UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

vs. **Appeal Docket No.: 14-14061**

JOHN H. ARMSTRONG, et al.,

Defendants-Appellants.

BRENNER APPELLEES' RESPONSE IN OPPOSITION TO MOTION TO EXTEND STAY OF PRELIMINARY INJUNCTIONS PENDING APPEAL, AND FOR EXPEDITED TREATMENT OF THIS MOTION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

16 Scholars of Federalism and Judicial Restraint, Amicus Curiae

Joyce Albu, Plaintiff-Appellee

Helen M. Alvare, Amicus Curiae

Alliance Defending Freedom, Amicus Curiae

American College of Pediatricians, Amicus Curiae

Ryan Anderson, Amicus Curiae

Carlos Andrade, Plaintiff-Appellee

John H. Armstrong, Defendant-Appellant

Harold Bazzell, Defendant-Appellant

The Beckett Fund for Religious Liberty, Amicus Curiae

David Boyle, Amicus Curiae

James Domer Brenner, Plaintiff-Appellee

Anthony Citro, Amicus Curiae

Bob Collier – Plaintiff-Appellee

Concerned Women for America, Amicus Curiae

Leslie Cooper, Esquire, Counsel for Plaintiffs-Appellees

Bryan E. DeMaggio, Esquire, Counsel for Plaintiffs-Appellees

John Fitzgerald, Plaintiff-Appellee

Florida Family Action, Inc., Amicus Curiae

Florida Conference of Catholic Bishops, Inc., Amicus Curiae

Thomas Gantt, Jr., Plaintiff-Appellee

Gary J. Gates, Amicus Curiae

Robert P. George, Amicus Curiae

Arlene Goldberg, Plaintiff-Appellee

Carol Goldwasser, Plaintiff-Appellee

James Goodman, Jr., Esquire, Counsel for Defendant-Appellant

Sloan Grimsley, Plaintiff-Appellee

Eric Hankin, Plaintiff-Appellee

Juan Del Herro – Plaintiff-Appellee

Hon. Robert L. Hinkle, U.S. District Judge

Howard University School of Law Civil Rights Clinic, Amicus Curiae

Denise Hueso, Plaintiff-Appellee

Sarah Humlie – Plaintiff-Appellee

Chuck Hunziker, Plaintiff-Appellee

Samuel S. Jacobson, Esquire, Counsel for Plaintiffs-Appellees

Charles Dean Jones, Plaintiff-Appellee

Maria Kayanan, Esquire, Counsel for Plaintiff-Appellees

The Lighted Candle Society, Amicus Curiae

Robert Oscar Lopez, Amicus Curiae

Robert Loupo, Plaintiff-Appellee

Marriage Law Foundation, Amicus Curiae

Paul McHugh, Amicus Curiae

Horatio G. Mihet, Esquire, Counsel for Amicus Curiae

Richard Milstein, Plaintiff-Appellee

Leslie Myers, Plaintiff-Appellee

Sandra Newson, Plaintiff-Appellee

Craig J. Nichols, Defendant-Appellant

North Carolina Values Coalition, Amicus Curiae

Stephen F. Rosenthal, Counsel for Plaintiffs-Appellees

Ozzie Russ, Plaintiff-Appellee

Scholars of the Institution of Marriage, Amicus Curiae

Stephen Sclairet, Plaintiff-Appellee

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Charles A. Stampelos, U.S. Magistrate Judge

Daniel B. Tilley, Esquire, Counsel for Plaintiff-Appellee

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U.S. Conference of Catholic Bishops, Amicus Curiae

Scott Tannenbaum, Esquire, Counsel for Defendant-Appelalnt

Gordon Wayne Watts, Amicus Curiae

Elizabeth L. White, Esquire, Counsel for Plaintiffs-Appellees

Allen C. Winsor, Esquire, Counsel for Defendant-Appellant

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Appellees, James Brenner, et al., through their undersigned counsel, file this Response in opposition to Appellants' Motion to Extend Stay of Preliminary Injunctions Pending Appeal, and for Expedited Treatment of this Motion. For the reasons set forth herein, Appellants' Motion to Extend Stay of Preliminary Injunctions Pending Appeal, and for Expedited Treatment of this Motion should be denied.

INTRODUCTION

The issue in this appeal is whether the Fourteenth Amendment requires Florida to recognize same-sex marriages. The district court held that it did, and it preliminary enjoined enforcement of Florida's marriage laws. Notably, in its order, the district court also recognized that the State of Florida's prohibition on

same-sex marriage harms the Plaintiffs. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014). Notwithstanding this undisputed harm, the Appellants ask this Court to extend the stay. However, Appellants have not met their burden of showing that they are entitled to an extended stay under the law of this Circuit. Appellants do not have a likelihood of succeeding on appeal and an extended stay would not serve the public interest. Appellees would suffer numerous hardships of constitutional magnitude if the stay were extended, while the Appellants have not shown how they would suffer in any meaningful way if the Order were enforced. Accordingly, Appellant's motion to extend the stay should be denied.

PROCEDURAL BACKGROUND

Appellees are satisfied with Appellants' Statement of Procedural Background and hereby adopt the same pursuant to 11th Cir.R. 28-1(f) and 28-2.

SUBJECT-MATTER AND APPELLATE JURISDICTION

Appellees are satisfied with Appellants' Statement of Subject-Matter and Appellate Jurisdiction and hereby adopt the same pursuant to 11th Cir.R. 28-1(f) and 28-2.

ARGUMENT

I. STANDARD IN THIS CIRCUIT FOR GRANTING A STAY

Whether a stay is appropriate depends on "the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation and

citation omitted). A stay "is not a matter of right" and the party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief. *Id.* at 433-34. There are four factors to be considered: (1) "a strong showing" that the party requesting the stay will succeed on the merits; (2) the presence of irreparable injury by the party seeking the stay; (3) whether the stay will substantially injure other parties to the litigation; and (4) and whether the public interest is served by the grant of the stay. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); see also *Nken*, 556 U.S. at 434.

II. THE APPELLANTS HAVE MADE NO "STRONG SHOWING" THAT THEY ARE LIKELY TO SUCCEED ON APPEAL AND, INDEED, THEY ARE UNLIKELY TO SUCCEED ON APPEAL.

Appellants are not likely to succeed on the merits of their appeal and have made no "strong showing" otherwise. Instead, they have simply reiterated the same arguments that have already been set forth *ad nauseum*. These arguments are unpersuasive for the following reasons: (1) *Baker v. Nelson* does not foreclose Appellees' claims; (2) Appellees have a fundamental right to marry; (3) the fact that same-sex marriage is a relatively new concept does not mean that Appellees do not have a fundamental right to marry; (4) *Lofton* is no longer good law; and (5) the United States Supreme Court is unlikely to intervene in this matter. Therefore, Appellants are not likely to succeed on appeal.

A. Baker v. Nelson Does Not Foreclose Appellees' Claims.

Appellants argue that *Baker v. Nelson*, 409 U.S. 810 (1972), remains binding precedent. However, the Supreme Court's summary affirmance in *Baker* does not control Appellees' claims. In *Baker,* the Supreme Court dismissed "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple. However, summary dismissals "do not... have the same precedential value... as does an opinion of [the Supreme] Court after briefing and oral argument on the merits." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The precedential reach of a summary dismissal by the Supreme Court is extremely limited. "'A summary disposition affirms only the judgment of the court below, and no more may be read into [such disposition] than was essential to sustain that judgment.'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)). The Supreme Court's summary dismissals are binding on lower courts only "on the precise issues presented and necessarily decided," *Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (per curiam), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's case law. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (internal quotation marks omitted).

