No. 14A840

In the Supreme Court of the United States

October Term 2014

LUTHER STRANGE, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

APPLICANT-PETITIONER

V.

CARI D. SEARCY, ET AL.,

RESPONDENTS.

RESPONSDENTS' OPPOSITION TO EMERGENCY APPLICATION OF ALABAMA ATTORNEY GENERAL TO STAY THE INJUNCTIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

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LIST OF PARTIES AND AFFILIATES

Cari D. Searcy, Respondent

Kimberly McKeand, Respondent

James N. Strawser, Respondent

John E. Humphrey, Respondent

Luther Strange, Attorney General of the State of Alabama, Applicant

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INTRODUCTION

Respondents, Cari Searcy, Kimberly McKeand and their minor son K.S., by and through undersigned counsel, Christine C. Hernandez and David G. Kennedy, hereby respectfully request that Alabama Attorney General Luther Strange's Application to Stay Injunctions of the United States District Court for the Southern District of Alabama (hereinafter "Application") be denied. [1]

Applicant, Alabama Attorney General Luther Strange cannot meet the high burden for the extraordinary relief he seeks. The judgment of the United States District Court for the Southern District of Alabama is in accord with the majority of court of appeals having decided this issue, following this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

The Appellant's motion should be denied because Ala. Const. Art. I § 36.03 (2006) and Ala. Code 1975 § 30-1-19 (hereinafter "Alabama Sanctity Laws") "violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." (District Judge Granade's Order of January 23, 2015 attached to Applicant's Petition as Appendix "A"). As a matter of law, the Sanctity Laws are irrational and arbitrary.

It is equally irrational and arbitrary for the State of Alabama to require the Respondents to wait any longer to solidify the safety, dignity, and standing of their family. Every day, the Respondents are confronted with risks, humiliations, and

[1] This Response is on behalf of all Respondents.

dangers. Respondents request that this Court insure that the Respondents, and others like them, no longer face such vulnerability.

While the Sanctity Laws unconstitutionally infringe on the Respondents' rights in numerous areas of life, the State's refusal to immediately issue an adoption in the *Searcy* case places the minor child K.S. in immediate risk with every minute that passes. As President Kennedy famously remarked "We all breathe the same air. We all cherish our children's futures. And, we are all mortal.[2]" If the biological mother, Kimberly McKeand were to die (as we are all subject to do at any time), K.S. would be left without a legal parent. Undersigned counsel submits that this Court should, for that reason alone, deny the State's motion.

The Applicant's assertion of confusion as it relates to a very serious issue addressing an abstract affront to the sovereignty of the State resulting in "confusion, conflict and additional litigation" (Application 2-3) does not amount to the required showing of irreparable injury. Cf. *Lucas*, 486 U.S. at 1304. Even were such an asserted harm to the State cognizable, it would be decidedly outweighed by the harm to Respondents.

If a stay issues, respondents will continue to be denied the right to complete the adoption of Respondents in *Strange v. Searcy, et. al.* Likewise the Respondents in *Strange v. Humphrey and Strawser* will continue to be denied the right to enter into or have recognized the "most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted). Respondents will continue to lack

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[2] President John F. Kennedy speech at American University, June 10, 1963.

critical legal protections for their families, such as adoption, marriage recognition, spousal-visitation and medical-decision-making rights in hospitals, that different-sex couples have long enjoyed. K.S. and other children similarly situated in Alabama will continue to be deprived of the security of knowing that their parents' relationships are recognized by the State where they live.

The Applicant provides nothing to justify the issuance of a stay in this case other than an unsubstantiated claim of confusion. Neither confusion nor chaos have erupted in thirty-six other states across the Country as marriage recognition and the invocation of marriage rights under the umbrella of equality has occurred. Declining to extend the stay of Judge Granade's order set to expire February 9, 2015 does not impair the Applicant's ability to argue his position on appeal at the Eleventh Circuit, does not create confusion, and does not impair the functions of state government; however, extending the stay would create impairments as Judge Granade so eloquently referenced when citing this Court's decision in *Windsor,* 133 S.Ct. at 2694.

