No. 15A-_____

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.

Application to Stay Injunctions of the United States District Court
for the Southern District of Alabama

APPLICATION OF LUTHER STRANGE, ATTORNEY GENERAL, TO THE HONORABLE ASSOCIATE JUSTICE CLARENCE THOMAS FOR STAY OF INJUNCTION

LUTHER STRANGE
ALA. ATTORNEY GENERAL
ANDREW L. BRASHER
ALA. SOLICITOR GENERAL
Counsel of Record
STATE OF ALABAMA
OFFICE OF ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130
Tel : (334) 353-2609
abrasher@ago.state.al.us

Counsel for Applicant-Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

APPLICATION OF LUTHER STRANGE, ATTORNEY GENERAL FOR STAY OF INJUNCTION PENDING APPEAL

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:

Applicant Luther Strange, Attorney General of the State of Alabama, petitions for a stay pending appeal of an injunction entered by the United States District Court for the Southern District of Alabama, which enjoined the Attorney General from enforcing provisions of Alabama law that define marriage as an institution existing between a man and a woman. The District Court's injunctions, entered on January 23, 2015 and January 26, 2015, in two linked cases that were consolidated on appeal, are included as App. A. Attorney General Strange moved the District Court to stay its order pending appeal. The District Court declined to enter an indefinite stay, but stayed its judgment in both cases until February 9, 2015, to give Attorney General Strange an opportunity to seek a stay from the Eleventh Circuit. (App. B). The Eleventh Circuit denied Attorney General Strange's application for a stay pending appeal. (App. C).

Attorney General Strange respectfully requests a ruling on this motion by February 9, 2015 and a stay until this Court issues its opinion in *Obergefell v. Hodges*, 14-556, *Tanco v. Haslam*, 14-562, *DeBoer v. Snyder*, 14-571 and *Bourke v. Beshear*, No. 14-574, in which the merits of the instant case will be decided.

INTRODUCTION

There are two groups of plaintiffs in these consolidated cases. One group, Searcy and McKeand, are a same-sex couple who obtained a marriage license from the State of California. The second group, Strawser and Humphrey, are a same-sex couple that has undergone a religious marriage ceremony in Alabama and seeks state recognition of that marriage. Both groups sued to challenge Alabama's marriage laws so that their relationships may be recognized as "marriages" by Alabama law. App. A. The Attorney General, the only named Defendant, does not issue marriage licenses or approve adoptions. The District Court's order enjoins him from enforcing Alabama's marriage laws to the extent those laws prohibit recognition of same-sex marriage.

The decisions by the District Court and the Eleventh Circuit (App. B, C) to deny a longer stay have created confusion in the State. Probate judges, who are not supervised by the Attorney General and are not under his control, issue marriage licenses. As an association, the Probate Judges initially said they did not believe they were subject to the District Court's injunction and remained under an obligation to follow Alabama law.[1] Later, at least some individual Probate Judges reached a different conclusion.[2] The Chief Justice of the Supreme Court of Alabama,

---

[1] *See* Michael Finch II, *Alabama Probate Judges Association says not to issue marriage licenses to same-sex couples on Monday*, AL.COM, Jan. 25, 2015, http://www.al.com/news/mobile/index.ssf/2015/01/alabama_probate_court_judges_gay_marriage.html.

[2] *See* Brendan Kirby, *Alabama probate judges' group agrees decision voiding same-sex marriage ban applies to them*, AL.COM, Jan. 28, 2015,

who also heads the Administrative Office of Courts which may have bearing on the authority of Probate Judges and the administration of their work, has expressed doubts about the scope of the District Court order and its application to members of the Alabama Judicial Branch, when the only Defendant before the District Court was the Attorney General.[3] Then there are dozens of other agencies that perform tasks such as completing birth and death certificates, processing income tax returns, *etc.*, that are not under the Attorney General's control and must determine their obligations under the District Court's injunction.

The District Court, in an effort to clarify its order, entered a second order: The District Court did not hold that Probate Judges were directly enjoined in the case, but it expressed an opinion that officials who did not voluntarily comply with the order would be subject to suit and exposure to attorney's fees. (App. D.) That is, the District Court has invited further litigation.

