No. 15-10295-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Luther Strange, Attorney General,

Defendant-Appellant,

v.

Cari D. Searcy, et al.,

Plaintiffs-Appellees.

On appeal from the United States District Court
for the Southern District of Alabama
Case No. 1:14-cv-208-CG-N

APPELLANT'S TIME-SENSITIVE MOTION TO STAY
(RULING REQUESTED BEFORE FEB. 9, 2015)

Luther Strange
Attorney General

Andrew L. Brasher*
Solicitor General

James W. Davis
Laura Howell
Assistant Attorneys General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
(334) 353-8440 (fax)
abrasher@ago.state.al.us

January 26, 2015

CERTIFICATE OF INTERESTED PERSONS

Appellant Luther Strange, Attorney General, pursuant to 11th Cir. R. 26.1-1, certifies that the following persons have an interest in the outcome of this case and/or appeal:

1. Brasher, Andrew L., Solicitor General
2. Davis, James W., Assistant Attorney General
3. Granade, Hon. Callie V. S., United States District Judge
4. Hernandez, Christine C., attorney for plaintiffs
5. Howell, Laura E., Assistant Attorney General
6. Kennedy, David G., attorney for plaintiffs
7. McKeand, Kimberly, plaintiff
8. Searcy, Cari D., plaintiff
9. Strange, Luther, Attorney General

s/ Andrew L. Brasher
Andrew L. Brasher
Solicitor General
Counsel for the Appellant

TIME-SENSITIVE MOTION TO STAY

Alabama Attorney General Luther Strange has appealed from the District Court's Order and Judgment (**Exhibit A**), which declared Alabama's marriage laws to be unconstitutional to the extent they do not recognize same-sex marriages. Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, the Attorney General moves for a stay of the District Court's Order and Judgment during the pendency of this appeal.

We are mindful that a Panel of this Court recently denied a stay application presented by the State of Florida in a similar case. *See* the *Brenner* and *Grimsley* appeals, Appeal Nos. 14-14061-AA and 14-14066-AA. But the judgment at issue in that case had already been stayed by the district court for several months, so state and local officials had time to prepare. And Florida's request for an additional stay came before the Supreme Court agreed to rule on whether states are required to recognize same-sex marriage by granting certiorari in four cases from the Sixth Circuit. *See James v. Hodges*, Supreme Court No. 14-556, Order dated January 16, 2015; *see also* cases 14-562, 14-571, and 14-574. In other words, the Panel denied Florida's request for a stay before we knew the Supreme Court would decide the issue. Now, unlike then, we know that the Supreme Court will tell us, within six months, whether states must recognize same-sex marriages. If the Constitution requires same-sex marriage, the stay will be a very short one.

In the meantime, the Attorney General seeks a stay for two principal reasons. First, a stay would avoid the chaos and confusion that will result if same-sex marriages are temporarily legal in Alabama, but are later determined not to be so. Second, a stay will avoid the confusion and additional litigation that will result in light of the procedural posture of this case. There are several same-sex marriage cases pending in Alabama's other district courts and those judges, including other judges in the district court at issue here, are not bound by the lower court's decision in this case. Moreover, because the local officials who perform marriages and issue marriage licenses in Alabama are not parties to this case, additional litigation is certain to occur if the judgment is not stayed. 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." Doc. 53 at 6 n.1. It makes sense to stay the lower court's decision until the U.S. Supreme Court or this Court issues a final decision that is binding on all lower courts and controlling to all state officials.

The lower court entered a temporary 14-day stay to allow the Attorney General to seek a longer stay in this Court. That stay expires on February 9, 2015 "if no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay." Accordingly, we respectfully request a ruling on this motion *before* February 9, 2015.

Procedural Background

Alabama law defines marriage as existing only between two people of the opposite sex, and expressly declines to recognize same-sex marriage. ALA. CONST. ART. I, § 36.03 (2006); ALA. CODE 1975 § 30-1-19. The 2006 Constitutional Amendment and the statute from the 1990's are relatively recent, but prior Alabama law, even though it did not *expressly* require an opposite-sex relationship, nonetheless was limited to opposite-sex couplings, based on the definition of marriage recognized throughout the world for millennia. *See* Atty.Gen. Op. No. 83-206 (doc. 49-1) (opining that under prior statutes, it was not possible for two persons of the same sex to marry in Alabama).

Plaintiffs filed suit to challenge those laws on Equal Protection and Due Process grounds. (Doc. 1). Plaintiffs and Defendant filed cross-motions for summary judgment. (Docs. 21, 22, 47, 48, 51, 52). On January 23, 2015, the District Court granted Plaintiffs' motion and denied Defendant's motion, entering equitable relief declaring that Alabama's marriage laws are unconstitutional and enjoining Attorney General Strange from enforcing those laws. In its 10-page order, the District Court noted that the Supreme Court had granted certiorari on whether the Constitution requires states to recognize same-sex marriage. It explained that "[t]he 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." Doc. 53 at 6 n.1. The Memorandum and Order is attached to this motion as **Exhibit A.**

Attorney General Strange moved for a stay of the District Court's judgment on January 23, 2015, the same date it was entered. (Doc. 55). On Sunday, January 25, 2015, the District Court denied the Attorney General's motion in part and granted it in part. The District Court declined to stay its order pending the U.S. Supreme Court's resolution of the same-sex marriage issue. But the District Court entered a short stay of 14 days "to 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." Doc. 59 at 5. This Order is attached to this motion as **Exhibit B.**

Attorney General Strange appealed the District Court's judgment on January 26, 2015. The Notice of Appeal is attached to this motion as **Exhibit C.**

Jurisdiction

The Attorney General filed a timely notice of appeal on January 26, 2015. *See* Ex. C. This Court has jurisdiction under 28 U.S.C. § 1292(a), because the District Court entered a final judgment and granted injunctive relief. This Court has the authority to consider this motion under Federal Rule of Appellate Procedure 8(a)(2)(A)(ii). This motion requests the same relief that the District Court already denied.

Argument

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*, ___ F.3d ___, 2014 WL 5748990 *7 (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 Circuit and this Court, 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, the U.S. Supreme 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. Attorney General Strange 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." 2014 WL 5748990 *8. In particular, and without limitation, the District Court's opinion made the following errors:

Failure to follow Supreme Court precedent. In *Baker v. Nelson*, the Supreme Court dismissed, for failure to present a substantial federal question, an appeal which raised the same issues this case presents. 409 U.S. 810, 93 S. Ct. 37 (1972). The District Court concluded that it need not follow that binding precedent because of so-called "doctrinal developments." (Doc. 53). Lower courts, however, are not free to decide that the Supreme Court might decide a case differently today, any more than district courts are free to disregard an opinion from this Court.

Baker remains good law. As the Sixth Circuit held, when finding that *Baker* controlled the issue:

> Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 345 (1975) (internal quotation marks omitted). The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

DeBoer, 2014 WL 5748990 at *5.

Failure to acknowledge that the parties presented opposing definitions of marriage. The District Court appeared to conclude that the Plaintiffs' relationship is a "marriage" but for an arbitrary restriction in Alabama law. However, Defendant presented evidence that in fact, for as long as marriage has existed and up until the 21st Century, marriage has *by definition* been an opposite-sex union. *See* Doc. 49 (expert report of Sherif Girgis). These opposite-sex unions, or "conjugal marriages," have been thought over all times and cultures to have unique and distinctive value. Many other human relationships have value too, and have their own dignity, but they are not "marriages" and have not been recognized as such. Alabama law therefore does not draw a line with opposite-sex couples on one side and same-sex couples on the other, and does not discriminate on the basis of sexual orientation at all. Rather, Alabama law distinguishes between marriage and non-marriage. Therefore, to require Alabama to recognize Plaintiffs'

relationship as a "marriage" is not to include Plaintiffs in an existing institution, but to alter that institution and give it a new definition. Obviously there are wide disagreements on the wisdom of making that definitional change, but a change it would be.

Defining the right plaintiffs seek as the "fundamental" right to marriage. Because of the failure to recognize that the parties define marriage differently, the District Court held that the Plaintiffs seek the "fundamental right" to marry. Once the right is carefully described, though, it becomes clear that Plaintiffs seek not the straight-forward right to marry, but the *new* right to marry someone of the same gender. *See Washington v. Glucksberg*, 521 U.S. 702, 723, 117 S. Ct. 2258, 2269 (1997) (rejecting "right to die" as an insufficiently "precise" description of the right at issue, and instead defining the right as the "right to commit suicide which itself includes assistance in doing so."). This "right" – to same-sex marriage – is not deeply rooted in this Nation's history and tradition, a prerequisite to a holding that a right is fundamental and subject to heightened scrutiny. Rather, as Justice Kennedy explained in *Windsor*, until very recent years "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675,

2689 (2013). Because plaintiffs seek a new right, the District Court should have applied the rational basis test to Alabama's marriage laws.

Failure to acknowledge the evidence presented by the Defendant. Defendant contended that Alabama's marriage laws promote the state interest of linking children to their biological parents: That in most cases, the persons best suited to rear a child is his or her biological parents, and that by encouraging parents and potential parents to marry, Alabama law in fact promotes that connection, both to the biological parents and extended kin. The District Court's opinion held that Defendant did not provide evidence supporting this claim, but that is incorrect. Defendant presented evidence that marriage is regulated and promoted not to support the emotional needs of adults, but with an eye toward the needs of children. *See* Doc. 49 at 8. He showed that all else being equal, and in most cases, the best situation for children is to be raised by his or her biological parents, and that even a study cited by *Plaintiffs'* expert witness concluded that "[C]hildren appear most apt to succeed well as adults – on multiple counts and across a variety of domains – when they spend their entire childhood with their married mother and father." *See* Doc. 52 at 8-11. Defendant further presented evidence that it is rational to be concerned that if marriage is redefined so that its focus is on meeting the emotional needs of adults, and if the view of the law is that mothers and fathers are fungible (and can be replaced with another adult of any

gender with no harm to the child), then parents and potential parents may be less likely to become married or to stay married. (Doc. 49; Doc. 48 at 20-31; Doc. 52 at 6-11).

As the Sixth Circuit held, "[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." *DeBoer*, 2014 WL 5748990 at *9. That court was persuaded that a rational basis exists for the conjugal view of marriage:

> By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

Id. at *11. And the court recognized the legitimacy of encouraging an environment that will be good for children:

> People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative. And governments

> typically are not second-guessed under the Constitution for prioritizing how they tackle such issues.

Id. at *10.

Regardless of this Court's consideration of the merits, however, the Attorney General remains entitled to a stay. When, as here, there is a "serious legal question" involved, *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981), and the balance of the equities identified in the other factors "weighs heavily in favor of granting the stay," 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) (internal quotations, brackets, and citations omitted). As shown below, the equities in this case in fact weigh heavily in favor of a stay.

B. 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 or the U.S. Supreme 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 the U.S. Supreme 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.

C. The Plaintiffs will not suffer harm if the Court enters a stay to preserve the status quo during the pendency of this appeal.

There was no evidence in the District Court of any immediacy to Plaintiffs' claims. There was no preliminary injunction motion, nor is there any 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 thus 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 the Supreme Court to rule.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court rule on this motion before February 9, 2015 and enter an order staying the Memorandum Opinion and Judgment during the pendency of the appeal or until further order of this Court or the U.S. Supreme Court.

Respectfully submitted,

LUTHER STRANGE (ASB-0036-G42L)
ATTORNEY GENERAL
BY:

s/ Andrew L. Brasher

Andrew L. Brasher
Solicitor General
James W. Davis
Laura E. Howell
Assistant Attorneys General
Attorneys for the Appellant

OF COUNSEL:

Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
(334) 353-8440 Fax
Email: abrasher@ago.state.al.us
jimdavis@ago.state.al.us
lhowell@ago.state.al.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January, 2015, I served a copy of the foregoing upon the following by electronic mail and U.S. Mail:

Christine C. Hernandez
P. O. Box 66174
Mobile, AL 36660
Telephone: (251) 479-1477
christine@hernandezlaw.comcastbiz.net

David G. Kennedy
P. O. Box 556
Mobile, AL 36601
Telephone (251) 338-9805
david@kennedylawyers.com

s/ Andrew L. Brasher
Andrew L. Brasher
Of Counsel

Exhibit 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**

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.	)	

JUDGMENT

In accordance with the court's order entered this date, it is **ORDERED**, **ADJUDGED** and **DECREED** that **JUDGMENT** be and is hereby entered in favor plaintiffs, Cari D. Searcy and Kimberly McKeand and against defendant, Luther Strange, in his capacity as Attorney General for the State of Alabama.

ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are hereby **DECLARED** to be unconstitutional because they violate they Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The defendant Luther Strange, in his capacity as Attorney General for the State of Alabama, is hereby **ENJOINED** from enforcing those laws. Costs are to be taxed against the defendant.

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

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

Exhibit 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

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CARI. D. SEARCY and KIMBERLY MCKEEAND, individually and as parent and next friend of K.S., a minor, *Plaintiffs,* v. LUTHER STRANGE, in his official capacity as Attorney General of the State of Alabama, *Defendant*.	)	Civil Action No. 1:14-cv-208-CG-N

NOTICE OF APPEAL

Alabama Attorney General Luther Strange, sued in his official capacity, gives notice of his appeal, to the Eleventh Circuit Court of Appeals, of the District Court's Memorandum Opinion and Order (doc. 53) and Judgment (doc. 54), entered January 23, 2015.

Respectfully submitted,

LUTHER STRANGE
Attorney General

s/ Andrew L. Brasher
Andrew L. Brasher
Solicitor General
James W. Davis
Laura E. Howell
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
(334) 242-7300
(334) 353-8440 (fax)
jimdavis@ago.state.al.us
lhowell@ago.state.al.us

Attorneys for Alabama Attorney General Luther Strange

CERTIFICATE OF SERVICE

I certify that on January 26, 2015, I electronically filed the foregoing document using the Court's CM/ECF system which will send notification of such filing to the following persons:

Christine C. Hernandez
P. O. Box 66174
Mobile, AL 36660
Telephone: (251) 479-1477
christine@hernandezlaw.comcastbiz.net

David G. Kennedy
P. O. Box 556
Mobile, AL 36601
Telephone (251) 338-9805
david@kennedylawyers.com

s/Andrew L. Brasher
Counsel for the Defendant