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

JAMES N. STRAWSER and JOHN E. HUMPHREY,	*	
Plaintiffs,	*	
V.	*	CIVIL ACTION NO. 14-0424-CG-C
STATE OF ALABAMA,	*	
Defendant	*	

NOTICE TO THIS COURT OF PRESENTLY CONFLICTING AUTHORITY AND POTENTIAL CONFLICTING AUTHORITY BASED ON RECENT FILINGS

Judge Don Davis, by and through his attorneys, provides notice to this Court of presently conflicting authority and potential conflicting authority which could apply to Judge Don Davis on the matter that is before this Honorable Court. Judge Davis also provides to this Court the filings which Judge Davis has taken through his attorneys to attempt to address the potential conflicting authorities relating to this matter before this Court.

1. On February 8, 2015, the Chief Justice of the Supreme Court of Alabama issued an Administrative Order which set out the following Order:

> "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."

2. The United States Supreme Court on February 9, 2015 refused to stay the order of this Honorable Court that had ruled unconstitutional both the state law constitutional and statutory

provisions cited as the basis for J. Moore's Administrative Order. Clearly, Judge Davis was placed in a conflict regarding the authority of this Court and the authority of the Chief Justice of the Alabama Supreme Court who, by authority of his office, is also the chief administrative officer of the State of Alabama Judicial System.

3. Although Judge Davis was not a party to this Court's Order in the above styled case, Judge Davis recognized the potential conflicting authority which confronted his office as set out above. Due to the conflicting orders of this Court and the Chief Justice of the Alabama Supreme Court, Judge Davis felt compelled to close the office which issues marriage licenses in Mobile County until this conflict was resolved.

4. Due to the U.S. Supreme Court's ruling and the Motion for Contempt filed by the Plaintiffs in another related matter before this court, Judge Davis then filed an in rem action in the Alabama Supreme Court to address the continuing validity of the res, the Administrative Order of Chief Justice Moore, which is the subject of the in rem action filed in the Alabama Supreme Court. This in rem action which is attached to this pleading focused the filing solely on whether Chief Justice Moore's Administrative Order was still valid after the U.S. Supreme Court ruling. Judge Davis set out in the in rem action that if the Alabama Supreme Court failed to address the "Administrative Order" which is the res in rem action filed within the Alabama Supreme Court that he would abide by the ruling of the Southern District of Alabama.

5. After this Honorable Court denied the Motion for Contempt filed against Judge Davis in the other related case before this Court, this Court also ordered that the parties before this Court appear today before this Court.

6. The Governor of the State of Alabama then responded to Chief Justice Moore's

Administrative Order when he announced that he would not take any steps to enforce Chief Justice Moore's Administrative Order. This statement of the Governor was significant due to the fact that Chief Justice Moore's Administrative Order set out the following in the last sentence of the Administrative Order regarding its enforcement:

> "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)).

7. Due to this new development, the Order on its face appeared that it might now be unenforceable. The in rem action filed in the Alabama Supreme Court was amended to include these two developments which had occurred after the filing of the in rem action. This amended in rem action is attached hereto.

8. In both the in rem action and the amended in rem action, Judge Davis set out as follows:

> If this Court either fails to docket this in rem action regarding the Administrative Order or fails to address this in rem action filed before this Court before the federal court in the Southern District of Alabama enters an Order requiring Judge Davis to abide by the above federal court orders, then Judge Davis will accept this Court's failure to act on this in rem matter as an implicit directive to Judge Davis to abide by the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015. Para 5 of in rem and Para 7 of the Amended in rem action filed in the Alabama Supreme Court.

9. On February 11, 2015, the Alabama Supreme Court issued the attached Order in response to the in rem action regarding the Administrative Order and set out as follows:

The petition filed in this Court by the Mobile County Probate Judge on February 9, 2015, in substance is a request for an advisory opinion. Section 12-2-10, Ala. Code 1975,authorizes this Court to address requests for advisory opinions from only the Governor or the Legislature. See Opinion of the Justices No. 199, 286 Ala. 156, 158, 238 So. 2d 326, 327 (1970). Because this Court is not authorized to address this petition, the petition is dismissed. PETITION DISMISSED.

10. Judge Davis's filing in the Alabama Supreme Court to attempt to resolve the conflicting Administrative Order and the anticipated Order of this Court did not resolve the conflict of authority regarding this matter which applies to Judge Davis. Further, Judge Davis's attempt to resolve this conflict as set out above was addressed by Justice Bolin:

> While all of the above was occurring, the Chief Justice of the Alabama Supreme Court sent a letter to the probate judges giving them advice on how to address this issue, together with a memorandum of law, and finally issued an order to the probate judges on the eve of the expiration of the federal court's temporary stay that reflected a view of the law that directly conflicted with the federal judge's view of the law as espoused in her order.
>
> The ensuing legal "circus" has left the probate judges, who had no voice or opportunity to be heard in this matter, in an untenable position -- caught between a federal district judge's order, the statewide precedential value of which is uncertain, and an order from the Chief Justice of the Alabama Supreme Court. If the term "circus" is hyperbole, the current predicament at least qualifies as a "darned if I do, darned if I don't" dilemma for the probate judges, and this is no way to wisely, fairly, and deliberately administer justice.
>
> The Chief Justice has wide powers pursuant to § 12-230(b) (7) and (8), Ala. Code 1975, but the question arises as to whether those powers apply to probate judges'administrative, as opposed to judicial, actions. Should a probate judge follow the order of the chief judicial officer in the State of Alabama? Or should the probate judge follow an order of a federal district judge, of which he or she has possibly been made aware by media or by word of mouth through his or her professional association, not by having had a seat at the table in the courtroom as a party? There are many federal district judges in the three federal districts in Alabama. From a precedential standpoint, what happens if the opinions of two federal district judges conflict: Which opinion, if either, would be the binding precedent on a federal question? Who wins if there is a conflict

between a federal court order and a state-court opinion on a federal question? . . .

After describing the present conflict which confronts the Probate Judges of Alabama who, unlike Judge Davis, are not under the direct jurisdiction of this Court, Justice Bolin addressed the in rem action's statement which was set out as a guide for Judge Davis in the event, as occurred in the in rem action, that the Supreme Court did not directly address the continuing authority of Chief Justice Moore's Administrative Order:

> In conclusion, I feel compelled to comment on a portion of the amended pleading in the "In Rem Action" that is actually before this Court and that the Court properly dismisses. There is a portion contained in the "action" with which I sharply disagree. I quote from paragraph 7 of the "action":
> "7. If this Court either fails to docket this amended in rem action regarding the Administrative Order or fails to address this amended in rem action filed within this Court before the federal court in the Southern District of Alabama enters an Order requiring Judge Davis to abide by the above federal court orders, then Judge Davis will accept this Honorable Court's failure to act on this amended in rem matter as an implicit directive to Judge Davis to abide by the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015. Judge Davis anticipates that Judge Granade could enter this Order as quickly as tomorrow based on the Order the judge has entered today." (Emphasis added.)
>
> With due regard for the fact that the above document was submitted to this Court by a probate judge who is suffering the uncertainties set forth in this writing, I would caution any litigant coming before this Court that, although, proverbially, silence may be golden, the silence of this Court, as an institution, should never be treated as an "implicit directive" to take any particular course of action.

11. Judge Bolin has set out that Judge Davis cannot interpret the ruling of the Alabama Supreme Court as providing any guidance to him regarding the conflict which Chief Justice Moore's Administrative Order and the anticipated Order of this Honorable Court presents to Judge Davis.

12. Yesterday, this conflict which has resulted in Judge Davis's closing the office which issues marriage licenses was further intensified when a Mandamus Petition was filed by the

Alabama Policy Institute and Alabama Citizens Action Program against the Probate Judges which began to issue marriage licenses to same sex couples when this Court's stay was lifted. This Mandamus Petition is attached hereto. Judge Davis submits this material to provide to this Court the documents which relate to the conflicts of authority which are before Judge Davis uniquely and before the other probate judges in this state who could potentially face the same conflicts presented now to Judge Davis. Judge Davis presents these materials for the consideration of this Honorable Court to consider as this Court issues the Order of this Court.

/S/ Lee L. Hale

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CERTIFICATE OF SERVICE

I hereby certify that I 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 on this the 12th day of February 2015.

/S/ Lee L. Hale

LEE L. HALE

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.

Roy S. Moore
Chief Justice

E-Filed
02/10/2015 @ 05:02:33 PM
Honorable Julia Jordan Weller
Clerk Of The Court

NO. 1140456
IN THE SUPREME COURT OF ALABAMA

IN REM ACTION
REGARDING THE ABOVE ADMINISTRATIVE ORDER
TO THE SUPREME COURT OF ALABAMA

ATTORNEYS FOR MOBILE COUNTY PROBATE JUDGE DON DAVIS:

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IN THE SUPREME COURT OF ALABAMA

IN RE THE ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA DATED THE 8TH OF FEBRUARY 2015

*
*
* CASE NO.: 1140456
*

AMENDED IN REM ACTION REGARDING THE ABOVE ADMINISTRATIVE ORDER TO THE SUPREME COURT OF ALABAMA

After the above in rem action was filed with this Honorable Court yesterday, critical events have occurred which must be reported to this Honorable court as each of these changing circumstances further erode the continuing effectiveness, validity, and authority of the Administrative Order of the Chief Justice of the Supreme Court of Alabama dated the 8th of February 2015. These events are so important that the original in rem action must be amended in order to bring these matters before this Honorable Court to consider regarding the in rem action and the Administrative Order.

