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

JAMES N. STRAWSER, *et al.*, Plaintiffs, v. LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama, *et al.*, Defendants.	)	Civil Action No. 14-0424-CG-C

PLAINTIFFS' CONSOLIDATED REPLY TO DEFENDANTS' RESPONSES

Pursuant to the Court's order granting leave (Doc. 154), Plaintiffs file this consolidated reply to Defendant Strange's Response (Doc. 150), Defendant Russell's Response (Doc. 151), and Defendant Davis's Response (Doc. 152) to Plaintiffs' Motion for Permanent Injunction and Final Judgment (Doc. 142).

Plaintiffs seek a permanent injunction requiring Defendants to comply with this Court's earlier decision prohibiting Defendants from discriminating against same-sex couples who wish to get married or have their marriages recognized in the state of Alabama. In response, Defendants offer assurances of the non-binding variety. Defendants claim that a permanent injunction is unnecessary because (1) they are bound by orders in other cases to which Plaintiffs are not parties, (2) they are currently complying with the preliminary injunction in this case, and (3) they acknowledge the decision of the U.S. Supreme Court in *Obergefell*. But none of these assurances provide Plaintiffs with a formal, enforceable order in the event that

Defendants decide to stop issuing marriage licenses to same-sex couples or to not fully recognize marriages validly entered into in Alabama or elsewhere.

The history of this case reinforces the need for permanent relief. Throughout the case various state officials, taking direction from the Alabama Supreme Court, refused to issue marriage licenses to same-sex couples unless and until they were personally subject to a formal order directing them to issue licenses to the particular plaintiffs in front of the Court. While many Defendants are now issuing marriage licenses equally to same-sex couples, and others have ceased issuing licenses at all rather than issue them equally to same-sex couples. Only a permanent injunction and final judgment will guarantee that Plaintiffs obtain the full relief to which they are entitled and that state and local officials will permanently cease to enforce Alabama's unconstitutional laws barring same-sex couples from marriage and refusing to recognize their valid marriages.

I. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION AGAINST DEFENDANT STRANGE.

Defendant Strange admits that "[t]he United States Supreme Court has resolved in Plaintiffs' favor the legal issues presented in this case" and does not contest the preliminary injunction being made permanent with respect to the members of the Defendant Class of county probate judges. Doc. 150 at 1 (citing *Obergefell v. Hodges,* __ S. Ct. __, 2015 WL 2473451 (June 26, 2015)). Defendant Strange's only argument is that because he is already enjoined by an injunction in *Searcy v. Strange*, S.D. Ala. Civil Action No. 14-0208-CG-N, Doc. 53, no injunction is warranted against him in this case.

But *Searcy* provides Plaintiffs and the Plaintiff Class (collectively "Plaintiffs") no relief. Plaintiffs are strangers to the *Searcy* litigation and have no legal authority to invoke the Court's jurisdiction to enforce the *Searcy* injunction. *See*, *e.g.*, *In re Emp't Discrimination Litig. Against the State*, 213 F.R.D. 592, 601 (M.D. Ala. 2003) (Fed. R. Civ. P. 71 does not provide basis for enforcement of court orders by non-party plaintiffs); *see also Salter v. Douglas MacArthur State Technical Coll.*, 929 F. Supp. 1470, 1481 (M.D. Ala. 1966) (non-party has no standing to enforce terms of consent decree); *Sims v. Montgomery Cnty. Comm'n*, 873 F. Supp. 585, 599 (M.D. Ala. 1994) (same). Thus, the *Searcy* injunction does not provide Plaintiffs with any means to obtain relief against Defendant Strange or his successors in office should further relief or enforcement become necessary.

This concern is more than academic. *Obergefell* invalidated state statutes and state constitutional provisions in each of the Sixth Circuit's states. But Alabama's constitutional provision and state statute remain on the books. A permanent injunction and final declaratory judgment gives Plaintiffs the full relief to which they are entitled after prevailing on the merits and ensures that these unconstitutional laws will never again be enforced in Alabama.

II. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION AGAINST DEFENDANT RUSSELL.

Defendant Russell asserts that entry of a permanent injunction against him is unwarranted because he is complying with the preliminary injunction and is "issuing marriage licenses to same-sex couples on the same priority and in the same manner as those licenses are issued to couples of the opposite sex." Doc. 151 at 1.

But the Court previously rejected the same claim made by Defendant Davis. *See* Order, Doc. 111 at 4 ("The fact that Davis has reportedly complied with the injunction order does not invalidate Plaintiffs' claims. Plaintiffs have continued standing to ensure compliance with the injunction. *See Salazar v. Buono*, 559 U.S. 700 (2010).")

Defendant Russell reasserts, and incorporates, the arguments from his earlier Motion to Dismiss (Doc. 108) and Motion for Reconsideration (Doc. 114). The Court denied both of his motions (Doc. 111 and Doc. 124). He offers no basis for suggesting that the Court's earlier denial of those motions was incorrect; he notes only that he has appealed those orders and the preliminary injunction and is seeking a permissive appeal as to class certification. Doc. 151 at 2. And he insists that in light of his appeals, "the entry of a permanent injunction and final judgment would be premature." *Id.* at 3.

But it is well established that the pendency of appeals of other matters in this case does not deprive this Court of jurisdiction to enter final relief and judgment. *See Alabama v. Envtl. Prot. Agency*, 871 F.2d 1548, 1553–4 (11th Cir. 1989) ("The district court had jurisdiction to grant summary judgment and to dismiss the suit despite the pending interlocutory appeal" of the preliminary injunction.") (citation omitted). And, given the decision in *Obergefell*, this Court's preliminary injunctive relief will certainly be affirmed—it is controlled squarely by *Obergefell*.

Finally, a permanent injunction and final judgment are especially important in light of continued resistance to this Court's findings and the U.S. Supreme Court's holding in *Obergefell*. In fact, in *Ex parte State v. King*, No. 1140460 (Ala. Sup. Ct.), relators have suggested that there is room for the Alabama judiciary and state officials to disregard the U.S. Supreme Court's decision in *Obergefell*. *See* Relator Alabama Policy Institute and Alabama Citizen's Action Program's Brief Addressing the Effect of *Obergefell* on This Court's Existing Orders, attached hereto as Exhibit A.

