



Standing is a threshold jurisdictional question that cannot be waived. *See Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996) (“[S]tanding, which is jurisdictional [is] not subject to waiver.”); *Maverick Media Group, Inc. v. Hillsborough County*, 528 F.3d 817, 819 (11th Cir.2008) (“[S]tanding requirements are jurisdictional ... and, therefore cannot be waived or otherwise conferred upon the court by the parties.”) (internal citation omitted). Attorney General Strange can be dismissed as a Defendant without interrupting the proceedings, which may go forward against Defendants Davis and Russell. Attorney General Strange may be allowed, and so reserves his right, to intervene in his capacity as the chief legal advisor of the State to assert legal arguments in support of Alabama’s marriage laws in the manner in which he has been doing (*see* Fed.R.Civ.P. 5.1), but then his role is more appropriately akin to that of an amicus, instead of as a party defendant, when his connection to Alabama’s marriage laws is too attenuated to support jurisdiction.

### **Argument**

“To have standing, the plaintiffs must demonstrate injury in fact, causation, and redressability.” *I.L. v. Alabama*, 739 F.3d 1273, 1278 (11th Cir. 2014) (citing *DiMaio v. Democratic Nat’l Comm.*, 520 F.3d 1299, 1301-02 (11th Cir. 2008)). And “standing cannot be ‘dispensed in gross.’” *Id.* at 1279 (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). The Court must “address standing for each category of claims separately.” *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185 (2000)). Here, even assuming the existence of an injury, Plaintiffs cannot show that Attorney General Strange *caused* their alleged injuries, or that an injunction against him would *redress* their injuries.

To the extent Plaintiffs suffered injury because of their inability to obtain a marriage license, it was not caused by the Attorney General. Alabama law vests no authority in the

Attorney General to issue marriage licenses, but instead vests such authority with the probate courts in each county. Ala. Code § 30-1-9 (“Marriage licenses may be issued by the judges of probate of the several counties.”). Probate courts are part of the “unified judicial system” (the “Judicial Department”) of Alabama:

Except as otherwise provided by this Constitution, the judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, ... the circuit court, ... the district court, a probate court and such municipal courts as may be provided by law.

Ala. Const. (1901) Art. VI. § 139 (emphasis added).

The Alabama doctrine of separation of powers would preclude any action by the Attorney General that may cause (or redress) such an injury. The Attorney General is a member of the Executive Branch of Alabama government:

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.”).

Ala. Const. (1901) Art. V, § 112. In Alabama, the legislative, judicial, and executive powers are strictly divided among the three branches of government:

The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ala. Const. (1901) Art. III, § 42. Each branch is strictly prohibited from exercising the powers of the other two branches:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Ala. Const. (1901) Art. III, § 43. Attorney General Strange therefore is not permitted to issue a marriage license or to require a Probate Judge to do so.

For much the same reasons, Attorney General Strange cannot redress Plaintiffs' alleged injuries. The facts of this case bear that out. Marriage licenses were not issued in Mobile County as a result of an injunction against the Attorney General. When those injunctions against the Attorney General first went into effect on February 9, 2015, Probate Judges in this area continued to withhold such licenses, not being parties to the injunction. *See, e.g.*, Doc. 95 at ¶ 18. While Probate Judge in some counties issued marriage licenses to same-sex couples, it was not because of the injunctions against the Attorney General – those injunctions did not bind the non-party Probate Judges – but because of those Judges' own views of their constitutional obligations.

When licenses were denied, some parties complained to this Court and asked that Attorney General Strange be further enjoined or sanctioned, but no one could point to a single act or omission of the Attorney General that was in violation of this Court's orders or that could possibly result in their obtaining a marriage license. *See, e.g., Searcy v. Strange*, case no. 14-cv-208 (Motion for Sanctions and Order, docs 71-72); *Hedgepeth v. Strange*, case no. 15-cv-67 (Complaint doc. 1). Instead, what prompted the issuance of marriage licenses to same-sex couples, when they were being issued, was the injunction against the Probate Judge. *See* Plaintiffs' Second Amended Complaint, doc. 95 at ¶18 (“As a result of this Court's further order of February 12,2015, granting a preliminary injunction in this action [against the Probate Judge], Plaintiffs Strawser and [Humphrey] married in Alabama pursuant to a marriage license issued by Defendant Davis.”). *See also id.* at ¶19, 20, and 21.

To the extent Plaintiffs desire other benefits to marriage, and not just the issuance of a marriage license, the fact remains that the Attorney General is not the proper defendant. The Attorney General does not, for example, determine who may or who may not file joint tax returns, adopt, or inherit. Attorney General Strange simply cannot give Plaintiffs what they want, and as a result, Plaintiffs' lack standing to assert their claims against the Attorney General.

The Attorney General's view of the claims in this case has not changed. He continues to believe that Alabama's marriage laws are constitutional, and he stands by the legal arguments that he raised in this and similar actions. By saying that the case should proceed against the Probate Judges, he does not question their actions or suggest that they should be enjoined. He has in fact argued that further injunctions would be detrimental and that the Probate Judges deserve the right to make their own arguments against the motions for class certification and preliminary injunction, and that remains true today. His argument here is that, as the facts of this case have made abundantly clear, he is not the proper Defendant in an action challenging the constitutionality of Alabama's marriage laws.

For these reasons, the claims against the Attorney General are due to be dismissed. If appropriate, the Attorney General may appear as an amicus to argue in support of the constitutionality of state law.

Respectfully submitted,

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