No. 14A-840

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2014

LUTHER STRANGE, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Applicant-Petitioner,

vs.

CARI D. SEARCY, *etc., et al.*,

Respondents.

On Application to Stay Injunctions of the
U.S. District Court for the Southern District of Alabama

Motion of Robert J. Bentley, Governor of Alabama, for Leave of Court to Appear as *Amicus Curiae* in Support of Application of Alabama Attorney General Luther Strange for Stay

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February 3, 2015

LIST OF PARTIES AND AFFILIATES

Luther Strange, in his Official Capacity as Attorney General of the State of Alabama, Petitioner

Cari D. Searcy, Respondent

Kimberly McKeand, Respondent

James N. Strawser, Respondent

John E. Humphrey, Respondent

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MOTION OF ROBERT J. BENTLEY, GOVERNOR OF ALABAMA, FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION OF ATTORNEY GENERAL LUTHER STRANGE FOR STAY

To The Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Robert J. Bentley, Governor of Alabama ("Movant"), by and through counsel, moves this Honorable Court to grant him leave to appear as *amicus curiae* in this matter for the limited purpose of supporting the motion filed by Attorney General Luther Strange for stay of the injunctions entered by the United States District Court for the Southern District of Alabama in two cases (consolidated in the Court of Appeals) on January 23 and 26, 2015, enjoining him from enforcing Alabama laws which define marriage as between a man and a woman. (App. A). The District Court entered a stay in both cases until February 9, 2015, to give the Attorney General time to seek a stay of its injunctions. (App. B). On February 3, 2015, the United States Court of Appeals for the Eleventh Circuit denied Attorney General Strange's motion to extend the stay entered by the District Court pending the appeal from the injunctions or the release of this Court's decision in cases in which petitions for the writ of *certiorari* have been granted. (App. C). *See, James v. Hodges*, Supreme Court No. 14-556, Order dated January 16, 2015; *see also* cases 14-562, 14-571, and 14-574.

Because this Court has granted certiorari in the *DeBoer* case and related cases, the same reasoning that justified stays pending appeal of earlier Circuit Court rulings also

justifies a stay here. *McQuigg v. Bostic*, 135 S. Ct. 32 (2014); *Herbert v. Kitchen*, 134 S.Ct. 893 (2014).

In support of his motion for leave to appear as *amicus curiae*, Movant shows as follows.

INTEREST OF *AMICUS CURIAE*

Movant, as Governor of Alabama, is constitutionally vested with the supreme executive power of the State of Alabama. Art. V, § 113, ALA. CONST. (1901). He is constitutionally designated chief magistrate for the state of Alabama. *Id.* Further, Movant is constitutionally required to "...take care that the laws be faithfully executed." Art. V, § 120, ALA. CONST. (1901).

With regard to Movant's constitutional authority, the Alabama Supreme Court has stated:

> ... these express constitutional provisions, all of which are of course unique to the office of governor, plainly vest the governor with an authority to act on behalf of the State of Alabama and to ensure "that the laws [are] faithfully executed" that is "supreme" to the "duties" given the other executive-branch officials created by the same constitution. *See generally Black's Law Dictionary* 970 (8th ed. 2004) (defining a "magistrate" as "[t]he highest-ranking official in a government, such as the king in a monarchy, the president in a republic, or governor in a state.–Also termed *chief magistrate*; first magistrate."). *See also Opinion of the Justices No. 179*, 275 Ala. 547, 549, 156 So.2d 639, 641 (1961): "The laws of the state contemplate domestic peace. To breach that peace is to breach the law, and execution of the laws demands that peace be preserved. The governor is charged with the duty of taking care that the laws be executed and, as a necessary consequence, of taking care that the peace be preserved."

Ex parte State of Alabama, 57 So.3d 704, 719 (Ala. 2010). Thus, Movant has a direct and constitutionally-based interest in the application filed by Attorney General Luther Strange. Accordingly, Movant respectfully submits that his motion for leave to appear as *amicus curiae* is due to be granted.

REASONS THE MOTION FOR STAY FILED BY ATTORNEY GENERAL LUTHER STRANGE SHOULD BE GRANTED

I. Neither the District Court nor the Circuit Court gave any consideration to the Attorney General's arguments or to those of *amicus curiae*.

The District Court and Circuit Court failed to consider the arguments of Alabama's Attorney General and Governor that the power to define the incidents of marriage is reserved to the States. On a complicated and controversial issue such as this, with no clear warrant in the Constitution for imposing one State's conception of marriage on another, the judiciary has a duty not to do so. As the Supreme Court stated last term, the people of the sovereign States have a "fundamental right" that is "held in common," the right "to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014). And "[t]hat process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.*

The District Court and Circuit Court failed to consider the State of Alabama's other

arguments, including Alabama's asserted compelling interest in preserving those incidents of marriage in law that secure the fundamental rights of children to be connected to their biological parents and biological kin. Also, the District Court and Circuit Court failed to provide guidance to officials in Alabama concerning which incidents of Alabama's marriage laws are now deemed unconstitutional. Read literally, the District Court's order requires Alabama to stop enforcing all laws that pertain to the marital union of a man and a woman. As explained below, not even States that issue marriage licenses to same-sex couples, such as Massachusetts and New York, have gone that far. Nor could they without jeopardizing the rights of children to be connected to their biological parents.

To create full equality in law between marriage and same-sex unions, as the District Court has ordered, would require eliminating the duties and presumptions of marriage that secure those fundamental rights, such as presumptions of paternity and parental custody, presumptions in favor of biological kin in foster care, etc. No State has done what the District Court is ordering here because doing so would invite chaos.

II. Legal Facts and Arguments Ignored by the Courts Below

A. As the Supreme Executive Authority of Alabama, Movant Oversees Executive Officials, Like the Attorney General, Who Have the Primary Duty to Enforce Alabama's Marriage Laws, But Who Have No Authority Under Alabama's Constitution to Exercise Judicial or Legislative Power.