Defendant Russell also makes the inaccurate and irrelevant claim that "he was never allowed an opportunity to oppose the Motion for Class Certification, which was filed before he was a Defendant in this case and therefore was never served on him as required by the Federal Rules of Civil Procedure" Doc. 151 at 2–3. In fact, Defendant Russell was served with the class certification motion (Doc. 76), all of its exhibits (Docs. 76-1, 76-2, 76-3, 76-4, 76-5), the Attorney General's opposition (Doc. 78), Defendant Davis's opposition (Doc. 90), and the Court's Order granting leave to file a second amended complaint (Doc. 92). *See* Proof of Service, March 20, 2015, Doc. 97.

Indeed, Defendant Russell was aware of the pending motion for class certification and stated in his motion to dismiss that "[i]f this Motion to Dismiss is not granted, Judge Russell will submit an opposition to class certification." Doc. 108 at n.1 (emphasis added). And Plaintiffs' response to Defendant Russell's Motion to

Dismiss again put him on notice that if he wished to address the class certification issue, he should do so:

> Defendant Russell, in a footnote to his motion (Doc. 108 n.1), suggests that he wishes to submit an opposition to Plaintiffs' motion for class certification. He has been on notice of the pending motion and briefing since he was served with process on March 20, 2015. *See* Proof of Service, Doc. 97; Pls.' Reply in Supp. of Certification of Pl. and Def. Classes and Issuance of Prelim. Inj., Doc. 100 at 30 (Certificate of Service). Defendant Russell has had a full opportunity to weigh in on that issue and has chosen not to do so. Plaintiffs respectfully ask that the Court not permit his belated request to delay its determination of the pending motion.

Doc. 110 at 2–3.

Rather than follow through with his stated intent to respond to the class certification motion after his motion to dismiss was denied on April 27 (Doc. 111), Defendant Russell moved to alter, amend, or vacate the Court's denial (Doc 114). The class certification order was not issued until May 21, more than three weeks after the motion to dismiss was denied, and just over two months after he was served with the motion for class certification. Defendant Russell can hardly sit on his hands and do nothing, only to complain later that he had no opportunity to respond. In any event, if Defendant Russell wishes to pursue an appeal of the class certification order, he may do so following entry of final judgment.

Finally, Defendant Russell's assertion "that Alabama's probate judges have taken three separate approaches to the circus surrounding the issuance of same-sex marriage licenses" is irrelevant to the entry of final injunctive relief (Doc. 151 at 3).[1]

[1] Defendant Russell mischaracterizes the Court's footnote stating that probate court judges could comply with both this Court's preliminary injunction

Plaintiffs seek only such relief as afforded in the preliminary injunction order—final declaratory relief 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. 123 at 13)—and a permanent injunction tracking the preliminary injunctions entered against the Attorney General and the Defendant Class. This relief will ensure that the challenged Alabama laws will not be enforced in this state and that same-sex couples will not be denied the fundamental right to marry and to have their marriages recognized by Alabama officials.

III. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION AGAINST DEFENDANT DAVIS.

Defendant Davis first argues that Plaintiffs' motion should be denied and their case dismissed, claiming that Plaintiffs' "claims for declaratory and injunctive relief are no longer 'live' because, in light of the U.S. Supreme Court's decision and the probate judges' compliance with that ruling, same-sex couples can and have already received marriage licenses in this state." Doc. 152 at 3. Defendants cite no

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order and the Alabama Supreme Court's mandamus order by simply not issuing marriage licenses, and then concludes that claims against such probate court judges are moot. Doc. 151 at 3. The Court made no such finding and entered the preliminary injunction against the entire class of Alabama's probate court judges, without carving out any exceptions. Doc. 123. Indeed, given *Obergefell*'s express finding that "same-sex couples may exercise the fundamental right to marry" and that "no longer may this liberty be denied to them," 2015 WL 2473451 at *19, it is an open question whether an Alabama probate court judge may burden that right by refusing to issue any marriage licenses at all. The Court need not decide this issue in order to enter a permanent injunction that prevents any probate court judge from issuing licenses to opposite-sex couples while denying them to same-sex couples.

authority suggesting that voluntarily ceasing enforcement of challenged laws in light of relevant Supreme Court precedent moots a case challenging those laws. Although a Supreme Court decision is binding precedent on questions of law, even the Supreme Court cannot decide cases and controversies not directly before it. Thus, while *Obergefell*'s reasoning dictates the outcome of this case, *Obergefell* did not declare Alabama's marriage bans and anti-recognition laws to be unconstitutional, nor did it order Alabama officials to stop enforcing the state's unconstitutional marriage laws. Some Defendant Class members and other officials have stopped enforcing Alabama's marriage ban in light of the Supreme Court's decision in *Obergefell*, but current or future state and county officials may disagree about *Obergefell's* applicability to the challenged Alabama laws or otherwise resist the decision. As a result, this case is not moot and Plaintiffs are entitled to entry of a permanent injunction and final judgment.

Defendants' argument is also undermined by the response of other courts to *Obergefell*. Since the Supreme Court issued its decision, the Fifth Circuit Court of Appeals ordered District Courts in Texas, Mississippi, and Louisiana to enter final judgment in favor of plaintiffs in cases challenging the constitutionality of those states' discriminatory marriage laws, and permanent injunctions have been entered in each of those cases. *See, e.g.*, *Robicheaux v. Caldwell*, --- F.3d ----, 2015 WL 4032118 (5th Cir. July 1, 2015) (ordering entry of final judgment in favor of plaintiffs); *Campaign for S. Equal. v. Bryant*, --- F.3d ----, 2015 WL 4032186 (5th Cir. July 1, 2015) (same); *De Leon v. Abbott*, --- F.3d ----, 2015 WL 4032161 (5th Cir.

July 1, 2015) (same); *Robicheaux v. Caldwell*, Nos. 13-5090 C/W, 14-97, 14-327, 2015 WL 4090353 (E.D. La. July 2, 2015) (entering final judgment and permanent injunction in plaintiff's favor); Permanent Inj., *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d (S.D. Miss. July 1, 2015) (Doc. 34) (same), attached hereto as Exhibit B; Final J., *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. July 7, 2015) (Doc. 98) (same), attached hereto as Exhibit C. Those courts have not concluded that plaintiffs' claims in those cases are moot, and there is no basis for this Court to conclude any differently here.

