**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

Case No. 15-10313

JAMES N. STRAWSER and JOHN E. HUMPHREY,

*Plaintiffs-Appellees*,

v.

LUTHER STRANGE, in his official capacity
as Attorney General of the State of Alabama,

*Defendant-Appellant*.

Appeal from the United States District Court for the Southern District of Alabama
Case No. 1:14-cv-00424-CG-C

# RESPONSE OF PLAINTIFFS-APPELLEES IN OPPOSITION TO APPELLANT'S TIME-SENSITIVE MOTION TO STAY

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, Plaintiffs-Appellees James N. Strawser and John E. Humphrey hereby certify that the following persons have an interest in the outcome of this appeal:

1. Brasher, Andrew L., Solicitor General
2. Davis, James W., Assistant Attorney General
3. Heather Fann, counsel for Plaintiffs-Appellees
4. Granade, Hon. Callie V. S., United States District Judge
5. Howell, Laura E., Assistant Attorney General
6. Humphrey, John E., Plaintiff-Appellee
7. Minter, Shannon P., counsel for Plaintiffs-Appellees
8. Stoll, Christopher F., counsel for Plaintiffs-Appellees
9. Strange, Luther, Attorney General
10. Strawser, James N., Plaintiff-Appellee.

Dated: January 30, 2015

/s Christopher F. Stoll
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## INTRODUCTION

Plaintiffs-Appellees James N. Strawser and John E. Humphrey ("Plaintiffs") respectfully oppose the motion for stay pending appeal filed by Defendant-Appellant Luther Strange ("Defendant").

"A stay is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). A party seeking the extraordinary relief of a stay must satisfy a four-factor test, which requires, among other things, a "strong showing that [the stay applicant] is likely to succeed on the merits" and a showing that "the applicant will be irreparably injured absent a stay." *Id.* at 434. None of the requirements for a stay pending appeal is satisfied in this case.

Defendant cannot show a strong likelihood of success on the merits. Since the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), dozens of federal court decisions—including decisions from four federal courts of appeals—have struck down state laws prohibiting marriage for same-sex couples. Nor can Defendant show that the other factors favoring a stay are satisfied in this case. Defendant would suffer no harm whatsoever if Plaintiffs and other same-sex couples are permitted to marry while this appeal proceeds. Plaintiffs, on the other hand, suffer serious and irreparable harm each day they continue to be denied access to the protections that marriage provides. The Plaintiffs in this case are an older couple dealing with significant health issues; a delay of even several months in the

vindication of their constitutional rights exposes them to a significant risk that they will be denied the right to make medical decisions for one another—as has already occurred during previous hospitalizations—or even that they could lose forever the opportunity to marry due to illness or death, leaving the surviving partner with no recognition or protection. The relevant factors therefore weigh decisively against a stay pending appeal.

A stay is further unwarranted in light of recent decisions by the Supreme Court of the United States to deny stays pending appeal in similar cases, including a case from Florida in which this Court previously denied a stay. *See Brenner v. Armstrong*, Nos. 14-14061-AA, 14-14066-AA. On October 6, 2014, the Supreme Court denied certiorari in cases from the Fourth, Seventh, and Tenth Circuits, each of which had ruled in favor of same-sex couples' constitutional freedom to marry, dissolving all previously-entered stays in those cases and allowing same-sex couples to begin marrying in those states. *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271(2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014). Since its denial of certiorari in those cases, the Supreme Court has denied stays in every case in which a lower court has struck down a state marriage ban; in each of these cases, the Court has allowed lower court orders requiring states to issue marriage

licenses to same-sex couples to take effect while appeals in those cases proceed.[1] Most recently, the Supreme Court denied the State of Florida's request for a stay of a district court's preliminary injunction requiring issuance of marriage licenses to same-sex couples throughout that state while the state's appeal to this Court moves forward. *See Armstrong v. Brenner*, 135 S. Ct. 890 (2014). A stay is equally unwarranted in this case.

That the Supreme Court recently granted certiorari in four cases from the Sixth Circuit does not alter this conclusion. In those cases, the Sixth Circuit erroneously held that the Fourteenth Amendment allows states to deny same-sex couples the freedom to marry. *See DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The Sixth Circuit issued its decision on November 6, 2014, well before the Supreme Court's denial of a stay in *Brenner* and other recent cases. Had the Supreme Court believed that the split among the circuits (and therefore the likelihood that it would review the issue) meant that it was no longer appropriate to allow lower court injunctions to remain in place pending appeal, it would have entered a stay in those cases. Instead, marriages continue to be performed in Florida, South Carolina, Kansas, Alaska,

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[1] *See Wilson v. Condon*, No. 14A533, 2014 WL 6474220 (U.S. Nov. 20, 2014) (South Carolina); *Moser v. Marie*, No. 14A503, 2014 WL 5847590 (U.S. Nov. 12, 2014) (Kansas); *Otter v. Latta*, No. 14A374, 2014 WL 5094190 (U.S. Oct. 10, 2014) (Idaho); *Parnell v. Hamby*, No. 14A413, 2014 WL 5311581 (U.S. Oct. 17, 2014) (Alaska).

Idaho, and other states even while those states pursue appeals. The pending Supreme Court cases therefore provide no basis for entry of a stay in this case. In sum, because the four *Nken* factors are not satisfied here, this Court should deny a stay pending appeal, just as it previously denied a stay in *Brenner*.

## ARGUMENT

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 434-35. In determining whether to grant a stay pending appeal, courts consider "(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." *Id.* at 434 (citation and internal quotation marks omitted).

The first two of these factors are the most critical, and a substantial showing is required for both. *See id.* "It is not enough that the chance of success on the merits be 'better than negligible.'" *Id.* (citation omitted). "By the same token, simply showing some 'possibility of irreparable injury,' . . . fails to satisfy the second factor." *Id.* at 434-35 (citation omitted). Here, Defendant cannot carry his burden, and indeed cannot satisfy *any* of the four *Nken* factors.

## I. DEFENDANT CANNOT MAKE A "STRONG SHOWING" THAT HE IS LIKELY TO PREVAIL ON APPEAL.

Defendant cannot show that he is likely to succeed on the merits of his appeal. The District Court correctly concluded that the Fourteenth Amendment requires the State of Alabama to allow otherwise qualified same-sex couples to marry. Since the Supreme Court's decision in *Windsor*, nearly all federal courts to consider the issue, including four federal courts of appeals, have concluded that state laws similar to those challenged here violate due process and/or equal protection. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1204-08 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *see also Campaign for S. Equal. v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *1 n. 1 (S.D. Miss. Nov. 25, 2014) (collecting cases).

In *Windsor*, the Supreme Court held that Section 3 of the federal Defense of Marriage Act ("DOMA") violated "basic due process and equal protection principles." 133 S. Ct. at 2693. In so holding, the Court explained that Section 3 "interfere[d] with the equal dignity" of the lawful marriages of same-sex couples by treating those marriages as if they did not exist for purposes of federal law. *Id.* The

Court found the statute to be invalid, "for no legitimate purpose overcomes the purpose and effect to disparage and injure" those couples. *Id*. at 2696.

Alabama's refusal to respect the existing marriages of same-sex couples or to allow same-sex couples to marry within the state deprives those couples of due process and equal protection for reasons similar to those that led the Supreme Court in *Windsor* to conclude that the federal government's refusal to respect the valid marriages of same-sex couples infringed those same constitutional guarantees.

### A. *Baker v. Nelson* Does Not Bar Plaintiffs' Claims.

Defendant erroneously argues that the District Court's decision conflicts with the Supreme Court's summary dismissal of the appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972). Four other Circuits have issued opinions striking down laws prohibiting same-sex couples from marrying, and all have agreed that *Baker* does not preclude review by the lower federal courts of state laws prohibiting same-sex couples from marrying. *See Bostic*, 760 F.3d at 373-75; *Kitchen*, 755 F.3d at 1204-08; *Baskin*, 766 F.3d at 659-60; *Bishop*, 760 F.3d at 1080; *Latta*, 771 F.3d 456. The contrary decision of the Sixth Circuit concerning the applicability of *Baker*, *see DeBoer v. Snyder*, 772 F.3d at 399-402, is both erroneous and out of step with the clear weight of authority among the federal courts

on this issue, and that erroneous decision is presently under review by the Supreme Court.

As nearly every federal court to consider the question has held, *Baker* does not bind lower courts on the question whether the Fourteenth Amendment requires states to permit same-sex couples to marry. The Supreme Court has cautioned that a summary dismissal of an appeal for lack of a substantial federal question is no longer binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation omitted). Here, *Baker* predates important pronouncements by the Supreme Court regarding the fundamental right to marry,[2] as well as the Supreme Court's determination that classifications based on sex require heightened scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). It also predates important decisions by both the Supreme Court and state courts striking down sex-based distinctions relating to marriage and other areas of family law and recognizing that such distinctions often

[2] *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that "the decision to marry is a fundamental right").

rest upon impermissible sex role stereotypes about the "proper" roles of men and women in marriage and domestic life.[3]

*Baker* also predates the Supreme Court's express application of equal protection and due process principles to laws that discriminate based on sexual orientation or that disadvantage same-sex couples. Since *Baker* was decided, the Supreme Court has held that laws enacted to disadvantage gay and lesbian people lack a rational basis, *see Romer v. Evans*, 517 U.S. 620 (1996), and that same-sex couples have a constitutionally protected right to engage in intimate sexual conduct and to have their relationships treated with equal "dignity," *see Lawrence v. Texas*, 539 U.S. 558, 568 (2003). And in *Windsor*, the Court held that married same-sex couples have a protected liberty interest in their marriages that the federal government must respect. *Windsor*, 133 S. Ct. at 2695. Although nothing *precedential* can be read into the Supreme Court's denials of petitions for certiorari in recent marriage cases from the Fourth, Seventh, and Tenth Circuits, *see*, *e.g.*, *Robinson v. Ignacio*, 360 F.3d 1044, 1056 n.6 (9th Cir. 2004), it seems improbable

[3] *See*, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (striking down public assistance provision offering benefits to families with children when fathers, but not mothers, became unemployed, and stating that the provision carried the "baggage of sexual stereotypes") (internal quotation omitted); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down statutory scheme allowing women, but not men, to seek alimony in divorce proceedings).

that the Supreme Court would have denied review in cases requiring five states in three circuits to permit same-sex couples to marry and to recognize their existing marriages if *Baker* stood as precedent binding all lower courts in the country to rule otherwise. *See DeBoer*, 772 F.3d at 431 (Daughtrey, J., dissenting) ("If this string of cases—*Romer*, *Lawrence*, *Windsor*, *Kitchen*, *Bostic*, and *Baskin*—does not represent the Court's overruling of *Baker sub silentio*, it certainly creates the '"doctrinal development'" that frees the lower courts from the strictures of a summary disposition by the Supreme Court." (quoting *Hicks*, 422 U.S. at 344 (1975)). In short, *Baker* presents no obstacle to this Court's review.

**B. Alabama's Marriage Ban Violates The Equal Protection Clause.**

*Windsor* held that the federal government's refusal to recognize the legal marriages of same-sex couples was unconstitutional because it burdened "many aspects of married and family life, from the mundane to the profound," 133 S. Ct. at 2694, and because the "avowed purpose and practical effect" of DOMA were to treat same-sex couples unequally, rather than to further a legitimate purpose. *Id.* at 2693.

Alabama's marriage ban violate the Equal Protection Clause for similar reasons. Just as the "avowed purpose and practical effect" of Section 3 of DOMA were to exclude married same-sex couples from all protections and duties otherwise applicable to married couples under federal law, so the purpose and effect of Alabama's marriage ban is to deny same-sex couples access to the protections and

duties of marriage. As in *Windsor*, this classification violates equal protection principles in the most basic way—by singling out a disfavored group for adverse treatment, not to further any legitimate goal, but to impose inequality.

Alabama's marriage ban also violates equal protection because it discriminates on the basis of sexual orientation and gender, and thus warrants, and cannot survive, heightened scrutiny under the Equal Protection Clause. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996).[4] Numerous decisions both before and after *Windsor* have concluded that laws excluding same-sex couples from marriage, or denying recognition to the existing marriages of same-sex couples, are unconstitutional because they discriminate against gay men and lesbians based on their sexual orientation. *See, e.g.*, *Baskin*, 766 F.3d at 671; *Latta*, 771 F.3d 456. *See also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010); *Varnum v. Brien*, 763 N.W.2d 862, 890 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*,

[4] Although this Court previously has held that rational-basis scrutiny applies to laws that discriminate on the basis of sexual orientation, *see Lofton v. Sec'y, Fla. Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18 (11th Cir. 2004), that holding cannot be reconciled with the Supreme Court's analysis in *Windsor*. "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin*, 766 F.3d at 671. "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481.

957 A.2d 407, 435 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 429 (Cal. 2008).

Heightened scrutiny also applies because Alabama's marriage laws expressly classify based on gender. It is undisputed that each of the Plaintiffs in this case would be permitted to marry his chosen male partner if he was a woman; each is prohibited from doing so solely because he is a man. This is gender discrimination. *See Latta*, 771 F.3d 456 (Berzon, J., concurring). Alabama's marriage ban also rests on gender-based expectations or stereotypes, including such gendered expectations as that a woman should marry a man and that a man should form his most intimate personal relationship with a woman. But as the Supreme Court has stated, "overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot justify gender-based classifications of individuals. *Virginia*, 518 U.S. at 533.

**C. Alabama's Marriage Ban Violates The Due Process Clause.**

Plaintiffs are likely to succeed on their claim that Alabama's marriage ban violates their fundamental right to marry. The Supreme Court has repeatedly held that the freedom to marry is a fundamental right deeply rooted in privacy, liberty, and freedom of intimate association. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974);

*Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987).

The Supreme Court has held that individuals in same-sex relationships have the same liberty and privacy interest in their intimate relationships as other people. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). In *Windsor*, the Supreme Court reaffirmed that principle and further held that legally married same-sex couples—like some of the Plaintiffs in this case—have a protected liberty interest in their marriages, and that the marriages of same-sex couples and opposite-sex couples must be treated with "equal dignity." *Windsor*, 133 S. Ct. at 2693.

These precedents establish that persons in same-sex relationships have the same stake as others in the underlying autonomy, privacy, and associational interests protected by the fundamental freedom to marry. When determining the contours of a fundamental right, the Supreme Court has never held that the right can be limited based on who seeks to exercise it or on historical patterns of discrimination.

The position urged by Defendant—that Plaintiffs seek not the same right to marry as others, but a new right to "same-sex marriage—repeats the analytical error made by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court erroneously framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id*. at 190. As the Supreme Court explained when it reversed *Bowers* in *Lawrence*, that

statement "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. Similarly here, there is no principled basis for framing the right at stake as a new right specific only to gay and lesbian persons. Plaintiffs and other same-sex couples in Alabama seek to exercise the same right to marry enjoyed by all other citizens of this nation. Alabama's marriage ban deprives Plaintiffs of that fundamental right, requiring application of strict scrutiny under the Due Process Clause.

### D. Alabama's Marriage Ban Cannot Survive Any Level Of Scrutiny, Let Alone Heightened Scrutiny.

Regardless of the applicable level of scrutiny, Plaintiffs are likely to succeed on their constitutional claims because there is no rational connection between Alabama's discriminatory marriage laws and any conceivable legitimate aim of government.

There is no rational connection between barring same-sex couples from marriage and the promotion of "responsible procreation" by opposite-sex couples, "linking children to their biological parents," Motion at 8, or any other conceivable justification relating to parenting or child welfare. To the extent the protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed before Alabama's exclusionary laws were enacted, and they would continue to exist if those laws are struck down. *See, e.g., Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012). Excluding same-sex couples from

marriage does not rationally further the goal of creating stable family units for raising children. To the contrary, the exclusion *undermines* that goal. By treating same-sex relationships as unequal and unworthy of recognition, the state "humiliates" the children "now being raised by same-sex couples" in Idaho, bringing them "financial harm" by depriving their families of a host of benefits and "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families." *Windsor*, 133 S. Ct. at 2694-95. Prohibiting same-sex couples from marrying does not enhance the stability of families headed by married couples raising their biological children, but serves only to harm the children now being raised by same-sex couples.

Similarly, Defendant's argument that allowing same-sex couples to marry may make "parents and potential parents . . . less likely to become married or to stay married" lacks any "footing in . . . realit[y]." *Heller v. Doe*, 509 U.S. 312, 321 (1993). This argument is premised on the irrational suggestion that if same-sex couples are allowed to marry, "a man who has a child with a woman will conclude that his involvement in that child's life is not essential." *Latta*, 771 F.3d 456. *See also Kitchen*, 755 F.3d at 1223 (holding that it was "wholly illogical" to suggest that permitting same-sex couples to marry would affect opposite-sex couples' choices). In short, Alabama's marriage ban lacks even a rational basis, let alone the compelling

justification required to deprive Plaintiffs and other same-sex couples of their fundamental right to marry.

## II. DEFENDANT HAS FAILED TO ESTABLISH THAT HE WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

Defendant has offered no evidence that he will suffer any harm, much less *irreparable* harm, if the District Court's injunction remains in effect while this appeal is pending. He identifies no meaningful burden to the State of Alabama or its agencies or political subdivisions that would arise if the state is required to issue marriage licenses to same-sex couples while this appeal is pending. Nor has he made any showing that harm to the state is not only probable but *irreparable—i.e.*, that any claimed injury to the state is incapable of being remedied at a later date if the District Court decision is ultimately reversed.

Defendant argues that enjoining the enforcement of a state law is in itself a form of irreparable injury to the state. Motion at 10. That is equally true of *any* case in which a court preliminarily enjoins a state law because the law is likely unconstitutional. Defendant's argument, taken to its conclusion, would mean that a preliminary injunction can *never* be granted in a constitutional challenge, and that any injunction in such a case must *always* be stayed pending appeal. That manifestly is not the law.

Defendant also complains that in the absence of a stay, the issuance of marriage licenses to same-sex couples would result in uncertainty concerning the

validity of those marriages. But there will be no uncertainty. The law is clear that marriages validly entered into pursuant to the District Court's injunction while this appeal is pending will remain valid regardless of the outcome of the appeal. *See Caspar v. Snyder*, No. 14–CV–11499, -- F. Supp. 3d --, 2015 WL 224741, *27 *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *17 (D. Utah May 19, 2014)).

## III. THE HARM PLAINTIFFS WILL SUFFER IF A STAY IS GRANTED FAR OUTWEIGHS ANY HARM TO DEFENDANT FROM COMPLYING WITH THE DISTRICT COURT'S INJUNCTION.

When a party seeks a stay pending appeal, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). Here, while Defendant has not shown that Alabama would suffer any harm in the absence of a stay, the challenged laws cause serious, continuing, and irreparable harm to Plaintiffs and other same-sex couples—and to their children—each day they remain in effect.

The challenged measures violate the fundamental constitutional rights to due process and equal protection. Under well-settled law, any deprivation of

constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In addition, staying the order would injure Plaintiffs by exposing them to irreparable and continuing insecurity, vulnerability, and stigma. Numerous legal benefits and responsibilities flow from a valid marriage. Indeed, the purpose of marriage, in large part, is to provide security and protection in the face of anticipated and unanticipated hardships and crises—*e.g.*, in the face of death, aging, illness, accidents, incapacity, and the vicissitudes of life. As the District Court found, Plaintiff Strawser is facing significant health issues that put his life at great risk. Prior to previous hospitalizations, Plaintiff Strawser had given Plaintiff 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. *See* Motion, Ex. A. at 2. In addition, Plaintiff Strawser's mother faces health issues, and he is concerned that Plaintiff Humphrey will not be permitted to assist his mother with her affairs should Strawser pass away in the near future. *Id.*

Plaintiffs and other Alabama same-sex couples who wish to marry are subjected to irreparable harm every day they are forced to live without the security that marriage provides. That harm is not speculative, but immediate and real. Plaintiffs and other couples are presently harmed in facing the events of their lives

in the coming months without being able to plan or approach the future with the certainty and stability marriage is intended to afford. Moreover, many of the protections marriage provides—such as the right to receive social security benefits as a surviving spouse—hinge directly on the length of the marriage. Therefore, by preventing couples who wish to marry now from doing so, a stay would have irreparable consequences for many couples who will be denied benefits or receive significantly diminished protections as a direct result of that delay.

A stay would also inflict irreparable injury on Plaintiffs and other same-sex couples, by exposing them and their families to continuing stigma. As the Supreme Court recognized in *Windsor,* discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects" and "humiliates" their children, making 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. The consequences of such harms can never be undone.

## IV. THE PUBLIC INTEREST STRONGLY WEIGHS AGAINST A STAY.

For many of the same reasons, the final factor—the public interest—also weighs strongly against a stay pending appeal. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Moreover, the public

is harmed when families and children are deprived of the benefits and stability that that marriage provides. The public has no interest in enforcing unconstitutional laws or in relegating same-sex couples and their families to a permanent second-class status and perpetual state of financial and legal vulnerability.

## CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court to deny Defendant's motion to stay.

DATED: January 30, 2015

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 30, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christopher F. Stoll