Alabama's Constitution contains strong and time-tested language prohibiting executive officials from exercising the powers granted to officers in the legislative and judicial branches of Alabama's government. Alabama Constitution Article III, §§ 42, 43.

The District Court failed to give any consideration to how the Attorney General could possibly prohibit legislative or judicial officers from acting upon Alabama's marriage laws without violating Alabama's constitutional prohibitions embodying the doctrine of separation of powers.

Movant was initially a party in the proceedings at the District Court below but was not a party at the time the Memorandum Opinion and Order to which this Motion is directed was entered. The only named defendant in the proceedings before the District Court was the Attorney General of Alabama, who is also a member of the Executive Department under Alabama's Constitution. Yet in its Order Clarifying Judgment issued January 28, 2015 ("Order II"), the District Court suggested that its Memorandum Opinion and Order dated January 23, 2015 ("Order I") applies to State officials not parties to the case because those officials' "obligation to follow the law arises from sources other than" the injunction contained in Order I. None of the constitutional officers of the Executive Department possesses the judicial power to adjudicate cases affected by the District Court's Memorandum Opinion and Order.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The attempt of the District Court to enjoin parties not before the District Court is of concern to Movant, who is charged with ensuring that those parties execute the laws.

That is merely the most obvious due process problem with the District Court's theory of legal obligation. Neither Order I nor Order II identifies what laws Alabama officials are not now to enforce. The District Court seems to labor under the impression that marriage has been created in Alabama by a constitutional amendment and a statute, as if civil marriage is a product of positive law, and as if it never consisted of a man and a woman before that definition entered the Alabama Code. But the institution of marriage is fundamental and pervasive throughout Alabama law, and the literal enforcement of the Orders would lead to absurd and unconstitutional results. This Court should stay the Orders and take briefing to clarify which of the incidents of marriage in Alabama law, if any, offend equal protection and due process.

Movant is the chief executive official of the State of Alabama, and bears the duty to take care that the laws are faithfully executed. For the reasons set out below, Movant cannot know what the Orders require.

B. The power to define privileges and incidents of marriage is reserved to the States by the Tenth Amendment to the United States Constitution.

As the United States Supreme Court affirmed in *Windsor*, the States have the sovereign power to define the incidents of the marital relation. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Alabama has exercised its power by codifying the fundamental right of marriage, the oldest and most proven security in law for the natural duties of the biological family.

Other States have exercised their "power in defining the marital relation" to confer upon same-sex couples "a dignity and status of immense import." *Windsor*, 133 S. Ct. at 2692. That is a value very different from the value of the intact, biological family. Because the States retain "sovereign power" to define the incidents and privileges of marriage, *id.* at 2693, those States are fully within their right that use marriage law to confer approbation upon intimate same-sex relationships, despite the costs identified below. That those States still differentiate between marriage and same-sex unions for many purposes shows that Alabama is also within its right to continue to set marriage apart.

Neither the District Court nor the Circuit Court gave any indication that it considered this argument. As a result, officials in Alabama do not know what the new scope of their powers is to be.

C. The District Court should explain which incidents of Alabama's marriage laws are unconstitutional.

The District Court has enjoined Alabama officials from distinguishing between marriage and non-marriage. Taken together, Order I and Order II enjoin the Attorney General and other State officials from enforcing Alabama Constitution Article I, § 36.03 (2006) and Alabama Code 1975 § 30-1-19. Those are the constitutional and statutory codifications, respectively, of Alabama's fundamental marriage law, which has defined marriage as the union of a man and woman since before Alabama became a State. The District Court is therefore ordering that Alabama officials not enforce the law that defines

marriage as the union of a man and a woman. Then what *is* marriage? The District Court has provided no guidance.

Among the many facts and arguments that the Attorney General advanced in his submissions to the District Court, and that the District Court and Circuit Court both neglected to mention, is that Alabama's conjugal conception of marriage, as the union of a man and woman, pervades and undergirds State law. Many Alabama laws either affirmatively identify or presuppose marriage to be the union of a man and a woman. Neither the District Court nor the Circuit Court has explained which of those laws are now unconstitutional.

It is instructive that States that have attempted to redefine marriage to include same-sex couples continue to treat marriage and "same-sex marriage" differently for many purposes. Consider, for example, that Massachusetts retains the presumption of paternity, though it cannot apply in the same way to a man-man "marriage" that it does to a natural marriage involving a man and woman, and might not apply in the same way to a woman-woman marriage. See *Opinion of the Justices to the Senate*, 802 N.E.2d 565, 581 n.3 (Mass. 2004) (Cordy, J., dissenting); *Hunter v. Rose*, 975 N.E.2d 857, 861-62 (Mass. 2012) (holding that presumption applies to woman married to biological mother where both she and biological father *consent* to insemination of mother).

Recently, the high court of New York interpreted New York's incest prohibition in light of its rational basis that incest carries a risk of genetic defects in potential biological offspring. *Nguyen v. Holder*, 21 N.E.3d 1017, 1021-22 (N.Y. 2014). That rule also makes no sense if applied to same-sex couples. (The New York court also identified the State's

interest in expressing its moral disapproval of incest, but it is difficult to see how that rationale can survive the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Not surprisingly, the incest prohibition in Massachusetts law, M.G.L. c. 272, § 17, is defined by its opposite-sex predicates. "No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister." M.G.L. c. 207 § 1. "No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother." M.G.L. c. 207, §2. Massachusetts also retains its polygamy prohibition, M.G.L. c. 207 § 4. These laws presuppose that marriage is what it is in biological fact—the union of a man and a woman.

These laws differentiate between marriage and same-sex unions in States that redefined marriage years ago in order to issue "marriage" licenses to same-sex couples. Does the District Court expect Alabama officials not to enforce the presumption of paternity and incest prohibition? In order to make same-sex couples equal to married couples in law, that is what the order must entail. But that cannot be what the District Court intended.