Moreover, Defendant Davis's position ignores well-established law: "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted); *see also Cook v. Bennett*, --- F.3d ----, 2015 WL 4086148, at *3 (11th Cir. July 7, 2015); *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014). The Supreme Court has made clear that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189–190; *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (this "heavy burden" is on the party asserting mootness); *Doe*, 747 F.3d at 1322; *Harrell v. Fla. Bar*, 608 F.3d 1241, 1268 (11th Cir. 2010). The Eleventh Circuit has applied this "heavy burden" to government actors, requiring them to show "that it is absolutely clear that the

alleged wrongful behavior could not reasonably be expected to recur." *Doe*, 747 F.3d at 1322 (emphasis in original). Although government actors often receive "more leeway than private parties in the presumption that they are unlikely to resume illegal activities," the government actor "is entitled to this presumption only after it has shown unambiguous termination of the complained of activity." *Doe*, 747 F.3d at 1322 (emphasis in original, internal citations and quotations omitted).

Defendant Davis has not met this heavy burden. Defendants Davis and Russell, along with many members of the Defendant Class, are currently complying with *Obergefell*'s reasoning. But a number of the Defendant Class members stopped enforcing Alabama's unconstitutional marriage bans only after this Court clarified that its preliminary injunction is in effect, and several continue to refuse to issue marriage licenses at all rather than issue them equally to same-sex couples. The Supreme Court's decision in *Obergefell* alone was not sufficient to cause compliance by members of the Defendant Class, and the only thing securing the compliance of several probate judges after *Obergefell* is this Court's preliminary injunction. Without a permanent injunction, it is reasonable to believe that compliance by some members of the Defendant Class would be in doubt. *Doe*, 747 F.3d at 1322.[2] Under

[2] In addition, although Defendant Strange has made public statements that *Obergefell* is the law of the land, there is no guarantee that all state officials will agree and comply. Even if Defendant Strange had the ability to control the actions of all state officials while they remain in office (and there is no indication that he can), he cannot permanently direct the conduct of all state and county officials after he leaves office. *See Friends of the Earth, Inc.*, 528 U.S. at 190 ("a citywide moratorium . . . would not have mooted an otherwise valid claim for injunctive relief, because the moratorium, by its terms was not permanent"). There is also no guarantee that future probate judges will refrain from offering a different

these circumstances, Plaintiffs still have "need of the judicial protection that [they] sought." *Adarand Constructors, Inc.*, 528 U.S. at 224.

Defendant Davis also erroneously suggests that Plaintiffs want "an impermissible 'obey the law' injunction." Doc. 152 at 6. But "obey the law" injunctions are off limits because they fail to comply with Rule 65(d)'s specificity requirements, which ensure that "those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law." *Fla. Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dept. of Health and Rehabilitative Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000). Here, the injunctive relief sought by Plaintiffs could not be clearer: an order requiring Defendants to stop enforcing Alabama's unconstitutional laws barring same-sex couples from marriage and refusing to recognize their valid marriages.[3]

Remarkably, Defendant Davis argues that Plaintiffs are not entitled to a permanent injunction because they "cannot establish the fact of a constitutional

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interpretation of *Obergefell* and from reinstating a discriminatory policy of refusing to issue marriage licenses to same sex couples. Defendant Davis's reliance on the mootness analysis in *Dudley v. Stewart*, 724 F.3d 1493 (11th Cir. 1984), is misplaced, because in that case a class had not been certified. Here, both plaintiff and defendant classes have been certified and the defendant class specifically includes "all Alabama county probate judges who are enforcing or in the future may enforce Alabama's laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages." Doc. 122 at 17.

[3] Defendant Davis's reliance on *Thomas ex rel Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), is also misplaced. In *Thomas*, the district court determined that the desired injunctive relief was improper because the alleged constitutional violations were insufficiently related to the policies at issue. That holding has no relevance here, where Plaintiffs seek to make permanent a preliminary injunction that was appropriately tailored to the challenged state laws.

violation." Doc. 152 at 8. The Court has already held that Plaintiffs have suffered a constitutional violation. *See, e.g.*, Doc. 123 at 6–7.

Anticipating a motion by Plaintiffs for attorneys' fees and costs, Defendant Davis reasserts his failed claims of judicial and quasi-judicial immunity. His judicial-immunity arguments should be rejected now for the same reasons they were rejected before. *See* Doc. 123 at 7–8. Even if the mootness doctrine barred entry of a permanent injunction in this case—which it does not—Plaintiffs would be entitled to an award of attorneys' fees and costs as a prevailing party because they obtained a preliminary injunction against Defendants. *See, e.g.*, *Tripple J Inv., LLC v. Cape Canaveral*, No. 6:08-cv-283-Orl-DAB, 2008 WL 2477625, at *2 (M.D. Fla. June 17, 2008) (citing *McDonald v. Oliver*, 525 F.2d 1217, 1226 (5th Cir.1976)) (considering award of attorney's fees despite finding injunctive relief moot); *Harding v. Manners*, 646 F. Supp. 277, 278 (N.D. Ga. 1986) (mootness of the request for an injunction did not automatically moot plaintiffs' request for attorney's fees). In any event, Defendant Davis's opposition to attorneys' fees and costs are premature and put the cart before the horse.

Defendant Davis suggests, without authority, that a permanent injunction should not be issued against the Defendant Class members who are currently issuing marriage licenses to same-sex couples. Doc. 152 at 6. This is incorrect. Permanent injunctions are not reserved for those who violate preliminary injunctions, and those who comply with preliminary orders are not immune from permanent ones.

Finally, Defendant Davis argues that Plaintiffs' motion is premature and that this Court should wait to act until the 25-day Supreme Court rehearing deadline expires. But Defendant Davis offers no reason to think that *Obergefell* will be reheard or that a different decision would result in the event of rehearing.

In response to *Obergefell*, many district courts have entered permanent injunctions and final judgments providing for the freedom to marry. This Court should do the same.

Respectfully Submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system on July 14, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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Exhibit A

IN THE SUPREME COURT OF ALABAMA

Ex parte STATE of ALABAMA ex rel. ALABAMA POLICY INSTITUTE, ALABAMA CITIZENS ACTION PROGRAM, and JOHN E. ENSLEN, in his official capacity as Judge of Probate for Elmore County,

Petitioner,

v.

ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, et al.,

Respondents.

_____/

CASE NO. 1140460

RELATORS ALABAMA POLICY INSTITUTE AND ALABAMA CITIZENS ACTION PROGRAM'S BRIEF ADDRESSING THE EFFECT OF *OBERGEFELL* ON THIS COURT'S EXISTING ORDERS

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INTRODUCTION

On June 29. 2015, this Court entered its Corrected Order an order inviting the parties "to submit any motions or briefs addressing the effect of the Supreme Court's decision in *Obergefell* on this Court's existing orders." Relators ALABAMA POLICY INSTITUTE and ALABAMA CITIZENS ACTION PROGRAM file this brief in response to the Court's Corrected Order.

SUMMARY OF ARGUMENT

"**[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. . . . Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.**" *Obergefell v. Hodges*, 2015 WL 2473451, *24 (2015) (Roberts, C.J., dissenting) (emphasis added).

In determining the effect of the U.S. Supreme Court's *Obergefell* decision on this Court's prior orders, this Court should consider several important factors. These include the decision's substantial assault on the Rule of Law, Democracy, and Natural Law, and its necessary diminishment of the constitutional right to Free Exercise of Religion. Furthermore, this Court should consider existing precedent

for a state's highest court to reject an unlawful mandate from the U.S. Supreme Court.

Finally, this Court should ensure the protection of the constitutional rights of Alabama probate judges in light of *Obergefell*.

ARGUMENT

I. THIS COURT SHOULD CONSIDER SEVERAL IMPORTANT FACTORS IN DETERMINING THE EFFECT OF *OBERGEFELL* ON THIS COURT'S EXISTING ORDERS.

A. The majority opinion in *Obergefell* is an assault on the Rule of Law.

"[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. . . . Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law." *Obergefell v. Hodges*, 2015 WL 2473451, *24 (2015) (Roberts, C.J., dissenting) (emphasis added).

The *Obergefell* majority's assault on the Rule of Law is manifest. And one need look no further than the four *Obergefell* dissents to comprehend the assault's expanse.

It perhaps cannot be said more succinctly than Chief Justice Roberts above. But he was constrained to further explain what should not need explaining: "this Court is not a legislature. . . . Under the Constitution, judges have power

to say what the law is, not what it should be." *Id.* at *23. The Chief Justice continued, exasperated, "**The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. . . . Just who do we think we are?**" *Id.* at *24 (emphasis added). "[A]s a judge, I find the majority's position indefensible as a matter of constitutional law." *Id.* at *28.

Each of the other dissenting justices took a turn eulogizing the rule of law:

> Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.

Id. at *57 (Alito, J., dissenting).

> The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. . . . Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic.

Id. at *46 (Thomas, J., dissenting).

> This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. . . .
>
> . . . .
>
> But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since.

Id. at *43-44 (Scalia, J., dissenting).

The willful act of the five lawyers in the majority is particularly egregious in light of what the **same majority** said **only two years ago** in *United States v. Windsor*:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. **The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities. The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce and the Constitution**

> **delegated no authority to the Government of the United States on the subject of marriage and divorce.**
>
> Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. . . .
>
> 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.**

133 S. Ct. 2675, 2691 (2013) (emphasis added) (internal quotations and citations omitted).[1]

Justice Roberts provides an appropriate conclusion: "The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to . . . ." *Id.* at *35. "[T]his approach is dangerous for the rule of law." *Id.* at 37.

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[1] Egregious, though sadly predicted by Justice Scalia in his *Windsor* dissent, looking ahead to the Supreme Court's inevitable marriage decision: "**The only thing that will 'confine' the Court's holding is its sense of what it can get away with.**" 133 S. Ct. at 2709 (Scalia, J., dissenting) (emphasis added).

B. The majority opinion in *Obergefell* is an assault on Alabamian and American Democracy.

"The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it." *Id.* at *39 (Roberts, J., dissenting).

As recognized by Chief Justice Roberts above, the *Obergefell* majority's assault on Alabamian and American Democracy is not only willful, but also frontal. "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges." *Id.* at *39 (Roberts, C.J., dissenting).

Justice Scalia likens the majority's usurpation to the high crime of robbery:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, **robs the People of the**

> **most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.**

Id. at *42. Justice Alito too: "Today's decision **usurps the constitutional right of the people to decide** whether to keep or alter the traditional understanding of marriage." *Id.* at *56 (emphasis added).

Chief Justice Roberts likewise calls it stealing:

> "But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. **Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.**
>
> . . . .
>
> . . . . The majority today neglects that restrained conception of the judicial role. **It seizes for itself a question the Constitution leaves to the people . . . .**

Id. at *24.

This Court has itself recognized the damage to democracy caused by judicial redefinition of marriage:

> [I]t is for the stability and welfare of society, for the general good of the public, that a proper understanding and preservation of the institution of marriage is critical. It is the people themselves, not the government, who must go about the business of working, playing, worshiping, and raising children in whatever society, whatever culture, whatever community is facilitated by the framework of laws that these same people, directly and through their representatives, choose for themselves. It is they, who on a daily basis must interact with their fellow men and live out their lives within that framework, who are the real stakeholders in that framework and in the preservation and execution of the institutions and laws that form it. There is no institution more fundamental to that framework than that of marriage as properly understood throughout history.

(Order, March 3, 2015 (the "Mandamus Order") at 16-17.)

C. The majority opinion in *Obergefell* is an assault on Natural Law.

The five-lawyer majority opinion in *Obergefell* openly violates the natural law governing marriage. Five lawyers opined that "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited

by our basic charter." *Obergefell*, 2015 WL 2473451, at *16 (Kennedy, J.) Incredibly, these five lawyers proclaim that "our basic charter" (presumably, the Constitution) demands and compels same-sex marriage in all States, despite the indisputable biological differences between marriage and same-sex marriage and the undeniable fact that no State at the founding of this nation or at the time of the Civil War Amendments (nor any country at those times or in the preceding millennia of recorded history and civilization) recognized marriage as such, *id.* at *24 (Roberts, C.J., dissenting), nor could they. Indeed, the institution of marriage predates the lifetime of these five lawyers, not to mention the 239-year old United States of America, the 226-year old United States Constitution, or the 147-year old Fourteenth Amendment.

Contrary to the five-lawyer majority opinion in *Obergefell*, marriage between a man and a woman is not a mirage that only "*seemed* natural and just" for millennia (*i.e.*, from the beginning of civilization), only to shed its deceiving skin after the eyes of five lawyers were allegedly opened with newfound "knowledge." Instead, this conjugal view of marriage (as a comprehensive and complementary union of a man and a woman that naturally creates families) was (and is), in

fact, "natural and just" for it mirrored (and continues to mirror to this day) the intrinsic nature of marriage regardless of the five lawyers' newly-laid foundation for this universal institution. Prior attempts at changing the true nature of the institution of marriage were explicitly rebuffed by this Court.

As recently as March 3, 2015, this Court firmly recognized the nature of marriage as an institution designed only for a man and a woman without exception or limitation. According to this Court, prior court decisions and the body of statutory law in this State relating to and supporting the institution of marriage "**reflect**[]" the following "**truths**": marriage is (1) a "union between one man and one woman" and (2) the "fundamental unit of society." (Mandamus Order at 20 (emphasis added).) The foregoing conclusions are especially illuminating in light of the five lawyers' stated beliefs about "marriage" in *Obergefell* that contravene "the Laws of Nature and of Nature's God." *See* Declaration of Independence, July 4, 1776.

In the first instance, this Court's prior conclusions demonstrate that, when it comes to the institution of marriage, existing statutes and multiple decisional laws from

this Court (as well as earlier Supreme Court opinions) merely "reflect," or "show an image of," cast back or "throw back" from, or embody "a sign of the nature" of certain "truths" about marriage. *See* Oxford Dictionary, accessible online at http://www.oxforddictionaries.com/us/definition/learner/reflect. As a reflection of "truths" then, the law simply reproduced the preexistent and self-evident nature of marriage, which preceded legislative enactment or judicial recognition. Said another way, these laws did not create the institution of marriage and then define the contours of it. Instead, they recognized its unwritten nature and then codified it. This leads to the second indissoluble aspect of this Court's conclusions about marriage.

Only four months ago, this Court described in detail what marriage, in fact and truth, **is**. And, critically, that recognition of what marriage is was not hinged to five lawyers' personal musings but instead fastened to the enduring nature, universal and procreative significance, and conjugal meaning of marriage. As it did 145 years earlier, this Court unambiguously identified the "fundamental nature" of marriage as the union of one man and one woman that begets the family, the "building block of society." (Mandamus Order

at 20, 57-58, 91 n.23, 97, 104-05.) *See also Goodrich v. Goodrich*, 44 Ala. 670, 672-75 (1870).

Certainly, prior Supreme Court decisions supported this "axiomatic nature of marriage." (Mandamus Order at 17.) *See also, e.g., Maynard v. Hill*, 125 U.S. 190, 211 ("[Marriage] is . . . the foundation of the family and of society, without which there would be neither civilization nor progress."); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (recognizing that the family "consist[s] in and spring[s] from union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization"). To be sure, just two years ago in *Windsor*, the same majority who decided *Obergefell* recognized, "until recent years . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. at 2689. *See also Obergefell*, 2015 WL 2473451, at *27 (Roberts, C.J., dissenting) ("This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning.").

But the distinctive nature of marriage--the "foundation of the family," which is, in turn, the "fundamental unit of society," (Mandamus Order at 14)--is no more dependent upon these statements (which accurately project its image) than a pronouncement from five living lawyers that rejects, deforms and conceals it. As this Court stated, the one man, one woman characteristic of marriage is "immutable." (Mandamus Order at 104. Said differently, it is the "core structure" or "core meaning" of marriage. *See Obergefell*, 2015 WL 2473451, at *27 (Roberts, C.J., dissenting).

As a result, to this day, this "obvious" and natural foundation of marriage remains absolute, undeniable, and unchanging:

> "Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union between men and women (often) produces children. Marriage demonstrably channels the results of sex between members of the opposite sex—procreation—in a socially advantageous manner. It creates the family, the institution that is almost universally acknowledged to be the building block of society at large because it provides the optimum environment for defining the responsibilities of parents and for raising children to become productive members of society."

(Mandamus Order at 104-105 (internal footnotes omitted); 14-15 (citing favorably to the underpinnings of marriage as a "'prepolitical' 'natural institution' 'not created by law,'

but nonetheless recognized and regulated by law in every culture") (citing Robert P. George, *Law and Moral Purpose*, First Things, Jan. 2008, and Robert P. George *et al.*, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 270 (2011).) *See also* 1 William Blackstone, *Commentaries on the Laws of England*, at 410 (1765) (describing the relationship of "husband and wife" as "founded in nature").

This natural foundation to marriage was recognized by the dissenting justices in *Obergefell*. In the principal dissenting opinion, Chief Justice Roberts, joined by two other justices, stated that "[t]his universal definition of marriage as the union of a man and a woman" is not the result of any "moving force of world history" but instead "arose in the nature of things." *Obergefell*, 2015 WL 2473451, at *25 (Roberts, C.J., dissenting). Justice Alito, in his dissenting opinion joined by two other justices, recognized that "[f]or millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate." *Id.* at *55 (Alito, J., dissenting). Justice Thomas, in his dissent joined by the Chief Justice and another justice, further explained that "[t]he traditional definition of marriage has prevailed in every society that has recognized marriage

throughout history, was born "out of a desire 'to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world,'" and "has existed in civilizations containing all manner of views on homosexuality." *Id.* at *50 n.5 (Thomas, J., dissenting) (citing Brief for Scholars of History and Related Disciplines as *Amici Curiae* at 1, 8, and Brief for Ryan T. Anderson as *Amicus Curiae* at 11-12).

Five lawyers' protestations against the natural and intrinsic foundation of marriage do not transmogrify the very "nature of being 'married.'" (Mandamus Order at 91 n.23.) Indeed, the nature of marriage and its "truths"--which have been powerfully recognized by this Court--cannot be unwound, unbound, or untied from their foundation without displacing the institution itself and all that naturally proceeds therefrom. This "fundamental" nature of marriage--which, as indicated above, is rooted in biology, comprehensive in its union, engendered for the proliferation of families and societies, and observable and traceable across recorded history and cultures--demands continued adherence as a just and natural law already (and consistently) recognized by this

Court. *See* Martin Luther King, Jr., *Letter from a Birmingham Jail*, Apr. 16, 1963 (distinguishing between a "just law," which consists of a "man made code that squares with the moral law or the law of God" and in response to which "[o]ne has not only a legal but a moral responsibility to obey," and an "unjust law," which consists of a "human law that is not rooted in eternal law and natural law" and thus is "no law at all," and in response to which "one has a moral responsibility to disobey").

D. The majority opinion in *Obergefell* diminishes the constitutional right of Free Exercise of Religion.

"Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect." *Obergefell*, 2015 WL 2473451, at *52 (Thomas, J., dissenting) (emphasis added). Justice Thomas further explained the unavoidable religious liberty problem with the *Obergefell* decision:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to

> participate in and endorse civil marriages between same-sex couples.
>
> The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons. . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." **Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.**

Id. at *52-53 (citations omitted).

Justice Alito was likewise unpersuaded by the majority's perfunctory nod to religious liberty, expressing concern for the effect of the majority opinion on the treatment of religious persons:

> It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.
>
> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will

> soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Id. at *57 (citations omitted).

Chief Justice Roberts shared Justice Alito's concern for the treatment of religious persons in light of the majority's thinly-veiled animus:

> By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

Id. at *41 (citations omitted).

E. There is precedent for the highest court of a state to reject a U.S. Supreme Court mandate which is unlawful.

To this day, the Wisconsin Supreme Court celebrates its adherence to the U.S. Constitution in openly defying an unlawful federal statute and an unlawful U.S. Supreme Court mandate:

> What has come to be known as the Booth case is actually a series of cases from the Wisconsin Supreme Court and one from the U.S. Supreme Court. In the midst of the pre-Civil War states' rights movement, the Wisconsin Supreme Court boldly defied federal judicial authority and nullified the federal fugitive slave law (which required northern states to return runaway slaves). **The U.S. Supreme Court overturned the state Supreme Court which, in a final act of defiance, never filed the mandates.**[2]

The first Wisconsin "Booth case" arose from the 1854 escape of fugitive slave Joshua Glover from federal custody. *In re Booth*, 3 Wis. 1 (1854) ("*Booth I*"). Glover, who allegedly had fled from his owner in Missouri, subsequently had been captured in Wisconsin by the U.S. Marshal. *Id.* at 4-5. When Glover escaped from the Marshal's custody, one Sherman

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[2] Wisconsin Court System, *Famous cases of the Supreme Court*, http://wicourts.gov/courts/supreme/famouscases.htm (last visited July 4, 2015) (emphasis added).

Booth was criminally charged, under the federal Fugitive Slave Act of 1850, with aiding and abetting Glover's escape. *Id.* Booth was taken into custody by the Marshal, but petitioned a justice of the Wisconsin Supreme Court for a writ of *habeas corpus*. *Id.* at 2-4. Justice Abram D. Smith issued the writ compelling the Marshal to produce Booth and justify his detention. *Id.* at 6.

Following a hearing, Justice Smith entered an order discharging Booth from federal custody on two grounds: (1) the warrant pursuant to which the U.S. Marshal took Booth into custody failed to state a crime cognizable under the Fugitive Slave Act, and (2) the Act was unconstitutional because, among other reasons, the Act improperly delegated enforcement proceedings to non-judicial officers, and denied fugitive slaves the right to trial by jury. *See id.* at 6, 22, 39, 47.

In holding the detention of Booth illegal, Justice Smith did not espouse rejection of federal authority *per se*; rather, he espoused rejection of the exercise of federal authority which is unlawful under the United States Constitution:

> The constitution of the United States is the fundamental law of the land. It emanated from the very source of sovereignty as the same is recognized in

> this country. It is the work of our fathers, but adopted and perpetuated by all the people, through their respective state organizations, and thus becomes our own. . . . He has, by his vote, mediate or immediate, established it as the great charter of his rights, and by which all his agents or representatives in the conduct of the government, are required to square their actions. **By the standard of the constitution, he has a right to judge of the acts of every officer or body whose existence as such is provided for by it.**
>
> **I recognize most fully the right of every citizen to try every enactment of the legislature, every decree or judgment of a court, and every proceeding of the executive or ministerial department, by the written, fundamental law of the land.** . . . [N]o law is so sacred, no officer so high, no power so vast, that the line and the rule of the constitution may not be applied to them. It is the source of all law, the limit of all authority, the primary rule of all conduct, private as well as official, and the citadel of personal security and liberty.

Booth I, 3 Wis. at 13 (emphasis added).

Justice Smith also recognized that state judges are duty bound to resist unconstitutional federal usurpations of authority by their solemn oaths to their states:

> But believing as I do, that every state officer who is required to take an oath to support the constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the

> great principles and rights which it was intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. I know well its consequences, and appreciate fully the criticism to which I may be subjected. **But I believe most sincerely and solemnly that the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty.** Seeking and enjoying the quiet and calm, so peculiar to the position in which I am placed, I desire to mingle no farther in the political discussions of the times, than the clear suggestions of official obligation require. But he who takes a solemn oath to support the constitution of the United States, as well as the state . . . is bound by a double tie to the nation and his state. Our system of government is two fold, and so is our allegiance. . . . To yield a cheerful acquiescence in, and support to every power constitutionally exercised by the federal government, is the sworn duty of every state officer; **but it is equally his duty to interpose a resistance, to the extent of his power, to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution.**

Id. at 22-23 (emphasis added).

Thus, Justice Smith reasoned, resistance to overreaching federal power both flows from and is felicitous to a solemn oath to uphold the U.S. Constitution, not contrary to it.

Even more, Justice Smith concluded, such resistance is a necessary preservative of state sovereignty:

> In view of the vastly increasing power of the federal government, and the relatively diminishing importance of the state sovereignties respectively, **the duty of the latter to watch closely and resist firmly every encroachment of the former, becomes every day more and more imperative, and the official oath of the functionaries of the states becomes more and more significant.** As the power of the federal government depends solely upon what the states have granted, expressly or by implication, and as no common judge has been provided for, to determine when the one or the other shall be proved unfaithful to the compact, the solemn pledge of faith exacted from both has been deemed an effectual guaranty . . . .

Id. at 24 (emphasis added).

The U.S. Marshal who had detained Booth petitioned the entire Wisconsin Supreme Court to review Justice Smith's writ and order. *Id.* at 49. The court granted review, and **the full court unanimously affirmed Justice Smith's holding that Booth's detention was illegal**. *Id.* at 49, 58, 64. Justice Smith himself, writing *seriatim*, provided a final (and prophetic) observation on the state high court's duty to guard against unconstitutional federal judicial decisions: "The subjection of judicial decisions to elementary criticism will never be denounced as audacious, but by those who are content

to follow precedent, **even though precedent overleap the law, and become the mere pretext for usurpation**. *Id.* at 89 (Smith, J.) (emphasis added).

The second *Booth* case also centered on a *habeas corpus* petition by Booth. *In re Booth*, 3 Wis. 157 (1854) ("*Booth II*").[3] After Booth's discharge from federal custody as a result of *Booth I*, Booth was nonetheless indicted, tried, and convicted in federal court under the Fugitive Slave Act. *Id.* at 171. Upon his incarceration, Booth once again petitioned the Wisconsin Supreme Court for a writ of *habeas corpus* challenging his detention. *Id.* at 172. Booth's alternative grounds in his petition were the lack of a charge or conviction of any crime cognizable under the Fugitive Slave

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[3] *Booth II* involved the identical *habeas* petitions of both Booth and one John Rycraft; however, the court referred primarily to Rycraft's petition. *See* 3 Wis. at 158 ("These two applications are the same in all respects . . . ."), 189 ("The case of *Sherman M. Booth,* which was argued and considered in connection with this case, is substantially disposed of in the foregoing opinion." (Crawford, J.)), 190 ("The facts in these two cases are essentially the same, and any observations which I feel called upon to make will apply to both cases alike, and, therefore, for the sake of convenience, mention will be made of the petition of *Rycraft* only." (Smith, J.)). Conversely, the U.S. Supreme Court, in its review of *Booth I* and *II*, only referred to Booth's petition from *Booth II*. *See Ableman v. Booth*, 62 U.S. 506, 509-511 (1858).

Act, such that the federal court lacked jurisdiction over him, and the unconstitutionality of the Act. *Id.* at 158-161. The court granted the petition and held a hearing. *Id.* at 172, 174.

In *seriatim* opinions, the same three justices who had decided *Booth I* unanimously held Booth's later federal detention unlawful on the grounds that Booth was not indicted or convicted of any cognizable crime under the Act, and therefore the federal court lacked jurisdiction over him. *Id.* at 175 (Whiton, C.J.), 189 (Crawford, J.), 216-17 (Smith, J.).[4] The court "ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty." *Ableman*, 62 U.S. at 511.

Though the reasons for the *Booth II* holding were largely the same as given in *Booth I*, the *Booth II* court expounded upon the constitutional principles underpinning the decisions. With respect to a state court's duty to protect

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[4] Though unnecessary to the court's holding, two of the three justices maintained their conclusions that the Act also was unconstitutional. *Id.* at 175 (Whiton, C.J.), 211-12 (Smith, J.).

the liberties of its own citizens from federal encroachment, Justice Smith concluded, "If, therefore, it is the duty of the state to guard and protect the liberty of its citizens, it must necessarily have the right and power to inquire into any authority by which that liberty is attempted to be taken away. But the power to inquire, includes the power to decide." *Booth II*, 3 Wis. at 193-94.

Judge Smith continued, "As, therefore, the STATES *delegated,* and the federal government *took* power, limited in character and extent, **the latter is at all times answerable to the former, and may be required to exhibit the constitutional warrant by which it claims to do, or refuses to perform, any given act** . . . ." *Id.* at 195 (emphasis added).

To illuminate the foundation of his conclusions, Justice Smith invoked the Supremacy Clause of the Constitution itself:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Justice Smith explained the clause's meaning:

> Here is a distinct recognition of the power and duty of state judges, not to be bound by all the acts of congress, **or by the judgments and decrees of the supreme federal court**, or by their interpretation of the constitution and acts of congress, **but by "*this constitution*,"** "*and the laws made in pursuance thereof.*"

Booth II, 3 Wis. at 196 (emphasis added) (italics in original).

Applying his conclusions specifically to federal judicial power, Justice Smith elucidated, "From these views, it is clear to me . . . that the judicial power of the union is as much circumscribed by the constitution as every other department of the federal government; [and] that **a judicial determination without the constitutional sphere, would be no judgment or decree** . . . ." *Id.* at 204.

The federal case in the *Booth* line of cases was *Ableman v. Booth*, 62 U.S. 506 (1858), in which the U.S. Supreme Court reviewed *Booth I* and *II* on the petition filed by the U.S. Marshal who had detained Booth. Chief Justice Roger Taney, writing for the Court, purported to reverse both *Booth I* and *Booth II* on the grounds that state courts cannot interfere, by *habeas corpus* proceedings, with any confinement which

occurs under federal authority. *Id.* at 523-26. Chief Justice Taney also opined, perhaps not surprisingly in light of his *Dred Scott* opinion, that the Fugitive Slave Act was constitutionally sound.[5] *Id.* at 526.

In the nearly 157 years since the U.S. Supreme Court's purported reversal of *Booth I* and *II*, the Wisconsin Supreme Court has never filed or accepted the U.S. Supreme Court's mandates. *Famous cases*, *supra* note 1. In the final *Booth* case before the Wisconsin Supreme Court, *Ableman v. Booth*, 11 Wis. 498 (1859) ("*Booth III*"), the court denied the United States' motions to file the Supreme Court's mandates, thus completing the Wisconsin high court's rejection--in fidelity to the U.S. Constitution--of the unlawful acts of the federal judiciary. *Booth III*, 11 Wis. at 498-99.

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[5] In 1856, Chief Justice Taney delivered his infamous *Dred Scott* opinion, in which he espoused with conviction his view that black persons "whose [African] ancestors were imported into this country, and sold as slaves" were constitutionally inferior humans, even mere property. *Dred Scott v. Sandford*, 60 U.S. 393, 403, 416, 452 (1856). The American People ultimately rejected *Dred Scott* "on the battlefields of the Civil War and by constitutional amendment after Appomattox." *Obergefell*, 2015 WL 2473451, at *30 (Roberts, C.J., dissenting).

Writing previously in *Booth II*, Justice Smith thoroughly contemplated that "collisions" such as those between the Wisconsin Supreme Court and the U.S. Supreme Court in *Booth III* would be infrequent, but nonetheless healthy and beneficial towards preserving the mutual state and federal sovereignties:

> The obligations of the state and federal governments are herein perceived to be mutual and reciprocal. The one to abstain from all interference, whenever it perceives the subject matter to be within the attached jurisdiction of the other, and that other to show that the authority which it claims to exercise is within the powers delegated, and one which it may rightfully exercise. There is little danger of troublesome collision, so long as each shall be willing to measure its functions by the standard created for the guide of both. **But, if to avoid collision, an absolute unquestioning submission on the one hand is requisite, and on the other, a perfect immunity to claim and usurp all powers, and to be the sole and ultimate judge of the extent and validity of its own claims; and to enforce its decisions upon the states, then collision is the preferable alternative, because collision invokes the arbitrament of the people themselves, the ultimate source of political power, whose judgments and decrees are made and pronounced through the peaceful and constitutional modes and means which they had the wisdom and foresight to provide in the organization of the present system of government.** "Collisions" of this kind are by no means new in this government. They have occurred

> from time to time as the supposed exigincies of the country have called into exercise new powers, or have seemed to require the adoption of new measures. **They are the rightful and healthful operations of those necessary checks and balances which are indispensable in a government of divided or distributed powers. But such "collisions" have, all along our history, found their appropriate remedy in the awakening of inquiry, in a recurrence to primary and fundamental principles, and in a return of the erring to the constitutional sphere.** And so will it ever be, until one or another shall repudiate these constitutional checks and balances, and rashly and madly rush on to extremities, in defiance of constitutional obligations and remedies.

