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

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

JUDGE DON DAVIS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR (1) LEAVE TO FILE SECOND AMENDED COMPLAINT ADDING ADDITIONAL PARTIES AND PLAINTIFF AND DEFENDANT CLASSES; (2) CERTIFICATION OF PLAINTIFF AND DEFENDANT CLASSES; AND (3) PRELIMINARY INJUNCTION

INTRODUCTION

The plaintiffs' motion asserts that the proposed class of plaintiffs includes thousands of Alabamians, that the named plaintiffs' and proposed class members' claims present a common legal question, and that the named plaintiffs' claims are typical of those of the proposed class members. (Doc. 76, p. 5). The plaintiffs seek class certification under Rules 23(a), 23(b)(1)(A), and 23(b)(2) of the Federal Rules of Civil Procedure. Defendant Don Davis shows herein that the addition of the new named plaintiffs and certification of plaintiff and defendant classes should be denied.

STANDARD OF REVIEW

"Questions concerning class certification are left to the sound discretion of the district court. *Armstrong v. Martin Marietta Corp*., 138 F.3d 1374, 1386 (11th Cir. 1998) (*en banc*)." *Cooper v. Southern Co.*, 390 F.3d 695, 711 (11th Cir. 2004). "A class action may be maintained only when it satisfies all of the requirements of *Fed.R.Civ.P. 23(a)* and at least one of the alternative requirements of Rule 23(b)." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997).

"Thus, the court must evaluate whether the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy of representation. *See Fed.R.Civ.P. 23(a)*. Furthermore, the court must determine whether one of the following grounds for maintaining the suit as a class action pursuant to Rule 23(b) is present: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication." *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 534 (N.D. Ala. 2001). "Plaintiffs, as class representatives, bear the burden of proving that all four prerequisites of Rule 23(a) are met. Failure to establish any one requirement will completely defeat a motion for class certification." *Id.* at 536, (citation omitted). The plaintiffs cannot demonstrate the prerequisites for class certification and their motion is therefore due to be denied.

ARGUMENT

I. PRUDENTIAL CONSIDERATIONS MANDATE THAT CLASS CERTIFICATION BE DENIED.

Class certification is inappropriate in this case because it is unnecessary as a practical matter. The United States Supreme Court will rule on the marriage rights of same-sex couples during its current term, long before a class action in this Court could be litigated to a final judgment. If the Supreme Court abrogates state laws barring same-sex marriage or recognition of same-sex marriages, that relief will extend to all persons who fit the description of the proposed plaintiff class members here, whether certified as a class or not. Class certification therefore would add no possibility for relief beyond what the named plaintiffs have claimed on their own behalf, and would unnecessarily increase the costs and other burdens of this litigation.

The U.S. District Court for the Middle District of Alabama in *Hard v. Bentley*, Case No. 2:13-CV-922, Doc. 77 (M.D. Ala. March 10, 2015), a factually similar case, entered an order staying proceedings as to claims challenging bans on same-sex marriage and recognition of same-sex marriages. The class of persons proposed here includes parties in the Middle District, including the Middle District residents subject to the stay order in *Hard v. Bentley*, as well as others whose claims likely would be stayed if filed in their home district. There are already conflicting decisions between

district courts in Alabama, and certification of a class will only add to the confusion unnecessarily, because the U.S. Supreme Court will decide the issues this term. Such considerations mandate that class certification in this case be denied.

II. REQUIREMENTS OF RULE 23(A), FED.R.CIV.P. HAVE NOT BEEN MET SO AS TO CERTIFY A PLAINTIFF CLASS.

A. Numerosity.

Initially, the plaintiffs have not established the requirement of numerosity. Although the plaintiffs contend "the plaintiff class includes thousands of Alabamians" (Doc. 76, p. 5), the proposed class is described only as "[a]ll persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and to have that marriage recognized under Alabama law, and who are unable to do so because of the enforcement of Alabama's laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages." (*Id*. p. 2). Other than their own unsupported allegations, plaintiffs have presented nothing to show how many such persons other than the proposed named plaintiff class representatives could properly be included in this action. The current named plaintiffs have obtained marriage licenses. Thus, they would not be included in the proposed plaintiff class.