States that issue marriage licenses to same-sex couples continue to distinguish between marriage and same-sex relations for the same reason that Alabama does, to secure the fundamental rights of children to have legal connections to their biological parents. As

California law affirms, the "establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights." *Ruddock v. Ohls*, 154 Cal. Rptr. 87, 91 (Ct. App. Cal. 1979). Indeed, it is "a child's most fundamental right next to life itself." *Id.* at 92.

Eliminating the distinction between marriage and non-marital relations would obscure the nature of marriage, frustrate the State's efforts to distinguish between marriage and non-marital relations, and threaten the unique legal protections for the fundamental rights of children to have legal connections to their biological parents. That is the very foundation of the fundamental right of marriage upon which the District Court purported to predicate its ruling.

The District Court failed carefully to define the nature of the right, as required by Supreme Court precedent and urged by the Attorney General in briefing to the District Court. Nor did the District Court make any attempt to discern the right to "same-sex marriage" anywhere in the fundamental laws of this State or Nation, much less so "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations and quotation marks omitted).

The Supreme Court *has* identified the marriage right on numerous occasions, and always as the fundamental right of mother and father to fulfill their natural duties to their biological children. The rights securing the biological family's integrity are "intrinsic human rights" that are deeply rooted in our Nation's "history and tradition." *Smith v. Organization*

of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977), quoting *City of East Cleveland*, 431 U.S. at 504. As Justice Sotomayor expressed it, the "biological bond between parent and child is meaningful," and the right of a biological parent is "an interest far more precious than any property right." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2574-75 (2013) (Sotomayor, dissenting).

The biological family precedes the state. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). The rights and duties of the family arise out of the nature of the family, "consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Because the duties are grounded in nature and not the will of the lawmaker, the State has no power to reconstitute the fundamental rights of the biological family.

This makes the fundamental marriage right distinct from legal privileges of marriage, such as adoption. As this Court has explained, "Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state." *Lofton v. Secretary of the Dept. of Children and Family Services*, 358 F.3d 804, 809 (11th Cir. 2004). Therefore, the practice of adopting is not a fundamental right but rather a privilege created by state law. *Id.* at 811-15.

Our fundamental laws thus retain the common law view that parental rights and parental duties are grounded in the laws of nature, and therefore beyond the power of governments to alter. *See generally* 2 James Kent, *Commentaries on American Law* 225-67

(Boston, Little, Brown & Co., O.W. Holmes, Jr. ed., 12th ed. 1873) (1851); 1 William Blackstone, *Commentaries on the Laws of England* 435-440 (University of Chicago Press 1979) (1765). The state did not create the biological family and is powerless to eradicate it. This view informed the framers of the United States Constitution, "who saw it as a vice that monarchy transgressed against the integrity of life's separate realms and sought to make the king the father of the state." James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* 83 (1992).

For Blackstone, the "most universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife. Blackstone, at 434. The "main end and design of marriage" is to "ascertain and fix upon some certain person, to whom the care, protection, the maintenance, and the education of the children should belong." *Id.* at 443. And those duties are duties of natural law. *Id.* at 435, 438-39. Positive law does not create the rights and duties, it only adds security to them (or not).

Order I requires all those who are subject to it not to enforce this ancient definition of marriage. With what new definition will it be replaced? The District Court has not addressed that question. Furthermore, the relief ordered for the Plaintiffs would require the State to eradicate from Alabama law at least some distinctions between wife and husband, mother and father; there is no other way to make men and women fungible, as the Order requires. Which legal distinctions are now unconstitutional? The District Court provides no guidance.

Consider just some of the most obvious laws that this Order will require State officials to examine: all of the statutes governing marital and domestic relations, Ala. Code Title 30, and the judicial decisions interpreting them; the presumption of paternity, Ala. Code § 26-17-204, and other rules for establishment of the parent-child relationship, Ala. Code § 26-17-201; laws governing consent to adopt, Ala. Code § 26-10A-7(3), and all other laws governing adoption, Ala. Code Title 26, Chapter 10A; termination of parental rights, Ala. Code § 12-15-319; all laws that presuppose different people occupying the positions of "father," "mother," "husband," and "wife," *e.g.*, Ala. Code § 40-7-17; laws governing intestate distribution, the spousal share, Ala. Code § 43-8-41, and the share of pretermitted children, Ala. Code § 43-8-91; legal protections for non-marital children, Ala. Code § 26-17-202; registration of births, Ala. Code § 22-9A-7, *J.M.V. v. J.K.H.*, 149 So. 3d 1100 (Ala. Civ. App. 2014); conflict-of-interest rules and other ethical standards prohibiting marital relations, Ala. Code § 45-28-70(f)(1), *Cooner v. Alabama State Bar*, 59 So.3d 29 (Ala.2010); and laws presupposing biological kin relations, Ala. Code § 38-12-2.

This does not include laws governing forms issued by the State that identify mothers, fathers, husband, or wife; tax laws; education curricula; accreditation standards for educational institutions; licensing standards for professions; public accommodations rules; religious liberty protections; health care regulations; and many other areas of law. What are children to be taught in Alabama's schools about the nature of marriage? How will it be defined in textbooks and other instructional materials? Will all private schools, colleges, and universities be required to go along with the new definition, whatever it is? Will there be

moral or religious exemptions for those who perceive inherent differences between marital unions and non-marital unions?

The significance of the injunction is not merely a function of the enormity of the task facing Alabama officials—(1) identifying all of the relevant statutory provisions, administrative rules, judgments, judicial opinions, customs, vested rights, and other laws that differentiate between marriage and non-marital relations, and (2) issuing instructions to all State officials how to avoid enforcing them—though that task is daunting. The problem is more foundational than that. All States, including Alabama, have compelling reasons to distinguish between marriage and non-marriage in order to secure the fundamental rights of children to have legal connections to their biological parents.

