury. It was painful enough that James's final vital record disregarded that their marriage ever existed, but to be told that correcting DOH's discriminatory treatment meant he had to spend money on court fees and lawyers felt like a slap in the face. Birchfield Decl. ¶ 12.

For Paul, the fees and lawyer expenses also would be a tremendous financial burden. He has been unable to secure Social Security survivor benefits because of the short duration of their marriage and has experienced significant financial stress from the loss of Greg's income. His rent consumes all but $78 per month of his own Social Security benefits. Paul understands that the filing fee could be waived upon a showing of indigence, but is uncertain whether he qualifies, and is daunted by having to navigate filing a court case. Mocko Decl. ¶ 17.

ARGUMENT

The outcome of this case is directly controlled by the Supreme Court's decision in *Obergefell* and this Court's rulings in *Brenner*. It is beyond cavil that Florida's laws denying recognition to the marriages of same-sex couples are unconstitutional, and Defendants' compliance with those laws in issuing death certificates that disregarded decendents' marriages to same-sex spouses was

unconstitutional. *See Obergefell*, 135 S. Ct. at 2608 (holding "that there 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"); *Brenner*, 999 F. Supp. 2d at 1293 ("Florida provisions that prohibit the recognition of same-sex marriages lawfully entered elsewhere, like the federal provision, are unconstitutional."). These rulings apply retroactively to Defendants' disregard of Plaintiffs' marriages on their spouses' death certificates, despite DOH's issuance of the certificates prior to the courts having struck down Florida's marriage ban.

Defendants' failure to remedy their unconstitutional discrimination is what brings Plaintiffs before this Court. Rather than provide amended death certificates to surviving same-sex spouses against whom they have discriminated, Defendants insist that Plaintiffs shoulder the burden of obtaining individual court orders before they will recognize their marriages and their roles as surviving spouses on their spouses' death certificates. DOH's requirement that same-sex spouses obtain court orders to cure DOH's own discriminatory erasure of their marriages adds insult to injury, repeating and intensifying the constitutional deprivation Plaintiffs have already experienced.

There are no genuine issues of material fact in this case, and Plaintiffs are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

I. FLORIDA'S REFUSAL TO RECOGNIZE THE MARRIAGES OF SAME-SEX COUPLES ON DEATH CERTIFICATES VIOLATES THE FOURTEENTH AMENDMENT'S LIBERTY AND EQUALITY GUARANTEES.

There is simply no longer any question that Florida's laws barring recognition of lawful marriages between same-sex spouses violate the liberty interests of same-sex couples and deprive them of equal protection under the law. In *Obergefell*, the Supreme Court held:

> The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. . . . [T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

135 S. Ct. at 2604-05. Directly addressing Florida's marriage ban, this Court declared that "Florida's same-sex marriage provisions violate the Due Process and Equal Protection Clauses." *Brenner*, 999 F. Supp. 2d at 1290. Indeed, this Court concluded that "[t]he right to marry is as fundamental for [same-sex couples] as for any other person wishing to enter a marriage or have it recognized," and that all justifications offered in support of Florida's marriage ban were "make-weight arguments that do not withstand" the application of strict scrutiny. *Id.*

Despite the clear command of these rulings, Defendants continue to resist their constitutional obligation to treat same-sex spouses with full dignity and equality with regard to the issuance of death certificates. *See* Answer ¶ 48

(denying allegation that the refusal to recognize the marriages of same-sex couples on vital records like death certificates is unconstitutional); *id.* at ¶ 52 (denying outright allegation that Defendants' refusal to recognize Plaintiffs' marriages and to list Plaintiffs as spouses on their respective spouses' death certificates pursuant to the marriage ban was and is unconstitutional). Florida's continued refusal to follow the clear instruction of both the Supreme Court and this Court to treat same-sex spouses equally for purposes of death certificates is indefensible, causing inexcusable harm to Hal, Paul, and other surviving spouses like them.

A. Florida's Refusal To Recognize The Marriages Of Same-Sex Couples On Death Certificates Violates The Fundamental Right To Marry And Other Protected Liberty Interests.