Further, a stay of the injunction precluding enforcement of both the ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE § 30-1-19 will strike at the very heart of the choices central to personal dignity and autonomy of the Respondents. A stay of the injunction as requested by the Applicant restricts the human dignity and the very liberty protected by the Fourteenth Amendment. "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).

Such central choices are protected against state interference of any kind because they implicate "associational rights...'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).(Case 1:14-cv-00208-CG-N Document 22 Filed 06/12/14 Page 12 of 37) These rights are directly at the heart of what it means to be human—who to marry, whether to have children, and how to raise and educate children. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003),(Case 1:14-cv-00208-CG-N Document 22 Filed 06/12/14 Page 12 of 37).

The Applicant's unfounded position that the mere recognition of lawful marriages performed and sanctioned in other states would be confusing to its citizens,

and that issuing same-sex marriages during the pendency of the cases presently pending before this U.S. Supreme Court is nothing more than Strange attempting to induce fear of differences associated with a political minority.

The Applicant supports the existence of confusion in part from statements asserted by the Chief Justice of the Alabama Supreme Court. This elected official serves as the Administrative Office of Courts and exercises authority over the Judges, including those of Probate, and the administration of their work. In Attorney General Strange's Application, he asserts that that Alabama Chief Justice[3] validity of the District Court order is a measure of expressions of as to the confusion. However, the mere speculation of confusion exists only in the minds of those disseminating the information as it pertains to the authority of the District Court Judge in the Southern District of Alabama. In a January 27, 2015 letter to Governor Bentley which was disseminated to the press and publicized by Justice Moore and his associates, Moore stated, "...nothing in the Constitution grants the federal the authority to redefine the institution of marriage. The people of this state have specifically recognized in our Constitution that marriage is '[a]sacred covenant, solemnized between a man and a woman"; that "[a] marriage contracted between individuals of the same sex is invalid in this state"; and that "[a] union replicating marriage of or between persons of the

[3]Roy Moore is the chief justice of Alabama who, in 2001, ordered the erection of a 5,200 pound granite copy of the Ten Commandments in the rotunda of the Alabama Supreme Court -- then refused to remove it in 2003 after a federal court ruled it unconstitutional. Noah Feldman, a Bloomberg View columnist, is a professor of constitutional and international law at Harvard University and the author of six books, most recently "Cool War: The Future of Global Competition." (Jan. 28, 2015) See also Mike Cason, Alabama Chief Justice Roy Moore says he will continue to recognize ban on same-sex marriage. AL.COM, January 27, 2015.

same sex.... shall be considered and treated in all respects as having no legal force or effect in this state." Art. I §36.03(c),(b) &(g), Ala. Const. of 1901. (App. A) Moore went on to state, "...I am dismayed by those judges in our state who have stated they will recognize and unilaterally enforce a federal court decision which does not bind them. I would advise them that the issuance of [marriage] such licenses would be in defiance of the laws and Constitution of Alabama."[4]

An extension of stay by this Court would only further endorse Alabama's elected officials' policy of instilling fear in its citizens and would remove the welfare of the children purported to be at the very heart of the Applicant's assertions.

The application should be denied.

BACKGROUND

1. Ala. Code 1975 § 30-1-19 states:

> (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 this 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 the same sex that occurred or was alleged to have occurred as a result

[4] Statement by Roy Moore as released by Bloomberg Vie; http://www.bloombergview.com/articles/2015-01-28/renegade-alabama-judge-roy-moore-defies-gay-marriage-order

of the law of any jurisdiction regardless of whether a marriage license was issued.

2. Alabama Const. Art. I § 36.03 (2006) states:

> (1) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.
> (2) 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.
> (3) 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.
> (4) No marriage license shall be issued in the State of Alabama to parties of the same sex.
> (5) 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.
> (6) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
> (7) 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.