The District Court seems to be under the impression that the State of Alabama can make marriage and "same-sex marriage" (whatever that is, whatever incidents must attach to it, and from what source of authority it emanates are not explained in the District Court's Memorandum of Opinion) the same in law. But, as the Attorney General explained to the District Court (but the District Court did not mention in its Opinion), the only way to make them exactly the same in law (because they cannot be made the same in biological fact) is to eradicate from law the incidents of marriage that secure the natural duties of parents to their biological children, and many other laws that presuppose that men and women are different. Either the District Court is writing a check that it does not expect the State to honor, promising "marriage equality" but allowing the State to treat marriage and same-sex relations differently (as the State must in order to preserve the duties of biological parents to their

children), or the District Court means the order literally, in which case the District Court is asking Alabama to eliminate the fundamental rights and duties of marriage and parentage.

That cannot be. It would particularly place at risk the connection between fathers and their children. This problem was explained well more than a decade ago by a Justice of the Massachusetts Supreme Judicial Court: "Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child." Marriage fills the gap "by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic." *Goodridge v. Dept. Public Health*, 798 N.E.2d 941, 995-97 (Mass. 2003) (Cordy, dissenting).

It is therefore no wonder that Massachusetts has not made marriage and same-sex relations the same in law. As shown above, in Massachusetts married couples, man-man couples, and woman-woman couples remain distinctly unequal in important respects. By calling all three types of relationships "marriage," the laws of Massachusetts are confused. That confusion is not benign. Only those States that reserve the name "marriage" for unions that are marital in fact are able to make clear the unique importance and fundamental rights and duties of the father-mother-child relationship. To force States to redefine marriage is to obscure the non-fungible value of mother and father. As the Attorney General explained to the District Court (but the District Court did not mention), to redefine marriage is to

communicate the message that it is not important for fathers and mothers to remain committed to each other because no rational person would believe that having connections to both mother and father would make any difference for children.

If, as the District Court concluded, it is not rational to believe that mother and father are each uniquely important, then it should not surprise us if people stop admitting that they believe that mother and father are important, or stop actually believing that mother and father are important, or stop encouraging each other to act as though mother and father are important. When marriage and birth certificates no longer designate "husband" and "wife," "father" and "mother," people might well internalize the message that the State does not consider those important designations.

The cost of redefining marriage is to obscure important and enduring truths about the fundamental rights of children, the duties of parents, and the unique significance of the father-mother-child relation, which has always been known in our laws as the fundamental right of marriage.There are other costs of trying to eliminate marriage from law. In its so-far unsuccessful attempt to make man-man and woman-woman relations equal to marriage, Massachusetts has forced Catholic Charities to stop placing children in adoptions.[1] A private, religious college that distinguishes between marriage and non-marriage has been threatened

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[1] The Boston Globe, *Catholic Charities Stuns State, Ends Adoptions* (March 11, 2006), available at http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/ (last visited January 30, 2015).

with loss of accreditation.[2] The Sisters of St. Joseph of Boston, an order of nuns who operate a parochial school, have been forced to defend themselves against a complaint filed at the Massachusetts Commission Against Discrimination for acting on their religious conviction that marriage is a man-woman union.[3] In these and other ways, witness to the reality of marriage is being excluded from public life.

If the District Court expects Alabama to eliminate from its laws the distinction between marriage and non-marriage then Alabama will need more time. When one declares irrational and unconstitutional the most foundational institution known to all human civilizations, one that has stood as a foundation stone of Anglo-American law from the beginning, it is unrealistic to expect all State officials to avoid executing any of the incidents and vestiges of that institution in the State laws. It would be absurd to expect that task to be completed before February 9. The District Court's order must mean something other than what it literally says.

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[2] The Boston Globe, *Accrediting Agency to Review Gordon College* (July 11, 2014), available at http://www.bostonglobe.com/metro/2014/07/11/agency-review-whether-gordon-college-antigay-stance-policies-violate-accrediting-standards/Cti63s3A4cEHLGMPRQ5NyJ/story.html (last visited January 30, 2015).

[3] The Boston Globe, Gay Married Man Says Catholic School Rescinded Job Offer (January 30, 2014), available at http://www.bostonglobe.com/metro/2014/01/29/dorchester-man-files-discrimination-against-catholic-school-says-lost-job-because-was-gay-married/0KswVITMsOrruEbhsOsOeN/story.html (last visited January 30, 2015).

III. Issuance of a Stay is in the Public Interest.

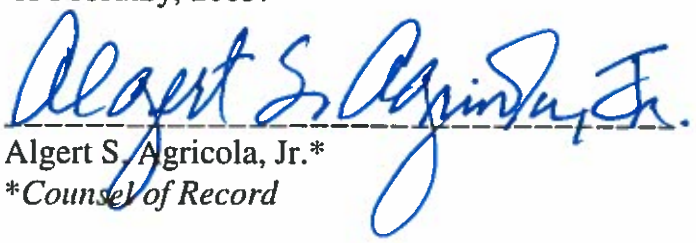
Further, Movant believes that the recent decision of the Supreme Court to hear cases this term in which issues similar to those raised in this case will be decided is a substantial reason why this Court should grant the stay as requested by the Attorney General pending this appeal or the decision of the Supreme Court. Issuance of a stay is in the public interest because a stay would avoid substantial confusion in the administration of Alabama laws relating to the issuance of marriage licenses should the Supreme Court rule in a manner consistent with the Attorney General's position in this case. Granting a stay will not harm the plaintiffs in this matter but will only preserve the *status quo* pending consideration of these issues by the appellate courts.

Just as this Court issued stays of lower court decisions striking State marriage laws before (see eg, Justice Sotomayor's January 6, 2014 Order in *Herbert v. Kitchen*, No. 13A-687), the Court's decision to hear arguments in the cases arising out of the Sixth Circuit presents a strong reason to stay the Order of the District Court below pending this Court's resolution of the underlying issues within the next several weeks.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Governor Robert J. Bentley submits that his motion for leave to appear as *amicus curiae* to support the application of Attorney General Luther Strange for stay of the District Court's injunction is due to be granted. Movant further submits that the motion filed by Attorney General Strange for stay as above set out is due to be granted.

Respectfully submitted this 3d day of February, 2015.