Booth II, 3 Wis. at 208-09 (emphasis added).

And, as predicted by Justice Smith, the *Booth* "collision" did not dissolve the union, but was perhaps timely to preserve it:

> It is much safer to resist unauthorized and unconstitutional power, at its very commencement, when it can be done by constitutional means, than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution. If collisions between the departments of the same government have heretofore occurred without dissolution, may we not hope that it will be able to stand yet awhile, in spite of an occasional difference and discussion between the state and federal functionaries?

Id. at 201 n.a1.

II. THIS COURT SHOULD PROTECT THE CONSTITUTIONAL RIGHTS OF ALABAMA PROBATE JUDGES.

Religious conscience protections for individuals (including state officials) are mandated by the First Amendment. *See* U.S. Const. amend I (requiring that government must not "prohibit[] the free exercise" of religion); *see also Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.").

In addition to First Amendment protection, state official's religious conscience is further protected by the Religious Test Clause of the Constitution. *See* U.S. Const. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). Compelling all government actors who have any responsibilities in the solemnization, celebration, or issuance of marriage licenses (*e.g.*, probate judges or clerks) to participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding office. However, government may not "oppos[e] or

show[] hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Many individuals who believe and practice certain religions (and who hold public office in this State) also believe that marriage is sacred and foundational to their religious beliefs. To require those individuals to participate in the solemnization and celebration of same-sex marriage is repugnant and antithetical to their religious convictions and conscience.

Some may contend that such religious persons (who accepted their public employment job before *Obergefell*) must either participate without exception in the issuance of same-sex marriages (their consciences be damned) or resign if they refuse to participate since holding public office is that person's choice (their livelihood and commitment to public service be damned). To those not yet serving in those public roles, they are told to cast aside their deep religious convictions before entering the door of public service. But the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."

Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (striking down as unconstitutional Maryland's religious test for public office). Indeed, the very idea that religious persons "need not apply" for these public positions that have historically been accessible to them constitutes an unmistakable religious litmus test. By imposing on all public employees a mandate to participate in same-sex marriage, without any protection for religious conscience, government violates the First Amendment and Religious Test Clause of the Constitution.

At a minimum, this Court must ensure that these constitutional protections are recognized and left in place for the current public employees of this State who are serving as probate judges, clerks, and their support personnel, as well as all religious persons aspiring to someday serve the public in these and other similar capacities.[6]

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[6] *See, e.g.*, N.C. Gen. Stat. § 51-5.5 (2015) ("(a) Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection. . . (b) Every assistant register of deeds and deputy register of deeds has the right to recuse from issuing all lawful marriage licenses under this Chapter based upon any sincerely held religious objection. . . (d) No magistrate, assistant register of deeds, or deputy register of deeds may be charged or convicted under G.S. 14-230 or G.S. 161-27, or subjected to a disciplinary action, due to a good-faith recusal under this section.")

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 6th day of July, 2015, served copies of this brief, by e-mail transmission, as follows:

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY; REBECCA BICKETT; ANDREA SANDERS; JOCELYN PRITCHETT; *and* CARLA WEBB — **PLAINTIFFS**

V. — **CAUSE NO. 3:14-CV-818-CWR-LRA**

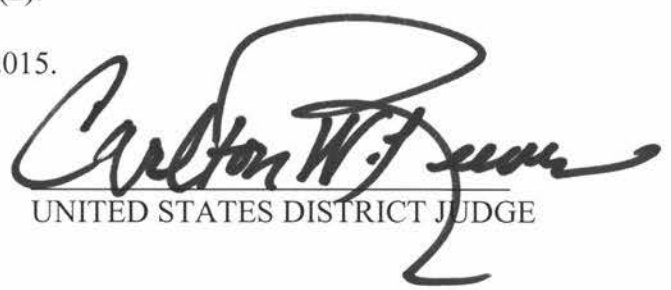
PHIL BRYANT, *in his official capacity as Governor of the State of Mississippi*; JIM HOOD, *in his official capacity as Mississippi Attorney General*; *and* BARBARA DUNN, *in her official capacity as Hinds County Circuit Clerk* — **DEFENDANTS**

PERMANENT INJUNCTION

In light of the United States Supreme Court's decision in *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015), and the issuance of the mandate from the United States Court of Appeals for the Fifth Circuit, it is now appropriate to permanently enjoin the enforcement of Mississippi's same-sex marriage ban. Accordingly,

IT IS HEREBY ORDERED that the State of Mississippi and all its agents, officers, employees, and subsidiaries, and the Circuit Clerk of Hinds County and all her agents, officers, and employees, are permanently enjoined from enforcing Section 263A of the Mississippi Constitution and Mississippi Code Section 93-1-1(2).

SO ORDERED, this the 1st day of July, 2015.



UNITED STATES DISTRICT JUDGE

Exhibit C

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

CLEOPATRA DE LEON, et al. Plaintiffs,	§	
v.	§	Cause No. SA-13-CA-00982-OLG
RICK PERRY, in his official capacity as Governor of the State of Texas, et al., Defendants.	§	

FINAL JUDGMENT

On July 1, 2015, the Fifth Circuit affirmed this Court's grant of a preliminary injunction and issued a mandate for this Court to enter judgment in favor of Plaintiffs in this case. *See De Leon v. Abbott*, No. 14-50196, 2015 WL 4032161, ___ F.3d ___ (5th Cir. 2015). In light of the United States Supreme Court's decision in *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451, ___ U.S. ___ (2015), and pursuant to the Fifth Circuit's mandate, the Court hereby enters judgment in this case.

It is hereby ORDERED, ADJUDGED, and DECREED that:

1) Any Texas law denying same-sex couples the right to marry, including Article I, §32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;
2) Defendants are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage; and
3) Any taxable costs in this case are assessed against the Defendants.

It is so ORDERED.

SIGNED this 7 day of July, 2015.

United States District Judge Orlando L. Garcia