It is mere speculation by plaintiffs as to the number of same-sex couples in

Alabama, and even further speculation as to how many of those couples wish to apply for a marriage license. In any relationship of either same-sex or opposite sex couples, one half of the couple may wish to be married, but it takes two people actually to apply for a marriage license. The plaintiffs therefore must show not only how many gay and lesbian persons live in Alabama, but also how many are in a relationship, how many "discuss" marriage, and how many actually have two individuals prepared to apply for a marriage license to count accurately the number of individuals in the proposed plaintiff class.

Also, according to the proposed new plaintiffs' Affidavits, each couple – one from the Middle District, one from the Northern District, and one from the Southern District – attempted to obtain a marriage license in their home county and then made a telephone call to the Baldwin County Probate Court to inquire about receiving a same-sex marriage license there. The original plaintiffs in this matter, Strawser and Humphrey, Povilat and Persinger, Miller and Carmichael, and Simmons and Safford, obtained marriage licenses. They have been granted the relief that they originally sought. They will not be parties to this suit if the amendment is allowed and the case moves forward. The parties who wish to be added should in fact file a new suit in their own districts of residence. However, they want to be a part of this suit before

this Court, and it is not difficult to understand why they wish to be made parties to this action.

There are many reasons why couples remain unmarried. Some may be for economic reasons, for tax reasons, for Social Security benefits, to avoid becoming obligated for their partner's debts or medical treatment, or numerous other possibilities. Those unmarried couples, be they same-sex couples or opposite-sex couples, are not seeking a marriage license, supports the argument that there is nothing to substantiate the plaintiffs' bare allegation of numerosity.

> [M]ere allegations of numerosity are insufficient ... . Plaintiffs must show some evidence of or reasonably estimate the number of class members. ... Mere speculation and unsubstantiated allegations as to numerosity, however, are insufficient to satisfy Rule 23(a)(1).

Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 537-38 (N.D. Ala., 2001). Because the plaintiffs here have offered only speculation, their motion should be denied.

B. <u>Commonality</u>.

Commonality requires that "the questions of law or fact common to the members of the class must predominate over any questions affecting only individual members. In other words, the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues

that are subject only to individualized proof." *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989). (Alterations and citations omitted). The Supreme Court recently explained that the language of Rule 23(a)(2)

> . . . is easy to misread, since any competently crafted class complaint literally raises common questions. ... Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011), (internal citations and alterations omitted). The named plaintiffs have not demonstrated that the "thousands of Alabamians" allegedly in the proposed plaintiff class have suffered any injury at all. The described class may well include a substantial number of same-sex couples who have no present intention of seeking a marriage license and who are therefore unaffected by the laws cited. Further, the four original plaintiffs have all obtained marriage licenses, and they do not share the commonality with other proposed members of the plaintiff class. The allegations of the proposed second amended complaint fail to make the required showing of commonality.

C. Typicality.

Typicality refers to the individual characteristics of the named plaintiffs in relation to the class. See *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 536 fn 18, quoting *Prado-Steiman v. Bush*, 221 F.3d1266, 1279 n 14 (11th Cir. 2000). The

specific circumstances of same-sex couples in Alabama, like those of all couples, vary widely, precluding the named plaintiffs from satisfying the typicality requirement. As with numerosity and commonality, there is nothing to substantiate the plaintiffs' bare allegation that their claims are typical of all persons who fit the description of the proposed plaintiff class. The named plaintiffs in this case therefore fail to satisfy all requirements of Rule 23(a), and their Motion for Class Certification must be denied.

III. PLAINTIFFS' REQUESTS FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO ADD A DEFENDANT CLASS AND FOR CERTIFICATION OF A DEFENDANT CLASS OF ALABAMA'S PROBATE JUDGES ARE DUE TO BE DENIED.

In plaintiffs' Motion, they assert that they are seeking leave to file a Second Amended Complaint that:

> . . . adds Tim Russell, in his official capacity as Probate Judge of Baldwin County, as representative of a Defendant Class of similarly situated probate judges in the State of Alabama, and adds Defendant Davis as a named representative of the Defendant Class.

(Doc. 76, pp. 1-2). Plaintiffs further move the Court for certification of Plaintiff and Defendant classes in this matter, defining the Defendant class as: "All Alabama county probate judges who are enforcing or in the future may enforce Alabama's laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages." (Doc. 76, p. 2). Plaintiffs claim that no prejudice will be

experienced by any opposing party if their second amended complaint is allowed. However, Defendant Don Davis will be extremely prejudiced if leave is granted for filing a second amended complaint and a defendant class is allowed as part of plaintiffs' second amended complaint. He will further be prejudiced if required to be a defendant class representative. The cost of the representation of a defendant class should not fall solely on the shoulders of Mobile County, the county which elected Judge Davis to his current position. Further, some probate judges have openly advocated for the granting of marriage licenses to same-sex couples, while other judges have openly spoken against the granting of marriage licenses for same-sex couples. Judge Don Davis has never made public statements or taken a public stance for or against the issue.

As with any class action, this Court can only certify the defendant class if the four requirements of 23(a) are satisfied, and at least one requirement of 23(b) is satisfied.

A. Rule 23(a)(1).

Plaintiffs argue that their request for certification of a defendant class meets the rule's requirements since the class would consist of 67 persons, and joinder would be impracticable because "these individuals are dispersed throughout three federal districts and every county in the State of Alabama." (Doc. 76, p. 15) The defendant

class is proposed to consist of all probate judges in Alabama. While plaintiffs claim there are 67 such judges in this State, there are actually 68, since there are two probate judges in Jefferson County. Clearly, joinder of this limited number of public officials is not difficult. As noted in Defendant Luther Strange's response in opposition to the plaintiffs' Motion (Doc. 78), the contact information for each probate judge is listed on http://www.sos.state.al.us/vb/election/all.aspx?trgtoffice=Judge%20of%Probate. (Doc. 78, p. 4, fn 2). To make it even easier, in *Ex parte State ex rel. Alabama Policy Institute and Alabama Citizens Action Program 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*, Alabama Supreme Court Case No. 1140460, Clarke County Probate Judge Valerie Bradford Davis filed a Correction to Certificate of Service, with an attached certificate of service which identifies the addresses of each of the State's 67 other probate judges. (See attached Correction).

Furthermore, plaintiffs cannot show that all 68 probate judges are enforcing, or in the future may enforce, Alabama's laws barring the issuance of marriage

licenses to same-sex couples and refusing to recognize their marriages. While the Alabama Supreme Court has ordered all probate judges to enforce Alabama's Sanctity of Marriage laws, Defendant Don Davis is unaware whether other elected officials in other parts of the State are abiding by that Court's Order. Additionally, plaintiffs cannot show that a same-sex couple has requested and been denied a marriage license in each of Alabama's 67 counties. Thus, it is possible that the number of defendants in the class would actually be less than 68 probate judges. Accordingly, the number of probate judges is not too numerous for the joinder of all parties.

Finally, plaintiffs' argument that Rule 23(a)(1) is satisfied because an Order certifying the defendant class fosters judicial economy, since it would consolidate all parties and defenses in a single proceeding, preventing the re-litigation of identical issues in multiple suits around Alabama, is completely without merit. (Doc. 76, p. 17). Obviously, there is already re-litigation of identical issues in multiple suits around Alabama, with conflicting opinions. In *Hard v. Bentley*, *supra*., Judge Watkins entered a stay to litigation which began on December 16, 2013, a full eight months prior to the complaint being filed in this case. The *Hard* case is much further along in its proceedings, as the parties have completed discovery and filed cross motions for summary judgment. Yet, Judge Watkins stayed the case until a decision is made in the next few months by the United States Supreme Court on the very issue

to be litigated in this proposed double class action. As previously argued in this brief, and in Defendant Davis' Supplement to the Motion to Stay, the plaintiff class is proposed to include same-sex couples who reside in counties contained within the Middle District. The same holds true for the proposed defendant class. The 23 probate judges from the counties in the Middle District of Alabama are potentially subject to Judge Watkins' Order to Stay. If this Court were to grant the plaintiff class' requested relief, those 23 probate judges would be held to a different standard than they would possibly have been held if this case had been brought in the Middle District, where the same request for relief has been stayed. Plaintiffs assert that amending the *Complaint* and granting the *Motion for Class Certification* would promote judicial economy, but what would truly foster judicial economy would be to stay this matter pending a ruling from the Supreme Court of the United States.

B. Rule 23(a)(2) and (3).

The commonality and typicality tests also cannot be met here. The case of *Ex parte State ex rel. Alabama Policy Institute and Alabama Citizens Action Program v. Alan L. King* is evidence that various Alabama probate judges have taken various opposing positions on the issue of same-sex marriage laws. Thus, each defendant class member would not necessarily raise the same legal arguments in defense against the plaintiff class' allegations.

C. Rule 23(a)(4).

Plaintiffs argue that Defendant Russell and Defendant Davis will fairly and adequately represent the interests of the defendant class. (Doc. 76, p. 19). This brief is only filed on behalf of Defendant Don Davis. Plaintiffs set out the two part inquiry which must be addressed in determining the adequacy of representation by Defendant Davis: (1) whether there is any antagonism between the defendant class representative and the class members; and (2) whether the class representative will adequately defend the action. (Doc. 76, p. 19).

Judge Davis cannot efficiently and accurately represent the class. Judge Davis is a sole judge in one of the busiest probate courts in Alabama. Requiring him to serve as a class representative deprives the citizens of Mobile County of the service of their elected Probate Judge. Requiring Judge Davis to also be the class representative requires an expense of the tax payers of Mobile County that should, instead, be the burden of all 67 counties in Alabama, if class action status is granted. Judge Davis cannot represent all of the probate judges in Alabama because there is not unanimity among them. As is obvious from the matter before the Alabama Supreme Court, Case No. 1140460, *Ex parte State ex rel. Alabama Policy Institute and Alabama Citizens Action Program 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, various probate judges have taken various opposing positions. Judge Davis has never made his personal feelings known, but some probate judges have done so in the press and even before the Alabama Supreme Court. For example, one probate judge responded to the Alabama Supreme Court's ruling by citing her religious beliefs and citing protection of her religious beliefs under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq*. Since there is a disagreement among probate judges, Judge Davis cannot be an effective class representative because there is no unified position of the 68 probate judges.

It is relevant to this argument to note that the law firms representing Judge Davis, or some other law firm representing Judge Russell, would be asked to shoulder the responsibility for defending the interests of perhaps more than sixty other probate judges, who, by the same token, are being asked to place the responsibility for this litigation in lawyers with whom they may not be familiar. "The Court's duty to ensure that the named representatives are adequate representatives of the class is designed

to protect the absent members." *Doss v. Long*, 93 F.R.D. 112, 118 (No. Dist. Ga. 1981).

> The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately represent the interests of the classes,... and the legal constitutional issue is not complex in light of recent Supreme Court decisions.

Doss, 93 F.R.D. at 118 (quoting *Lynch v. Household Finance Corp.*, 360 F. Supp. 720, 722 n. 3 (D. Conn. 1973)).

The legal issue of this proposed double class action is complex enough that there are differing opinions between federal district courts, between state and federal courts and between 68 probate judges. Further, while no money damages are demanded, there is the potential for an award of attorneys' fees in favor of the plaintiffs.

D. Rules 23(b)(1)(A) and (2).

Assuming, *arguendo*, this Court holds that the numerosity, commonality, typicality, and representative tests of Rule 23(a) have been met, plaintiffs' request for leave to amend to add a defendant class should still be denied.

Under 23(b)(1)(A), plaintiffs argue that "prosecution of separate actions against individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama probate judges being required to issue marriage licenses to same-

sex couples and required to respect the marriages of same-sex couples, and others not." (Doc. 76, p. 20) However, as has been argued previously, the threat of such inconsistent and varying adjudications will be nullified in a few months when the United States Supreme Court issues its decision in the appeal from *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted, 135 S. Ct. 1040 (2015), *cert. granted sub nom*., *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), *Tanco v. Haslam*, 135 S. Ct. 1040 (2015), *Bourke v. Beshear*, 135 S. Ct. 1041 (2015).

There are already inconsistent and varying adjudications on this issue; however, requiring Judge Davis to be the representative of a class of defendant Alabama probate judges will not solve these inconsistencies – the Supreme Court of the United States will have the final say in resolving these inconsistencies.

Plaintiffs' request for class certification under Rule 23(b)(2) is also due to fail. There is no support for plaintiffs' assertion that enforcement of Alabama's marriage laws by its probate judges "inflicts the same constitutional harms on each member of the plaintiff class." (Doc. 76, p. 21) As has been argued previously, Plaintiffs cannot support their allegation that all probate judges in the State of Alabama have denied at least one same-sex couple a marriage license.

IV. THE CLAIMS OF THE PROPOSED NEW PLAINTIFFS AND CLASS WOULD BE BARRED BY QUALIFIED IMMUNITY.

In this case, if there are potential money damages to be awarded in the form of attorney's fees to the plaintiff class, Judge Davis, like the other probate judges, has immunity. The Eleventh Circuit Court explained in *Denno ex rel. Denno v. School Bd.*, 218 F.3d 1267 (11th Cir. Fla. 2000):

> Qualified immunity shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known. See *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir.1998)(citing *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1182 (11th Cir.1997)). Elaborating on the qualified immunity standard, we have held:
>
> > For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel, (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances. *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir.1994)(*en banc*).

Denno v. School Bd., 218 F.3d at 1269-1270. The Eleventh Circuit Court also stated recently in *Gomez v. United States*, 2015 U.S. App. LEXIS 2124 (11th Cir. Feb. 11, 2015):

> The "threshold inquiry" in determining whether qualified immunity is appropriate is whether plaintiff's allegations, if true, establish a constitutional violation. If the plaintiff's allegations, taken as true, fail to establish a constitutional violation, qualified immunity attaches and the district court should dismiss the complaint.

> Even if the plaintiff alleges facts that would establish a violation of a constitutional right, qualified immunity will shield the defendant from suit unless the right was clearly established at the time of the alleged violation. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.
>
> We need not employ a rigid two-step procedure, but rather may exercise our discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Id. at 7-8, (quotations marks and citations omitted).

In this case, the answer to the clearly-established-law inquiry is readily apparent. Few, if any, issues of law currently are as *uncertain* in this state and country as that of the marriage and associated rights of same-sex couples. Conflicting rulings from this Court and the Alabama Supreme Court, and from state and federal courts in other jurisdictions, as well as the imminent ruling by the U.S. Supreme Court on the rights of same-sex couples, have created much confusion about what the applicable law requires. Only "decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state . . . can clearly establish the law. See *Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc)." *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. Fla. 2007). The fact that the U.S. Supreme Court will consider during its current term the constitutional rights of same-sex couples shows conclusively that the

law on the issue *is not* clearly established in the federal courts. In fact, the *only* court that has addressed the issue and has authority to establish the law clearly in Alabama for qualified immunity purposes – the Alabama Supreme Court – on March 3, 2015 explicitly ordered Alabama probate judges to enforce the state's laws prohibiting recognition of same-sex marriage. On March 10, 2015, the Alabama Supreme Court issued an 11-page Order that Judge Davis must comply with the earlier order to enforce the state's laws. Because the law on the issue is not clearly established, Judge Davis would be entitled to qualified immunity for any violations of rights alleged by the proposed new plaintiffs or the proposed class members.

The "threshold inquiry" for qualified immunity, the existence of a constitutional violation, also mandates denial of the plaintiffs' motion. Where the law is not clearly established, this Court need not even consider whether the factual allegations, if true, would show a constitutional violation. *Gomez v. U.S.*, 2015 U.S. App. LEXIS 2124 at 8. As yet, there is no decision by a court that can clearly establish the law for qualified immunity purposes that there is a right to same-sex marriage in the state of Alabama, nor a right to recognition of same sex marriages. Therefore, the allegations fail to show that the proposed new plaintiffs or class members have suffered any violation of their Constitutional rights. Claims on behalf of those proposed plaintiffs would therefore be barred by qualified immunity.

V. JUDGE DAVIS IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FOR HIS ACTIONS AS A STATE JUDICIAL OFFICER.

The Office of the Probate Judge of Mobile County, Alabama is a position created by the Alabama Constitution:

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

Alabama Const., Art. VI, Sec. 144. As Judge of Probate, Judge Davis is a member of the state's unified judicial system:

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

Alabama Const., Art. VI, Sec. 139. (Emphasis added). Marriage licenses in Alabama are issued by authority of the state, not of the individual counties. Couples can go to any county to obtain a license. Therefore, in issuing marriage licenses, probate judges act as state officials, not county officers. Any claims by the proposed new plaintiffs and class would be barred by 11th Amendment immunity. The motion to amend and to certify a class should therefore be denied.

VI. THE COURT SHOULD NOT ISSUE A PRELIMINARY INJUNCTION.

Entry of a preliminary injunction is not warranted, because the original plaintiffs have been granted the relief requested. Further, to allow the new named plaintiffs to be added would allow forum shopping. The proposed new couples allege they have been together for between one and 22 years, and they fail to show what irreparable harm they would suffer if required to wait until the Supreme Court of the United States rules within the next sixty (60) days and resolves this emotional and divisive issue.

The entry of an additional preliminary injunction would be in direct contradiction to the order issued by the Alabama Supreme Court in *Ex parte State ex rel. Alabama policy Institute and Alabama Citizens Action Program v. Alan L. King, et al.*, and would create numerous problems, and confusion among the judges as well as the citizens of Alabama. That confusion is unnecessary in light of the Supreme Court's imminent ruling, and it would be unfair to Alabama's probate judges who, like Judge Davis, would be subject to conflicting court orders.

The plaintiffs argue that the issuance of marriage licenses is a ministerial act, however the issuance of marriage license is a state function.

Plaintiffs' argument of public interest is not valid. The public interest would be best served if this Court does not issue a preliminary injunction and avoids the

problem of conflicting orders between the Alabama Supreme Court and the United States District Court. After this Court's prior injunctive order, the probate judges in the 67 counties in Alabama took different actions, including issuing marriage licenses to all qualified persons, issuing marriage licenses to only same-sex couples, and issuing marriage licenses to no one at all. This will likely occur again, and this will not serve the public interest. Allowing these 67 counties and the United States to operate in a dignified, Constitutional and practical way would best serve the public interest.

WHEREFORE, based on the foregoing reasons and the authorities cited, defendant Don Davis respectfully shows that the plaintiffs' Motion for (1) Leave to File Second Amended Complaint Adding Additional parties and Plaintiff and Defendant Classes; (2) Certification of Plaintiff and Defendant Classes; and (3) Preliminary Injunction is due to be denied

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CERTIFICATE OF SERVICE

I do hereby certify that I have on **March 17th, 2015** electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of record, and I have mailed the same to non-CM/ECF participants via United States Mail properly addressed and first class postage prepaid, to wit:

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Attachment
Judge Valerie Bradford Davis's Correction to Certificate of Service

IN THE SUPREME COURT OF ALABAMA

Ex parte State of Alabama *ex rel.* Alabama Policy Institute, *et al.*,	)	
Petitioners	)	
v.	)	No. 1140460
Alan L. King, *etc.*, *et al.*,	)	
Respondents.	)	

JUDGE VALERIE BRADFORD DAVIS'S CORRECTION TO CERTIFICATE OF SERVICE

Clarke County Probate Judge Valerie Bradford Davis hereby files the attached corrected certificate of service noting additional officials who have been served with her Response to Emergency Petition for Writ of Mandamus filed with this Court on March 10, 2015.

Respectfully submitted on March 11, 2015.

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Certificate of Service

I certify that I have on March 11, 2015, served a copy of the foregoing Judge Valerie Bradford Davis's Correction to Certificate of Service on all counsel by the Court's electronic-filing system, e-mail, or by U.S. Mail, postage prepaid and addressed as follows:

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Certificate of Service

I certify that I have on March 10, 2015, served a copy of the foregoing Response to Emergency Petition for Writ of Mandamus on all counsel by the Court's electronic-filing system, e-mail, or by U.S. Mail, postage prepaid and addressed as follows:

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