If the stay is not extended, there will be unnecessary confusion and litigation until this Court issues its opinion in the same-sex marriage cases on certiorari review from the Sixth Circuit. This confusion, conflict, and additional itigation will serve no purpose because, by the end of this term, the answers to the questions presented in this case will be clear and binding for all involved.

---

http://www.al.com/news/mobile/index.ssf/2015/01/alabama_probate_judges_group_a.html.

[3] *See* Mike Cason, *Alabama Chief Justice Roy Moore says he will continue to recognize ban on same-sex marriage*, AL.COM, Jan. 27, 2015, http://www.al.com/news/index.ssf/2015/01/alabama_chief_justice_roy_moor_1.htmle.

Earlier this year, under similar circumstances, Justice Sotomayor (after referral to the full Court) granted a stay of a district court order enjoining enforcement of traditional state marriage definitions, pending disposition of an appeal to the Tenth Circuit. *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (No. 13A687). Several circuits subsequently stayed orders in other cases based on that stay. This Court denied cert. petitions in those cases and the stays in the other circuits ended, but the rationale justifying the stay pending appeal in the Tenth Circuit (which had then not yet addressed the constitutional question) also justifies a stay pending appeal in the Eleventh Circuit (which has not yet addressed the constitutional question). And now, of course, this Court has decided to resolve the question in cases from the Sixth Circuit. To avoid unnecessary litigation and confusion, the Attorney General asks for such a stay until this Court's ruling later this term.

JURISDICTION

The applicants seek a stay of a district court's injunctions against enforcement of Alabama's marriage laws while the injunction undergoes appellate review. The district court had original jurisdiction because the cases presented issues of federal law. *See* 28 U.S.C. §§ 1331, 1343(a). The Eleventh Circuit has appellate jurisdiction because the district court ordered injunctive relief. *See* 28 U.S.C. § 1292(a).

The district court entered a stay until February 9, 2015, to give the Attorney General an opportunity to seek a stay from the Eleventh Circuit. App. B. On

February 3, 2015, the Eleventh Circuit denied the Attorney General's application to extend the stay. App. C.[4] Therefore, the stay sought "is not available from any other court or judge." Sup. Ct. R. 23.3.

This Court has jurisdiction to review cases properly in a circuit court. *See* 28 U.S.C. § 254(1); *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1303 (1976) (Rehnquist, Circuit Justice) (noting that under section 1254, Court "has jurisdiction to review by certiorari *any* case in a court of appeals") emphasis supplied); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (explaining that "petition is properly before this Court for consideration," even before a decision by circuit court, if case otherwise "was properly 'in' the Court of Appeals when the petition for certiorari was filed"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue fundamental to the further conduct of the case.") (internal quotation omitted).

This Court also has jurisdiction to consider and grant a stay for the pendency of the appeal and any subsequent petition for certiorari. *Cf. Nken v. Holder*, 556 U.S. 418, 426-27 (2009) (explaining that an appellate court's authority to stay an order while the order's legality is assessed is "inherent," "traditional," and "firmly embedded"—and "preserved in the grant of authority to federal courts" through section 1651(a)—to "ensur[e] that appellate courts can responsibly fulfill their role in the judicial process"); *see* 28 U.S.C. § 1651(a); *see also Twentieth Century Airlines v. Ryan*, 74 S. Ct. 8, 10-11 (1953) (Reed, J., in chambers) (noting that power

[4] The Eleventh Circuit's local rules do not allow for *en banc* review of that court's orders on motions to stay. *See* 11th Cir. R. 35-4.

of any justice to act on stay application, even regarding stay of a non-final order, "is assumed"); *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302, 1304 (2006) (Kennedy, Circuit Justice) (granting stay of injunction pending appeal in circuit court).

REASONS FOR GRANTING THE STAY

The issue on appeal is a serious one, and it deserves the review of a higher court before the injunction becomes effective. The plaintiffs contend that the Fourteenth Amendment requires states to recognize same-sex marriage; the Attorney General disagrees. Several Circuits (two with divided panels) recently held that the plaintiffs' view is correct. *See DeBoer v. Snyder*, 772 F.3d 388, 402 (6th Cir. Nov. 6, 2014) (collecting cases). More recently, the Sixth Circuit (also with a divided panel) held that the Attorney General's view is correct. *See generally id.* Other Circuits, including the Fifth and Eleventh Circuits, have not ruled on this issue. *See DeLeon v. Perry*, Case No. 14-50196 (5th Cir.), *Brenner v. Sec'y, Fla. Dep't of Health*, Appeal No. 14-14061-AA (11th Cir.), *Grimsley v. Sec'y Dep't of Health*, Appeal No. 14-14066-AA (11th Cir.). And, as the District Court expressly recognized, this Court will resolve this issue by the end of this current Term.

Whether a stay is appropriate depends on "the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749, 1760 (2009) (internal quotation and citation omitted). There are four factors to be considered: (1) the likelihood of prevailing on the merits on appeal; (2) irreparable harm to the movant if no stay is granted; (3) harm to the adverse parties if a stay is granted;

and (4) the public interest. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *see also Nken*, 556 U.S. at 434, 129 S. Ct. at 1761. Each factor weighs in favor of granting a stay.

A. This Court has already granted certiorari on the questions presented in this case.

This Court has already granted certiorari review on the questions presented in this case, and they will be resolved by the end of the present Term. *See Obergefell v. Hodges*, 14-556; *Tanco v. Haslam*, 14-562; *DeBoer v. Snyder*, 14-571; *Bourke v. Beshear*, No. 14-574. The District Court expressly recognized that "[t]he questions raised in this lawsuit will . . . be definitively decided by the end of the current Supreme Court term, regardless of today's holding by this court." Ex A. (Doc. 53) at 6 n.1.

B. The Attorney General is likely to prevail on the merits of his appeal.

The Constitution is silent on the issue of marriage and how states may define it. The District Court nonetheless agreed with several other courts and held that the Constitution requires Alabama to adopt a new definition of marriage that does not require sexual complementarity. The District Court's judgment is due to be reversed. As the Sixth Circuit held in *DeBoer*, "[n]ot one of the plaintiffs' theories … makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hand of state voters." 772 F.3d at 402-03. "A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society

in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States." *Id.* at 404.

The interests supported by opposite-sex marriage are, at the very least, rational. States are not in the marriage business "to regulate love." *Id.* at 404. Instead, state marriage laws link children to their biological parents (and link these biological parents to each other) by imposing a package of privileges and obligations—such as presumptions of paternity—that make less sense in the context of same-sex relationships. It is not irrational or malicious for state laws to reflect an "awareness of the biological reality that couples of the same sex do not have children the same way as couples of opposite sexes." *Id.* at 405. It is instead the background against which the institution of marriage has developed over the last several thousand years.

C. The State and the public interest will suffer irreparable harm if the stay is not granted.

If the action is not stayed, the Attorney General, in his official capacity, will suffer irreparable harm in three ways. First, "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1, 3 (2012) (Roberts, C. J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Second, marriages could be recognized that are ultimately determined to be inconsistent with Alabama law, resulting in confusion in the law and in the legal status of marriages. Third, the Attorney General of Alabama – the only official enjoined by the District Court –

does not issue marriage licenses, perform marriage ceremonies, or issue adoption certificates. There is, therefore, a surety that there will be other litigation against other non-parties, such as county officials and probate judges, if the court's order is not stayed. A stay would serve the public interest by avoiding confusion among local officials and additional litigation in Alabama's other district courts. The law on this issue can only be settled by a ruling from an appellate court that is binding on all district court judges and state officials.

These factors have led other courts to issue stays in similar circumstances. The orders reviewed (and reversed) by the Sixth Circuit, for example, were stayed while they were on appeal. *See Tanco v. Haslam*, Case No. 14-5297 (mem. order) (6th Cir. Apr. 25, 2014) (granting stay pending appeal in Tennessee case after district court denied stay; finding that "public interest requires granting a stay" in light of "hotly contested issue in the contemporary legal landscape" and possible confusion, cost, and inequity if State ultimately successful) (following and quoting *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, at *1 (S.D. Ohio Apr. 16, 2014)); *DeBoer v. Snyder*, No. 14-1341 (mem. order) (6th Cir. Mar. 25, 2014) (Michigan case); *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 558 (W.D. Ky. 2014) ("One judge may decide a case, but ultimately others have a final say . . . . It is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes."). The Fifth Circuit is considering the issue as well, and a stay remains in

place there, too. *See DeLeon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014). The public interest rationale that justified these stays applies with equal force here.

The public interest also weighs strongly in favor of a stay because this Court has already decided to resolve this issue by the end of June. There is nothing to be gained from the confusion and litigation that will occur (without a stay) in the intervening six months. The wise use of judicial resources militates strongly in favor of granting a stay.

D. The Plaintiffs will not suffer harm if the Court enters a stay to preserve the status quo until it decides the same-sex marriage cases from the Sixth Circuit.

There was no evidence in the District Court of any immediacy to Plaintiffs' claims. There was no event or circumstance that would require a ruling now as opposed to six months from now. Granting a stay will not harm the Plaintiffs, but would only maintain the status quo while these issues are considered by the appellate courts. As everyone knows, and the District Court admitted, the "questions raised in this lawsuit will . . . be definitively decided by the end of the current Supreme Court term, regardless of today's holding by this court." Doc. 53 at 6 n.1. It will not harm the plaintiffs to wait six months for this Court to rule.

In the Eleventh Circuit, plaintiffs argued that they would be harmed by a stay for two primary reasons. First, they said that they will be "in a state of limbo with respect to adoption, child care and custody, medical decisions," etc. Second, they argued that denying them various legal incidents of marriage until this Court rules in June will harm them and their children in mostly intangible ways, such as

"stigma." These purported harms are not traceable to a stay, they are speculative, and they are not the kinds of harms that should prevent the issuance of a stay.

First, neither the plaintiffs nor anyone else will be in a "state of limbo" if a stay is issued. Instead, a stay will prevent them from being in state of limbo. Absent a stay, any same-sex marriages that are recognized by any official in Alabama will be subject to dispute and challenge. If this Court were to affirm the Sixth Circuit in June, any marriage or related adoption may also be subject to vacatur. A stay ensures that everyone knows what the law is, instead of being confused over the import of the lower court's ruling. A stay ensures that people in Alabama, including the plaintiffs, do not have to worry about the undoing of same-sex marriages or adoptions after this Court rules this June. A stay prevents legal "limbo"; it does not create it.

Second, to the extent the plaintiffs have alleged tangible harms that they believe might occur if there is a stay, those harms are highly speculative. The plaintiffs argue that, in theory, it is *possible* that some unnamed non-party will need a same-sex marriage in the next five months to avoid an unidentified injury to that non-party. Even assuming the injunction applied to nonparties, the plaintiffs cannot rely on such hypothetical harms to maintain their injunction. This Court has rejected a "'possibility' standard" as "too lenient" to support an injunction; instead, an irreparable injury must be "likely." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). And the plaintiffs have not argued that

irreparable injury to the plaintiffs or any non-party is "likely" if the Court stays the lower court's decision *until this Court rules in five months*.

Third, there are many ways that the plaintiffs or others can avoid these speculative injuries, even if they were actually likely to occur. For example, if plaintiff McKeand is concerned about who would care for her child if she were to die unexpectedly within the next five months, then she can—right now—write a will that places guardianship of the child with plaintiff Searcy. *See* Ala. Code § 26-2A-71(a) (parent may appoint child's guardian by will). *See also* Ala. Code § 26-2A-7 (parent may in writing delegate any power over minor child to any other person). We do not mean to say that such legal documents give plaintiffs the same benefits as marriage. But they do provide a much surer remedy over the next five months than the district court's injunction against the Attorney General, which is subject to reversal on appeal.

CONCLUSION

For the foregoing reasons, Luther Strange, Attorney General of the State of Alabama, respectfully requests a ruling on this motion before February 9, 2015 and a stay of the district court's injunction during appeal through this Court's resolution of *Obergefell v. Hodges*, 14-556, *Tanco v. Haslam*, 14-562, *DeBoer v. Snyder*, 14-571 and *Bourke v. Beshear*, No. 14-574, in which the merits of the instant case will be decided.

.

Dated: February 3, 2015

Respectfully submitted,

LUTHER STRANGE
ALA. ATTORNEY GENERAL

ANDREW L. BRASHER
ALA. SOLICITOR GENERAL
Counsel of Record
STATE OF ALABAMA
501 Washington Avenue
Montgomery, Alabama 36130
Tel : (334) 353-2609
abrasher@ago.state.al.us

Counsel for Luther Strange, Alabama Attorney General

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

[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.

---

[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