

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

|                                      |   |                                      |
|--------------------------------------|---|--------------------------------------|
| <b>JAMES N. STRAWSER, et al.,</b>    | ) |                                      |
|                                      | ) |                                      |
| <b>Plaintiffs,</b>                   | ) |                                      |
|                                      | ) |                                      |
| <b>v.</b>                            | ) | <b>Civil Action No. 14-0424-CG-C</b> |
|                                      | ) |                                      |
| <b>LUTHER STRANGE, in his</b>        | ) |                                      |
| <b>Official Capacity as Attorney</b> | ) |                                      |
| <b>General for the State of</b>      | ) |                                      |
| <b>Alabama, et al.,</b>              | ) |                                      |
|                                      | ) |                                      |
| <b>Defendants.</b>                   | ) |                                      |

**DEFENDANT PROBATE JUDGE TIM RUSSELL’S  
MOTION TO DISMISS**

COMES NOW Tim Russell, in his official capacity as Probate Judge of Baldwin County, and hereby respectfully submits this Motion to Dismiss.<sup>1</sup> All claims against Judge Russell in his official capacity, both individually and as a putative class representative,<sup>2</sup> are due to be dismissed with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as follows:

1. Judge Russell, and every other probate judge in the State of Alabama, has been enjoined by the Alabama Supreme Court from issuing any marriage

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<sup>1</sup> If this Motion to Dismiss is not granted, Judge Russell will submit an opposition to class certification.

<sup>2</sup> Judge Russell does not understand the Second Amended Complaint to contain any claims against him in his individual capacity, despite the somewhat confusing phrasing of the caption. (Doc. 95, ¶ 27.)

licenses to same-sex couples. Ex parte State ex rel. Alabama Policy Institute, \_\_ So.3d\_\_, 2015 WL 892752 at \*43 (Ala. March 3, 2015); Ex parte State ex rel. Alabama Policy Institute, \_\_ So.3d\_\_, 2015 WL 1036064 at \*3 (Ala. March 10, 2015); (Exhibit A, Administrative Order.) (Exhibit B, March 12, 2015 Order).

2. Plaintiffs request that this Court effectively overturn the judgment of the Alabama Supreme Court. There is no jurisdictional provision that would allow this Court to grant the requested relief. This relief is specifically barred by the Anti-Injunction Act, 28 U.S.C. § 2283, as well as by the principle that “lower federal courts possess no power whatever to sit in direct review of state court decisions.” Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al., 398 U.S. 281, 296 (1970).

3. The fact that the complained-of conduct by Judge Russell was undertaken pursuant to a judicial order also entitles him to quasi-judicial immunity.

4. Further, Plaintiffs lack standing to bring any claims based on the constitutionality of Alabama’s marital sanctity laws against Judge Russell or any other probate judge in the State of Alabama because neither the elements of causation or redressibility can be met as to a probate judge. Plaintiffs cannot satisfy the standing requirements in this case, as none of them actually attempted to apply for a marriage license from Judge Russell.

5. Even if this Court were to find that it has jurisdiction over this action, Judge Russell respectfully requests that it refrain from exercising that jurisdiction for considerations of comity and federalism in order to avoid forcing him to decide which court's order to defy. In the alternative, Judge Russell respectfully requests that this Court stay all further proceedings in this case until such time as the United States Supreme Court issues its opinion in the consolidated cases of *Obergefell v. Hodges*, No. 14-556, *Tanco v. Haslam*, No. 14-562, *DeBoer v. Snyder*, No. 14-571, and *Bourke v. Beshear*, No. 14-574 in June of this year.

WHEREFORE, THESE PREMISES CONSIDERED, Judge Russell, in his official capacity as Probate Judge for Baldwin County, Alabama, both individually and as a class representative, hereby respectfully requests that this Court dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, that this Court stay any further proceedings in this action.

Respectfully submitted this the 10<sup>th</sup> day of April, 2015.