1. The original in rem action filed with this Honorable Court regarding the continuing effectiveness, validity, and authority of the Administrative Order of the Chief Justice of the Supreme Court of Alabama dated the 8th of February 2015 is incorporated herein as if fully set out herein. A copy of this Administrative Order was attached to the in rem action filed yesterday.

2. After this in rem action was filed with this Court, Judge Granade of the Southern

District of Alabama issued an Order regarding the Motion for Contempt and Request for Immediate Relief against the Honorable Don Davis. A copy of this Motion was attached to the in rem action filed with this Honorable Court. After considering this over-broad motion, Judge Granade exercised judicial restraint and acknowledged that the Order did not directly apply to Judge Davis who is not presently a party to the case in which the Order was issued. Further, Judge Granade exercised judicial restraint and did not immediately reach out to exert jurisdiction over Judge Davis in order to execute immediately the Order of the Court. Instead Judge Granade narrowly construed the recent Orders of the Court. In the Order of February 9, 2015, Judge Granade first quoted from the Plaintiff's Motion as follows:

> On this date, at 10:10 a.m. CST, Honorable Don Davis, Probate Judge in Mobile County, Alabama, had not opened the marriage license division of the Mobile County Probate Court. The Honorable Don Davis has not given a reason why the marriage license division is closed on this particular day, and he has not stated as to when the office will reopen. (Doc. 71, p. 1-2).

The Court then set out the Plaintiff's demand for relief and the narrow basis for the Court's denial of that request for relief:

> Plaintiffs request that this court hold Davis in contempt, to order law enforcement to open the marriage license division of Mobile County Probate Court, and to impose sanctions. After reviewing the Plaintiffs' motion, the court finds that Plaintiffs have not shown that Davis has failed to comply with this court's order. On January 23, 2015, this court declared that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional and enjoined defendant Luther Strange, in his capacity as Attorney General for the State of Alabama, from enforcing those laws. (Doc. 54).Upon motion by the Plaintiffs, this court further clarified the January 23, 2015 order stating that:
>
> > … [A] clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees. … The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution

> requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.(Doc. 65, p. 3 quoting Brenner v. Scott, 2015 WL 44260 at *1 (N.D. Fla. Jan 1,2015)). Probate Judge Don Davis is not a party in this case and the Order of January 23, 2015, did not directly order Davis to do anything. Judge Davis's obligation to follow the Constitution does not arise from this court's Order. The Clarification Order noted that actions against Judge Davis or others who fail to follow the Constitution could be initiated by persons who are harmed by their failure to follow the law. However, no such action is before the Court at this time. Plaintiffs have also offered no affidavit or other evidence to show that they have been prevented from applying for the adoption or that their adoption application was wrongfully denied after this court's January 23, 2015, Order.

3. The Plaintiffs before the federal court have this morning filed additional pleadings with Judge Granade to invoke the federal court's jurisdiction over Judge Davis. Judge Granade has considered these pleadings and has set out the Court's intention to proceed rapidly with enforcement of these Orders against Judge Don Davis. Today's Order sets out as follows:

> Plaintiffs' motion to amend seeks to add three additional same-sex couples as plaintiffs and to add Don Davis as a defendant in his official capacity as Probate Judge of Mobile County, Alabama. The current Defendant, Attorney General Luther Strange does not oppose Plaintiffs' request for leave to file an amended complaint. (Doc. 43). The same-sex couples Plaintiffs wish to add live in Alabama and like Strawser and Humphrey have allegedly been denied the basic rights, privileges, and protections of marriage for themselves and their children. Plaintiffs seek to join Judge Davis as a defendant because he allegedly refused to issue marriage licenses to all of the Plaintiffs' named in the proposed Amended Complaint, despite this court having granted a preliminary injunction to Strawser and Humphrey (Doc. 29) and despite this court's ruling in Searcy v. Strange, SDAL Civil Action No. 14-00208-CGN, that Alabama's laws prohibiting and refusing to recognize same-sex marriage are unconstitutional. . . There being no substantial reason to deny leave to amend, the court must allow the amendment. Accordingly, Plaintiffs' motion for leave to file an amended complaint is hereby GRANTED.
>
> **II. Motion for Preliminary Injunction**
>
> After reviewing Plaintiff's motion, the court finds it appropriate to set a preliminary injunction hearing. A hearing on Plaintiffs' motion for preliminary injunction is hereby set for February 12, 2015, at 1:00 p.m., in Courtroom 2B, United States Courthouse, Mobile, Alabama.
>
> Counsel for plaintiffs has averred that his co-counsel has spoken with

> Joseph Michael Druhan, Jr., counsel for Judge Don Davis, and that Mr. Druhan agreed to accept service by e-mail of the motion to amend the complaint and associated papers. (Doc. 43-2). The clerk of court is directed to provide Mr. Druhan, a member of the bar of this court, with a copy of this Order.
>
> The court notes that Attorney General Luther Strange is already subject to an injunction from this court which prohibits him from enforcing Alabama's marriage laws to the extent they prohibit same-sex marriage or the recognition of same-sex marriages legally performed in other states. Accordingly, Attorney General Strange's presence is not required at the preliminary injunction hearing set above.
>
> DONE and ORDERED this 10th day of February, 2015.
>
> /s/ Callie V. S. Granade

This Order, a copy of which is attached hereto, makes clear that the Judge will enter an Order tomorrow which is similar in all respects to the previous Order from Judge Granade entered against the Attorney General which will in effect require Judge Davis to issue marriage licenses to all same sex couples who seek them without regard to their sexual orientation.

> 4. Paragraph 5 of the in rem action filed yesterday in this Court set out as follows: If this Court either fails to docket this in rem action regarding the Administrative Order or fails to address this in rem action filed before this Court before the federal court in the Southern District of Alabama enters an Order requiring Judge Davis to abide by the above federal court orders, then Judge Davis will accept this Court's failure to act on this in rem matter as an implicit directive to Judge Davis to abide by the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015.

Obviously, this statement set out in the original in rem action remains in place as Judge Davis awaits the response or non-response of this Honorable Court.

5. Further, the Administrative Order of the Chief Justice of February 8, 2015 sets out the following in the last sentence of the Administrative Order regarding its enforcement:

> 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)).

Yesterday, this statement within the Administrative Order was completely undermined when Governor Bentley issued the following statement according to a report from Al.com on February 9, 2015:

> "This issue has created confusion with conflicting direction for probate judges in Alabama," Bentley said. "Probate judges have a unique responsibility in our state, and I support them. **I will not take any action against probate judges, which would only serve to further complicate this issue. "We will follow the rule of law in Alabama, and allow the issue of same sex marriage to be worked out through the proper legal channels."** (Emphasis supplied)

Since the Administrative Order set out the executive authority of the Governor is the only enforcement authority for this Administrative Order and since the Governor as Chief Executive Officer had made clear that he will take no action to enforce this Administrative Order, the Administrative Order seems to be without authority due to this statement of the Governor that he "will not take any action against probate judges, which would only serve to further complicate this issue. "We will follow the rule of law in Alabama, and allow the issue of same sex marriage to be worked out through the proper legal channels." In light of this statement of the Governor, Judge Davis must conclude that if this Honorable Court does not address this Amended In Rem Action filed with this Honorable Court, then this Court is implicitly taking the same position as the Governor which is that this Administrative Order is not going to be enforced in this state. Thus if this Court fails to address this filing, this Honorable Court is implicitly indicating that the federal court order effectively overrules the Administrative Order of this Court which will not be enforced in the State of Alabama.

6. This amended in rem action is filed in order to give this Honorable Court acting as the entire Supreme Court of Alabama the opportunity to review the application of the above

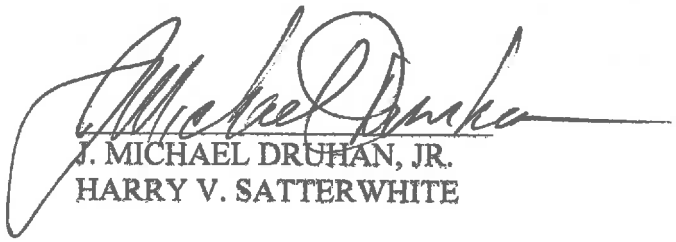
Administrative Order to all probate courts in general and to the Honorable Don Davis, the first Probate Judge over which the federal court for the Southern District of Alabama has exercised personal jurisdiction in his official capacity for the purpose of enforcement of the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015, both of which were attached to the previous in rem filing.

7. If this Court either fails to docket this amended in rem action regarding the Administrative Order or fails to address this amended in rem action filed within this Court before the federal court in the Southern District of Alabama enters an Order requiring Judge Davis to abide by the above federal court orders, then Judge Davis will accept this Honorable Court's failure to act on this amended in rem matter as an implicit directive to Judge Davis to abide by the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015. Judge Davis anticipates that Judge Granade could enter this Order as quickly as tomorrow based on the Order the judge has entered today.

Wherefore, this Court is urged to consider this Amended In Rem action regarding the effectiveness of the above Administrative Order of the Chief Justice in light of the multiple events which have occurred after the issuance of the Administrative Order of February 8, 2015 that appear to undermine the authority and enforceability of the Administrative Order. This amended in rem action provides to this Honorable Court the opportunity to provide guidance to all of the Probate Judges of the State of Alabama in general and to Judge Don Davis in particular regarding the above matters of vital importance to the State of Alabama.

Filed: February 10, 2015

Respectfully submitted,



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

JAMES N. STRAWSER and JOHN E. HUMPHREY,	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION NO. 14-0424-CG-C**
STATE OF ALABAMA,	)	
Defendant.	)	

ORDER

This matter is before the court on Plaintiffs' emergency motion for leave to file an amended complaint and for preliminary injunction and/or temporary restraining order (Doc. 43), and the response thereto of Attorney General Strange (Doc. 44). For the reasons explained below, the court finds that Plaintiffs' emergency motion for leave to amend should be granted and that a hearing should be set on Plaintiffs' motion for preliminary injunction.