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, and protects individuals from governmental infringement of fundamental rights, including the right to receive respect for a lawful marriage. Both *Obergefell* and *Brenner* directly addressed the deprivation of these rights inherent in a state's failure to recognize the marriages of same-sex couples on a death certificate. The Supreme Court discussed the harms experienced by surviving same-sex spouse James Obergefell in having his marriage and his role as spouse excluded from his deceased husband's death certificate. The Court noted that, pursuant to Ohio's marriage ban, Obergefell and

his husband "must remain strangers even in death, a state-imposed separation Obergefell deems 'hurtful for the rest of time[,]'" 135 S. Ct. at 2594-95. The Court recognized that the marriages of same-sex couples "embod[y] a love that may endure even past death," *id.* at 2608, and that having one's marriage recognized on a death certificate is one of the governmental protections designed to protect the marital union. *Id.* at 2601.

This Court, too, recognized the standing of a surviving spouse to challenge the marriage ban's erasure of her marriage from her deceased wife's death certificate in *Brenner*, stating, "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." 999 F. Supp. 2d at 1285. Both decisions squarely recognize that denying marriage recognition, including on a death certificate, infringes the fundamental right to marry.

DOH's disregard for Plaintiffs' marriages impinges as well upon a broad range of protected liberty interests, including "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597-98 (citing *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 484–486 (1965)). Florida's erasure of Plaintiffs' marriages from their spouses' death

certificates deprives them of the rights of self-definition and expression and intimate association, disregarding their enduring bond, and rendering them strangers in death. *Id*. at 2599-2600.

These binding precedents apply directly to DOH's refusal to recognize Plaintiffs' marriages and spousal status on their spouses' death certificates. As this Court concluded in *Brenner,* disregarding these marriages on their spouses' death certificates cannot survive the heightened scrutiny warranted by deprivation of Plaintiffs' fundamental rights. 999 F. Supp. 2d at 1290.

B. Florida's Refusal To Recognize The Marriages Of Same-Sex Couples On Death Certificates Impermissibly Discriminates Based On Sex And Sexual Orientation.

Defendants' denial of marriage recognition also runs afoul of the guarantee of equal protection. By this exclusion, Plaintiffs "are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right" in violation of the Equal Protection Clause. *Obergefell*, 135 S. Ct. at 2604.

Beyond Defendants' unequal burdening of Plaintiffs' fundamental right to marry, DOH's discriminatory death certificate requirements violate other equality principles. First, Defendants' refusal to recognize same-sex spouses on their spouses' death certificates, while recognizing different-sex spouses, unconstitutionally discriminates based on sex. Were Hal and Paul women, they would have been listed automatically as surviving spouses on their husbands' death

certificates. Defendants' refusal to recognize their marriages to men is solely because they, too, are men. This is quintessential sex discrimination. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring) (laws allowing a woman to marry a man but not another woman impermissibly discriminate based on sex); *cf. Baldwin v. Foxx*, E.E.O.C. No. 0120133080, 2015 WL 4397641, at *5-10 (E.E.O.C. July 15, 2015) (discrimination against a woman because she is in a relationship with a woman is impermissible sex discrimination under Title VII). This kind of sex discrimination cannot survive heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 524 (1996).

Second, Defendants' refusal to recognize gay and lesbian spouses on death certificates and correct the certificates that withheld this recognition impermissibly discriminates based on sexual orientation. Although *Brenner* cited *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), as precluding heightened scrutiny for sexual orientation classifications, 999 F. Supp. 2d at 1291, this conclusion was wholly undermined by *Obergefell*. Without directly addressing the applicable level of scrutiny, the opinion recognized that sexual orientation classifications meet all of the relevant factors the Supreme Court has determined warrant heightened scrutiny. Specifically, the Court noted (1) the history of discrimination against gay men and lesbians, 135 S. Ct. at 2596-97; (2) that being gay or lesbian has no bearing on an individual's ability to contribute to

society and is instead "a normal expression of human sexuality," *id.* at 2596; (3) that sexual orientation is "immutable," *id.* at 2594, 2596; and (4) the relative lack of political power of gay people, as illustrated by unremitting political setbacks and the importance of being able to "invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act, *id.* at 2596-97, 2606. This analysis undermines *Lofton* to the point of abrogation, and this Court is therefore no longer bound by *Lofton*'s application of rational basis review to discrimination based on sexual orientation. *See United States v. Lopez,* 562 F.3d 1309, 1312 (11th Cir. 2009). DOH's discrimination cannot be sustained.

