IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E. HUMPHREY, et al.,	)	
Plaintiffs,	)	**Case No. 1:14-cv-424-CG-N**
v.	)	
STATE OF ALABAMA, LUTHER STRANGE, and DON DAVIS,	)	
Defendants.	)	

JUDGE DON DAVIS' MOTION TO DISMISS
SECOND AMENDED COMPLAINT (DOC. 95)

COMES NOW Defendant Don Davis, Judge of Probate, Mobile County, Alabama, and respectfully moves to dismiss this case pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*, showing the following:

INTRODUCTION

The individual plaintiffs filed this class action suit to challenge Alabama's constitutional and statutory provisions that define civil marriage as the union of one man and one woman. This case must be dismissed in its entirety because:

A. The Court lacks subject matter jurisdiction due to the plaintiffs' failure to raise a substantial federal question;
B. The plaintiffs lack standing because they have not shown any injury in fact and their alleged injuries are not redressable by Judge Davis;
C. The claims for injunctive relief are barred by judicial immunity and the express limitations of 42 U.S.C. §1983 and §1988;
D. The plaintiffs' allegations fail to show violation of a clearly-established constitutional or statutory right and are therefore barred by qualified immunity;
E. Judge Davis is entitled to Eleventh Amendment immunity as an officer performing a state function;
F. The plaintiffs' claim for declaratory relief is moot;
G. The plaintiffs seek an impermissibly vague and overly broad injunction; and
H. This Court's jurisdiction is precluded by the Alabama Supreme Court's adjudication that the laws on same-sex marriage are constitutional.

The plaintiffs have asked this Court to declare that the people of Alabama no longer have the right to decide for themselves whether to define marriage in this state in the way every state in our Union defined it as recently as 2003. The plaintiffs contend that sexual orientation is a suspect class and they ask this Court to recognize a new fundamental right to same-sex marriage. The Eleventh Circuit Court has rejected both of those propositions. See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). The Court noted in *Lofton,* "[m]oreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class." *Id*. at 818 and fn. 16 (citing cases from the Fifth, Sixth, Seventh, Ninth, Tenth and District of Columbia Circuits). Accordingly, rational basis scrutiny applies, not strict scrutiny. The plaintiffs also claim that the

state's definition of marriage as between opposite sex couples discriminates on the basis of sex, but even a majority of the courts that have created a new right to same-sex marriage have rejected this argument because the laws apply equally to men and women.

The United States Supreme Court will address the issue of same-sex marriage rights this month in the cases of *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S.Ct. 1040 (2015), *cert. granted sub nom.*, *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015), *Tanco v. Haslam*, 135 S.Ct. 1040 (2015), and *Bourke v. Beshear*, 135 S.Ct. 1041 (2015). During the last several years, some states have decided through the democratic process to expand their definitions of marriage to include same-sex couples. (See Appendix 1). Citizens of other states, including Alabama, voted not to expand their marriage definitions. Our country in its entirety soon will have a definitive ruling on same-sex marriage rights. Currently, however, controlling precedents mandate the dismissal of the plaintiffs' claims, and Judge Davis urges this Court not to attempt to anticipate a future ruling of the U.S. Supreme Court, but rather either to dismiss the plaintiff's claims or await that ruling.

In the cases it will review later this month, the U.S. Supreme Court will address whether the Fourteenth Amendment requires states to license marriage between two people of the same-sex or to recognize such marriages performed in other states. But the Court has not yet answered those questions, and in *U. S. v. Windsor*, 133 S.Ct.

2675, 186 L. Ed. 2d 808 (2013) – the closest it has come – the Court clearly did not address those issues. The Court stated in *Windsor*: "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. ***This opinion and its holding are confined to those lawful marriages***." 133 S. Ct. at 2696 (emphasis added). *Windsor* held that the due process clause prohibits the government from acting out of animus to strip individuals of rights they already possess. The plaintiffs in this case seek to establish an entirely new right in Alabama and to invalidate the definition of marriage chosen by the citizens of the state, which until 2003, also was universal in this nation. *See Windsor*, 133 S. Ct. at 2715 (Alito, J. dissenting).

State laws historically have varied in granting access to civil marriage. For example, states vary in the legal minimum age of consent for marriage (see Appendix 2), whether blood relatives can marry, whether a marriage can include more than two partners (see Appendix 3), and they differ regarding the circumstances in which a person can divorce or otherwise be legally separated from marriage. State laws also vary with regard to whether a blood test is required prior to the issuance of a marriage license, or if a waiting period is imposed between the time the license is issued and the time the marriage may take place.[1] *See* 133 S. Ct. at 2691. The Supreme Court

[1] Alabama has no residency requirement for a marriage license. Thus, when Judge Davis was issuing marriage licenses, a significant portion of applicants were not Alabama residents.

noted in *U.S. v. Windsor*, "[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Id*. at 2689-90. It noted also that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens" and "the Federal Government, throughout our history, has deferred to state-law policy decisions with respect to domestic relations." *Id*. at 2691. "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Id*. (Quotation marks and citation omitted). The Court in *Windsor* also described the States' authority to define the marital relation as "historic and essential authority" *id*., and said:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discreet community treat each other in their daily contact and constant interaction with each other.