**s/Kendrick E. Webb**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 10th day of April, 2015, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide notice to the following CM/ECF participants:

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**s/Kendrick E. Webb**  
OF COUNSEL

**EXHIBIT A**

**STATE OF ALABAMA -- JUDICIAL SYSTEM**

**ADMINISTRATIVE ORDER OF THE  
CHIEF JUSTICE OF THE SUPREME COURT**

WHEREAS, pursuant to Article VI, Section 149, of the Constitution of Alabama, the Chief Justice of the Supreme Court of Alabama is the administrative head of the judicial system; and

WHEREAS, pursuant to § 12-2-30(b)(7), Ala. Code 1975, the Chief Justice is authorized and empowered to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state"; and

WHEREAS, pursuant to § 12-2-30(b)(8), Ala. Code 1975, the Chief Justice is authorized and empowered to "take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere"; and

WHEREAS, pursuant to Article VI, Section 139(a), of the Constitution of Alabama, the Probate Judges of Alabama are part of Alabama's Unified Judicial System; and

WHEREAS, pursuant to Article XVI, Section 279, of the Constitution of Alabama, the Probate Judges of Alabama are bound by oath to "support the Constitution of the United States, and the Constitution of the State of Alabama"; and

WHEREAS, as explained in my Letter and Memorandum to the Alabama Probate Judges, dated February 3, 2015, and incorporated fully herein by reference, the Probate Judges of Alabama are not bound by the orders of January 23, 2015 and January 28, 2015 in the case of Searcy v. Strange (No. 1:14-208-CG-N) (S.D. Ala.) or by the order of January 26, 2015 in Strawser v. Strange (No. 1:14-CV-424-CG-C) (S.D. Ala.); and

WHEREAS, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the aforementioned orders bind only the



Alabama Attorney General and do not bind the Probate Judges of Alabama who, as members of the judicial branch, neither act as agents or employees of the Attorney General nor in concert or participation with him; and

WHEREAS, the Attorney General possesses no authority under Alabama law to issue marriage licenses, and therefore, under the doctrine of Ex parte Young, 209 U.S. 123 (2008), lacks a sufficient connection to the administration of those laws; and

WHEREAS, the Eleventh Amendment of the United States Constitution prohibits the Attorney General, as a defendant in a legal action, from standing as a surrogate for all state officials; and

WHEREAS, the separation of powers provisions of the Alabama Constitution, Art. III, §§ 42 and 43, Ala. Const. 1901, do not permit the Attorney General, a member of the executive branch, to control the duties and responsibilities of Alabama Probate Judges; and

WHEREAS, the Probate Judges of Alabama fall under the direct supervision and authority of the Chief Justice of the Supreme Court as the Administrative Head of the Judicial Branch; and

WHEREAS, the United States District Court for the Southern District of Alabama has not issued an order directed to the Probate Judges of Alabama to issue marriage licenses that violate Alabama law; and

WHEREAS, the opinions of the United States District Court for the Southern District of Alabama do not bind the state courts of Alabama but only serve as persuasive authority; and

WHEREAS, some Probate Judges have expressed an intention to cease issuing all marriage licenses, others an intention to issue only marriage licenses that conform to Alabama law, and yet others an intention to issue marriage licenses that violate Alabama law, thus creating confusion and disarray in the administration of the law; and

WHEREAS, the Alabama Department of Public Health has redrafted marriage license forms in contradiction to the public statements of Governor Bentley to uphold the Alabama Constitution, and has sent such forms to all Alabama Probate Judges, creating further inconsistency in the administration of justice; and

WHEREAS, cases are currently pending before The United States District Court for the Middle District of Alabama and the United States District Court for the Northern District of Alabama that could result in orders that conflict with those in Searcy and Strawser, thus creating confusion and uncertainty that would adversely affect the administration of justice within Alabama; and

WHEREAS, if Probate Judges in Alabama either issue marriage licenses that are prohibited by Alabama law or recognize marriages performed in other jurisdictions that are not legal under Alabama law, the pending cases in the federal district courts in Alabama outside of the Southern District could be mooted, thus undermining the capacity of those courts to act independently of the Southern District and creating further confusion and uncertainty as to the administration of justice within this State; and

WHEREAS Article I, Section 36.03, of the Constitution of Alabama, entitled "Sanctity of marriage," states:

(a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

(f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.

(g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

and

WHEREAS § 30-1-9, Ala. Code 1975, entitled "Marriage, recognition thereof, between persons of the same sex prohibited," states:

(a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability

and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

and

WHEREAS, neither the Supreme Court of the United States nor the Supreme Court of Alabama has ruled on the constitutionality of either the Sanctity of Marriage Amendment or the Marriage Protection Act:

**NOW THEREFORE, IT IS ORDERED AND DIRECTED THAT:**

To ensure the orderly administration of justice within the State of Alabama, to alleviate a situation adversely affecting the administration of justice within the State, and to harmonize the administration of justice between the Alabama judicial branch and the federal courts in Alabama:

**Effective immediately, no Probate Judge of the State of Alabama nor any agent or employee of any Alabama Probate Judge shall issue or recognize a marriage license that is inconsistent with Article 1, Section 36.03, of the Alabama Constitution or § 30-1-19, Ala. Code 1975.**

Should any Probate Judge of this state fail to

follow the Constitution and statutes of Alabama as stated, it would be the responsibility of the Chief Executive Officer of the State of Alabama, Governor Robert Bentley, in whom the Constitution vests "the supreme executive power of this state," Art. V, § 113, Ala. Const. 1901, to ensure the execution of the law. "The Governor shall take care that the laws be faithfully executed." Art. V, § 120, Ala. Const. 1901. "'If the governor's "supreme executive power" means anything, it means that when the governor makes a determination that the laws are not being faithfully executed, he can act using the legal means that are at his disposal.'" Tyson v. Jones, 60 So. 3d 831, 850 (Ala. 2010) (quoting Riley v. Cornerstone, 57 So. 3d 704, 733 (Ala. 2010)).

DONE on this 8th day of February, 2015.

A handwritten signature in black ink, appearing to read "Roy S. Moore". The signature is written in a cursive, flowing style.

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Roy S. Moore  
Chief Justice

## **EXHIBIT B**

IN THE SUPREME COURT OF ALABAMA  
March 12, 2015

1140460

Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslin, in his official capacity as Judge of Probate for Elmore County.

ORDER

On March 3, 2015, this Court issued an opinion in which we held that the issuance of marriage licenses to same-sex couples is contrary to Alabama law, that Alabama probate judges have a ministerial duty to comply with that law, and that nothing in the United States Constitution alters or overrides this duty. Consistent with this holding, in Part IV of our opinion, we expressly ordered the named respondents to discontinue issuing marriage licenses to same-sex couples. On March 10, 2015, we issued an order adding Judge Don Davis, Judge of Probate for Mobile County, to this proceeding as a respondent and extending our March 3, 2015, order to include him.

In Part IV of our March 3 opinion, we also joined as respondents all probate judges other than the named respondents and Judge Davis<sup>1</sup> and temporarily enjoined these

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<sup>1</sup>Judge John E. Enslin was joined and realigned as a relator.

1140460

additional respondents from issuing any marriage license contrary to Alabama law. Our order of March 3 further gave each such additional respondent five business days in which to file an answer, if the respondent elected to do so,<sup>2</sup> and to show cause, if any, as to why he or she should not be bound by the order of this Court. Having received no meritorious showing by any of the additional respondents as to why he or she should not be bound in the same manner as are the named respondents and Judge Davis, all respondents continue hereafter to be bound by the order of this Court. Accordingly, all probate judges in this State may issue marriage licenses only in accordance with Alabama law as described in our opinion of March 3, 2015.

Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan,  
JJ., concur.

Shaw, J., dissents.

**I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.**

Witness my hand this 12<sup>th</sup> day of March, 2015

*Julia Jordan Weller*  
Clerk, Supreme Court of Alabama *sm*

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<sup>2</sup>We have received but one answer from among the 62 additional respondent probate judges. Among other things, that respondent states that, even in the absence of an order from this Court, she would not issue any marriage license contrary to Alabama law.



1140460

SHAW, Justice (dissenting).

As explained in my dissent in Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2015), I do not believe that this Court has jurisdiction in this case; therefore, I dissent.