UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case Nos. 14-14061-AA, 14-14066-AA

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The *Grimsley* Plaintiffs-Appellees state, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-2(c), that Appellants' Certificate of Interested Persons appears correct and complete with the exception that the following additional individuals and entities also have an interest in the outcome of this review:

de Aguirre, Carlos Martinez

Allen, Dr. Douglas W.

Alliance Defending Freedom

Alvaré, Helen M.

American College of Pediatricians

Anderson, Ryan T.

Araujo, Dr. Robert John

Babione, Byron

Basset, Dr. Ursula C.

The Becket Fund for Religious Liberty

Beckwith, Dr. Francis J.

Benne, Dr. Robert D.

Bleich, Dr. J. David

Boyle, David

Bradford, Dr. Kay

Bradley, Gerard V.

Busby, Dr. Dean

Carroll, Dr. Jason S.

Cere, Dr. Daniel

Christensen, Dr. Bryce

The Church of Jesus Christ of Latter-day Saints

Clark & Sauer, LLC

Cohen & Grigsby, P.C.

Cohen, Lloyd

Concerned Women for America

Corral, Dr. Hernan

Deneen, Dr. Patrick J.

Dent, Jr., George W.

Dewart, Deborah J.

DeWolf, David K.

Duncan, Dwight

Duncan, William C.

Dushku, Alexander

Erickson, Dr. Jenet J.

Esbeck, Carl H.

Esolen, Dr. Anthony M.

Esseks, James D.

The Ethics & Religious Liberty Commission of the Southern Baptist Convention

Farr, Thomas F.

Fields, Dr. Stephen M.

Fieler, Dr. Ana Cecilia

Finnis, Dr. John M.

Fitschen, Steven W.

FitzGibbon, Scott T.

Foley, Dr. Michael P.

Franck, Matthew J.

Garcimartin, Dr. Carmen

Gates, Gary J.

George, Dr. Robert P.

George, Dr. Timothy

Gibbs, David C.

Girgis, Sherif

Gunnarson, R. Shawn

Hafen, Bruce C.

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Jacob, Bradley P.

Jeffrey, Dr. David Lyle

de Jesus, Ligia M.

Jeynes, Dr. William

Johnson, Dr. Byron R.

Kirton McConkie

Knapp, Dr. Stan J.

Knippenberg, Joseph M.

Kohm, Lynne Marie

Lafferriere, Dr. Jorge Nicolas

Lee, Dr. Patrick

Liberty, Life, and Law Foundation

Lighted Candle Society

Lindevaldsen, Rena M.

Lopez, Robert Oscar

Loukonen, Rachel Spring

The Lutheran Church—Missouri Synod

Marriage Law Foundation

Martins, Joseph J.

McDermott, Dr. Gerald R.

McHugh, Dr. Paul

Moon, Jeffrey Hunter

Morse, Dr. Jennifer Roback

Moschella, Dr. Melissa

Moses, Michael F.

Myers, Richard S.

Nagel, Robert F.

National Association of Evangelicals

National Center for Life and Liberty

The National Legal Foundation

Nicgorski, Walter

North Carolina Values Coalition

Pacific Justice Institute

Pakaluk, Dr. Catherine R.

Pecknold, Dr. C. C.

Peterson, Dr. James C.

Picarello, Jr., Anthony R.

Presser, Stephen B.

Price, Dr. Joseph

Rahe, Dr. Paul A.

Regnerus, Dr. Mark

Rhoads, Steven E.

Rossum, Ralph A.

Sauer, D. John

Schaerr, Gene C.

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Schlueter, Dr. Nathan

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Trent, Edward H.

United States Conference of Catholic Bishops

Upham, Dr. David

Wardle, Lynn

Watson, Bradley C.S.

Watts, Gordon Wayne

Weaver, George M.

Williams, Dr. Richard N.

Wimberly Lawson Wright Daves & Jones, PLLC

Wolfe, Dr. Christopher

Wood, Dr. Peter W.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the *Grimsley* Plaintiffs-Appellees state that there are no corporate disclosures.

