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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

|  |   |                                  |
|--|---|----------------------------------|
| <b>Nelda Majors, et al.,</b>                       | ) |                                  |
|  | ) |                                  |
| <b>Plaintiffs,</b>                                 | ) | <b>2:14-cv-00518 JWS</b>         |
|  | ) |                                  |
| <b>vs.</b>   | ) | <b>ORDER AND OPINION</b>         |
|  | ) |                                  |
| <b>Michael K. Jeanes, in his official capacity</b> | ) | <b>[Re: Motion at Docket 64]</b> |
| <b>as Clerk of the Superior Court of</b>           | ) |                                  |
| <b>Maricopa County, Arizona, et al.,</b>           | ) |                                  |
|  | ) |                                  |
| <b>Defendants.</b>                                 | ) |                                  |
|  | ) |                                  |

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**I. MOTION PRESENTED**

At docket 64, plaintiff Fred McQuire ("McQuire") asks for a temporary restraining order which would require defendants to recognize the legitimacy of his California marriage to his recently deceased partner George Martinez ("Martinez"), require defendant Will Humble ("Humble") to prepare and issue a death certificate showing that Martinez was married to McQuire when he died, and require Humble to issue any necessary directives to health departments, funeral homes, physicians, medical examiners, and anyone else involved in preparing the death certificate to comply with the requirement to show that Martinez was married to McQuire at the time of his death.

1 Defendants' response is at docket 70. McQuire replies at docket 73. Oral argument  
2 was heard on September 12, 2014.

3  
4 **II. BACKGROUND**

5 McQuire and Martinez were a gay couple who lived together for many years in  
6 Green Valley, Arizona, until the time of Martinez's death. They are among the nineteen  
7 plaintiffs who filed the case at bar to challenge Arizona's constitutional and statutory  
8 provisions which ban same-sex marriage in Arizona and prevent Arizona from  
9 recognizing same-sex marriages lawfully entered in other states.<sup>1</sup> The defendants  
10 named in the current complaint<sup>2</sup> are Michael K. Jeanes, sued in his official capacity as  
11 Clerk of the Superior Court of Maricopa County; Will Humble, sued in his official  
12 capacity as Director of Arizona's Department of Health Services; and David Raber,  
13 sued in his official capacity as Director of the Arizona Department of Revenue.  
14

15 Plaintiffs contend—and defendants deny—that the challenged provisions of  
16 Arizona law deny them the equal protection of the laws required by the Fourteenth  
17 Amendment. In addition, plaintiffs contend—and defendants deny—that the challenged  
18 laws deny plaintiffs the substantive due process of law required by the Fourteenth  
19 Amendment.  
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21 **III. STANDARD OF REVIEW**

22 McQuire asks the court to issue an injunction commanding defendant Humble  
23 and his agents to prepare, issue, and accept a death certificate for Martinez stating he  
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26 <sup>1</sup>ARIZ. CONST. art. XXX, § 1; A.R.S. §§ 25-101(C), 25-112(A), and 25-125(A).

27 <sup>2</sup>Second Amended Complaint for Injunctive and Declaratory Relief at doc. 50.

1 was married and naming McQuire as his spouse.<sup>3</sup> Injunctive relief is an extraordinary  
2 remedy<sup>4</sup> which is not routinely granted.<sup>5</sup> The Ninth Circuit has explained that to obtain  
3 injunctive relief a plaintiff must show four things: First, he is likely to succeed on the  
4 merits; second, he is likely to suffer irreparable harm without the relief sought; third, a  
5 balancing of the equities tips toward him; and fourth, the public interest favors issuance  
6 of an injunction.<sup>6</sup>

#### 8 IV. DISCUSSION

##### 9 **A. Preliminary Consideration**

10 Defendants contend that the Supreme Court's decision in *Baker v. Nelson*<sup>7</sup>  
11 effectively decided the claim upon which McQuire's motion rests—that a state violates  
12 the United States Constitution when it refuses to sanction same-sex marriages.<sup>8</sup>

13 Defendants misapprehend the current significance of *Baker*. There, 42 years ago the  
14 Court said that a challenge to a Minnesota law defining marriage as between a man  
15 and a woman did not raise a substantial federal question. Even such a terse  
16 pronouncement binds the lower federal courts unless subsequent developments in the  
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20 <sup>3</sup>Requests for temporary restraining orders are governed by the same standards that  
21 govern the issuance of a preliminary injunction. *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors,*  
*Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *Lockheed Missile & Space Co. v. Hughes*  
*Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D. Cal. 1995).

22 <sup>4</sup>See *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 496 (2001).

23 <sup>5</sup>*Martin v. O'Grady*, 783 F.Supp. 1191, 1195 (N.D. Ill. 1990).

24 <sup>6</sup>*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*,  
25 752 F.3d 755, 759 (9th Cir. 2014).

26 <sup>7</sup>409 U.S. 810 (1972).

27 <sup>8</sup>Doc. 70 at 3.

1 Supreme Court's own jurisprudence establish that the pronouncement no longer  
2 comports with the Supreme Court's view of an issue.<sup>9</sup>

3 The Supreme Court's decisions in *Romer v. Evans*,<sup>10</sup> and *Lawrence v. Texas*,<sup>11</sup>  
4 cast doubt on the proposition that *Baker* commands lower courts to treat challenges to  
5 same-sex marriage prohibitions as matters not raising a substantial federal question.  
6

7 The Court's more recent decision in *United States v. Windsor*<sup>12</sup> eliminates any  
8 uncertainty. The majority opinion striking down the federal Defense of Marriage Act  
9 ("DOMA") holds that DOMA's definition of marriage as between members of different  
10 genders for purposes of all federal laws required the Supreme Court "to address  
11 whether the resulting injury and indignity (to same-sex couples) is a deprivation of an  
12 essential part of the liberty protected by the Fifth Amendment."<sup>13</sup> Less than two weeks  
13 ago the Seventh Circuit joined numerous other federal courts in recognizing that *Baker*  
14 does not foreclose consideration of claims challenging the constitutionality of state laws  
15 forbidding same-sex marriages.<sup>14</sup> *Baker* is not an impediment to consideration of  
16 McQuire's claim.  
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21 <sup>9</sup>See, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (recognizing that the Court's "doctrinal  
development" may vitiate the binding nature of a decision like *Baker*.)

22 <sup>10</sup>517 U.S. 620 (1996).

23 <sup>11</sup>539 U.S. 558 (2003).

24 <sup>12</sup>133 S.Ct. 2675 (2013).

25 <sup>13</sup>*Id.* at 2692.

26 <sup>14</sup>*Baskin v. Bogan*, \_\_\_ F.3d \_\_\_, Nos. 14–2386, 14–2387, 14–2388, 14–2526, 2014 WL  
27 4359059, at \*7 (7th Cir. Sept. 4, 2014).

1 **B. Likelihood of Success on the Merits**

2           Within the past year, many federal courts have held that state laws forbidding  
3 same-sex marriage violate the United States Constitution. The most recent circuit court  
4 decision is the Seventh Circuit's decision in *Baskin v. Bogan*,<sup>15</sup> which held that the  
5 prohibitions on same-sex marriages in Indiana and Wisconsin violated the Equal  
6 Protection clause of the Fourteenth Amendment. Just weeks prior to *Baskin*, the Fourth  
7 Circuit held in *Bostic v. Schaefer*<sup>16</sup> that Virginia's prohibition on same-sex marriages  
8 violated both the Equal Protection and Due Process clauses of the Fourteenth  
9 Amendment. Prior to that, the Tenth Circuit held in *Kitchen v. Herbert*<sup>17</sup> that Utah's  
10 prohibition of same-sex marriages violated the Constitution. No other circuit courts  
11 have yet addressed the issue. Numerous district courts have also held that state  
12 prohibitions on same-sex marriage violate the Constitution.<sup>18</sup>

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18           <sup>15</sup>*Id.* at \*21 (holding Indiana and Wisconsin prohibitions on same-sex marriage violated  
19 equal protection).

20           <sup>16</sup> \_\_\_ F. 3d \_\_\_, Nos. 14–1167, 14–1169, 14–1173, 2014 WL 3702493, at \*16 (4th Cir.  
21 July 28, 2014).

22           <sup>17</sup>755 F.3d 1193, 1229–30 (10th Cir. 2014).

23           <sup>18</sup>*Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147–48 (D. Or. 2014); *Whitewood v.*  
24 *Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 550  
25 (W.D. Ky. 2014); *Baskin v. Bogan*, \_\_\_ F. Supp. 2d \_\_\_, Nos. 1:14–cv–00355–RLY–TAB,  
26 1:14–cv–00404–RLY–TAB, 1:14–cv–00406–RLY–MJD, 2014 WL 2884868, at \*14 (S.D. Ind.  
27 June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1026–28 (W.D. Wisc. 2014); *Latta v.*  
*Otter*, \_\_\_ F. Supp. 2d \_\_\_, No. 1:13–cv–00482–CWD, 2014 WL 1909999, at \*28 (D. Idaho May  
13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014); *DeLeon v. Perry*,  
975 F. Supp. 2d 632, 665–66 (W.D. Tex. 2014) (granting preliminary injunction, but staying  
same pending appeal).

1 Only a Nevada district court and two Louisiana district courts have upheld state  
2 bans.<sup>19</sup> None of these decisions are persuasive. The judges in Nevada and the more  
3 recent Louisiana case applied rational basis review to the plaintiffs' equal protection  
4 challenges. However, the Ninth Circuit's decision in *SmithKline Beecham v. Abbott*  
5 *Laboratories*,<sup>20</sup> holds that discrimination based on sexual orientation must be evaluated  
6 using a heightened standard of review.<sup>21</sup> Defendants contend that *SmithKline Beecham*  
7 is inapposite for four reasons.

9 First, defendants argue Arizona's man/woman marriage laws do not discriminate  
10 on the basis of sexual orientation.<sup>22</sup> Yet, the reason why couples such as McQuire and  
11 Martinez may not marry is precisely because of their sexual orientation. This argument  
12 lacks merit.

14 Second, defendants contend Arizona's man/woman marriage laws were not  
15 intended to discriminate against same-sex couples.<sup>23</sup> Accepting that as true, it does not  
16 alter the fact that the laws do discriminate. Evidence of malignant intent might support  
17 a higher standard of review, but defendants do not explain why its absence necessarily  
18 forecloses use of a higher standard.

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21 <sup>19</sup>*Robicheaux v. Caldwell*, \_\_\_ F. Supp. 2d \_\_\_, Nos. 13-5090, 14-97, 14-327, 2014 WL  
22 4347099, at \*12 (E.D. La. Sept. 3, 2014) (applying rational basis review standard); *Sevcik v.*  
23 *Sandoval*, 911 F. Supp. 2d 996, 1018 (D. Nev. 2012) (applying rational basis review standard);  
*Merritt v. Attorney General*, No. 13-00215-BAJ-SCR, 2013 WL 6044329, at \*1 (M.D. La.  
Nov. 14, 2013) (district court adopted recommendation of a magistrate judge).

24 <sup>20</sup>740 F.3d 471 (9th Cir. 2014).

25 <sup>21</sup>*Id.* at 484.

26 <sup>22</sup>Doc. 70 at 4.

27 <sup>23</sup>*Id.*

1 Third, defendants argue that because the marriage laws in question are based  
2 upon a biological difference which reflects society's interest in the capacity to create  
3 children, a higher standard of review should not apply.<sup>24</sup> This argument is  
4 circular—there is a rational basis for the distinction, ergo rational basis review applies.  
5 Whether marriage laws which discriminate between heterosexuals and homosexuals  
6 should be subject to a higher level of scrutiny depends on whether a fundamental right  
7 or a suspect classification is involved,<sup>25</sup> not whether the state can offer a rational basis  
8 for the distinction.<sup>26</sup> Moreover, there is circuit court authority for the proposition that  
9 marriage laws which discriminate between heterosexual couples and homosexual  
10 couples infringe a fundamental right.<sup>27</sup>

13 Fourth, defendants argue that *SmithKline Beecham* does not reach so far as the  
14 circumstances before this court because it relied on the Supreme Court's decision in  
15 *Windsor*, which did not explicitly establish a heightened standard of review for all cases  
16 involving laws with a disparate impact on same-sex couples.<sup>28</sup> The argument is not  
17 persuasive. To begin with, the issue here was not before the court in *Windsor*, so the  
18 Court did not need to explain how far its analysis might reach. Second, if one is to infer  
19 the reach of the *Windsor* analysis, it is at least as reasonable to infer that *Windsor* does  
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22 <sup>24</sup>*Id.*

23 <sup>25</sup>*Am. Tower Corp. v. City of San Diego*, \_\_\_ F.3d \_\_\_, Nos. 11–56766, 11–56767,  
24 11–56861, and 11–56862, 2014 WL 3953765, at \*17 (9th Cir. Aug. 14, 2014).

25 <sup>26</sup>*See Kitchen*, 755 F.3d at 1218.

26 <sup>27</sup>*Bostic*, 2014 WL 3702493 at \*8–10; *Kitchen*, 755 F.3d at 1218.

27 <sup>28</sup>Doc. 70 at 11–12.

1 imply use of a heightened standard of review in the case before this court as it is to  
2 infer the opposite. Finally, it is important to note that *SmithKline Beecham* relied on  
3 *Windsor* to reverse Ninth Circuit precedent which had held that rational basis review  
4 applied, and broadly declared, “there can no longer be any question that gays and  
5 lesbians are no longer a group or class of individuals normally subject to rational basis  
6 review.”<sup>29</sup>

8 The court now turns to the other Louisiana district court case which upheld a  
9 state law forbidding same-sex marriage. As relevant to the issue at hand, the court  
10 relied on a single proposition—that *Baker v. Nelson* was controlling.<sup>30</sup> As explained in  
11 the previous subsection of this order, *Baker* is no longer controlling.

13 The remainder of defendants’ opposition essentially details its arguments on the  
14 merits. While the court is not presently passing on the merits of those arguments, for  
15 present purposes it suffices to say that in the persuasive decisions by other federal  
16 courts set out above, they have all been found wanting. Given the wealth of case law  
17 holding that state prohibitions on same-sex marriage violate the Constitution, and the  
18 absence of any persuasive case law to the contrary, the court concludes that McQuire  
19 is likely to prevail on the merits.

### 21 **C. Likelihood of Irreparable Harm**

22 McQuire identifies three types of irreparable harm he will suffer absent injunctive  
23 relief: (1) he will lose the dignity associated with his marriage and suffer that loss in the  
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25 <sup>29</sup>*SmithKline Beecham*, 740 F.3d at 484 (internal quotation marks omitted) (quoting  
26 *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 114, 143 (1994) .

27 <sup>30</sup>*Merritt*, 2013 WL 6044329 at \*2.



1 midst of his grieving; (2) he will lose significant financial benefits; and (3) he will suffer a  
2 violation of his constitutional rights.

3 **1. Emotional harm caused by the loss of dignity and status**

4 McQuire argues that if he is not listed as a spouse on Martinez's death  
5 certificate, he will lose the dignity associated with their marriage and suffer that loss in  
6 the midst of his grieving. The Supreme Court has recognized that the right to marry  
7 confers on the individuals able to exercise the right "a dignity and a status of immense  
8 import."<sup>31</sup> McQuire likely faces irreparable emotional harm by being denied this dignity  
9 and status as he grieves Martinez's death.  
10

11 Defendants deny McQuire's allegation that the marriage laws deprive him of the  
12 dignity and status conferred by his marriage to Martinez. Defendants rely on the fact  
13 that the Supreme Court stayed the effect of three lower court decisions in *Herbert v.*  
14 *Kitchen*,<sup>32</sup> *Herbert v. Evans*,<sup>33</sup> and *McQuigg v. Bostic*.<sup>34</sup> The cases subject to these  
15 stays involve lengthy opinions. The Court's stays shed no light on what issue, if any,  
16 will deserve review in the Supreme Court. In sum, it is not possible to say that the stays  
17 disclose anything about the legitimacy of McQuire's claim for loss of dignity. On the  
18 other hand, the Court's decision in *Windsor* expressly recognizes that where it is  
19 permitted, the marital state of same-sex couples is invested with "a dignity and status of  
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24 <sup>31</sup>*Windsor*, 133 S.Ct. at 2692

25 <sup>32</sup>134 S.Ct. 893 (2014).

26 <sup>33</sup>No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014).

27 <sup>34</sup>No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014).

1 immense import.”<sup>35</sup> Further, the stays suspended the effect of lower court decisions  
2 that affected the general populations of Utah and Virginia. The Court was not  
3 presented with particularized showings of irreparable harm, as is the case here.  
4 Defendants’ argument based on the three stays issued by the Supreme Court is not  
5 persuasive.  
6

## 7 **2. Financial harm**

8 At a more prosaic level, McQuire argues that if his marriage is not recognized  
9 now he will lose significant financial benefits. In particular, if his name does not appear  
10 on Martinez’s death certificate, McQuire will be unable to succeed to Martinez’s much  
11 more substantial social security and Veteran’s benefits.<sup>36</sup> McQuire is in poor health and  
12 unable to work. By succeeding to Martinez’s benefits, McQuire would have a monthly  
13 income in excess of \$4,000. Without those benefits, his income would be only a bit  
14 over \$1,300. Given that McQuire’s monthly mortgage payment is about \$725, the court  
15 accepts as true that without Martinez’s benefits, McQuire will be unable to keep his  
16 home. Defendants contend that the monetary harm urged by McQuire is illusory  
17 because federal law would not allow him to succeed to either Martinez’s social security  
18 benefits or his Veterans benefits.<sup>37</sup> The court agrees.  
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22 <sup>35</sup>*Windsor*, 133 S.Ct. at 2692.

23  
24 <sup>36</sup>Doc. 66 at 5 ¶ 14. The substantial roadblocks standing between McQuire and the  
25 enhanced benefits to which he would be entitled if recognized as Martinez’s spouse are  
26 explained in the memorandum supporting his motion. Doc. 64 at pp. 13–15. See also *Baskin*,  
2014 WL 4359059 at \*6 (describing the catalog of benefits denied to same-sex couples whose  
27 marriages are not officially recognized).

28 <sup>37</sup>Doc. 70 at 4–5.

1 Defendants cite 20 C.F.R. § 404.335(a)(1) to support the argument that because  
2 the McQuire/Martinez marriage license was obtained (and therefore the marriage was  
3 performed) less than nine months prior to Martinez's death, McQuire is not entitled to  
4 succeed to Martinez's social security benefits. The marriage took place July of 2014.<sup>38</sup>  
5 Martinez died on August 28, 2014.<sup>39</sup> While the regulation includes four situations in  
6 which a widow married less than 9 months prior to the death may still receive benefits,<sup>40</sup>  
7 none of those exceptions applies here. The court concludes that regardless of what is  
8 said on Martinez's death certificate, McQuire will be unable to succeed to his social  
9 security benefits.  
10

11 Defendants cite 38 U.S.C. § 1304 to support their argument that McQuire cannot  
12 obtain enhanced Veterans benefits as a result of Martinez's death. As pertinent here,  
13 the provision which controls provides that to obtain benefits, the surviving spouse must  
14 have been married to the deceased veteran for a period of "one year or more."<sup>41</sup>  
15 McQuire was married to Martinez for less than a year, so he is not qualified to obtain  
16 any Veteran's benefits as a result of Martinez's death.  
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24 <sup>38</sup>Doc. 66 at 2–3 ¶ 5.

25 <sup>39</sup>*Id.* at 3 ¶ 9.

26 <sup>40</sup>20 C.F.C. § 404.335(a)(2).

27 <sup>41</sup>38 U.S.C. § 1304(2).

1           **3. Harm caused by the deprivation of a constitutional right**

2           Finally, McQuire argues that because the harm of which he complains flows from  
3 a violation of his constitutional rights, that fact alone suffices to show irreparable harm.  
4 The Ninth Circuit has said that “[t]he deprivation of constitutional rights ‘unquestionably  
5 constitutes irreparable injury.’”<sup>42</sup>  
6

7           Defendants do not dispute that deprivation of a constitutional right is in-and-of-  
8 itself an irreparable harm. Instead, they contend that the Arizona marriage laws do not  
9 violate the Fourteenth Amendment. However, as discussed above, for purpose of the  
10 pending motion that contention fails in light of the substantial case law which  
11 contravenes defendants’ position.<sup>43</sup>  
12

13           In summary, the court agrees with defendants that McQuire has not shown  
14 irreparable harm based on the financial consequences of not recognizing his marriage  
15 to Martinez. Nevertheless, on the basis of the loss of dignity and status coming in the  
16 midst of an elderly man’s personal grief and on the fact that deprivation of a  
17 constitutional right constitutes irreparable harm, the court holds that McQuire has  
18 shown the requisite irreparable harm.  
19

20           **D. Balance of the Equities**

21           On one side of the scale rest McQuire’s loss of dignity and the irreparable harm  
22 to him caused by denial of his constitutional rights. On the other side, there is the fact  
23 recognized by the Ninth Circuit that whenever a state law is enjoined, the state and its  
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25                     <sup>42</sup>*Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014)  
26 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.2012)).

27                     <sup>43</sup>Doc. 70 at 14–15.

1 people also suffer an irreparable injury.<sup>44</sup> It is to be noted that McQuire seeks relief that  
2 would apply only to him and not to the other plaintiffs. This limitation substantially  
3 reduces the reach and impact of the injunctive relief he seeks. Because McQuire's  
4 irreparable harm inheres in a claimed violation of the Constitution—a violation which he  
5 is very likely to establish for the reasons set out in subsection B. above—and because  
6 the injunctive relief sought is limited to a single individual, it cannot be said that the  
7 balance of the equities favors defendants. In these circumstances, the court concludes  
8 that the balance of equities is consistent with issuance of an injunction limited in scope  
9 to McQuire's situation.  
10

#### 11 **E. Public Interest**

12  
13 The public has an important interest in the faithful discharge of duties imposed  
14 on Arizona's public officials by Arizona law. The public also has an important interest in  
15 those same officials' compliance with the highest law of the land, the United States  
16 Constitution. Where discharging state law runs afoul of the United States Constitution,  
17 the interest of the public necessarily lies in compliance with the higher law.  
18

19 The court has not yet decided whether there is a conflict between Arizona law  
20 and the Constitution, but the court has decided that it is probable that there is such a  
21 conflict so that Arizona will be required to permit same-sex marriages. Thus, it is  
22 probable that the public interest would be advanced if the requested narrowly-limited  
23 injunctive relief is awarded. Conversely, it is probable that the public interest would be  
24 harmed if no such relief were provided.  
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27 <sup>44</sup>*Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

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**V. CONCLUSION AND ORDER**

For the reasons above, McQuire’s motion at docket 64 is **GRANTED**, and

**IT IS ORDERED:**

- 1. As to plaintiff Fred McQuire only, Arizona officials receiving notice of this order are TEMPORARILY RESTRAINED from enforcing § 1 of Article 30 of the Arizona Constitution, A.R.S. § 25-101(C), A.R.S. § 25-112(A), and any other Arizona law against recognition of the marriage of Fred McQuire to George Martinez; and
- 2. Defendant Will Humble, in his capacity as Director of the Arizona Department of Health Services, and his agents shall promptly prepare, issue, and accept a death certificate for George Martinez which records his marital status as “married” and his surviving spouse as Fred McQuire.

DATED this 12<sup>th</sup> day of September 2014.

\_\_\_\_\_  
/s/  
JOHN W. SEDWICK  
UNITED STATES DISTRICT COURT