Id. at 2692. Until the Supreme Court rules, it is no less a proper exercise of the State of Alabama's sovereign authority to define marriage in this State according to the consensus of Alabama citizens respecting their daily contact and interaction with each

other. "The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the States' classifications have and the daily lives and customs of its people." *Id*. at 2693. The Supreme Court noted also that the definition of lawful marriages was pursuant to "the unquestioned authority of the States." *Id*. The plaintiffs in this case are asking this Court to abandon those historic principles and the authority that the Constitution reserves for the States and their citizens, and to impose instead a substitute vision of how the members of this community should treat each other in their daily contact and interaction. Such a substitution would violate the U.S. Constitution.

Judge Davis is not discriminating against same-sex couples. He is not refusing to recognize prior orders of this Court. He is making every effort to comply with two separate orders from two different courts: this Court's order in this litigation, and the *Writ of Mandamus* issued March 3, 2015 by the Alabama Supreme Court, *Ex parte State of Alabama, ex rel. Alabama Policy Institute, et al.*, No. 1140460, 2015 Ala. LEXIS 33 (Ala. March 3, 2015), and the subsequent order issued on March 10, 2015 ordering Judge Davis to comply with the March 3 order. 2015 Ala. LEXIS 35.

A. The Plaintiff's Claims Do Not Present A Federal Question, Therefore The Court Lacks Subject-Matter Jurisdiction.

"Absent diversity of citizenship, a plaintiff must present a 'substantial' federal question in order to invoke the court's jurisdiction." *Wyke v. Polk County Sch. Bd.*,

129 F.3d 560, 566 (11th Cir. 1997) (citing *Hagans v. Lavine*, 415 U.S. 528, 537 (1974)). The plaintiffs' claims in this case are indistinguishable from claims that were before the U.S. Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972). In that case, the Supreme Court of Minnesota held that a state statute prohibiting marriage of persons of the same-sex "does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution." *Baker v. Nelson*, 291 Minn. 310, 315, 191 N.W.2d 185, 187 (Minn. 1971). The U.S. Supreme Court held that the plaintiffs failed to raise a substantial federal question and dismissed their appeal of the Minnesota Court's ruling. The Supreme Court also has stated, "unless and until [this] Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise," and "the lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-345, 95 S. Ct. 2281, 2289, 45 L. Ed. 2d 223, 236 (U.S. 1975). (Alterations, quotation marks and citations omitted.) The Supreme Court's comments in *Hicks v. Miranda* also show that it is the province of that Court, not the lower courts, to declare when a question previously held to be unsubstantial has become substantial for jurisdictional purposes. The Sixth Circuit Court of Appeals noted in *DeBoer v. Snyder*, 772 F. 3d 388 (6th Cir. 2014) that although *Baker v. Nelson* does not bind the U.S. Supreme Court in later cases:

> it does confine lower federal courts in later cases. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions until such time as the Court informs us that we are not. The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

Id. at 400. (Quotation marks and citation omitted). *Baker v. Nelson* remains binding and establishes that the plaintiffs' claims do not present a substantial federal question. All claims against Judge Davis must therefore be dismissed. *See Arbaugh v. W and H Corp.*, 546 U.S. 500, 514 (2006) ("When a federal court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in its entirety.")[2]

B. <u>The Plaintiffs Lack Standing Because They Cannot Show An Injury In Fact And Their Alleged Injuries Are Not Redressable By Judge Davis</u>.

"Standing is one of the Article III case or controversy requirements, *see Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc*., 524 F.3d 1229, 1232 (11th Cir. 2008), and must therefore be established 'as a threshold matter,' *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). To

[2] It might be argued that the Supreme Court's decision in *U.S. v. Windsor*, 133 S. Ct. 2675, 1861 L. Ed. 2d 808 (2013) shows sufficient doctrinal developments to indicate that *Baker v. Nelson* may be disregarded. The "doctrinal developments" language of *Hicks v. Miranda*, however, is merely dicta. *Hicks* held squarely that "the District Court was in error in holding that it could disregard" precedent established by the Supreme Court's earlier summary dismissal. 422 U.S. at 343. Further, the Sixth Circuit observed in *DeBoer v. Snyder*, that the Supreme Court's decision in *Windsor* "never mentions *Baker*, much less overrules it." 772 F. 3d at 400.

have standing, the plaintiffs must demonstrate injury in fact, causation, and redressability. *See, e.g., DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1301-02 (11th Cir. 2008). Failure to satisfy any of these three requirements is fatal. *See Fla. Wildlife Fed., Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011)." *I. L. v. Alabama*, 739 F.3d 1273, 1278 (11th Cir. 2014). The plaintiffs ask this Court to certify a plaintiff class consisting of all persons in Alabama who wish to obtain a marriage license in order to marry a person of the same-sex and have that marriage recognized under Alabama law, but who are unable to do so because of the enforcement of Alabama's laws prohibiting issuance of marriage licenses to same-sex couples and barring recognition of their marriages. But, the plaintiffs have not suffered any injury in fact. Furthermore, defendant Don Davis, in his official capacity as Judge of Probate of Mobile County, Alabama, has no authority to order or enforce recognition of marriages "for all purposes" under Alabama law nor to afford the plaintiffs the "myriad benefits of marriage" which they seek. (See Doc. 95, p. 35)[3] Because the plaintiffs cannot show an injury in fact and their claims are not redressable, they do not meet the requirements for standing and their claims they are

[3] The plaintiffs argue that Alabama's Constitution and laws "classify" the plaintiffs, keeps the plaintiffs from "making a legally binding commitment" and "being able to fully protect and assume responsibility for one another," and that "the government treats them differently." (See Doc. 95, p. 7). The plaintiffs thus complain about diverse matters ranging from discrimination to the ability to contract, all of which are outside of any probate court's authority. Although a judicial officer for the State of Alabama, Judge Davis has no equitable power over the State of Alabama, presuming that is "the government" against which plaintiffs complain.

due to be dismissed.

The plaintiffs have not suffered any injury. Currently, the Mobile County Probate Court is not issuing marriage licenses at all; therefore the plaintiffs are being treated no differently than opposite-sex couples and they have suffered no discrimination or other injury. Also, nothing in the statute governing issuance of marriage licenses requires probate judges to issue them, so the plaintiffs cannot establish any legal injury from their inability to obtain a license in Mobile County. They could obtain a marriage license elsewhere, and so, have suffered no injury. Further, there also is no allegation that any plaintiff has actually sought, but been denied, recognition of a same-sex marriage performed in another state, and no such request for recognition has been submitted to the Mobile County Probate Court. Even if such a request were submitted, Judge Davis could not afford relief. Since the plaintiffs cannot show an injury in fact, they lack standing and their claims are due to be dismissed.

The plaintiffs further lack standing because their claims are not redressable by Judge Davis. The Code of Alabama enumerates the duties of the probate judges in Alabama. Those duties include probate of wills, granting letters testamentary, rights of guardianship, name changes and adoptions. The injunctive relief sought by plaintiffs encompasses matters outside the scope of responsibility and authority vested in probate judges by Alabama law. (See §§12-13-1, 12-13-40 and 12-13-41,

Ala. Code). Granting marriage licenses to same-sex couples cannot afford the plaintiffs the "myriad benefits" they are seeking. Attendant rights and privileges of marriage beyond issuance of licenses are beyond Judge Davis' control. For example, rights of separation, divorce, property division, alimony, child custody, visitation, and child support are exclusively within the jurisdiction of the circuit courts. Probate judges also do not have jurisdiction over real and personal property rights of married couples, powers of attorney, bankruptcies, tax issues, health insurance and life insurance contract rights, pension and retirement benefits, and numerous other legal issues. The plaintiffs specifically also seek relief that is beyond Judge Davis' authority to issue, such as "veterans benefits and coverage" (Doc. 95, p. 9, ¶24), to be treated as family members in the event of an emergency (Doc. 95, p. 8, ¶22 and p. 9, ¶23), and to be permitted to care for each other in the event of health problems. (Doc. 95, p. 7, ¶19). Because Judge Davis has no ability to afford the relief sought by the plaintiffs, the claims against him must be dismissed.[4]

Mere possession of a marriage license does not give a same-sex couple legal rights of an opposite-sex couple whose marriage conforms to Alabama's Constitution

[4] Plaintiff Strawser also alleges concern that plaintiff Humphrey will not be permitted to assist Strawser's mother pursuant to a medical power of attorney in the event of Strawser's death. (Doc. 95, p. 6). Section 22-8A-4, Ala. Code, Advance Directive for Healthcare provides specifically that a competent adult may execute a written healthcare proxy designation appointing any other competent adult to make healthcare decisions. As to this issue, the plaintiffs have an existing legal remedy so that neither declaratory nor injunctive relief is necessary.

and statutes, nor does possession of a marriage license prevent enforcement of Alabama's Constitution and laws. A same-sex couple with a marriage license is not considered "married" under Alabama's Constitution and laws, and thus, by those laws, cannot currently inherit from each other through Alabama's intestacy laws. Whether Judge Davis issues a marriage license cannot affect plaintiffs' rights to make healthcare decisions. For example, same-sex spouses still cannot make heathcare decisions for each other based solely on a marriage license because the Alabama Supreme Court says the marriage is invalid. Judge Davis cannot change the Alabama Supreme Court's ruling. Judge Davis does not have jurisdiction to enforce a legally binding power of attorney, but a circuit court in Alabama can entertain a complaint to do so. The presence or absence of a marriage license is irrelevant to the validity of a power of attorney. Thus, the claim of plaintiff Strawser that his power of attorney to plaintiff Humphrey was not followed (Doc. 95, ¶ 18) is an example of how Judge Davis cannot redress plaintiffs' concerns.

The Eleventh Circuit Court discussed the redressability requirement of standing in *I. L. v. Alabama*, *supra*, and noted:

> The Supreme Court has described redressability as "a substantial likelihood that the relief requested will redress the injury claimed." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 75 n.20, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (internal quotation marks omitted). . . . [I]t remains part of the "irreducible constitutional minimum of standing," *Lujan* [*v. Defenders of Wildlife*], 504 U.S. [555] at 560 [(1992)], and this case can only proceed if the plaintiffs have shown that

> the requested injunctive relief would likely resolve their inability to adequately raise revenue for public education. See *Warth v. Seldin*, 422 U.S. 490, 504, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). *See also Allen* [*v. Wright*], 468 U.S. [737] at 753 n.19 [(1984)] (explaining that redressibility "examines the causal connection between the alleged injury and the judicial relief requested").

739 F.3d at 1279. (Citations completed.) As discussed, it is well beyond Judge Davis' authority to provide to same-sex couples all the legal and social benefits that accrue to married couples. Even if this Court were to order Judge Davis to issue marriage licenses to the plaintiffs, rather than "a substantial likelihood that the relief requested will redress the injury claimed," there is an absolute certainty that the alleged injuries *will not* be redressed. The Eleventh Circuit stated in *I. L. v. Alabama*, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." 739 F.3d at 1280. (Citation omitted.) The plaintiffs in *I. L. v. Alabama* challenged certain Alabama constitutional amendments and laws affecting property tax rates, alleging that such resulted in unequal funding of public education in some counties. The court held that the plaintiffs lacked standing to challenge the cap on property tax millage rates because "removal of the millage caps is not likely to result in an increased ability to fund public education." *Id*. at 1281-82. By the same reasoning, requiring Judge Davis to issue marriage licenses to same-sex couples will not afford them recognition of those marriages "for all purposes under state law"

which the plaintiffs seek. The plaintiffs therefore lack standing and their claims must be dismissed.

C. The Plaintiffs' Claims For Injunctive Relief And Attorneys' Fees Are Barred By Judicial Immunity And The Express Provisions Of 42 U.S.C. §1983 and §1988.

The plaintiffs' Second Amended Complaint states that "[t]his action arises under the Constitution and laws of the United States including Article III, Section 1, of the United States Constitution and 42 U.S.C. §1983." (Doc. 95, p. 5, ¶16). The plaintiffs seek injunctive relief requiring Judge Davis to issue marriage licenses to the named plaintiffs and members of the plaintiff class. (Doc. 95, p. 21, ¶ 68). The relief sought is barred by Judge Davis' judicial immunity.

Title 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ***except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.***

(Emphasis added.) The plaintiffs seek expenses, costs, fees, and other disbursements associated with the filing and maintenance of the section 1983 actions, including a reasonable attorneys fee, pursuant to 42 U.S.C. § 1988. Section 1988 provides that:

> [I]n any action or proceeding to enforce a provision of sections . . . 1983 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, ***except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.***

42 U.S.C. § 1988(b) (as amended; emphasis added). The plaintiffs' claims against Judge Davis relate to acts or omissions in his capacity as a judicial officer; Judge Davis has not violated any declaratory decree of this Court, or any other court; the plaintiffs have not shown that declaratory relief is not available; and the plaintiffs have not alleged that Judge Davis acted in excess of his authority. Therefore §1983 by its express terms precludes the injunctive relief sought by the plaintiff, and §1988, by its terms, bars any award of attorneys' fees or costs against a judicial officer.

"Furthermore, a 42 U.S.C. §1983 action may not be used to compel a state court to take a particular course of action because [the federal district] court has no authority to issue a writ directing state courts or their judicial officers in the performance of their duties. *Lamar v. 118 Judicial Dist. Court of Texas*, 440 F.2d 383, 384 (5th Cir. 1971)."[5] *Taylor v. Smithart*, 2011 U.S. Dist. LEXIS 37572, 3, 2011 WL 1188553 (M.D. Ala. Jan. 25, 2011) (Report and recommendation for dismissal of claims against state circuit judge.) (*Adopted and approved by Taylor v. Smithart*,

[5] Decisions of the former Fifth Circuit handed down on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

2011 U.S. Dist. LEXIS 33863 (M.D. Ala., Mar. 30, 2011)). See also *Critten v. Yates*, No. 10-10146, 2010 U.S. App. LEXIS 12383 (11th Cir. June 16, 2010) (holding that 28 U.S.C. §1361 limits the district court's jurisdiction to compelling "an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.")[6] The newly-added named plaintiffs allege they are unable to obtain marriage licenses in Mobile County because Judge Davis "has ceased issuing marriage licenses" entirely. (Doc. 95, p. 13, ¶ 35). Because there is no allegation Judge Davis is issuing licenses selectively in a discriminatory manner, this Court lacks jurisdiction to compel him to issue marriage licenses. Nor is it clear that Judge Davis could be compelled to issue marriage licenses by any court. Code of Alabama, §30-1-9 states in part, "[m]arriage licenses *may be issued* by the judges of probate of the several counties." (Emphasis added.) Nothing in the statutory language indicates that a probate judge *must* issue marriage licenses. The refusal to issue any licenses at all is therefore within the discretionary authority of the Judge of Probate.[7] The injunctive relief sought by the plaintiffs is barred by judicial immunity and the express provisions of 42 U.S.C. §1983 and all claims against Judge Davis are due to

[6] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.S. §1361.

[7] The Alabama Supreme Court also says probate judges are not *required* to issue marriage licenses because the statute merely authorizes them to do so. (*Ex parte State of Alabama, ex rel. Alabama Policy Institute, et al.*, No. 1140460, 2015 Ala. LEXIS 33 (Ala. March 3, 2015), at p. 58.

be dismissed. Immunity also must be determined at the earliest possible stage of the litigation to preserve the officer's protection. See *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 815, 172 L. Ed. 2d 565, 573 (2009).

D. The Claims Against Judge Davis Are Barred By Qualified Immunity.[8]

The plaintiffs contend that issuance of marriage licenses is merely a ministerial function of the probate court, such that their claims in this case would not be barred by Judge Davis' qualified immunity. However, because the plaintiffs' claims relate to the performance of Judge Davis' official duties, and because whether and how to exercise these duties is within Judge Davis' discretion, he is entitled to qualified immunity, which bars not only the claims for relief, but also all the burdens of litigation.

"Qualified immunity shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known." *Denno ex rel. Denno v. School Bd.*, 218 F.3d 1267, 1269 (11th Cir. 2000). "Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery)... ." *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146,

[8] The Second Amended Complaint states that the claims are lodged against Judge Davis officially, individually, and as a class representative. It also seeks pre-judgment interest, post-judgment interest, costs, expenses, attorneys' fees and "other and further relief."

1149 (11th Cir. 1994) (*en banc*). (Quotation marks and citation omitted.) "Qualified immunity applies to a defendant who establishes that he was a government official acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (quotation marks omitted). 'Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.' *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)." *Gomez v. United States*, 2015 U.S. App. LEXIS 2124, 7-8 (11th Cir. Feb. 11, 2015). The Eleventh Circuit Court has explained the proper analysis of whether an official is acting within his discretionary authority:

> In many areas other than qualified immunity, a "discretionary function" is defined as an activity requiring the exercise of independent judgment, and is the opposite of a "ministerial task." See, e.g., *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). In the qualified immunity context, however, we appear to have abandoned this "discretionary function / ministerial task" dichotomy. In *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir. 1995), we interpreted 'the term "discretionary authority" to include actions that do not necessarily involve an element of choice,' and emphasized that, for purposes of qualified immunity, a governmental actor engaged in purely ministerial activities can nevertheless be performing a discretionary function.
>
> Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. Our inquiry is two-fold. We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize. See *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 n.17 (11th Cir. 1994) ("A

> government official acts within his or her discretionary authority if objective circumstances compel the conclusion that challenged actions occurred in the performance of the official's duties and within the scope of this authority." (emphasis added)).

Holloman v. Harland, 370 F.3d 1252, 1265-1266 (11th Cir. 2004).

The plaintiffs seek a declaratory judgment that Alabama's refusal to issue marriage licenses to same-sex couples violates the U.S. Constitution, and an injunction requiring the defendants, including Judge Davis, to issue marriage licenses. Issuance of marriage licenses is unquestionably within Judge Davis' authority and responsibilities as Judge of Probate of Mobile County. It is a job-related function accomplished through means that are within his power to use. The plaintiffs contend the duty to issue licenses is ministerial. To the contrary, the probate judge, or staff acting under his authority, must confirm whether applicants meet all statutory requirements and can refuse to issue the license if not. Because issuing licenses is an official duty within the judge's discretionary authority, it is protected by qualified immunity.

"The 'threshold inquiry' in determining whether qualified immunity is appropriate is 'whether plaintiff's allegations, if true, establish a constitutional violation.' [*Hope v.*] *Pelzer*, 536 U.S. at 736, 122 S. Ct. at 2513. If the plaintiff's allegations, taken as true, fail to establish a constitutional violation, qualified immunity attaches and the district court should dismiss the complaint. *Chesser v.*

Sparks, 248 F.3d 1117, 1121 (11th Cir. 2001)." *Gomez v. United States*, 2015 U.S. App. LEXIS 2124, 7-8 (11th Cir. Feb. 11, 2015). The U.S. Supreme Court, the Alabama Supreme Court and the Eleventh Circuit have yet to rule conclusively that same-sex couples have a right under the U.S. Constitution to obtain a marriage license. The plaintiffs therefore fail the threshold inquiry and their claims must be dismissed on qualified immunity grounds.

Even if the Court concludes the plaintiffs have satisfied the threshold inquiry, Judge Davis still is entitled to qualified immunity because a right to same-sex marriage, if one exists, was not clearly established at the time of Judge Davis' alleged acts or omissions, nor is it clearly established now.[9] Within the Eleventh Circuit, only "decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state . . . can clearly establish the law" for qualified immunity purposes. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (*en banc*). The decision of this Court cannot establish the law clearly for qualified immunity purposes, and neither the Eleventh Circuit Court nor the U.S. Supreme Court has ruled that there is a constitutional right to recognition of same-sex marriage. The fact that the U.S. Supreme Court during its current term will consider same-sex marriage rights shows conclusively that the law

[9] It is axiomatic that the plaintiffs cannot seek relief on the basis of a clearly-established constitutional right in the same action in which they seek a declaratory judgment that the constitutional right exists in the first place.

on the issue is not clearly established in the federal courts. In fact, the only court the Eleventh Circuit says posseses the authority to establish the law clearly that has addressed the issue – the Alabama Supreme Court – on March 3, 2015 explicitly ordered Alabama probate judges not to violate the state's laws prohibiting recognition of same-sex marriage. *Ex parte State of Alabama, ex rel. Alabama Policy Institute, et al.*, No. 1140460, 2015 Ala. LEXIS 33 (Ala. March 3, 2015). On March 10, 2015, the Alabama Supreme Court ordered that Judge Davis must comply with the March 3rd order. 2015 Ala. LEXIS 35. Because the law on the issue is not clearly established, Judge Davis is entitled to qualified immunity even if the plaintiffs could show a violation of their constitutional rights. Furthermore, because immunity extends to all burdens of litigation, including participation in the discovery process, and is effectively lost if a case is erroneously permitted to proceed, the U.S. Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565, 573 (2009) quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). Judge Davis is therefore entitled to immediate dismissal of all claims against him.[10]

[10] Plaintiffs cannot argue that qualified immunity is inapplicable because Judge Davis is sued only officially. The Second Amended Complaint does not say Judge Davis is sued only officially. The Second Amended Complaint seeks money (attorneys' fees in ¶ 69 and pre- and post-judgment interest in ¶ 70) from Judge Davis. And since the Complaint seeks interest, the question becomes interest on what? Do plaintiffs intend to seek compensatory or punitive damages under their final

E. Judge Davis Is Entitled To Eleventh Amendment Immunity As An Officer Performing A State Function.

"The Eleventh Amendment is 'a recognition that states, though part of a union, retain attributes of sovereignty, including immunity from being compelled to appear in the courts of another sovereign against their will.' *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001). It is also well-settled that Eleventh Amendment immunity bars suits brought in federal court when the State itself is sued and when an 'arm of the State' is sued. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). To receive Eleventh Amendment immunity, a defendant need not be labeled a 'state officer' or 'state official,' but instead need only be acting as an 'arm of the State,' which includes agents and instrumentalities of the State. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429-30, 137 L. Ed. 2d 55, 117 S. Ct. 900 (1997). Whether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003).

The Office of the Probate Judge of Mobile County, Alabama is a position

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requested relief (¶71)? Further, in describing all defendants, the Second Amended Complaint, in paragraph 45, says Judge Davis is sued individually. The style of the case, although technically not an averment of the Complaint, says Judge Davis is sued individually. Indeed, the plaintiffs make it clear that only the claims for injunctive and declaratory relief are brought against Judge Davis in his official capacity. (Doc. 95, ¶14).

created by Article VI, Section 144 of the Alabama Constitution, which provides:

> There shall be a probate court in each county which shall have general jurisdiction of orphans' business, and of adoptions, and with power to grant letters testamentary, and of administration, and of guardianships, and shall have such further jurisdiction as may be provided by law,... .

The "further jurisdiction" of probate judges provided by law includes issuance of marriage licenses on behalf of the State of Alabama. See §30-1-9, Ala. Code. In administering state laws governing marriages, probate judges clearly are executing a state function, not a function of the county for which they serve.

As Judge of Probate, Judge Davis also is a member of Alabama's unified judicial system:

> 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, a trial court of general jurisdiction known as the circuit court, a trial court of limited jurisdiction known as the district court, *a probate court* and such municipal courts as may be provided by law.

Alabama Const., Art. VI, Sec. 139. (Emphasis added.) The Eleventh Circuit has noted that "[t]he Eleventh Amendment prohibits actions against state courts. . . ." *Kaimowitz v. The Fla. Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993). Furthermore, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." *Kentucky. v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 121 (1985) (Citation omitted.) See also *Busby v. City of Orlando*, 931

F.2d 764 (11th Cir. 1991) ("when an officer is sued under Section 1983 in his or her official capacity, the suit is simply another way of pleading an action against an entity of which an officer is an agent.") The plaintiffs state they are suing Judge Davis in his official capacity as Judge of Probate therefore their claims are against an arm of the state and clearly are barred by Eleventh Amendment immunity.

F. The Plaintiffs' Claim Against Judge Davis For Declaratory Relief Is Moot.

"Plaintiffs seek a declaration from this Court that Ala. Const., art. I, §36.03 and Ala. Code §30-1-19 violate the Fourteenth Amendment to the United States Constitution . . . ." (Doc. 95, p. 4). This Court previously ruled that the identified sections of the Alabama Constitution and Code violate the U.S. Constitution. (Doc. 55, p. 7). The plaintiffs' claim for declaratory relief is therefore moot.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1326 (11th Cir. 2001) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)). "If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001). This Court previously issued an order declaring that "ALA. CONST. ART. I, §36.03 (2006) and

Ala. Code 1975 §30-1-19 are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment." (Doc. 55, p. 7). Because this Court has already granted the declaratory relief the plaintiffs are seeking, that claim must be dismissed as moot.

Another district court within the Eleventh Circuit explained:

> The mootness inquiry applicable to claims for declaratory relief can be outlined as follows:
>
> > Article III's requirement that federal courts adjudicate only cases and controversies necessitates that courts decline to exercise jurisdiction where the award of any requested relief would be moot—i.e. where the controversy is no longer live and ongoing. *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477-78, 110 S. Ct. 1249, 1253-54, 108 L.Ed.2d 400 (1990). The touchstone of the mootness inquiry is whether the controversy continues to "touch[] the legal relations of parties having adverse legal interests" in the outcome of the case. *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S. Ct. 1704, 1706, 40 L.Ed.2d 164 (1974) (per curiam) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 463-64, 81 L.Ed. 617 (1937)). This "legal interest" must be more than simply the satisfaction of a declaration that a person was wronged. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73, 97 S. Ct. 1739, 1740, 52 L.Ed.2d 219 (1977) (per curiam) (holding that a claim for declaratory relief is moot when no "present right" is involved and the primary interest is the emotional satisfaction from a favorable ruling).
>
> > It is well established that what makes a declaratory judgment action "a proper judicial resolution of a 'case and controversy' rather than an advisory opinion—is [] the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S.

755, 761, 107 S. Ct. 2672, 2676, 96 L.Ed.2d 654 (1987).

Green v. Branson, 108 F.3d 1296, 1299-1300 (10th Cir. 1997) (quoting *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994)).

McGee v. Evans, 2011 U.S. Dist. LEXIS 156913, 9-11, 2011 WL 10067984 (S.D. Ga. Aug. 26, 2011) (vacated on other grounds, *McGee v. Solicitor Gen. of Richmond County*, 727 F.3d 1322 (11th Cir. 2013)). In light of this Court's prior declaratory order, there is no longer, in this civil action, a live dispute between the parties as to the constitutionality of the challenged laws. Further, the plaintiffs' claims for attorneys' fees to pursue this already-litigated issue are redundant and seek impermissibly to burden the taxpayers who are providing the defendants a defense to this action. The claims for declaratory relief must therefore be dismissed.

G. <u>The Plaintiffs Seek An Impermissibly Vague And Overly Broad Injunction</u>.

The plaintiffs request an injunction against enforcement of "any other Alabama laws or orders that prohibit same-sex couples from marrying within the state or that prohibit recognition of valid marriages of same-sex couples." (Doc. 95, p. 4). The "Relief Requested" also demands an order ""[t]emporarily, preliminarily, and permanently enjoining enforcement by Defendants of . . .any other sources of state law, policy, or practice that exclude Plaintiffs from marriage or that refuse recognition of the marriages of the Plaintiffs." (Doc. 95, p. 20). These claims for injunctive relief must be dismissed because they seek an impermissibly vague

injunction. *Id*. at 1233, FN 14. The Eleventh Circuit noted in *S.E.C. v. Smyth*, 420 F.3d 1225 (11th Cir. 2005)"[t]he specificity requirement of Rule 65(d) [Fed.R.Civ.P.] is no mere technicality; the command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order. An injunction must be framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law." *Id*. at 1233, Fn 14. (Quotation marks and citation omitted). The vague injunctive relief sought by the plaintiffs in this case – an order for the defendants not to enforce "any other sources of state law, policy or practice"– is exactly what Rule 65 proscribes. The request for an injunction therefore fails to state a claim for which relief can be granted and is due to be dismissed.

This claim must also be dismissed because the order sought by the plaintiffs would be impossible for Judge Davis to perform as it is overly broad. Judge Davis has no authority to enforce "state law, policy or practice" outside the jurisdiction of the Mobile County Probate Court, which the vague, non-specific injunction sought by the plaintiffs would encompass. The order sought by the plaintiffs would potentially subject Judge Davis to sanctions for failing to stop something he is powerless to prevent, or for the actions of persons who are beyond Judge Davis' authority to control. The plaintiffs seek to enjoin all persons "acting in concert" with Judge Davis. (Doc. 95, ¶15). Judge Davis cannot control "all persons." By that

broad language, plaintiffs apparently seek to enjoin the Alabama Supreme Court. Due to the vagueness of the relief sought and the impossibility of performance, the plaintiffs' claim for injunctive relief is due to be dismissed.

H. This Court's Jurisdiction Is Precluded By The Alabama Supreme Court's Adjudication That The Laws On Same-Sex Marriage Are Constitutional.

The Alabama Supreme Court ruled on March 3, 2015 that the state's constitutional amendment and statute prohibiting same-sex marriages do not violate the U.S. Constitution. *Ex parte State of Alabama, ex rel. Alabama Policy Institute, et al.*, No. 1140460, 2105 Ala. LEXIS 33 (Ala. March 3, 2015 at p. 58). That ruling is binding upon all state courts in Alabama and upon anyone within the State of Alabama seeking a marriage license, and it precludes this Court from assuming jurisdiction over claims by plaintiffs who already are bound by the Alabama Supreme Court's ruling. Only the U.S. Supreme Court can now review the constitutionality of the state's same-sex marriage laws and anyone allegedly aggrieved by those laws must seek review by the U.S. Supreme Court.

Federal courts are courts of limited jurisdiction. Hence, 28 U.S.C. Title 28 U.S.C. § 1257 provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity . . . of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of

the United States, . . .” In certain circumstances, the Supreme Court’s appellate jurisdiction over state-court judgments under §1257 “precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., . . . §1331 (federal question), and §1332 (diversity).” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291, 125 S. Ct. 1517, 1526, 161 L. Ed. 2d 454, 466 (2005). “The Full Faith and Credit Act, 28 U.S.C. § 1738 . . . requires the federal court to give the same preclusive effect to a state-court judgment as another court of that State would give.” 544 U.S. at 293. (Quotation marks and citation omitted.) Accordingly, the U.S. Supreme Court’s appellate jurisdiction under §1257 precludes the plaintiffs’ claims, which much be dismissed.

I. Other Grounds.

Judge Davis incorporates the motions and grounds of the Alabama Attorney General and Judge Russell, to the extent their motions and grounds are not inconsistent with the above. Judge Davis also incorporates by reference his objection to the class action (Doc. 90).

WHEREFORE, based upon the foregoing grounds and authorities, Honorable Don Davis, Judge of Probate, Mobile County, Alabama, respectfully moves for dismissal of all claims against him.

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ORAL ARGUMENT REQUESTED.

CERTIFICATE OF SERVICE

I do hereby certify that I have on **April 6, 2015** electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of record, and I have mailed the same to non-CM/ECF participants via United States Mail properly addressed and first class postage prepaid, to wit:

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APPENDIX 1

Eight states (Minnesota, Illinois, Hawaii, Delaware, New York, New Hampshire, Rhode Island, and Vermont) and the District of Columbia passed legislation that initiated recognition of same-sex marriages. See Del. Code Ann. tit. 13, §129 (West 2014) (effective July 1, 2013); D.C. Code §46-401 (2014) (effective Mar. 3, 2010); Haw. Rev. Stat. § 572-1 (West 2014) (effective Dec. 2, 2013); 750 Ill. Comp. Stat. Ann. 5/201 (West 2014) (effective June 1, 2014); Minn. Stat. Ann. §517.01 (West 2014) (effective Aug. 1, 2013); N.H. Rev. Stat. Ann. §457:1-a (2014) (effective Jan. 1, 2010); N.Y. Dom. Rel. Law §10-a (McKinney 2014) (effective July 24, 2011); R.I. Gen. Laws Ann. §15-1-1 (West 2013) (effective Aug. 1, 2013); Vt. Stat. Ann. tit. 15, §8 (West 2014) (effective Sept. 1, 2009). The voters of Maryland, Washington, and Maine approved same-sex marriage electorally. Maine Dep't of the Secretary of State, November 6, 2012 Referendum Election Tabulations, www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (last visited July 14, 2014); Washington Secretary of State, November 06, 2012 General Election Results: Referendum Measure No. 74 Concerns Marriage for Same-Sex Couples (Nov. 27, 2012 4:55 PM), vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html; Maryland State Board of Elections, Ballot Question Certifications (Nov. 30, 2012), www.elections.state.md.us/elections/2012/linda_balot_question_certifications.pdf.

APPENDIX 2

See Ala. Code §30-1-4; § 30-1-5; Alaska Stat. Ann. §25.05.171; Ariz. Rev. Stat. Ann. §25-102; Ark. Code Ann. §9-11-102 ; Cal. Fam. Code §300 - §303; Colo. Rev. Stat. §14-2-106; §14-2-108; Conn. Gen. Stat. Ann. §46b-30; Del. Code Ann. tit. 13, §123; Fla. Stat. Ann. §794.05, 800.04; Ga. Code Ann. §§19-3-2; Haw. Rev. Stat. §572-1, 572-2; Idaho Code Ann. §32-202 ; 750 Ill. Comp. Stat. Ann. 5/203, 5/208; Ind. Code Ann. §31-11-1-4 - §31-11-1-6; Kan. Stat. Ann. §23-106; Ky. Rev. Stat. Ann. §402.020; La. Child. Code Ann. art. 1545; Me. Rev. Stat. Ann. Tit. 19, §652; Md. Code. Ann., Family Law §2-301; Mass. Gen. Laws Ann. Ch. 207, §7, 24, 25; Mich. Comp. Laws Ann. §551.51; §551.103; Minn. Stat. Ann. §517.02; Miss. Code Ann. §93-1-5; Mo. Ann. Stat. §451.090; Mont. Code. Ann. §40-1-213;§40-1-202; Neb. Rev. St. §42-102; 42-105; Nev. Rev. Stat. Ann. §122.025; N.H. Rev. Stat. §457:4, §457:5; N.J. Stat. Ann. 37:1-6; N.M. Stat. Ann. §40-1-5, §40-1-6; N.Y. Dom. Rel. §7, 15a; N.C. Gen. Stat. Ann. §51-2, 51-2.1; N.D. Cent. Code Ann. §14-03-02; Ohio Rev. Code Ann. §3101.01, §3101.05; Okla. Stat. Tit. 43, §3; Or. Rev. Stat. Ann. §106.010 - §106.060; 23 Pa. Cons. Stat. §1304; R.I. Gen. Laws Ann. §15-2-11; S.C. Code Ann.

§20-1-100, 20-1-250, 20-1-300; S.D. Codified Laws §25-1-9; Tenn. Code Ann. §36-3-104 - §36-3-107; Tex. Fam. Code Ann. §2.101-2.103; Utah Code Ann. §30-1-2, §30-1-9; Vt. Stat. Ann. tit. 18, §5142 ; Va. Code Ann. §20-48, §20-49; Wash. Rev. Code §26.04.010; W. Va. Code §48-2-301; Wis. Stat. Ann. §765.02; Wyo. Stat. Ann. §20-1-102; D.C. Code §46-403, §46-411.

APPENDIX 3

While all 50 states and the District of Columbia currently outlaw polygamy, they outlawed the practice at different times, and currently vary in the manner in which it is defined and penalized. See Ala. Code §13A-13-1; Alaska Stat. §11.51.140; Ariz. Rev. Stat. §13-3606; Ark. Code Ann. §5-26-201; Cal. Penal Code §281- §283; Colo. Rev. Stat. 18-6-201; Conn. Gen. Stat. §53a-190; Del. Code Ann. Tit. 11 §1001; Fla. Stat. §826.01; Ga. Code Ann. §16-6-20; Haw. Rev. Stat. Ann. §709- 900; Idaho Code Ann. §18-1101-1103; 720 Ill. Comp. Stat. Ann. 5/11-45 ; Ind. Code Ann. §35-46-1-2; Iowa Code §726.1; Kan. Stat. Ann. §21-5609; Ky. Rev. Stat. Ann. §530.010; La. Rev. Stat. Ann. §14:76; Me. Rev. Stat. Ann. Tit. 17, §551; Md. Code Ann., Crim. Law §10-502; Mass. Gen. Laws Ann. Ch. 272, §15; Mich. Comp. Laws Serv. §551.5; Minn. Stat. §609.355; Miss. Code Ann. §97-29-13; Mo. Rev. Stat. §568.010 ; Mont. Code Ann. §45-5-611; Neb. Rev. Stat. Ann. §28-701; Nev. Rev. Stat. Ann. §201.160; N.H. Rev. Stat. Ann. 639:1; N.J. Stat. Ann. §2C:24-1; N.M. Stat. Ann. §30-10-1; N.Y. Penal Law §255.15 (Consol.) ; N.C. Gen. Stat. §14-183; N.D. Cent. Code, §12.1-20-13; Ohio Rev. Code Ann. 2919.01; Okla. Stat. Tit. 21, §881-883; Or. Rev. Stat. §163.515; 18 Pa. Cons. Stat. §4301; R.I. Gen. Laws §11-6-1; S.C. Code Ann. §16-15-10; S.D. Codified Laws §22-22A- 1; Tenn. Code Ann. §39-15-301; Tex. Penal Code Ann. §25.01; Utah Code Ann. §76-7-101; Vt. Stat. Ann. Tit. 13, §206; Va. Code Ann. §18.2-362; Wash. Rev. Code Ann. §9A.64.010; W. Va. Code Ann. §61-8-1; Wis. Stat. §944.05; Wyo. Stat. Ann. §6-4-401; D.C. Code §22-501.