/s/ Daniel B. Tilley
Daniel B. Tilley

The *Grimsley* Plaintiffs-Appellees (the "*Grimsley* Appellees")[1] submit this response to Appellants' Motion to Extend Stay of Preliminary Injunctions Pending Appeal (hereinafter "Motion"). Appellants ask this Court to extend the stay of the district court's preliminary injunction, set to expire on January 5, 2015, for the duration of the appeal. The *Grimsley* Appellees respectfully submit that the factors governing whether to issue a stay pending appeal all weigh heavily against a stay and that Appellants' motion should therefore be denied.

A four-part test governs 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." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Appellants have failed to show a strong likelihood of success on the merits. An avalanche of federal court decisions since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013)—including decisions from four circuit courts of appeal—has struck down state prohibitions on marriage for same-

[1] The *Grimsley* Appellees are Sloan Grimsley, Joyce Albu, Bob Collier, Chuck Hunziker, Lindsay Myers, Sarah Humlie, Robert Loupo, John Fitzgerald, Denise Hueso, Sandra Newson, Juan del Hierro, Thomas Gantt, Jr., Christian Ulvert, Carlos Andrade, Richard Milstein, Eric Hankin, Arlene Goldberg, and SAVE Foundation, Inc.

sex couples as unconstitutional.[2] The fact that a divided panel of one circuit court reached the opposite conclusion, *DeBoer*, 2014 WL 5748990, does not create a strong likelihood of success on the merits. In *Windsor*, the Supreme Court struck down a law barring the federal government from recognizing the marriages of same-sex couples. It held that the law's demeaning and stigmatizing (and also economically harmful) exclusion of same-sex couples from a "status of immense import" and its "humilat[ion]" of their children violated the guarantees of due process and equal protection. *Windsor*, 133 S. Ct. at 2693, 2694. Florida's marriage ban has the same damaging effect on numerous Florida families, and the State has not offered any justification for this harmful treatment that can satisfy any level of constitutional scrutiny.

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[2] *See Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17688, --- F.3d ----, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316, *and cert. denied sub nom.*, *Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308, *cert. denied sub nom.*, *Rainey v. Bostic*, 135 S. Ct. 286, *and cert denied sub nom.*, *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *see also Campaign for S. Equality v. Bryant*, No. 3:14-cv-818-CWR-LRA, D.E. 30, at 2 n.1 (S.D. Miss. Nov. 25, 2014) (collecting district court cases). *But see DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014), *petitions for cert. filed*, -- U.S.L.W. -- (U.S. Nov. 14, 2014) (Nos. 14-556, 14-562, 14-571), *and petition for cert. filed*, -- U.S.L.W. – (U.S. Nov. 18, 2014) (No. 14-574); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253, --- F. Supp. 3d ----, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), *appeal docketed*, No. 14-2184 (1st Cir. Nov. 13, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 5, 2014).

The *Grimsley* Appellees have demonstrated that they suffer serious irreparable harm every day that the marriage ban remains in effect, including the significant stigma that flows from being branded "second-tier" families. *Windsor*, 133 S. Ct. at 2694. And denying an extension of the stay will harm neither the State nor the public interest. Contrary to the State's suggestion, any marriages entered into in reliance on the district court's injunction would be valid regardless of the outcome of the appeal. *See Evans v. Utah*, No. 2:14CV55DAK, --- F. Supp. 2d ----, 2014 WL 2048343, at *17 (D. Utah May 19, 2014) (holding that plaintiffs had vested interest in the marriages they entered into in Utah after district court entered injunction and prior to stay issued by Supreme Court; thus, state's refusal to recognize the marriages violated the Due Process Clause), *appeal withdrawn*. Appellants' other claimed harms are neither irreparable nor as weighty as the harms suffered by same-sex couples who are excluded from marriage.

All of the stay factors strongly support denying the extension of the stay. Although the Supreme Court previously granted stays pending appeal in marriage cases, since its decision on October 6, 2014, to deny review of decisions of three circuit courts striking down laws excluding same-sex couples from marriage,[3] the Court has refused all requests for stays of injunctions in marriage cases with

[3] *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014).

appeals pending, even after the Sixth Circuit's decision in *DeBoer* created a circuit split.[4] These actions make clear that the Supreme Court no longer views the possible risk of reversal to be a basis to stay an injunction in a marriage case.[5]

I. Defendants have not made a strong showing that they are likely to succeed on the merits.[6]

Appellants do not even attempt to argue a likelihood of success on the merits, let alone make a strong showing. Instead, they assert that the other factors support a stay and that therefore they need only show a "substantial case on the merits." Motion at 8 (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1452 (11th Cir. 1986)). But *Garcia-Mir* sanctioned this lesser showing only where the other factors

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[4] *See Wilson v. Condon*, No. 14A533, 2014 WL 6474220 (U.S. Nov. 20, 2014) (denying application for stay pending appeal in South Carolina marriage case); *Moser v. Marie*, No. 14A503, 2014 WL 5847590 (U.S. Nov. 12, 2014) (same in Kansas marriage case); *Otter v. Latta*, No. 14A374, 2014 WL 5094190 (U.S. Oct. 10, 2014) (denying Idaho's application for stay pending a petition for *certiorari*); *Parnell v. Hamby*, No. 14A413, 2014 WL 5311581 (U.S. Oct. 17, 2014) (denying Alaska's application for stay pending appeal).

[5] Since October 6, 2014, two federal district courts stayed injunctions in marriage cases, *Lawson v. Kelly*, No. 4:14-cv-00622-ODS, D.E. 58 (W.D. Mo. Nov. 25, 2014); *Jernigan v. Crane*, No. 4:13-cv-410-KGB, D.E. 40 (E.D. Ark. Nov. 25, 2014), but neither of those courts considered the stay factors, instead relying on Supreme Court stays from prior to the denials of *certiorari*. Moreover, it is not surprising that these courts, like the district court in this case, wanted to allow this decision to be made by the Court of Appeals. *See Lawson*, No. 4:14-cv-00622-ODS, D.E. 58, at 2 (noting that "Plaintiffs are free to ask the Court of Appeals to lift the stay.").

[6] This section provides a summary of the *Grimsley* Appellees' merits argument that will be more fully presented in their merits brief, which will be filed by December 15, 2014, well in advance of the expiration of the stay.

"weigh[] heavily in favor of granting the stay," 781 F.2d at 1453. For the reasons discussed in Points II-IV, *infra*, all of the other factors strongly weigh *against* a stay. The overwhelming weight of judicial authority since *Windsor* agrees that marriage bans like Florida's are unconstitutional. *See* p. 2 n.2, *supra*.[7] There is a near judicial consensus on this issue because there is no valid legal argument supporting marriage bans.

Baker v. Nelson is not binding precedent.

Appellants claim that the Supreme Court's 1972 summary dismissal without opinion of an appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), is binding on this Court. But the precedential value of a summary dismissal is not the same as that of an opinion of the Court addressing the issue after full briefing and argument. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). "[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) (emphasis added). Decisions from the Supreme Court since 1972

[7] Moreover, the Supreme Court has denied review of three circuit court decisions striking down marriage laws. True, the denial of a writ of *certiorari* is not an opinion on the merits of the case, but these denials—by leaving in place binding precedent in three circuits—effectively overturned bans on marriage for same-sex couples in eleven states in one day. And the Court's denial of stay applications after the emergence of the circuit split further suggests that the Court is unlikely to uphold marriage bans if such as case is before it.

make clear that constitutional challenges to marriage bans present a substantial federal question. *See, e.g.*, *Latta*, 2014 WL 4977682, at *3 (citing *Windsor*, 133 S. Ct. 2675; *Lawrence v. Texas*, 538 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996)).

Principles of federalism do not insulate the marriage ban from scrutiny.

Appellants cite "the State's virtually exclusive authority to define and regulate marriage." Motion at 9. But *Windsor* unequivocally affirmed that state laws restricting who may marry "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379.[8]

The marriage ban is unconstitutional.

A. *The marriage ban is subject to strict scrutiny because it burdens the fundamental right to marry.*

[8] In *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014), while the Supreme Court discussed the appropriateness of leaving issues to the voters when they do not result in the "infliction of a specific injury," it reaffirmed "the well-established principle that when hurt or injury is inflicted" by state laws, "the Constitution requires redress by the courts." That is the case here.

Florida's marriage ban infringes upon same-sex couples' fundamental right to marry and is therefore subject to strict scrutiny under both the Due Process and Equal Protection Clauses. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving*, 388 U.S. at 12. The fundamental right to marry also protects legally married couples from state attempts to deprive those marriages of legal recognition. *See Kitchen*, 755 F.3d at 1213 (collecting cases).

This case is about the fundamental right to marry—not a right to "same sex marriage." Characterizing the right at issue as a new right to "same-sex marriage" would repeat the mistake made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), when the Court narrowly characterized the right at issue in challenges to criminal sodomy laws as an asserted "fundamental right [for] homosexuals to engage in sodomy." *Id.* at 190. When the Court overruled *Bowers*, it specifically criticized *Bowers* for narrowly framing the right at issue in a manner that "failed to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 566-67. Instead of the using narrow framing of *Bowers*, the *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* "indicate[s] that the choices

that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. Similarly here, Plaintiffs are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry that the Court has long recognized.

Florida cannot continue to deny fundamental rights to certain groups simply because it has done so in the past. "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *See Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," and "[b]ecause we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg*'s analysis is inapplicable here."). For example, the fundamental right to marry extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). "Thus the question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" *Kitchen*, 755 F.3d at 1210

(quoting *Loving*, 388 U.S. at 12). Because "[o]ur Constitution 'neither knows nor tolerates classes among citizens,'" *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)), all people, including same-sex couples, are protected by the same fundamental right to marry.

Appellants offer no support for their semantic argument that ending the exclusion of same-sex couples from marriage—but not other long-standing exclusions, *e.g.*, of interracial couples—constitutes a "redefinition" of marriage taking it outside of the protection of the fundamental right to marry. Joint Initial Brief of All Appellants ("Merits Br.") at 13-14. The assertion that same-sex couples are excluded from the institution of marriage "by definition is wholly circular." *Kitchen*, 755 F.3d at 1216; *id.* ("To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so.").[9]

B. *The marriage ban is subject to heightened scrutiny because it discriminates on the basis of sexual orientation.*

[9] Appellants also argue that other restrictions on marriage such as age requirements would be "at risk" if strict scrutiny applies here. Merits Br. at 26. Whatever questions may exist about whether other types of relationships fall within the protection of liberty afforded by the Due Process Clause, the Supreme Court already recognized in *Lawrence* and *Windsor* "that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377.

"*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014); *accord Baskin*, 766 F.3d at 671. In invalidating the Defense of Marriage Act ("DOMA"), "*Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline*, 740 F.3d at 481. The Court did not begin with a presumption that discrimination against same-sex couples is constitutional. *Baskin*, 766 F.3d at 671 ("Notably absent from *Windsor*'s review of DOMA are the strong presumption in favor of the constitutionality of laws and the extremely deferential posture toward government action that are the marks of rational basis review." (quoting *SmithKline*, 740 F.3d at 483)) (internal quotation marks omitted).

Rather, *Windsor* held that there must be a "legitimate purpose" to "overcome[ ]" the harms that DOMA imposed on same-sex couples. 133 S. Ct. at 2696. *Windsor*'s "balancing of the government's interest against the harm or injury to gays and lesbians," *Baskin*, 766 F.3d at 671, is in stark contrast to rational basis review, one of the hallmarks of which is that it "avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722.

Windsor's rejection of rational basis review abrogates this Court's decision in *Lofton v. Sec'y, Fla. Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18 (11th Cir. 2004), which held that rational basis review applies to sexual-orientation

classifications. Before *Windsor*, like this Court, the Ninth Circuit in *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), also held that sexual-orientation classifications are subject to rational basis review. But after *Windsor*, the Ninth Circuit concluded, "*Windsor* requires that we reexamine our prior precedents" and "apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *SmithKline*, 740 F.3d at 484. Just as *Windsor* abrogated *Witt*, it abrogates *Lofton*. That means this Court must engage in "balancing of the government's interest against the harm or injury to gays and lesbians." *Baskin*, 766 F.3d at 671. The marriage ban causes extraordinary harms to same-sex couples and their families (*see* Point III, *infra*) and does not even rationally further a legitimate government interest (*see* Point II.D.1, *infra*), let alone serve a strong enough interest to overcome that harm.

C. *The marriage ban is subject to heightened scrutiny because it discriminates on the basis of sex.*

In addition, "all gender-based classifications today warrant heightened scrutiny." *Virginia*, 518 U.S. at 555 (internal quotation marks omitted). Florida's marriage ban imposes explicit sex classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. A woman may marry a man but not another woman, and a man may marry a woman but not another man. Like any other sex classification, the marriage ban must therefore be tested under heightened scrutiny. *See Latta*, 2014 WL 4977682, at *15-18 (Berzon,

J., concurring); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013); *Lawson*, --- F. Supp. 3d ----, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014).

D. *The marriage ban fails any level of constitutional scrutiny.*

Applying heightened scrutiny, Appellants cannot carry their burden. Even under the most deferential standard, the marriage ban could not withstand scrutiny.

1. The marriage ban does not rationally further any legitimate government interest.

In its motion, Appellants assert only one rationale for the marriage ban: that "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Motion at 10 (quoting *DeBoer*, 2014 WL 5748990, at *11). But this is not "an independent and legitimate legislative end" for purposes of rational basis review. *Romer*, 517 U.S. at 633. "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Latta*, 2014 WL 4977682, at *10 (internal quotation marks omitted). "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557.

Framing the interest in maintaining the status quo as a wish to "wait and see" does not make this asserted rationale any more legitimate. Appellants do not

even attempt to identify any harms that would befall society if the marriage ban is ended. Moreover, the "wait and see" approach accepted in *DeBoer*

> fails to recognize the role of courts in the democratic process. It is the duty of the judiciary to examine government action through the lens of the Constitution's protection of individual freedom. Courts cannot avoid or deny this duty just because it arises during the contentious public debate that often accompanies the evolution of policy making throughout the states.

McGee v. Cole, No. 3:13-24068, 2014 WL 5802665 (S.D. W.Va. Nov. 7, 2014), at *9.[10]

Although Appellants asserted below that the marriage ban furthered the State's interest in promoting responsible procreation and optimal child-rearing, they have completely abandoned such justifications on appeal, apparently recognizing the lack of any logical connection between excluding same-sex couples from marriage and these interests.[11]

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[10] The only other rationale even touched upon in Appellants' merits brief is the assertion that the legislature or the people may rationally choose not to expand the groups entitled to the package of government benefits that come with marriage. Merits Br. at 31. But conserving resources is not a legitimate justification for excluding a group from government benefits without an independent rationale for why the cost savings ought to be borne by the particular group being denied the benefit. *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

[11] These interests were offered as a defense of DOMA (*see* Merits Br. of Bipartisan Legal Advisory Group of the U.S. House of Reps., *U.S. v. Windsor*, 2013 WL 267026, at *21), and were necessarily rejected by the Supreme Court when it held that "no legitimate purpose" could justify the inequality DOMA imposed. *Windsor*, 133 S. Ct. at 2696. Nearly every court to consider these rationales since *Windsor* has held that there is no logical connection between marriage bans and these interests because whether or not same-sex couples are permitted to marry has no

2. The marriage ban fails any level of scrutiny because its primary purpose and practical effect are to make same-sex couples unequal.

An additional reason the marriage ban is unconstitutional under any level of scrutiny is that its primary purpose and practical effect are to make same-sex couples unequal. *Windsor* is the latest in a long line of cases holding that statutes whose primary purpose and practical effect are to "impose inequality" violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). *Windsor* instructs that to determine whether laws have the primary purpose or practical effect of imposing inequality, courts should examine "[t]he history of [the] enactment and its own text," as well as the law's "operation in practice." *Windsor*, 133 S. Ct. at 2694. Based on its analysis of DOMA's history, text, and operation in practice, the Court concluded that DOMA was unconstitutional because its "avowed purpose and practical

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conceivable impact on the procreative and child-rearing decisions of heterosexual couples, and excluding same-sex couples from marrying does not prevent them from having children; it just harms the children they do have. *See, e.g., Kitchen*, 755 F.3d at 1224, 1226; *Bostic*, 760 F.3d at 382-83; *Baskin*, 766 F.3d at 662-63, 665; *Latta*, 2014 WL 4977682, at *6, 8; *see also Windsor*, 133 U.S. at 2694 (denying recognition of marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and makes it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). The "optimal child-rearing" defense was even rejected by the Sixth Circuit panel that upheld similar marriage bans. *DeBoer*, 2014 WL 5748990, at *10.

effect" was "to impose a disadvantage, a separate status, and so a stigma upon" married same-sex couples and their families. *Id*. at 2693.

All of the factors leading the Supreme Court to reach this conclusion about DOMA apply equally here. Florida's marriage ban (both the statute and constitutional amendment) sprung from the same historical background that prompted the enactment of DOMA. Like DOMA, Florida's marriage ban was not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the ban was enacted in the first place. The avowed purpose of DOMA was to "defend the institution of traditional heterosexual marriage" against "[t]he effort to redefine 'marriage' to extend to homosexual couples." *Windsor*, 133 S. Ct. at 2693 (citing the House Report). Similarly, Florida's marriage ban was enacted in response to developments in other jurisdictions where same-sex couples sought the freedom to marry.[12]

[12] *See* H.R. Comm. on Governmental Operations, Final Bill Research and Economic Impact Statement, HB 147 (1997) at 1 (*Grimsley/Brenner* Consolidated Docket ("Con. Dkt.") D.E. 42-2). As the bill's House sponsor explained it, the bill was necessary "because gays were 'picking a fight' by insisting on being allowed to marry." *House OKs Gay Marriage Ban*, Orlando Sentinel, Mar. 27, 1997, at D4 (Con. Dkt. D.E. 42-3); 1997 WLNR 5938295. Supporters of the constitutional

Second, the marriage ban's text reflects the same purpose of imposing inequality that the Supreme Court found in DOMA. The text of DOMA provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 10. The Supreme Court viewed this text to be further evidence of a purpose to impose a separate, unequal status on same-sex couples. *Windsor*, 133 S. Ct. at 2683, 2693. The text of Florida's statute and constitutional amendment even more starkly reflect this purpose. The statutory marriage ban strips "[m]arriages between persons of the same sex entered into in any jurisdiction . . . or relationship between persons of the same sex which are treated as marriages in any jurisdiction" of all legal force: they "are not recognized for any purpose in this state." Fla. Stat. § 741.212(1). And, like DOMA, it provides that "[f]or purposes of interpreting any state statute or rule, the term 'marriage' means only a legal union between one man and one woman as husband and wife, and the term 'spouse' applies only to a member of such a union." Fla. Stat. § 741.212(3). The constitutional marriage ban likewise provides that "[i]nasmuch as marriage is the legal union of only one man and one woman as

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amendment similarly cited same-sex marriages happening in other states as a reason to vote for the amendment. *See* Christian Coalition, *Questions and Answers Florida Marriage Amendment* (Con. Dkt. D.E. 42-4); http://www.cfcoalition.com/full_article.php?article_no=94 (accessed Nov. 26, 2014).

husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Fla. Const. art. I, § 27.

Finally, like DOMA, the inescapable "practical effect" of Florida's marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct at 2693. The marriage ban "diminish[es] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694.

As was the case for DOMA, the history and text of Florida's marriage ban, as well as its practical effect, show that imposing inequality on same-sex couples was not "an incidental effect" of some broader public policy; it was "its essence." *Windsor*, 133 S. Ct at 2693. This governmental declaration of inequality is precisely what *Windsor* prohibits the government from doing.

II. Appellants have not shown that they will suffer irreparable injury if the stay is lifted.

The only concrete harm Appellants claim would befall them absent a continuation of the stay is a "considerable risk of confusion—reorienting whole systems to accommodate the preliminary injunctions while this appeal is pending, and potentially trying to undo that reorientation if the injunction is reversed." Motion at 13. They specifically point to public employee retirement and health insurance systems and vital records systems. *Id.* at 7. If the stay is lifted, it is true

that the State would need to make administrative changes to implement the injunction. Even if this Court were to reverse the district court's decision, the State would not have to reverse those administrative changes, since the couples who got married in the interim would remain married, including for purposes of state programs. A reversal on appeal would mean simply that no further same-sex couples could get married. And whatever administrative process the State has to go through, that pales in comparison to the harm being done to same-sex couples while the stay remains in place and they are barred from marriage. *See* Point III, *infra*. Moreover, it does not meet the requirement of a showing that the applicant for a stay would be "*irreparably* injured." *Hilton*, 481 U.S. at 776 (emphasis added); *see also Belton v. Georgia*, No. 1:10-CV-0583-RWS, 2013 WL 4551307, at *2 (N.D. Ga. Aug. 27, 2013) (where state defendants asserted "they will face irreparable injury if they spend funds and personnel time on implementing programs only to have those sections of the Remedial Order set aside on appeal," court rejected a finding of irreparable injury in part because "the Court cannot justify delaying compliance with the Remedial Order just because Defendants now claim there is a remote possibility that some programs will be set aside on appeal.") (docket citations omitted).

III. The harm that the *Grimsley* Appellees and other same-sex couples would suffer if the stay remains in effect far outweighs any harm to Appellants.

The *Grimsley* Appellees and same-sex couples across the State are subjected to irreparable harm every day they are forced to live without the security and protections marriage provides. As they wait, children will be born, partners and spouses will get sick, and some will die. Each day that passes, some people will pass away without ever having been able to marry the person they love or to have their marriage recognized in their home state, depriving their surviving spouse of important protections, as Appellee Arlene Goldberg continues to experience. Ms. Goldberg is unable to access her late spouse's social security—significantly impacting her standard of living—as long as Florida refuses to recognize her marriage. *See* Goldberg Decl. (Con. Dkt. D.E. 42-1 at 10-11).[13]

Continuing the stay would also inflict irreparable injury on the *Grimsley* Appellees and other same-sex couples by exposing them and their children to continuing stigma. *Windsor*, 133 S. Ct. at 2694. The consequences of such harms can never be undone.

Appellants' only answer to this harm is to say that it is no different than that experienced by same-sex couples residing in some other states. Motion at 13. That does not justify the harms and does not entitle Appellants to a stay.

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[13] Some of the protections marriage provides—*e.g.*, the right to receive social security surviving spouse benefits—hinge on the length of the marriage. *See*, *e.g.*, 42 U.S.C. § 416(c)(1). Thus, a continued stay for the duration of the appeal, delaying couples' ability to marry, would have irreparable consequences for many couples who will be denied benefits as a direct result of that delay.

IV. **The public interest strongly weighs against a stay.**

The vindication of constitutional rights furthers the public interest. *See, e.g.*, *Popham v. City of Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987). And the public suffers harm when families and children are deprived of the protections that marriage provides. Appellants argue that there is a substantial public interest in "stable marriage laws." Motion at 6. But, contrary to Appellants' suggestion, *id.* at 7, any marriages entered into in reliance on the court's injunction would be valid regardless of the outcome of the appeal. *See Evans*, 2014 WL 2048343, at *17. With respect to any other purported concerns about stability and uniformity in the marriage law, [14] the Supreme Court has now denied several stays of injunctions in marriage cases that were still pending on appeal and thus could be reversed. *See* p. 4 n.4, *supra*. Now that the Supreme Court has made clear that it does not deem the risk of reversal to be a basis to stay an injunction in marriage cases, this Court should not extend the stay on that basis.

Conclusion

For these reasons, the *Grimsley* Appellees respectfully request that Appellants' motion to extend the stay be denied.

[14] Appellants offer no basis for their purported concern about same-sex couples rushing into marriages without due deliberation "before this Court (or the United States Supreme Court) rules on the merits." Motion at 6.

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Respectfully submitted,

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