IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10313

JAMES STRAWSER, *et al.*, *Plaintiffs-Appellees,*
v.
LUTHER STRANGE, ATTORNEY GENERAL,
STATE OF ALABAMA, *Defendant-Appellant.*
_____/

Appeal from the U.S. District Court, Southern District of Alabama
Civil Action No. 1:14-cv-0424-CG-C, before Hon. Callie V.S. Granade

Amicus Curiae Brief of Gordon Wayne Watts in support of Atty. General's motion for stay, but offering a Compromise to redress legitimate grievances of Plaintiffs, Strawser & Humphrey

(Time-sensitive: RULING REQUESTED BEFORE FEB. 9, 2015)

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

***Strawser, et al v. Strange*,** Appeal No: 15-10313

Amicus, Gordon Wayne Watts, pursuant to 11th Cir. R. 26.1-1, hereby certifies that the following is a list of trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party those who have an interest in the outcome of this case and/or appeal:

1. Agricola, Jr., Algert Swanson, Attorney for Alabama Probate Judges Association

("APJA") & Gov. Bentley

2. Alabama Probate Judges Association

3. Allen, Wes, Probate Judge, Pike County, Alabama, APJA Treasurer

4. Bentley, Robert J., Governor of Alabama

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6. Brasher, Andrew Lynn, Solicitor General

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11. Granade, Hon. Callie V. S., United States District Judge

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U.S. COURT OF APPEALS FOR THE 11th CIR., CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
***Strawser, et al v. Strange*, Appeal No: 15-10313**

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No counsel for any party authored this brief in whole or part, nor did anyone make any monetary contribution intended to subsidise/fund preparation/submission of this brief. I, Gordon Wayne Watts, alone, both wrote & funded it. *Amicus*, Gordon Wayne Watts, is an individual, not a corporation, and accordingly does not does not issue any stock and does not have any parent corporations or any publicly held corporations that own 10 percent or more of stock of that nonexistent parent corporation.

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TABLE OF CONTENTS

Cover page (not numbered).....1
Certificate of Interested Persons and Corporate Disclosure Statement.....C1—C2
Table of Contents.....(a)
Table of Citations / Authorities.....(b)
STATEMENT OF JURISDICTION.....2
STATEMENT OF THE CASE / FACTS.....2

ARGUMENTS

I. New developments require a Stay Pending Appeal..... 3—5

II: Plaintiffs have legitimate complaints too.....5—9

III. Inferior Federal Courts don't even have jurisdiction to address 'Gay Marriage' dispute.....9—11

IV. Addressing *Baker, Romer, Lawrence, Lofton, and Windsor.*.....11—15

V. CONCLUSION.....15—16

Certificate of Compliance.....17—18

Certificate of Service.....18—19

TABLE OF CITATIONS / AUTHORITIES

Alabama Statutory and Constitutional Law:

Ala. Code §26-1-2(4), (6) (1975).....5
Ala. Code §26-10A-5(a) (1975).....7
Ala. Code §26-10A-27 (1975).....7
Ala. Code §30-1-19 (1975).....2, 6—7

Cases:

Arizonans for official English and Robert D. Park, Petitioners v. ARIZONA et al., 520 U.S. 43, at Syllabus 23, note 11.....10
Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37 (1972).....11
Bowers v. Hardwick, 478 U.S. 186 (1986).....12, 13
Brenner v. Armstrong, 14-14061, 11th Cir., 2014, perfected.....*passim*
DeBoer v. Snyder, No. 14-571 (U.S. Sup. Ct., cert accepted, 2015).....3
Doe v. Pryor, 344 F.3d. 1282, 1286 (11th Cir. 2003).....9
Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).....3
Grimsley v. Armstrong, 14-14061, 11th Cir., 2014, perfected.....*passim*
Hicks v. Miranda, 422 U.S. 332, 344 (1975).....12
Lawrence v. Texas, 539 U.S. 558 (2003).....12, 15
Lofton v. Secretary of Department of Children & Family Services, 358 F.3d 804 (11th Cir. 2004).....12—13, 15
Romer v. Evans, 517 U.S. 620.....4, 14
Searcy, et al., v. Strange, 11th Cir., No. 15-10295, *related*.....7
U.S. v. Windsor, 133 S.Ct. 2675 (2013).....15

Briefs:

"AMENDED AMICUS CURIAE BRIEF OF GORDON WAYNE WATTS, SUPPORTING PETITION OF DEFENDANT, JOHN ARMSTRONG, RE: FLORIDA LAW, BUT SUPPORTIVE OF SOME ELEMENTS OF PLAINTIFFS' PETITION," *Brenner v. Armstrong* & *Grimsley v. Armstrong*, consolidated, Nos. 14-14061, 14-14066, 11th Cir., 2014, perfected & awaiting ruling.....*passim*
"RESPONSE OF PLAINTIFFS-APPELLEES IN OPPOSITION TO APPELLANT'S TIME-SENSITIVE MOTION TO STAY," *Strawser, et al. v. Strange*, No. 15-10313, 11th Cir. 2015, *sub judice*.....*passim*

Other Materials:

DOMA (the The Defense of Marriage Act).....15
RULE 3, Fed.R.Civ.P.....6
RULE 8(a)(1)(A), Fed.R.App.P.....5
RULE 25, Fed.R.App.P.....18
RULE 29, Fed.R.App.P.....2, 17
RULE 32, Fed.R.App.P.....17

STATEMENT OF JURISDICTION

In accordance with Rule 29. Brief of an Amicus Curiae, (a) When Permitted, I hereby certify the following: I, Gordon Wayne Watts, state that I have consulted with lead attorneys for both parties, seeking consent to filing of this amicus brief, and I state that both parties have consented to its filing.

STATEMENT OF THE CASE / FACTS

Plaintiffs-Appellees, James Strawser and John Humphrey, are Alabama residents who attempted to obtain a marriage license, but were denied, because it's against Alabama Law, Ala. Code §30-1-19, the so-called "Marriage Protection Act." Their lawsuit describes a denial of various rights, such as Contract Law rights regarding the naming of a person to Power of Attorney for medical decisions, *inter alia*, as well as Equal Protection claims regarding loss of Federal Social Security benefits, which, legally, are only due a spouse. Their suit lays blame on Ala. Code §30-1-19, and seek to repeal it under due process and/or equal protection constitutional grounds. (Brief at page 5) The court below found in favour of Plaintiffs, and now the State is appealing the decision in the case at bar. *Amicus*, Watts, who has studied this issue at length, feels Plaintiffs have some legitimate complaints and has found what he believes may be some solutions that could be acceptable to both sides, and, counsel for both sides were gracious enough to grant consent to file an *amicus*, which is the instant brief, in the case *sub judice.*

Argument I. New developments require a Stay Pending Appeal

The court below found against the defendant, claiming he wasn't likely to succeed on the merits, but entered a 14-day stay, set to expire *circa* Feb. 09, 2015. **Well-settled case-law (and Order of the court below) state the 4-prong test governing 'Stays Pending Appeal':** *(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.* Defendant makes a 'balance of equities' argument, citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986), and *amicus*, Alabama Probate Judges Assn., made a 'public interests' argument (citing "substantial confusion" that would result if SCOTUS reversed). *Amicus*, Gov. Bentley, makes "biological family" & 10th Am. States' Rights arguments, but neither States' Rights, nor *Stare Decisis*, that is, precedent, *as is sometimes argued,* are absolute standards guaranteeing legality. Although defendant's motion for stay pending appeal cited the U.S. 6th Circuit's recent *DeBoer* ruling (upholding 'Gay Marriage' ban), *and* the recent grant of Certiorari by the U.S. Supreme Court, supporting his prong-4 argument (public interest), he altogether *failed* to make an argument that he's likely to succeed on the merits (prong-1). Based on the Watts *amicus*, in the *Brenner* (14-14061) and *Grimsley* (14-14066), there's one argument that guarantees defendant

will likely succeed on the merits. Said brief makes an argument that has never heretofore been advanced**:** even though polygamy has been invoked as either *obiter dictum* or for 'slippery slope' arguments, it has never been properly used as an 'Equal Protection' argument -until, that is, here**:** However, now that the Watts amicus is lodged before This Court, there is absolutely no way that 'Gay Marriage' can remain legal at all "[U]nless, of course, polygamists for some reason have fewer constitutional rights than homosexuals." *Romer v. Evans*, 517 U.S. 620, at 648 (1996). Since polygamy has a much stronger legal and historical precedent (see Watts brief, *supra*), than Gay Marriage, it would *perforce*, via Equal Protection, be impossible to grant 'Gay Marriage' any greater legal status**; and,** since polygamy is **very** unlikely to become legal in the near future, then Gay Marriage is even more certain to fail, and thus defendant, Luther Strange, has made a strong showing that he's likely to succeed on the merits, even if it was by proxy (by the instant memorandum of law), thus fully satisfying prong-1 and requiring a stay pending appeal in the case at bar. These facts, when added to the points *supra*, only clinch what is already certain legal justification for granting a stay pending appeal. Furthermore, a stay pending appeal is typically mandatory in many state courts, implying that, absent "extreme" circumstances (life-or-death jeopardy), a stay pending appeal is appropriate. Even if the court below fails to issue a stay

pending appeal, This Court has "oversight" responsibility (see: Fed.R.App.P., RULE 8(a)(1)(A)), and, so, as the old saying goes: "The buck stops here."

Argument II: Plaintiffs have legitimate complaints too

Even though plaintiffs are certain to lose on the merits, with regard to the definition of 'marriage,' they do have legitimate grievances, which I shall endeavor to address in Argument II, here:

First, they complain (Brief, pp.1-2, 17) about the ability to appoint one another the legal ability to make medical decisions, and that is a legitimate concern. The legal term, here, is "Power of Attorney" (POA) which, basically, is written authorisation to act on another's behalf in private affairs, business, or otherwise legally represent them in some legal matter—sometimes even against the wishes of the other. However, Alabama law already allows a non-family member to become a POA: See e.g., Alabama Code §26-1-2(4), (6) (1975), which reads:

> "(4) Subject to any limitation in the durable power of attorney, an attorney in fact may, for the purpose of making a health care decision, request, review, and receive any information, oral or written, regarding the principal's physical or mental health, including medical and hospital records, execute a release or other document required to obtain the information, and consent to the disclosure of the information."
>
> (6) No health care provider or any employee or agent thereof who in good faith and pursuant to reasonable medical standards follows the direction of a duly authorized attorney in fact shall, as a result thereof, be subject to criminal or civil liability..."

It, then, is quite clear**:** these sections taken *in pari materia* clearly give the POA the

legal right to make medical decisions. If, however, the hospital is refusing to honour Alabama Law on this head, the proper solution is to sue the hospital, but in any event, any complaint about **Ala. Code §30-1-19** (the so-called "Marriage Protection Act") is unfounded, and clearly used as a "straw man" argument to strike a good law**: RULE 3 of the Fed.R.Civ.P.**, clearly state that "A civil action is commenced by filing a complaint with the court," and so with a proper solution to redress grievances (that I provided above), no complaint may legally issue**:** no foul, no harm, is a legal standard.

Next, they complain (Brief, p.18) that the "right to receive social security benefits as a surviving spouse—hinge directly on the length of the marriage." This is a valid complaint, but the unconstitutional law in question is the Social Security Law, not the Alabama State Law. To put things in perspective, what if, for example, someone wanted to name his brother as a surviving recipient of Social Security? What if (as I would agree) that Equal Protection demands a right to do so? Then, should that *perforce* make it legal to marry your brother? God forbid, and certainly not! Again, I sympathise with the just and legitimate complaints of plaintiffs, but they make a Straw Man argument and attack the good law, whist leaving alone the bad one!

Then, they complain about the 'stigma' of inability to get married (Brief, p.18). I would agree that there is unfortunately some lingering prejudice against

homosexuals (and this is wrong), but, leaving aside our human weakness, looking at the argument in question: What if, for example, a woman in UTAH (where polygamy was recently very common—and still practiced by 'splinter' groups) felt 'stigma' for inability to be legally 'married' to a man –and his 5 other wives? While no one would condone or support making fun of this plural-marriage family, would this allow her to get 'legal' status for her polygamous relationship? Certainly not, and by this, we see this logic is "bad logic" and must, perforce, reject any conclusions on such premises.

Although not mentioned in this case, in a related case, *Searcy, et al., v. Strange*, 11th Cir., No. 15-10295, a lesbian couple complains about their inability to adopt, and, I feel they have a legitimate grievance**:** any outright "Gay adoption Ban" (whether statutory, or merely due to personal prejudice) is clearly an Equal Protection violation, and, in a brief in that case, I cite a Florida Law which was struck down for that reason. However, as with Plaintiffs, Strawser and Humphrey, they allege that **Ala. Code §30-1-19** (the so-called "Marriage Protection Act") is the problem, when, clearly, it is not: They can, indeed, adopt: See e.g., Ala. Code §26-10A-5(a) and Ala. Code §26-10A-27 (1975), which grant them strong statutory protections in this regard. This, then, is a pattern of behaviour, to strike the good law (§30-1-19), whilst ignoring the several bad ones.

Thus, This Honorable Court now has several solutions to the problem that don't violate Equal Protection viz. Polygamy. This solution should satisfy plaintiffs (who can get a "fair shake" in POA matters) as well as defendants (who defined marriage as it has been defined for tens of thousands of years, in all societies, cultures, and countries, since the very beginning of time, and that, for compelling state interests in promoting traditional marriage).

I do not pretend to have all the solutions, but I hope to get people focused on real solutions, not illusionary and Constitutionally-impossible ones.

Since I have provided a solution to defendants' problem, then **Now that this case has been appealed, This Court has "subject matter" jurisdiction,** and some solution I offer could, legally, work**; I hope that my solutions are acceptable compromises to both sides,** to help my fellow-man (and woman) come to a truce –and reduce arguments and strife. – I hope to be helpful to the goodwill of several parties in getting a solution acceptable to all.

Additionally, there are many, many more unfair laws, which target both straights and gays and single adults. However, in Amicus in *Brenner* and *Grimsley* (14-14061, 14-14066, 11th Cir. 2014, perfected), I strongly oppose the mistreatment of Sloan Grimsley, a homosexual firefighter, who can not name her homosexual spouse as a beneficiary of her life-insurance policy (Brief, p.14) or, for example, the "Marriage Penalty," which penalises straight people, based solely on marital

"status," in things such as disability, retirement, and even higher taxes required from some married couples that would not be required by two otherwise identical single people with exactly the same income. (A straight friend of mine would see his disability 'go down' if he married his girlfriend.) So, prejudice exists in law against both straights and gays, but it is not due to the Alabama Law defining marriage as 1-man and 1-woman, and thus an attack on that law is misplaced. **I add this paragraph solely to be respectful and courteous -and show plaintiffs that I am not prejudiced, and, indeed, most 'conservatives' are strongly opposed to gays to be mistreated in any form or fashion.**

III. Inferior Federal Courts don't even have jurisdiction to address 'Gay Marriage' dispute

On it's face, it would seem that the Supremacy Clause would allow a Federal District Court, such as here, to 'strike down' any state law or state Constitutional provision, such as has been happening in the 'Gay Marriage' dispute, nationwide. *But, is this so?*

Doe v. Pryor, 344 F.3d. 1282, 1286 (11th Cir. 2003), held that: "The only federal court whose decisions bind state courts is the United States Supreme Court." Their advisory opinion on this head evokes the Rooker-Feldman doctrine, which, in essence, holds that lower United States federal courts may not sit in direct review of state court decisions. This would give a strong support to

Federalism, and 10th Amendment State's rights, that is, that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States." Accord: *Arizonans for official English and Robert D. Park, Petitioners v. ARIZONA et al.*, 520 U.S. 43, at Syllabus 23, note 11, in which the U.S. Supreme Court held: "(Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law)." In other words, lower Federal Courts (including the Circuit Courts of Appeals) may not sit in appellate review of state court decisions; this court may only address these issues through original jurisdiction (which, apparently, the plaintiffs allege, insofar as they claim that the state laws in question are unconstitutional).

While this case law seems counter-intuitive, let me illustrate why this, if taken to its logical end, is not unreasonable: What if, for example, residents from 49 U.S. states appeared in one single Federal District Court (of the 50th state), demanding that their states' laws, recognising marriage one way or the other, should yield to the State Law of the 50th State, where the case is being heard, and demand The Court enter a ruling that the laws of these 49 states are unconstitutionally-restrictive, and ask The Court to exercise "Long Arm Jurisdiction" to enforce such an order against these 49 states? Well, what if, then, *another* U.S. District Court entered a ruling just the opposite? Can you not see the mayhem and confusion that would surely ensue? (And, as it stands, the nation-

wide 'patchwork' of Gay Marriage Laws has effectively made my prophecy, here, come true!) So, the case law that holds that the Supremacy Clause is restricted in this regard is 'good' case law: **Only The U.S. Supreme Court may exercise jurisdiction in this regard,** and most other courts, while well-meaning and well-intentioned, have exceeded their authority. Lastly, I don't know what significance this may be, but I ask This Court to take Judicial Notice of the court below, which appears to have issued an informal edict (APPENDIX-A) outright refusing to grant Due Process/Redress to a short *pro se* amicus memorandum of law when considering difficult & time-sensitive issues, such as this stay. See also my response (APPENDIX-B) to the Due Process/Constitutional issues implicated.