I. Motion to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires." See Fed. R. Civ. P. 15(a). The Eleventh Circuit recognized that Rule 15(a) "severely restricts" a district court's discretion to deny leave to amend. Sibley v. Lando, 437 F.3d 1067, 1073 (11th Cir. 2005). "Unless a substantial reason exists to deny leave to amend, the discretion of the District Court is not broad enough to permit denial." Florida Evergreen Foliage v. E.I. DuPont De Nemours and Co., 470 F.3d 1036, 1041 (11th Cir. 2006) (citation

omitted). That said, leave to amend can be properly denied under circumstances of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Equity Lifestyle Properties, Inc. v. Florida Mowing and Landscape Service, Inc., 556 F.3d 1232, 1241 (11th Cir. 2009) (citation omitted).

Plaintiffs Strawser and Humphrey, who until recently had proceeded *pro se*, are now represented by counsel and wish to clarify their causes of action and add new parties. Plaintiffs' motion to amend seeks to add three additional same-sex couples as plaintiffs and to add Don Davis as a defendant in his official capacity as Probate Judge of Mobile County, Alabama. The current Defendant, Attorney General Luther Strange does not oppose Plaintiffs' request for leave to file an amended complaint. (Doc. 43). The same-sex couples Plaintiffs wish to add live in Alabama and like Strawser and Humphrey have allegedly been denied the basic rights, privileges, and protections of marriage for themselves and their children. Plaintiffs seek to join Judge Davis as a defendant because he allegedly refused to issue marriage licenses to all of the Plaintiffs' named in the proposed Amended Complaint, despite this court having granted a preliminary injunction to Strawser and Humphrey (Doc. 29) and despite this court's ruling in Searcy v. Strange, SDAL Civil Action No. 14-00208-CGN, that Alabama's laws prohibiting and refusing to recognize same-sex marriage are unconstitutional. The proposed amendment will not cause undue delay or prejudice, there is no indication of any bad faith or

dilatory motive on the part of the movants, and the amendment does not appear to be futile. There being no substantial reason to deny leave to amend, the court must allow the amendment. Accordingly, Plaintiffs' motion for leave to file an amended complaint is hereby **GRANTED.**

II. Motion for Preliminary Injunction

After reviewing Plaintiff's motion, the court finds it appropriate to set a preliminary injunction hearing. A hearing on Plaintiffs' motion for preliminary injunction is hereby set for **February 12, 2015, at 1:00 p.m.**, in Courtroom 2B, United States Courthouse, Mobile, Alabama.

Counsel for plaintiffs has averred that his co-counsel has spoken with Joseph Michael Druhan, Jr., counsel for Judge Don Davis, and that Mr. Druhan agreed to accept service by e-mail of the motion to amend the complaint and associated papers. (Doc. 43-2). The clerk of court is directed to provide Mr. Druhan, a member of the bar of this court, with a copy of this Order.

The court notes that Attorney General Luther Strange is already subject to an injunction from this court which prohibits him from enforcing Alabama's marriage laws to the extent they prohibit same-sex marriage or the recognition of same-sex marriages legally performed in other states. Accordingly, Attorney General Strange's presence is not required at the preliminary injunction hearing set above.

DONE and ORDERED this 10th day of February, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2014-2015

1140456

Ex parte Don Davis,
Judge of Mobile County Probate Court

ORDER

The petition filed in this Court by the Mobile County Probate Judge on February 9, 2015, in substance is a request for an advisory opinion. Section 12-2-10, Ala. Code 1975, authorizes this Court to address requests for advisory opinions from only the Governor or the Legislature. See Opinion of the Justices No. 199, 286 Ala. 156, 158, 238 So. 2d 326, 327 (1970). Because this Court is not authorized to address this petition, the petition is dismissed.

PETITION DISMISSED.

Stuart, Main, Wise, and Bryan, JJ., concur.

Bolin, Murdock, and Shaw, JJ., concur specially.

Parker, J., concurs in the result.

Moore, C.J., recuses himself.

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 11th day of February, 2015
Julia Jordan Weller
Clerk, Supreme Court of Alabama

BOLIN, Justice (concurring specially).

"What has been an orderly process, I suspect, will soon resemble a three-ring circus." Tyson v. Macon Cnty. Greyhound Park, Inc., 43 So. 3d 587, 595 (Ala. 2010)(Woodall, J., dissenting). Admittedly this quotation is taken out of context. From the perspective of a probate judge in Alabama, however, the events that have unfolded subsequent to the issuance of the memorandum opinion and order by United States District Judge Callie S. Granade, in the United States District Court for the Southern District of Alabama, Southern Division, in Civil Action No. 14-0208-CG-N surely brings to mind this quotation. I do not intend to trivialize the important constitutional questions presented by this controversy, but the unfortunate path this litigation has taken so far has resulted in mass confusion that I suspect has led the public to wonder what has happened to the orderly rule of law.

As a former probate judge, I am aware of the many duties imposed by law upon the office of probate judge, only one of which is judicial. Some of the other "hats" worn by some or all probate judges include being the keeper of records and

documents that must be maintained for posterity, serving as the chief election official of the county in all elections, and, although this particularly may vary from county to county, issuing a variety of licenses, e.g., hunting licenses, fishing licenses, driver's license renewals, automobile-tag renewals, and marriage licenses.

Although I concur fully with the dismissal of the action herein, as will be addressed further below I am disappointed and concerned that, amongst everyone heretofore connected with the constitutional issues and the litigation, nowhere has there been a probate judge with a seat as a party at any of these proceedings, except for Mobile County Probate Judge Don Davis, who was dismissed from the proceedings on July 25, 2014, and added again as a party on February 10, 2015. The only two judicial participants who exercised wisdom, restraint, and discretion on the record were United States Supreme Court Justices Thomas and Scalia. I specifically refer to Justice Thomas's dissent to the United States Supreme Court's denial of a stay in the federal court matter, which Justice Scalia joined and which states as follows:

> "The Attorney General of Alabama asked us to stay a federal injunction preventing him from

enforcing several provisions of Alabama law defining marriage as a legal union of one man and one woman pending our consideration 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. Those cases are scheduled to be argued this Term and present the same constitutional question at issue here: Whether the Fourteenth Amendment requires States to recognize unions between two people of the same sex as a marriage under state law.

"When courts declare state laws unconstitutional and enjoin state officials from enforcing them, our ordinary practice is to suspend those injunctions from taking effect pending appellate review. See, e.g., Herbert v. Kitchen, [Ms. 13A687, January 6, 2014] 571 U.S. ___ (2014); see also San Diegans for Mt. Soledad Nat. War Memorial v. Paulson, 548 U.S. 1301 (2006) (Kennedy, J., in chambers) (staying an injunction requiring a city to remove its religious memorial). Although a stay is not a matter of right, this practice reflects the particularly strong showing that States are often able to make in favor of such a stay. Because States are required to comply with the Constitution, and indeed take care to do so when they enact their laws, it is a rare case in which a State will be unable to make at least some showing of a likelihood of success on the merits. States also easily meet the requirement of irreparable injury, for '"[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."' Maryland v. King, [Ms. 12A48, July 30, 2012] 567 U.S. ___, ___ (2012) (slip op., at 2-3) (Roberts, C.J., in chambers) (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The equities and public interest likewise generally weigh in favor of enforcing duly enacted state laws.

"It was thus no surprise when we granted a stay in similar circumstances a little over a year ago. See Herbert v. Kitchen, supra. Nor was it a surprise when we granted a stay in similar circumstances less than six months ago. McQuigg v. Bostic, [Ms. 14A196, Aug. 20, 2014] 573 U.S. __ (2014). Those decisions reflected the appropriate respect we owe to States as sovereigns and to the people of those States who approved those laws.

"This application should have been treated no differently. That the Court more recently denied several stay applications in this context is of no moment. Those denials followed this Court's decision in October not to review seven petitions seeking further review of lower court judgments invalidating state marriage laws. Although I disagreed with the decisions to deny those applications, Armstrong v. Brenner, ante, p. ___; Wilson v. Condon, ante, p. _; Moser v. Marie, ante, p. ___, I acknowledge that there was at least an argument that the October decision justified an inference that the Court would be less likely to grant a writ of certiorari to consider subsequent petitions. That argument is no longer credible. The Court has now granted a writ of certiorari to review these important issues and will do so by the end of the Term. The Attorney General of Alabama is thus in an even better position than the applicant to whom we granted a stay in Herbert v. Kitchen.

"Yet rather than treat like applicants alike, the Court looks the other way as yet another Federal District Judge casts aside state laws without making any effort to preserve the status quo pending the Court's resolution of a constitutional question it left open in United States v. Windsor, [Ms. 12-307, June 26, 2013] 570 U.S. ____ (2013) (slip op., at 25-26). This acquiescence may well be seen as a signal of the Court's intended resolution of that question. This is not the proper way to discharge our Article III responsibilities. And, it is

indecorous for this Court to pretend that it is.

> "Today's decision represents yet another example of this Court's increasingly cavalier attitude toward the States. Over the past few months, the Court has repeatedly denied stays of lower court judgments enjoining the enforcement of state laws on questionable constitutional grounds. See, e.g., Maricopa County v. Lopez-Valenzuela, [Ms. 14A493, Nov. 13, 2014] 574 U.S. ___, ___ (2014) (slip op., at 2) (Thomas, J., joined by Scalia, J., respecting denial of application for stay) (collecting cases). It has similarly declined to grant certiorari to review such judgments without any regard for the people who approved those laws in popular referendums or the elected representatives who voted for them. In this case, the Court refuses even to grant a temporary stay when it will resolve the issue at hand in several months.
>
> "I respectfully dissent from the denial of this application. I would have shown the people of Alabama the respect they deserve and preserved the status quo while the Court resolves this important constitutional question."