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARI D. SEARCY and KIMBERLY MCKEAND, individually and as parent and next friend of K.S., a minor,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 14-0208-CG-N**
LUTHER STRANGE, in his capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

MEMORANUM OPINION AND ORDER

This case challenges the constitutionality of the State of Alabama's "Alabama Sanctity of Marriage Amendment" and the "Alabama Marriage Protection Act." It is before the Court on cross motions for summary judgment (Docs. 21, 22, 47 & 48). For the reasons explained below, the Court finds the challenged laws to be unconstitutional on Equal Protection and Due Process Grounds.

I. Facts

This case is brought by a same-sex couple, Cari Searcy and Kimberly McKeand, who were legally married in California under that state's laws. The Plaintiffs want Searcy to be able to adopt McKeand's 8-year-old biological son, K.S., under a provision of Alabama's adoption code that allows a person to adopt her "spouse's child." ALA. CODE § 26-10A-27. Searcy filed a petition in the Probate Court of Mobile County seeking to adopt K.S. on December 29, 2011, but that petition was denied based on the "Alabama Sanctity of Marriage Amendment" and the "Alabama

Marriage Protection Act." (Doc. 22-6). The Alabama Sanctity of Marriage Amendment to the Alabama Constitution provides the following:

> (a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.
>
> (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
>
> (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
>
> (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
>
> (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.
>
> (f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
>
> (g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

ALA. CONST. ART. I, § 36.03 (2006).

> The Alabama Marriage Protection Act provides:
>
> (a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."
>
> (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in

> order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
>
> (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
>
> (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
>
> (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

ALA. CODE § 30-1-19. Because Alabama does not recognize Plaintiffs' marriage, Searcy does not qualify as a "spouse" for adoption purposes. Searcy appealed the denial of her adoption petition and the Alabama Court of Civil Appeals affirmed the decision of the probate court. (Doc. 22-7).

II. Discussion

There is no dispute that the court has jurisdiction over the issues raised herein, which are clearly constitutional federal claims. This court has jurisdiction over constitutional challenges to state laws because such challenges are federal questions. 28 U.S.C. § 1331.

Summary judgment is appropriate if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). Because the parties do not dispute the pertinent facts or that they present purely legal issues, the court turns to the merits.

Plaintiffs contend that the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act violate the Constitution's Full Faith and Credit clause and

the Equal Protection and Due Process clauses of the Fourteenth Amendment. Alabama's Attorney General, Luther Strange, contends that Baker v. Nelson, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), is controlling in this case. In Baker, the United States Supreme Court summarily dismissed "for want of substantial federal question" an appeal from the Minnesota Supreme Court, which upheld a ban on same-sex marriage. Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (Minn.1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). The Minnesota Supreme Court held that a state statute defining marriage as a union between persons of the opposite sex did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. Baker, 191 N.W.2d at 185–86. However, Supreme Court decisions since Baker reflect significant "doctrinal developments" concerning the constitutionality of prohibiting same-sex relationships. See Kitchen v. Herbert, 755 F.3d 1193, 1204–05 (10th Cir. 2014). As the Tenth Circuit noted in Kitchen, "[t]wo landmark decisions by the Supreme Court", Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and United States v. Windsor, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), "have undermined the notion that the question presented in Baker is insubstantial." 755 F.3d at 1205. Lawrence held that the government could not lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." Lawrence, 539 U.S. at 574, 123 S.Ct. 2472. In Windsor, the Supreme Court struck down the federal definition of marriage as being between a man and a woman because, when applied to legally married same-sex couples, it "demean[ed] the couple, whose moral and sexual choices the Constitution protects."

Windsor, 133 S.Ct. at 2694. In doing so, the Supreme Court affirmed the decision of the United States Court of Appeals for the Second Circuit, which expressly held that Baker did not foreclose review of the federal marriage definition. Windsor v. United States, 699 F.3d 169, 178–80 (2d Cir.2012) ("Even if Baker might have had resonance ... in 1971, it does not today.").

Although the Eleventh Circuit Court of Appeals has not yet determined the issue, several federal courts of appeals that have considered Baker's impact in the wake of Lawrence and Windsor have concluded that Baker does not bar a federal court from considering the constitutionality of a state's ban on same-sex marriage. See, e.g., Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen, 755 F.3d 1193 (10th Cir.2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014). Numerous lower federal courts also have questioned whether Baker serves as binding precedent following the Supreme Court's decision in Windsor. This Court has the benefit of reviewing the decisions of all of these other courts. "[A] significant majority of courts have found that Baker is no longer controlling in light of the doctrinal developments of the last 40 years." Jernigan v. Crane, 2014 WL 6685391, *13 (E.D. Ark. 2014) (citing Rosenbrahn v. Daugaard, 2014 WL 6386903, at *6–7 n. 5 (D.S.D. Nov.14, 2014) (collecting cases that have called Baker into doubt)). The Court notes that the Sixth Circuit recently concluded that Baker is still binding precedent in DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), but finds the reasoning of the Fourth, Seventh, Ninth, and Tenth Circuits to be more persuasive on the question and concludes that

Baker does not preclude consideration of the questions presented herein.[1] Thus, the Court first addresses the merits of Plaintiffs' Due Process and Equal Protection claims, as those claims provide the most appropriate analytical framework. And if equal protection analysis decides this case, there is no need to address the Full Faith and Credit claim.

Rational basis review applies to an equal protection analysis unless Alabama's laws affect a suspect class of individuals or significantly interfere with a fundamental right. Zablocki v. Redhail, 434 U.S. 374, 388, 98S.Ct. 673, 54 L.Ed.2d 618 (1978). Although a strong argument can be made that classification based on sexual orientation is suspect, Eleventh Circuit precedence holds that such classification is not suspect. Lofton v. Secretary of Dep't. of Children and Family Services, 358 F.3d 804, 818 (11th Cir. 2004)/ The post-Windsor landscape may ultimately change the view expressed in Lofton, however no clear majority of Justices in Windsor stated that sexual orientation was a suspect category.

Laws that implicate fundamental rights are subject to strict scrutiny and will survive constitutional analysis only if narrowly tailored to a compelling government interest. Reno v. Flores, 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). Careful review of the parties' briefs and the substantial case law on the subject persuades the Court that the institution of marriage itself is a fundamental right

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[1] This court also notes that the Supreme Court has granted certiorari in the DeBoer case, Bourke v. Bashear , __ S.Ct.__, 2015 WL 213651 (U.S. January 16, 2015), limiting review to these two questions: 1) Does the 14th Amendment require a state to license a marriage between two people of the same sex? and 2) Does the 14th Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? The questions raised in this lawsuit will thus be definitively decided by the end of the current Supreme Court term, regardless of today's holding by this court.

protected by the Constitution, and that the State must therefore convince the Court that its laws restricting the fundamental right to marry serve a compelling state interest.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and women. Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Numerous cases have recognized marriage as a fundamental right, describing it as a right of liberty, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), of privacy, Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and of association, M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

"Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny." Bostic v. Schaefer, 760 F.3d 352, 375(4th Cir. 2014). Strict scrutiny "entail[s] a most searching examination" and requires "the most exact connection between justification and classification." Gratz v. Bollinger, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (internal quotations omitted). Under this standard, the defendant "cannot rest upon a generalized assertion as to the classification's relevance to its goals." Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). "The purpose of the narrow tailoring requirement is to ensure that the

means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." Grutter v. Bollinger, 539 U.S. 306, 333, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

Defendant contends that Alabama has a legitimate interest in protecting the ties between children and their biological parents and other biological kin.[2] However, the Court finds that the laws in question are not narrowly tailored to fulfill the reported interest. The Attorney General does not explain how allowing or recognizing same-sex marriage between two consenting adults will prevent heterosexual parents or other biological kin from caring for their biological children. He proffers no justification for why it is that the provisions in question single out same-sex couples and prohibit them, and them alone, from marrying in order to meet that goal. Alabama does not exclude from marriage any other couples who are either unwilling or unable to biologically procreate. There is no law prohibiting infertile couples, elderly couples, or couples who do not wish to procreate from marrying. Nor does the state prohibit recognition of marriages between such couples from other states. The Attorney General fails to demonstrate any rational, much less

[2] Although Defendant seems to hang his hat on the biological parent-child bond argument, Defendant hints that this is one of many state interests justifying the laws in question and some of his arguments could be construed to assert additional state interests that have commonly been proffered in similar cases. The court finds that these other interests also do not constitute compelling state interests. See Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (finding that the following interests neither individually nor collectively constitute a compelling state interest for recognizing same-sex marriages: (1) the State's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment.).

compelling, link between its prohibition and non-recognition of same-sex marriage and its goal of having more children raised in the biological family structure the state wishes to promote. There has been no evidence presented that these marriage laws have any effect on the choices of couples to have or raise children, whether they are same-sex couples or opposite-sex couples. In sum, the laws in question are an irrational way of promoting biological relationships in Alabama. Kitchen, 755 F.3d at 1222 ("As between non-procreative opposite-sex couples and same-sex couples, we can discern no meaningful distinction with respect to appellants' interest in fostering biological reproduction within marriages.").

If anything, Alabama's prohibition of same-sex marriage detracts from its goal of promoting optimal environments for children. Those children currently being raised by same-sex parents in Alabama are just as worthy of protection and recognition by the State as are the children being raised by opposite-sex parents. Yet Alabama's Sanctity laws harms the children of same-sex couples for the same reasons that the Supreme Court found that the Defense of Marriage Act harmed the children of same-sex couples. Such a law "humiliates [ ] thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S.Ct. at 2694. Alabama's prohibition and non-recognition of same-sex marriage "also brings financial harm to children of same-sex couples." id. at 2695, because it denies the families of these children a panoply of benefits that the State and the federal government offer to families who are legally wed. Additionally, these laws

further injures those children of all couples who are themselves gay or lesbian, and who will grow up knowing that Alabama does not believe they are as capable of creating a family as their heterosexual friends.

For all of these reasons, the court finds that Alabama's marriage laws violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

III. Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment (Doc. 21), is **GRANTED** and Defendant's motion for summary judgment (Docs. 47), is **DENIED**.

IT IS FURTHER ORDERED that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional because they violate they Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

IT IS FURTHER ORDERED that the defendant is enjoined from enforcing those laws.

DONE and **ORDERED** this 23rd day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E. HUMPHREY,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 14-0424-CG-C**
LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

ORDER

This matter is before the court on Plaintiffs' motion for preliminary and permanent injunction. (Doc. 15). An evidentiary hearing was held and sworn testimony was offered by Plaintiffs in support of their motion on December 18, 2014. For the reasons stated below, the court finds that Plaintiffs are entitled to preliminary injunctive relief.

The decision to grant or deny a preliminary injunction "is within the sound discretion of the district court..." Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002). This court may grant a preliminary injunction only if the plaintiff demonstrates each of the following prerequisites: (1) a substantial likelihood of success on the merits; (2) a substantial threat irreparable injury will occur absent issuance of the injunction; (3) the threatened injury outweighs the potential damage the required injunction may cause the non-moving parties; and (4) the injunction would not be adverse to the public interest. Id., 287 F.3d at 1329; see also McDonald's Corp. v. Robertson, 147 F.3d. 1301, 1306 (11th Cir. 1998). "In this

Circuit, '[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the "burden of persuasion" ' as to the four requisites." McDonald's Corp., 147 F.3d at 1306; All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)(a preliminary injunction is issued only when "drastic relief" is necessary.

This case is brought by a same-sex couple, James Strawser and John Humphrey, who have been denied the right to a legal marriage under the laws of Alabama. The couple resides in Mobile, Alabama and participated in a church sanctioned marriage ceremony in Alabama. Strawser and Humphrey applied for a marriage license in Mobile County, Alabama, but were denied.

Strawser testified that he has health issues that will require surgery that will put his life at great risk. Strawser's mother also has health issues and requires assistance. Prior to previous surgeries, Strawser had given Humphrey a medical power of attorney, but was told by the hospital where he was receiving medical treatment that they would not honor the document because Humphrey was not a family member or spouse. Additionally, Strawser is very concerned that Humphrey be permitted to assist Strawser's mother in all of her affairs if Strawser does not survive surgery.

Plaintiffs contend that Alabama's marriage laws violate their rights to Due Process, Equal Protection and the free exercise of religion. This court has determined in another case, Searcy v. Strange, SDAL Civil Action No. 14-00208-CG-N, that Alabama's laws prohibiting and refusing to recognize same-sex marriage violate the Due Process Clause and Equal Protection Clause of the Fourteenth

Amendment to the United States. In Searcy, this court found that the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act restrict the Plaintiffs' fundamental marriage right and do not serve a compelling state interest. The Attorney General of Alabama has asserted the same grounds and arguments in defense of this case as he did in the Searcy case. Although the Plaintiffs in this case seek to marry in Alabama, rather than have their marriage in another state recognized, the court adopts the reasoning expressed in the Searcy case and finds that Alabama's laws violate the Plaintiffs' rights for the same reasons. Alabama's marriage laws violate Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by prohibiting same-sex marriage. Said laws are unconstitutional.

As such, Plaintiffs have met the preliminary injunction factors. Plaintiffs' inability to exercise their fundamental right to marry has caused them irreparable harm which outweighs any injury to defendant. See Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (holding that deprivation of constitutional rights "unquestionably constitutes irreparable harm."). Moreover, Strawser's inability to have Humphrey make medical decisions for him and visit him in the hospital as a spouse present a substantial threat of irreparable injury. Additionally, "it is always in the public interest to protect constitutional rights." Phelps–Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008). Therefore, the Plaintiffs have met their burden for issuance of a preliminary injunction against the enforcement of state marriage laws prohibiting same-sex marriage.

Accordingly, the court hereby **ORDERS** that the Alabama Attorney General is prohibited from enforcing the Alabama laws which prohibit same-sex marriage. This injunction binds the defendant and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage.

Defendant stated at the hearing that if the court were to grant Plaintiffs' motion, Defendant requests a stay of the injunction pending an appeal. As it did in the Searcy case, the Court hereby **STAYS** execution of this injunction for fourteen days to allow the defendant to seek a further stay pending appeal in the Eleventh Circuit Court of Appeals. If no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay within that time period, this stay will be lifted on February 9, 2015.

DONE and **ORDERED** this 26th day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARI D. SEARCY and KIMBERLY MCKEAND, individually and as parent and next friend of K.S., a minor,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 14-0208-CG-N**
LUTHER STRANGE, in his capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

ORDER

On January 23, 2015, the court granted summary judgment for plaintiffs in this lawsuit and declared that Alabama's laws prohibiting same-sex marriage and prohibiting recognition of same-sex marriages performed legally in other states are unconstitutional (Docs 53-54). The Attorney General has now moved for a stay of the order enjoining him from enforcing those laws pending a ruling by the Supreme Court on other similar cases (Doc. 56). The plaintiffs oppose that request and seek further clarification of the injunction issued herein (Doc 56).

Rule 62(c) of the Federal Rules of Civil Procedure provides: "While an appeal is pending from a[ ] . . . final judgment that grants . . . an injunction, the court may suspend, modify, restore, or grant an injunction ... on terms that secure the opposing party's rights." Fed.R.Civ.P. 62(c). In this case there

has been no notice of appeal filed, and from his motion, it appears that the Attorney General's intention is simply to await the ruling of the Supreme Court in four similar cases that were recently granted certiorari. See James v. Hodges, Supreme Court No. 14-556, Order dated January 16, 2015; see also cases 14-562, 14-571 and 14-574. The motion for a stay cited Rule 62 "and other applicable law" as the basis for his request for a stay. Because he does not identify what other law may apply, the court applies the factors to be considered when a motion for stay pending appeal is filed:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

1. The Attorney General Has Not Shown that He Is Likely to Succeed on Appeal

The Attorney General seems to concede that he cannot make such showing because his argument on this point simply refers to the arguments he made in connection with his motion for summary judgment, which the court has rejected. He further contends that because this case involves a "serious legal question", the balance of the equities identified by the other factors "weighs heavily in favor of granting the stay," and the stay may issue upon a "lesser showing of a substantial case on the merits." Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Plaintiffs argues that recent actions by the Supreme Court indicate that it no longer views the possible risk of reversal of the validity of same-sex marriage cases to be a basis to stay an injunction. Plaintiffs points out that the Supreme Court recently denied certiorari from three circuit courts of appeals striking down marriage exclusions in four states, thus dissolving the stays in those cases and leaving those circuit court decisions as binding precedent to overturn marriage exclusions in eleven states. Moreover, the Supreme Court denied stays in similar marriage cases in which appeals were still pending, by denying Idaho's application for stay pending a petition for certiorari, Otter v. Latta, ___U.S. ___, 135 S.Ct. 345 (2014), and Alaska's application for a stay pending appeal, Parnell v. Hamby, ___ U.S. ___, 135 S.Ct. 399 (2014). Additionally, the Eleventh Circuit Court of Appeals recently denied a motion to stay pending appeal in the Northern District of Florida case overturning a ban on same-sex marriage. Brenner v. Armstrong, Cases No. 14-14061 and 14-14066, 2014 WL 5891383 (11th Cir., Dec. 3, 2014). The Supreme Court also denied a stay in those cases. Armstrong v. Brenner, 2014 WL 7210190 (Supreme Court, Dec. 19, 2014).

The court thus finds that the Attorney General is not likely to succeed on appeal.