3. Respondents include small-business owners, a minor child, and two disabled individuals. They have formed families, contributed to their professions and communities, and chosen Alabama as their home. Kim McKeand and Cari Searcy are parents to K.S. but only McKeand is legally recognized under Alabama law.

4. Respondents include Searcy and McKeand, a same-sex couple from Mobile, Alabama who legally married in the State of California. K.S. is the biological son of McKeand. Searcy and McKeand seek to have their California Marriage license recognized by Alabama officials and Probate Court Judges for the purpose of perfecting the adoption of K.S. by Searcy.

5. Respondents, John Humphrey and James Strawser, are residents of Alabama who wish to get married in Alabama and 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.

6. Respondent Strawser testified that he has health issues that will require surgery that will put his life at great risk. Stroller'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.

7. The District Court consistently holding in Respondents Strawser and Humphrey's case as was held in *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. (*Applicant's App. "A" Strawser v Strange, at pp. 2- 3).*

8. The District Judge held, "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." (Applicant's Appendix "B" at 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." (Applicant's Appendix "B" at p. 3).

9. 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).

10. "The Respondents, and same-sex couples similarly situated 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." (Applicant's Appendix "B" at p. 5).

11. The District Court having jurisdiction pursuant to 28 U.S.C. § 1331, concluded that Alabama's laws were found to violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. "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).

12. Strange contends that Alabama has a legitimate interest in protecting the ties between children and their biological parents and other biological kin. The District Court held:

> "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 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."

(Applicant's App. "A" at p. 8).

13. The District Court enjoined enforcement of Alabama Const. Art. I § 36.03 (2006) and Ala. Code 1975 § 30-1-19." *(Applicant's App. "A" at p. 10)*. The injunction was stayed for 14 days to allow the Eleventh Circuit Court of Appeals to address the Applicant's request to extend the stay which was denied on February 3, 2015. *(Applicant's App. "A" at p. 10).*

14. The Eleventh Circuit declined Applicant's request to extend the stay.*(Applicant's App. "C" at p. 2).*

REASONS THE APPLICATION FOR STAY SHOULD BE DENIED

Whether a stay is appropriate depends on the "the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433, 129 S.Ct. 1749, 1760 (2009). To warrant a stay, an "applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted). Justices considering such applications also may "'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* "Denial of such in-chambers stay applications is the norm; relief is granted only in extraordinary cases." *Id.* (internal quotation marks omitted).

Justice Scalia has states, "[w]e may not vacate a stay entered by a court of appeals unless that court clearly and 'demonstrably' erred in its application of 'accepted standards.'" *Planned Parenthood of Greater Texas v. Abbott*, 571 U.S. ____ (2013)(No. 13A452)(Scalia, Thomas, Alito Concurring). "Great deference" is owed to the Eleventh Circuit's decision on the issue of staying the ruling. *Id.*

"[W]hen a district court judgment is reviewable by a court of appeals that has denied a motion for a stay, the applicant seeking override from this Court bears 'an especially heavy burden.'" *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (citing *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)). Applicant cannot meet his burden of showing that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding [whether] to issue the stay," and that Applicants "may be seriously and irreparably injured [without] the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

I. This Court is unlikely to grant *certiorari* in this matter.

There is no "reasonable probability" that certiorari will be granted in this case as required to receive a stay from this Court. *Conkright*, 556 U.S. at 1402. The petitions currently pending before this Court are suitable vehicles to decide the constitutional questions. Absent this petition attracting the votes of four Justices, there is no reasonable probability that this petition would be necessary to further the issues already set before this court.

This court recently declined to hear the emergency issues raised by a case pending appeal before the Fifth circuit Supreme Court of the United States. *Robicheaux v. George,* No. 14-596, 2015 WL 133500, at *1 (U.S. Jan. 12, 2015) The Respondents' case is likewise pending appeal before the Eleventh Circuit and is presently before this court on emergency petition.