C. Defendants' Refusal To Recognize The Marriages Of Same-Sex Couples On Death Certificates Was Unconstitutional Before The Marriage Ban Was Struck Down.

That Florida's marriage ban was in effect at the time Defendants issued death certificates disregarding Hal and James's marriage and Paul and Greg's marriage does not render DOH's actions constitutional. The Supreme Court's ruling in *Obergefell* declaring the marriage ban unconstitutional applies retroactively, and thus Defendants cannot escape responsibility for their unconstitutional actions by pointing to their compliance with then-existing Florida law.

The Supreme Court has made clear that, once it has applied a new rule to the parties before it – as did *Obergefell* – that rule applies retroactively. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (clarifying that this retroactivity requirement was developed by the Supreme Court's foundational retroactivity decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993)). The Court left no doubt that, when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97; *see also Glazner v. Glazner*, 347 F.3d 1212, 1218 (11th Cir. 2003) (same). Under this well-settled doctrine,

> an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio.

19 AM. JUR. 2D, Constitutional Law § 195 (footnotes omitted).

This was precisely the case in *Obergefell*, in which the Supreme Court applied its declaration of the unconstitutionality of state marriage bans to the parties before them. *See* 135 S. Ct. at 2608. Under established retroactivity principles, every state in the country was obligated in the past, and is obligated

now, to recognize the marriages of same-sex spouses as of the time those spouses entered into valid marriages.[1] This includes Florida. Regardless of Defendants' compliance with then in effect discriminatory Florida law, their refusal to recognize the marriages of same-sex couples was just as unconstitutional in 2013 and 2014 as it was held to be in 2015.

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[1] Courts and agencies across the country have recognized the retroactive application of Supreme Court cases regarding discrimination against the marriages of same-sex couples. *See, e.g., Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1166 (N.D. Cal. 2016) (applying retroactively *United States v. Windsor*, 133 S. Ct. 2675 (2013), striking down federal bar on recognition of marriages of same-sex couples as unconstitutional; holding FedEx violated ERISA in denying spousal benefits to woman whose spouse died before *Windsor*); *Williams v. Colvin*, No. 1:14-cv-08874, Order, ECF No. 36 (Oct. 26, 2015) (directing Commissioner of Social Security "to apply the SSA's rules and regulations and process the [spousal benefits] claim consistent with, and in light of, the Supreme Court's decision in *Obergefell*, and the Commissioner's own internal instructions, which both recognize the nature of plaintiff's marriage as valid as of the date it was celebrated"); Social Security Administration, Program Operations Manual System GN 00210.002, at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210002 (requiring recognition of marriages of same-sex couples as of date of marriage even if state of domicile had marriage ban when spouses became eligible for benefits). *Cf. Hard v. Att'y Gen., Ala.*, No. 15-13836, 2016 WL 1579015, at *3 (11th Cir. Apr. 20, 2016) (district court did not abuse discretion in disbursing spousal share of wrongful death proceeds to survivor whose same-sex spouse died before Alabama's marriage ban was struck down).

II. FLORIDA'S REFUSAL TO REMEDY ITS UNCONSTITUTIONAL ERASURE OF THE MARRIAGES OF SAME-SEX COUPLES FROM DEATH CERTIFICATES ABSENT A COURT ORDER VIOLATES THE FOURTEENTH AMENDMENT'S LIBERTY AND EQUALITY GUARANTEES.

Despite the clear constitutional deprivation Defendants' disregard for Plaintiffs' marriages entails, Defendants continue to deny Hal and Paul and hundreds of other surviving same-sex spouses the "simple human dignity" of being listed on their spouses' death certificates. *Brenner*, 999 F. Supp. 2d at 1292. Defendants persist in resisting the notion that the *Obergefell* and *Brenner* rulings apply to their actions – a matter this Court sought to address in issuing summary judgment for the *Brenner* plaintiffs. *See Brenner* Summary Judgment Order, at 8 (noting the state defendants' "history of resistance" to prior orders and "insistence that state provisions remain in force until explicitly struck down," as proof the state defendants had not "unambiguously terminated their illegal practices," thus warranting summary judgment). This Court explicitly declared Florida's marriage ban unconstitutional and enjoined the Surgeon General from taking "steps to enforce or apply these Florida provisions on same-sex marriage." *Id*. at 9. Defendants nonetheless refuse to take responsibility for the harm they have caused through their unconstitutional discrimination against surviving same-sex spouses like the Plaintiffs.

Yet Defendants have the obligation to do so. Just because they finally began to recognize marriages of same-sex couples after the *Brenner* injunction went into effect does not mean that the unconstitutional deprivation of Plaintiffs' Due Process and Equal Protection rights has been remedied. Plaintiffs remain "strangers even in death" to their spouses due to Defendants' "state-imposed separation." *Obergefell*, 135 S. Ct. at 2594. Defendants persist in "the ongoing unconstitutional denial of a fundamental right." *Brenner*, 999 F. Supp. 2d at 1291.

Defendants have both the authority and the obligation to issue amended death certificates, and they should be required to do so without placing the burden of seeking individual court orders on every surviving spouse who has experienced illegal discrimination at Defendants' hands. Defendants' demand of a court order from surviving same-sex spouses impermissibly compounds and reiterates the violation of Plaintiffs' rights to due process and equal protection.

A. DOH Has The Statutory Authority And Obligation To Correct These Death Certificates.

Florida law explicitly charges Defendants with the obligation of correcting errors and omissions on death certificates. Specifically, upon receipt of a prescribed fee, specified documentary evidence of omissions or errors, and an affidavit setting out the needed correction, DOH "*shall* amend or replace the original certificate as necessary." Fla. Stat. § 382.016 (emphasis added). This statute goes further, explicitly allowing Defendants to amend the certificate to add

the name of the surviving spouse when, as here, it has been entirely omitted, without requiring a court order. *Id*. at (2) ("*Except for a misspelling or an omission on a death certificate with regard to the name of the surviving spouse*, [DOH] may not change the name of a surviving spouse on the certificate except by order of a court of competent jurisdiction.") (emphasis added). The obligation to amend death certificates is unequivocal. *See Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made."). There is no dispute that James's and Greg's death certificates erroneously fail to recognize and acknowledge their legally valid marriages to Hal and Paul, respectively. There is no dispute that Defendants omitted Hal's and Paul's names as surviving spouses on their husbands' death certificates. Given these errors and omissions, under both the general and specific grants of authority set forth in Fla. Stat. § 382.016, Defendants can and must amend the death certificates of Plaintiffs' spouses.

B. Defendants' Insistence On Individual Court Orders To Correct Their Discriminatory Errors And Omissions On Each Affected Death Certificate Repeats The Underlying Deprivation Of Plaintiffs' Constitutional Rights.

Defendants point to this very same statute, however, to argue that they require a court order before they will amend Plaintiffs' spouses' death certificates to recognize their marriages and list them as spouses. *See, e.g.,* Answer ¶¶ 53-57, 61; Joint Report of 26(f) Conference, Dkt. 26, ¶ 3(b). Oddly, Defendants claim in

their answers that Fla. Stat. § 382.016(2) requires a court order to change the *marital status* of a decedent on a death certificate. *See* Answer, ¶¶ 53-57, 61. The plain language of subsection (2) addresses only changes to the *name* of a surviving spouse, however, and does not require a court order at all when the name of a surviving spouse has been omitted. *See* Fla. Stat. § 382.016(2).

Given the lack of any such requirement in the plain terms of the statute, Defendants' position seemingly stems from the regulation relating to the required documentary evidence for death certificate amendments. *See* Fla. Admin. Code 64V-1.007. The regulation allows amendments to either marital status or the name of the surviving spouse based on an application, affidavit, and documentary evidence, but if both require amending, DOH may not change them absent an order from a court of competent jurisdiction. *Id*. Defendants appear to be requiring 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.

Aside from the fact that DOH could amend the regulation, *see* Fla. Stat. § 382.003(10), and has chosen not to, the regulation's application to surviving same-sex spouses like the Plaintiffs is unconstitutional, as it merely serves to duplicate DOH's unconstitutional treatment of married same-sex couples. Requiring Hal,

Paul, and other surviving same-sex spouses to incur the expense, delay, and burden of individually obtaining court orders before Defendants will issue death certificates respecting their marriages does not place these surviving spouses "in the position they would have occupied in the absence of discrimination." *U.S. v. Virginia*, 518 U.S. at 547 (quotation omitted). On the contrary, Defendants' requirement of a court order from each same-sex surviving spouse prolongs and perpetuates their deprivation of Plaintiffs' constitutional rights, while also imposing upon them additional expenses and obligations. As applied to surviving same-sex spouses, Fla. Admin. Code 64V-1.007's requirement of a court order before Florida will recognize Plaintiffs' marriages on their spouses' death certificates is unconstitutional in and of itself.

This requirement burdens Plaintiffs' fundamental right to marry, imposing barriers to Florida's recognition of their marriages "on the ground of their same-sex character." *Obergefell*, 135 S. Ct. at 2608. Defendants' insistence on a court order before recognizing Plaintiffs' marriages is inextricably linked to their underlying discrimination, which, as discussed *supra* at Part I(A), infringes Plaintiffs' liberty interests.

Moreover, applying the regulation to same-sex spouses discriminates on the basis of sex and sexual orientation. For different-sex couples in which one spouse died prior to the *Brenner* injunction, Defendants automatically recognized the

marriages on the spouses' death certificates and automatically listed different-sex spouses as surviving spouses. In order to receive the same treatment, Defendants are requiring same-sex spouses to obtain a court order. Placing this unequal burden on same-sex couples is the essence of unconstitutional discrimination. *See So. Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 237 U.S. 63, 72-73 (1915) ("what the equal protection of the law requires is equality of burdens upon those in like situation or condition."). And just as Defendants' initial denial of marriage recognition on Plaintiffs' spouses' death certificates constituted impermissible sex discrimination and sexual orientation discrimination, *see* Part I(B), *supra*, the application of the regulation to Plaintiffs does too. If Paul were a woman, he would not have to get a court order to obtain recognition of his marriage to Greg on Greg's death certificate. If Hal and James were a heterosexual couple, Hal would not have to get a court order to obtain recognition of their marriage on James's death certificate.

Further, *Obergefell* addressed the harms to same-sex spouses of governmental agencies being allowed to determine in a piecemeal fashion whether and when to recognize their marriages. Permitting DOH to determine on a case-by-case basis "the required availability of specific public benefits to same-sex couples … still would deny gays and lesbians many rights and responsibilities intertwined with marriage." 135 S. Ct. at 2606. *Obergefell* made clear that states

may no longer dishonor the marriages of same-sex couples by imposing obstacles and costs upon them. Defendants' policy perpetuates precisely this kind of prohibited irreparable harm.

As a result, DOH's application of the regulation to Plaintiffs is subject to strict scrutiny – a test it cannot survive. *See Eide v. Sarasota Cty.*, 908 F.2d 716, 722 (11th Cir. 1990) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16-17 (1973)).

C. Defendants' Ongoing Resistance To Treating Same-Sex Couples With Full Dignity And Equality Is Subject To Heightened Scrutiny, But Fails Any Level Of Review.

Defendants advance no justification for imposing unconstitutional burdens on Plaintiffs in order to secure recognition of their marriages on their spouses' death certificates. Defendants offer nothing more than repeated cites to the statute to justify their infringement of Plaintiffs' constitutional rights. *See* Answer ¶¶ 80-81, 88-91.

Defendants' insistence that their application of the statute is constitutional because they are treating all couples the same by requiring a court order before amending the marital status and surviving spouse sections on any death certificates misses the point entirely. This justification ignores that DOH's own illegal actions caused the error requiring correction for same-sex couples. DOH did not unconstitutionally disregard the marriages of any decedent with a different-sex

spouse, while unconstitutionally disregarding *all* marriages of decedents with same-sex spouses. Whether or not requiring a different-sex spouse whose marriage was accidentally omitted from a spouse's death certificate to obtain a court order is a perfectly reasonable regulatory requirement, Defendants simply cannot pretend such a person is in the same position as a same-sex spouse whose marriage Defendants intentionally omitted pursuant to unconstitutional marriage recognition laws.

Conditioning Florida's recognition of Plaintiffs' marriages on their spouses' death certificates on obtaining a court order harms Plaintiffs, infringes their constitutional rights to equality and liberty under the Fourteenth Amendment, and cannot be justified by any rational – let alone substantial or compelling – governmental interest. As such, Plaintiffs are entitled to summary judgment on these claims.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF TO REMEDY DOH'S UNCONSTITUTIONAL DISCRIMINATION.