2. The Attorney General Has Not Shown that He Will Suffer Irreparable Harm

The Attorney General argues that the state will suffer irreparable harm "if marriages are recognized on an interim basis that are ultimately

determined to be inconsistent with Alabama law, resulting in confusion in the law and in the legal status of marriages." (Doc. 55, pp. 1-2). The court disagrees. What the Attorney General is describing is harm that may occur to those whose marriages become legal or who are permitted to marry by the State while the injunction is in place, only to have them nullified if this court's ruling is overturned. This is not a harm to the State, but rather a potential harm to the same-sex couples whose marriage arrangements recognized or entered into during the period of the injunction which may be subject to future legal challenge by the State if the injunction is overturned. Moreover, the plaintiffs point out that any marriages entered into in reliance on the court's injunction are likely to be ruled valid regardless of the outcome of the appeal. See Evans v. Utah, 21 F.Supp.3d 1192, 1209-1210 (D.Utah 2014)(finding that marriages entered into in Utah after district court entered injunction and prior to stay issued by Supreme Court were valid).

3. Granting a Stay Will Irreparably Harm the Plaintiffs and Other Same-Sex Couples

As indicated above and in its order granting the injunction, the court has already found that same-sex couples face harm by not having their marriages recognized and not being allowed to marry. The harms entailed in having their constitutional rights violated are irreparable and far outweigh any potential harm to the Attorney General and the State of Alabama. As long as a stay is in place, same-sex couples and their families remain in a

state of limbo with respect to adoption, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance and many other rights associated with marriage. The court concludes that these circumstance constitute irreparable harm.

4. The Public Interest Will be Harmed by a Stay

The Attorney General argues that a stay will serve the public interest by avoiding the confusion and inconsistency that will result from an on-again, off-again enforcement of marriage laws. (Doc. 55 at 2). The court finds that the state's interesting in refusing recognize the plaintiff's same-sex marriage or in allowing same-sex marriage is insufficient to override the plaintiffs' interest in vindicating their constitutional rights. The public interest does not call for a different result.

In its discretion, however, the court recognizes the value of allowing the Eleventh Circuit an opportunity to determine whether a stay is appropriate. Accordingly, although no indefinite stay issues today, the court will allow the Attorney General time to present his arguments to the Eleventh Circuit so that the appeals court can decide whether to dissolve or continue the stay pending appeal (assuming there will be an appeal.) The preliminary injunction will be stayed for 14 days.

Prior to the 14-day stay's expiration, the court will issue a separate order addressing plaintiffs' request for clarification of the court's injunction order. (See Doc. 56, pp. 6-10).

Conclusion

IT IS HEREBY ORDERED that the Court's Order of Injunction and Judgment (Docs. 53 & 54) are **STAYED FOR 14 DAYS.** If no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay within that time period, this court's stay will be lifted on February 9, 2105.

DONE and ORDERED this 25th day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10295-C

CARI D. SEARCY,
individually and as parent and next friend of K.S.,
a minor,
KIMBERLY MCKEAND,

Plaintiffs-Appellees,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,

Defendant-Appellant.

No. 15-10313-A

JAMES N. STRAWSER,
JOHN E. HUMPHREY,

Plaintiffs-Appellees,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Alabama

Before: TJOFLAT, HULL, and MARCUS, Circuit Judges.

BY THE COURT:

We *sua sponte* consolidate the above appeals in case nos. 15-10295 and 15-10313.

The motions of the Alabama Probate Judges Association and Robert J. Bentley, Governor of Alabama, "for Leave to Appear as *Amicus Curiae* in Support of Motion[s] of Attorney General Luther Strange for Stay" are GRANTED to the extent that we have accepted and considered the *amicus* filings in support of the motions for stay.

The Attorney General of the State of Alabama's motions for a stay pending appeal are DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARI D. SEARCY and KIMBERLY MCKEAND, individually and as parent and next friend of K.S., a minor,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 14-0208-CG-N**
LUTHER STRANGE, in his capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

ORDER CLARIFYING JUDGMENT

This matter is before the court on Plaintiffs' Request for Clarification that was contained in their Objection and Response (Doc. 56) to Defendant's Motion to Stay (Doc. 55).

On January 23, 2015, this court granted summary judgment in favor of Plaintiffs in this lawsuit, declaring that Alabama's laws prohibiting same-sex marriage and prohibiting recognition of same-sex marriages performed legally in other states are unconstitutional. (Docs. 53-54). As part of the Judgment entered in this case, the court specifically enjoined the Defendant from enforcing those laws. (Doc. 54). Upon Defendant's motion, the court then stayed the order of injunction and judgment for 14 days. (Doc. 59). If no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay within that time period, this court's stay will be lifted on February 9, 2015.

Plaintiffs have asked for clarification of this court's injunction and judgment based on statements made to the press by the Alabama Probate Judges Association ("APJA")[1] that despite this court's ruling, they must follow Alabama law and cannot issue marriage licenses to same-sex couples. (Doc. 56, pp. 6-8). According to the local news, prior to this court's entry of a 14 day stay, the APJA advised its members not to issue marriage licenses to same-sex couples.[2] A representative of the APJA reportedly stated that this court's decision was limited to the same-sex couple that filed the case and that the only party who was enjoined from enforcing the laws in question was Attorney General Strange.

Because the court has entered a stay of the Judgment in this case, neither the named Defendant, nor the Probate Courts in Alabama are currently required to follow or uphold the Judgment. However, if the stay is lifted, the Judgment in this case makes it clear that ALA. CONST. ART. I, § 36.03 and ALA. CODE § 30-1-19 are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Commissioners of Mobile County, Alabama.

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[1] The court notes that on January 25, 2015, the APJA moved for leave to appear as *amicus curiae* in support of Defendant's motion for stay. (Doc. 58).

[2] See http://www.al.com/news/index.ssf/2015/01/alabama_probate_association_ju.html - incart_related_stories and http://www.al.com/news/mobile/index.ssf/2015/01/alabama_probate_court_judges_gay_marriage.html - incart_river

As Judge Hinkle of the Northern District of Florida recently stated when presented with an almost identical issue:

> History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law. Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. here should be no debate, however, on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees.
>
> * * * *
>
> The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.

Brenner v. Scott, 2015 WL 44260 at *1(N.D. Fla. Jan. 1, 2015).

For the reasons stated above, Plaintiff's motion to clarify (Doc. 56), is **GRANTED** and the Judgment in this case is **CLARIFIED** as set out above.

DONE and **ORDERED** this 28th day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE