No. 14-50196

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; GREG ABBOTT, in his official capacity as Texas Attorney General; and DAVID LAKEY, in his official capacity as Commissioner of the Texas Department of State Health Services,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, NO. 5:13-CV-00982

PLAINTIFFS' OPPOSED MOTION TO LIFT STAY OF INJUNCTION FOR ALL PARTIES OR, IN THE ALTERNATIVE, FOR ORDER RE BIRTH OF CHILD

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PRELIMINARY STATEMENT

On February 26, 2014, the District Court held that Section 32 violates the Fourteenth Amendment and enjoined Defendants from enforcing Texas' laws prohibiting same-sex couples from marrying and denying recognition to same-sex marriages validly entered in other states (collectively, "Section 32").[1] However, the District Court stayed its injunction. Now—almost a year later—Plaintiffs still are unable to marry or to have their marriages recognized, even as same-sex marriages proceed in state after state. The Supreme Court's recent actions indicate a stay is no longer necessary.

Since the District Court issued its decision, Plaintiffs continue to suffer irreparable harm. Plaintiffs De Leon and Dimetman are expecting a child, and the State's refusal to recognize their marriage risks grave harm both to the Plaintiffs and the child. In addition, Defendants' continued denial of the right to marry and refusal to recognize lawful out-of-state marriages harms couples without children, like Plaintiffs Holmes and Phariss. Should Holmes or Phariss die before marrying, they would never experience the dignity of having a recognized marriage. Further,

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[1] Plaintiffs challenged three Texas laws that prohibit same-sex couples from marrying and declaring void lawful out-of-state marriages between same-sex couples: (1) Family Code § 2.001, originally enacted in 1973 as Family Code § 1.01; (2) Family Code § 6.204, enacted in 2003; and (3) Article I, § 32 of the Texas Constitution, passed as H.J.R. 6 by the Legislature and approved by voters in November 2005. Plaintiffs refer to these laws collectively as "Section 32."

the surviving partner would be denied rights that married widows receive, such as survivor benefits to social security, military pensions, and basic inheritance rights. Thus, the Court should lift the stay entered by the District Court in its entirety.

If the Court will not lift the stay in its entirety, it should nonetheless lift the stay for the limited purpose of protecting the interests of the unborn child of Plaintiffs Nicole Dimetman and Cleopatra De Leon. Plaintiff Dimetman is pregnant. Her due date is in March, but she could give birth any day between now and then. Because the District Court stayed its injunction, Dimetman's lawfully wed spouse, Plaintiff De Leon, will not be recognized as the baby's parent when the baby is born. Not only does this injustice require them to endure expensive and intrusive adoption proceedings to establish that De Leon is the child's parent, it creates great risk and uncertainty surrounding the child's birth. This Court should lift the stay to remedy the impending and real irreparable harm De Leon, Dimetman, and their child now face—that the State's refusal to recognize De Leon's and Dimetman's marriage will prevent them from both being recognized as the child's parents. Accordingly, if the Court refuses to lift the District Court's stay in its entirety, Plaintiffs request that the Court lift the existing stay for a single, limited purpose and issue an order establishing that Plaintiff De Leon has full parental rights and directing Defendant David Lakey, in his capacity as Texas

Department of State Health Services Commissioner, to issue a birth certificate for Dimetman and De Leon's baby that lists both of them as mothers.[2]

In the event that the Court issues an opinion on the pending appeal in time for the District Court's stay to expire before the baby is born, this motion would be moot.

ARGUMENT

I. THE COURT SHOULD LIFT THE STAY.

Since this Court stayed the decision finding Mississippi's same-sex marriage ban unconstitutional, *Campaign for Southern Equality v. Bryant*, No. 14-60837 (5th Cir. Dec. 10, 2014),[3] the Supreme Court has twice denied requests to stay similar decisions. In *Strange v. Searcy*, No. 14A840, 2015 WL 505563, at *1 (U.S. Feb. 9, 2015), the Supreme Court denied the State of Alabama's request for a stay of the District Court's ruling that Alabama's same-sex marriage ban violated the Constitution, *Searcy v. Strange*, No. 14-0208-CG-N, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015). The Supreme Court denied the State's request despite the fact that it previously granted writs of certiorari to consider the Sixth Circuit's ruling on similar same-sex marriage bans. *See, e.g.*, *Obergefell v. Hodges*, No. 14-556, 2015

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[2] As Department of State Health Services Commissioner, Defendant Lackey oversees the Texas Department of State Health Services Vital Statistics Unit, which is tasked with collecting birth records. Tex. Health & Safety Code §§ 192.002, 192.03; Tex. Admin. Code § 181.1, *et seq.*

[3] As the Court is aware, the parties in *Bryant* ably briefed the stay issue, and Plaintiffs will not repeat the same arguments here.

WL 213646, at *1 (U.S. Jan. 16, 2015). The *Strange* denial was the second time the Supreme Court refused to stay a decision finding that a same-sex marriage ban was unconstitutional, despite the lack of any circuit precedent on the issue. *See Armstrong v. Brenner*, 135 S. Ct. 890 (2014).

The Supreme Court's actions indicate that the stay of the District Court's decision is no longer necessary. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (staying execution of preliminary injunction finding Texas' same-sex marriage ban unconstitutional). The District Court expressly found that the denial of the fundamental right to marry causes irreparable harm. *Id.* at 663-64. Despite this, Plaintiffs continue to suffer irreparable harm—only now the potential consequences are graver. As discussed further below, Plaintiffs De Leon and Dimetman are expecting a child any day, and the State's refusal to recognize their marriage risks grave harm both to the Plaintiffs and the child. In addition, Defendants' continued denial of the right to marry and refusal to recognize lawful out-of-state marriages harms couples without children, like Plaintiffs Holmes and Phariss. Should Holmes or Phariss die before marrying, the surviving partner would be denied rights that married widows receive, such as survivor benefits to social security, military pensions, and basic inheritance rights. Most importantly, they would never enjoy the validation of their relationship in the eyes of the State or the validation (and joy) from having their family and friends attend their

wedding. Holmes and Phariss are not unique. These are indignities and risks all of the hundreds of thousands of Texas same-sex couples are forced to endure until they are finally allowed to marry. These risks are not speculative and cannot be cured afterwards. Indeed, one of the plaintiffs in a lawsuit challenging Pennsylvania's same-sex marriage ban passed away before being able to marry. Kaitlynn Riely, *Obituary: Fredia Hurdle/Among plaintiffs in Pa.'s gay marriage case*, Pittsburgh Post-Gazette (Aug. 12, 2014).[4] Holmes and Phariss applied for a marriage license on October 3, 2013—more than 16 months ago—a wait no heterosexual couple must endure.[5] These harms should not continue when the Court has held the laws that cause them are unconstitutional.

These are real and tangible risks that same-sex couples face every day they are denied the right to marry and to have their out-of-state marriages recognized. Section 32—the law that creates these risks—is unconstitutional. The Court should lift the stay immediately and prevent Plaintiffs from needlessly suffering as a result of the unconstitutional laws.

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[4] Available at http://www.post-gazette.com/news/obituaries/2014/08/11/Obituary-Fredia-Hurdle-Among-plaintiffs-in-Pa-s-gay-marriage-case/stories/201408110049#ixzz3A5m9N8eT.

[5] ROA 180, 183.

II. IN THE ALTERNATIVE, THE COURT SHOULD LIFT THE STAY TO PROTECT PLAINTIFFS DIMETMAN AND DE LEON'S CHILD.

A. Lifting The Stay For A Limited Purpose Will Prevent Irreparable Harm To Dimetman, De Leon, And Their Child.

The District Court expressly found Section 32 creates "a substantial threat" of "irreparable injury" to Plaintiffs and other same-sex couples. *De Leon*, 975 F. Supp. 2d at 663. But with the impending birth of their child, this "substantial threat" is particularly imminent for Dimetman, De Leon, and the child they will soon welcome.

Dimetman is expected to give birth on March 15, 2015. *See* Exhibit A, Declaration of Nicole Dimetman in Support of Motion to Lift Stay ¶ 1 (hereinafter, "Dimetman Decl"). If the State of Texas refuses to recognize Dimetman and De Leon's marriage, which was validly performed in Massachusetts, De Leon will not be the child's legal parent until she formally adopts the child. This stands in stark contrast to how Texas treats opposite sex couples: a husband who consents to his wife's assisted reproduction is automatically deemed the child's parent. *See* Tex. Family Code § 160.703 (providing that if a "husband" consents to his wife's assisted reproduction, he is the child's parent).

The adoption process is onerous, expensive, and uncertain. It is also intrusive. Prior to obtaining a court order establishing that De Leon is also the child's parent, Plaintiffs De Leon and Dimetman must meet with a social worker

who will evaluate their fitness as parents. Dimetman Decl. ¶ 3. The social worker requires them to provide the following (to the extent they exist):

- Proof of citizenship;
- Proof of income for the previous two years;
- Life and medical insurance policies;
- A sketch of their house floorplan;
- Proof that all pets have rabies vaccinations;
- Three completed reference forms from three separate references, two of whom must be non-relatives;
- A will indicating who will care for the children if Plaintiffs Dimetman and De Leon die;
- All legal papers relating to the adoption (i.e., adoption petition);
- Completed and cleared criminal background checks;
- Divorce decrees;
- Death certificates of previous spouses or deceased children;
- Birth certificates of all household members;
- Driver's licenses of each adult; and
- Completed and cleared central registry checks.

Id. They also must complete an eighteen page questionnaire that asks about highly personal matters, such as the nature of their relationship with their parents. *Id.*

Finally, they must meet with the social worker for a "home study." *Id.* Only after jumping through all of these hoops can they go to court to obtain an order establishing Plaintiff De Leon as the baby's parent.

Far worse than the uncertainty, expense, and intrusiveness of the adoption process, the State's refusal to recognize their marriage exposes the unborn baby to great uncertainty and insecurity if, God forbid, Dimetman is rendered incapable of caring for the newborn child. If Dimetman did not survive childbirth, the baby will be an orphan without a parent directing the baby's care. *See* Tex. Family Code § 151.001(a)(6) (providing that parent has right to direct medical care of child). If Dimetman is otherwise incapacitated, De Leon's right and ability to care for the child will be far from assured, as she will not have parental rights unless and until the adoption is completed. Thus, De Leon may not be able to rock the baby to sleep; she may not be able to comfort the baby when he or she is upset; she may not be able to direct the baby's medical care. Adoption takes time, and if something happens to Dimetman, time will not be a luxury that De Leon and the baby have.

No similarly situated, married heterosexual couple must endure such uncertainties, expense, and intrusion when their child is born. These harms are real and irreparable if the child is born while the stay is in place. Although the Court should lift the stay for all same-sex couples, at a minimum, Dimetman and De

Leon should not have to suffer these harms when the District Court has already found the laws that cause them are unconstitutional.

B. Other Courts Have Issued Similar Limited Orders In Same-Sex Marriage Cases.

Precedent supports lifting the stay for the limited purpose of issuing an order establishing that De Leon has full parental rights and directing Defendant Lakey to issue a birth certificate that lists both Dimetman and De Leon as parents. In two prior cases involving terminally ill plaintiffs, courts issued orders directing state officials to recognize valid out-of-state same-sex marriages. Before ruling on the merits of the case, in *Obergefell v. Kasich*, No. 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013), the district court issued a temporary restraining order requiring the Ohio Registrar to only accept a death certificate for one of the plaintiffs if it listed his status as married and his spouse as the "surviving spouse" (as he and his partner were married in another state). *Id.* at *1. Similarly, the court in *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014), issued both a temporary restraining order and injunction requiring the State of Indiana to recognize the out-of-state marriage of the plaintiffs, citing one of the plaintiff's terminal disease as a basis for irreparable harm. In both cases, the district court addressed the immediate need for an order for specific plaintiffs, separately from deciding the ultimate merits of the case. *Obergefell v. Wymyslo,* 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.*; *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir.

2014), *cert. granted sub nom.*; *Obergefell v. Hodges*, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015) and *cert. granted sub nom.*; *Tanco v. Haslam*, No. 14-562, 2015 WL 213648 (U.S. Jan. 16, 2015) and *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015) and *cert. granted sub nom.*; *Bourke v. Beshear*, No. 14-574, 2015 WL 213651 (U.S. Jan. 16, 2015); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 2884868 (S.D. Ind. June 25, 2014) *aff'd*, 766 F.3d 648 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 316, 190 L. Ed. 2d 142 (2014) and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316, 190 L. Ed. 2d 142 (2014).

As in those cases, there is no reason why this Court should hesitate to issue an order to prevent irreparable harm to Dimetman, De Leon, and their baby.

C. The State Will Suffer No Harm By Lifting The Stay For This Limited Purpose.

As Dimetman and De Leon's experience with their first child attests, Texas permits the non-biological parent of a same-sex couple to adopt the couple's child. Therefore, there can be no harm to the State in recognizing De Leon's status as the child's mother on the child's birth certificate without undergoing formal adoption proceedings. Accordingly, there is no countervailing harm to the State that weighs against lifting the stay for the limited purpose requested.

D. The Pending Appeal Is No Reason To Delay Lifting The Stay.

The appeal from the District Court's injunction was argued in this Court on January 9, 2015. The State may argue that the pendency of the appeal is reason not to lift the stay. The State would be wrong.

The District Court's order imposing the stay provides that it is to be in effect "pending the final disposition of any appeal to the Fifth Circuit Court of Appeals." *De Leon*, 932 F. Supp. 2d at 666. Under this Court's procedure, mandate does not issue until the eighth day after the last day for a time to file a petition for rehearing expires, or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Fifth Circuit Internal Operating Procedure, Fed. R. App. P. 41. The deadline to file such a petition is 14 days after issuance of the Court's opinion. Fed. R. App. P. 40(a)(1). And a party may seek to stay the mandate while petitioning the Supreme Court for *certiorari*. Consequently, even a favorable opinion from this Court may not result in the lifting of the District Court's stay before the birth of De Leon's and Dimetman's child. However, should this Court issue an opinion on the pending appeal in time for the District Court's stay to expire before the baby is born, this motion would be moot.

III. THIS MOTION IS PROPERLY BEFORE THIS COURT.

Under Federal Rule of Appellate Procedure 8(a), a party seeking a stay or an order modifying an injunction may bring a motion before a Court of Appeals by showing that moving first in the district court would be "impracticable." Bringing this motion in the District Court is impractical, because the District Court has already found that "the Fifth Circuit has expressly supported the issuance of a stay in same-sex marriage cases pending consideration of their appeal." Order Denying Plaintiffs' Motion to Lift the Stay of Injunction, filed Dec. 12, 2014 (attached as Exhibit B) (relying on *Campaign for S. Equal. v. Bryant*, No. 14-60837, Doc. 00512858022, at 4 (5th Cir. Dec. 4, 2014)).

Given the District Court's prior reliance on *Bryant* in refusing to lift the stay, it is impractical to ask the District Court to again lift the stay, even for limited relief. The District Court has already indicated that the proverbial ball is in this Court. Therefore, Plaintiffs request that this Court decide the motion in the first instance.

CONCLUSION

For the reasons set forth above, the Court should lift the stay. At a minimum, the Court should lift the stay for the limited purpose of establishing Plaintiff De Leon's parental rights and directing Defendant Lakey to issue a birth certificate for Dimetman and De Leon's child that identifies both of them as the child's mothers.

Dated: February 12, 2015

AKIN GUMP STRAUSS HAUER & FELD LLP

By: s/ *Daniel McNeel Lane, Jr.*
Daniel McNeel Lane, Jr.

Attorney for Plaintiffs-Appellees Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he conferred with Defendant-Appellants' counsel, and this motion is opposed. The undersigned also certifies that counsel for Plaintiff-Appellees conferred with Defendant Rickhoff, who is not a party to this appeal, and Defendant Rickhoff is unopposed to the relief requested herein.

February 12, 2015

s/ *Daniel McNeel Lane, Jr.*
Daniel McNeel Lane, Jr.

EXHIBIT A

No. 14-50196

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; GREG ABBOTT, in his official capacity as Texas Attorney General; and DAVID LAKEY, in his official capacity as Commissioner of the Texas Department of State Health Services,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, NO. 5:13-CV-00982

DECLARATION OF NICOLE DIMETMAN IN SUPPORT OF MOTION TO LIFT STAY

I, Nicole Dimetman, hereby declare the following:

1. I am pregnant with my and my wife's second child. Our child is due on March 15, 2015.

2. If the State of Texas continues to refuse to recognize my marriage to Plaintiff Cleopatra De Leon, she and I will have to proceed with the formal adoption process, as we did with our first child. This process is intrusive, expensive, and uncertain.

3. For instance, prior to adopting, Plaintiff De Leon and I must meet with a social worker who will evaluate our fitness as parents. Among other things, we must provide copies of the following documents (to the extent they apply): divorce decrees, death certificates of previous spouses or deceased children; birth certificates of all household members; driver's licenses of each adult; proof of citizenship; proof of income for the previous two years; life and medical insurance policies; a sketch of our house's floorplan; proof that all pets have rabies vaccinations; three completed reference forms from three separate references, two of whom must be non-relatives; a will indicating who will care for our children if we die; all legal papers relating to the adoption (i.e., adoption petition); completed and cleared criminal background checks; and completed and cleared central registry checks. We also must complete an 18 page questionnaire that asks very personal questions about our relationship with our parents, our siblings, and each other. We then must meet with the social worker for a "home study." Once these steps are done, we then must go to court to obtain an order establishing Plaintiff De Leon as the baby's parent.

4. While the adoption process is onerous and offensive, the worst aspect of the State's refusal to recognize my marriage is that it exposes our unborn baby to great uncertainty and insecurity if something were to happen to me before Plaintiff De Leon can formally adopt our child.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 2/11/2015

Nicole Dimetman

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, et al.
Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas, et al.,
Defendants,

§ § § § § § § § § §

Cause No. SA-13-CA-00982-OLG

ORDER DENYING PLAINTIFFS' MOTION TO LIFT THE STAY OF INJUNCTION

On this day the Court considered Plaintiffs' Opposed Motion to Lift the Stay of Injunction (docket no. 83), Defendants' response in opposition (docket no. 84), and Plaintiffs' reply thereto (docket no. 86). The parties have also submitted notices of additional recent authority in support of their arguments (docket nos. 87, 88, 89 and 90). After careful consideration, the Court finds Plaintiffs' motion should be DENIED.

I. BACKGROUND

On February 27, 2014, this Court held that Texas's laws prohibiting same-sex marriage and denying recognition of same-sex marriages entered in other states (hereinafter "Section 32") were unconstitutional. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 665–66 (W.D. Tex. 2014). The Court granted Plaintiffs' motion for preliminary injunction, enjoining Defendants from enforcing Section 32. *Id.* However, the Court also "stay[ed] execution of this preliminary injunction pending the final disposition of any appeal to the Fifth Circuit Court of Appeals." *Id.* On March 7, 2014, the Court granted Defendants' unopposed motion to stay proceedings pending appeal of the preliminary injunction order (docket no. 76).

On November 24, 2014, Plaintiffs filed a motion asking the Court to lift the stay of injunction. In support of their motion, Plaintiffs allege: (1) the Supreme Court has denied certiorari from circuit decisions recognizing same-sex marriage, effectively dissolving the stays imposed in those cases; and (2) Texas's laws restricting same-sex marriage continue to harm Plaintiffs during the pendency of the stay.

II. ANALYSIS

A. The Court has jurisdiction to lift or amend the stay.

As a preliminary threshold matter, Defendants contend the Court lacks jurisdiction to vacate the stay because an appeal is pending before the Fifth Circuit. As a general rule, "the filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control of *those aspects of the case* involved in appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (emphasis added). However, the district court maintains jurisdiction over other matters, including ordering or modifying stays of injunctive relief. *Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145 (5th Cir. 1982); *see also Mazurek v. United States*, No. CIV. 99-2003, 2001 WL 616668, at *1 (E.D. La. Apr. 20, 2001) (noting a district court's jurisdiction includes the authority to lift the stay of an order on appeal).

The stay of the injunction is not being appealed in this case. Rather, the only issue before the Fifth Circuit is whether the Court erred in issuing a preliminary injunction and holding that Section 32 was unconstitutional. Vacating the stay of the injunction would not substantially alter the judgment or order of the Court, and would not make the appeal moot. *See Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 819–21 (5th Cir. 1989). Therefore, the Court finds it has jurisdiction to determine whether the injunction stay should be lifted.

B. The Supreme Court's actions since the imposition of the stay do not dictate the stay should be lifted.

Plaintiffs argue the Court should lift the stay because the Supreme Court's actions following this Court's decision no longer support the stay's continuance. Specifically, Plaintiffs allege the Supreme Court denied certiorari of appeals upholding same-sex marriage. *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (Utah); *Walker v. Wolf*, 135 S. Ct. 316 (2014) (Wisconsin); *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (Virginia); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014) (Virginia); *Smith v. Bishop*, 135 S. Ct. 271 (2014) (Oklahoma); and *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (Indiana).[1] Furthermore, Plaintiffs contend that since the denial of certiorari, the Supreme Court has denied similar stays from other district courts. *See, e.g., Wilson v. Condon*, No. 14A533, 2014 WL 6474220 (U.S. Nov. 20, 2014); *Parnell v. Hamby*, No. 14A413, 2014 WL 5311581, at *1 (U.S. Oct. 17, 2014); *Otter v. Latta*, 135 S. Ct. 345 (2014).

However, the Court is not persuaded that these actions support lifting the stay in this case. As Plaintiffs concede, the Supreme Court's denial of certiorari is legally inconsequential. Furthermore, the recent Supreme Court orders declining to stay injunctions in same-sex marriage cases apply to states with binding circuit precedent which the Supreme Court had declined to review. *See id.* Plaintiffs cite no case, and the Court is unaware of any, in which the Supreme Court has declined to stay a district court's injunction on a same-sex marriage case in a circuit that has not resolved the issue. Because there is a pending appeal in this case before the Fifth Circuit, the Court finds Plaintiffs' arguments fail.

C. The Eleventh Circuit decision is distinguishable from this case.

Plaintiffs also note the Eleventh Circuit recently denied the State Defendants' motion to

[1] The Court notes this basis for Plaintiffs' motion, the denial of certiorari in other same-sex marriage cases, occurred over two months ago, on October 6, 2014.

extend the district court's stay, and argue this decision supports their motion. *See Grimsley v. Armstrong*, No. 14-14066-AA (11th Cir. Dec. 3, 2014). In that case, the district court denied a similar motion to extend the stay, explaining the stay "would leave the Eleventh Circuit insufficient time to make a considered judgment on whether the stay should remain in place and thus would be inconsistent with the public interest in implementing just once the constitutional decision on same-sex marriage in Florida." *Brenner v. Scott*, No. 4:15-CV-107-RH/CAS, at *4 (N.D. Fla. Nov. 5, 2014).

However, our case has a significantly different posture. As previously mentioned, an appeal of this Court's preliminary injunction order remains pending before the Fifth Circuit. In fact, the Fifth Circuit will hear the merits of the appeal in less than a month. *See De Leon v. Perry*, No. 14-50196, Doc. 00512795903, at 1 (5th Cir. Oct. 7, 2014) (granting a motion to expedite oral argument of the merits of the appeal). Importantly, the Fifth Circuit recently stayed a district court's preliminary injunction against Mississippi's prohibition on same-sex marriage. *Campaign for S. Equal. v. Bryant*, No. 14-60837, Doc. 00512858022, at 4 (5th Cir. Dec. 4. 2014). In contrast to the Eleventh Circuit's decision not to extend the stay, the Fifth Circuit noted that "'a detailed and in depth examination of this serious legal issue' is warranted before a disruption of a long standing status quo." *Id.* at 3–4 (citing *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983)). Therefore, the Fifth Circuit has expressly supported the issuance of a stay in same-sex marriage cases pending consideration of their appeal.

D. The legal and practical concerns for imposing the original stay remain today.

In its order imposing a stay in Mississippi, the Fifth Circuit addressed some of the same legal and practical concerns this Court considered when imposing the immediate stay in this case. *See id.* As the Court noted, "considerations of intra-circuit uniformity and the avoidance

of confusion, should this court lift the stay that is currently in place . . ." militate in favor of denying Plaintiffs' motion. *See id.* This Court shares the Fifth Circuit's concern that lifting the stay would cause an "inevitable disruption that would arise from a lack of continuity and stability in this important area of the law" and presents a potential harm not just to Texas but to Plaintiffs themselves and to the public interest at large. *See id.* For example, if this Court lifted the stay and the Fifth Circuit ultimately reversed and vacated the preliminary injunction, what would be the legal status of same-sex marriages entered into during the pendency of the appeal, or the parental rights of children born in these interim same-sex marriages? *See, e.g., Evans v. Utah*, ___ F. Supp. 2d ___, 2014 WL 2048343, at *1–4 (D. Utah May 19, 2014) (noting the confusion that resulted from Utah's marriage ban being enjoined and subsequently reinstated); *see also Strauss v. Horton*, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009) (discussing the validity of same-sex marriages that occurred after the California Supreme Court's decision allowing same-sex marriage and the passage of Proposition 8 precluding same-sex marriages). Furthermore, given the Fifth Circuit's recent stay of the Mississippi injunction, it is practically certain the Circuit Court would re-impose the stay in this case if lifted.

Although the Court recognizes that Plaintiffs are potentially harmed by the continuation of the stay, "this harm is attenuated by the imminent consideration of their case by a full oral argument" before the Fifth Circuit. *See id.* The merits of the appeal in this case are scheduled to be heard on January 9, 2015, that is, 28 days from the date of this Order. Given that Plaintiffs' claims will soon be heard, "a temporary maintenance of the status quo balances the possibility of this harm with the need to resolve Plaintiffs claims in a manner that is both expeditious and circumspect." *See id.*

III. CONCLUSION

Lifting the stay would not bring finality to this Fourteenth Amendment claim. To the contrary, such action would only be temporary, with confusion and doubt to follow. The day for finality and legal certainty in the long and difficult journey for equality is closer than ever before. Ultimately, as mentioned in the February 12, 2014 hearing, this Court believes the issue will ultimately be resolved by the United States Supreme Court and "a group of five people will decide this case." Accordingly, Plaintiffs' motion is DENIED.

It is so ORDERED.

SIGNED this 12 day of December, 2014.

United States District Judge Orlando L. Garcia

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all parties listed on this certificate of service will receive a copy of the foregoing document filed electronically with the United States Court of Appeals for the Fifth Circuit, on this 12th day of February, 2015, with notice of case activity to be generated and ECF notice to be sent electronically by the Clerk of the Court. A copy will be mailed Via Certified Mail to those who do not receive ECF notice from the Clerk of the Court.

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