IV. Addressing *Baker, Romer, Lawrence, Lofton,* and *Windsor*

Plaintiffs mention *Windsor* and *Baker* in their brief, but appear to interpret it incorrectly in their conclusion, so now would be a good time to go over key case-law on that head.

Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37 (1972) was decided when the case came to the Supreme Court through mandatory appellate review (not certiorari); therefore, its dismissal constituted a decision on the merits and established *Baker* as precedent. Though the extent of its precedential effect has been subject to debate (and ignored by several US appellate circuits), it remains

binding case law on the point of Gay Marriage: only the U.S. Supreme Court may overrule its own decisions.

There are commonly "doctrinal development" arguments made to argue that *Baker* was *de facto* overturned, [e.g., "[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise[.]" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)], but is this really the case?

Some proponents of the 'doctrinal development' arguments for overturning *Baker* cite to such as *Lawrence v. Texas*, 539 U.S. 558 (2003), which criminalised sodomy. They sometimes claim that *Lawrence* removed any impediment to recognising that "Sexual Orientation" classifications warrant "Heightened Scrutiny," and sometimes claim that the *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004) holding was in reliance on out-of-circuit cases that based their holdings on *Bowers v. Hardwick*, 478 U.S. 186 (1986), and thus incompatible with intervening contrary decisions of the Supreme Court and should not be followed.

Very good point! However, we must ask two questions: First, did *Lawrence* really demand use of heightened scrutiny, or, instead, was it merely a rejection of the ban on certain behaviour (sodomy, in this case)? Secondly, even if some justices in *Lawrence* personally relied on this, as Obiter Dictum, and not as a

formal holding, is heightened scrutiny actually necessary as an absolute truth? ANSWER: *Bowers* held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right" under the Due Process Clause, 478 U.S., at 191-194. Noting that "[p]roscriptions_against that conduct have ancient roots," id., at 192, that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," ibid., and that many States had retained their bans on sodomy, id., at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition,'" id., at 192. The U.S. Supreme Court, in *Lawrence* did not overrule this holding: Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to "strict" scrutiny much less to "heightened" scrutiny! Nonetheless, some scrutiny is necessary due to the lingering prejudice that exists in both law and society against homosexuals. Thus, *Lofton* is still good case-law: a state's limitation of marriage to male-female unions must be subject only to deferential rational-basis review.

Nonetheless, I will conclude with one final statement on the "scrutiny wars," which are waged by lawyers on both sides of this argument: Lawyers for both sides have repeatedly bragged that their arguments are "sound," no matter WHICH level of scrutiny be applied, and thus dared The Courts to apply ANY level of scrutiny to

test their arguments.

This amicus agrees with their claim on this head: While the 'Doctrine of Scrutiny' is certainly a useful guide, in the end, it matters not how much light This Court shines on all our arguments, and so “heightened scrutiny” is acceptable, and, in light of the national debate on 'Gay Marriage,' perhaps “even more scrutiny” should be given to both this case and the cases in the other U.S. Circuits, for example, the *Brenner* & *Grimsley* cases, where the 11th Circuit is still 'reviewing' these Florida Gay Marriage cases. (*Brenner* and *Grimsley* should be reviewed *en banc*, I think, decided upon, one way or the other, and then granted Certiorari for This Court's review, and consolidated with these instant grants in the case at bar.)

In *Romer v. Evans*, 517 U.S. 620 (1996), at 648 Justice Antonin Scalia, in his dissent, said: “[U]nless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.” This would seem to contradict my claims that the instant brief (by Amicus, Gordon W. Watts) was the first to use “Polygamy vs. Gay Marriage” as a formal “Equal Protection” argument; however, reading Justice Scalia's comments in the context of this holding, we see that *Romer* merely addresses denial of certain rights to gays: it did not address the legal definition of marriage, a similar, but legally distinct, question of law. Thus, Scalia's comments, while legally-correct, were merely obiter dictum: comments on the definition of marriage, and not on treatment issues.

Romer set the stage for *Lawrence v. Texas*, 539 U.S. 558 (2003), which dealt with another treatment issue: private sexual conduct (sodomy, in this case) –again, not the legal definition of marriage (which is under review in the case at bar).

In Lofton v. Sec. of the Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004), *inter alia*, the 11th Circuit declined to treat homosexuals as a suspect class, and then, subsequently declined the Plaintiffs petition for rehearing *en banc*.

The key point of *U.S. v. Windsor*, 133 S.Ct._2675 (2013), was not that it struck down DOMA (the The Defense of Marriage Act), nor the obiter dictum that "differentiation [in marital status] demeans the couple" in question. The only key point in the *Windsor* holding that applies to the case at bar is that The U.S. Supreme Court upheld "States' Rights" for NY to define marriage as it sees fit; if anything, this supports citizens' initiatives & legislative acts to define marriage as the elected majority see fit, as has happened in four 6th Cir. states and Florida (where an almost 62% supermajority voted for its passage).

V. CONCLUSION

I believe that the court below acted with good intentions in trying to help the Plaintiffs get married to increase the odds they would be treated fairly at the hospital—or to get benefits to which I think they should be entitled, but not only was the solution an unconstitutional over-reach, wholly unnecessary when simpler

(less invasive) solutions are available, but Inferiour Federal Courts probably don't even have the authority to address the merits of this type of tort, as I show above. Regardless, however, of whatever authority This Court may have **This Court may (and, I think, should) still enter a Stay Pending Appeal, and let the SCOTUS deal with it, if the stay was inappropriate.** For further clarification and supporting case-law, you may see the rough draft of a proposed filing to the U.S. Supreme Court (an inferiour version of which is already filed with that court) at this link below, and take note of how I take fellow-conservatives to task, proving, once again, that I am not prejudiced or biased: "Argument V. Correcting common errors of 'Traditional Marriage' advocates." LINKS:

http://GordonWatts.com/14-571_ac_GordonWayneWatts_REPRINT.pdf

http://GordonWayneWatts.com/14-571_ac_GordonWayneWatts_REPRINT.pdf

I'm greatly grieved by the hate and discontent that has been generated by the differences and arguments in the Gay Marriage case here, and elsewhere, and I do not like the toxic atmosphere that results, and, as a result, am hoping that compromises amenable to all sides can be reached, where each side "walks away a winner," and gets something of value, which is appropriate, because both sides (plaintiffs & defendants) have some legitimate grievances, but a stay pending appeal is appropriate here, and then a reversal on the merits of the definition of marriage, while still addressing some legitimate complaints Plaintiffs have.

Dated: --day, XX Month 20145– Respectfully submitted,

s/ _____

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 29, Brief of an Amicus Curiae (c), Contents and Form, Fed.R.App.P., I hereby certify the following: The instant amicus brief complies with Rule 32: see *infra.*

The cover identifies the party or parties supported and indicate whether the brief supports affirmance or reversal: This brief supports defendant, **LUTHER STRANGE**, regarding his motion for a "State Pending Appeal" –and affirmance of the Alabama Law in question, and on many other points, but supports many elements of the plaintiffs, including (but not limited to) fair and just treatment of all people, including homosexual citizens. In addition, I certify that I complied with the disclosure requirement in the CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT, *supra.*

In accordance with Rule 32(a)(7), Length., Fed.R.App.P., I hereby certify the following:

Rules 32(a)(7)(A), Page limitation, 32(a)(7)(B) Type-volume limitation, and 32(a)(7)(C)(i) Certificate of compliance [e.g., "A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B)"] do not apply: **This brief is neither a principal nor reply brief.**

Regarding Rule 32(a)(7)(C)(ii), which states in succinct part that "Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i)," **I am hereby following this standard to be safe:**

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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s/ _____
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In accordance with Rule 25(c)(4), Manner of Service, "Service by mail or by commercial carrier is complete on mailing or delivery to the carrier," which I hereby certify that I am doing today, _____, 2015, to the following parties (below), by _____ –and by Electronic Mail, when/where possible. Additionally, I hope to post a TRUE COPY of these filings on my Open Source online docket, for free download, at the following two (2) URL's, as soon as practically possible:

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