Plaintiffs' claims meet the standards for declaratory and injunctive relief. They present an actual controversy, warranting this Court's declaration of "the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Defendants' present and ongoing refusal to recognize

Plaintiffs' marriages on their spouses' death certificates absent court orders clearly poses a justiciable controversy.

Plaintiffs are also entitled to permanent injunctive relief, as they can demonstrate that they have suffered irreparable injury, injunctive relief is required to redress that injury, the balance of hardships between the parties warrants equitable relief, and the public interest would be served by a permanent injunction. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010).

Plaintiffs have experienced irreparable tangible and intangible harm from Defendants' discriminatory disregard of their marriages on their spouses' death certificates and from Defendants' placing the onus on them to seek court order to correct Defendants' discrimination. As this Court has noted, "the ongoing unconstitutional denial of a fundamental right almost always constitutes irreparable harm." *Brenner*, 999 F. Supp. 2d at 1291. Further, requiring surviving same-sex spouses to obtain court orders causes financial harm, requiring them to pay a filing fee of hundreds of dollars. As well, filing a petition to amend a death certificate may not be easily understandable or accessible for *pro se* litigants and may necessitate hiring an attorney. For surviving spouses like Paul, this economic burden compounds the financial stress from losing their deceased spouses' incomes. Mocko Decl. ¶ 17. The financial costs of having to seek a court order to

remedy the harm inflicted by the unconstitutionally issued death certificates may pose an insurmountable barrier for many surviving spouses.

An injunction against the unconstitutional application of the regulation to the plaintiffs is required, *see Eide*, 908 F.2d at 722, and Defendants should be ordered to remedy their unconstitutional actions immediately. As the Supreme Court has recognized, "[a] proper remedy for an unconstitutional exclusion … aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'" *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965)). Such a remedy "must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" *Id.*, 518 U.S. at 547 (quoting *Milliken v. Bradley,* 433 U.S. 267, 280 (1977)). *See also Smith v. Young Men's Christian Ass'n of Montgomery, Inc.*, 462 F.2d 634, 650 (5th Cir. 1972) (remedy must be "adequate to solve the problem of past discriminatory practices").

In keeping with these principles, the only way to approach making surviving same-sex spouses whole is for Defendants to issue them death certificates for their spouses as the certificates should have appeared at the time of their spouses' deaths – namely, death certificates that honor their marriages and reflect their legal status as spouses. Defendants should be required 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.

The balance of the hardships favors Plaintiffs. Any burden to Defendants in issuing accurate death certificates respecting Plaintiffs' marriages would be de minimis, as the workload would be no different than if Defendants had issued accurate death certificates at the time of the spouses' deaths, and should be no different from the administrative processes DOH already has in place for seeking amendments through application and affidavit.

Finally, injunctive relief ensuring that all surviving same-sex spouses have a means to obtain relief from Defendants' unconstitutional failure to respect their marriages on their spouses' death certificates furthers the public interest. As this Court noted in *Brenner*, "Vindicating constitutional rights almost always serves the public interest." 999 F. Supp. 2d at 1291-92. *See also League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition.").

For both Hal and Paul, having a corrected death certificate is about honoring the memories of their husbands and the commitment they shared. It is also about correcting the injustice of having the final documents memorializing their husbands' existence treat them like second-class citizens and their marriages as illegitimate or counterfeit. They seek the dignity and equality of having Florida fully recognize their marriages. Birchfield Decl. ¶ 13; Mocko Decl. ¶ 18.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court enter summary judgment in their favor.

Dated: June 17, 2016

Respectfully submitted,

HAL F.B. BIRCHFIELD and PAUL G. MOCKO

By Counsel:

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CERTIFICATION OF COMPLIANCE
PURSUANT TO LOCAL RULES 7.1, 56.1

Pursuant to N.D. Fla. Local Rules 7.1 and 56.1, I hereby certify that this memorandum of law is in compliance with the Court's word limit. According to the word processing program used to prepare this memorandum, the total number of words in the memorandum, inclusive of headings, footnotes and quotations, and exclusive of the case style, signature block, and any certificate of service is 7863.

Dated: June 17, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June 2016, I effected service upon counsel for Defendants by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

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