With striking uniformity, the Fourth, Seventh, and Tenth Circuits have ruled that the Fourteenth Amendment prohibits States from enacting such laws. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), cert. denied, Nos. 14-153, 14-225, 14-251 (U.S. Oct. 6, 2014); *Baskin v. Bogan*, --- F.3d ---, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014), cert. denied, Nos. 14-277, 14-278 (U.S. Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), cert. denied, Nos. 14-124, 14-136 (U.S. Oct. 6, 2014). 1 *Herbert v. Kitchen*, No. 14-124 (U.S. Oct. 6, 2014); *Smith v. Bishop*, No. 14-136 (U.S. Oct. 6, 2014); *Rainey v. Bostic*, No. 14-153 (U.S. Oct. 6, 2014); *Schaefer v. Bostic*, No. 14-225 (U.S. Oct. 6, 2014); *McQuigg v. Bostic,* No. 14-251 (U.S. Oct. 6, 2014); *Bogan v. Baskin*, No. 14-277 (U.S. Oct. 6, 2014); *Walker v. Wolf*, No. 14-278 (U.S. Oct. 6, 2014). See also, *DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014), petitions for cert. filed, -- U.S.L.W. -- (U.S. Nov. 14, 2014) (Nos. 14-556, 14-562, 14-571), and petition for cert. filed, -- U.S.L.W. – (U.S. Nov. 18, 2014) (No. 14- 574); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253, --- F. Supp. 3d ----, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), appeal docketed, No. 14-2184 (1st Cir. Nov. 13, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), appeal docketed, No. 14-31037 (5th Cir. Sept. 5, 2014).

This Court has previously denied several petitions for writs of certiorari seeking review of judgments from three courts of appeals that together held that five States' prohibitions on marriages by same-sex couples violate those couples' Fourteenth Amendment rights. *Bostic, at 352 (4th Cir.); Baskin v. Bogan, --- F.3d ---*

, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014), cert. denied, Nos. 14-277, 14-278 (U.S. Oct. 6, 2014); Kitchen at 1193 (10th Cir.), cert. denied, Nos. 14-124, 14-136 (U.S. Oct. 6, 2014). Herbert v. Kitchen, No. 14-124 (U.S. Oct. 6, 2014); *Smith v. Bishop*, No. 14-136 (U.S. Oct. 6, 2014); *Rainey v. Bostic*, No. 14-153 (U.S. Oct. 6, 2014); *Schaefer v. Bostic*, No. 14-225 (U.S. Oct. 6, 2014); *McQuigg v. Bostic*, No. 14-251 (U.S. Oct. 6, 2014); *Bogan v. Baskin*, No. 14-277 (U.S. Oct. 6, 2014); *Walker v. Wolf*, No. 14-278 (U.S. Oct. 6, 2014).

Applicants argue that the courts of appeals are divided on the subsidiary issue of the level of scrutiny applicable to laws that make classifications among individuals based on their sexual orientation. Application at 9-10. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)).

In any event, the same subsidiary standard-of-review issue that applicants claim is distinguishing was cited as a basis for review in the certiorari petitions denied by this Court last week. The court of appeals' ruling here thus does nothing to alter the landscape that existed at the time this Court denied certiorari in the other marriage cases. Given these circumstances there is no reasonable probability this Court will grant applicants' planned petition on the subsidiary level-of-deference question.

II. The factors considered by the District Court and Eleventh Circuit Court of Appeals mandate denial of Strange's Application.

As did the Eleventh Circuit, there are four other factors that this Court should consider in deciding whether or not to grant a further stay:

> (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); *Venus Lines Agency v. CVG Industrial Venezolana De Aluminio*, C.A., 201 F. 3d 1309, 1313 (11th Cir. 2000) (applying the same test) and *Brenner v. Scott*, 999 F.Supp.2d 1278, 1292 (N.D.Fla.2014 order clarified, No.4:14CV107-RH/CAS, 2015 WL44260(N.D.Fla. 2015).

A. Strange has not made a strong showing that he is likely to succeed on the merits.

The District Court stated, "The Attorney General seems to concede that he cannot make such showing...The court thus finds that the Attorney General is not likely to succeed on appeal." (Applicant's App. "B" at pp. 2-3).

Strange 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).

The District Court disagreed and reasoned, "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." (Applicant's App. "B").

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)." Almost every federal Court to address the issues similar to this case have ruled gay marriage bans and out-of-state marriage recognition bans as unconstitutional. While the Respondents do not presume to know what the Eleventh Circuit Court of Appeals will decide as to the merits of the appeal, it is respectfully submitted that Strange has made no showing that he is likely to be successful on appeal, much less a "strong showing" as is required. Moreover, the Applicant has not demonstrated that the Eleventh Circuit "demonstrably erred" by not using "accepted standards" in refusing to grant a lengthy stay.

B. Attorney General Strange has not shown that the State of Alabama will be irreparably harmed if a stay is not granted.

Applicant argues that Alabama 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.

In response, Respondents, Searcy and McKeand, adopt the District Court's analysis "that argument was deemed to be an assertion by the state that the 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" was "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." (Applicant's App. "B"). The District Court is correct in there is no risk to the State but a certain risk of harm to same-sex couples in Alabama.

Moreover, 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).

C. Extending the Stay will irreparably harm the Respondents, Searcy, McKeand and K.S. and others similarly situated.

Judge Granade concluded that same-sex couples face irreparable harm by not having their marriages recognized and not being allowed to marry. As Judge Granade held "[t]he 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.

In *Windsor*, this Supreme Court struck down a law barring the federal government from recognizing the marriages of same-sex couples. This Court held that the law's demeaning and stigmatizing (and also economically harmful) exclusion of same-sex couples from a "status of immense import" and its "humilat[ion]" of their children violated the guarantees of due process and equal protection. *Windsor*, 133 S. Ct. at 2693, 2694. The State has not offered any justification for this harmful treatment that can satisfy any level of constitutional scrutiny. See *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17688, --- F.3d ----, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), cert. denied, 135 S. Ct. 316, and cert. denied sub nom., *Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), cert. denied, 135 S. Ct. 308, cert. denied sub nom., *Rainey v. Bostic*, 135 S. Ct. 286, and cert denied sub nom., *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), cert. denied, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193(10th Cir.), cert. denied, 135 S. Ct. 265 (2014); see also *Campaign for S. Equality v. Bryant*, No. 3:14-cv-818-CWR-LRA, D.E. 30, at 2 n.1 (S.D. Miss. Nov. 25, 2014) (collecting district court cases). But see *DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014), petitions for cert. filed, -- U.S.L.W. -- (U.S. Nov. 14, 2014) (Nos. 14-556, 14-562, 14-571), and petition for cert. filed, -- U.S.L.W. – (U.S. Nov. 18, 2014) (No. 14- 574); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253, --- F. Supp. 3d ----, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), appeal docketed, No. 14-2184 (1st Cir. Nov. 13, 2014);

Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014), appeal docketed, No. 14-31037 (5th Cir. Sept. 5, 2014).

Alabama's marriage ban has the same damaging effect on numerous Alabama families, particularly the Respondents, and the State has failed to offer any justification for this discriminative and harmful treatment which would satisfy any level of constitutional scrutiny. More disconcerting, Strange continues to ignore the real consequences that affect real people in this case and in Alabama. Alabama's Sanctity Laws are irrational and unconstitutional. The harm that Respondents, and other same-sex couples, would suffer if a stay were issued far outweighs any harm to Strange. Every day that couples have to wait to marry or have their marriages recognized, profoundly affects Respondents and other same-sex couples across the State. Likewise, every day that K.S. does not have two legal parents is a day that he is placed in jeopardy without justification.

Respondents and other same-sex couples are subjected to irreparable harm every day they are forced to live without the security that marriage provides. As they wait, children will be born, partners and spouses will get sick, and some will die. By further preventing Respondents and other couples similarly situated who wish to marry now from doing so, under a stay of the District Court's Order would have irreparable consequences for many couples who will be denied benefits or receive significantly diminished protections as a direct result of that delay. Issuing a stay will continue to inflict irreparable injury on Respondents and other same-sex couples

by exposing them, and their children, to continuing stigma; the consequences of which can never be undone.

Applicant asks this Court to "maintain the status quo," i.e., he seeks to have the court allow the entire State of Alabama to continue to place children of same-sex parents in peril, to allow "thousands of children now being raised by same-sex couples" to continue to be humiliated; "bring[] financial harm to children of same-sex couples" in Alabama by denying "the families of these children a panoply of benefits that the State and federal government offer to families who are legally wed;" and to be allowed to continue to deny children of same-sex couples from understanding the "integrity and closeness of their own family and its concord with other families in their community and in their daily lives." (citing *Windsor,* 133 S. Ct. at 2694, Applicant's App. "A" at p. 9). Perhaps one of the most compelling harms suffered by Respondents and Alabama Residents include the injures to 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. (Applicant's App. "A" at p. 10)

As the District Court eloquently stated "Alabama's Sanctity laws harm 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.'" (Applicant's App. "A" at p. 9).

D. The public interest will be *harmed* if the Stay is extended.

The Applicant 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. The District Court correctly held that the state's interest in refusing to recognize Searcy and McKeand's lawful marriage is insufficient to override the Respondents' interest in vindicating their constitutional rights. The public interest does not call for a different result.

The Respondents suffer irreparable harm every day that the marriage ban remains in effect, including the significant stigma that flows from being branded "second-tier" families, the denial of the legal status of a two parent home for the minor child in this case. Contrary to the State's suggestion, any marriages entered into in reliance on the district court's injunction would be valid regardless of the outcome of the appeal. See *Evans v. Utah*, No. 2:14CV55DAK, --- F. Supp. 2d ----, 2014 WL 2048343, at *17 (D. Utah May 19, 2014) (holding that plaintiffs had vested interest in the marriages they entered into in Utah after district court entered injunction and prior to stay issued by Supreme Court; thus, state's refusal to recognize the marriages violated the Due Process Clause), appeal withdrawn.

The District Court made clear that same-sex marriages would be issued and recognized in Alabama beginning February 9, 2015. Extending that deadline, which

has been widely reported in the media, will only serve to add to the confusion, frustration, and inconvenience of the public and the state and local officials.

CONCLUSION

An Applicant bears the burden of showing that they will suffer if a stay is not granted. *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) ("An applicant for stay first must show irreparable harm if a stay is denied."). The Applicant falls far short in meeting their burden. The purported "administrative" or "financial costs" that might arise from seeking judicial determinations concerning issues of validity of marriages cannot constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Simply put, Alabama's marriage laws were found to violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Even if the Applicant could show that he or the state of Alabama would suffer irreparable harm (which they cannot), he would not be entitled to a stay. "The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301 (1991) (Scalia, J., in chambers)*. The Southern District Court has already found a Stay of her Order inflicts irreparable harm upon Respondents and Respondents have adopted that reasoning. There has been no

discernible articulated argument offered by the Appellant to demonstrate why an extension of stay is imperative nor has there been an articulation of actual harm that will result to the State of Alabama as a result of the present stay expiring on February 9, 2015. An extension of Stay would extend and compound the harms upon Respondents. Therefore, this application for extension of stay should be DENIED.

Respectfully submitted this 4th day of February, 2015,

Respectfully submitted this 4th day of February, 2015,

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SUPREME COURT OF ALABAMA
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(334) 229-0700

January 27, 2015

Hon. Robert Bentley
Governor of Alabama
State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130

Dear Governor Bentley:

The recent ruling of Judge Callie Granade of the United States District Court for the Southern District of Alabama has raised serious, legitimate concerns about the propriety of federal court jurisdiction over the Alabama Sanctity of Marriage Amendment. Art. I, § 36.03, Ala. Const. of 1901.

As you know, nothing in the United States Constitution grants the federal government the authority to redefine the institution of marriage. The people of this state have specifically recognized in our Constitution that marriage is "[a] sacred covenant, solemnized between a man and a woman"; that "[a] marriage contracted between individuals of the same sex is invalid in this state"; and that "[a] union replicating marriage of or between persons of the same sex . . . shall be considered and treated in all respects as having no legal force or effect in this state." Art. I, § 36.03(c), (b) & (g), Ala. Const. of 1901.

The Supreme Court of Alabama has likewise described marriage as "a divine institution," imposing upon the parties "higher moral and religious obligations than those imposed by any mere human institution or government." *Hughes v. Hughes*, 44 Ala. 698, 703 (1870). In *Smith v. Smith*, 141 Ala. 590, 592, 37 So. 638, 639 (1904), this Court again referred to marriage as a "sacred relation."

The laws of this state have always recognized the Biblical admonition stated by our Lord:

> But from the beginning of the creation God made them male and female. For this cause shall a man leave father and mother, and cleave

> to his wife; And they twain shall be one flesh: so then they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. (Mark 10:6-9).

Even the United States Supreme Court has repeatedly recognized that the basic foundation of marriage and family upon which our Country rests is "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; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (quoted in *United States v. Bitty*, 208 U.S. 393, 401 (1908)).

Today the destruction of that institution is upon us by federal courts using specious pretexts based on the Equal Protection, Due Process, and Full Faith and Credit Clauses of the United States Constitution. As of this date, 44 federal courts have imposed by judicial fiat same-sex marriages in 21 states of the Union, overturning the express will of the people in those states. If we are to preserve that "reverent morality which is our source of all beneficent progress in social and political improvement," then we must act to oppose such tyranny!

On December 26, 1825, Thomas Jefferson wrote:

> I see as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers foreign and <u>domestic</u>; and that too, by constructions which, if legitimate, leave no limits to their power. Take together the <u>decisions of the federal court</u>, the doctrines of the President, and the misconstructions of the constitutional compact [U.S. Constitution], acted on by the legislature of the federal branch, and it is but too evident, that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves, all functions foreign and <u>domestic</u>.

Letter to William Branch Giles, December 26, 1825 (emphasis added).

Jefferson's words precisely express my sentiments on this occasion. Our State Constitution and our morality are under attack by a federal court decision that has no basis in the Constitution of the United States. Nothing in the United States Constitution grants to the federal government the authority to desecrate the institution of marriage. Indeed, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states,

are reserved to the states respectively, or to the people." U.S. Const. Amend. X. An infringement upon the definition of marriage affects all that have entered into it in the past as well as all who will enter in the future.

I am encouraged by the Alabama Probate Judges Association which has advised probate judges to follow Alabama law in refusing to license marriages between two members of the same sex. However, I am dismayed by those judges in our state who have stated they will recognize and unilaterally enforce a federal court decision which does not bind them. I would advise them that the issuance of such licenses would be in defiance of the laws and Constitution of Alabama. Moreover, I note that "United States district court decisions are not controlling authority in this Court." *Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 744 n.5 (Ala. 2009). See also *Ex parte Johnson*, 993 So. 2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts."). As Chief Justice of the Alabama Supreme Court, I will continue to recognize the Alabama Constitution and the will of the people overwhelmingly expressed in the Sanctity of Marriage Amendment.

I ask you to continue to uphold and support the Alabama Constitution with respect to marriage, both for the welfare of this state and for our posterity. Be advised that I stand with you to stop judicial tyranny and any unlawful opinions issued without constitutional authority.

With due respect to your authority and responsibility as Governor and Chief Executive of the State of Alabama, I am

Sincerely,

Roy S. Moore
Chief Justice
Alabama Supreme Court