The Supreme Court's summary disposition of the due process question in *Baker* is not controlling here because *Baker* cannot be reconciled with the Court's subsequent "doctrinal developments." *Id.* At the time *Baker* was decided, no jurisdiction in the world permitted same-sex couples to marry. *Baker* therefore presented no issue regarding the recognition of marriages entered into in another state. Moreover, "[i]n the forty years after *Baker,* there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States,* 699 F.3d 169, 178-79 (2d Cir.) (2012). *Baker* was decided before the Supreme Court recognized that sex is a quasi-suspect classification, *see Craig v. Boren,* 429 U.S. 190, 197 (1976); *Frontiero v. Richardson,* 411 U.S. 677, 688 (1973) (plurality op.), and before the Court recognized in *Romer* and *Windsor* that the Constitution protects gay men and lesbians from discrimination based on their sexual orientation. *Romer v. Evans,* 517 U.S. 620, 631-32 (1996); *United States v. Windsor,* 133 S. Ct., 2675, 2695-96 (2013). With respect to due process, at the time *Baker* was decided, the Supreme Court had not yet held that same-sex couples have the same protected liberty interests in their relationships as others. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Nor had the Court affirmed that "the right to marry is of fundamental importance for all individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), or held that incarcerated persons who are unable to procreate nonetheless have a protected right to marry. *Turner v. Safely*, 482 U.S. 78, 94-97

(1987). And of course, the Court had not considered a case involving married same-sex couples or held that "the injury and indignity" caused by the government's refusal to recognize the lawful marriage of such a couple is "a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Windsor*, 133 S. Ct. at 2692-93.

In addition, just last year, during oral argument in the Supreme Court, concerning California's exclusion of same-sex couples from marriage, the attorney defending California's ban argued that *Baker* was controlling. Justice Ginsburg observed: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.... I don't think we can extract much in *Baker v. Nelson*." Tr. of Oral Argument at 12, *Hollingsworth v. Perry*, No. 12-144, 133 S. Ct. 2652 (2013). *Baker* was not mentioned by any other Justice during the argument, and none of the opinions in *Hollingsworth* or in *Windsor* mentioned *Baker*. *See Hollingsworth*, 133 S. Ct. at 2652; *Windsor*, 133 S. Ct. at 2675. Thus, these "manifold changes" in the Supreme Court's jurisprudence have nullified *Baker's* precedential force.

B. Appellees Have a Fundamental Right to Marry.

The right asserted by the Appellees is the right to marry. The Supreme Court has repeatedly recognized that this is a fundamental right. Thus, for example, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court held that Virginia's ban on

interracial marriage violated the Due Process and Equal Protection clauses, even though similar bans were widespread and of long standing. The court did not cast the issue as whether the right to *interracial* marriage was fundamental. *Kitchen v. Herbert*, 755 F.3d 1193, 1210 (10th Cir.) *cert. denied*, 135 S. Ct. 265 (2014) ("[In *Loving*] the right at issue was "the freedom of choice to marry.")

Similarly, in *Zablocki,* the Court labeled the right to marry as fundamental and struck down, on equal-protection grounds, a Wisconsin statute that prohibited residents with unpaid court-ordered child-support obligations from entering new marriages. The Court did not ask whether the right not to pay child support was fundamental, or whether the right to marry while owing child support was fundamental; the Court started and ended its analysis on this issue with the accepted principle that the right to marry is fundamental.

The Court took the same approach in *Turner*. A Missouri regulation prohibited prisoners from marrying other than for a compelling reason. The Court said the state's interests in regulating its prisons were insufficient to overcome the prisoners' fundamental right to marry. The Court did not ask whether there is a fundamental right to marry while in prison, as distinguished from the more general right to marry.

Thus, the right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice-not on the partner

chosen. *See generally Loving,* 388 U.S. at 12; *Turner,* 482 U.S. at 95. As the Supreme Court explained in *Lawrence,* "our laws and tradition afford constitutional protection to personal decisions relating to marriage ... [and] family relationships" because of the "respect the Constitution demands for the autonomy of the person in making these choices" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574. The scope of a fundamental right is not defined by the identity of the people who seek to exercise it or who have been excluded from doing so in the past. Instead, the scope of a fundamental right is defined by the attributes of the right itself—in other words, the nature of the autonomy sought. "[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen*, 755 F.3d at 1215. Therefore, Appellees have a fundamental right to marry.

C. The Fact That Same-Sex Marriage is a Relatively New Concept Does Not Mean That Appellee's Do Not Have a Fundamental Right to Marry.

Appellants argue that because same-sex marriage is a relatively new concept, it is not deeply rooted in this Nation's history and tradition, and thus, it is not a fundamental right. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). However, in numerous cases, the Supreme Court has struck down infringements of fundamental rights or liberty interests even though plaintiffs

themselves were not historically afforded those rights. *See e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving*...."); *Turner*, 482 U.S. 78 (striking down restriction on inmates' ability to marry); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not burden divorced person's fundamental right to marry, even though no historical right to divorce and remarry).

For much of our nation's past, states routinely barred prisoners from marrying. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 278 (1985) (noting that such restrictions were "almost universally upheld"). But in *Turner*, the Court held that incarcerated persons have the same freedom to marry as others. 482 U.S. at 95-96. The Court did not limit the freedom to marry based on the long history of excluding prisoners from marriage. Instead, the Court examined the core attributes of marriage that cause it to be protected as a fundamental right and concluded that prisoners shared the same interest as others in those important, defining attributes. The Court held that even incarcerated prisoners with no right to conjugal visits have a fundamental right to marry

because "[m]any important attributes of marriage remain... after taking into account the limitations imposed by prison life... [including] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." *Id.* at 95-96.

Similarly, for most of our nation's history, the freedom to marry did not include a right to remarry upon divorce. But in the modern era, the Supreme Court has held that states may not burden an individual's right to remarry. *Boddie*, 401 U.S. at 382-83 (holding that state law requiring indigent persons to pay court fees to petition for divorce unduly burdened their fundamental right to remarry). In the same vein, modern contraceptives have been available only since the early decades of the twentieth century. Yet the Supreme Court in *Griswold* did not hesitate to hold that barring married couples' access to contraceptives violated their fundamental right to marital privacy. 381 U.S. at 485-86. The history of marriage in Florida and elsewhere around the country belies any argument that marriage is static and defined by its historic limitations. Same-sex couples are no less capable of participating in, and benefitting from, and have no less of a personal interest and stake in, the constitutionally protected attributes of marriage than others.

As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. *Windsor*, 133 S. Ct. at 2689

(explaining that when permitting same-sex couples to marry, New York corrected "what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood"). Therefore, the fact that same-sex marriage is a relatively new concept does not mean that Appellees do not have a fundamental right to marry.

D. *Lofton* is No Longer Good Law.

Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), does not bind this court to find that heightened scrutiny should not be applied in the instant case. First of all, *Lofton* says nothing about whether marriage is a fundamental right. As discussed, above, marriage is a fundamental right and therefore, heightened scrutiny is appropriate under the Due Process and Equal Protection clauses. Florida's marriage laws are also subject to heightened scrutiny because they discriminate on the basis of sexual orientation.

Appellants argue that *Lofton* establishes that sexual orientation is not a suspect classification for equal protection purposes. However, this Court should not apply *Lofton* in the instant case because *Lofton* has been effectively overturned by the intervening Supreme Court decision in *Windsor*. The *Windsor* decision meets the Eleventh Circuit's own standard for when to abandon precedent.

This court may abandon decisions of a prior panel to give effect to an intervening Supreme Court decision. The Eleventh Circuit has previously held that

it may abandon its precedent, should a conflicting ruling come down from the United States Supreme Court. In doing so, the Eleventh Circuit expressly held "A panel of [the Eleventh Circuit] may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court of the United States." *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992). Accordingly, the mere existence of *Lofton* does not preclude the Eleventh Circuit from applying some form of heightened scrutiny to the instant case.

The Eleventh Circuit may give full effect to intervening decisions of the Supreme Court only when those decisions have "actually overruled or conflicted with" prior Eleventh Circuit precedent. The quoted text from *Lufkin* raises the questions of when precisely a departure from precedent is necessary to give full effect to a decision of the Supreme Court (or, alternatively, when such a departure is unnecessary). The test is whether or not the conflicting Supreme Court decision actually has a different holding, or merely conflicting dicta. "For the Supreme Court to overrule a case, its decision must have actually overruled or conflicted with [this court's prior precedent]." *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008) (quoting *United States v. Marte*, 356 F.3d 1336, 1344 (11th Cir.2004)). "There is a difference between the holding in a case and the reasoning that supports that holding." *Id.* at 1237. (citing *Atlantic Sounding Co., Inc. v.*

Townsend, 496 F.3d 1282, 1284 (11th Cir.2007)). "Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision." *Id.* However, an Eleventh Circuit decision may still be "undermined to the point of abrogation by the Supreme Court." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (holding that the Eleventh Circuit's prior test as to what constitutes a "violent felony" under the Federal Sentencing Guidelines had been superseded by a Supreme Court ruling in an analogous case). Taken together, all that is necessary for this Court to abandon Eleventh Circuit precedent is a directly conflicting holding from the Supreme Court or a directly conflicting analytical framework from the Supreme Court that goes beyond mere dicta.

The *Windsor* decision undermines *Lofton* to the point of abrogation. If the Eleventh Circuit may not be required to follow its own precedent pursuant to the test in *Vega-Castillo*, the only remaining question is whether or not *Windsor* actually conflicts with *Lofton*. Appellants claim that *Lofton* precludes heightened scrutiny for sexual orientation. However, there is ample evidence to support the conclusion that *Windsor* indeed directly overturns *Lofton*.

First, the *Windsor* case affirmed a decision by the Second Circuit, which clearly applied heightened scrutiny. *See Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) *aff'd*, 133 S. Ct. 2675 (U.S. 2013). Second, Justice Scalia's

dissent in Windsor, concedes that "the Court certainly does not apply anything that resembles [the rational-basis] framework." *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting). Third, an analysis of what the Supreme Court actually did in *Windsor* indicates that, at minimum it adopted a heightened scrutiny standard. The majority opinion in *Windsor*: 1) did not look for post-hoc rationalizations for DOMA; 2) required that the state provide a legitimate state interest to support DOMA; and 3) relied primarily on decisions where the right in question was subject to heightened scrutiny.

The Eleventh Circuit has, on numerous occasions, gone against its own precedent when an intervening Supreme Court decision has overruled it. These instances should be kept in mind by this Court in the instant case, when it considers whether or not to apply *Lofton*. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004); *Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933 (11th Cir. 1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996); *Lufkin v. McCallum*, 956 F.2d 1104, 1108 (11th Cir. 1992). Given the aforementioned reasons, this Court should not reflexively apply *Lofton* to the instant case. The *Lofton* decision has been effectively overturned by an intervening Supreme Court decision, and an abandonment of *Lofton* would square with prior instances where the Eleventh Circuit has refused to follow its own prior decisions.

Disregarding *Lofton*'s precedent would not constitute federal intrusion on state decision making, since the Florida ban on same-sex adoption at the center of *Lofton*'s controversy, is no longer the law in Florida. In *Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 82 (Fla. 3d DCA 2010), the Third District Court of Appeals held that Section 63.042(3), Florida Statutes (2006), violated the Equal Protection Clause of the Florida Constitution, applying rational basis review. *Id.* at 90. The court found that there was insufficient evidence to support the state's contentions that same-sex couples were less qualified as parents than opposite-sex couples. *Id.* at 86. Furthermore, the court found that the statute was under-inclusive, since nothing in Florida law prevents homosexual persons from serving as foster guardians, and over-inclusive, because the statute prohibited same-sex couples from adopting children where the adoption would be in the best interests of the child. *Id.* at 90. The state chose not to appeal after the court issued its ruling, and the state has since stopped denying same-sex adoptions. Thus, *Lofton* is no longer good law, even in the state of Florida, much less the Eleventh Circuit.

E. The United States Supreme Court is Unlikely to Intervene in This Matter.

Federal courts in virtually every circuit and every state with a same-sex marriage ban have heard lawsuits challenging the constitutionality of state law provisions. These suits commonly involve challenges by same-sex couples

seeking marriage licenses and/or same-sex couples validly married in another state attempting to obtain home state recognition of their marital status. Four Federal Courts of Appeal have held that state law bans on same-sex marriage violate the constitutional rights of same-sex couples: the Fourth, Seventh, Ninth, and Tenth Circuit. One appellate court, the Sixth Circuit, recently held that there is no constitutional right to same-sex marriage, overturning lower court decisions in Kentucky, Michigan, Ohio and Tennessee. *DeBoer v. Snydner,* 2014 WL 5748990 (6th Cir. Nov. 6, 2014), overturning lower court decisions in *Love v. Beshear,* 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Henry v. Himes,* 2014 WL 1418395 (S.D. Ohio Apr. 14,2014); *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Lee* v. *Orr,* No. 13-cv-8719, 2014 WL 684680 (N.D. Ill. Feb. 21,2014); *Bourke* v. *Beshear,* 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Obergefell* v. *Wymyslo,* 962 F. Supp. 2d 968 (S.D. Ohio 2013). The United States Supreme Court, on October 6, 2014, declined to grant review of the decisions of the Fourth, Seventh and Tenth Circuits, leaving their judgments in place. *See Latta v. Otter*, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 2014 WL 4425162 (Oct. 6, 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. July 18, 2014), *cert. denied*, 2014 WL 3854318 (Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert denied*, 2014 WL

3841263 (Oct. 6, 2014). Additionally, a clear majority of federal district courts that have addressed this issue have found state same sex marriage bans unconstitutional. *See Lawson v. Kelly,* No. 14-cv-0622 (W.D. Mo. Nov. 7, 2014); *Marie v. Moser,* No. 14-cv-2518, 2014 WL 5598128 (D. Kan. Nov. 4, 2014); *Connolly v. Jeanes,* No. 2:14-cv-00024, 2014 WL 5320642 (D. Ariz. Oct. 17,2014); *Majors* v. *Horne,* 2014 WL 5286743 (D. Ariz. Oct. 16,2014); *Fisher-Borne v. Smith,* 2014 WL 5138914 (M.D.N.C. Oct. 14,2014); *Hamby v. Parnell,* 2014 WL 5089399 (D. Alaska Oct. 12,2014); *Gen. Synod of the United Church of Christ v. Resinger,* 12 F. Supp. 3d 790 (W.D.N.C. 2014); *Brenner*, 999 F. Supp. 2d 1278; *Bowling v. Pence,* 2014 WL 4104814 (S.D. Ind. Aug. 19,2014); *Burns v. Hickenlooper,* No. 14-cv-1817, 2014 WL 3634834 (D. Colo. July 23, 2014) (preliminary injunction), *made permanent by* 2014 WL 5312541 (D. Colo. Oct. 17, 2014); *Baskin v. Bogan,* 12 F. Supp. 3d 1144 (S.D. Ind. 2014), *aff'd,* 766 F.3d 649 (7th Cir. 2014); *Wolf v. Walker,* 986 F. Supp. 2d 982 (W.D. Wis. 2014), *aff'd,* 766 F.3d 648 (7th Cir. 2014); *Whitewood v. Wolf,* 992 F. Supp. 2d 410 (M.D. Pa. May 20,2014); *Geiger v. Kitzhaber,* 994 F. Supp. 2d 1128 (D. Or. May 19, 2014*); Latta v. Otter,* 2014 WL 1909999 (D. Idaho May 13,2014), *aff'd,* 2014 WL 4977682 (9th Cir. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd* 760 F.3d 352 (4th Cir. 2014); *Bishop v. us. ex rei. Holder,* 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *aff'd,* 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert,* 961 F. Supp. 2d

1181 (D. Utah 2013), *aff'd,* 755 F.3d 1193 (l0th Cir. 2014). *But see Conde-Vidal v. Garcia-Padilla,* 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell,* 2 F. Supp. 3d 910 (E.D. La. 2014). In Montana, U.S. District Judge Brian Morris struck down the state's marriage law, did not stay his ruling, and several same-sex couples married later that day. *Rolando v. Fox*, No. CV-14-40-GF-BMM, 2014 WL 6476196 (D. Mont. Nov. 19, 2014). In Kansas, the Supreme Court recently declined to keep a stay on a decision that legalized gay marriage. *Moser v. Marie*, No. 14A503, 2014 WL 5847590, at *1 (U.S. Nov. 12, 2014). Thus, four out of five appellate court decisions and the overwhelming majority of the district court decisions favor the Appellees' position.

Appellants argue that the United States Supreme Court might review the issue now that there is a circuit split. However, not every decision is heard and decided by the United States Supreme Court. In fact, very few are. Recently, in an order denying a request by Arizona officials on an immigration issue, Justice Thomas published a statement, joined by Justice Scalia. *Maricopa Cnty., Ariz. V. Lopez-Valenzuela*, No. 14A493, 2014 WL 5878739, at *1-2 (U.S. Nov. 13, 2014). Thomas complained that, while the court has generally heard cases when federal or state laws have been found to be unconstitutional by lower courts, the justices "have not done so with any consistency, especially in recent months" – citing the court's decisions to deny the marriage case appeal requests out of Utah, Oklahoma,

Virginia and Wisconsin and the stay requests denied since in marriage cases pending in Idaho and Alaska. *Id.* Thomas and Scalia joined the order denying Arizona's request "because there appears to be no 'reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.'" *Id.* (citing *Hollingsworth*, 558 U.S. at 190). Thomas stated further, "I hope my prediction about whether that petition will be granted proves wrong. Our recent practice, however, gives me little reason to be optimistic." *Id.* Therefore, the Supreme Court is unlikely to intervene in this matter.

In light of the analysis above, Appellants cannot carry their burden of showing a likelihood of success on appeal.

III. THERE IS NO THREAT OF IRREPARABLE HARM TO THE APPELLANTS ABSENT AN EXTENDED STAY.

Appellants must show that there is a threat of irreparable harm to them absent issuance of an extended stay. The district court clearly found that the State of Florida would not suffer irreparable harm by allowing same-sex couples to marry because it found that the State failed to show any relationship, let alone a rational relationship, between the purported state interests and allowing same-sex couples to marry. *Brenner*, 999 F. Supp. 2d at 1291 ("The proffered justifications have all been uniformly found insufficient. Indeed, the states' asserted interests would fail even intermediate scrutiny, and many courts have said they would fail rational-basis review as well. On these issues the circuit decisions in *Bostic,*

Bishop, and *Kitchen* are particularly persuasive.") Accordingly, allowing same-sex marriages to occur pending the appeal of this matter will not damage any legitimate state interest.

Even without this finding, Appellants have not explained how allowing same-sex couples to marry, thereby assuring their access to equal rights pending appellate review, would cause any harm to the State, or to any other party. The State has not pointed to any burden caused by this Court's decision, other than to voice an unsubstantiated and speculative harm from operating under "a risk of confusion." (Motion, p. 13). However, any abstract "harm" alleged by the Appellants cannot justify depriving Appellees and other same-sex couples of their constitutional rights, or outweigh the real, concrete injuries resulting to the Appellees which the Appellants have admitted in their motion. *Id.* ("It is true that any denial of a constitutional right is a real injury…) Moreover, experiences in numerous other states illustrate that states can effectively manage changes to their marriage laws pending and following litigation concerning same-sex couples' access to marriage, and there is no need for this Court to issue an extended stay of its order.

IV. IF AN EXTENDED STAY IS GRANTED, APPELLEES AND OTHER SAME-SEX COUPLES IN FLORIDA WILL BE IRREPARABLY HARMED.

The district court has found that Appellees and other same-sex couples in Florida have been suffering constitutional injury due to Florida's marriage laws. *Brenner*, 999 F. Supp. 2d at 1291. It is well settled that any deprivation of constitutional rights "for even minimal periods of time" constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). Continuing deprivation of Appellees' (and others') fundamental right to marriage and equal protection of the law constitutes irreparable harm.

In contrast to the Appellants' speculative concerns, the harm experienced by same-sex couples in Florida as a result of their inability to marry is undisputed. To apply the Supreme Court's reasoning in *Windsor*, Florida's marriage laws tell "those couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition. This places same-sex couples in an unstable position of being in a second-tier [relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitutions protects." *Windsor*, 133 S. Ct. at 2694. Moreover, same-sex marriage bans have been found to impose on same-sex couples "profound legal, financial, social and psychic harms" that are "considerable." *Latta*, 2014 WL 4977682, at *11; *Baskin*, 766 F.3d at 658.

In this case, the fact that Appellees would continue to suffer violations of their constitutional rights and irreparable injury through ongoing ineligibility for civil marriage and the State's refusal to recognize existing marriages weighs in favor of denying the requested stay.

V. THE PUBLIC INTEREST WILL BE HARMED BY AN EXTENDED STAY.

Finally, there is no public interest in allowing an unconstitutional or illegal practice to continue. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d, 1261, 1272 (11th Cir. 2006); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981). Granting an extended stay in this case would simply allow the State of Florida to continue to violate the constitutional rights of Appellees and Florida's same-sex couples, which cannot be considered a legitimate public interest. Thus, entry of the relief sought by Appellees will serve the public interest.

The Appellants speak of avoiding confusion as to the status of same-sex marriage in the state as a purported public interest. However, of more importance to the public interest is the confusion that hangs each day over a sizable portion of Florida's citizens who are being denied the right to marry, and who as a direct result cannot plan for their retirement or their families; that confusion and uncertainty is particularly harmful to children, as noted by the Supreme Court in *Windsor*. Each day of an extended stay would prevent gay and lesbian citizens in

long-term, committed relationships from planning and doing a host of things that their heterosexual counterparts may do freely. These citizens face uncertainty due to the non-recognition of their family relationships, and the public interest is harmed by that.

Moreover, as the Supreme Court held in *Windsor* with regard to the children of same-sex couples in the United States, the harm caused to these families is palpable, real and irreparable. The State has an obligation to protect those children, as well as children in what they deem the optimal family relationship. The public interest is in continuing to require the State to do so which mandates denial of the motion to stay.

CONCLUSION

For the reasons discussed above, the Court should deny the Appellants' request to extend the stay of the Order pending appeal because they have not met their burden of showing that they are entitled to such relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 26th, 2014, I electronically filed the foregoing with the Clerk of the Eleventh Circuit by using CM/ECF System which will send a notice of electronic filing to the following:

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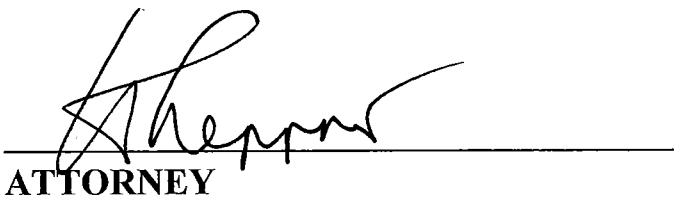

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