Strange v. Searcy, [Ms. 14A840, February 9, 2015] 574 U.S. ___, ___ (2015) (emphasis added).

The highly emotional issue involved in the federal proceeding, on both sides of the argument, it appears will be decided only by the United States Supreme Court. The plaintiffs in the two cases decided by the federal district court could have joined the various probate judges in the State as parties, if nothing else, as relief parties. For

that matter, the federal district court could have provided that the probate judges were made defendants. See Rules 19 and 20, Fed. R. Civ. P. (allowing for joinder and permissive joinder, respectively). This would have allowed the probate judges notice and an opportunity to be heard. Rather, the only probate judge made an original party to the federal court action was Judge Davis, the petitioner in the instant proceeding, who was later dismissed from that action with prejudice and who has now been added as a party again. The federal district judge in her order acknowledged both that the United States Supreme Court has granted certiorari in a case to be decided in this Term of Court and that that case will "definitively" decide the important constitutional issues involved. However, the same federal district court denied a stay past February 9, 2015, although the definitive decision lies just four months ahead. It is my judgment that the United States Court of Appeals for the Eleventh Circuit, with due respect, also contributed to the resulting confusion by refusing to take further action in this and similar same-sex-marriage cases in that circuit until the United States Supreme Court issues a decision and by denying a stay of the federal

court matter before Judge Granade. While all of the above was occurring, the Chief Justice of the Alabama Supreme Court sent a letter to the probate judges giving them advice on how to address this issue, together with a memorandum of law, and finally issued an order to the probate judges on the eve of the expiration of the federal court's temporary stay that reflected a view of the law that directly conflicted with the federal judge's view of the law as espoused in her order.

The ensuing legal "circus" has left the probate judges, who had no voice or opportunity to be heard in this matter, in an untenable position -- caught between a federal district judge's order, the statewide precedential value of which is uncertain, and an order from the Chief Justice of the Alabama Supreme Court. If the term "circus" is hyperbole, the current predicament at least qualifies as a "darned if I do, darned if I don't" dilemma for the probate judges, and this is no way to wisely, fairly, and deliberately administer justice.

The Chief Justice has wide powers pursuant to § 12-2-30(b)(7) and (8), Ala. Code 1975, but the question arises as to whether those powers apply to probate judges' administrative, as opposed to judicial, actions. Should a

probate judge follow the order of the chief judicial officer in the State of Alabama? Or should the probate judge follow an order of a federal district judge, of which he or she has possibly been made aware by media or by word of mouth through his or her professional association, not by having had a seat at the table in the courtroom as a party? There are many federal district judges in the three federal districts in Alabama. From a precedential standpoint, what happens if the opinions of two federal district judges conflict: Which opinion, if either, would be the binding precedent on a federal question? Who wins if there is a conflict between a federal court order and a state-court opinion on a federal question? Although I do not agree with the entirety of the article, these questions were recently examined in the introduction to that article in the Vanderbilt Law Review, which does state correctly the following pivotal questions:

> "Lower federal court precedent cannot bind state courts, or so we are told. Most state courts assert that they are free to reach their own conclusions about the meaning of federal law, even when doing so creates a conflict with the federal court of appeals presiding over the geographic region in which they sit. Several federal circuits have conceded that their decisions are not binding on state courts, and, in concurring opinions, two justices have emphatically agreed. A number of federal courts

scholars have declared that state courts need not follow lower federal court precedent because state courts are 'coordinate' with lower federal courts and not 'subordinate' to them.

"And yet, upon closer inspection, the role of lower federal court precedent in state court decisionmaking remains unclear. A few state courts appear to believe that they are bound to follow the decisions of the federal courts of appeals on questions of federal law, and many others have issued inconsistent opinions on that question. The U.S. Courts of Appeals for the Eighth and Ninth Circuits claim that state courts must follow their lead on federal questions, creating a circuit split that has never been resolved by the Supreme Court. Only a handful of legal scholars have opined on the matter, and most have done so in passing in articles devoted to other subjects. Remarkably, then, this significant question about the interplay between the state and federal judicial systems lingers unresolved more than two-hundred years after the Constitution's ratification.

"The relationship between the lower federal courts and the state courts raises foundational questions about the place of those federal courts in our constitutional structure. Are the lower federal courts' interpretations of federal law binding on the states under the Supremacy Clause, as the Supreme Court considers its own precedent to be? Alternatively, are state and lower federal courts coequals under the Constitution such that neither can control the other's rulings? Does Congress or the Supreme Court have the constitutional authority to require that state courts follow lower federal court precedent? If not, is it because principles of federalism forbid such interference with state institutions, or because such a rule undermines judicial independence, or both?

"Similar foundational questions were raised

> seventy-five years ago in Erie Railroad v. Tompkins, [304 U.S. 64, 71 (1938),] when the Supreme Court overruled Swift v. Tyson, [41 U.S. (16 Pet.) 1, 18 (1842),] and held that federal courts must follow state law as articulated by a state's highest court. The Court explained that federal courts undermined state sovereignty by failing to treat state courts' views on state law as controlling. Although Erie focused on the federal courts' obligation to adopt state common law, the decision confirmed that federal courts must follow state courts' interpretations of state positive law as well. The bottom line after Erie is that state courts have the final word on the meaning of state law.
>
> "Erie is one of a handful of iconic cases that has shaped our understanding of not only the relationship between state and federal courts but also our entire federal system. According to John Hart Ely, Erie 'implicates, indeed perhaps it is, the very essence of our federalism.' And yet Erie left the job half done. The case tells us how federal courts should treat state courts' precedent on state law, but it does not address how state courts should respond to federal courts' interpretation of federal law. Of course, some might argue that Erie supports the conclusion that state courts are bound only by the Supreme Court on questions of federal law, just as federal courts are required to follow only the precedent of the highest court of the state on questions of state law. And yet the unique and limited role of the Supreme Court creates a significant disjunction: the Court cannot quickly resolve disputes between state and federal courts on the meaning of federal law, leaving intrastate splits to linger between these court systems for decades."

Amanda Frost, Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?,

68 Vand. L. Rev. 53, 55-59 (2015)(footnotes omitted; emphasis added).

The purpose of this writing is not to try today to answer the questions posed by the article quoted above. It is offered solely to illustrate the probable angst and consternation that each of the 68 probate judges of this State has undergone since the federal court's order and Chief Justice Moore's order were issued, and it did not have to be this way.

As stated above, I place the blame for the confusion that now exists in the various probate courts of this State since the two-week stay expired at the feet of everyone involved, save the Attorney General, who has properly requested a stay at all levels, and Justices Thomas and Scalia, who offered a solution that would have delayed this matter for only four months or less -- after which we would have had the final answer, no confusion, and, most importantly, an orderly administration of justice.

In conclusion, I feel compelled to comment on a portion of the amended pleading in the "In Rem Action" that is actually before this Court and that the Court properly

dismisses. There is a portion contained in the "action" with which I sharply disagree. I quote from paragraph 7 of the "action":

> "7. If this Court either fails to docket this amended in rem action regarding the Administrative Order or fails to address this amended in rem action filed within this Court before the federal court in the Southern District of Alabama enters an Order requiring Judge Davis to abide by the above federal court orders, then Judge Davis will accept this Honorable Court's failure to act on this amended in rem matter as an implicit directive to Judge Davis to abide by the Orders of the Southern District of Alabama on January 23rd and also January 28th, 2015. Judge Davis anticipates that Judge Granade could enter this Order as quickly as tomorrow based on the Order the judge has entered today."

(Emphasis added.)

With due regard for the fact that the above document was submitted to this Court by a probate judge who is suffering the uncertainties set forth in this writing, I would caution any litigant coming before this Court that, although, proverbially, silence may be golden, the silence of this Court, as an institution, should never be treated as an "implicit directive" to take any particular course of action.

MURDOCK, Justice (concurring specially).

The amended petition before us quotes from the February 9, 2015, order of Judge Granade in the case of Searcy v. Strange (Ms. 14-0208, S.D. Ala., Jan. 23, 2015), stating that her injunction in that case "enjoined ... [the] Attorney General for the State of Alabama" and those under his supervision and that, because the petitioner was not a party to that case, his actions or inactions did not constitute a "fail[ure] to comply with th[at] order." The petitioner asks this Court for guidance with respect to the issue of the constitutionality of the various statutes enacted by the Alabama Legislature providing for the governmental licensing and recognition of what are referred to in those statutes as "marriages," see Ala. Code 1975, §§ 30-1-3 through -19. Inherent in the petitioner's request for guidance, particularly given the facts alleged in the petition, is whether, under the terms of those statutes, particularly § 30-1-9, a probate judge has an affirmative obligation to issue marriage licenses at all, and whether, under the principles articulated in such cases as Newton v. City of Tuscaloosa, 251 Ala. 209, 36 So. 2d 487 (1948), and City of Birmingham v.

Smith, 507 So. 2d 1312 (Ala. 1987), and considering the meaning of the term "marriage" intended by the Legislature in those statutes, they may be deemed to survive, or must be stricken as wholly void, if they are not to be applied solely to a union between a man and a woman.[1] These are substantial questions. These questions, however, are not before us in an adversary proceeding or in the context of a request for an advisory opinion by the Governor or the Legislature. Nor has there been a showing that these questions are properly before us on some other basis. I therefore concur in the order of this Court.

