NEWS ADVISORY

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Alabama Attorney General

FOR IMMEDIATE RELEASE
January 26, 2015

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AG STRANGE FILES APPEAL AND MOTION FOR STAY OF FEDERAL DISTRICT COURT RULING DECLARING ALABAMA'S SAME-SEX MARRIAGE BAN UNCONSTITUTIONAL

(MONTGOMERY) –Alabama Attorney General Luther Strange has filed an appeal and a motion to stay a federal court order overturning Alabama's definition of marriage as between one man and one woman.

Attorney General Strange filed the appeal and motion to stay with the U.S. 11th Circuit Court of Appeals Monday. The actions follow the Attorney General's request to stay the U.S. District Court's January 23, 2015, ruling. U.S. District Judge Callie Granade of Mobile granted the stay request on January 25, 2015, for a period of 14 days to allow the State of Alabama time to appeal to the 11th Circuit Court of Appeals.

"My office has filed an appeal and a motion to stay the federal District Court's decision and we are preparing our case to defend Alabama's laws prohibiting same-sex marriage," said Attorney General Luther Strange. "Unfortunately, the District Court's ruling to strike down Alabama's marriage laws has created uncertainty and confusion among the public over the law. My office has moved quickly to bring the issue before the 11th Circuit Court of Appeals to ensure that Alabama's laws are defended. Ultimately, the U.S. Supreme Court is scheduled to address the issue of same-sex marriage in a few months."

Note: The documents are available at these links:

http://www.ago.alabama.gov/File-2015-01-26-Motion-to-Stay

http://www.ago.alabama.gov/File-2015-01-26-Notice-of-Appeal

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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)

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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)
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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:

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Of Counsel

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
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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:

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