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[1]"The act 'ought not to be wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional.'" 251 Ala. at 217, 36 So. 2d at 493 (quoting A. Bertolla & Sons v. State, 247 Ala. 269, 271, 24 So. 2d 23, 25 (1945)). "The test is ... whether the legislature would have passed the statute without the [unconstitutional aspect included therein]." 507 So. 2d at 1317.

SHAW, Justice (concurring specially).

In the matter before this Court, Mobile County Probate Court Judge Don Davis references an order of the United States District Court for the Southern District of Alabama that states: "Ala. Const. Art. I, § 36.03 (2006) and Ala. Code 1975, § 30-1-19 are unconstitutional ...." Searcy v. Strange (Ms. 14-0208, Jan. 23, 2015). Judge Davis then notes that on February 8, 2015, Alabama's Chief Justice issued an administrative order stating that "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 I, Section 36.03, of the Alabama Constitution or § 30-1-19, Ala. Code 1975."

The matter Judge Davis filed in this Court states that it "is filed in order to give this Honorable Court acting as the entire Supreme Court of Alabama the opportunity to review the application of the above Administrative Order." This invitation to "review" the administrative order issued by the Chief Justice, in my view, is a request for an advisory opinion. However, only the governor or the legislature may request an advisory opinion. Ala. Code 1975, § 12-2-10 ("The

Governor, by a request in writing, or either house of the Legislature, by a resolution of such house, may obtain a written opinion of the justices of the Supreme Court of Alabama or a majority thereof on important constitutional questions."). See also Opinion of the Justices No. 199, 286 Ala. 156, 158, 238 So. 2d 326, 327 (1970) ("[T]he present request originated not with the Governor, but with the Contest Subcommittee of the State Committee ..., which course of action is not within the purview of [§ 12-2-10]. To hold otherwise would add a new concept to the prerogatives of [§ 12-2-10] and set a new precedent for litigants to request advisory opinions whenever the constitutionality of a law arises."). This Court is not empowered "'to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases.'" Stamps v. Jefferson Cnty. Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (quoting Town of Warrior v. Blaylock, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963) (emphasis omitted)). See also AIRCO, Inc. v. Alabama Pub. Serv. Comm'n, 360 So. 2d 970, 971 (Ala. 1978) ("To render an opinion based solely upon the Commission's alleged improper actions (without seeking a

remedy therefrom) or upon its prospective improprieties would be to render impermissible advisory opinions.").

IN THE SUPREME COURT OF ALABAMA

Ex parte STATE ex rel. ALABAMA POLICY INSTITUTE and ALABAMA CITIZENS ACTION PROGRAM,

Petitioner,

v.

ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, ROBERT M. MARTIN, in his official capacity as Judge of Probate for Chilton County, Alabama, TOMMY RAGLAND, in his official capacity as Judge of Probate for Madison County, Alabama, STEVEN L. REED, in his official capacity as Judge of Probate for Montgomery County, Alabama, and JUDGE DOES ##1-63, each in his or her official capacity as an Alabama Judge of Probate,

Respondents.
_____/

CASE NO. _____

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

STATEMENT OF FACTS

Comes now Petitioner, State of Alabama, on the relation of ALABAMA POLICY INSTITUTE and ALABAMA CITIZENS ACTION PROGRAM, and petitions this Court for a writ of mandamus to each Respondent, and shows the following in support of this petition:

1. On January 23, 2015, in *Searcy v. Strange*, No. 1:14-208-CG-N, the Honorable Callie Granade, a judge of the United States District Court for the Southern District of Alabama, enjoined the Alabama Attorney General from enforcing Alabama's Sanctity of Marriage Amendment, Art. I, § 36.03, Ala. Const. 1901 (the "Marriage Amendment"), and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975 (the "Marriage Act"). Judge Granade ruled that both the Marriage Amendment and the Marriage Act, to the extent they prohibit the recognition of same-sex marriages, are unconstitutional under the Fourteenth Amendment to the United States Constitution. A copy of Judge Granade's ruling (hereinafter referred to as the "*Searcy* Injunction") is attached hereto as Exhibit A.

2. On January 26, 2015, in *Strawser v. Strange*, No. 1:14-CV- 424-CG-C, Judge Granade preliminarily enjoined the

Alabama Attorney General from enforcing the Marriage Amendment and the Marriage Act on the same grounds as in *Searcy*. A copy of the ruling (hereinafter referred to as the "*Strawser* Injunction") is attached hereto as Exhibit B.

3. Judge Granade stayed both the *Searcy* and *Strawser* Injunctions until February 9, 2015.

4. On February 8, 2015, Chief Justice Roy S. Moore of the Supreme Court of Alabama entered an administrative order ruling that neither the *Searcy* nor the *Strawser* Injunction is binding on any Alabama probate judge, and prohibiting any probate judge from issuing or recognizing a marriage license which violates the Marriage Amendment or the Marriage Act. A copy of Chief Justice Moore's administrative order (hereinafter referred to as the "Administrative Order") is attached hereto as Exhibit C.

5. Respondent ALAN L. KING is a Judge of Probate for Jefferson County, Alabama who on February 9, 2015, began issuing marriage licenses to same-sex couples in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order.

6. Respondent ROBERT M. MARTIN is a Judge of Probate for Chilton County, Alabama who on February 9, 2015, began

issuing marriage licenses to same-sex couples in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order.

7. Respondent TOMMY RAGLAND is a Judge of Probate for Madison County, Alabama who on February 9, 2015, began issuing marriage licenses to same-sex couples in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order.

8. Respondent STEVEN L. REED is a Judge of Probate for Montgomery County, Alabama who on February 9, 2015, began issuing marriage licenses to same-sex couples in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order.

9. Each of Respondents JUDGE DOES ##1-63 is a Judge of Probate in Alabama who may issue, or may have issued, marriage licenses to same-sex couples in Alabama as a result of the *Searcy* or *Strawser* Injunction, in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order.

10. Relator ALABAMA POLICY INSTITUTE ("API") is a 501(c)(3) non-partisan, non-profit research and education organization with thousands of constituents throughout Alabama, dedicated to influencing public policy in the

interest of the preservation of free markets, rule of law, limited government, and strong families, which are indispensable to a prosperous society. API achieves these objectives through in-depth research and policy analysis communicated through published writings and studies which are circulated and cited throughout the state and nation. Over the years, API has published a number of studies showing the great benefits to families of marriage between one man and one woman and the detriments associated with divorce, cohabitation, and same-sex unions, particularly when children are involved. API has consistently cautioned against the gradual shift toward sanctioning same-sex marriage on this basis. API was a leading proponent of both the Marriage Act, passed in 1998, and the Marriage Amendment, which was approved by 81% of Alabama voters in 2006.

11. Relator ALABAMA CITIZENS ACTION PROGRAM ("ALCAP") is a non-profit 501(c)(4) organization with thousands of constituents throughout Alabama, which exists to promote pro-life, pro-family and pro-moral issues in the. In addition to lobbying the Alabama Legislature on behalf of churches and individuals who desire a family-friendly environment in Alabama, ALCAP provides a communication link between Alabama

legislators and their constituents. After passage of the Marriage Act, ALCAP vigorously promoted passage of the Marriage Amendment to both legislators and citizens, making ALCAP instrumental in the resulting 81% vote approving the Marriage Amendment in 2006.

STATEMENT OF ISSUES

Petitioner, by the Relators, seeks a writ of mandamus directed to each Respondent judge of probate, commanding each judge not to issue marriage licenses to same-sex couples and not to recognize any marriage licenses issued to same-sex couples.

STATEMENT OF WHY WRITS SHOULD ISSUE

I. THE WRITS SHOULD ISSUE BECAUSE THE ALABAMA CONSTITUTION AND STATUTES PROHIBIT PROBATE JUDGES FROM ISSUING MARRIAGE LICENSES TO SAME-SEX COUPLES.

A. Alabama probate judges do not have discretion to issue marriage licenses to same-sex couples.

The Code of Alabama confers authority to issue marriage licenses only to "the judges of probate of the several counties." § 30-1-9, Ala. Code 1975. In exercising this authority, a probate judge is expressly prohibited by the Marriage Amendment and the Marriage Act from issuing a license

"to parties of the same sex." Art. 1, § 36.03(d), Ala. Const. 1901; § 30-1-19(d), Ala. Code 1975.

Where the operative statute unequivocally directs a state official's performance, that performance is ministerial. *See Graham v. Alabama State Employees Ass'n*, 991 So. 2d 710, 718 (Ala. Civ. App. 2007).

> Alabama law has defined discretionary acts as those acts as to which there is no *hard and fast rule* as to course of conduct that one must or must not take and those requiring exercise in judgment and choice and involving what is just and proper under the circumstances. In contrast, official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act.

Id. (internal quotations and citations omitted) (emphasis in original). Although probate judges are members of the judicial branch of Alabama government, Art. VI, §§ 139, 144, Ala. Const. 1901, this Court long ago recognized that "**[t]he issuance of a marriage license by a judge of probate is a ministerial and not a judicial act.**" *Ashley v. State*, 109 Ala. 48, 49, 19 So. 917, 918 (1896) (emphasis added). Thus, an Alabama probate judge has no discretion to issue a marriage license to a same-sex couple in utter disregard of the express prohibitions of the Marriage Amendment and the Marriage Act.

B. Neither the *Searcy* nor the *Strawser* Injunction requires Alabama probate judges to issue marriage licenses to same-sex couples.

The duty of Alabama probate judges not to issue marriage licenses to same-sex couples was in no way altered by the *Searcy* or the *Strawser* Injunction because neither is binding on any Alabama probate judge, either on its face or by operation of law.

As an initial matter, neither Injunction is binding on any Alabama probate judge because no probate judge is a party in either case. The only defendant enjoined in both *Searcy* and *Strawser* is the Alabama Attorney General.[1] Therefore, the

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[1] The *Strawser* Injunction provides, in pertinent part:

> [T]he court hereby ORDERS that the Alabama Attorney General is prohibited from enforcing the Alabama laws which prohibit same-sex marriage. This injunction binds the defendant and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage.

(*Strawser* Inj. (Ex. B) at 4.)

Similarly, the *Searcy* Injunction provides, in pertinent part:

federal court did not acquire jurisdiction over any probate judge for purposes of ordering injunctive relief. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."). An injunction against a single state official sued in his official capacity does not enjoin all state officials. *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1255 n.3 (11th Cir. 2001).

> IT IS FURTHER ORDERED that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional because they violate they Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.
>
> IT IS FURTHER ORDERED that the defendant [Alabama Attorney General] is enjoined from enforcing those laws.

(*Searcy* Inj. (Ex. A) at 10.)

Nor does either Injunction extend to any Alabama probate judge by operation of law. Under Federal Rule of Civil Procedure 65, in addition to parties, an injunction binds the parties' officers, agents, servants, employees, and attorneys, and other persons acting in concert or participation with the parties with regard to property that is the subject of the injunction. *See Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 971-72 (11th Cir. 2012); *Le Tourneau Co. of Ga. v. NL.R.B.*, 150 F.2d 1012, 1013 (5th Cir. 1945); Fed. R. Civ. P. 65(d)(2). In the issuance of marriage licenses, however, an Alabama probate judge is in no way an agent or person acting in concert with the Attorney General.

"[L]ike the Governor, the attorney general is an officer of the executive branch of government." *Ex parte State ex rel. James*, 711 So. 2d 952, 964 n.5 (Ala. 1998); *see also McDowell v. State*, 243 Ala. 87, 89, 8 So. 2d 569, 570 (1942) ("The Attorney General is a constitutional officer and a member of the Executive Department of the State government."); Art. V, § 112, Ala. Const. 1901 ("The executive department shall consist of a governor, lieutenant governor, attorney-general . . . .").

Contrarily, probate judges are members of the judicial branch:

> 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.

Art. VI, § 139(a), Ala. Const. 1901.

Alabama observes strict separation of powers between the branches of government. "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Art. III, § 42, Ala. Const. 1901.

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

Art. III, § 43, Ala. Const. 1901 (emphasis added).

As a matter of Alabama constitutional law, therefore, probate judges are not agents of the Attorney General. Probate judges are bound by the constitutional command, "the judicial shall never exercise the ... executive powers." *Id.* The Attorney General is bound by the constitutional command, "the executive shall never exercise the . . . judicial powers." *Id.*

Nor can a probate judge be deemed a person in active concert with the Attorney General in the issuance of marriage licenses. Alabama law gives no authority to the Attorney General to issue marriage licenses; this authority is exclusively reserved to probate judges. *See* § 30-1-9, Ala. Code 1975. As independent constitutional officers of the judicial branch of government who are directly elected by the people and shielded from executive influence by the Alabama Constitution, the judges of probate are neither beholden to the Attorney General for their offices nor subject to his control in the execution of their duties.

Judge Granade herself was ultimately forced to concede this point in her Order denying the *Searcy* plaintiffs' motion to hold Judge of Probate Don Davis in contempt for violating

the *Searcy* Injunction. (A copy of the Order is attached hereto as Exhibit D.) The plaintiffs before Judge Granade claimed that Judge Davis violated the *Searcy* Injunction by not opening the marriage license division of the Mobile County Probate Court on February 9, 2015. (Ord. (Ex. D) at 1.) In denying the motion, Judge Granade acknowledged that Judge Davis was not a party to the case,[2] and was not ordered to do anything by the *Searcy* Injunction. Thus, Judge Granade concluded, "Plaintiffs have offered no authority by which this court can hold Davis in contempt or order any of the relief sought by Plaintiffs." (Ord. (Ex. D) at 3.)

As shown above, Alabama probate judges are not bound by Judge Granade's legal conclusions in either the *Searcy* or the *Strawser* Injunction.[3] Thus, neither Injunction provides any

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[2] Judge Davis was an original party to the case, but was dismissed by stipulation of the parties. (Ord. (Ex. D) at 2 n.1.)

[3] No Alabama court is bound by a federal district court's ruling that an Alabama statute is unconstitutional. *See, e.g., Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003) ("The only federal court whose decisions bind state courts is the United States Supreme Court"); *Buist v. Time Domain Corp.*, 926 So. 2d 290, 297 (Ala. 2005) ("United States district court cases . . . can serve only as persuasive authority."); *cf. Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 748 (Ala. 2009)

legal basis for a probate judge to disregard the clear prohibitions against issuing marriage licenses to same-sex couples in the Marriage Amendment and the Marriage Act.

C. Mandamus relief is appropriate to command Respondent probate judges to perform their ministerial duty not to issue marriage licenses to same-sex couples.

1. Petitioner has a clear legal right to mandamus relief.

The required elements for mandamus relief are as follows:

> 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.

(noting "United States district court decisions are not controlling authority in this Court"); *Ex parte Hale*, 6 So. 3d 452, 462 (Ala. 2008), as modified on denial of reh'g (Oct. 10, 2008) ("[W]e are not bound by the decisions of the Eleventh Circuit."); *Ex parte Johnson*, 993 So. 2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts."); *Glass v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala. 2004) ("Legal principles and holdings from inferior federal courts have no controlling effect here . . . ."); *Amerada Hess v. Owens-Corning Fiberglass*, 627 So. 2d 367, 373 n.1 (Ala. 1993) ("This Court is not bound by decisions of lower federal courts."); *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So. 2d 165, 167 n.2 (Ala. 1991) ("Decisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court.").

Ex parte Jim Walter Resources, Inc., 91 So. 3d 50, 52 (Ala. 2012) (internal quotations and citations omitted). Petitioner satisfies the first element because Petitioner has a clear legal right to mandamus relief commanding Respondent probate judges to perform their ministerial duties under the Marriage Amendment and the Marriage Act.

This Court previously has held mandamus relief is appropriate to require ministerial action by state officials, including judges of probate. *See, e.g., Ex parte Jim Walter Resources, Inc.*, 91 So. 3d at 53 (issuing writ commanding probate judge to perform ministerial function of imposing recordation tax on mortgage). As shown above, the issuance of marriage licenses by probate judges is a ministerial function. (*See supra* § I.A.) Thus, mandamus relief is clearly appropriate to command probate judges to comply with the express prohibitions against issuing marriage licenses to same-sex couples under the Marriage Amendment and the Marriage Act.

Furthermore, the Relators have standing to seek mandamus relief in the name of the State under well-settled Alabama law:

> It is now the settled rule in Alabama that a mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public . . . .

Kendrick v. State ex rel. Shoemaker, 256 Ala. 206, 213, 54 So. 2d 442, 447 (1951); *see also Morrison v. Morris*, 273 Ala. 390, 392, 141 So. 2d 169, 170 (1962) (same); *Homan v. State ex rel. Smith*, 265 Ala. 17, 19, 89 So. 2d 184, 186 (1956) (same).

The Alabama public has an interest in probate judges' faithful performance of their duties under the Marriage Amendment and the Marriage Act, and Relators comprise persons likewise interested in probate judges' performance, both as citizens in general, and as persons with special interests in the enactment of both the Marriage Amendment and the Marriage Act. (*See supra* Statement of Facts, ¶¶ 10-11.)

Accordingly, Petitioner, through the Relators, has a clear legal right to Respondents' performance, and therefore satisfies the first mandamus requirement.

2. Respondents refuse to perform an imperative duty.

As shown above, the duty of each Respondent probate judge not to issue marriage licenses to same-sex couples is unequivocal under both the Marriage Amendment and the Marriage Act. (*See supra* § I.A.). As also shown above, each Respondent probate judge has clearly disregarded this imperative duty. (*See supra* Statement of Facts, ¶¶ 5-9.) Thus, the second mandamus requirement is met.

3. Petitioner has no other remedy.

Relators have no other remedy against Respondent probate judges' issuance of illegal marriage licenses, in derogation of their public duty, because the public cannot be a party to a marriage license proceeding before any Respondent and is not otherwise able to appeal Respondents' illegal issuance of licenses. Thus, this case does not offend the rule that mandamus will not lie as a substitute for appeal. *See generally Ex parte Spears*, 621 So. 2d 1255, 1256 (Ala. 1993).

4. This Court's jurisdiction is properly invoked.

This Court has both constitutional and statutory authority to issue original writs "as may be necessary to give it general supervision and control of courts of inferior

jurisdiction." Art. VI, § 140(b), Ala. Const. 1901; § 12-2-7(3), Ala. Code 1975. The necessity for invoking this Court's jurisdiction in this case arises from the statewide nature of the relief requested. As Chief Justice Moore found in his Administrative Order:

> 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 . . . .

(Admin. Ord. (Ex. C) at 2.)

Thus, while relief against any one Respondent probate judge might arguably be obtained in an inferior court, immediate and urgent relief against all Respondents, and swiftly correcting the statewide "confusion and disarray" caused by probate judges issuing illegal licenses, requires the "full relief and . . . complete justice" that only this Court can provide. *Ex parte Alabama Textile Products Corp.*, 7 So. 2d 303, 306 (1942). To be sure, the statewide injury to the public caused by infidelity to Alabama's marriage laws makes this case "of more than ordinary magnitude and importance," such that no inferior court "possesses the

authority to afford to the petitioner relief as ample as this court could grant." *Id.*, 7 So. 2d at 305-306.

Moreover, this Petition merits consideration not only by this Court, but by the entire panel of this Court's Justices because of the critical importance of the issues involved and the urgency of preventing continued open violations of the Marriage Amendment and Marriage Act.

II. THE WRITS SHOULD ISSUE BECAUSE THE CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA ORDERED ALL PROBATE JUDGES NOT TO ISSUE LICENSES TO SAME-SEX COUPLES.

In addition to the reasons shown in Section I above, Chief Justice Moore's Administrative Order provides a separate basis for mandamus relief because it directly prohibits all Alabama probate judges from issuing marriage licenses to same-sex couples in violation of the Marriage Amendment and the Marriage Act. (Admin. Ord. (Ex. C) at 5.) The Administrative Order is binding on all probate judges for the reasons stated in the order. Just as mandamus is appropriate for this Court to command a lower court's compliance this Court's mandate, *see, e.g., Ex parte Ins. Co. of N. Am.*, 523 So. 2d 1064, 1068-69 (Ala. 1988), it is appropriate for this Court to command probate judges' compliance with the Administrative Order.

CONCLUSION

The Marriage Amendment, the Marriage Act, and the Administrative Order could not be more clear: Alabama probate judges are prohibited from issuing marriage licenses to same-sex couples. It is equally clear that neither the *Searcy* nor the *Strawser* Injunction, nor any other authority compels or authorizes probate judges to disregard Alabama's marriage laws. Nonetheless, some probate judges have done just that, creating confusion and disarray in the issuance of marriage licenses in the state. This Court should remove the confusion and disarray by giving Alabama probate judges a clear judicial pronouncement that Alabama law prohibits the issuance of marriage licenses to same-sex couples.

WHEREFORE, the premises considered, Petitioner prays that the Court grant this petition *ex parte*, on an emergency

basis, issue the writs of mandamus prayed for herein, and order that an answer to the petition be subsequently filed by Respondents.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 11th day of February, 2015, served copies of this petition on the Respondents and the Alabama Attorney General, by e-mail and FedEx standard overnight service, as follows:

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

CARI D. SEARCY and KIMBERLY MCKEAND, individually and as parent and next friend of K.S., a minor,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 14-0208-CG-N
LUTHER STRANGE, in his capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

MEMORANUM OPINION AND ORDER

This case challenges the constitutionality of the State of Alabama's "Alabama Sanctity of Marriage Amendment" and the "Alabama Marriage Protection Act." It is before the Court on cross motions for summary judgment (Docs. 21, 22, 47 & 48). For the reasons explained below, the Court finds the challenged laws to be unconstitutional on Equal Protection and Due Process Grounds.

I. Facts

This case is brought by a same-sex couple, Cari Searcy and Kimberly McKeand, who were legally married in California under that state's laws. The Plaintiffs want Searcy to be able to adopt McKeand's 8-year-old biological son, K.S., under a provision of Alabama's adoption code that allows a person to adopt her "spouse's child." ALA. CODE § 26-10A-27. Searcy filed a petition in the Probate Court of Mobile County seeking to adopt K.S. on December 29, 2011, but that petition was denied based on the "Alabama Sanctity of Marriage Amendment" and the "Alabama

Marriage Protection Act." (Doc. 22-6). The Alabama Sanctity of Marriage Amendment to the Alabama Constitution provides the following:

> (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.

ALA. CONST. ART. I, § 36.03 (2006).

> The Alabama Marriage Protection Act provides:
>
> (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.

ALA. CODE § 30-1-19. Because Alabama does not recognize Plaintiffs' marriage, Searcy does not qualify as a "spouse" for adoption purposes. Searcy appealed the denial of her adoption petition and the Alabama Court of Civil Appeals affirmed the decision of the probate court. (Doc. 22-7).

II. Discussion

There is no dispute that the court has jurisdiction over the issues raised herein, which are clearly constitutional federal claims. This court has jurisdiction over constitutional challenges to state laws because such challenges are federal questions. 28 U.S.C. § 1331.

Summary judgment is appropriate if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). Because the parties do not dispute the pertinent facts or that they present purely legal issues, the court turns to the merits.

Plaintiffs contend that the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act violate the Constitution's Full Faith and Credit clause and

the Equal Protection and Due Process clauses of the Fourteenth Amendment. Alabama's Attorney General, Luther Strange, contends that Baker v. Nelson, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), is controlling in this case. In Baker, the United States Supreme Court summarily dismissed "for want of substantial federal question" an appeal from the Minnesota Supreme Court, which upheld a ban on same-sex marriage. Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (Minn.1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). The Minnesota Supreme Court held that a state statute defining marriage as a union between persons of the opposite sex did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. Baker, 191 N.W.2d at 185–86. However, Supreme Court decisions since Baker reflect significant "doctrinal developments" concerning the constitutionality of prohibiting same-sex relationships. See Kitchen v. Herbert, 755 F.3d 1193, 1204–05 (10th Cir. 2014). As the Tenth Circuit noted in Kitchen, "[t]wo landmark decisions by the Supreme Court", Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and United States v. Windsor, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), "have undermined the notion that the question presented in Baker is insubstantial." 755 F.3d at 1205. Lawrence held that the government could not lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime." Lawrence, 539 U.S. at 574, 123 S.Ct. 2472. In Windsor, the Supreme Court struck down the federal definition of marriage as being between a man and a woman because, when applied to legally married same-sex couples, it "demean[ed] the couple, whose moral and sexual choices the Constitution protects."

Windsor, 133 S.Ct. at 2694. In doing so, the Supreme Court affirmed the decision of the United States Court of Appeals for the Second Circuit, which expressly held that Baker did not foreclose review of the federal marriage definition. Windsor v. United States, 699 F.3d 169, 178–80 (2d Cir.2012) ("Even if Baker might have had resonance ... in 1971, it does not today.").

Although the Eleventh Circuit Court of Appeals has not yet determined the issue, several federal courts of appeals that have considered Baker's impact in the wake of Lawrence and Windsor have concluded that Baker does not bar a federal court from considering the constitutionality of a state's ban on same-sex marriage. See, e.g., Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen, 755 F.3d 1193 (10th Cir.2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014). Numerous lower federal courts also have questioned whether Baker serves as binding precedent following the Supreme Court's decision in Windsor. This Court has the benefit of reviewing the decisions of all of these other courts. "[A] significant majority of courts have found that Baker is no longer controlling in light of the doctrinal developments of the last 40 years." Jernigan v. Crane, 2014 WL 6685391, *13 (E.D. Ark. 2014) (citing Rosenbrahn v. Daugaard, 2014 WL 6386903, at *6–7 n. 5 (D.S.D. Nov.14, 2014) (collecting cases that have called Baker into doubt)). The Court notes that the Sixth Circuit recently concluded that Baker is still binding precedent in DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), but finds the reasoning of the Fourth, Seventh, Ninth, and Tenth Circuits to be more persuasive on the question and concludes that

Baker does not preclude consideration of the questions presented herein.[1] Thus, the Court first addresses the merits of Plaintiffs' Due Process and Equal Protection claims, as those claims provide the most appropriate analytical framework. And if equal protection analysis decides this case, there is no need to address the Full Faith and Credit claim.

Rational basis review applies to an equal protection analysis unless Alabama's laws affect a suspect class of individuals or significantly interfere with a fundamental right. Zablocki v. Redhail, 434 U.S. 374, 388, 98S.Ct. 673, 54 L.Ed.2d 618 (1978). Although a strong argument can be made that classification based on sexual orientation is suspect, Eleventh Circuit precedence holds that such classification is not suspect. Lofton v. Secretary of Dep't. of Children and Family Services, 358 F.3d 804, 818 (11th Cir. 2004)/ The post-Windsor landscape may ultimately change the view expressed in Lofton, however no clear majority of Justices in Windsor stated that sexual orientation was a suspect category.

Laws that implicate fundamental rights are subject to strict scrutiny and will survive constitutional analysis only if narrowly tailored to a compelling government interest. Reno v. Flores, 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). Careful review of the parties' briefs and the substantial case law on the subject persuades the Court that the institution of marriage itself is a fundamental right

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[1] This court also notes that the Supreme Court has granted certiorari in the DeBoer case, Bourke v. Bashear , __ S.Ct.__, 2015 WL 213651 (U.S. January 16, 2015), limiting review to these two questions: 1) Does the 14th Amendment require a state to license a marriage between two people of the same sex? and 2) Does the 14th Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? The questions raised in this lawsuit will thus be definitively decided by the end of the current Supreme Court term, regardless of today's holding by this court.

protected by the Constitution, and that the State must therefore convince the Court that its laws restricting the fundamental right to marry serve a compelling state interest.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and women. Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Numerous cases have recognized marriage as a fundamental right, describing it as a right of liberty, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), of privacy, Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and of association, M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

"Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny." Bostic v. Schaefer, 760 F.3d 352, 375(4th Cir. 2014). Strict scrutiny "entail[s] a most searching examination" and requires "the most exact connection between justification and classification." Gratz v. Bollinger, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (internal quotations omitted). Under this standard, the defendant "cannot rest upon a generalized assertion as to the classification's relevance to its goals." Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). "The purpose of the narrow tailoring requirement is to ensure that the

means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." Grutter v. Bollinger, 539 U.S. 306, 333, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

Defendant contends that Alabama has a legitimate interest in protecting the ties between children and their biological parents and other biological kin.[2] However, the Court finds that the laws in question are not narrowly tailored to fulfill the reported interest. The Attorney General does not explain how allowing or recognizing same-sex marriage between two consenting adults will prevent heterosexual parents or other biological kin from caring for their biological children. He proffers no justification for why it is that the provisions in question single out same-sex couples and prohibit them, and them alone, from marrying in order to meet that goal. Alabama does not exclude from marriage any other couples who are either unwilling or unable to biologically procreate. There is no law prohibiting infertile couples, elderly couples, or couples who do not wish to procreate from marrying. Nor does the state prohibit recognition of marriages between such couples from other states. The Attorney General fails to demonstrate any rational, much less

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[2] Although Defendant seems to hang his hat on the biological parent-child bond argument, Defendant hints that this is one of many state interests justifying the laws in question and some of his arguments could be construed to assert additional state interests that have commonly been proffered in similar cases. The court finds that these other interests also do not constitute compelling state interests. See Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (finding that the following interests neither individually nor collectively constitute a compelling state interest for recognizing same-sex marriages: (1) the State's federalism-based interest in maintaining control over the definition of marriage within its borders, (2) the history and tradition of opposite-sex marriage, (3) protecting the institution of marriage, (4) encouraging responsible procreation, and (5) promoting the optimal childrearing environment.).

compelling, link between its prohibition and non-recognition of same-sex marriage and its goal of having more children raised in the biological family structure the state wishes to promote. There has been no evidence presented that these marriage laws have any effect on the choices of couples to have or raise children, whether they are same-sex couples or opposite-sex couples. In sum, the laws in question are an irrational way of promoting biological relationships in Alabama. Kitchen, 755 F.3d at 1222 ("As between non-procreative opposite-sex couples and same-sex couples, we can discern no meaningful distinction with respect to appellants' interest in fostering biological reproduction within marriages.").

If anything, Alabama's prohibition of same-sex marriage detracts from its goal of promoting optimal environments for children. Those children currently being raised by same-sex parents in Alabama are just as worthy of protection and recognition by the State as are the children being raised by opposite-sex parents. Yet Alabama's Sanctity laws harms the children of same-sex couples for the same reasons that the Supreme Court found that the Defense of Marriage Act harmed the children of same-sex couples. Such a law "humiliates [ ] thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S.Ct. at 2694. Alabama's prohibition and non-recognition of same-sex marriage "also brings financial harm to children of same-sex couples." id. at 2695, because it denies the families of these children a panoply of benefits that the State and the federal government offer to families who are legally wed. Additionally, these laws

further injures those children of all couples who are themselves gay or lesbian, and who will grow up knowing that Alabama does not believe they are as capable of creating a family as their heterosexual friends.

For all of these reasons, the court finds that Alabama's marriage laws violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

III. Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment (Doc. 21), is **GRANTED** and Defendant's motion for summary judgment (Docs. 47), is **DENIED.**

IT IS FURTHER ORDERED that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional because they violate they Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

IT IS FURTHER ORDERED that the defendant is enjoined from enforcing those laws.

DONE and **ORDERED** this 23rd day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

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

JAMES N. STRAWSER and JOHN E. HUMPHREY, Plaintiffs, vs. LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama, Defendant.	)	CIVIL ACTION NO. 14-0424-CG-C

ORDER

This matter is before the court on Plaintiffs' motion for preliminary and permanent injunction. (Doc. 15). An evidentiary hearing was held and sworn testimony was offered by Plaintiffs in support of their motion on December 18, 2014. For the reasons stated below, the court finds that Plaintiffs are entitled to preliminary injunctive relief.

The decision to grant or deny a preliminary injunction "is within the sound discretion of the district court..." Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002). This court may grant a preliminary injunction only if the plaintiff demonstrates each of the following prerequisites: (1) a substantial likelihood of success on the merits; (2) a substantial threat irreparable injury will occur absent issuance of the injunction; (3) the threatened injury outweighs the potential damage the required injunction may cause the non-moving parties; and (4) the injunction would not be adverse to the public interest. Id., 287 F.3d at 1329; see also McDonald's Corp. v. Robertson, 147 F.3d. 1301, 1306 (11th Cir. 1998). "In this

EXHIBIT B

Circuit, '[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the "burden of persuasion" ' as to the four requisites." McDonald's Corp., 147 F.3d at 1306; All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)(a preliminary injunction is issued only when "drastic relief" is necessary.

This case is brought by a same-sex couple, James Strawser and John Humphrey, who have been denied the right to a legal marriage under the laws of Alabama. The couple resides in Mobile, Alabama and participated in a church sanctioned marriage ceremony in Alabama. Strawser and Humphrey applied for a marriage license in Mobile County, Alabama, but were denied.

Strawser testified that he has health issues that will require surgery that will put his life at great risk. Strawser's mother also has health issues and requires assistance. Prior to previous surgeries, Strawser had given Humphrey a medical power of attorney, but was told by the hospital where he was receiving medical treatment that they would not honor the document because Humphrey was not a family member or spouse. Additionally, Strawser is very concerned that Humphrey be permitted to assist Strawser's mother in all of her affairs if Strawser does not survive surgery.

Plaintiffs contend that Alabama's marriage laws violate their rights to Due Process, Equal Protection and the free exercise of religion. This court has determined in another case, Searcy v. Strange, SDAL Civil Action No. 14-00208-CG-N, that Alabama's laws prohibiting and refusing to recognize same-sex marriage violate the Due Process Clause and Equal Protection Clause of the Fourteenth

Amendment to the United States. In Searcy, this court found that the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act restrict the Plaintiffs' fundamental marriage right and do not serve a compelling state interest. The Attorney General of Alabama has asserted the same grounds and arguments in defense of this case as he did in the Searcy case. Although the Plaintiffs in this case seek to marry in Alabama, rather than have their marriage in another state recognized, the court adopts the reasoning expressed in the Searcy case and finds that Alabama's laws violate the Plaintiffs' rights for the same reasons. Alabama's marriage laws violate Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by prohibiting same-sex marriage. Said laws are unconstitutional.

As such, Plaintiffs have met the preliminary injunction factors. Plaintiffs' inability to exercise their fundamental right to marry has caused them irreparable harm which outweighs any injury to defendant. See Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (holding that deprivation of constitutional rights "unquestionably constitutes irreparable harm."). Moreover, Strawser's inability to have Humphrey make medical decisions for him and visit him in the hospital as a spouse present a substantial threat of irreparable injury. Additionally, "it is always in the public interest to protect constitutional rights." Phelps–Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008). Therefore, the Plaintiffs have met their burden for issuance of a preliminary injunction against the enforcement of state marriage laws prohibiting same-sex marriage.

Accordingly, the court hereby ORDERS that the Alabama Attorney General is prohibited from enforcing the Alabama laws which prohibit same-sex marriage. This injunction binds the defendant and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage.

Defendant stated at the hearing that if the court were to grant Plaintiffs' motion, Defendant requests a stay of the injunction pending an appeal. As it did in the Searcy case, the Court hereby STAYS execution of this injunction for fourteen days to allow the defendant to seek a further stay pending appeal in the Eleventh Circuit Court of Appeals. If no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay within that time period, this stay will be lifted on February 9, 2015.

DONE and ORDERED this 26th day of January, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

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

EXHIBIT C

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.

Roy S. Moore
Chief Justice

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

CARI D. SEARCY and KIMBERLY MCKEAND, individually and as parent and next friend of K.S., a minor,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 14-0208-CG-N
LUTHER STRANGE, in his capacity as Attorney General for the State of Alabama,	)	
Defendant.	)	

ORDER

This matter is before the court on Plaintiffs' motion for contempt and request for immediate relief. (Doc. 71). Plaintiffs report that "the Honorable Don Davis has failed to comply with this Court's January 23, 2015 Order." According to the motion:

> On this date, at 10:10 a.m. CST, Honorable Don Davis, Probate Judge in Mobile County, Alabama, had not opened the marriage license division of the Mobile County Probate Court. The Honorable Don Davis has not given a reason why the marriage license division is closed on this particular day, and he has not stated as to when the office will reopen.

(Doc. 71, p. 1-2). Plaintiffs request that this court hold Davis in contempt, to order law enforcement to open the marriage license division of Mobile County Probate Court, and to impose sanctions.

After reviewing the Plaintiffs' motion, the court finds that Plaintiffs have not shown that Davis has failed to comply with this court's order. On January 23, 2015,

EXHIBIT D

this court declared that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional and enjoined defendant Luther Strange, in his capacity as Attorney General for the State of Alabama, from enforcing those laws. (Doc. 54). Upon motion by the Plaintiffs, this court further clarified the January 23, 2015 order stating that:

> ... [A] clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees. ... The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.

(Doc. 65, p. 3 quoting Brenner v. Scott, 2015 WL 44260 at *1 (N.D. Fla. Jan 1, 2015)). Probate Judge Don Davis is not a party in this case[1] and the Order of January 23, 2015, did not directly order Davis to do anything. Judge Davis's obligation to follow the Constitution does not arise from this court's Order. The Clarification Order noted that actions against Judge Davis or others who fail to follow the Constitution could be initiated by persons who are harmed by their failure to follow the law. However, no such action is before the Court at this time.

Plaintiffs have also offered no affidavit or other evidence to show that they have been prevented from applying for the adoption or that their adoption application was wrongfully denied after this court's January 23, 2015, Order.

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[1] Judge Davis was originally named as a defendant, but by stipulation of the parties (Doc. 29) was dismissed from the case.

Nothing in Plaintiffs' motion would compel this court to order law enforcement to open the marriage license division of Mobile County Probate Court or impose sanctions. Plaintiffs have offered no authority by which this court can hold Davis in contempt or order any of the relief sought by Plaintiffs. Accordingly, Plaintiffs' motion for contempt and immediate relief (Doc. 71), is DENIED.

DONE and ORDERED this 9th day of February, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE