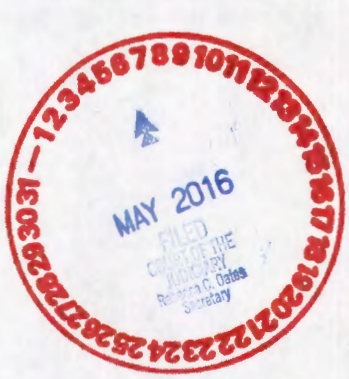
IN THE ALABAMA COURT OF THE JUDICIARY



In the Matter of:

ROY S. MOORE,
Chief Justice
Supreme Court of Alabama

Case No. 46

COMPLAINT

The Judicial Inquiry Commission of the State of Alabama files this Complaint against Chief Justice Roy S. Moore of the Supreme Court of Alabama. The facts and charges upon which this Complaint is based, averred separately and severally, are set out below.

I.

FACTS

A. Prior to Administrative Order of January 6, 2016

1. In 2003, Chief Justice Moore was removed from the Office of Chief Justice by Order of the Alabama Court of the Judiciary upon its finding he violated the Alabama Canons of Judicial Ethics by willfully refusing to obey an injunction issued by a United States District Court, when that order was in effect, directed to him, and binding upon

him. In the Matter of Roy S. Moore, Chief Justice of Alabama, COJ #33.

2. In January 2013, Roy S. Moore became Chief Justice of the Supreme Court of Alabama for the second time and has continued in that position until the present. In that capacity, Chief Justice Moore, in addition to his other responsibilities, has served continuously as the administrative head of the judicial system of the state of Alabama. See Ala. Const. 1901, art. VI, § 148; Ala. Code 1975, § 12-2-30(b).

3. Significant to the context of this matter is that the vast majority of probate judges in this state are not licensed to practice law.

4. During Chief Justice Moore's current term of office, the existence of a right to marriage for same-sex couples has been a subject of litigation across the United States, including the United States Supreme Court, and in Alabama.

5. That litigation culminated in the United States Supreme Court's decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), holding that

> [S]ame-sex couples may exercise the fundamental right to marry in all States,

id. at 2607, and

> [T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Id. at 2608 (emphasis added).

6. For reasons he has clearly enunciated on numerous occasions and, as is his personal right, Chief Justice Moore strongly disagrees with those courts, especially federal courts, that have found that same-sex couples have an enforceable fundamental right under the United States Constitution to marry and that right cannot be infringed upon by the states.[1]

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[1] Chief Justice Moore has, however, taken actions in which he failed to adhere to the high standards required by the Alabama Canons of Judicial Ethics include the following:

(a) Showing disrespect for and failing to acknowledge the authority of a United States District Court's injunction, through various non-adjudicatory communications issued as Chief Justice, culminating in his issuance of the Administrative Order of January 6, 2016, that directs or appears to direct Alabama's 68 probate judges to disregard an unstayed, binding federal injunction directed to them;

(b) By way of his January 6, 2016 Administrative Order, ordering or appearing to order all 68

7. Chief Justice Moore, however, took an oath of office to support the United States Constitution (Ala. Const. 1901, art. XVI, § 279) and, as a state judicial officer, is bound by the United States Supreme Court's interpretation and application of that Constitution.

8. Chief Justice Moore's conduct in this matter involves the interplay of four cases:

- Searcy v. Strange, Civil No. 14-028-CG-N ("Searcy"), and Strawser v. Strange, Civil No. 14-0424-CG-C ("Strawser"), before the United States District Court for the Southern District of Alabama, litigating the

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Alabama probate judges to violate the Alabama Canons of Judicial Ethics when he well knew the precedent for such violation is removal from office;

(c) Abusing his authority as chief administrative officer of Alabama's court system by issuing an Administrative Order on substantive law issues, i.e., his Administrative Order of January 6, 2016;

(d) Issuing an Administrative Order on a matter pending before his court for the court's decision i.e., his Administrative Order of January 6, 2016;

(e) Commenting on a case pending before his court through his Administrative Order of January 6, 2016;

(f) Issuing an Administrative Order of January 6, 2016, that necessitated his disqualification in any subsequent proceeding in the case discussed.

constitutionality of Alabama's ban on same-sex marriage and the recognition of such marriages[2];

- Obergefell v. Hodges, 135 S. Ct. 2584 (June 26, 2015) ("Obergefell"), argued before the United States Supreme Court on April 28, 2015, recognizing that, under the United States Constitution, "same-sex couples may exercise the fundamental right to marry in all States," id. at 2607, and "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character," id. at 2608(emphasis added); and
- Ex parte State ex rel. Alabama Policy Institute, Ms. 1140460, 2015 WL 892752, (Ala. March 3, 2015), with additional motions and petitions being dismissed and the certificate of judgment issued on March 4, 2016, 2016 WL 859009 ("API"), before the Alabama Supreme Court, filed after Searcy and Strawser were initially decided. Contrary to Searcy and Strawser, the

[2]The Alabama Sanctity of Marriage Amendment, art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975, as amended ("the Alabama marriage laws").

Alabama Supreme Court held that Alabama's ban on same-sex marriages, see n.2 (the Alabama marriage laws), is constitutional and the United States Constitution does not guarantee same-sex couples the right to marry.

9. In 2014, Searcy and Strawser were filed, pursuant to 42 U.S.C. § 1983, in the United States District Court for the Southern District of Alabama: Searcy on May 11, 2014, and Strawser on September 11, 2014. The United States District Court took jurisdiction under 28 U.S.C § 1331 (federal-question jurisdiction) to decide the constitutionality of the Alabama marriage laws under the United States Constitution, as those laws denied the right of marriage and accompanying rights to the plaintiffs as same-sex couples.

10. On January 23, 2015, the United States District Court held the Alabama marriage laws unconstitutional insofar as those laws denied marital recognition to same-sex couples. Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015).

11. Three days later, on January 26, 2015, the District Court, in Strawser, granted a preliminary

injunction against Alabama's Attorney General, Luther Strange, the only party-defendant at that time, enjoining him from enforcing the Alabama marriage laws that prohibit same sex-marriage in Alabama. Strawser (Unpublished Order, Jan. 26, 2015).

12. The next day, January 27, 2015, Chief Justice Moore wrote a letter to Alabama Governor Robert Bentley, using Alabama Supreme Court letterhead containing the names of the nine justices. That letter in part explains Chief Justice Moore's refusal to acknowledge and respect any federal district court authority over state officials regarding the unconstitutionality of the Alabama marriage laws. Chief Justice Moore begins his letter:

> The recent ruling of Judge Callie Grenade of the United States District Court for the Southern District of Alabama has raised serious, legitimate concerns about the propriety of federal court jurisdiction over [the Alabama marriage laws].

13. On January 28, 2015, the District Court issued an "Order Clarifying Judgment" in Searcy, stating the injunction bound only the parties to that case, but noting that other state agents who did not choose to follow the court's holding could be subject to suit and payment of attorney fees.

14. On February 3, 2015, the United States Court of Appeals for the Eleventh Circuit declined to enter a stay of the District Court's injunction in Searcy pending appeal.

15. In addition, on February 3, 2015, Chief Justice Moore sent an "advisory letter" to all probate judges, advising them on how to address the issue. In his letter, he "warn[ed] against any unlawful intrusion into the jurisdiction and sovereignty of this state and its courts." He concluded:

> Lower federal courts are without authority to impose their own interpretation of federal constitutional law upon the state courts. Furthermore, they have absolutely no legitimate authority to compel state courts to redefine marriage to include persons of the same sex. Not only is the Mobile federal court acting without constitutional authority, but it is doing so in a manner inconsistent with the Eleventh Amendment to the United States Constitution.
>
> I urge you to uphold and support the Alabama Constitution and the Constitution of the United States to the best of your ability, So Help You God!

16. With his "advisory letter," Chief Justice Moore sent the probate judges his 27-page memorandum of law, addressing his legal conclusion that probate judges do not have to defer to nor are they in any sense bound by lower

federal court decisions on constitutional questions. He also presented argument for his assertion that the District Court lacked jurisdiction. He concluded with the declaration that he is of "the opinion that an Alabama probate judge may deliver his own considered opinion, subject to review, on the issues raised in Searcy and Strawser and is not required to defer to federal district and circuit court rulings on the same questions."

17. On February 8, 2015, Chief Justice Moore issued an Administrative Order in which he directly addressed the effect of Strawser and its initial injunction on Alabama's 68 probate judges, advising that the decision affected only the parties to the litigation and did not affect probate judges who were not parties. (At that time, Strawser was not a class action and did not include all of Alabama's 68 probate judges as defendants.) In this Administrative Order, Chief Justice Moore "incorporated fully" his February 3, 2015 letter and memorandum.

18. Four days later, on February 12, 2015, in Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015), tracking its decision in Searcy, the District Court again held unconstitutional the denial of marriage licenses to same-

sex couples under the Alabama marriage laws as violating both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

19. In that February 12, 2015 order in Strawser, the Court enjoined Mobile County Probate Judge Don Davis, who had been added as a party-defendant (the only probate-judge defendant at that time), from refusing to issue marriage licenses to the same-sex party-plaintiffs. 44 F. Supp. 3d at 1209.

20. On that same day, February 12, 2015, API was docketed in the Alabama Supreme Court. The Alabama marriage laws had already been declared unconstitutional in Searcy and Strawser. Yet, the petitioners in API sought the Court's issuance of a writ of mandamus declaring, contrary to the District Court's orders and injunctions, that the Alabama marriage laws do not violate the United States Constitution and directing probate judges to continue to enforce the Alabama marriage laws by complying with the laws' ministerial duty to issue marriage licenses only to opposite-sex couples.

21. On March 3, 2015, the Alabama Supreme Court, contrary to the rulings of the District Court declaring the Alabama marriage laws unconstitutional, declared those provisions to be constitutional and ordered all probate judges who were not parties to Strawser to enforce those provisions in executing their duties regarding the issuance of marriage licenses.[3] Shortly thereafter, the Alabama Supreme Court extended its ruling to all probate judges.

22. On March 6, 2015, three days after the Alabama Supreme Court's ruling in API, plaintiffs in Strawser moved to amend the complaint and to certify both a plaintiff class and a defendant class.

23. On May 21, 2015, the District Court certified a plaintiff class, consisting of same-sex couples subject to discrimination under the Alabama marriage laws, and a defendant class consisting of all Alabama probate judges who, in the performance of their duties, are subject to compliance with those laws. Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015).

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[3] In several instances in API, the Court showed sensitivity to the existing District Court orders and injunctions by specifically limiting its writ to those probate judges not then subject to injunctions.

24. By separate order on the same date, May 21, 2015, the District Court in Strawser issued a preliminary injunction enjoining all members of the defendant class, i.e., all probate judges in Alabama, from refusing to issue marriage licenses to same-sex couples for the sole reason the couple is of the same sex. Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015).

25. In issuing the injunction, the District Court enjoined all Alabama probate judges from following any law or order, specifically including any order or injunction issued by the Alabama Supreme Court, that would deny a marriage license to same-sex couples on that ground alone:

> If the named Plaintiffs or any member of the Plaintiff Class take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, . . . the members of the Defendant Class may not deny them a license on the ground that they are same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order, including any injunction issued by the Alabama Supreme Court [API] pertaining to same-sex marriage. This injunction binds . . . any of the members of the Defendant Class who would seek to enforce the

> marriage laws of Alabama which prohibit or fail to recognize same-sex marriage.

Id. at 1330.

26. In issuing the May 21, 2015 preliminary injunction in Strawser, the District Court considered whether it should abstain from issuing an injunction to all probate judges that would conflict with the injunction issued by the Alabama Supreme Court. The Court declined to abstain, finding that because the class plaintiffs in Strawser were not parties to API and therefore not bound by the conclusions of the Alabama Supreme Court, they have a right to have their rights enforced. The District Court cited Hale v. Bimco Trading, 306 U.S. 375, 377-78 (1939), for the rule of law: a successful mandamus proceeding in a state court against state officials to enforce a challenged statute does not bar injunctive relief in a United States district court where the federal plaintiffs are not bound by the state court mandamus. The District Court, in addition, noted its holding that the Alabama marriage laws are unconstitutional predated the Alabama Supreme Court's action. 105 F. Supp. 3d at 1329.

27. The District Court stayed its injunction pending a decision of the United States Supreme Court in Obergefell and related cases. 105 F. Supp. 3d at 1330. When the opinion in Obergefell was issued on June 26, 2015, the District Court's stay—by its own terms—was lifted, and its injunction went into effect.

28. By ordering all Alabama probate judges not to deny same-sex couples a marriage license on the ground that it is prohibited by any order in API, the District Court rendered ineffective any existing order or future order in API (or any other case) that would require probate judges to deny a same-sex couple a marriage license based on the same-sex character of the couple. When the District Court's injunction became effective, the writ and ensuing injunction that had been issued by the Alabama Supreme Court in API no longer had any enforceable legal effect.

29. On June 26, 2015, the United States Supreme Court issued its decision in Obergefell. The Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the United States Constitution and

that bans on same-sex marriage violate these constitutional provisions. The Court clearly stated:

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.

id. at 2607, and

> It follows that the Court also must hold—and it now does hold—that that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Id. at 2607-08 (emphasis supplied). The United States Supreme Court, thus, gave clear instruction that no state court decision holding to the contrary could stand.

30. On June 29, 2015, three days after the Obergefell decision, the Alabama Supreme Court invited additional briefing on the effect of Obergefell on the Court's existing orders in API.

31. On July 1, 2015, the District Court "clarified" its May 21, 2015 preliminary injunction, in Strawser, stating that it "is now in effect and binding on all members of the Defendant Class [all] probate judges in Alabama who are otherwise bound by [the Alabama marriage laws]." Strawser (Unpublished Order, July 1, 2015).

32. When the District Court lifted the stay, all provisions of that Court's order became effective, including that all 68 probate judges in Alabama are enjoined from following any conflicting Alabama law, including Alabama Supreme Court orders. Obergefell's holding had become binding precedent for all lower federal courts and state courts.

33. The following statement by the District Court in Strawser describes the unenforceability of the Alabama Supreme Court's injunction in API: "Judge Davis and the other probate judges cannot be held liable for violating Alabama state law when their conduct was required by the United States Constitution," 105 F. Supp. 3rd at 1330. From that point forward, the Alabama Supreme Court's order, or any subsequently rendered order to the same effect, would no longer be effective or enforceable, i.e., those enjoined by API could no longer follow the order. Clearly, probate judges could no longer exercise a ministerial duty to refuse to issue marriage licenses to same-sex couples based solely on their same-sex character.

34. Alabama's probate judges, the defendant class in Strawser, almost immediately recognized they were bound by

Obergefell and the injunction in Strawser. Two weeks after Obergefell, on July 10, 2015, the probate judges filed their "Response to Plaintiffs' Motion for a Permanent Injunction" in Strawser wherein they explicitly recognized their duty to obey the injunction of the District Court, as follows:

> Probate judges take an oath to follow the law upon investiture. The U.S. Supreme Court has now resolved the conflict between this Court's rulings and the ruling of the Alabama Supreme Court. Both Courts are entitled to interpret the U.S. Constitution, and the U.S. Supreme Court decided that this Court's interpretation was correct, essentially overruling the Alabama Supreme Court's determination. The bottom line is this: probate judges in this State were following Court orders when they either refused to issue marriage licenses or refused to issue same-sex marriage licenses. Now that confusion about the law has been cleared by the U.S. Supreme Court, there is no indication that the probate judges will violate their oath and refuse to follow what the Supreme Court has established, and what the Alabama Attorney General and the Governor have said is now the law of the land.

Strawser, Doc. 152, p. 12-13, July 10, 2015.

35. The diminution of API was also recognized by United States Court of Appeals for the Eleventh Circuit. On an interlocutory appeal, one of the probate judges argued the District Court's preliminary injunction was improper because it conflicted with an order from the

Alabama Supreme Court. The Eleventh Circuit summarily rejected this argument on October 20, 2015, stating:

> Since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court decision in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause, and that bans on same-sex marriage are unconstitutional.

Strawser v. State, (No. 15-12508-CC, Oct. 20, 2015 (11th Cir. 2015). The Court of Appeals dismissed the appeal as to the District Court's granting of the preliminary injunction. The mandate of the Court of Appeals, making that Court's decision final, was issued on the same date.

B. Administrative Order of January 6, 2016 to Present

36. On January 6, 2016, the Alabama Supreme Court, by invitation to the parties, still had before it for consideration the issue of the effect of the decision in Obergefell on the Court's decision in API. While the Court had set July 10, 2015, as the due date for the filings, the Court had taken no action, and the certificate of judgment signifying the case was closed had not been issued.

37. On January 6, 2016, API remained a pending case although its injunction against probate judges had been eviscerated by Obergefell's holding that same-sex couples have the fundamental right to marry in all States," 135 S.Ct. at 2607, and "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character," id. at 2608, as well as by the injunction filed in the District Court.

38. On January 6, 2016—despite the United States Supreme Court's ruling in Obergefell, despite the United States District Court's injunction against all Alabama probate judges that specifically enjoined them from obeying any contrary order of the Alabama Supreme Court, and despite the Eleventh Circuit's October 20, 2015 order recognizing the abrogation of API by Obergefell—Chief Justice Moore, under the guise of his administrative authority as Chief Justice, unilaterally issued an Administrative Order to all probate judges that they continue to have a ministerial duty under API to enforce the Alabama marriage laws against same-sex couples. His Administrative Order states in part:

IT IS ORDERED AND DIRECTED THAT:

> Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.

39. In light of all of the circumstances set out in this complaint, Chief Justice Moore's January 6, 2016 Administrative Order directs or gives the appearance of directing probate judges to not obey the Strawser injunction that specifically prohibits them from following the Alabama Supreme Court's order in API.

40. In his Administrative Order of January 6, 2016, Chief Justice Moore again refused to acknowledge and respect an injunction issued by a United States District Court—this time, an injunction enjoining all 68 probate judges from following any orders of the Alabama Supreme Court that are contrary to the District Court's order.[4]

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[4] See n. 1, regarding the 2003 Order of the Court of the Judiciary finding Chief Justice Moore in violation of the Canons by willfully refusing to obey a United States District Court injunction. As noted, the Court imposed the sanction of removal from office.

41. Chief Justice Moore flagrantly disregarded and abused his authority as chief administrative officer of Alabama's judicial branch granted to him under Ala. Const. 1901, art. VI, and Ala. Code 1975, § 12-2-30, in issuing his Administrative Order of January 6, 2016, and ordering or appearing to order the probate judges to not obey the District Court's injunction; in so doing, Chief Justice Moore knowingly ordered them to commit violations of the Canons of Judicial Ethics, knowingly subjecting them to potential prosecution and removal from office.

42. Chief Justice Moore's ignoring the federal injunction and his issuance of the January 6, 2016 Administrative Order echoed his declared belief that United States District Courts, standing alone, have no authority or no superior authority over the constitutionality of state statutes or state-court orders enjoining state officials from enforcing those statutes, without the United States Supreme Court's acquiescence. He reconfirmed that position in his testimony before the Commission. When asked about the specific provision in the District Court's injunction that probate judges are enjoined regardless of any opinion or injunction issued by the Alabama Supreme

Court, Chief Justice Moore testified, "That's not the United States Supreme Court. That is a federal district judge in the Southern District of Alabama." (R. 46.)

43. By issuing the Administrative Order of January 6, 2016, Judge Moore attempted to directly interfere or gave the appearance of attempting to interfere with the United States District Court in the Southern District of Alabama in the exercise of its jurisdiction under federal law.[5]

44. In issuing his Administrative Order of January 6, 2016, Chief Justice Moore demonstrated an unwillingness to apply the law.

45. Chief Justice Moore's order of January 6, 2016, was contrary to clear and determined law about which there is no confusion or unsettled question.

46. By issuing his unilateral order of January 6, 2016, Chief Justice Moore flagrantly disregarded a fundamental constitutional right guaranteed in all states, as declared by the United States Court in Obergefell.

[5] 28 U.S.C § 1331 (federal-question jurisdiction) and 22 U.S.C. § 2283 (authority to stay a state court proceeding in aid of its jurisdiction).

47. In his Administrative Order of January 6, 2016, Chief Justice Moore completely and flagrantly ignored, i.e., failed to even mention, the existence of the Alabama federal lawsuits Searcy and Strawser, as though no injunction had been issued ordering the probate judges not to follow any conflicting orders of the Alabama Supreme Court.

48. Nor did Chief Justice Moore mention, in his January 6, 2016 Administrative Order, that the United States Court of Appeals for the Eleventh Circuit had declared that the order in API had been "abrogated" by Obergefell.

49. Chief Justice Moore flagrantly disregarded and abused his authority as the chief administrative officer of Alabama's judicial branch by issuing the Administrative Order of January 6, 2016, and attempting to directly interfere or giving the appearance of attempting to interfere with the Alabama Supreme Court's consideration of the pending issues in API.

50. By issuing the Administrative Order of January 6, 2016, Chief Justice Moore flagrantly disregarded and abused his authority as the chief administrative officer of

Alabama's judicial branch, by addressing in an administrative order, substantive legal issues which are within the exclusive province of the Court to adjudicate. See Alabama Code 1975 § 12-2-30.

51. In issuing his Administrative Order of January 6, 2016, Chief Justice Moore flagrantly exceeded his authority as the chief administrative officer of Alabama's judicial branch by using his administrative authority to speak for the entire court on matters briefed and pending before the Court. While he stated in his order that he could not address the issue pending before the Court in API, i.e., the effect of Obergefell on the existing orders of the Alabama Supreme Court in API, he proceeded to do just that.

52. In issuing his Administrative Order of January 6, 2016, Chief Justice Moore flagrantly disregarded and abused his authority as the chief administrative officer of Alabama's judicial branch in substituting his individual opinion for that of the Court in the Administrative Order of January 6, 2016.

53. By unilaterally issuing his Administrative Order of January 6, 2016, Chief Justice Moore willfully failed to respect the orderly legal procedures available to the

parties—procedures designed to protect the due process rights of the parties and the integrity and independence of the courts—to ask the courts, including the federal district court, to determine or resolve any issues about which a conflict or confusion existed, and he further willfully failed to respect the authority of those courts to decide those matters.

54. By issuing his unilateral order of January 6, 2016, Chief Justice Moore flagrantly disregarded the fundamental right of the parties in API to be heard on the matter.

55. By issuing his order of January 6, 2016, Chief Justice Moore abandoned his role as a neutral and detached chief administrator of the judicial system.

56. By issuing his order of January 6, 2016, and his comments therein, Chief Justice Moore disqualified himself from any further participation in API, yet chose to participate in the decision of the Court in ultimately dismissing that case. Notwithstanding that he should have disqualified himself from the case because of his prior actions, he filed a lengthy concurrence.

57. Chief Justice Moore's stated reason for issuing his administrative order of January 6, 2016, was because there was confusion and uncertainty among the probate judges who issue marriage licenses as to which conflicting order to obey.

II.

Charges

58. All of the following charges are based on the totality of the facts and circumstances, separately and severally, alleged in this complaint.

Charge One

59. By willfully issuing his Administrative Order of January 6, 2016, in which he directed or appeared to direct all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples, Chief Justice Roy S. Moore violated the following Alabama Canons of Judicial Ethics in that he, separately and severally:

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to participate in establishing, maintaining, and enforcing and to himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B; and/or

g. Failed to perform the duties of his office impartially, Canon 3.

Charge Two

60. In demonstrating his unwillingness in his Administrative Order of January 6, 2016, to follow clear law, Chief Justice Roy S. Moore violated the following Alabama Canons of Judicial Ethics in that he, separately and severally:

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to participate in establishing, maintaining, and enforcing and to himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B; and/or

h. Failed to perform the duties of his office impartially, Canon 3.

Charge Three

61. In issuing his Administrative Order of January 6, 2016, and in abusing his administrative authority by addressing and/or deciding substantive legal issues while acting in his administrative capacity, Chief Justice Roy S. Moore violated the following Alabama Canons of Judicial Ethics in that he, separately and severally,

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to participate in establishing, maintaining, and enforcing and to himself observe high standards

of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B; and/or

g. Failed to perform the duties of his office impartially, Canon 3.

Charge Four

62. In issuing his Administrative Order of January 6, 2016, and thereby substituting his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court, i.e., the effect of the decision of the United States Supreme Court in Obergefell, Chief Justice Roy S. Moore violated the following Alabama Canons of Judicial Ethics in that he, separately and severally:

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B;

g. Failed to perform the duties of his office impartially, Canon 3; and/or

h. Failed to abstain from public comment about a pending proceeding in his own court, Canon 3A(6).

Charge Five

63. By issuing his Administrative Order of January 6, 2016, and willfully abusing his administrative authority to issue the Administrative Order of January 6, 2016, Chief Justice Roy S. Moore interfered with legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama's

probate judges were parties. In so doing, Chief Justice Moore, separately and severally, violated the following Alabama Canons of Judicial Ethics:

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B; and/or

g. Failed to perform the duties of his office impartially, Canon 3.

Charge Six

64. By taking legal positions in his Administrative Order of January 6, 2016, on a matter pending before the Alabama Supreme Court in API, Chief Justice Roy S. Moore placed his impartiality into question on those issues, thus disqualifying himself from further proceedings in that

case; yet he participated in further proceedings in API, after having disqualified himself by his actions, in violation of the following Alabama Canons of Judicial Ethics, separately and severally:

a. Failed to uphold the integrity and independence of the judiciary, Canon 1;

b. Failed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1;

c. Failed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2;

d. Failed to respect and comply with the law, Canon 2A;

e. Failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A;

f. Failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B; and/or

g. Failed to perform the duties of his office impartially and diligently, Canon 3.

DONE this 6th day of May, 2016.

THE ALABAMA JUDICIAL INQUIRY COMMISSION

Billy C. Bedsole
Chairman

BY ORDER OF THE COMMISSION

DOCUMENTS ATTACHED

Attached to this Complaint and incorporated as a part hereof are true and correct copies of the following documents:

A. Administrative Order of January 6, 2016

B. In the Matter of Roy S. Moore, Chief Justice of Alabama, COJ #33 (Nov. 13, 2003)

C. Moore v. Judicial Inquiry Commission, 891 So. 2d 848 (Ala. 2004)

D. Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015)

E. Strawser v. Strange, (Unpublished Order, Jan. 26, 2015)

F. January 27, 2015 Letter from Chief Justice Moore to Governor Robert Bentley

G. Searcy v. Strange, (Unpublished Order, Jan. 28, 2015)

H. February 3, 2015 Letter from Chief Justice Moore to All Probate Judges of Alabama, with a Memorandum from Chief Justice Moore on "Sanctity of Marriage ruling"

I. Administrative Order of February 8, 2015

J. Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015)

K. Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] __ So. 3d __ (Ala. 2015)

L. Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015)

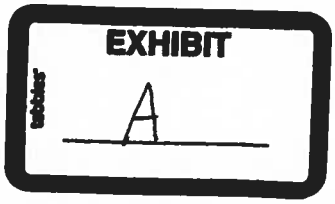
M. Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015)

N. Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

O. Strawser v. Strange, (Unpublished Order, July 1, 2015)

P. Strawser v. State, (No. 15-12508-CC, Oct. 20, 2015 (11th Cir. 2015)

Q. Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 4, 2016] __ So. 3d __ (Ala. 2016)



ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF THE ALABAMA SUPREME COURT

WHEREAS, IN CONSIDERATION OF THE FOLLOWING:

On March 3, 2015 the Alabama Supreme Court issued a lengthy opinion upholding the constitutionality of Article I, Section 36.03(b), Ala. Const. 1901 ("the Sanctity of Marriage Amendment"), and Section 30-1-19(b), Ala. Code 1975 ("the Marriage Protection Act"), which both state: "Marriage is inherently a unique relationship between a man and a woman." Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___ (Ala 2015) (hereinafter "API").

The API opinion relied on earlier opinions of the United States Supreme Court and the Alabama Supreme Court for authority. In 1885 the Supreme Court of the United States described marriage as "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Murphy v. Ramsey, 114 U.S. 15, 45. The Alabama Supreme Court similarly stated that "'[T]he relation of marriage is founded on the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness.'" Goodrich v. Goodrich, 44 Ala. 670, 675 (1870).

In its March 3 order in API, the Alabama Supreme Court stated that "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act]. Nothing in the United States Constitution alters or overrides this duty."

A week later the Court reaffirmed that its March 3 order bound every Alabama probate judge "to the end of achieving order and uniformity in the application of Alabama's marriage laws." API (Order of March 10, 2015). The Court also stated that "all probate judges in this State may issue marriage licenses only in accordance with Alabama law as described in our opinion of March 3, 2015." API (Order of March 12, 2015).

On June 26, 2015, approximately three months after the Alabama Supreme Court issued its orders in API, the United States Supreme Court in Obergefell v Hodges, 135 S. Ct. 2584 (2015), held unconstitutional certain marriage laws in the

states of Michigan, Kentucky, Ohio, and Tennessee, which fall within the jurisdiction of the Sixth Circuit Court of Appeals. In its 5-4 opinion the high court noted that "[t]hese cases come from Michigan, Kentucky, Ohio, and Tennessee." Obergefell, 135 S. Ct. at 2593.

On June 29, 2015, three days after the issuance of the Obergefell opinion, the Alabama Supreme Court invited the parties in API to address **the "effect of the Supreme Court's decision on this Court's existing orders in this case** no later than 5:00 p.m. on Monday, July 6." API (Order of June 29, 2015) (emphasis added).

Several parties filed briefs in response to that request. Additionally, on Sept 16, 2015, Washington County Probate Judge Nick Williams filed an "Emergency Petition for Declaratory Judgement and/or Protective Order in Light of Jailing of Kentucky Clerk Kim Davis," which requested the Court "to prevent the imprisonment and ruin of their State's probate judges who maintain fidelity to their oath of office and their faith." On September 22, Elmore County Probate Judge John Enslen joined Judge Williams's Emergency Petition. On October 5, Judge Enslen filed a separate petition for a declaratory judgment arguing additional grounds for relief.

In October, Eunie Smith, President of the Eagle Forum of Alabama and Dr. John Killian, Sr., former President of the Alabama Baptist State Convention, published a guest opinion on AL.com stating that they "anxiously await" the pending decision on the effect of Obergefell on the orders in API. In December, the Southeast Law Institute of Birmingham, whose President is local counsel for some of the parties in API, stated in an online commentary that he was "encouraging all of those who have great concern over this issue to be prayerfully patient" as the Court deliberates.

Confusion and uncertainty exist among the probate judges of this State as to the effect of Obergefell on the "existing orders" in API. Many probate judges are issuing marriage licenses to same-sex couples in accordance with Obergefell; others are issuing marriage licenses only to couples of the opposite gender or have ceased issuing all marriage licenses. This disparity affects the administration of justice in this State.

I am not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.

Nevertheless, recent developments of potential relevance since Obergefell may impact this issue. The United States Court of Appeals for the Eighth Circuit recently ruled that Obergefell did not directly invalidate the marriage laws of states under its jurisdiction. While applying Obergefell as precedent, the Eighth Circuit rejected the Nebraska defendants' suggestion that Obergefell mooted the case. The Eighth Circuit stated: "The [Obergefell] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee -- not Nebraska." Waters v Ricketts, 798 F.3d 682, 685 (8th Cir. 2015) (emphasis added). In two other cases the Eighth Circuit repeated its statement that Obergefell directly invalidated only the laws of the four states in the Sixth Circuit. See Jernigan v Crane, 796 F.3d 976, 979 (8th Cir. 2015) ("not Arkansas"); Rosenbrahn v Daugaard, 799 F.3d 918, 922 (8th Cir 2015) ("not South Dakota").

The United States District Court for the District of Kansas was even more explicit: "While Obergefell is clearly controlling Supreme Court precedent, it did not directly strike down the provisions of the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses ...." Marie v Mosier, 2015 WL 4724389 (D. Kan. August 10, 2015). Rejecting the Kansas defendants' claim that Obergefell mooted the case, the District Court stated that "Obergefell did not rule on the Kansas plaintiffs' claims." Id.

The above cases reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court. "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." Martin v. Wilks, 490 U.S. 755, 762 (1989). "[N]o court can make a decree which will bind anyone but a party ... no matter how broadly it words its decree." Alemite Mfg. Corp. v Staff, 42 F.3d 832, 832 (2d Cir. 1930). See also Rule 65, Fed R. Civ. P., on the scope of an injunction.

Whether or not the Alabama Supreme Court will apply the

reasoning of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of Kansas, or some other legal analysis is yet to be determined. Yet the fact remains that the administration of justice in the State of Alabama has been adversely affected by the apparent conflict between the decision of the Alabama Supreme Court in API and the decision of the United States Supreme Court in Obergefell.

NOW THEREFORE,

As Administrative Head of the Unified Judicial System of Alabama, authorized and empowered pursuant to Section 12-2-30(b)(7), Ala. Code 1975, to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state," and under Section 12-2-30(b)(8), Ala. Code 1975, 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 in that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." United States v. Mine Workers, 330 U.S. 258, 293 (1947) (quoted in Fields v. City of Fairfield, 143 So. 2d 177, 180 (Ala. 1962));

IT IS ORDERED AND DIRECTED THAT:

Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.

DONE January 6, 2016.

Roy S. Moore
Chief Justice

EXHIBIT
B

COURT OF THE JUDICIARY CASE NO. 33

IN THE MATTER OF: ROY S. MOORE
CHIEF JUSTICE
OF THE SUPREME COURT OF ALABAMA

FINAL JUDGMENT

At the outset, this court emphasizes that this is a case concerning only possible violations of the Canons of Judicial Ethics. It is not a case about the public display of the Ten Commandments in the State Judicial Building nor the acknowledgment of God. Indeed, we recognize that the acknowledgment of God is very much a vital part of the public and private fabric of our country. Moreover, this is not a case to review the judgment of Judge Myron Thompson nor the actions of the United States Court of Appeals for the Eleventh Circuit or the United States Supreme Court. This court does not have the authority or jurisdiction to reexamine those issues.

The Court of the Judiciary is a nine-member constitutionally-created judicial body that is only "convened to hear complaints filed by the Judicial Inquiry Commission" pertaining to alleged violations by judges of the Canons of Judicial Ethics as adopted by the Supreme Court of Alabama. The Canons are not merely guidelines for proper judicial

conduct; they are binding on all judges by the oath taken upon assuming office, and violations of the Canons can serve as the basis for disciplinary action. The charge or charges against a judge must be proved by clear and convincing evidence before any discipline may be imposed.

On January 15, 2001, Roy S. Moore took office as Alabama's Chief Justice. On August 1, 2001, Chief Justice Moore had a monument displaying the Ten Commandments and other historic and religious quotations installed in the rotunda of the State Judicial Building. After that monument was installed, two civil actions, Glassroth v. Moore, Case No. CV-01-T-1268-N, and Maddox and Howard v. Moore, Case No. CV-01-T-1269-N, were filed in the United States District Court for the Middle District of Alabama. These actions, brought against Chief Justice Moore in his official capacity, claimed that the monument violated the Establishment Clause of the First Amendment to the United States Constitution and sought its removal. Following a hearing on November 18, 2002, the district court determined that the monument violated the First Amendment, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), and on December 19, 2002, it entered a permanent injunction directing Chief Justice Moore to remove the

monument from the Alabama Judicial Building, Glassroth v. Moore, 242 F. Supp. 2d 1067 (M.D. Ala. 2002). That injunction was stayed by the district court pending Chief Justice Moore's appeal to the United States Court of Appeals for the Eleventh Circuit. Glassroth v. Moore, 242 F. Supp. 2d 1068 (M.D. Ala. 2002). The Court of Appeals affirmed the judgment of the district court on July 1, 2003. Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003).

Subsequent to the decision of the Court of Appeals, on August 5, 2003, the district court entered its "Final Judgment and Injunction." Glassroth v. Moore, 275 F. Supp. 2d 1347 (M.D. Ala. 2003). The district court ordered that its previous stay be dissolved and enjoined Chief Justice Moore to remove the monument by no later than August 20, 2003. The district court stated that it could "levy substantial fines against Chief Justice Moore in his official capacity and, thus, against the State of Alabama itself, until the monument [was] removed." 275 F. Supp. 2d at 1349. Chief Justice Moore stated publicly that he would not remove the monument as directed by the district court. On August 21, 2003, the monument remained in the rotunda of the State Judicial Building, and on that date the eight associate justices of the

Alabama Supreme Court ordered that the monument be removed.

On August 22, 2003, the Judicial Inquiry Commission (hereinafter referred to as "the JIC") filed a complaint with this court against Chief Justice Moore. In the six-charge complaint, the JIC alleged that Chief Justice Moore had committed six violations of the Canons of Judicial Ethics when he willfully failed to comply with a binding and existing court order of the United States District Court for the Middle District of Alabama. The JIC alleged that Chief Justice Moore violated the Canons of Judicial Ethics in (1) failing to uphold the integrity and independence of the judiciary; (2) failing to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved; (3) failing to avoid impropriety and the appearance of impropriety; (4) failing to respect and comply with the law; (5) failing to conduct himself in a manner promoting public confidence in the integrity and impartiality of the judiciary; and (6) failing to avoid conduct prejudicial to the administration of justice so as to bring the judicial office into disrepute, and the case was thereby presented to the Court of the Judiciary. On October 2, 2003, Chief Justice Moore filed an answer to the complaint filed by the JIC,

denying the allegations. Among other things, Chief Justice Moore argued that the complaint was premature because he had not been held in contempt of the district court's order, that the district court's order was unlawful, and that to follow the order would violate his oath of office.

On November 12, 2003, the case was called for trial before the Court of the Judiciary. At the hearing on that date, Chief Justice Moore was the only witness, although numerous exhibits were admitted by stipulation of the parties. Justice Moore testified regarding his belief that compliance with the federal court injunction would violate his oath of office. He was shown JIC Exhibit 18, admitted by stipulation, which was the transcript of his testimony before the JIC on August 22, 2003, which he read over carefully before testifying about it. This transcript includes the following testimony before the JIC:

> "I did what I did because I upheld my oath. And that's what I did, so I have no apologies for it. I would do it again. I didn't say I would defy the court order. I said I wouldn't move the monument. And I didn't move the monument, which you can take that as you will."

At the time he made this statement before the JIC, all efforts by Chief Justice Moore and his attorneys to prevent the federal court injunction from becoming legally and

ethically binding and obligatory had been exhausted in the federal district court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. Moore was asked on November 12, 2003, during the trial if he still stood by this statement, and he testified under oath that he stood by this statement without any changes. When he so testified on November 12, 2003, the United States Supreme Court had, at that time, also denied his petition for certiorari on November 3, 2003.

Chief Justice Moore contends that the disciplinary proceedings against him are improper because they were instituted in the absence of any finding of contempt by the federal district court that entered the judgment barring him from displaying the Ten Commandments monument in the rotunda of the State Judicial Building. We disagree. The motion to hold Chief Justice Moore in contempt was filed in the federal district court on August 21, 2003, but the other eight justices of the Alabama Supreme Court ordered the removal of the monument on that same date, thereby rendering the motion moot. As the Supreme Court of Connecticut has said:

> "Whether a judge's conduct compromises the integrity of the court or lessens public confidence in the judicial system cannot turn on whether contempt can lie. By accepting his office, a judge undertakes to

> conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect. That standard cannot be gauged by whether the conduct is punishable by contempt."

In re Dean, 246 Conn. 183, 196, 717 A.2d 176, 183 (1998) (emphasis added; citations and quotation marks omitted).

Chief Justice Moore also claims that the district court order was in conflict with the Alabama Constitution, relying primarily upon the preamble to the Alabama Constitution of 1901:

> "We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama."

The general rule is that courts interpret preambles as statements of general purpose and intent and not as sources of authority for the government. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905). Further, the oath taken by Chief Justice Moore commands him to support both the United States and Alabama Constitutions. In the event of conflict between the constitutions of Alabama and the United States, the Constitution of the United States must prevail. The Supremacy Clause of the United States Constitution provides that "[t]his

Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." U.S. Const., art. VI.

Chief Justice Moore further contends that the JIC complaint was premature because, he says, he had not exhausted all avenues of possible review in that the United States Supreme Court had not issued its order denying certiorari review of Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003). However, the court notes that the federal district court that entered the judgment against Chief Justice Moore clearly stated that "upon receipt of an appellate mandate affirming this court's decision and injunction, the court will immediately lift the stay and enter another injunction, along the lines of the December 19[, 2002,] injunction, requiring the removal of the Ten Commandments monument within fifteen days." Glassroth v. Moore, 242 F. Supp. 2d 1068, 1070 (M.D. Ala. 2002). Further, the possibility that the United States Supreme Court would grant certiorari to review the Eleventh Circuit's judgment affirming the judgment of the district court did not affect the binding nature of the district

court's and appellate court's judgments. It is well settled that "neither the right to petition for a writ of certiorari nor the actual filing of such a petition stays the enforcement of the underlying judgment." Peabody Coal Co. v. Navajo County, 117 Ariz. 335, 338, 572 P.2d 797, 800 (1977).

Chief Justice Moore did not have the legal authority to decide whether the federal court order issued to him in his official capacity as the State's highest judicial officer should be obeyed; rather, he was constitutionally mandated to obey it. "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." Cooper v. Aaron, 358 U.S. 1, 19 (1958).

Any person who undertakes a solemn oath to carry out a public trust must act in a manner that demonstrates both respect for and compliance with established rules of law of the institution that person serves. Here, however, we are faced with a situation in which the highest judicial officer of this state has decided to defy a court order. The Supreme Court of the United States has said:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are

creatures of the law and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882). The Supreme Judicial Court of Maine, in a judicial-disciplinary case, said that "[l]awless judicial conduct -- the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself -- is as threatening to the concept of government under law as is the loss of judicial independence." In re Ross, 428 A.2d 858, 861 (Me. 1981). To that same effect is the observation of the Supreme Court of New Mexico that "judges who, as self-perceived defenders of justice, set themselves above the law, to promote a personal belief about what the law should be, do a disservice to justice." In re Eastburn, 121 N.M. 531, 538, 914 P.2d 1028, 1035 (1996).

We respect and hold in high regard the right of every American citizen to express his or her views. However, when an individual, especially a judge, undertakes a position of civil authority, that person must conform his or her conduct in the exercise of public duties according to the established rules of law and accepted rules of ethics. If a judge, or any other person, disagrees with a determination by a governmental body, that person has every right to seek legal redress. When

one exhausts all legal remedies, one must refrain from conduct adversely affecting the impartial and objective carrying out of one's official duties. Chief Justice Moore sought legal redress by appealing to the limit of judicial review; he was bound by, and had the duty to follow, the rulings of the federal courts.

As was stated by the Alabama Supreme Court in its Order No. 03-01, "the justices of this Court are bound by solemn oath to follow the law, whether they agree or disagree with it, because all the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it." It is therefore the unanimous decision of this court that Chief Justice Moore has violated the Alabama Canons of Judicial Ethics as alleged by the JIC in its complaint.

Section 6.18 of the Judicial Article of the Alabama Constitution of 1901, as amended by Amendment No. 581, provides that this court shall have the authority, after a public hearing, to remove from office, to suspend without pay, or to censure a judge or to apply such other sanction as may be prescribed by law for violation of a Canon of Judicial Ethics, misconduct in office, or failure to perform his or her duties. This court has considered all possible sanctions to

determine an appropriate disposition in this case. While this court respects Chief Justice Moore's right to his personal opinion on the underlying issues presented in the federal court litigation, the fact remains that Chief Justice Moore is the chief judicial officer of this State and is held to a higher standard than a member of the general public.

This court has found that Chief Justice Moore not only willfully and publicly defied the orders of a United States district court, but upon direct questioning by the court he also gave the court no assurances that he would follow that order or any similar order in the future. In fact, he affirmed his earlier statements in which he said he would do the same. Under these circumstances, there is no penalty short of removal from office that would resolve this issue. Anything short of removal would only serve to set up another confrontation that would ultimately bring us back to where we are today. This court unanimously concludes that Chief Justice Moore should be removed from the office of Chief Justice.

It is therefore ORDERED and ADJUDGED by the court that Roy S. Moore be, and he hereby is, removed from the office of Chief Justice of the Supreme Court of Alabama.

DATED: 11-13-03

WILLIAM C. THOMPSON
Chief Judge

ROBERT G. KENDALL
Judge

J. SCOTT VOWELL
Judge

JOHN J. DOBSON
Judge

JOHN V. DENSON
Judge

SAM JONES
Judge

JAMES L. NORTH
Judge

SUE H. MCINNISH
Judge

WILLIAM D. MELTON
Judge

EXHIBIT
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891 So.2d 848
Supreme Court of Alabama.

Roy S. MOORE
v.
JUDICIAL INQUIRY COMMISSION
of the STATE OF ALABAMA.

1030398.
|
April 30, 2004.

Synopsis

Background: The Judicial Inquiry Commission filed a formal complaint against the Chief Justice of the Alabama Supreme Court in the Court of the Judiciary charging him with violating the Alabama Canons of Judicial Ethics. The Court of the Judiciary, No. 33, found that the Chief Justice had violated the Canons of Judicial Ethics as charged in the complaint, and removed him from office. The Chief Justice appealed.

Holdings: The special Supreme Court, appointed by the Governor of Alabama, held that:

[1] correctness of a federal court's ruling is not reviewable by the Court of the Judiciary;

[2] Court of the Judiciary neither applied an improper "religious test" in analyzing the issues before it, nor violated Chief Justice's constitutional rights to hold his religious beliefs, when it removed Chief Justice from office; and

[3] Chief Justice's violations of Alabama Canons of Judicial Ethics warranted his removal from office.

Affirmed.

Harry J. Wilters, Jr., Special Justice, concurred specially and filed opinion.

West Headnotes (9)

[1] Judges
Evidence

The applicable standard of review for an order from the Court of the Judiciary is that the evidence must be clear and convincing; that is, orders of the Court of the Judiciary are entitled to a presumption of correctness if the charge is supported by clear and convincing evidence.

Cases that cite this headnote

[2] Judges
Reference and Review

Factual findings of the Court of the Judiciary based on ore tenus evidence are presumed correct, and the Court of the Judiciary's judgment based on those findings will not be disturbed unless the appellate court, after considering all the evidence and all reasonable inferences that can be drawn therefrom, concludes that the judgment is plainly and palpably wrong, manifestly unjust, or without supporting evidence.

Cases that cite this headnote

[3] Appeal and Error
Findings of Court or Referee

In the absence of specific factual findings, the Supreme Court will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous and against the great weight and preponderance of the evidence.

Cases that cite this headnote

[4] Judges
Reference and Review

In reviewing an appeal from a judgment of the Court of the Judiciary finding a judge guilty of the charges against him or her, the Supreme Court must consider the evidence in the light most favorable to the Judicial Inquiry Commission, the prevailing party.

Cases that cite this headnote

[5] **Judges**
Proceedings and Review

Correctness of a federal court's ruling is not reviewable by the Court of the Judiciary, as only a superior federal court can review the merits of a ruling by a federal court.

Cases that cite this headnote

[6] **Judges**
Proceedings and Review

Court of the Judiciary is a trial court whose jurisdiction is limited to the trial of complaints filed by the Judicial Inquiry Commission charging a judge or justice with violating one or more of the Canons of Judicial Ethics.

1 Cases that cite this headnote

[7] **Judges**
Proceedings and Review

Court of the Judiciary does not have the authority to correct or control the judgments of federal courts, and the general rule is that state and federal courts will not interfere with or try to restrain each other's proceedings.

Cases that cite this headnote

[8] **Constitutional Law**
Ten Commandments

Judges
Grounds and Sanctions

Court of the Judiciary neither applied an improper "religious test" in analyzing the issues before it, nor violated Alabama Supreme Court Chief Justice's constitutional rights to hold his religious beliefs, when it removed Chief Justice from office for refusing to obey a valid order of a United States District Court requiring him to remove monument engraved with the Ten Commandments which he had placed in the Alabama State Judicial Building; case was not about a public official's right to acknowledge God, but rather, it was about a public official who refused to obey a valid order of a United States District Court. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 3.

2 Cases that cite this headnote

[9] **Judges**
Grounds and Sanctions

Alabama Supreme Court Chief Justice's violations of the Alabama Canons of Judicial Ethics, by willfully refusing to obey a lawful and binding order of a United States District Court requiring him to remove monument engraved with the Ten Commandments which he had placed in the Alabama State Judicial Building, warranted his removal from office. Canons of Jud.Ethics, Canons 1, 2, subds. A, B.

1 Cases that cite this headnote

Attorneys and Law Firms

***850** Andrew D. Dill, Foundation for Moral Law, Inc., Montgomery; and Phillip L. Jauregui, Birmingham, for appellant.

William H. Pryor, Jr., atty. gen.; Rosa H. Davis, chief asst. atty. gen.; and Charles B. Campbell and Melissa K. Atwood, asst. attys. gen., for appellee.

PER CURIAM. [1]

Facts

The material facts are not disputed. Roy S. Moore was elected to the office of Chief Justice of the Alabama Supreme Court in a statewide general election in November 2000. On January 15, 2001, Moore was sworn in as Alabama's 28th Chief Justice. Pursuant to the Judicial Article adopted in 1973 by constitutional Amendment No. 328 to the Alabama Constitution of 1901, Chief Justice Moore also became the administrative head of Alabama's Unified Judicial System ("The chief justice of the supreme court shall be the administrative head of the judicial system." Ala. Const.1901, Amend. No. 328, § 6.10).

After being elected Chief Justice, Moore designed and commissioned the construction of a granite monument that would, in Chief Justice Moore's words, "depict the moral foundation of law." Without notifying the eight Associate Justices of the Supreme Court, Chief Justice Moore installed the monument in the rotunda of the Judicial Building in Montgomery. The Judicial Building houses the Alabama Supreme Court, the Alabama Court of Criminal Appeals, the Alabama Court of Civil Appeals, the Alabama Administrative Office of Courts, and the State Law Library. The monument was installed during the night of July 31, 2001. [2]

***851** The monument was positioned in the rotunda of the Judicial Building so that it could be seen by every person entering the Judicial Building through the main entrance and by everyone who crossed the rotunda going to or from the State Law Library, the offices of the clerks of the intermediate appellate courts, and the public stairway, elevator, and restrooms. The monument was aptly described in the opinion of the federal district court in *Glassroth v. Moore,* 229 F.Supp.2d 1290, 1294-95 (M.D.Ala.2002):

> "The monument is in the shape of a cube, approximately three feet wide by three feet deep by four feet tall. The top of the monument is carved as two tablets with rounded tops, the common depiction of the Ten Commandments; these tablets slope toward a person viewing the monument from the front. The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a lectern....
>
> "Engraved on the left tablet is: 'I am the Lord thy God'; 'Thou shalt have no other Gods before me'; 'Thou shalt not make unto thee any graven image'; 'Thou shalt not take the name of the Lord thy God in vain'; and 'Remember the sabbath day, to keep it holy.' Engraved on the right tablet is: 'Honour thy father and thy mother'; 'Thou shalt not kill'; 'Thou shalt not commit adultery'; 'Thou shalt not steal'; 'Thou shalt not bear false witness'; and 'Thou shalt not covet.' In addition, the four sides of the monument are engraved with fourteen quotations from various secular sources; these sources are identified on the monument to the extent that each quotation is accompanied by the name of a document or an individual. On each side of the monument, one of the quotations is larger than the others and is set apart in relief. The smaller quotations on each side are intended to relate to that larger quotation. The north (front) side of the monument has a large quotation from the Declaration of Independence, 'Laws of nature and of nature's God,' and smaller quotations from George Mason, James Madison, and William Blackstone that speak of the relationship between nature's laws and God's laws. The large quotation on the west (right) side of the monument is the National Motto, 'In God We Trust'; the smaller quotations on that side were excerpted from the Preamble to the Alabama Constitution and the fourth verse of the National Anthem. The south (back) side of the monument bears a large quotation from the Judiciary Act of 1789, 'So help me God,' and smaller quotations from George Washington and John Jay speaking of oaths and justice. The east (left) side of the monument has a large quotation from the Pledge of Allegiance 1954, 'One nation under God, indivisible, with liberty and justice for all,' and smaller quotations from the legislative history of the Pledge, James Wilson, and Thomas Jefferson suggesting that both liberty and morality are based on God's authority....
>
> "... The court is impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse."

***852** When he unveiled the monument, Chief Justice Moore delivered prepared remarks, copies of which were made available to those present at the unveiling. Chief Justice Moore stated that the monument depicted the moral foundation of the law and that it "serves to remind the appellate courts and judges of the circuit and district courts of this State and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama Constitution that in order to establish justice we must invoke 'the favor and guidance of almighty God.' "

The Litigation

Shortly after the monument was installed, two actions were filed in the United States District Court for the Middle District of Alabama, seeking injunctions requiring Chief Justice Moore to remove the monument from the Judicial Building. These actions were consolidated for trial. *Glassroth v. Moore,* 229 F.Supp.2d at 1293. Following a trial that lasted several days, United States District Judge Myron Thompson issued an opinion on November 18, 2002, holding that by placing the monument in the rotunda of the Judicial Building,

Chief Justice Moore had violated the Establishment Clause of the Constitution of the United States. Judge Thompson ordered Chief Justice Moore to remove the monument within 30 days of the date of his opinion. The district court did not issue an injunction at the time it issued its opinion, but it stated that if the monument was not removed within 30 days, it would enter an injunction requiring the monument's removal within 15 days of the entry of the injunction. Chief Justice Moore appealed Judge Thompson's ruling to the United States Court of Appeals for the Eleventh Circuit.

Chief Justice Moore refused to remove the monument within the 30 days allowed by the November 18 order, and the district court, on December 19, 2002, issued a permanent injunction requiring Chief Justice Moore to remove the monument within 15 days (i.e., by January 3, 2003). *Glassroth v. Moore,* 242 F.Supp.2d 1067 (M.D.Ala.2002). Chief Justice Moore petitioned the district court for a stay of the injunction pending the disposition of his appeal to the Eleventh Circuit Court of Appeals. The district court granted the stay. *Glassroth v. Moore,* 242 F.Supp.2d 1068 (M.D.Ala.2002). On July 1, 2003, the Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court. *Glassroth v. Moore,* 335 F.3d 1282 (11th Cir.2003).

Chief Justice Moore did not seek a stay of the judgment of the Eleventh Circuit Court of Appeals and did not ask for a rehearing of that decision. On July 30, 2003, the court of appeals issued its mandate directing the district court to enforce its order to remove the monument. Pursuant to the mandate, the district court issued a mandatory injunction on August 5, 2003, requiring that the monument be removed no later than August 20, 2003. In response to this order, Chief Justice Moore issued a public statement on August 14, 2003, in which he said he had "no intention of removing the monument."

Chief Justice Moore did not appeal from the mandatory injunction; however, after the time for filing an appeal had expired, Chief Justice Moore asked the district court to stay the injunction pending the disposition of a petition for a writ of mandamus and prohibition he had filed in the United States Supreme Court. [3]

***853** On August 18, 2003, the district court denied the stay:

> "The Chief Justice could have appealed, and still can appeal, the August 5 final judgment and injunction to the Eleventh Circuit Court of Appeals. 28 U.S.C. §§ 1291, 1291 (1994 & Supp.2003). The Chief Justice should not be able to circumvent, or avoid, the Eleventh Circuit and keep that appellate court out of the orderly appellate process.
>
> "....
>
> "... The Chief Justice argues that granting the writ will 'aid [the United States Supreme] Court to conduct an orderly and timely review of [his] petition for writ of certiorari.' ...
>
> "This argument is completely meritless. Aside from the fact, as stated above, that the Chief Justice can simply seek relief in the Eleventh Circuit from this court's August 5 final judgment and injunction, this court, not once, but twice, invited the Chief Justice to invoke the orderly and established process under the federal rules for a stay of injunction pending a petition to the United States Supreme Court for a writ of certiorari-invitations which the Chief Justice declined."

On August 15, 2003, Chief Justice Moore filed with the Eleventh Circuit Court of Appeals a motion to recall the mandate and a motion to stay the injunction. That motion was denied on August 19. On August 20, 2003, Chief Justice Moore filed with the United States Supreme Court an application for recall and stay. The Supreme Court denied the application that same day.

When the monument was not removed by the August 20, 2003, deadline as ordered by the district court, some of the original plaintiffs filed a motion in the district court asking that court to hold Chief Justice Moore in contempt for refusing to obey the mandatory order of August 5. Before the district court ruled on the motion, the eight Associate Justices of the Alabama Supreme Court, exercising the power to overrule an administrative order of the Chief Justice given them by Ala.Code 1975, § 12-5-20, issued an order directing that the monument be removed. On August 21, 2003, the Alabama attorney general notified the district court that the action of the Associate Justices had rendered moot the motion to hold Chief Justice Moore in contempt. Removing the monument avoided the imposition of substantial daily fines against the State of Alabama, which the citizens of Alabama would have had to pay.

On the afternoon of August 21, 2003, Chief Justice Moore held a press conference at which he announced that he was, "very disappointed with my colleagues who have decided to act in response to [the federal district court's] order [and] exercise authority under § 12-5-20, Alabama Code, to remove

the monument of the Ten Commandments from the rotunda of the Alabama Judicial Building."

On August 22, 2003, the Judicial Inquiry Commission filed a formal complaint against Chief Justice Moore in the Court of the Judiciary charging Chief Justice Moore with violating Canons 1, 2A, and 2B of the Alabama Canons of Judicial Ethics.

On September 26, 2003, Chief Justice Moore filed a petition for a writ of certiorari with the United States Supreme Court, asking that Court to reverse the judgment of the Eleventh Circuit Court of Appeals. The United States Supreme ***854** Court denied Chief Justice Moore's petition for the writ of certiorari on November 3, 2003.

Canons 1, 2A, and 2B of the Canons of Judicial Ethics, which Chief Justice Moore was charged with violating, read as follows:

"*CANON 1*

"A Judge Should Uphold the Integrity and Independence of the Judiciary

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

"*CANON 2*

"A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

"A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"B. A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute."

Once a complaint is filed against a judge by the Judicial Inquiry Commission, the judge is automatically disqualified to act as a judge until the complaint is resolved in the Court of the Judiciary. Ala. Const.1901, Amend. No. 328, § 6.19. After the complaint against him was filed on August 22, Chief Justice Moore was no longer able to perform his duties as Chief Justice, pending resolution of the complaint in the Court of the Judiciary.

The Court of the Judiciary set October 3, 2003, as the deadline for Chief Justice Moore to file an answer to the complaint filed by the Judicial Inquiry Commission. Chief Justice Moore timely filed his answer, generally denying the allegations of the complaint and alleging that his refusal to obey the mandatory injunction issued by the federal district court was based upon his belief that the injunction was unlawful and illegal and that to obey it would require him to violate the oath of office by which he swore to uphold the Constitution of the State of Alabama.

After considering the evidence, most of which was not disputed, the Court of the Judiciary rendered its judgment and issued a unanimous opinion holding that Chief Justice Moore had violated the Canons of Judicial Ethics as charged in the complaint. The sanction imposed by the Court of the Judiciary was Chief Justice Moore's removal from office.

The Court of the Judiciary disposed of several pretrial motions filed by Chief Justice Moore.[4] This Court also considered ***855** and denied several preliminary motions before reaching the merits of this appeal.[5] We turn now to the merits.

The Scope of Review

The Court of the Judiciary is a constitutionally created court with limited jurisdiction. Ala. Const.1901, Amend. No. 581, § 6.18 (proclaimed ratified June 19, 1996). It can decide only cases involving charges brought against judges by the Judicial Inquiry Commission. § 6.18(a). "A judge aggrieved by a decision of the Court of the Judiciary may appeal to the Supreme Court [of Alabama]. The Supreme Court shall review the record of the proceedings on the law and the facts." § 6.18(b).

Standard of Review

[1] [2] [3] [4] "The applicable standard of review for an order from the Court of the Judiciary is that the evidence must be clear and convincing. That is, 'orders of the Court of the Judiciary are entitled to a presumption of correctness if the charge is supported by "clear and convincing evidence." ' " *In re Sheffield,* 465 So.2d 350, 355 (Ala.1984) (quoting *In re Samford,* 352 So.2d 1126, 1129 (Ala.1977)). With regard to questions of law, this Court's review is de novo. *Rogers Found. Repair, Inc. v. Powell,* 748 So.2d 869, 871 (Ala.1999)(quoting *Ex parte Graham,* 702 So.2d 1215 (Ala.1997)). However, factual findings of the Court of the Judiciary based on ore tenus evidence are presumed correct, and "[the Court of the Judiciary's] judgment based on those findings will not be disturbed unless the appellate court, after considering all the evidence and all reasonable inferences that can be drawn therefrom, concludes that the judgment is plainly and palpably wrong, manifestly unjust, or without supporting evidence." *Boggan v. Judicial Inquiry Comm'n,* 759 So.2d 550, 555 (Ala.1999). In the absence of specific factual findings, "this court will assume that the trial court [[6]] made those findings necessary to support its judgment, unless such findings would be clearly erroneous and against the great weight and preponderance of the evidence." 759 So.2d at 555 (quoting *Powers v. Judicial Inquiry Comm'n,* 434 So.2d 745, 749 (Ala.1983)). Further, in reviewing an appeal from a judgment of the Court of the Judiciary finding the judge guilty of the charges against him or her, the Supreme Court "must consider the evidence ... in the light most favorable to the Judicial Inquiry Commission, the prevailing party." *Boggan,* 759 So.2d at 555.

Our review is also guided by the Supremacy Clause of the United States Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const., art. VI, cl. 2.

Since the case of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), was decided, it has been without doubt that the federal judiciary has the power and authority, among other things, to interpret the provisions of the United States Constitution in determining whether a provision, such as the Establishment Clause, has been violated.

***856** *Issues On Appeal*

I.

Chief Justice Moore contends initially that the Judicial Inquiry Commission failed to prove, and the Court of the Judiciary failed to consider, "the threshold question" of whether the order of the federal district court requiring the removal of the monument was "lawful." Chief Justice Moore himself points out that the charges against him are based on his willful failure "to comply with an existing and binding court order directed to him." Chief Justice Moore reasons, however, that if the order of the federal district court was not lawful, he "was ethically bound by his solemn oath to comply with the Constitutions of the United States and of Alabama, and not [with] the unlawful court order." Chief Justice Moore contends that the federal court order was unlawful and that the Court of the Judiciary set a "dangerous precedent" by holding that he was required to obey that order because, he argues, "the ethical duties of his office [of Chief Justice of the Alabama Supreme Court] require that he disobey unlawful orders."

The order of the federal district court provides, in part:

> "The Establishment Clause of the First Amendment, made binding upon the States through the Fourteenth Amendment to the United States Constitution, provides that government 'shall make no law respecting an establishment of religion.' The question presented to this court is whether the Chief Justice of the Alabama Supreme Court violated the Establishment Clause when he placed a slightly over two-and-a-half ton monument-engraved with the Ten Commandments and other references to God-in the Alabama State Judicial Building with the specific purpose and effect, as the court finds from the evidence, of acknowledging the Judeo-Christian God as the moral foundation of our laws.... [T]his court holds that the evidence is overwhelming and the law is clear that the Chief Justice violated the Establishment Clause."

229 F.Supp.2d at 1293.

Chief Justice Moore contends 1) that as Chief Justice he "could not make a law," and 2) that the installation of the monument was not an establishment of religion. Therefore, Chief Justice Moore contends, the order of the federal district

court was unlawfully predicated on a First Amendment analysis.

Chief Justice Moore also claims that the order of the federal district court is unlawful in that it violates the Tenth Amendment to the United States Constitution, which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The Preamble to the Alabama Constitution of 1901 provides: "We, the people of Alabama, in order to establish justice, ... invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution...." Chief Justice Moore says that he installed the monument, consistent with this "constitutional[ly] divine acknowledgment," to recognize the God mentioned in the Preamble to the Alabama Constitution. He also says that power has not been delegated to the United States to deny the State of Alabama the right to do so. Chief Justice Moore argues that states have the inherent power to establish a system of justice, *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and that Alabama established its ***857** system of justice "invoking the favor and guidance of Almighty God." Thus, according to Chief Justice Moore, the order of the federal district court directly and unlawfully interferes with a power expressly reserved to the State of Alabama. Based upon his reasoning that the federal court order was unlawful and that the Court of the Judiciary refused to consider the lawfulness of that order, Chief Justice Moore concludes that the Court of the Judiciary's holding that he violated the Canons of Judicial Ethics is not supported by clear and convincing evidence. We disagree.

Chief Justice Moore contends that the Court of the Judiciary "shirked its duty" by assuming that the federal district court's order was lawful and in failing to determine as an issue whether that order was unlawful. Chief Justice Moore supports this argument with a statement from the dissenting opinion in *Butler v. Alabama Judicial Inquiry Commission,* 802 So.2d 207, 221 (Ala.2001): "In a proceeding before the Alabama Court of the Judiciary, a defendant can raise and have decided a constitutional challenge to a judicial canon that the defendant is charged with violating." (Houston, J., dissenting). Chief Justice Moore, relying on that dissent, reasons that if the Court of the Judiciary can decide a constitutional challenge to a canon of judicial ethics, it can likewise decide a constitutional challenge to a court order that forms the basis for the charges against a judge before the Court of the Judiciary.

Chief Justice Moore also says that it was error for the Court of the Judiciary to refuse to consider his *reasons* for not complying with the order of the federal district court, and to consider only whether Chief Justice Moore had refused to comply and would continue to do so. Chief Justice Moore states that the judgment of the Court of the Judiciary has in effect created an "oath transfer rule"-that an oath taken by a public official is no longer to a constitution but to a court's opinion, even one contrary to the constitution.

[5] The Judicial Inquiry Commission argues, however, that the Court of the Judiciary correctly refused to engage in a collateral review of the merits of the federal court order, because, it argues, the Court of the Judiciary lacks the jurisdiction or authority to engage in such a review. The Judicial Inquiry Commission says that it did not contend, and that the Court of the Judiciary did not hold, that the federal order was correctly decided. Rather, the Judicial Inquiry Commission says that it argued, and that the Court of the Judiciary held, that the correctness of a federal court's ruling is not reviewable by the Court of the Judiciary. We agree. Only a superior federal court can review the merits of a ruling by a federal court. Chief Justice Moore exercised his right to obtain such a review in the federal system, and the federal appellate courts consistently upheld the order of the federal district court.

[6] **[7]** "The Court of the Judiciary is a trial court whose jurisdiction is limited to the trial of complaints filed by the [Judicial Inquiry Commission] charging a judge or justice with violating one or more of the [Canons of Judicial Ethics]." *Butler,* 802 So.2d at 222 (Houston, J., dissenting). Further, the Court of the Judiciary does not have the authority to correct or control the judgments of federal courts, and the general rule is that state and federal courts will not interfere with "or try to restrain each other's proceedings." *Donovan v. City of Dallas,* 377 U.S. 408, 412, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) (cited in *Moody v. State ex rel. Payne,* 295 Ala. 299, 329 So.2d 73 (1976)); *Ex parte Consolidated Graphite Corp.,* 221 Ala. 394, 129 So. 262 (1930).

***858** We hold that there was before the Court of the Judiciary clear and convincing evidence that a federal injunction directed to Chief Justice Moore existed; that that injunction was a binding order of a court of competent

jurisdiction; and that Chief Justice Moore intentionally and publicly defied the injunction. [7]

II.

[8] Chief Justice Moore next argues that the Court of the Judiciary applied a constitutionally prohibited "religious test" in order to remove him from office for publicly acknowledging God through the installation of the monument. Chief Justice Moore notes that the Alabama Constitution, § 3, provides that "no religious test shall be required as a qualification to any office or public trust under this state." Chief Justice Moore says that the Judicial Inquiry Commission, in its argument before the Court of the Judiciary, characterized him as "totally unrepentant" for his refusal to cease his acknowledgment of God. According to Chief Justice Moore, he was forced to "deny God by removing the monument because a federal judge told him so."

Chief Justice Moore also contends that the judgment of the Court of the Judiciary runs afoul of the United States Constitution because, he argues, "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty,* 435 U.S. 618, 626, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978). The result of the judgment of the Court of the Judiciary, Chief Justice Moore argues, is to prohibit him from holding both his religious belief and his public office, and he reasons that if that judgment is based on the Canons of Judicial Ethics, then the Canons constitute a religious test that bar people with religious beliefs from holding judicial office.

The Judicial Inquiry Commission argues, however, that the Court of the Judiciary did not impose a "religious test" upon Chief Justice Moore and that it did not order that he forsake the public acknowledgment of God or surrender his office. The Judicial Inquiry Commission maintains that neither it nor the Court of the Judiciary asked Chief Justice Moore to deny God or to forsake a public acknowledgment of God. In fact, the Court of the Judiciary, in its final judgment, expressly recognized that the acknowledgment of God "is very much a vital part of the public ***859** and private fabric of our country." We agree.

The Judicial Inquiry Commission quotes *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940):

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

The *Cantwell* Court noted that the First Amendment "embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.,* at 303-04, 60 S.Ct. 900 (footnote omitted).

We cannot agree with Chief Justice Moore that the Court of the Judiciary applied an improper "religious test" in analyzing the issues before it, nor can we agree that its judgment violated Chief Justice Moore's constitutional rights to hold his religious beliefs.

We note that the actual statements made by the attorney general on behalf of the Judicial Inquiry Commission in closing argument before the Court of the Judiciary were as follows:

> "Because Chief Justice Roy Moore, despite his special responsibility as the highest judicial officer of our state, placed himself above the law, by refusing to abide by a final injunction entered against him, and by urging the public through the news media to support him, and because he is totally unrepentant, this court regrettably must remove Chief Justice Roy Moore from the office of Chief Justice of Alabama. The rule of law upon which our freedom depends, whether a judge, a police officer, or a citizen, demands no less."

The Judicial Inquiry Commission did not contend, as Chief Justice Moore argues, that sanctions were sought because Chief Justice Moore is totally unrepentant "for his refusal to cease his acknowledgment of God." And the Court of the Judiciary's opinion refutes Chief Justice Moore's assertion that he was forced "to deny God by removing the monument because a federal judge told him so."

Two federal courts have concluded that this case is not about a public official's right to acknowledge God, as Chief Justice Moore contends. Rather, this case is about a public official who took an oath to uphold the Constitution of the United States and then refused to obey a valid order of a United States District Court holding that the placement of the monument in the Judicial Building violated the Establishment Clause of the First Amendment to the United States Constitution.

We quote with approval the following from the opinion of the United States Court of Appeals for the Eleventh Circuit, affirming the order of the federal district court:

> "The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of ***860** course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. *See generally, e.g., Meredith v. Fair,* 328 F.2d 586, 589-90 (5th Cir.1962)(en banc) ...; *Williams v. Wallace,* 240 F.Supp. 100 (M.D.Ala.1965) ... (Johnson, J.,) ...; *cf. United States v. Barnett,* 376 U.S. 681 ... (1964).
>
> "Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case. See U.S. Const. Art. III, § 1; id., Art. VI, cl. 2. What a different federal district court judge wrote forty years ago, in connection with the threat of another high state official to defy a federal court order, remains true today:
>
> > " 'In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.'
>
> "*United States v. Wallace,* 218 F.Supp. 290, 292 (N.D.Ala.1963)....
>
> "The rule of law does require that every person obey judicial orders when all available means of appealing them has been exhausted.... The rule of law will prevail."

Glassroth v. Moore, 335 F.3d at 1302-03.

III.

Chief Justice Moore argues that the Court of the Judiciary denied his right to due process of law by refusing to hear his argument regarding the lawfulness of the order of the federal district court and by denying certain of the motions he filed with the Court of the Judiciary.

Citing *Stallworth v. City of Evergreen,* 680 So.2d 229 (Ala.1996), Chief Justice Moore contends that he had a property interest in the office of chief justice, that the Fourteenth Amendment prohibits states from depriving citizens of their property without due process of law, and that " 'the opportunity to present reasons ... why [a] proposed action should not be taken is a fundamental due process requirement.' " 680 So.2d at 233 (quoting *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545-46, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). Chief Justice Moore says that "in its haste to remove [him] from office, the [Court of the Judiciary] 'stopped up its ears' and ignored [his] argument that the underlying federal court order was unlawful and that such [an] order did not require his obedience as is consistent with his oath and conscience."

Chief Justice Moore also contends that the denial by the Court of the Judiciary of his "substantive motions" was a further violation of his due-process rights. The Court of the Judiciary denied filings that included 1) a motion to subpoena records that Chief Justice Moore indicated would show that the members of the Court of the Judiciary were not appointed in conformity with Ala. Const.1901, Amend. No. 581, § 6.18; 2) a motion seeking the opportunity to serve interrogatories on, and conduct voir dire of, members of the Court of the Judiciary regarding their possible bias against Chief Justice Moore; 3) an inquiry into the term of office of one of the members of the Court of the Judiciary; 4) an inquiry into

vacancies on the Court of the Judiciary; 5) a motion to allow "full and unrestricted media coverage" of Chief Justice Moore's hearing before the Court of the Judiciary; 6) a motion to disqualify ***861** Attorney General Pryor; 7) a motion to dismiss the complaint against Chief Justice Moore; and 8) a motion for a judgment of acquittal and/or a judgment as a matter of law.

The Judicial Inquiry Commission maintains, however, that the Court of the Judiciary provided Chief Justice Moore with due process *at every stage* of these proceedings. The Judicial Inquiry Commission argues that because the Court of the Judiciary has no jurisdiction to review the merits of a federal court order, Chief Justice Moore was not deprived of due process of law by the refusal of the Court of the Judiciary to accept evidence and to hear arguments on the merits of the order of the federal district court. We agree. Chief Justice Moore was not deprived of due process by the rejection of the Court of the Judiciary of evidence on an issue over which that court has no jurisdiction.

IV.

Chief Justice Moore argues that "[t]he very same rules wielded by the [Court of the Judiciary] to punish [him] for refusing to deny God were themselves predicated upon the Holy Scriptures and moral precepts of Almighty God." Chief Justice Moore points out that Thomas Goode Jones, a lawyer and the governor of Alabama from 1890-1894, authored the first code of ethics for lawyers, which was adopted by the Alabama State Bar Association in 1887. Jones based his code of ethics substantially on the writings of George Sharswood and David Hoffman, early pioneers in the field of legal ethics. Sharswood and Hoffman relied heavily on scriptural teachings and moral principles as a basis for their work. Alva H. Maddox, *Lawyers: The Aristocracy of Democracy or "Skunks, Snakes, and Sharks"?*, 29 Cumb. L.Rev. 323 (1998-99).

The Judicial Inquiry Commission contends that the piety of those behind the drafting of Alabama's first code of legal ethics does not authorize Chief Justice Moore to willfully disobey a federal court order directed to him, nor does it excuse his disobedience. Chief Justice Moore cites no authority that provides an exception to the rule of law that one must obey a court order or that would allow disobedience to a court order on the basis of one's religious beliefs. Further, there is no such exception to the application of the Canons of Judicial Ethics to Chief Justice Moore's conduct.

Penalty of Removal From Office

[9] The Judicial Inquiry Commission argues that this Court should not review the sanction imposed on Chief Justice Moore by the Court of the Judiciary because, it argues, there is clear and convincing evidence that Chief Justice Moore violated the Canons of Judicial Ethics, as charged, and once the Supreme Court determines that "the record shows by clear and convincing evidence that the charge or charges have been committed, then [the Supreme] Court does not have the authority to reduce or reject the sanction imposed by the [Court of the Judiciary]." *Boggan,* 759 So.2d at 555.

Chief Justice Moore, however, argues that, even if this Court finds that the Court of the Judiciary correctly held that he violated the Canons of Judicial Ethics, nothing in the Alabama Constitution of 1901 limits this Court's review of the sanction imposed by the Court of the Judiciary. Section 6.18(b), Amend. No. 581, Ala. Const.1901, provides that "[a] judge aggrieved by a decision of the Court of the Judiciary may appeal to the Supreme Court," and the Supreme Court "shall review the record of the proceedings on the law and the facts." Thus, argues Chief Justice Moore, if review of the sanction ***862** imposed by the Court of the Judiciary is beyond the reach of the reviewing court, then "a judge aggrieved by a decision of the Court of the Judiciary" has only one-half of the remedy set out in § 6.18(b). Thus, argues Chief Justice Moore, this Court should not only review the sanction imposed by the Court of the Judiciary and reverse its order imposing the sanction, it should also overrule the holding in *Boggan* and "remove the hindrance" *Boggan* poses to appellate review of a judgment of the Court of the Judiciary.

As we held in Part I of this opinion, the Court of the Judiciary had before it clear and convincing evidence that Chief Justice Moore violated Canons 1, 2A, and 2B of the Canons of Judicial Ethics, as charged in the complaint filed by the Judicial Inquiry Commission, by willfully refusing to obey a lawful and binding order of a federal court. We decline to revisit *Boggan* and its predecessor holdings, as Chief Justice Moore suggests we do. We find it unnecessary to do so because we conclude, as did the *Boggan* Court, that the sanction of removal from office was not plainly and palpably wrong, manifestly unjust, or without supporting evidence. In fact, the evidence of Chief Justice Moore's violations of

the Canons of Judicial Ethics was sufficiently strong and convincing that the Court of the Judiciary could hardly have done otherwise than to impose the penalty of removal from office. We find that the sanction imposed was proper and that it is supported by the evidence of record.

Conclusion

In addition to hearing oral arguments in this case, this Court has thoroughly reviewed the record on appeal and has carefully studied the briefs submitted by the parties. We conclude that the judgment of the Court of the Judiciary is fully supported by clear and convincing evidence, as is the sanction it imposed of removing Chief Justice Moore from office. The judgment of the Court of the Judiciary is hereby affirmed in its entirety.

AFFIRMED.

JOHN M. PATTERSON, Special Chief Justice, and JANIE L. SHORES, KENNETH F. INGRAM, BRAXTON KITTRELL, EDWARD DWIGHT FAY, JR., and J. RICHMOND PEARSON, Special Justices, concur.

HARRY J. WILTERS, JR., Special Justice, concurs specially.

HARRY J. WILTERS, JR., Special Justice (concurring specially).

I concur fully with the opinion of the Court. I write specially to add some personal observations.

The evidence received and considered by the Court of the Judiciary confirmed that Chief Justice Moore failed to obey an order of the federal district court. The Chief Justice never said whether, after he had exhausted all of his legal remedies, he would move the monument back into the rotunda of the Judicial Building.

Chief Justice Moore offered both legal and biblical arguments for his failure to comply with the federal court's order. Even if the biblical arguments could be considered, the Bible also tells us:

> "Every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him; consequently anyone who rebels against authority is resisting a divine institution, and those who so resist have themselves to thank for the punishment they will receive. For government, a terror to crime, has no terrors for good behavior. You wish to have no fear of the authorities? Then continue to do right and you will have their approval, for they are ***863** God's agents working for your good. But if you are doing wrong, then you will have cause to fear them; it is not for nothing that they hold the power of the sword, for they are God's agents of punishment, for retribution on the offender. That is why you are obliged to submit. It is an obligation imposed not merely by fear of retribution but by conscience. That is also why you pay taxes. The authorities are in God's service and to these duties they devote their energies. Discharge your obligations to all men; pay tax and toll, reverence and respect, to those to whom they are due." [8]

"Submit yourselves to every human institution for the sake of the Lord." [9]

"In him everything in heaven and on earth was created, not only things visible but also the invisible orders of thrones, sovereignties, authorities, and powers." [10]

"Remind them to be submissive to the government and the authorities, to obey them, and to be ready for any honorable form of work; to slander no one, not to pick quarrels, to show forbearance and a gentle disposition towards all men." [11]

"He said to them, 'Then pay Caesar what is due to Caesar, and pay to God what is due to God.' " [12]

"Do as the king commands you, and if you have to swear by God, do not be precipitate. Leave the king's presence and do not persist in a thing which displeases him; he does what he chooses. For the king's word carries authority. Who can

question what he does? Whoever obeys a command will come to no harm. A wise man knows in his heart the right time and method for action. There is a time and a method for every enterprise." [13]

All Citations

891 So.2d 848

Footnotes

1 Amendment No. 581, Ala. Const.1901, § 6.18(b), which amends the Judicial Article, provides that "[a] judge aggrieved by a decision of the Court of the Judiciary may appeal to the supreme court." Following the filing of the notice of appeal in this case on December 10, 2003, the members of the Alabama Supreme Court acknowledged that Canon 3 of the Alabama Canons of Judicial Ethics required their recusal from consideration of this appeal. In a unanimous order dated December 11, 2003, the Court, pursuant to Amend. No. 328, §§ 6.10 and 6.21(h), and Ala.Code 1975, § 12-2-14, authorized the acting Chief Justice to "participate with the Governor in a random drawing" of 20 names from a pool of retired justices and judges who are members of the Alabama State Bar and capable of service. The order provided: "From the 20 judges so drawn, the first 7 judges shall constitute the special Supreme Court. In the event any judge so selected is not willing and able to serve, then that judge's place shall be filled by the next judge in order of selection.... The undersigned Justices, having provided a mechanism affording Roy S. Moore a right to be heard, hereby recuse."

On December 16, 2003, in compliance with the random selection procedure, Governor Bob Riley appointed the following seven judges to serve as the special Supreme Court of Alabama in case no. 1030398, *Moore v. Judicial Inquiry Commission of the State of Alabama:* The Honorable John M. Patterson, of Tallapoosa County, Special Chief Justice; the Honorable Janie L. Shores, of Jefferson County; the Honorable Kenneth F. Ingram, of Clay County; the Honorable Harry J. Wilters, Jr., of Baldwin County; the Honorable Braxton Kittrell, of Mobile County; the Honorable Edward Dwight Fay, Jr., of Madison County; and the Honorable J. Richmond Pearson, of Washington County, Special Associate Justices.

2 The installation was videotaped, with Chief Justice Moore's permission, by Coral Ridge Ministries (an evangelical Christian media organization). Copies of the videotape have been sold to raise funds for the activities of Coral Ridge Ministries, which include the underwriting of expenses of Chief Justice Moore's legal defense.

3 In that petition Chief Justice Moore asked the Supreme Court to direct the Eleventh Circuit Court of Appeals and the federal district court to refrain from enforcing any order requiring the removal of the monument, arguing that the relief he sought from the United States Supreme Court was not available in any other court.

4 Including, among others, a motion to disqualify members of the Court of the Judiciary; a motion to move the hearing before the Court of the Judiciary to a larger facility; a motion to bar participation by or statements from lawyers who had represented Chief Justice Moore in other proceedings; and a motion to disqualify then Attorney General Pryor and representatives of his office (and a motion to reconsider the denial of that motion, supported by affidavits of former Governor Fob James, Jr., and his son, Forrest H. James III). The Court of the Judiciary considered every motion in turn, granting some and denying others.

5 Including motions to disqualify acting Chief Justice Houston and the Associate Justices of the Alabama Supreme Court and to vacate the order appointing this special Supreme Court; motions to disqualify all members of this Court on the ground that the selection process was contrary to law; and motions seeking the recusal of certain members of this special Supreme Court.

6 The Court of the Judiciary was the trial court in this case. See *Boggan,* 759 So.2d at 555.

7 The following are comments made by Chief Justice Moore:

"I have no intention of removing the monument of the Ten Commandments and the moral foundation of our law. To do so would, in effect, result in the disestablishment of our system of justice in this State." Public statement issued by Chief Justice Moore on August 14, 2003.

"I did what I did because I upheld my oath. And that's what I did, so I have no apologies for it. I would do it again. I didn't say I would defy the court order. I said I wouldn't move the monument." Chief Justice Moore's statement to the Judicial Inquiry Commission on August 22, 2003.

"I did say I will not move the monument, that this I could not do. I did not say I would defy [the order of the federal district court]. I did not use those words; but I did say I would not move the monument." Testimony of Chief Justice Moore before the Court of the Judiciary on November 12, 2003.

"Q. [Attorney General Pryor]: Mr. Chief Justice, you stand by your testimony of August 22 of this year before the Judicial Inquiry Commission that you would do it again, don't you?
"A. [Chief Justice Moore]: I would do everything that I have done again, yes." Testimony of Chief Justice Moore before the Court of the Judiciary on November 12, 2003.

8 *Romans* 13:1-7, The New English Bible.

9 I *Peter* 2:13, The New English Bible.

10 *Colossians* 1:16, The New English Bible.

11 *Titus* 3:1-2, The New English Bible.

12 *Matthew* 22:21, The New English Bible.

13 *Ecclesiastes* 8:3-6, The New English Bible.

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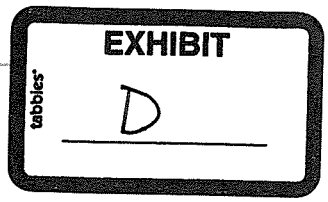

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Ex parte State ex rel. Alabama Policy Institute, Ala., March 3, 2015

81 F.Supp.3d 1285
United States District Court,
S.D. Alabama,
Southern Division.

Cari D. SEARCY and Kimberly McKeand, individually and as parent and next friend of K.S., a minor, Plaintiffs,
v.
Luther STRANGE, in his capacity as Attorney General for the State of Alabama, Defendant.

Civil Action No. 14–0208–CG–N.
|
Signed Jan. 23, 2015.

Synopsis

Background: Same-sex couple brought action challenging constitutionality of Alabama's prohibition against same-sex marriages. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Callie V.S. Granade, J., held that:

[1] United States Supreme Court's summary dismissal of appeal from state supreme court upholding ban on same-sex marriage for want of substantial federal question did not serve as binding precedent, and

[2] Alabama's prohibition against same-sex marriage violated same-sex couple's rights under Due Process and Equal Protection Clauses.

Plaintiffs' motion granted.

Stay conditionally granted, 2015 WL 328825.

West Headnotes (6)

[1] Courts
Supreme Court decisions

Courts
Particular questions or subject matter

United States Supreme Court's summary dismissal, in *Baker v. Nelson,* of appeal from decision of Minnesota Supreme Court upholding ban on same-sex marriage for want of substantial federal question did not serve as binding precedent barring federal district court from considering constitutionality of state's ban on same-sex marriages.

4 Cases that cite this headnote

[2] Constitutional Law
Sexual orientation

Classification based on sexual orientation is not suspect for purposes of Equal Protection Clause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

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Laws that implicate fundamental rights are subject to strict scrutiny under Equal Protection Clause, and will survive constitutional analysis only if narrowly tailored to compelling government interest. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[4] Constitutional Law
Marriage and divorce in general

Constitutional Law
Marital Relationship

Institution of marriage is fundamental right protected by Due Process and Equal Protection Clauses, and state must, therefore, demonstrate that its laws restricting fundamental right to marry serve compelling state interest. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

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Strict scrutiny and compelling interest in general

Constitutional Law
Levels of scrutiny; strict or heightened scrutiny

Under Due Process and Equal Protection Clauses, interference with fundamental right warrants application of strict scrutiny. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Marriage and civil unions

Constitutional Law
Same-sex marriage

Marriage
Power to regulate and control

Marriage
Same-Sex and Other Non-Traditional Unions

Alabama's prohibition against same-sex marriage was not narrowly tailored to fulfill state's legitimate interest in protecting ties between children and their biological parents and other biological kin, and thus violated same-sex couple's rights under Due Process and Equal Protection Clauses; state provided no explanation for how allowing or recognizing same-sex marriage between two consenting adults would prevent heterosexual parents or other biological kin from caring for their biological children, and state did not prohibit other couples who were either unwilling or unable to biologically procreate from marrying. U.S.C.A. Const.Amend. 14; Ala.Const. Art. 1, § 36.03; Ala.Code 1975, § 30–1–19.

3 Cases that cite this headnote

West Codenotes

Held Unconstitutional
Ala.Code 1975, § 30–1–19; Ala.Const. Art. 1, § 36.03

Attorneys and Law Firms

***1286** Christine Cassie Hernandez, David Graham Kennedy, Mobile, AL, for Plaintiffs.

James W. Davis, Office of the Attorney General, Laura Elizabeth Howell, Montgomery, AL, for Defendant.

MEMORANDUM OPINION AND ORDER

CALLIE V.S. GRANADE, District Judge.

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 ***1287** 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* ***1288** *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,* —— U.S. ——, 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.").

[1] 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,* 64 F.Supp.3d 1260, 1276, 2014 WL 6685391, *13 (E.D.Ark.2014) (citing *Rosenbrahn v. Daugaard,* 61 F.Supp.3d 845, 854–56 n. 5, 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.

[2] Rational basis review applies to an equal protection analysis unless Alabama's ***1289** laws affect a suspect class of individuals or significantly interfere with a fundamental right. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.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.

[3] **[4]** 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 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).

[5] "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).

[6] Defendant contends that Alabama has a legitimate interest in protecting the ties between children and their biological parents and other biological kin.[2] However, ***1290** 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 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 ***1291** 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.

All Citations

81 F.Supp.3d 1285

Footnotes

1 This court also notes that the Supreme Court has granted certiorari in the *DeBoer* case, *Bourke v. Beshear,* —— U.S. ——, 135 S.Ct. 1041, 190 L.Ed.2d 908 (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.

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.).

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by Ex parte State ex rel. Alabama Policy Institute, Ala., March 3, 2015

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[1] United States Supreme Court's summary dismissal of appeal from state supreme court upholding ban on same-sex marriage for want of substantial federal question did not serve as binding precedent, and

[2] Alabama's prohibition against same-sex marriage violated same-sex couple's rights under Due Process and Equal Protection Clauses.

Plaintiffs' motion granted.

Stay conditionally granted, 2015 WL 328825.

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⇐ Levels of scrutiny; strict or heightened scrutiny

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Attorneys and Law Firms

***1286** Christine Cassie Hernandez, David Graham Kennedy, Mobile, AL, for Plaintiffs.

James W. Davis, Office of the Attorney General, Laura Elizabeth Howell, Montgomery, AL, for Defendant.

MEMORANDUM OPINION AND ORDER

CALLIE V.S. GRANADE, District Judge.

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 ***1287** 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* ***1288** *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,* —— U.S. ——, 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.").

[1] 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,* 64 F.Supp.3d 1260, 1276, 2014 WL 6685391, *13 (E.D.Ark.2014) (citing *Rosenbrahn v. Daugaard,* 61 F.Supp.3d 845, 854–56 n. 5, 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.

[2] Rational basis review applies to an equal protection analysis unless Alabama's ***1289** laws affect a suspect class of individuals or significantly interfere with a fundamental right. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.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.

[3] **[4]** 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 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).

[5] "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).

[6] Defendant contends that Alabama has a legitimate interest in protecting the ties between children and their biological parents and other biological kin.[2] However, ***1290** 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 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 ***1291** 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.

All Citations

81 F.Supp.3d 1285

Footnotes

1 This court also notes that the Supreme Court has granted certiorari in the *DeBoer* case, *Bourke v. Beshear,* —— U.S. ——, 135 S.Ct. 1041, 190 L.Ed.2d 908 (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.

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.).

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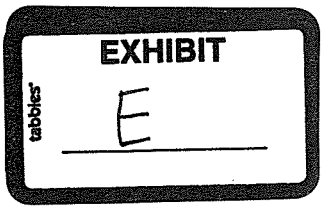


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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

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

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

SUPREME COURT OF ALABAMA
JUDICIAL BUILDING
300 DEXTER AVENUE
MONTGOMERY, ALABAMA 36104-3741
(334) 229-0700

January 27, 2015

Hon. Robert Bentley
Governor of Alabama
State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130

Dear Governor Bentley:

The recent ruling of Judge Callie Granade of the United States District Court for the Southern District of Alabama has raised serious, legitimate concerns about the propriety of federal court jurisdiction over the Alabama Sanctity of Marriage Amendment. Art. I, § 36.03, Ala. Const. of 1901.

As you know, nothing in the United States Constitution grants the federal government the authority to redefine the institution of marriage. The people of this state have specifically recognized in our Constitution that marriage is "[a] sacred covenant, solemnized between a man and a woman"; that "[a] marriage contracted between individuals of the same sex is invalid in this state"; and that "[a] union replicating marriage of or between persons of the same sex . . . shall be considered and treated in all respects as having no legal force or effect in this state." Art. I, § 36.03(c), (b) & (g), Ala. Const. of 1901.

The Supreme Court of Alabama has likewise described marriage as "a divine institution," imposing upon the parties "higher moral and religious obligations than those imposed by any mere human institution or government." *Hughes v. Hughes*, 44 Ala. 698, 703 (1870). In *Smith v. Smith*, 141 Ala. 590, 592, 37 So. 638, 639 (1904), this Court again referred to marriage as a "sacred relation."

The laws of this state have always recognized the Biblical admonition stated by our Lord:

> But from the beginning of the creation God made them male and female. For this cause shall a man leave father and mother, and cleave

> to his wife; And they twain shall be one flesh: so then they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. (Mark 10:6-9).

Even the United States Supreme Court has repeatedly recognized that the basic foundation of marriage and family upon which our Country rests is "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (quoted in *United States v. Bitty*, 208 U.S. 393, 401 (1908)).

Today the destruction of that institution is upon us by federal courts using specious pretexts based on the Equal Protection, Due Process, and Full Faith and Credit Clauses of the United States Constitution. As of this date, 44 federal courts have imposed by judicial fiat same-sex marriages in 21 states of the Union, overturning the express will of the people in those states. If we are to preserve that "reverent morality which is our source of all beneficent progress in social and political improvement," then we must act to oppose such tyranny!

On December 26, 1825, Thomas Jefferson wrote:

> I see as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers foreign and domestic; and that too, by constructions which, if legitimate, leave no limits to their power. Take together the decisions of the federal court, the doctrines of the President, and the misconstructions of the constitutional compact [U.S. Constitution], acted on by the legislature of the federal branch, and it is but too evident, that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves, all functions foreign and domestic.

Letter to William Branch Giles, December 26, 1825 (emphasis added).

Jefferson's words precisely express my sentiments on this occasion. Our State Constitution and our morality are under attack by a federal court decision that has no basis in the Constitution of the United States. Nothing in the United States Constitution grants to the federal government the authority to desecrate the institution of marriage. Indeed, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states,

are reserved to the states respectively, or to the people." U.S. Const. Amend. X. An infringement upon the definition of marriage affects all that have entered into it in the past as well as all who will enter in the future.

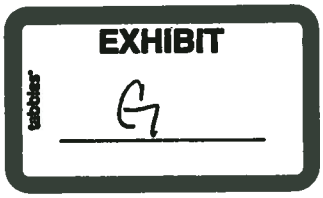
I am encouraged by the Alabama Probate Judges Association which has advised probate judges to follow Alabama law in refusing to license marriages between two members of the same sex. However, I am dismayed by those judges in our state who have stated they will recognize and unilaterally enforce a federal court decision which does not bind them. I would advise them that the issuance of such licenses would be in defiance of the laws and Constitution of Alabama. Moreover, I note that "United States district court decisions are not controlling authority in this Court." *Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 744 n.5 (Ala. 2009). See also *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."). As Chief Justice of the Alabama Supreme Court, I will continue to recognize the Alabama Constitution and the will of the people overwhelmingly expressed in the Sanctity of Marriage Amendment.

I ask you to continue to uphold and support the Alabama Constitution with respect to marriage, both for the welfare of this state and for our posterity. Be advised that I stand with you to stop judicial tyranny and any unlawful opinions issued without constitutional authority.

With due respect to your authority and responsibility as Governor and Chief Executive of the State of Alabama, I am

Sincerely,

Roy S. Moore
Chief Justice
Alabama Supreme Court



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 CLARIFYING JUDGMENT

This matter is before the court on Plaintiffs' Request for Clarification that was contained in their Objection and Response (Doc. 56) to Defendant's Motion to Stay (Doc. 55).

On January 23, 2015, this court granted summary judgment in favor of Plaintiffs in this lawsuit, declaring that Alabama's laws prohibiting same-sex marriage and prohibiting recognition of same-sex marriages performed legally in other states are unconstitutional. (Docs. 53-54). As part of the Judgment entered in this case, the court specifically enjoined the Defendant from enforcing those laws. (Doc. 54). Upon Defendant's motion, the court then stayed the order of injunction and judgment for 14 days. (Doc. 59). If no action is taken by the Eleventh Circuit Court of Appeals to extend or lift the stay within that time period, this court's stay will be lifted on February 9, 2015.

Plaintiffs have asked for clarification of this court's injunction and judgment based on statements made to the press by the Alabama Probate Judges Association ("APJA")[1] that despite this court's ruling, they must follow Alabama law and cannot issue marriage licenses to same-sex couples. (Doc. 56, pp. 6-8). According to the local news, prior to this court's entry of a 14 day stay, the APJA advised its members not to issue marriage licenses to same-sex couples.[2] A representative of the APJA reportedly stated that this court's decision was limited to the same-sex couple that filed the case and that the only party who was enjoined from enforcing the laws in question was Attorney General Strange.

Because the court has entered a stay of the Judgment in this case, neither the named Defendant, nor the Probate Courts in Alabama are currently required to follow or uphold the Judgment. However, if the stay is lifted, the Judgment in this case makes it clear that ALA. CONST. ART. I, § 36.03 and ALA. CODE § 30-1-19 are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Commissioners of Mobile County, Alabama.

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[1] The court notes that on January 25, 2015, the APJA moved for leave to appear as *amicus curiae* in support of Defendant's motion for stay. (Doc. 58).

[2] See http://www.al.com/news/index.ssf/2015/01/alabama_probate_association_ju.html - incart_related_stories and http://www.al.com/news/mobile/index.ssf/2015/01/alabama_probate_court_judges_gay_marriage.html - incart_river

As Judge Hinkle of the Northern District of Florida recently stated when presented with an almost identical issue:

> History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law. Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. here should be no debate, however, on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. And 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.

Brenner v. Scott, 2015 WL 44260 at *1(N.D. Fla. Jan. 1, 2015).

For the reasons stated above, Plaintiff's motion to clarify (Doc. 56), is **GRANTED** and the Judgment in this case is **CLARIFIED** as set out above.

DONE and **ORDERED** this 28th day of January, 2015.

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

EXHIBIT
H

ADMINISTRATIVE OFFICE OF COURTS
300 Dexter Avenue
Montgomery, Alabama 36104-3741
(334) 954-5000

Roy S. Moore
Chief Justice

Rich Hobson
Administrative Director of Courts

February 3, 2015

Re: Federal Intrusion into State Sovereignty

Dear Probate Judges of Alabama:

Attached hereto is a Memorandum with regard to the orders of United States District Judge Callie Granade dated January 23 and January 26, 2015, and the subsequent "Order Clarifying Judgment" dated January 28. The Memorandum presents substantial authority in support of the proposition that state courts are not bound by the opinions of lower federal courts. Furthermore, nothing in the orders of Judge Granade *requires* Alabama probate judges to issue marriage licenses that are illegal in Alabama. Pursuant to Rule 65(d)(2) of the Federal Rules of Civil Procedure, Alabama probate judges are not subject to those orders because the probate judges are not parties or associated with any party in those cases. I further submit that the federal district court lacked jurisdiction over these cases under the Eleventh Amendment to the United States Constitution, as explained in the appendix attached to the memorandum.

My letter to Governor Robert Bentley on January 27, 2015, expressed "serious, legitimate concerns about the propriety of federal court jurisdiction over the Alabama Sanctity of Marriage Amendment, Art. I, § 36.03, Ala. Const 1901."

The day after my letter was released, Judge Granade issued a "clarifying" order that warned the probate judges of this state that "if the stay is lifted, the Judgment in this case makes it clear, that Ala. Const. Art. I, § 36.03 and Ala. Code §30-1-19 are unconstitutional." Yet, paradoxically, that order of clarification quoted from an opinion of a Florida federal judge that stated: "The preliminary injunction now in effect thus does *not* require the Clerk to issue licenses to other applicants." (Emphasis added). Neither Judge Granade's orders nor her "clarification" ordered the state officials who are charged with the responsibility to issue marriage licenses *to do anything*. Consequently, the injunction and the stay or the lifting thereof can only apply to the sole defendant, the Alabama Attorney General.

The attached Memorandum demonstrates that both state and federal law recognize the principle that state courts are not bound by the judicial opinions of federal district or appeals courts on questions of federal constitutional law. While state courts may consider as "persuasive authority" the opinions of federal courts that are beneath the United States Supreme Court (referred to as lower or "inferior Courts" in Article III, Sec. 1 of the U.S. Constitution), the state courts are not bound by such rulings.

Under the principle of "dual sovereignty," the authority of state courts to interpret the federal Constitution is equal to that of the lower federal courts for the simple reason that both state and federal courts are equally sworn to uphold the United States Constitution. Only the United States Supreme Court can be the final arbiter of constitutional disputes between state and federal courts.

While my disagreement with Judge Granade's orders in the cases attacking Alabama marriage law has been criticized as "religious," "defiant," and "unethical," my actions are entirely consistent with my responsibility as Chief Justice of the Alabama Supreme Court. As Administrative Head of the Unified Judicial System, I am charged with the responsibility "to take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within this state." § 12-2-30(b)(7), Ala. Code 1975. I am further charged with the obligation to "take any such further or additional action as may be necessary for the orderly administration of justice within this state." § 12-2-30(b)(8), Ala. Code 1975. Interference with the right of state courts to make independent judgments based on their own view of the U.S. Constitution is a violation of state sovereignty. Moreover, the *amicus curiae* briefs of Governor Robert Bentley and of the Alabama Probate Judges Association filed with the Eleventh Circuit Court of Appeals make it very clear that "substantial" and even "mass" confusion will result if Judge Granade's orders are construed to apply to the entire state court system. Pursuant to my authority under Alabama law, I submit this advisory letter and memorandum as appropriate and necessary to the orderly administration of the Alabama Unified Judicial System and to warn against any unlawful intrusion into the jurisdiction and sovereignty of this state and its courts.

The authority of the federal judiciary to redefine marriage is now before the United States Supreme Court because a conflict exists among the federal Courts of Appeals on this issue. The United States Constitution contains neither the word "family" nor the word "marriage." The power to redefine these fundamental institutions of society is not enumerated in any of the provisions of Article 1, Section 8. Because the power to define marriage is not delegated to the United States, it is retained by the people. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, *or to the people*." Amend. X, U.S. Const. (emphasis added).

Marriage has long been recognized as a divine institution ordained of God. According to the United States Supreme Court, the basic foundation of marriage and family upon which our Country rests is "the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (quoted in *United States v. Bitty*, 208 U.S. 393, 401 (1908)). The Alabama Supreme Court has described marriage as a "divine institution" imposing upon the parties "higher moral and religious obligations than those imposed by any mere human institution or government." *Hughes v. Hughes*, 44 Ala. 698, 703 (1870). In *Smith v. Smith*, 141 Ala. 590, 592, 37 So. 638, 639 (1904), our Supreme Court referred to marriage as a "sacred relation." More recently, the people of Alabama amended our state constitution to provide that marriage is a "sacred covenant, solemnized between a man and a woman" and that a " marriage contracted between individuals of the same sex is invalid in this state." Art. 1 § 36.03, Ala. Const. 1901.

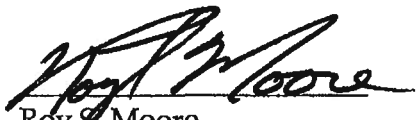
The right to enter into the institution of marriage, namely a union between one man and one woman, is established in history and law as a fundamental right. Although not enumerated in the Constitution, that right is retained by the people under the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The freedom to marry is an "unalienable right." *The Declaration of Independence* states: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that *among these* are Life, Liberty, and the Pursuit of Happiness . . . ." Even Judge Granade's order, quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967), acknowledges that "'[t]he 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." No court or other human authority should pretend to redefine that right. Such an enterprise would disregard the Bill of Rights contained in the United States Constitution as well as the Organic Law of our Country.

Lower federal courts are without authority to impose their own interpretation of federal constitutional law upon the state courts. Furthermore, they have absolutely no legitimate authority to compel state courts to redefine marriage to include persons of the same sex. Not only is the Mobile federal court acting without constitutional authority, but it is doing so in a manner inconsistent with the Eleventh Amendment to the United States Constitution.

I urge you to uphold and support the Alabama Constitution and the Constitution of the United States to the best of your ability, So Help You God!

Submitted for your consideration this 3rd day of February, 2015.



Roy S. Moore
Chief Justice
Alabama Supreme Court

MEMORANDUM

TO: Alabama Probate Judges

FROM: Chief Justice Roy S. Moore

RE: Sanctity of Marriage ruling

Date: February 3, 2015

The purpose of this memorandum is to provide guidance to the probate judges of Alabama as to their duties under Alabama's Sanctity of Marriage Amendment ("the Amendment"), Art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act ("the Act"), § 30-1-19, Ala. Code 1975, in light of the recent orders of the United States District Court for the Southern District of Alabama. A news story has quoted the Honorable Greg Norris, President of the Alabama Probate Judges Association, as saying: "I don't think I have had a week like this in my life."[1] I hope this memorandum will assist weary, beleaguered, and perplexed probate judges to unravel the meaning of the actions of the federal district court in Mobile, namely that the rulings in the marriage cases do not require you to issue marriage licenses that are illegal under Alabama law.

---

[1]Brian Lawson, With Alabama Same-sex Marriage Decision Looming, Some Probate Judges Stop Doing Weddings, AL.com (Jan. 29, 2015).

I. Background

On Friday, January 23, 2015, the Honorable Callie Granade, a judge of the United States District Court for the Southern District of Alabama, ruled in Searcy v. Strange (No. 1:14-208-CG-N) (S.D. Ala. Jan. 23, 2015), that the Amendment and the Act were unconstitutional. On January 25, in response to a motion by defendant Luther Strange, the Attorney General of Alabama, Judge Granade granted a stay of her ruling until February 9 to permit the United States Court of Appeals for the Eleventh Circuit to consider imposing a stay pending appeal. On February 3, the Eleventh Circuit declined to enter the requested stay.

On Monday, January 26, Judge Granade entered a preliminary injunction in Strawser v. Strange (No. 1:14-CV-424-CG-C) (S.D. Ala. Jan. 26, 2015), another case that challenged the constitutionality of the Amendment and the Act. Two days later, on January 28, Judge Granade issued an "Order Clarifying Judgment" in Searcy to address whether her order of January 23 bound "the Probate Courts in Alabama."

II. Administrative Authority of the Chief Justice

As administrative head of the Unified Judicial System,[2] I have a constitutional and a statutory obligation to provide guidance to the probate judges in this state as to their administrative responsibilities under these recent orders.[3] In that capacity I am authorized and empowered:

> ....
>
> (7) To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.
>
> (8) 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.

§ 12-2-30(b), Ala. Code 1975.

In my estimation, Judge Granade's orders in Searcy and Strawser have created a "situation adversely affecting the administration of justice within the state" that requires me "[t]o take ... action for the orderly administration of justice within the state."

---

[2]"The chief justice of the supreme court shall be the administrative head of the judicial system." Art. VI, § 149, Ala. Const. 1901.

[3]The probate judges are part of Alabama's unified judicial system. Art. VI, § 139(a), Ala. Const. 1901.

III. Analysis

A. Alabama probate judges are not bound by the orders in Searcy and Strawser.

In Searcy, an adoption case, Judge Granade enjoined the Attorney General from enforcing the Alabama marriage laws that prohibit recognition of same-sex unions. In Strawser, Judge Granade granted a preliminary injunction against enforcement of these same laws. Her order included standard language describing the scope of an injunction. See Rule 65, Fed. R. Civ. P.

> [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.

Order of Jan. 26, 2015, at 4. The Strawser order is of more significance for Alabama probate judges than the orders in the Searcy case because Strawser is a case about issuing same-sex marriage licenses in Alabama. Therefore, it merits careful scrutiny.

The Strawser order tracks the language of Rule 65(d)(2), Fed. R. Civ. P.:

> Persons Bound. The order binds only the following who receive actual notice of it by personal service

or otherwise:

> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Since no Alabama probate judges are parties to the Strawser case (or to the Searcy case), the only question to resolve in terms of their being bound by the court's order of January 26 is whether they, or any of them, are officers, agents, servants or employees of the Attorney General or "are in active concert or participation" with the Attorney General or his officers, agents, servants, and employees. "[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, ...").

Probate judges are members of the judicial branch of government. "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 ...." Art. VI, § 144, Ala. Const. 1901. Probate judges are elected to six-year terms by a vote of the people in each county. § 12-13-30, Ala. Code 1975.

Alabama has 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.

As a matter of constitutional and statutory law, therefore, Alabama probate judges are not officers, agents, or

servants of the Attorney General. The probate judges are members of the judicial branch; the Attorney General is a member of the executive branch. The Attorney General is bound by the constitutional command that "the executive shall never exercise the ... judicial powers." The probate judges are bound by the constitutional command that "the judicial shall never exercise the ... executive powers." A constitutional firewall separates the authority of the Attorney General from that of the probate courts. The probate judges are not in any sense agents or servants of the Attorney General

The only remaining question, therefore, to resolve in determining whether Alabama probate judges are bound by Judge Granade's orders in Searcy and Strawser is whether they are "in active concert or participation" with the Attorney General or any of his officers, agents, servants or employees in enforcing the Amendment or the Act. Again, the answer is "no" for the simple reason that neither the Attorney General nor any of his agents has any authority over the judges of probate. As independent constitutional officers of the judicial branch of government who are directly elected by the people and shielded from executive influence by Sections 42 and 43 of 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.

The federal court in Mobile has no authority to ignore the internal structure of state government. How a state government structures its powers is "a decision of the most fundamental sort for a sovereign entity." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). A state has "constitutional responsibility for the establishment and operation of its own government." Id. at 462. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." Id. at 460.

Finally, no probate judge was a defendant in the cases under discussion except for the Honorable Don Davis who was dismissed with prejudice before issuance of the court's orders. Judge Granade's orders apply to the parties to the case, but under a straightforward application of Rule 65(d)(2), Fed. R. Civ. P., those orders have no effect on the probate judges of Alabama. "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." Martin v. Wilks, 490 U.S. 755, 762 (1989).

Furthermore, as stated in the Appendix, Judge Granade's

orders are improper because the Eleventh Amendment prohibits the Attorney General from being a defendant in these cases.

B. The probate judges in their judicial capacity do not have to defer to decisions of a federal district court.

Having determined based on the above analysis that Alabama probate judges are not bound by Judge Granade's rulings in Searcy and Strawser, I would now like to give you a general perspective on the precedential effect in state courts of lower-federal-court decisions on constitutional questions. Because the United States Constitution provides that "the Judges in every State shall be bound thereby," Art. VI, cl. 2, U.S. Const., state judges are competent to adjudicate federal constitutional issues and indeed must do so when required in the exercise of properly acquired jurisdiction.

Because federal courts also adjudicate federal-law issues, the question has arisen whether state judges are in any sense bound by lower federal court decisions on constitutional questions. Almost universally the answer has been "no" for the simple reason that federal district and circuit courts have no appellate jurisdiction over state courts. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the

same judicial district, or even upon the same judge in a different case." Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p. 134-26 (3d ed. 2011)). Although decisions of state courts on federal questions are ultimately subject to review by the United States Supreme Court, 28 U.S.C. § 1257(a), as are decisions of federal courts, neither "coordinate" system reviews the decisions of the other. As a result, state courts may interpret the United States Constitution independently from and even contrary to the decisions of federal courts.

Numerous Alabama cases confirm this reasoning. "[I]n determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here, although they can serve as persuasive authority." Glass v. Birmingham So. R.R., 905 So.2d 789, 794 (Ala. 2004). See also Dolgencorp, Inc. v. Taylor, 28 So. 3d 737, 748 (Ala. 2009) (noting that "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."); Buist v. Time Domain Corp., 926 So. 2d 290, 297 (Ala. 2005) ("United States district court cases ... can serve only as persuasive authority."); 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.").

A recent detailed study of the courts of all 50 states and the District of Columbia determined that 46 states and the District of Columbia adopt the position that the precedents of lower federal courts are not binding in their jurisdictions. Wayne A. Logan, A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights, 90 Notre Dame L. Rev. 235, 280-81 (2014). The position of three other states is uncertain. Only one state (Delaware) defers to the constitutional decisions of lower federal courts. Id. at 281.

Federal courts have recognized that state-court review of constitutional questions is independent of the same authority lodged in the lower federal courts. "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court." United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970).

> Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other.

Surrick v. Killion, 449 F. 3d 520, 535 (3rd Cir. 2006).

The United States Supreme Court has acknowledged that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989). Two justices of the United States Supreme Court in special writings have elaborated on this principle.

The Supremacy Clause demands that state law yield to

> federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring). See also Steffel v. Thompson, 415 U.S. 452, 482, n. 3 (1974) (Rehnquist, J., concurring) (noting that a lower-federal-court decision "would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.").

For the above reasons, I am of the opinion that an Alabama probate judge may deliver his own considered opinion, subject to review, on the issues raised in Searcy and Strawser and is not required to defer to federal district and circuit court rulings on the same questions.

IV. Conclusion

In fulfillment of my obligations as Administrative Head of the Unified Judicial System, I have herein offered you my considered guidance on how the recent orders from the United

States District Court in Mobile affect your duties as an Alabama probate judge. Because, as demonstrated above, Alabama probate judges are not bound by Judge Granade's orders in the Searcy and Strawser cases, they would in my view be acting in violation of their oaths to uphold the Alabama Constitution if they issued marriage licenses prohibited under Alabama law.

APPENDIX

The reasoning employed by Judge Granade in dismissing Governor Bentley with prejudice on August 28, 2014, namely that his general authority to enforce the laws was insufficient to make him a defendant, also applies to Attorney General Strange, who is the sole remaining defendant in both Searcy and Strawser.

I.
How the Alabama Attorney General came to be the sole defendant in each case

A. Searcy

The complaint in Searcy named five defendants in both their individual and official capacities: Robert Bentley, Governor; Luther Strange III, Attorney General; Don Davis, Mobile County Judge of Probate; Catherine Donald, State Registrar of Vital Statistics; and Nancy Buckner, Commissioner of the Department of Human Resources.

On May 30, 2014, Judge Davis filed a motion to dismiss. He explained that in December 2011 Cari Searcy had filed in his court a petition for a step-parent adoption of the son of Kimberly McKeand. See § 26-10A-27, Ala. Code 1975. In April 2012, Judge Davis denied the petition on the ground that Alabama law did not recognize Searcy as McKeand's spouse.

Searcy appealed, and the Court of Civil Appeals affirmed. In re Adoption of K.R.S., 109 So. 3d 176 (2012). Once his decision was appealed, Judge Davis argued, he lost jurisdiction of the case and was thus unable to provide relief to the plaintiffs.

On June 3, 2014, Commissioner Buckner filed a motion to dismiss, alleging lack of standing, namely that Searcy had suffered no injury traceable to Buckner's actions that a court order could redress. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In her complaint Searcy alleged that Buckner "has the authority and power to ... amend birth certificates to reflect the adoption of a child." However, in her motion to dismiss, Buckner explained that such authority resides solely with the Department of Vital Statistics.

On June 6, 2014, Governor Bentley and Attorney General Strange filed a joint motion to dismiss. The motion argued that Governor Bentley's general authority over the executive branch was insufficient to name him as a defendant when he had no direct enforcement responsibility for the Amendment, the Act, or the adoption statute. Merely suing Governor Bentley as a representative of the State was no different than suing the State itself, an action forbidden by the Eleventh Amendment.

While seeking a dismissal of all claims against Governor Bentley, the Attorney General agreed to remain in the suit in his official capacity "to defend the validity of Alabama's marriage laws."

On June 24, 2014, the plaintiffs responded to the motions to dismiss. They volunteered to dismiss all claims against Davis, Donald, and Buckner and to dismiss the individual capacity claims against Bentley and Strange. However, they argued that the official-capacity claims against both Bentley and Strange should remain in the case. On July 14, 2014, Davis and the plaintiffs filed a joint stipulation for Davis's dismissal. On July 18, the court entered an order to dismiss Davis with prejudice if no other party objected by July 25.

On July 30, 2014, Magistrate Judge Katherine Nelson acknowledged the stipulation of dismissal of all claims against Davis, Donald, and Buckner. She also recommended granting Governor Bentley's motion to dismiss on the ground that his relationship to the acts complained of was "'too attenuated to establish that he was responsible for' implementation of the challenged laws." Report and Recommendation of July 30, 2014 (quoting Women's Emergency Network v. Bush, 323 F.3d 937, 949 (11th Cir. 2003)). Judge

Granade adopted the Magistrate's recommendation and, on August 28, dismissed with prejudice the claims against Bentley, Buckner, and Donald. The only remaining defendant in the case was the Attorney General in his official capacity.

B. Strawser

Because the complaint in Strawser named "the State of Alabama" as the sole defendant, the Attorney General filed a motion to dismiss on the ground of sovereign immunity. In an order dated October 21, 2014, Magistrate Judge William E. Cassady, providing free legal advice, advised the Strawser plaintiffs

> that rather than filing a substantive response in opposition to the defendant's motion to dismiss, they may well desire to respond by filing a motion to dismiss the State of Alabama and substitute as the proper defendant ... Luther Strange, in his official capacity as the Attorney General of the State of Alabama.

The order contained a detailed footnote advising these pro-se plaintiffs that "[t]he Eleventh Amendment bars suits against an unconsenting State by one of its citizens." The footnote included as supporting authority three citations and parenthetical supporting quotations from United States Supreme Court cases. Order of Oct. 21, 2014, at 1 n.1. In a second footnote, Magistrate Cassady continued the plaintiffs' legal

education by explaining that "'official-capacity actions for prospective relief are not treated as actions against the State.'" Order of Oct. 21, 2014, at 2 n.2 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). Dutifully following this advice from the court, the plaintiffs on November 13, 2014 filed a "Motion to Amend Complaint and Change Defendant." The Attorney General did not object to the motion.

Thus, by dismissal of all defendants except the Attorney General in Searcy, and the substitution, with court assistance, of the Attorney General for the State of Alabama in Strawser, Luther Strange in his official capacity became the sole defendant in each case.

II.
The Attorney General is not a proper defendant in these cases

The issuance of marriage licenses in Alabama is controlled by Chapter 1 ("Marriage") of Title 30 ("Marital and Domestic Relations"). Section 30-1-9, Ala. Code 1975, states: "No marriage shall be solemnized without a license. Marriage licenses may be issued by the judges of probate of the several counties." The duty is discretionary because certain prerequisites must be satisfied before a license may be issued, such as, where applicable, the age and parental

consent requirements of § 30-1-4 & -5, Ala. Code 1975. The probate judge must maintain a register of all licenses issued, § 30-1-12, Ala. Code 1975, which is to include certificates of solemnization received from those who perform weddings. § 30-1-13, Ala. Code 1975. "It is the duty of the judge of probate to give notice to the district attorney of all offenses under this chapter." § 30-1-18, Ala. Code 1975. "No marriage license shall be issued in the State of Alabama to parties of the same sex." § 30-1-19(d), Ala. Code 1975.

By contrast to the exclusive statutory duty of probate judges to issue and record marriage licenses, and to monitor this process, including solemnizations, for offenses, the Attorney General has no duties in this area.

As an officer of the State, the Attorney General shares the immunity of the State from private law suits in federal court. "[T]he Eleventh Amendment prohibits suits against state officials where the state is, in fact, the real party in interest." Summit Medical Associates, P.C. v. Pryor, 180 F. 3d 1326, 1336 (11th Cir. 1999). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963). An exception exists

to this rule for actions taken by state officials that violate the Constitution. "The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984). This principle, first articulated in Ex parte Young, 209 U.S. 123 (1908), "has not been provided an expansive interpretation." Pennhurst, 465 U.S. at 102. Actions for damages are precluded, but generally prospective actions for declaratory and injunctive relief are permitted.

Nonetheless, a key requirement of an Ex parte Young action against a state official is that "such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." 209 U.S. at 157. The Court elaborated:

> "In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the

> State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

209 U.S. at 157 (quoting Fitts v. McGhee, 172 U.S. 516, 530 (1899)).

The situation described in Ex parte Young is exactly what has occurred in this case. The Alabama Attorney General does not hold a "special relation to the particular statute alleged to be unconstitutional," nor is he "expressly directed to see to its enforcement." Those duties and responsibilities lie with the judges of probate in the judicial branch. In the passage that immediately precedes the one quoted in Ex parte Young, the Court in Fitts underscored this point:

> It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1895.
>
> ....
>
> There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an

> unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State.

Fitts v. McGhee, 172 U.S. at 529-30. Recapping its discussion of Fitts, the court in Ex parte Young stated: "As no state officer who was made a party bore any close official connection with the [act at issue], the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done." 209 U.S. at 156 (emphasis added).

Making the Attorney General, who is not the official chiefly responsible for enforcing the marriage laws, the sole defendant in this case was a convenient means of making the State of Alabama the defendant, a methodology condemned by Ex parte Young as unconstitutional under the Eleventh Amendment. Because both Searcy and Strawser were in substance actions against the State rather than against one of its officers, the United States district court lacked jurisdiction and its judgment is void. The tenor of Judge Granade's orders indicates that she intends the orders to be applicable to all

state officials merely because the Attorney General is the defendant. Such an assumption violates the Eleventh Amendment. "Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend Young beyond what the Supreme Court has intended and held." Children's Healthcare Is A Legal Duty v. Deters, 92 F. 3d 1412, 1416 (6th Cir. 1996).

The Tenth Circuit in a very similar case came to the same conclusion. Two women who desired to be married to each other filed an action against the Governor and the Attorney General of Oklahoma seeking to have that state's marriage amendment declared unconstitutional. The Tenth Circuit held that they lacked standing to sue these officials. "[T]he Oklahoma officials' generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce." Bishop v. Oklahoma, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished). Noting that marriage licenses in Oklahoma were issued by district-court clerks who were part of the judicial branch, the court stated: "Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to

issue a marriage license or record a marriage." 333 F. App'x at 365. Stating that "[t]hese claims are simply not connected to the duties of the Attorney General" and citing the specificity requirement of Ex parte Young, the court ordered dismissal of the claims against the Attorney General for lack of subject-matter jurisdiction under the Eleventh Amendment. Id.

In a later published case the Tenth Circuit noted that the holding in Bishop that the Attorney General was not a proper defendant in a challenge to Oklahoma's prohibition on same-sex marriage "turned on the conclusion that marriage licensing and recognition in Oklahoma were 'within the administration of the judiciary.'" Kitchen v. Herbert, 755 F.3d 1193, 1202 (10th Cir. 2014). The parallels with Searcy and Strawser are too obvious to require elaboration.

The Attorney General's agreement to litigate this case with himself as the sole defendant cannot confer subject-matter jurisdiction that is otherwise not present. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951) (emphasis added). "'It

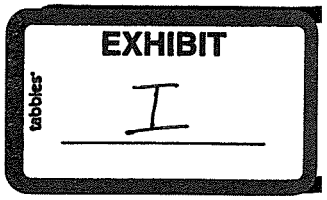
needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.'" Id. at 18 n.17 (quoting People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880)). See also Boumatic, L.L.C. v. Idento Operations, BV, 759 F. 3d 790, 793 (7th Cir. 2014) ("Litigants cannot confer subject-matter jurisdiction by agreement or omission ...."); SmallBizPros, Inc. v. MacDonald, 618 F. 3d 458, 464 n.4 (5th Cir. 2010). ("[P]arties cannot confer jurisdiction by agreement where it otherwise would not lie ....").

Further, because the Attorney General neither caused the plaintiffs' alleged injuries nor is able to redress them, the parties also lack standing to sue him as a defendant. "To have standing the plaintiffs must demonstrate injury in fact, causation, and redressability." I.L. v. Alabama, 739 F.3d 1273, 1278 (11th Cir. 2014). Accordingly, the federal court in Mobile lacked jurisdiction on this basis also. Alabama law agrees with these propositions:

> "Actions or opinions are denominated 'advisory,'" and, therefore, not justiciable, ... "where, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive." E. Borchard, Declaratory Judgments 31 (1934) (emphasis added). "'Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail

> on this ground, ... because the ... public officer or other person selected as a defendant has ... no special duties in relation to the matters which would be affected by any eventual judgment.'" Rogers v. Alabama Bd. of Educ., 392 So.2d 235, 237 (Ala. Civ. App. 1980) (emphasis added) (quoting E. Borchard, Declaratory Judgments 76 (2d ed. 1941)). "'The absence of adversary or the correct adversary parties is in principle fatal. A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power.'" Id. (emphasis added).

Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (emphasis in original).



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

44 F.Supp.3d 1206
United States District Court,
S.D. Alabama,
Southern Division.

James N. **STRAWSER**, et al., Plaintiffs,
v.
Luther STRANGE, in his official capacity as Attorney General for the State of Alabama and Don Davis in his official capacity as Probate Judge of Mobile County, Alabama, Defendants.

Civil Action No. 14–0424–CG–C.
|
Signed Feb. 12, 2015.

Synopsis

Background: Same-sex couples filed emergency motion for preliminary injunction and/or temporary restraining order (TRO) to prevent county probate judge for enforcing Alabama laws, policies, or practices that excluded movants from marrying.

Holdings: The District Court, Callie V.S. Granade, J., held that:

[1] Alabama's marriage sanctity laws, prohibiting same-sex marriage, violate the Due Process Clause and Equal Protection Clause, and

[2] irreparable harm to same-sex couples outweighed any harm to the judge.

Motion granted.

West Headnotes (6)

[1] **Injunction**
⇐ Discretionary Nature of Remedy

The decision to grant or deny a preliminary injunction is within the sound discretion of the district court.

Cases that cite this headnote

[2] **Injunction**
⇐ Grounds in general; multiple factors

Injunction
⇐ Balancing or weighing factors; sliding scale

The district 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.

Cases that cite this headnote

[3] **Injunction**
⇐ Extraordinary or unusual nature of remedy

A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites.

Cases that cite this headnote

[4] **Constitutional Law**
⇐ Marriage and civil unions

Constitutional Law
⇐ Same-sex marriage

Marriage
⇐ Power to regulate and control

Marriage
⇐ Same-Sex and Other Non-Traditional Unions

Alabama's marriage sanctity laws, prohibiting same-sex marriage, violate the Due Process Clause and Equal Protection Clause by restricting the fundamental marriage right, without serving a compelling state interest. U.S.C.A. Const.Amend. 14; Ala.Const. Art. 1, § 36.03; Ala.Code 1975, § 30–1–19.

1 Cases that cite this headnote

[5] **Injunction**

Marriage and divorce

Inability of plaintiff same-sex couples to marry in Alabama, because county probate judge would not allow marriage licenses to be issued, caused irreparable harm to the couples which outweighed any harm to the judge, as required for preliminary injunction enjoining the judge from enforcing Alabama's marriage sanctity laws prohibiting same-sex marriage which violated the Due Process Clause and the Equal Protection Clause; plaintiffs were being deprived of fundamental marriage right, they alleged that each day they were excluded from marriage, they had to deal with uncertainty about whether they would be treated as family members if they experienced a life crisis or emergency, and judge did not assert any injury, in his official capacity, that might result from issuance of injunction. U.S.C.A. Const.Amend. 14; Ala.Const. Art. 1, § 36.03; Ala.Code 1975, § 30–1–19.

1 Cases that cite this headnote

[6] **Injunction**

Public interest considerations

It is always in the public interest, as element for issuance of a preliminary injunction, to protect constitutional rights.

Cases that cite this headnote

West Codenotes

Held Unconstitutional

Ala.Const. Art. 1, § 36.03; AL Const. Amend. No. 774; Ala.Code 1975, § 30–1–19.

Attorneys and Law Firms

***1207** Christopher F. Stoll, San Francisco, CA, Heather Rene Fann, Boyd, Fernambucq, Dunn & Fann, P.C., Birmingham, AL, Randall C. Marshall, Aclu of Alabama Foundation, Inc., Montgomery, AL, Shannon P. Minter, Washington, DC, for Plaintiffs.

Joseph Michael Druhan, Jr., Johnston Druhan, LLP, Harry V. Satterwhite, Satterwhite & Tyler, LLC, Lee L. Hale, Hale and Hughes, Mobile, Al, for Defendants.

ORDER

CALLIE V.S. GRANADE, District Judge.

This matter is before the court on Plaintiffs' emergency motion for preliminary injunction and/or temporary restraining order (Doc. 43), and the response thereto of Attorney General Strange (Doc. 44). A hearing on Plaintiffs' motion was held on February 12, 2015. Appearing at the hearing were counsel for Plaintiffs, counsel for defendant Judge Don Davis and counsel for Plaintiffs in a similar case, SDAL Civil Action No. 15–067–CG–C. For the reasons explained below, the court finds that Plaintiffs' motion for preliminary injunction should be granted.

[1] [2] [3] 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 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 four same-sex couples in committed relationships who reside in Mobile, Alabama and have been denied the right to a legal marriage under the laws of Alabama. This court previously issued a preliminary injunction in this case prohibiting the Alabama Attorney General, "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 that prohibit same-sex marriage" from enforcing the Alabama laws which prohibit same-sex marriage. (Doc. 29). That preliminary injunction was initially stayed, but went into effect on Monday, February 9, 2015, after the Eleventh Circuit Court of Appeals and the Supreme Court of the United States denied Attorney ***1208** General Strange's request to extend the stay. (Doc. 40, Exh. 1; Doc. 43, p. 2). On February 9, 2015, the Plaintiffs went to the Mobile County Probate office seeking marriage licenses, but found the office closed. (Doc. 43–4, ¶ 5; Doc. 43–5, ¶ 5; Doc. 43–6, ¶ 5; Doc. 43–7, ¶ 5). Judge Don Davis of the Mobile County Probate Court issued a press release on February 9, 2015, stating that the Marriage License Section of the Court's Recording Division would remain closed pending further instructions from the United States District Court and the Chief Justice of the Alabama Supreme Court. (Doc. 43–3, and Hearing Exhibit 6). Judge Davis's press release further stated that he had filed an action with the Alabama Supreme Court seeking guidance and clarification. (Doc. 43–3 and Hearing Exhibit 6). The Alabama Supreme Court has since dismissed that petition. (See Doc. 52 at p. 26 and Hearing Exhibit 10B). Judge Davis was not initially a defendant in this matter and was not named in the preliminary injunction that went into effect on February 9, 2015. However, the amended complaint filed on February 10, 2015, names Judge Davis in his official capacity as a defendant and seeks an injunction against Judge Davis prohibiting him from enforcing the Alabama laws, policies or practices that exclude Plaintiffs from marriage. (Doc. 47).

The Plaintiffs report that they all feel demeaned and humiliated by Alabama's refusal to treat them equally. (Doc. 43–4, ¶ 3; Doc. 43–5, ¶ 3; Doc. 43–6, ¶ 3; Doc. 43–7, ¶ 3, Hearing Exhibits 1–4). Plaintiff James Strawser has serious health issues that will require surgery that will put his life at risk. (Doc. 43–4, ¶ 4, Hearing Exhibit 1). When Strawser had surgery in the past, he signed a form giving his partner, John Humphrey, legal power over Strawser's medical decisions, but the hospital refused to honor that document because under Alabama law Humphrey was not a spouse or family member. (Doc. 43–4, ¶ 4, Hearing Exhibit 1).

Plaintiff Meredith Miller wants to marry her partner, Anna Lisa Carmichael to have the legal protections and security that only marriage provides. (Doc. 43–5, ¶ 3, Hearing Exhibit 2). Each day that they are excluded from marriage, they must deal with uncertainty about whether they will be treated as family members if they experience a life crisis or emergency. (Doc. 43–5, ¶ 3, Hearing Exhibit 2). Miller and Carmichael hope to have children but are concerned that if they are not married their children will get the message that their family is not as worthy of dignity and respect as other families in Alabama and that their children will be denied important legal protections that come with marriage. (Doc. 43–5, ¶ 4, Hearing Exhibit 2).

Plaintiff Kristy Simmons wants to marry her partner, Marshay Safford, to have a legal family relationship and build stability for their children. (Doc. 43–6, ¶ 3, Hearing Exhibit 3). Each day that they are not permitted to marry they experience uncertainty about whether they will be treated as family members in the event of an emergency. (Doc. 43–6, ¶ 3, Hearing Exhibit 3). The legal protections of marriage are especially important to Simmons because she has a rare disorder called Wegener's Granulomatosis that causes her blood vessels to become inflamed and can damage her major organs. (Doc. 43–6, ¶ 4, Hearing Exhibit 3).

Plaintiff Robert Povilat wants to marry his partner, Milton Persinger, in order to protect one another and have the legal protections and security that only marriage provides. (Doc. 43–7, ¶ 3, Hearing Exhibit 4). Mr. Povilat has survived two bouts of prostate cancer and fears that he could be diagnosed with cancer again. ***1209** (Doc. 43–7, ¶ 4, Hearing Exhibit 4). Every day that they are not allowed to be married, they experience uncertainty about whether they will be treated as family members if they experience a crisis or an emergency. (Doc. 43–7, ¶ 3, Hearing Exhibit 4).

[4] Plaintiffs contend that Alabama's laws prohibiting same-sex marriage [1] violate their rights under the United States Constitution to Due Process and Equal Protection. This court has determined in another case, *Searcy v. Strange,* SDAL Civil Action No. 14–00208–CG–N, that Alabama's marriage sanctity 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 Constitution. In *Searcy,* this court found that those laws restrict the Plaintiffs' fundamental marriage right and do not serve a compelling state interest. Although the Plaintiffs in this case seek to marry in Alabama, rather than have their marriage in another state recognized in Alabama, the Court, as it previously did in issuing the preliminary injunction against Attorney General Strange, adopts the reasoning expressed in the *Searcy* case and finds that Alabama's laws violate the Plaintiffs' ***1210** rights for the same reasons. Alabama's marriage sanctity 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.

[5] **[6]** After considering the circumstances of this case and in light of the court's conclusion that the laws in question are unconstitutional, the court finds that Plaintiffs have met the preliminary injunction factors. Plaintiffs' inability to exercise their fundamental right to marry has caused them irreparable harm that outweighs any injury to defendant[2]. *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, the Plaintiffs in this case have submitted declarations attesting to the specific reasons why their inability to become legally married in Alabama presents 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 once again makes the following declaration:

It is **ORDERED** and **DECLARED** that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30–1–19 are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Probate Judge Don Davis is hereby **ENJOINED** from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage. If Plaintiffs take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, Judge Davis may not deny them a license on the ground that Plaintiffs constitute same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order pertaining to same-sex marriage. This injunction binds Judge Don Davis 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 or fail to recognize same-sex marriage.

All Citations

44 F.Supp.3d 1206

Footnotes

1 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.

2 Indeed, at the hearing on the motion, counsel for Judge Davis made no assertion of any injury to the Judge in his official capacity that might result from the issuance of an injunction.

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EXHIBIT
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K

KeyCite Red Flag - Severe Negative Treatment
Abrogated by Obergefell v. Hodges, U.S., June 26, 2015

2015 WL 892752
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte STATE of Alabama ex rel. ALABAMA POLICY INSTITUTE, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County (In re: Alan L. King, in his official capacity as Judge of Probate for Jefferson County, et al.).

1140460.
|
March 3, 2015.

Synopsis
Background: Public interest groups, in name of state, filed emergency petition for writ of mandamus to prohibit all probate judges in state from issuing **marriage licenses** to same-sex couples.

Holdings: The Supreme Court held that:

[1] statutes prohibiting issuance of **marriage licenses** to same-sex couples did not discriminate on basis of gender and thus were not subject to heightened scrutiny;

[2] statutes did not violate equal protection;

[3] statutes did not violate due process; and

[4] statutes were not based solely on animus against homosexuals.

Petition granted; writ issued.

Main, J., filed an opinion that concurred in part and concurred in the result.

Shaw, J., filed a dissenting opinion.

West Headnotes (19)

[1] **Mandamus**
Public Officers

Probate judge would be realigned as an additional relator, in proceedings on emergency petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing **marriage licenses** to same-sex couples, even though judge had been initially named as a respondent, where judge filed response specifically requesting that the relief sought in the petition be granted.

Cases that cite this headnote

[2] **Constitutional Law**
Marriage and Divorce

Husband and Wife
The Relation in General

Marriage is not a contract within the meaning of the clause of the constitution which prohibits impairing the obligation of contracts; it is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress. U.S.C.A. Const. Art. 1, § 10, cl. 1.

Cases that cite this headnote

[3] **Courts**
Courts, Judges, and Judicial Officers, Acts and Proceedings Of

Supreme Court had subject matter jurisdiction, pursuant to its power of general supervision and control of inferior courts, to hear emergency petition for writ of mandamus to prohibit probate judges from issuing **marriage licenses** to same-sex couples; probate judges **functioned** as courts of inferior jurisdiction with responsibility to administer law in many types of cases, there was a need for immediate, uniform relief among all

of state's probate judges, and no circuit court had jurisdiction over any probate judge outside its territorial jurisdiction. Const. Art. 6, § 140(b); Code 1975, § 12–2–7.

Cases that cite this headnote

[4] **Mandamus**
Use of Name of State

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.

Cases that cite this headnote

[5] **Mandamus**
Use of Name of State

Petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing **marriage licenses** to same-sex couples was not required to be brought by Attorney General, but could be brought by private parties in name of state, since petition did not concern a duty owed to the government as such; duty to issue **marriage licenses** in accordance with state law was a duty owed to the public for its benefit.

Cases that cite this headnote

[6] **Mandamus**
Interest in Subject-Matter

Probate judge had standing to litigate emergency petition in Supreme Court seeking writ of mandamus to prohibit probate judges from issuing **marriage licenses** to same-sex couples; in his official capacity, judge had interest in discharging his ministerial duty in a manner consistent with law, and judge would be required to confront question of validity of same-sex **marriages licensed** by other probate judges and to address unavoidable derivative questions.

Cases that cite this headnote

[7] **Courts**
Construction of Federal Constitution, Statutes, and Treaties

Courts
Courts, Judges, and Judicial Officers, Acts and Proceedings Of

Decision of federal district court, determining that statutes prohibiting issuance of **marriage licenses** to same-sex couples violated equal protection, was not controlling authority on state Supreme Court and did not preclude Supreme Court from issuing writ of mandamus prohibiting state probate judges from issuing **marriage licenses** to same-sex couples. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

4 Cases that cite this headnote

[8] **Courts**
Decisions of United States Courts as Authority in Other United States Courts

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.

Cases that cite this headnote

[9] **Courts**
Decisions of United States Courts as Authority in Other United States Courts

Courts
Decisions of United States Courts as Authority in State Courts

Federal district court decisions cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties.

Cases that cite this headnote

[10] **Courts**
Decisions of United States Courts as Authority in State Courts

In determining federal common law, the Alabama Supreme Court defers only to the holdings of the United States Supreme Court and its own interpretations of federal law; legal principles and holdings from inferior federal courts have no controlling effect, although they can serve as persuasive authority.

Cases that cite this headnote

[11] **Courts**
Nature of Judicial Determination
Courts
Construction of Federal Constitution, Statutes, and Treaties

In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy, for both sets of courts are governed by the same reviewing authority of the United States Supreme Court.

Cases that cite this headnote

[12] **Courts**
Decisions of United States Courts as Authority in Other United States Courts

Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions; indeed, such results were contemplated by the federal system, and neither sovereign is required to, nor expected to, yield to the other.

Cases that cite this headnote

[13] **Constitutional Law**
Equal Protection
Constitutional Law
Statutes and Other Written Regulations and Rules

For purposes of an equal protection challenge to a statute, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Equal Protection
Constitutional Law
Economic or Social Regulation in General

When social or economic legislation is at issue, the equal protection clause allows the states wide latitude, and the constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[15] **Constitutional Law**
Alien Status
Constitutional Law
Race, National Origin, or Ethnicity

When a statute classifies by race, alienage, or national origin, these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others; for these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny in an equal protection challenge and will be sustained only if they are suitably tailored to serve a compelling state interest. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[16] **Constitutional Law**
Marriage and Civil Unions
Marriage
Power to Regulate and Control
Marriage
Same-Sex and Other Non-Traditional Unions

Marriage

Authority to Issue **License**

Statutes prohibiting issuance of **marriage licenses** to same-sex couples did not discriminate on basis of gender, and thus were not subject to heightened scrutiny for purposes of determining whether statutes violated equal protection; all men and all women were equally restricted to **marriage** between the opposite sexes. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

Cases that cite this headnote

[17] **Constitutional Law**

Marriage and Civil Unions

Marriage

Power to Regulate and Control

Marriage

Same-Sex and Other Non-Traditional Unions

Marriage

Authority to Issue **License**

Rational basis existed for statutes prohibiting issuance of **marriage licenses** to same-sex couples, and thus statutes did not violate equal protection; statutes were rationally related to legitimate government interest in recognizing and encouraging the ties between children and their biological parents. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

Cases that cite this headnote

[18] **Constitutional Law**

Same-Sex **Marriage**

Marriage

Power to Regulate and Control

Marriage

Same-Sex and Other Non-Traditional Unions

Marriage

Authority to Issue **License**

Statutes prohibiting issuance of **marriage licenses** to same-sex couples did not violate due process, since statutes did not interfere with any fundamental rights; fundamental right to marry was limited to traditional opposite-sex **marriage** since same-sex **marriage** was not a deeply rooted tradition, there was no fundamental right to obtain state approval of one's sexual relationships, there was no fundamental right to marry a person one loved regardless of the gender of that person, and there was no fundamental right to enjoy the dignity of having the status of a married person. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

Cases that cite this headnote

[19] **Constitutional Law**

Same-Sex **Marriage**

Marriage

Power to Regulate and Control

Marriage

Same-Sex and Other Non-Traditional Unions

Marriage

Authority to Issue **License**

Statutes prohibiting issuance of **marriage licenses** to same-sex couples were not based solely on animus against homosexuals, and thus did not violate due process; statutes were not intended to single out same-sex partners for disfavored status, but served legitimate purposes including protecting children produced in opposite-sex relationships, fashioning a system for parental legal responsibilities, encouraging family structure, and enabling formative education and socialization of children. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 36.03; Code 1975, § 30–1–19.

Cases that cite this headnote

Attorneys and Law Firms

A. Eric Johnston, Birmingham; Samuel J. McLure of The Adoption Law Firm, Montgomery; and Mathew D. Staver, Horatio G. Mihet, and Roger K. Gannam of Liberty Counsel, Orlando, FL, for petitioner State ex rel. Alabama Policy Institute and Alabama Citizens Action Program.

John E. Enslen, Probate Judge of Elmore County, as petitioner.

Lee L. Hale, Mobile; and J. Michael Druhan, Jr., and Harry V. Satterwhite, Mobile, for respondent Judge Don Davis, Probate Judge of Mobile County.

Gregory H. Hawley, Christopher J. Nicholson, and G. Douglas Jones of Jones & Hawley, PC, Birmingham; and Jeffrey Sewell and French McMillan of Sewell, Sewell, McMillan, LLC, Jasper, for respondent Alan L. King, Probate Judge of Jefferson County.

George W. Royer, Jr., and Brad A. Chynoweth of Lanier Ford Shaver & Payne, P.C., Huntsville, for respondent Tommy Ragland, Probate Judge of Madison County.

Robert D. Segall of Copeland, Franco, Screws & Gill, P.A., Montgomery; Thomas T. Gallion and Constance C. Walker of Haskell Slaughter & Gallion, LLC, Montgomery; Samuel H. Heldman of The Gardner Firm, PC, Washington, D.C.; Tyrone C. Means, H. Lewis Gillis, and Kristen Gillis of Means Gillis Law, LLC, Montgomery; and John Mark Englehart, Montgomery, for respondent Steven L. Reed, Probate Judge of Montgomery County.

Kendrick E. Webb, Jamie Helen Kidd, and Fred L. Clements, Jr., of Webb & Eley, P.C., Montgomery, for respondent Robert M. Martin, Probate Judge of Chilton County.

L. Dean Johnson, Huntsville, for amici curiae Eagle Forum of Alabama Education Foundation and Eagle Forum Education & Legal Defense Fund, in support of the petitioner State ex rel. Alabama Policy Institute and Alabama Citizens Action Program.

J. Richard Cohen and David Dinielli, Southern Poverty Law Center, Montgomery; Ayesha Khan, Americans United for Separation of Church and state, Washington, D.C.; Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, CA; and Randall C. Marshall, ACLU of Alabama Foundation, Montgomery, for amicus curiae Equality Alabama, in support of the respondents.

J. Stanton Glasscox of Glasscox Law Firm, LLC, Birmingham, for amicus curiae J. Stanton Glasscox, in support of the respondents.

Opinion

PER CURIAM.

*1 The State of Alabama, on relation of the Alabama Policy Institute ("API"), the Alabama Citizens Action Program ("ACAP"), and John E. Enslen, in his official capacity as Judge of Probate for Elmore County, seeks emergency and other relief from this Court relating to the issuance of **marriage licenses** to same-sex couples. Named as respondents are Alabama Probate Judges Alan L. King (Jefferson County), Robert M. Martin (Chilton County), Tommy Ragland (Madison County), Steven L. Reed (Montgomery County), and "Judge Does ## 1–63, each in his or her official capacity as an Alabama Judge of Probate." API and ACAP ask on behalf of the State for "a clear judicial pronouncement that Alabama law prohibits the issuance of **marriage licenses** to same-sex couples." To the same end, Judge Enslen "requests that this Supreme Court of Alabama, by any and all lawful means available to it, protect and defend the sovereign will of the people of the State of Alabama."

Chapter 1 of Title 30, Ala.Code 1975, provides, as has its predecessor provisions throughout this State's history, a comprehensive set of regulations governing what these statutes refer to as "**marriage**." See, e.g., § 30–1–7, Ala.Code 1975 (providing for the solemnization of "**marriages**"), and § 30–1–9, Ala.Code 1975 (authorizing probate judges to issue "**marriage**" **licenses**). In 1998, the Alabama Legislature added to this chapter the "Alabama **Marriage** Protection Act," codified at § 30–1–19, Ala.Code 1975 ("the Act"), expressly stating that "**[m]arriage** is inherently a unique relationship between a man and a woman" and that "[n]o **marriage license** shall be issued in the State of Alabama to parties of the same sex." § 30–1–19(b) and (d), Ala.Code 1975. In 2006, the people of Alabama ratified an amendment to the Alabama Constitution known as the "Sanctity of **Marriage** Amendment," § 36.03, Ala. Const. 1901 ("the Amendment"), which contains identical language. § 36.03(b) and (d), Ala. Const. 1901. The petitioner here, the State of Alabama, by and through the relators, contends that the respondent Alabama probate judges are flouting a duty imposed upon them by the Amendment and the Act and that we should direct the respondent probate judges to perform that duty. [1]

The circumstances giving rise to this action are the result of decisions and orders recently issued by the United States District Court for the Southern District of Alabama ("the federal district court") in *Searcy v. Strange,* [Civil Action No. 14–0208–CG–N, Jan. 23, 2015] —— F.Supp.3d —— (S.D.Ala.2015) ("*Searcy I* "), and *Strawser v. Strange* (Civil Action No. 14–0424–CG–C, Jan. 26, 2015) and a subsequent

order by that court, in each of those cases, refusing to extend a stay of its initial order pending an appeal.

In its initial decision in *Searcy I,* the federal district court issued a "Memorandum Opinion and Order" in which that court came to the conclusion that the "prohibition and non-recognition of same-sex **marriage**" in the Amendment and the Act violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Searcy I,* the federal district court enjoined Alabama Attorney General Luther Strange—the only remaining defendant in that action—from enforcing the Amendment and the Act.

***2** On January 26, the federal district court entered a preliminary injunction in *Strawser,* a case in which a same-sex couple had been denied a **marriage license** in Mobile. The federal district court, relying on the reasons it provided in *Searcy I* for the unconstitutionality of the Amendment and the Act, enjoined Attorney General Strange and "all his officers, agents, servants and employees, and others in active concert or participation with any of them" from enforcing "the **marriage** laws of Alabama which prohibit same-sex **marriage**."

In the wake of the federal district court's orders, Attorney General Strange has refrained from fulfilling what would otherwise have been his customary role of providing advice and guidance to public officials, including probate judges, as to whether or how their duties under the law may have been altered by the federal district court's decision. Similarly, consistent with the federal district court's order, Attorney General Strange has refrained from taking any other official acts in conflict with those orders.

On January 28, 2015, the federal district court issued an "Order Clarifying Judgment" in *Searcy I,* in which it responded to "statements made to the press by the Alabama Probate Judges Association" that indicated that, "despite [the federal district court's] ruling, [probate judges] must follow Alabama law and cannot issue **marriage licenses** to same-sex couples." In that order, the federal district court observed that

> " '[r]easonable people can debate whether the ruling in this case was correct and who it binds. There should be no debate, however, on the question whether a clerk of court *may follow the ruling,* even for **marriage-license** applicants who are not parties to this case. And *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.' "

(Quoting *Brenner v. Scott* (No. 4:14cv107, Jan. 1, 2015) (N.D.Fla.) (emphasis added).)

The federal district court entered stays of the execution of its injunctions in *Searcy I* and *Strawser* until February 9, 2015, in order to allow Attorney General Strange to seek a further stay, pending appeal, from the United States Court of Appeals for the Eleventh Circuit. On February 3, 2015, the Eleventh Circuit declined Attorney General Strange's request for a stay. Thereafter, Attorney General Strange sought a stay from the United States Supreme Court. On February 9, 2015, the United States Supreme Court also declined to enter a stay over a strongly worded dissent from Justice Clarence Thomas that was joined by Justice Antonin Scalia. *Strange v. Searcy,* ——U.S. ——, 135 S.Ct. 940, —— L.Ed.2d —— (2015).

***3** On February 8, 2015, the Chief Justice of this Court entered an administrative order stating that the injunctions issued by the federal district court in *Searcy I* and *Strawser* were not binding on any Alabama probate judge and prohibiting any probate judge from issuing or recognizing a **marriage license** that violates the Amendment or the Act.

On February 9, 2015, the stays of the injunctions in *Searcy I* and *Strawser* were lifted. It is undisputed that at that time respondent probate Judges King, Martin, Ragland, and Reed began issuing **marriage licenses** to same-sex couples in their

respective counties. Probate judges in some other counties refused to issue any **marriage licenses** pending some further clarification concerning their duty under the law. Still other probate judges continued to issue **marriage licenses** to opposite-sex couples and refused to issue **marriage licenses** to same-sex couples.

Also on February 9, 2015, the plaintiffs in *Searcy I* filed a motion seeking to hold Mobile Probate Judge Don Davis in contempt for "fail[ing] to comply with [the federal district court's] January 23, 2015 Order." The federal district court denied the motion, stating:

> "Probate Judge Don Davis is not a party in this case and the Order of January 23, 2015, did not directly order [Judge] 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."

(Footnote omitted.)

On February 10, 2015, the federal court granted the plaintiffs' motion in *Strawser* to amend their complaint to add three additional same-sex couples as plaintiffs and to add Judge Davis as a defendant. On February 12, 2015, the federal district court entered an order requiring Judge Davis to issue **marriage licenses** to each of the four couples named as plaintiffs in that case.

As noted, on February 11, 2015, API and ACAP filed their petition. On February 13, 2015, this Court ordered answers and briefs in response to the petition, "as to the issues raised by the petition, including, but not limited to, any issue relating to standing or otherwise relating to this Court's subject-matter jurisdiction, and any issue relating to the showing necessary for temporary relief as requested in the petition." On February 18, 2015, the named respondent probate judges and Probate Judges Don Davis and John E. Enslen filed their respective responses to the petition.

In his response, Judge Davis "moved this ... Court to enter an Order that the Emergency Petition for Writ of Mandamus filed on February 11, 2015, with this Court does not apply to [him] due to changing circumstances that are not reflected in the Mandamus Petition." He states that the petition does not apply to him because he is a defendant, in his official capacity as probate judge, in *Strawser*, and he has been "enjoined from refusing to issue **marriage licenses** to the plaintiffs [in that case] due to the Alabama laws which prohibit same-sex **marriage**."

***4** [1] For his part, Judge Enslen stated in his response that he "has thus far refused to issue same sex **marriage licenses**." Judge Enslen expressly requested that this Court "by any and all lawful means available to it, protect and defend the sovereign will of the people of the State of Alabama as expressed in the Constitution of the State of Alabama, as amended." We treat Judge Enslen's response as a motion to join this proceeding in the place of one of the "Judge Doe" respondents, and we grant that motion.

Also, in light of the fact that the legal positions of API, ACAP, and respondent Judge Enslen are clearly aligned, we hereby modify the record to reflect that alignment. [2] Judge Enslen has been realigned as an additional relator seeking an order from this Court requiring, among other things, that Alabama probate judges continue to perform their duty in accordance with Alabama law. API, ACAP, and Enslen are hereinafter collectively referred to as "the relators."

The relators assert that Alabama's probate judges have a ministerial duty to follow Alabama law limiting **marriage** to a union of one man and one woman. In contrast, the respondents contend that granting the relief the relators request necessarily would require this Court to determine the validity of that law when tested against the United States Constitution because there would be no ministerial duty of the nature asserted if the law is unconstitutional.

The ministerial duty of probate judges in Alabama is, of course, a **function** of Alabama law, which probate judges swear by oath to support, except to the extent that that duty may be altered or overridden by the United States Constitution, to which they likewise swear an oath. Before the federal district court issued its decisions in *Searcy I* and *Strawser*, the named respondents and all other probate judges in this State were performing their ministerial duty in accordance with the express provisions of the Act and the Amendment. They did so even though numerous federal

courts had already declared other states' laws limiting **marriage** to opposite-sex couples to be unconstitutional. See, e.g., *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.2014); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir.2014); *Latta v. Otter,* 771 F.3d 456 (9th Cir.2014); and *Kitchen v. Herbert,* 755 F.3d 1193 (10th Cir.2014). The respondents stopped following Alabama law, however, following the *Searcy I* and *Strawser* decisions. Clearly, the respondents, who were not bound by the federal district court's decision, assumed a new position as to the nature of their duty in accordance with the position taken by the federal district court. Therefore, in order to determine whether the respondents are correct to now treat their ministerial duty as being altered or overridden by the United States Constitution, we must examine the reasoning of the federal district court's decision in *Searcy I,* which triggered their change of position. Absent our doing so, we cannot resolve the dispute that exists in this adversarial proceeding; we cannot provide the relators the relief that they request and that the respondents oppose. It would not be enough for this Court merely to order that the respondents "follow their ministerial duty." Such an order would beg the question whether they are or are not doing so at the present time, the very question the parties contest. Accordingly, in order to resolve the dispute before us and to discharge the supervisory duties and responsibilities imposed upon this Court by law, we must address that question.

I. *The Significance and Meaning of Marriage*

*5 [2] The family is the fundamental unit of society. **Marriage** is the foundation of the family. There is no institution in a civilized society in which the public has any greater interest.

> "The contract of **marriage** is the most important of all human transactions. It is the very basis of the whole fabric of civilized society."

Joseph Story, *Commentaries on the Conflict of Laws Foreign and Domestic* § 109 (3d ed.1846).

> "[**Marriage**] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."

Maynard v. Hill, 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). It "creat[es] the most important relation in life, ... having more to do with the morals and civilization of a people than any other institution." *Id.* at 205, 8 S.Ct. 723.

> " '[**Marriage**] is not then a contract within the meaning of the clause of the constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.' "

Id. at 211–12, 8 S.Ct. 723 (quoting *Adams v. Palmer,* 51 Me. 480, 484–85 (1863)).

> "[**M**]**arriage** is a contract *sui generis,* and the rights, duties, and obligations which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by private contract, but by the public laws of the State, which are imperative on all, who are domiciled within its territory."

Story, supra, at § 111.

According to one observer, **marriage** is a "prepolitical" "natural institution" "not created by law," but nonetheless recognized and regulated by law in every culture and, properly understood, an institution that must be preserved as a public institution based on the following rationale: "The family is the fundamental unit of society.... [F]amilies ... produce something that governments need but, on their own, they could not possibly produce: upright, decent people who make honest law-abiding, public-spirited citizens. And **marriage** is the indispensable foundation of the family." Robert P. George, *Law and Moral Purpose,* First Things, Jan. 2008; see also Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is **Marriage**?,* 34 Harv. J.L. & Pub. Pol'y 245, 270 (2011) (discussing the bases for laws supporting "conjugal" or "traditional" **marriage** and noting that "[**m**]**arriages** ... are a matter of urgent public interest, as the record of almost every culture attests—worth legally recognizing and regulating. Societies rely on families, built on strong **marriages**, to produce what they need but cannot form on their own: upright, decent people who make for reasonably

conscientious, law-abiding citizens. As they mature, children benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.... In the absence of a flourishing **marriage** culture, families often fail to form, or to achieve and maintain stability.").

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

In 1885, the United States Supreme Court expressed the axiomatic nature of **marriage** as follows:

> "[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

Murphy v. Ramsey, 114 U.S. 15, 45, 5 S.Ct. 747, 29 L.Ed. 47 (1885). See, also, *Smith v. Smith*, 141 Ala. 590, 592, 37 So. 638, 638–39 (1904), describing **marriage** as "the sacred relation." Even in decisions suggesting that **marriage** is simply a "civil status," courts have recognized "the fair point that same-sex **marriage** is unknown to history and tradition." *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir.2012). As the United States Supreme Court acknowledged in *United States v. Windsor*, — U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013):

> "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful **marriage**. For **marriage** between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and **function** throughout the history of civilization."

— U.S. at ——, 133 S.Ct. at 2689 (also noting that "[t]he limitation of lawful **marriage** to heterosexual couples ... for centuries had been deemed both necessary and fundamental," *id.*).

> "It is beyond dispute, as the Court of Appeal majority in this case persuasively indicated, that there is no deeply rooted tradition of same-sex **marriage**, in the nation or in this state. Precisely the opposite is true. The concept of same-sex **marriage** was unknown in our distant past, and is novel in our recent history, because the universally understood *definition* of **marriage** has been the legal or religious union of a man and a woman."

***7** *In re **Marriage** Cases*, 43 Cal.4th 757, 866, 183 P.3d 384, 460, 76 Cal.Rptr.3d 683, 773 (2008) (Baxter, J., concurring in part and dissenting in part) (footnote omitted). [3]

From its earliest days, Alabama has recognized so-called common-law **marriages**. See, e.g., *Campbell's Adm'r v. Gullatt*, 43 Ala. 57, 69 (1869) ("[A] **marriage** good at the common law, is to be held a valid **marriage** in this State."). Also from its earliest days, the State has by legislation provided a statutory scheme for the formal **licensing** and recognition of **marriages** by the State. H. Toulmin, *Digest of the Laws of Alabama*, tit. 42, ch. 1, § 1 (1823). The present statutorily prescribed scheme for the **licensing** and solemnization of **marriages** is found in Chapter 1 of Title 30,

Ala.Code 1975. Further, both the caselaw and the statutory law of Alabama incorporate or contemplate the institution of **marriage** in many areas.

The meaning and significance of **marriage** as an institution, as prescribed or recognized throughout all of these statutes and all of Alabama's decisional laws, reflects the truths described above: that **marriage**, as a union between one man and one woman, is the fundamental unit of society.

As the Alabama Supreme Court stated in 1870:

> "Archbishop Rutherford, one of the most able and eminent of the commentators on Grotius, has placed **marriage** among the natural rights of men. He defines it in these words: '**Marriage** is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other, for the purpose of their mutual happiness and for the production and education of children. Little, I suppose, need be said in support of this definition, as nothing is affirmed in it, but what all writers upon natural law seem to agree in.'—Ruthf. Insts. of Nat. Law, p. 162; 1 Bish. on Mar. and Div. § 3, 29; 2 Kent, 74, 75; 6 Bac. Abr. Bouv. p. 454; 2 Bouv. Law Dict. 12th ed. p. 105.
>
> "Mr. Parsons, referring to the same subject, in a late work of the highest authority, uses like language. He declares that 'the relation of **marriage** is founded on the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness. No legal topic surpasses this in importance; and some of the questions which it suggests are of great difficulty.'—2 Pars. on Contr. p. 74."

Goodrich v. Goodrich, 44 Ala. 670, 672–75 (1870).

II. *This Court's Authority And Responsibility To Act*

A. This Court Has Subject-Matter Jurisdiction

[3] As discussed, the federal district court's order in *Searcy I* enjoined Attorney General Strange from enforcing the Amendment and the Act, thus effectively preventing the Attorney General from giving much needed advice to Alabama's probate judges as to their legal duties under the law. The federal district court's order in *Strawser* specifically relied upon the legal reasoning set out in *Searcy I*. Neither order specifically discusses or analyzes the remainder of Chapter 1 of Title 30. Neither order analyzes the import of its approach to the term "**marriage**" for such related terms as "husband," "wife," "spouse," "father," and "mother" so entrenched in much of the caselaw and other statutory law of this State. See discussion infra. The probate judges of this State, in both their judicial and ministerial capacities, continue to be bound by that caselaw and by those statutes. Furthermore, 67 of this State's 68 probate judges are not the subject of any restraint by the federal district court, including as to the interpretation and application of the Act and the Amendment.

***8** Yet there is the federal district court decision. And, in the wake of that decision, the refusal of the federal district court to stay that decision and the unavailability of the Attorney General as a source of guidance, uncertainty has become the order of the day. Confusion reigns. Many judges, including the respondents, are issuing **marriage licenses** to both same-sex couples and opposite-sex couples. Others are issuing no **marriage licenses** at all. Still others, like relator Judge Enslen, are issuing **marriage licenses** only to opposite-sex couples. There is no order or uniformity of practice.

But the problems that lie before us are not limited to the confusion and disarray in the ministerial act of **licensing marriages**. If the same-sex **marriage licenses** being issued by respondents and other probate judges are given effect by those judges and their colleagues in other circuits throughout the State, this will work an expansive and overnight revolution in countless areas of caselaw and statutory law that incorporate or contemplate the traditional definition of **marriage**. To name but a few examples, there is caselaw and/or statutory law that presumes, accommodates, or contemplates man-woman **marriage** in such wide-ranging areas as the laws of inheritance and the distribution of estates, the administration of estates, postmarital support, custodial and other parental rights as to children, adoption of children,[4] dissolution of **marriages**, testimonial privileges in both the civil and criminal law, certain defenses in the criminal law, interests in land, the conveyance and recording of such interests, compensation for the loss of consortium, and the right to statutory or contractual benefits of many types. Indeed, most of the matters falling within the jurisdiction of the probate courts involve rights that are affected by marital status because of the rights of a spouse or legal preferences given to a spouse or parent.

Section 12–13–1, Ala.Code 1975, states, in part:

"(b) The probate court shall have original and general jurisdiction over the following matters:

"(1) The probate of wills.

"(2) The granting of letters testamentary and of administration and the repeal or revocation of the same.

"(3) All controversies in relation to the right of executorship or of administration.

"(4) The settlement of accounts of executors and administrators.

"(5) The sale and disposition of the real and personal property belonging to and the distribution of intestate's estates.

"(6) The appointment and removal of guardians for minors and persons of unsound mind.

"(7) All controversies as to the right of guardianship and the settlement of guardians' accounts.

"(8) The allotment of dower in land in the cases provided by law."

Without a clear understanding as to whether a **marriage** exists, how is a probate court to know whether a same-sex partner must be served with process as a surviving spouse for purposes of a petition to probate a deceased partner's will; how is the probate court to know whether a same-sex partner has a priority right, as a surviving spouse, to appointment as administrator of a deceased partner's estate; how is the probate court to know whether a deceased partner has the right of a surviving spouse to an intestate share of the estate, or to homestead allowance, to exempt property, to family allowance, or to other rights of a surviving spouse; and how is the probate court to determine priority rights as to the appointment of guardians and conservators?

***9** And the problems will not be confined to probate courts. Circuit courts must assess marital status in regard to whether to grant a petition for a legal separation or a divorce and in making property divisions and alimony awards. And marital status is part of our law concerning the legitimation of children and paternity, including presumptions as to married persons to whom a child is born, a matter that affects both circuit courts and juvenile courts. Likewise, circuit courts will be confronted with claims of loss of consortium and wrongful-death claims brought on behalf of the heirs of decedents, and all trial courts will have to assess the applicability of evidentiary privileges belonging to a spouse.

The Governor of Alabama recently highlighted in an amicus brief to the United States Court of Appeals for the Eleventh Circuit (filed in support of Attorney General Strange's request for a stay of the order in *Searcy I*) some of the laws and practices that potentially would be affected by a redefinition of **marriage**:

"[A]ll of the statutes governing marital and domestic relations, Ala.Code Title 30, and the judicial decisions interpreting them; the presumption of paternity, Ala.Code § 26–17–204, and other rules for establishment of the parent-child relationship, Ala.Code § 26–17–201; laws governing consent to adopt, Ala.Code § 26–10A–7(3), and all other laws governing adoption, Ala.Code Title 26, Chapter 10A; termination of parental rights, Ala.Code § 12–15–319; all laws that presuppose different people occupying the positions of 'father,' 'mother,' 'husband,' and 'wife,' e.g., Ala.Code § 40–7–17; laws governing intestate distribution, the spousal share, Ala.Code § 43–8–41, and the share of pretermitted children, Ala.Code § 43–8–91; legal protections for non-marital children, Ala.Code § 26–17–202; registration of births, Ala.Code § 22–9A–7, *J.M.V. v. J.K.H.*, 149 So.3d 1100 (Ala.Civ.App.2014); conflict-of-interest rules and other ethical standards prohibiting marital relations, Ala.Code § 45–28–70(f)(1), *Cooner v. Alabama State*, 59 So.3d 29 (Ala.2010); and laws presupposing biological kin relations, Ala.Code § 38–12–2.

"This does not include laws governing forms issued by the State that identify mothers, fathers, husband, or wife; tax laws; education curricula; accreditation standards for educational institutions; **licensing** standards for professions; public accommodations rules; religious liberty protections; health care regulations; and many other areas of law. What are children to be taught in Alabama's schools about the nature of **marriage**? How will it be defined in textbooks and other instructional materials? Will all private schools, colleges, and universities be required to go along with the new definition, whatever it is? Will there be moral or religious exemptions for those who perceive inherent differences between marital unions and non-marital unions?"

Every day, more and more purported "**marriage licenses**" are being issued to same-sex couples by some of the probate judges in this State. Every day, the recipients of those **licenses** and others with whom they interact may be, and

presumably are, relying upon the validity of those **licenses** in their personal and business affairs. Every probate judge in this State, regardless of his or her own stance on the issuance of such **licenses**, will soon enough be faced, in his or her judicial capacity, with a universe of novel derivative questions unprecedented in their multiplicity, scope, and urgency. The circuit courts of this State will confront a similar experience.

***10** The probate judges of this State are members of the judicial branch of government. Accepting the position suggested by all relators and respondents, that insofar as their execution of the authority to issue **marriage licenses** they **function** not as courts of inferior jurisdiction, but as **executive** ministers of the law, the fact remains that each probate judge in this State also **functions** as a "court of inferior jurisdiction" with responsibility to administer the law in many types of cases. Their ability to do so with any semblance of order and uniformity, with due regard for the lives their decisions impact, and with respect for the law and the constitutions of this State and of the United States, which they have sworn an oath to uphold, is in peril. Indeed, given the disparate views of the law held among these judges, and no doubt the circuit judges as well, we see no way for there to be uniform and even-handed application of the law among the circuits of this State unless and until this Court speaks.

Section 140(b), Ala. Const.1901, states that this Court "shall have original jurisdiction ... to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction." Section 12–2–7(3), Ala.Code 1975, echoes § 140, stating that "[t]he Supreme Court shall have authority ... [t]o issue writs of injunction, habeas corpus, and such other remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction." A separate provision of § 12–2–7, subsection (2), provides the following jurisdiction to the Supreme Court: "To exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction."

Alabama is not alone in its adoption of provisions such as those cited above. "Constitutional or statutory provisions expressly granting to various courts superintending control over inferior tribunals are common, although not universal, in the states of this country." P.V. Smith, Annotation, *Superintending Control Over Inferior Tribunals*, 112 A.L.R. 1351, 1352 (1938). The language used by most states in granting courts this power is very similar to the language found in Alabama's Constitution. Generally, concerning the origin of the superintending control over inferior tribunals, Smith states:

> "The following conclusion was drawn by the annotator in 51 L.R.A. 33, loc. cit. p. 111: 'The power of superintending control is an extraordinary power. *It is hampered by no specific rules or means for its exercise.* It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. And, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted.' "

***11** 112 A.L.R. at 1356 (emphasis added). Further,

> "[i]n *Kelly v. Kemp* (1917) 63 Okla. 103, 162 P. 1079, *in regard to the constitutional provision vesting the Supreme Court with a general superintending control over inferior tribunals,* the court said: 'This provision placed the Supreme Court in practically the same position with reference to the inferior courts of the State, as that occupied by the court of King's Bench to the inferior courts of England under the common law, which court, as stated by Blackstone, was *vested with power to keep all inferior courts within the bounds of their authority* and, to do this, *could remove their proceedings to be determined by it,* or prohibit their progress below (3 Bl. Com. 42), and that court was also possessed of authority to enforce in inferior tribunals the due exercise of those judicial or ministerial powers which had been vested in them, by *restraining their excesses and quickening their negligence and obviating their denial of justice* (2 Bl. Com. 111).' "

112 A.L.R. at 1356–57 (emphasis added).

"The power of superintending control is not limited by forms of procedure or by the writ used for its exercise." 112 A.L.R. at 1357.

> "Accordingly, in *State v. Long* (1911) 129 La. 777, 56 So. 884, where it was argued as to the conditions under which writs of certiorari, mandamus, and prohibition might issue, the Supreme Court said that, *in the exercise of its supervisory powers, it was not tied down by the provisions of the Code of Practice regarding such writs.*

> "And in *Thomas v. Doughty* (1927) 163 La. 213, 111 So. 681, the Supreme Court said: '*This court, in the exercise of its general supervision and control over inferior courts, is not tied down by forms of procedure, and will look at the substance of the right sought to be vindicated and the need for speedy relief, rather than to the form in which such relief is sought.*'
>
> "In *Dinsmore v. Manchester* (1911) 76 N.H. 187, 81 A. 533, in answer to an objection to the scope of review by the Supreme Court on certiorari under its statutory general superintendence of all inferior tribunals, the court said that it was unimportant that the proceeding was called 'certiorari,' and that 'the superintending power of the court over inferior tribunals does not depend upon, and is not limited by, technical accuracy of designation in legal forms of action.'
>
> "And in *Lowe v. District Ct.* (1921) 48 N.D. 1, 181 N.W. 92, the Supreme Court said that the nature and extent of its superintending control are 'not reflected by the name of the writ that has been used for its exercise.' "

112 A.L.R. at 1357–58 (emphasis added). See also *Thompson v. Lea*, 28 Ala. 453, 463 (1856) (Rice, C.J.) (noting that this Court's appellate jurisdiction and its superintending control over inferior tribunals are "distinct things, and must not be confounded" and stating that " '[a] general superintendence and control of inferior jurisdictions' is, by the constitution, granted to this court unconditionally. 'Appellate jurisdiction' is, by the very terms of the grant, *subjected to* 'such restrictions and regulations, not repugnant to this constitution, as may, from time to time, be prescribed by law.' " (emphasis added)).

***12** "The generally accepted view is that a court will exercise its superintending control over inferior tribunals only in extreme cases and under unusual circumstances." *Smith*, 112 A.L.R. at 1373. This sentiment is consistent with our Court's precedent. In *Ex parte Alabama Textile Products Corp.*, 242 Ala. 609, 613, 7 So.2d 303, 306 (1942), this Court exercised jurisdiction over an original action on the ground that the Montgomery Circuit Court could not provide the complete relief necessary, observing that

> "the higher court will not take jurisdiction where the application can be made to a lower court, unless for special reasons complete justice cannot otherwise be done, as where the case is of more than ordinary magnitude and importance to prevent a denial of justice or where no application can be made to the lower court in time to prevent the consummation of the alleged wrong."

See also *Roe v. Mobile Cnty. Appointment Bd.*, 676 So.2d 1206 (Ala.1995), overruled on other grounds by *Williamson v. Indianapolis Life Ins. Co.*, 741 So.2d 1057 (1999), in which this Court relied upon the unified nature of our court system and the supervisory authority granted to it under what is now § 140 of our constitution to "reach down" and "pull up" to it the record in a still pending lower court proceeding in order to create a framework for its assessment of a related matter.

The respondents' briefs focus on *Alabama Textile* and make three arguments as to why the holding in that case does not support jurisdiction in this Court over the present matter. First, the respondents argue that *Alabama Textile* involved a petition for a writ of certiorari rather than a petition for a writ of mandamus. The respondents give no explanation, and cite no authority, as to how or why this makes a difference. We cannot see that it does.

Second, the respondents argue that the Court in *Alabama Textile* determined that it should exercise jurisdiction "because all parties consented to the jurisdiction of the Supreme Court." This assertion is incorrect. Parties cannot vest this Court with jurisdiction by agreeing that it has jurisdiction. 242 Ala. at 612, 7 So.2d at 305 ("[T]his Court can only act within the jurisdiction conferred by law, and this cannot be enlarged by waiver or the consent of the parties."). And the parties did not do so in *Alabama Textile*. What they did agree to do was to waive the necessity of a writ of certiorari calling up the case for review. But the issue of a formal writ of certiorari is irrelevant here because the present case comes to us as a petition for a writ of mandamus or similar relief. The case therefore is already before us without the necessity of our calling it up from some lower court. [5]

The third and final argument of the respondents—which they refer to as their "most important[ ] argument"—is as follows: The holding of *Alabama Textile* has been recognized in subsequent cases, but only as dicta. The fact that *Alabama Textile*, itself, held as it did, however, is in itself sufficient precedent for the action taken by this Court today. In any event, one would expect that extraordinary circumstances justifying this Court's action, rather than

action by a circuit court, would be rare. In addition, as the respondents themselves note, the principle recognized by this Court in *Alabama Textile* has in fact been reiterated by this Court on several occasions, including in this Court's decision in *Ex parte Tubbs,* 585 So.2d 1301, 1302 (Ala.1991). See also *Denson v. Board of Trustees of the University of Alabama,* 247 Ala. 257, 258, 23 So.2d 714, 715 (1945), and *Ex parte Barger,* 243 Ala. 627, 628, 11 So.2d 359, 360 (1942).

***13** An additional argument that might have been, but was not, made by the respondents is that the probate court, in exercising its authority to issue **marriage licenses**, acts not as a "court" or a "court of inferior jurisdiction" in relation to this Court, but as an **executive** minister. API and ACAP themselves cite authority for the proposition that " '[t]he issuance of a **marriage license** by a judge of probate is a ministerial and not a judicial act.' " (Quoting *Ashley v. State,* 109 Ala. 48, 49, 19 So. 917, 918 (1896).)

There are several problems with attempting to conclude that this Court lacks jurisdiction on the basis of such a purported distinction in *Alabama Textile.* First, the respondent in *Alabama Textile* was not a "court" either. It was the Alabama Department of Industrial Relations, an agency of the **executive** branch of government. Although its internal procedures for decision-making might have been quasi-judicial in nature, its eventual action or inaction was that of an **executive** agency, not a court.

It would further appear that the exact nature of the party before the Court in *Alabama Textile* was of no moment to the Court, and would have been of no moment even if examined more closely, given the provisions of § 12–2–7(2). As noted, that section states simply that the Supreme Court "shall have authority ... [t]o exercise original jurisdiction in the issue and determination of writs of quo warranto and mandamus in relation to matters in which no other court has jurisdiction." The text refers not to writs directed to lower "courts" but to "matters in which no ... court" (other than the Supreme Court) would have jurisdiction. In addition, of course, there is the fact that the writ of quo warranto authorized thereby is not a writ issued only to courts acting as courts, but is in the normal course a writ issued to individuals purporting to hold (or exercise the authority of) offices of all sorts in all three branches of government. In fact, this Court recently exercised its original jurisdiction under § 12–2–7(2) to issue a writ of mandamus to a probate judge in his administrative capacity where no circuit court had the ability to do so. [6]

It is clear that no other court in this State has the jurisdiction to provide the relief necessary in this most unusual of cases. There is a need for immediate, uniform relief among all the probate judges of this State, and no circuit court has jurisdiction over any probate judge outside its territorial jurisdiction. See *Brogden v. Employees' Ret. Sys.,* 336 So.2d 1376 (Ala.Civ.App.1976) (explaining that the Constitution authorized the Legislature to divide the state into judicial circuits with geographical or territorial boundaries, that within such boundaries each circuit court exercises the authority granted it exclusive of other circuit courts, and therefore the statutory grant to a circuit court of supervisory power over inferior jurisdictions could be applied only to such inferior judicial bodies that sat or acted within the territorial limits of the circuit), cert. denied sub nom., *Ex parte State ex rel. Baxley,* 336 So.2d 1381 (1976).

***14** *Alabama Textile* offers a helpful framework for assessing the necessity of action by this Court under § 12–2–7(2) in this case:

> "The necessity is not wholly dependent upon whether some court inferior to this has the legal power by certiorari to review the order in question. See *Ex parte Boynton,* 44 Ala. 261 [(1870)]. But *the rule observed elsewhere with a similar provision of the constitution seems to be that the higher court will not take jurisdiction where the application can be made to a lower court, unless for special reasons complete justice cannot otherwise be done, as where the case is of more than ordinary magnitude and importance to prevent a denial of justice or where no application can be made to the lower court in time to prevent the consummation of the alleged wrong.* 14 Corpus Juris Secundum, Certiorari, p. 204, § 57. That authority cites *Halliday v. Jacksonville [& Alligator] Plank Road Co.,* 6 Fla. 304 [(1855)]. The report of that case quotes the constitution of Florida in identical language as our section 140, supra, as here material, and observes: 'It is not doubted, but that under the latitude given by the said proviso, a writ of certiorari will lie from this Court to any of the inferior jurisdictions, whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice.' [6 Fla. at 304.]
>
> "We do not think that the requirement of the Constitution that we shall issue such writs only when necessary to give us a general superintendence fixes an iron-clad rule that we cannot do so when another court inferior in grade to us has a like power.

> "While we hold that the Circuit Court of Montgomery County may review by appropriate remedial writs the boards and commissions of the State sitting in Montgomery, we also think that *this Court may do so when in our judgment it is necessary to afford full relief and do complete justice.* An exercise of such discretion will receive more favorable consideration when the interested parties appear and virtually agree that there is such necessity by submitting the cause without making the objection that there is an absence of it. *We have the right to determine whether a necessity exists, influenced by the magnitude and importance of the question involved, and the convenience of the parties in presenting it, rather than in first going to the Circuit Court of the county where the board sits.*
>
> "*On account of the importance of the question here involved, its state-wide application, the need of an early decision, the territorially restricted jurisdiction of the circuit court* and the consent of the parties, we have concluded in the exercise of our power and discretion to give consideration to the merits of the question and make decision of it."

242 Ala. at 613–14, 7 So.2d at 306 (emphasis added).

The "magnitude and importance" of the issue before us is unparalleled. And the "special reasons" that compel us to act are unlike any other in the history of our jurisprudence. Given the textual grant of authority described above, the *sui generis* nature of this matter, the unprecedented existing and potential confusion and disarray among the probate and other judges of this State, the multiplicity and magnitude of the substantive issues presented, the resulting need for an immediate resolution of this matter, the unavailability in any other court of the immediate statewide relief that is needed, and this Court's ultimate responsibility for the orderly administration of justice in this State, we are clear to the conclusion that this Court has the authority to act in this matter to maintain and restore order in the administration of our laws by the probate judges and the courts of this State.

B. This Proceeding Is Between Adverse Parties with Standing

***15** The respondents argue that the relators lack "standing" to bring this action because, they say, the relators have no *private interest or private right* in the performance by Alabama's probate judges of their duty to issue **marriage licenses** only in accordance with Alabama law. The respondents fail to allow for the fact, however, that the present petition is filed in the name of the State for the purpose of securing performance by public officials of *a duty owed to the public,* not in the name of a private party to enforce a private right or duty.

[4] The rule of public-interest standing, sometimes referred to as the public-interest exception, has been widely and long-recognized. Consistent with this principle, this Court has stated that a relator has standing to bring a petition for mandamus or comparable relief, in the name of the State, *seeking to uphold a State statute and to secure performance by respondents of a duty owed to the public.*

> "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). Indeed, this has been well settled in Alabama for over 100 years: "There is no doubt that, where the writ is sued out to require the performance of a definite duty to the public, the proceeding must proceed in the name of the state as plaintiff." *Bryce v. Burke,* 172 Ala. 219, 230, 55 So. 635, 638 (1911) (opinion on rehearing).

This Court did not fundamentally change the law of standing in Alabama in 2003 when it adopted the federal formulation of the general standing rule focusing on injury. See *Alabama Alcoholic Beverage Control Bd. v. Henri–Duval Winery, L.L.C.,* 890 So.2d 70, 74 (Ala.2003). Rather, the Court "effectively *restated the standard* ... using language adopted from the Supreme Court of the United States." *Town of Cedar Bluff v. Citizens Caring for Children,* 904 So.2d 1253, 1256 (Ala.2004) (emphasis added). The *Cedar Bluff* Court explained the development as follows:

"In *Jones v. Black*, 48 Ala. 540 (1872), this Court first articulated a test for determining whether a party has the necessary standing to challenge the constitutionality of an act of the Legislature. We stated then:

" 'A party who seeks to have an act of the legislature declared unconstitutional, must not only show that he is, or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown.'

***16** "48 Ala. at 543. In *Alabama Alcoholic Beverage Control Board v. Henri–Duval Winery, LLC*, 890 So.2d 70, 74 (Ala.2003), a party challenged the constitutionality of Alabama's Native Farm Winery Act, § 28–6–1 et seq., Ala.Code 1975. In that case, this Court effectively restated the standard articulated in *Jones*, using language adopted from the Supreme Court of the United States:

" 'A party establishes standing to bring a challenge [on constitutional grounds] when it demonstrates the existence of (1) an actual, concrete and particularized "injury in fact"—"an invasion of a legally protected interest"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).' "

904 So.2d at 1256–57 (emphasis omitted). [7]

By comparing this Court's own standing formulation from *Jones v. Black*, 48 Ala. 540 (1872) (focusing on injury), with the adopted, three-pronged formulation from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (focusing on injury), the *Cedar Bluff* Court showed that this was no seismic shift in Alabama standing law. The Court simply used the federal formulation to state its own entrenched standing law more precisely. See *Ex parte King*, 50 So.3d 1056, 1059 (Ala.2010) ("[I]n 2003 this Court adopted the ... more precise[ ] rule regarding standing based upon the test used by the Supreme Court of the United States."); *Muhammad v. Ford*, 986 So.2d 1158, 1162 (Ala.2007) ("In [*Henri–Duval*], this Court adopted a more precise rule regarding standing articulated by the United States Supreme Court.").

What this Court did not do in *Henri–Duval* in 2003, and has not done since, is overrule those cases recognizing the equally entrenched standing rule applicable in mandamus cases seeking to compel performance of a public duty. To be sure, the rule is known in the modern law of other states under such labels as the "public-standing exception," the "public-standing doctrine," and "public-interest standing," etc. For example, the Indiana Supreme Court in 2003 concluded, after surveying the laws of numerous accordant states: "*The public standing doctrine, which applies in cases where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right, continues to be a viable exception to the general standing requirement.*" *State ex rel. Cittadine v. Indiana Dep't of Transp.*, 790 N.E.2d 978, 983 (Ind.2003) (emphasis added). In affirming the viability of the rule, the court explained:

"Under our general rule of standing, only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing. Absent this showing, complainants may not invoke the jurisdiction of the court. It is generally insufficient that a plaintiff merely has a general interest common to all members of the public.

***17** "[Relator] seeks to avoid this general rule by invoking the public standing exception. *He does not contend that he has suffered a specific injury, but argues that, because the object of the mandate is to procure the enforcement of a public duty, he has standing under Indiana's public standing doctrine.* As we recently noted in *Schloss [v. City of Indianapolis*, 553 N.E.2d 1204 (Ind.1990)]:

" 'Indiana cases recognize certain situations in which public rather than private rights are at issue and hold that the usual standards for establishing standing need not be met. This Court held in those cases that *when a case involves enforcement of a public rather than a private right* the plaintiff need not have a special interest in the matter nor be a public official.'

"*Schloss*, 553 N.E.2d at 1206 n. 3 (quoting *Higgins [v. Hale]*, 476 N.E.2d [95,] at 101 [(Ind. 1985)]). Specifically, the public standing doctrine eliminates the requirement that the relator have an interest in the outcome of the litigation different from that of the general public.

"The public standing doctrine has been recognized in Indiana case law for more than one hundred and fifty years."

790 N.E.2d at 979–80 (emphasis added; some citations omitted).

More recently, the historical yet still vital "public-interest standing" was invoked in a 2013 New York mandamus proceeding:

> "However, *in matters of great public interest, a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty. The office which the citizen performs is merely one of instituting a proceeding for the general benefit, the only interest necessary is that of the people at large.* One who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding for the performance by officials of their mandatory duties, even without a personal grievance or a personal interest in the outcome. The public interest standing of a citizen has been extended to corporations as well as other organizations.
>
> "In fact, as far back as the Nineteenth Century, the Court of Appeals held, the writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue ... on the relation of one, who, in common with all other citizens, is *interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body,* who refuse to perform it."

Marone v. Nassau Cnty., 967 N.Y.S.2d 583, 589, 39 Misc.3d 1034, 1040–41 (Sup.Ct.2013) (expressing a limitation of the doctrine to "*matters of great public interest* ") (internal quotation marks and citations omitted; emphasis added).

Still more recently, the California Court of Appeal affirmed the vitality of the "public-interest exception":

> "It is true that ordinarily the writ of mandate will be issued only to persons who are beneficially interested. Yet, in [1945, the California Supreme Court] recognized an exception to the general rule where the question is one of *public right* and the object of the mandamus is to procure *the enforcement of a public duty,* the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in *having the laws executed and the duty in question enforced.* The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing *a public right.* It has often been invoked by California courts."

***18** *Hector F. v. El Centro Elementary Sch. Dist.*, 173 Cal.Rptr.3d 413, 418, 227 Cal.App.4th. 331, 338 (2014) (emphasis added; internal quotation marks and citations omitted).

The same rule is found in states throughout the nation. See, e.g., *Southern LNG, Inc. v. MacGinnitie,* 294 Ga. 657, 660, 755 S.E.2d 683, 687 (2014) (" 'Where the question is one of *[a] public right* and the object is to procure the enforcement of *a public duty,* no legal or special interest need be shown [to petition for mandamus], but it shall be sufficient that a plaintiff is interested in *having the laws executed* and the duty in question enforced.' ") (quoting Ga.Code Ann. § 9–6–24 (West 2014) (emphasis added))); *Protect MI Constitution v. Secretary of State,* 297 Mich.App. 553, 566–67, 824 N.W.2d 299, 306 (2012), rev'd on other grounds, 492 Mich. 860, 819 N.W.2d 428 (2012); *ProgressOhio.org, Inc. v. JobsOhio,* 973 N.E.2d 307, 313 (Ohio Ct.App.2012); *State ex rel. Kansas City Power & Light Co. v. McBeth,* 322 S.W.3d 525, 531 (Mo.2010) ("[W]here the duty sought to be enforced is a simple, definite ministerial duty imposed by law, the threshold for standing is extremely low."); *Anzalone v. Administrative Office of Trial Court,* 457 Mass. 647, 653–54, 932 N.E.2d 774, 781 (2010); *Stumes v. Bloomberg,* 551 N.W.2d 590, 592 (S.D.1996); *State ex rel. Clark v. Johnson,* 120 N.M. 562, 568–69, 904 P.2d 11, 17–18 (1995); *Rogers v. Hechler,* 176 W.Va. 713, 348 S.E.2d 299 (1986); *Wells v. Purcell,* 267 Ark. 456, 461, 592 S.W.2d 100, 103 (1979) ("The rule is well settled, that when ... the proceedings are for the enforcement of *a duty affecting not a private right, but a public one, common to the whole community,* it is not necessary that the relator should have a special interest in the matter." (emphasis added)); and *Florida Indus. Comm'n v. State ex rel. Orange State Oil Co.*, 155 Fla. 772, 775, 21 So.2d 599, 600–01 (1945) ("We also said in that case that where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient that he is interested as a citizen in *having the law executed and the duty in question enforced.*" (emphasis added)). [8]

Alabama's public-standing rule, as articulated in *Kendrick,* contemplates an action in the name of the State, which obviously has standing in its own right. Like the authorities from other states cited above, it respects the injury-in-fact requirement for general standing when a plaintiff seeks in his own name to vindicate his or her private right, while equally respecting the alternative rule (or exception) for cases brought in the name of the State to vindicate the public interest in the enforcement of duties owed to the public rather than to an individual. Several Alabama cases illustrate this fidelity.

***19** First, in *Rodgers v. Meredith,* 274 Ala. 179, 146 So.2d 308 (1962), a clerk of the circuit court petitioned, in his own name, for a writ of mandamus to compel the county sheriff to perform his statutory duty to file written reports with the clerk regarding the prisoners entering and leaving the county jail. The Court held that compliance with the statute was mandatory for the sheriff. 274 Ala. at 185–86, 146 So.2d at 314. But the Court also held that the circuit clerk did not have standing to seek mandamus to compel the sheriff's performance because the statute conferred no private right on the clerk. 274 Ala. at 186, 146 So.2d at 314. In so holding, the Court distinguished the private standing on which the clerk relied in error from the public standing on which the clerk could have relied:

> "We hold that the duty here placed on the sheriff by [the reporting statute] *is a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely.* Under the settled rule, petition for mandamus to compel a public officer to perform such duty is properly brought in the name of the state on the relation of one or more persons interested in the performance of that duty. The instant petition was not so brought."

274 Ala. at 186, 146 So.2d at 314–15 (emphasis added). In other words, *because the duty involved was owed to the public,* [9] *the clerk did not have a private interest in the matter, and so the action could be brought only as an on-relation action in the name of the State.* 274 Ala. at 186, 146 So.2d at 315.

Second, in *Kendrick,* a citizen relator, in the name of the State, sued his county commission to force it to provide voting machines for elections in compliance with a State statute. The statute required the county to provide voting machines for all elections in the county, but gave the commission discretion not to provide machines in any precinct having less than 100 registered voters. 256 Ala. at 213, 54 So.2d at 447. The respondents challenged the relator's petition on the basis that he failed to show the requested relief would redress any injury particular to him, because he failed to show he voted in a precinct entitled to be provided voting machines. *Id.*

In rejecting the respondents' challenge to the relator's standing, the Court cited the public-standing rule:

> "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."

256 Ala. at 213, 54 So.2d at 447 (emphasis added). Applying the public-standing rule, the Court concluded:

> "It is clear that the act which petitioner seeks to have performed does not concern the sovereign rights of the State and is one in which *the public, all the people of Jefferson County, have an interest.* Petitioner's right to have the act performed is *not dependent upon the fact that he may or may not vote in a voting place where the governing body is required to install a voting machine.*"

***20** *Id.* (emphasis added).

Similarly, in *Homan v. State ex rel. Smith,* 265 Ala. 17, 18, 89 So.2d 184, 186 (1956), a relator filed an action seeking to force the respondents, all the members of the Board of Commissioners of the Town of Muscle Shoals,

> " 'to forthwith call an election for and in the Town of Muscle Shoals, a municipal corporation in Alabama, to decide the question whether said town shall be annexed to the City of Sheffield, a municipal corporation in Alabama, and to pass the necessary Ordinance providing for such an election to be held not less than thirty days after the passage

of the Ordinance, in accordance with the provisions of Title 37, § 188.' "

265 Ala. at 18, 89 So.2d at 185. The circuit court granted the petition, and, on appeal, the respondents contended that the relator did not have a sufficient interest in the action. The *Homan* Court rejected the argument:

> "*The act sought to be performed does not concern the sovereign rights of the State and is one in which the public, all of the people of the municipalities involved, have an interest.* We hold that this mandamus proceeding was properly brought in the name of the State on the relation of J.E. Smith, and that the trial court did not err in overruling motion of appellants to require Smith to show by what authority the suit was filed in the name of the State of Alabama."

265 Ala. at 19, 89 So.2d at 186 (emphasis added).

In *Gray v. State ex rel. Garrison*, 231 Ala. 229, 231, 164 So. 293, 295 (1935), the Court held that a county commissioner's statutory duty to sign a warrant on appropriation for a public library was "a legal duty in which there was such public interest as warranted a proceeding by mandamus in the name of the state." And in *Marshall County Board of Education v. State ex rel. Williams*, 252 Ala. 547, 551, 42 So.2d 24, 27 (1949), the Court held that a petition for mandamus to a county board of education to compel its performance of a statutory duty to allow school enrollment only to students of a certain age "was for the enforcement of a public duty by respondents and, therefore ... was properly brought in the name of the State on the relation of the petitioners."

Whereas in *Rodgers* the petitioner lacked standing to bring the action in his own name because he had no particularized injury (and he failed to invoke public standing through an on-relation action in the name of the State), in each of the other cases discussed above the relator properly invoked public standing. In each, the official duty was imposed by applicable law, and the duty owed was to the public. In particular, the right at issue was not the relator's private right.

In *Henri–Duval Winery, L.L.C.*, 890 So.2d at 74, the plaintiff, a winery, brought an action for its own benefit, not that of the public, to invalidate, not enforce, a statute providing for the taxation of wine sales. A careful reading of the plurality opinion in *Ex parte Alabama Educational Television Commission*, 151 So.3d 283 (Ala.2013), reveals a similar circumstance. The plaintiffs there sought not to procure an injunction requiring the commission to hold open meetings in the future pursuant to applicable law, something that could benefit the public, but to vindicate a violation of their private rights allegedly stemming from a meeting that had already occurred:

> ***21** "Applying the *Lujan[v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992),] test here, we conclude that Pizzato and Howland do not have standing to bring this action because they have failed to demonstrate 'a likelihood that [their alleged] injury will be "redressed by a favorable decision.' " *Henri–Duval*, supra. Pizzato and Howland argue that they were injured by the Commission's termination of their employment and that that 'termination was the direct result and consequence of the Commissioners' violation of the Open Meetings Act.'
>
> "....
>
> "... [T]he only specific relief Pizzato and Howland requested was the civil fines provided for in § 36–25A–9(g) [, Ala.Code 1975]. Like the injury in *Steel Co. [v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)], however, the alleged injury here was caused by an alleged one-time violation of the Open Meetings Act that was wholly past when Pizzato and Howland's action was filed. Pizzato and Howland have not alleged any 'continuing or imminent violation,' nor does any 'basis for such an allegation appear to exist.' "

Alabama Educ. Television Comm'n, 151 So.3d at 288 (footnote omitted); see also *id.* at 291 (Murdock, J., concurring specially) ("[W]e do not have before us a claim by which a media organization or a citizen seeks to enjoin an anticipated future violation of the statute.").

In sum, injury in fact has always been the primary focus of Alabama's general standing rule (as it has been for the other states discussed above). See *King*, 50 So.3d at 1059 ("Traditionally, Alabama courts have focused primarily on the injury claimed by the aggrieved party to determine whether that party has standing."). For over a century, however, Alabama has recognized that actions may be brought in the name of the State in circumstances comparable to those in which other states refer to public-interest standing. See, e.g., *Bryce*, 172 Ala. at 229, 55 So. at 638. As in other

states, as Alabama adopted the formulaic restatement of the general standing rule (adopted by this Court in *Henri–Duval*), we did not overrule our cases providing for such proceedings by persons interested in the enforcement of a public duty. [10]

As indicated, relators must show that they are seeking to require a "public officer to perform a legal duty in which the public has an interest." *Kendrick*, 256 Ala. at 213, 54 So.2d at 447. It could not be clearer that the public—the people of Alabama—have an interest in the respondents' faithful compliance with Alabama's **marriage** laws. The duty owed by the probate judges to follow state law in the issuance of **marriage licenses** is a duty owed to the public. We refer the reader in this regard to our discussion of the fundamental nature of this law and the critical interest of the public in it for the reasons discussed in Part I above. [11]

That the duty and corresponding right at issue are owed to and held by the public is made even clearer when one considers the exact nature of the duty in question as one that is not even susceptible of vindication as a private right. The duty is not of some affirmative action on the part of the respondents, because the statute in question merely authorizes, without requiring, the issuance of **licenses** by a probate judge. See § 30–1–9 (a probate judge "may" issue **marriage licenses**). Rather, the duty sought to be enforced is in the negative, i.e., to *not* take certain action. It is a duty *not* to issue **marriage licenses** to same-sex couples. It is hard to conceive of a *private right* in any person to *prevent* the issuance of a **marriage license** to another person. The duty and the corresponding right are intrinsically public in their nature, not even susceptible to an action by an individual asserting a private right as to their enforcement.

***22** **[5]** Notwithstanding the foregoing, the respondents contend that the present case falls within a subcategory of on-relation cases that can only be brought in the name of the State by the Attorney General. They point to the below emphasized portion of the larger passage from *Williams* with which we began our discussion of standing:

> "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; *but if the matter concerns the sovereign rights of the State, it must be instituted on the relation of the Attorney General, the law officer of the State.*"

Marshall Cnty. Bd. of Educ. v. State ex rel. Williams, 252 Ala. 547, 551, 42 So.2d 24, 27 (1949).

In *Morrison v. Morris*, 273 Ala. 390, 391–92, 141 So.2d 169, 169–70 (1962), the relator, a member of the Jefferson County Board of Equalization, sought a writ of mandamus against the chairman of the board to void a notification sent by the board to certain taxpayers that changes had been made in assessment of their property.

> "Identical motions to dismiss were filed by the appellee, by the State of Alabama, and by the Attorney General individually, grounded upon the position that the appellant was not a proper party to the petition since the **functioning** of the Board was an activity affecting the sovereign rights of the State, necessitating the filing of such petition by the law officer of the State, the Attorney General."

273 Ala. at 391, 141 So.2d at 169. The *Morrison* Court agreed that the action fell within the sovereign rights of the State and as such could not be brought as an on-relation action by a private party in the name of the State. Its explanation of the applicable rule begins to shed light on its inapplicability to the present case, however:

> "The conduct of County Boards of Equalization is governed by legislative act. Title 51, §§ 81–113, Code, and amendments. The authority of these Boards, having emanated from the State, it necessarily follows that the **functioning** of the Boards is a matter affecting the State, which has a peculiar interest in the uniformity of their activities. 'The right of a private individual to enforce by mandamus duties owing to the public is necessarily confined to duties which are not owing to the state in its sovereign capacity. *Where the duty is owing to the government as such,* private individuals, even though taxpayers, cannot resort to mandamus to enforce it; ....' 35 Am.Jur., Mandamus, § 321, citing *State ex rel. Foshee v. Butler*, 225 Ala. 194, 142 So. 533 [(1932)]. See also *State*

> *ex rel. Chilton County v. Butler*, 225 Ala. 191, 142 So. 531 [(1932)]. *Where a right pertains to the sovereignty of the State,* proceedings for the enforcement of such right are to be instituted by the Attorney General."

***23** 273 Ala. at 391–92, 141 So.2d at 169–70 (emphasis added).

The rule as stated in *Marshall County* and *Morrison* is that only the Attorney General may bring an action in the name of the State if its purpose is to *enforce a "duty owing to the government as such."* The duty in those cases concerned the payment of taxes. *Lewright v. Love*, 95 Tex. 157, 159, 65 S.W. 1089, 1089–90 (1902), is an early example of an action involving the sovereign rights of the state in which the court well explains the significance of this fact. In *Lewright,* the private relator

> "file[d] a petition for a writ of mandamus against the comptroller of the state to compel him to institute a suit against the International & Great Northern Railroad Company to recover taxes alleged to be due the state upon the gross passenger earnings of a certain line of its road for the series of years extending from 1879 to 1900."

95 Tex. at 159, 65 S.W. at 1089. The Texas Supreme Court concluded that the relator could not bring the action, explaining:

> "Suits to collect debts due the state must, as a rule, be brought in the name of the state, and by its principal law officer, the attorney general, or by some other law officer whose duty it is to represent the state in legal proceedings, and who may be authorized by statute to sue for it in the particular class of cases.
>
> "....
>
> "In the case of *Kimberl[]y v. Morris,* 87 Tex. 637, 31 S.W. 808 [(1895)], the rule announced in *[Union Pacific] Railroad Co. v. Hall,* 91 U.S. 343, 23 L.Ed. 428 [(1875)], 'that private persons may move for a mandamus to enforce a public duty not due to the government as such, without the intervention of the government law officer,' was quoted with approval.... *[I]t should be held, as it seems to us, that a citizen of the state, though a taxpayer, cannot maintain a suit to compel an officer to perform a* ***function*** *due merely to the government as such,* and *in which he can have no private interest whatever.* There are some decisions which probably hold to the contrary, but we think the great weight of authority and the better reason support the rule announced by us. We therefore conclude that, *if a suit of this character were maintainable against the comptroller, the relator in the petition before us is not the proper party to bring it.*"

95 Tex. at 159–60, 65 S.W. at 1089–90 (emphasis added). The duty in *Lewright*—the collection of taxes owed to the government—was one owed to the government as such, and as such could only be brought by the state's attorney general.

The *Lewright* court's conclusion followed from the fact that taxation is a sovereign right of the state, a proposition that has been repeated by courts throughout the country, including our own. See, e.g., *Doremus v. Business Council of Alabama Workers' Comp. Self-Insurers Fund,* 686 So.2d 252, 253 (Ala.1996) ("The exclusive power and authority to sue for collection of State taxes lies with the State."); *State ex rel. St. Louis Young Men's Christian Ass'n v. Gehner,* 320 Mo. 1172, 1182, 11 S.W.2d 30, 34 (1928) ("Taxation is a sovereign right of the state...."); and *Aldridge v. Federal Land Bank of Columbia,* 203 Ga. 285, 290, 46 S.E.2d 578, 581 (1948) (noting "the sovereign right of the State to tax as declared by the constitution"). [12]

***24** Alabama on-relation cases bear out this distinction between duties owed to the government and duties owed to the public. This Court has addressed cases concerning the sovereign rights of the State in which the Court concluded that a private party could not bring the on-relation action. In *Morrison,* as already noted, the Court concluded that the duty of the Board of Equalization was owed to the government as such, not to the public at large, because it implicated the power of taxation.

Another such case, heavily relied upon by the respondents, is *State ex rel. Foshee v. Butler, State Tax Commissioner,* 225 Ala. 194, 142 So. 533 (1932), a case in which the relator, a resident citizen and taxpayer of Chilton County, sought a writ of mandamus to compel the State tax commissioner to assess the property of the Alabama Power Company in that county at 60 percent instead of 45 percent. The Court concluded that the

> "Relator shows no official duty to the public at large, but only to the state in its sovereign capacity. The general rule is that *an individual cannot enforce a right owing to the*

government; certainly not in any case, *unless he sustains an injury peculiar to himself....*

"He is, as is Chilton [C]ounty in its case, merely seeking to force the state, by the unauthorized use of its name, to control an administrative **function** of one of its officers, in respect to a matter which is the prerogative of the state."

225 Ala. at 195, 142 So. at 534.

The *Foshee* Court's mention of the case of "Chilton County" is a reference to *State ex rel. Chilton County v. Butler, State Tax Commissioner,* 225 Ala. 191, 142 So. 531 (1932), what *Foshee* describes as the "companion case" to *Foshee,* 225 Ala. at 194, 142 So. at 533. In *Chilton County,* the county likewise brought an on-relation action to force the tax commissioner to assess the property of Alabama Power Company in that county at 60 percent instead of 45 percent. In a passage that explains the outcome in both cases, the Court stated:

> "In respect to petitions for mandamus and other remedial writs when they seek to enforce private rights, petitioner may pursue such remedy without the use of the name of the state.... But when relief is sought against a public officer to require the performance of a public duty to the general public as distinguished from the state in its sovereign capacity, the petition is properly brought in the name of the state on the relation of petitioner, a member of the general public who may have such right."

Chilton County, 225 Ala. at 192–93, 142 So. at 532. Both *Chilton County* and *Foshee,* however, involved the tax commissioner. The duty involved was one owed to the government as such, not to the public at large:

"So that when a county undertakes to use the name of the state to require state officers to fix a certain value upon property for taxation generally, *it is seeking to enforce a claim which involves sovereign capacity,* rather than one which relates to a **function** delegated to the county, *and does not show a private right with the privilege of using the name of the state as a mere formal party.* 38 Corpus Juris, 838.

***25** "Relator here is seeking to use the name of the state to enforce a public duty to it in its sovereign right which belongs exclusively to [the state], and it has not delegated to the county nor to any one the right to enforce the duties to it of its own administrative officer. The Attorney General and perhaps the Governor are vested with the ultimate power, conferred by the sovereignty, to control this sort of litigation."

Chilton County, 225 Ala. at 193–94, 142 So. at 533. [13]

In a separate argument, the respondents contend that the above-emphasized language states that the petitioner must have some "injury peculiar to himself" in order to qualify as a relator who can invoke the standing of the State in an on-relation action. Respondents misread *Foshee* and *Chilton County* and ignore other Alabama authorities in reaching this conclusion. Again, in *Foshee,* the Court noted that the "[r]elator shows no official duty [by the defendant] to the public at large, but only to the state in its sovereign capacity. The general rule is [indeed] that an individual cannot enforce a right *owing to the government;* certainly not in any case, *unless he sustains an injury peculiar to himself.*" 225 Ala. at 195, 142 So. at 534 (emphasis added). In other words, a private party cannot bring an action that concerns *a duty owed to the government as such,* unless the private party also seeks to vindicate or obtain redress for his or her own private rights or injury relating thereto. [14]

[6] Granted, *Kendrick* and similar cases do refer to on-relation actions brought in the name of the State "on the relation of one or more *persons interested in the performance of [a] duty*" to the public. E.g., *Kendrick,* 256 Ala. at 213, 54 So.2d at 447. Even if we were to now consider this language as a basis for qualifying prospective on-relation plaintiffs beyond the holding of mere citizenship, the nature of the "interest" we would impose in order to qualify a relator on behalf of the State, at least in the unique situation where, as here, the Attorney General is unavailable to fulfill his normal role of representing the public interest, certainly would not be an interest that rises to the same level required of plaintiffs under *Lujan.* The State itself supplies that standing. The only question would be whether the relator has a sufficient "peculiar interest" in the matter or a sufficient relationship to the State, coupled with the ability to do so, that he or she can be expected to prosecute the matter vigorously to the end of assuring a proper adversarial proceeding for its just resolution. Ultimately, we need not resolve the question

whether there is a need for such an interest that would bear on API's and ACAP's status as relators in this proceeding. We are clear to the conclusion that Judge Enslen more than satisfies such criteria. As an individual, he would have the same interest held by other members of the public, yet, in his official capacity, he obviously has a relationship with the State and an interest in discharging his ministerial duty in a manner that is consistent with both Alabama law and the United States Constitution. Moreover, in his judicial capacity, his jurisdiction includes cases involving adoptions, administration of estates, guardianships, and conservatorship in which he must assess whether a **marriage** exists. In other words, Judge Enslen's position will require him to confront the question of the validity of purported "**marriages**" **licensed** by other probate judges and to address unavoidable derivative questions. Indeed, even if we were to consider the issue before us as a matter concerning the "sovereign right" of the State as urged by the respondents, Judge Enslen would well qualify to prosecute it in the name of the State under the circumstances presented. [15]

***26** Judge Reed also argues that there must be a limitation on public standing because "[a]ll laws and **executive** actions affect the public in some sense, directly or indirectly." But he cannot point to any authority or to the articulation of some sort of rule that would explain where we are to draw the line between those "public-duty" cases that members of the public can bring and those that only the Attorney General can bring. The only line articulated in precedents here or elsewhere is between those cases that involve a duty owed to the public and those that involve a duty owed to the government as such. We can find no line of the nature he suggests differentiating between public-duty cases that can be brought by a citizen and those that can be brought only by the Attorney General, with one exception: Many states have limited the availability of on-relation or comparable actions on behalf of the state to "matters of great public interest" or "matters of great importance." We have no problem applying such a limitation in the present case, for we can think of no matter of greater public interest or importance than the one before us.

It is beyond question that the duty to issue **marriage licenses** only in accordance with Alabama law is a duty owed to the public for its benefit. The failure to perform that duty damages the framework of law and institutions the people have chosen for themselves. The proceeding before us is properly before us as an on-relation action to enforce a duty to the public—the people who must live their lives and raise their families within that framework and within the society made possible thereby.

C. The Federal Court Order Does Not Prevent this Court from Acting

[7] The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State who, unlike Judge Davis in his ministerial capacity, are not bound by the order of the federal district court in *Strawser*. The answer is no.

[8] **[9]** Although decisions of state courts on federal questions are ultimately subject to review by the United States Supreme Court, 28 U.S.C. § 1257(a), as are decisions of federal courts, neither "coordinate" system reviews the decisions of the other. As a result, state courts may interpret the United States Constitution independently from, and even contrary to, federal courts. [16] For that matter, it is even true that " '[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.' " *Camreta v. Greene*, — U.S. —, —, 131 S.Ct. 2020, 2033 n. 7, 179 L.Ed.2d 1118 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1][d], pp. 134–26 (3d ed.2011)). As the Seventh Circuit Court of Appeals noted in *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir.1995), "[federal district court decisions] cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties."

***27** **[10]** Numerous Alabama cases confirm this reasoning. "[I]n determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here, although they can serve as persuasive authority." *Glass v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala.2004). See also *Dolgencorp, Inc. v. Taylor*, 28 So.3d 737, 744 n. 5 (Ala.2009) (noting that "United States district court decisions are not controlling authority in this Court"); *Ex parte Hale*, 6 So.3d 452, 458 n. 5 (Ala.2008), as modified on denial of reh'g ("[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...."); *Buist v. Time Domain Corp.*, 926 So.2d 290, 297 (Ala.2005) ("United States district court cases ... can serve only as persuasive authority."); *Amerada Hess Corp. v. Owens–Corning Fiberglass Corp.*, 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.").

[11] **[12]** Federal courts have recognized that state-court review of constitutional questions is independent of the same authority lodged in the lower federal courts. " 'In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.' " *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir.1970) (quoting *State v. Coleman*, 46 N.J. 16, 36, 214 A.2d 393, 403 (1965)).

> "Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other."

Surrick v. Killion, 449 F.3d 520, 535 (3d Cir.2006).

The United States Supreme Court has acknowledged that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Two Justices of the United States Supreme Court in special writings have elaborated on this principle.

> "The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."

***28** *Lockhart v. Fretwell*, 506 U.S. 364, 375–76, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring). See also *Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring) (noting that a state court "would not be compelled to follow" a lower federal court decision).

III. *Respondents' Ministerial Duty is Not Altered by the United States Constitution*

The United States District Court for the Southern District of Alabama has declared that Alabama's laws that define **marriage** as being only between two members of the opposite sex—what has been denominated traditional **marriage**—violate the United States Constitution. After careful consideration of the reasoning employed by the federal district court in *Searcy I*, we find that the provisions of Alabama law contemplating the issuance of **marriage licenses** only to opposite-sex couples do not violate the United States Constitution and that the Constitution does not alter or override the ministerial duties of the respondents under Alabama law.

It is important to observe at the outset that some of the federal courts that have declared traditional **marriage** laws unconstitutional have insinuated that these **marriage** laws are something new by pointing to the **marriage** laws and amendments that states began enacting in the early 1990s. By focusing on this spate of laws, the federal courts have asserted that **marriage** laws were enacted to target homosexuals. This line of argument was born in *United States v. Windsor*, ––– U.S. ––––, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), when the United States Supreme Court concluded that Congress's passage of the Defense of **Marriage** Act ("DOMA") in 1996 demonstrated a clear animus toward homosexuals because Congress rarely chose to enter the realm of domestic-relations law. But as *Windsor* itself observed, domestic law historically is controlled by the states. [17]

For example, in Alabama it is true that the Act was enacted in 1998, and that the Amendment was ratified in 2006. Laws

that include the concept of **marriage** as between a husband and wife have existed, however, since the inception of the Alabama as a state in 1819.[18] Such laws include the full statutory scheme set out in the provisions of Chapter 1 of Title 30 (and their predecessors dating back 200 years) by which the legislature has provided for the affirmative **licensing** and recognition of "**marriage**," including the provision in § 30–1–9 (and its predecessors) for the **licensing** of "**marriages**" and the provisions in § 30–1–7 (and its predecessors) for the solemnization of "**marriages**." And it is clear that the term "**marriage**" as used in all those laws always has been, and still is (unless the courts can conjure the ability to retroactively change the meaning of a word after it has been used by the legislature), a union between one man and one woman.

Further, the contemplated change in the definition (or "application" if one insists, although this clearly misapprehends the true nature of what is occurring) of the term "**marriage**" so as to make it mean (or apply to) something antithetical to that which was intended by the legislature and to the organic purpose of Title 30, Chapter 1, would appear to require nothing short of striking down that entire statutory scheme.[19] And beyond even that statutory scheme, what ultimately is at issue is the entire edifice of family law discussed previously, an edifice that has existed in some form since before the United States was even a country.[20] See 1 Judith S. Crittenden and Charles P. Kindregan, Jr., *Alabama Family Law* § 1:1 (2008) (observing that "a whole range of state and federal legal rights and obligations depend on the existence of a valid **marriage**. If there is no legal **marriage**, then those rights and obligations do not apply. These legal rights and obligations are basic to the well-being of society, as the United States Supreme Court has noted in describing the importance of **marriage** as having a 'basic position' in 'society's hierarchy of values.' " (quoting *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). It is no small thing to wipe away this edifice with a wave of the judicial wand.

***29** It is in this context that we turn then to the specific reasoning employed by the federal district court, reasoning that can be boiled down to the following train of thought. (1) **Marriage** is a fundamental right. (2) Under the Due Process and Equal Protection Clauses of the United States Constitution, laws that impinge upon fundamental rights are subject to "strict scrutiny" and are sustained only if supported by a "compelling state interest" and if they are "narrowly tailored" to fulfill that interest. (3) The interests cited by the State of Alabama in support of its laws limiting **marriage** to opposite-sex couples are either not compelling state interests or the limitation is not so narrowly tailored as to meet the stated interest. (4) Therefore, Alabama's **marriage** laws impermissibly violate the right to marry and consequently "violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

[13] **[14]** **[15]** The *Searcy I* plaintiffs' first constitutional claim that led to the federal court's decision and the reasoning it adopted is one that is often repeated in the **marriage** debate. The *Searcy I* plaintiffs contended that Alabama's **marriage** laws violate the Equal Protection Clause because those laws unconstitutionally discriminate against same-sex couples in favor of opposite-sex couples by conferring benefits on the latter under the law not accorded to the former.

> "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.... *The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude,* and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.
>
> "The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (emphasis added and citations omitted).

[16] The difficulty with the *Searcy I* plaintiffs' equal-protection claim is that, in order to trigger a "strict-scrutiny" analysis, the offending law must discriminate against a suspect class, e.g., a class determined by race, alienage,

or national origin. It is often contended that although laws upholding traditional **marriage** do not implicate any of these suspect classes, they do discriminate based on gender, a category the United States Supreme Court has stated is sometimes entitled to heightened scrutiny. See, e.g., *United States v. Virginia,* 518 U.S. 515, 532, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (observing that "[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed[v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971),] decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)" (footnote omitted)).

***30** The fact is, however, that traditional-**marriage** laws do not discriminate based on gender: All men and all women are equally entitled to enter the institution of **marriage**. Only by redefining the term "**marriage**" to mean something it is not (and in the process assuming an answer as part of the question), can this statement be challenged. Put in the negative, traditional-**marriage** laws do not discriminate on the basis of gender because all men and all women are equally restricted to **marriage** between the opposite sexes. See, e.g., *Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252, 1286 (N.D.Okla.2014) ("Common sense dictates that the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes, and the law cannot be subject to heightened scrutiny on that basis."); *Geiger v. Kitzhaber,* 994 F.Supp.2d 1128, 1139–40 (D.Or.2014) ("The state's **marriage** laws discriminate based on sexual orientation, not gender. In fact, the ban does not treat genders differently at all. Men and women are prohibited from doing the exact same thing: marrying an individual of the same gender."). Thus, if such laws discriminate against a classification, it is one based on sexual orientation, not gender. As the federal district court itself observed in its memorandum opinion in *Searcy I:* "Eleventh Circuit preceden [t] 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)."[21] See also *DeBoer v. Snyder,* 772 F.3d 388, 413 (6th Cir.2014) (noting that "[t]he Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades").

[17] Because Alabama's **marriage** laws are not subject to strict scrutiny under the Equal Protection Clause, they need only survive a rational-basis analysis to pass constitutional muster. We have reviewed at length the more than rational bases for Alabama's understanding of **marriage** in Part I, above. As discussed, one legitimate interest behind the laws (among others) is recognizing and encouraging the ties between children and their biological parents. Alabama's **marriage** laws clearly survive rational-basis review.

[18] The *Searcy I* plaintiffs' second contention was that Alabama's **marriage** laws violate the Due Process Clause of the Fourteenth Amendment because, according to their complaint, "[t]he Constitution protects the rights and liberties of married, homosexual couples just as it does heterosexual, married couples." As we previously noted, the federal district court latched onto this argument, stating that "[n]umerous cases have recognized **marriage** as a fundamental right." In this way, the federal district court subjected Alabama's **marriage** laws to strict-scrutiny analysis.

To support its assertion that "**marriage**" is a fundamental right, the federal district court cited such cases as *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The federal district court is, of course, correct that there are several United States Supreme Court cases stating such a principle. In *Zablocki v. Redhail,* 434 U.S. 374, 383–84, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), for example, the Court stated: " '**Marriage** is one of the "basic civil rights of man," fundamental to our very existence and survival.' [*Loving,* 388 U.S.] at 12, 87 S.Ct. 1817, quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)." In *Griswold,* the Court stated that **marriage** is "a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. **Marriage** is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486, 85 S.Ct. 1678. In *Meyer,* the Court recognized that "the right of an individual ... to marry, establish a home and bring up children" is protected by the Due Process Clause. 262 U.S. at 399, 43 S.Ct. 625.

31** What the federal district court ignored in these cases, however, is that the Supreme Court plainly was referring to *traditional* ***marriage when it proclaimed that **marriage** is a fundamental right. See, e.g., *DeBoer,* 772 F.3d at 412 (observing that "[w]hen *Loving* and its progeny used the word **marriage**, they did not redefine the term but accepted its traditional meaning"). This is evident from the fact that in each of those cases the discussion of the right involved

children. It is also apparent from the fact that, as the federal district court discussed, in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), the Supreme Court summarily dismissed "for want of a substantial federal question" an appeal from the Minnesota Supreme Court in which that court concluded that a state statute defining **marriage** in the traditional manner did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. Despite disagreement among the federal circuit courts of appeal regarding *Baker* 's strength as precedent in the wake of *Windsor*, [22] *Baker* indisputably demonstrates that, in the plethora of cases in which the Supreme Court has discussed a "right to **marriage**," it was not referring to an institution that formally recognized homosexual relationships.

Thus, what the federal district court has done is to declare an entirely new concept of "**marriage**" a fundamental right under the guise of the previously understood meaning of that institution. It is, plainly and simply, circular reasoning—it assumes the conclusion of the matter, i.e., that **marriage** as newly defined is a fundamental right, in the premise of the question without acknowledging that a change of terms has occurred. [23] As one federal appeals court judge has noted: "To now define the previously recognized fundamental right to '**marriage**' as a concept that includes the new notion of 'same-sex **marriage**' amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end." [24] *Bostic v. Schaefer*, 760 F.3d 352, 391 (4th Cir.2014) (Niemeyer, J., dissenting). [25]

The ostensible reason for the federal district court's judicial sleight of hand is apparent enough: conferring fundamental-right status upon a concept of **marriage** divorced from its traditional understanding is, to say the least, curious.

> "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' [*Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)] (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674] (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 302 U.S. 319, 325, 326 [58 S.Ct. 149, 82 L.Ed. 288] (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. [*Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)]."

***32** *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

> "It is beyond dispute that the right to same-sex **marriage** is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex **marriage** until the Massachusetts Supreme Judicial Court held in 2003 that limiting **marriage** to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 [(2003)]. Nor is the right to same-sex **marriage** deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000."

Windsor, —— U.S. at ——, 133 S.Ct. at 2715 (Alito, J., dissenting) (footnote omitted). See also *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 821 N.Y.S.2d 770, 777, 855 N.E.2d 1, 8 (2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which **marriage** existed, that there could be **marriages** only between participants of different sex."). [26] See Part I, supra.

Beyond the obvious historical problem with labeling **marriage** as defined by the *Searcy I* plaintiffs a fundamental right, there exists another logical problem with doing so. Proponents of same-sex **marriage** repeatedly contend that extending the benefits of **marriage** to their relationships carries no religious or moral dimension and therefore does not constitute a fundamental shift in the social fabric of America, because **marriage**, as far as the government is concerned, is simply a civil acknowledgment of a legal bond. See *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 321, 798 N.E.2d 941, 954 (2003) ("We begin by considering the nature of civil **marriage** itself. Simply put, the government creates civil **marriage**.... [C]ivil **marriage** is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution."). [27] If **marriage** truly is nothing more than a state-granted legal **license**, it is difficult to see how it could rise to the status of a fundamental right of such importance that the United States Constitution prohibits states

from approving only the historically accepted understanding of the institution.

Before we follow the proponents of same-sex **marriage** down the road toward finding their new definition of **marriage** constitutionally significant (but somehow socially innocuous), we need to know what characteristic of **marriage** is so fundamental that it warrants constitutional protection. As the *Glucksberg* Court observed: "[A] 'careful description' of the asserted fundamental liberty interest" is required in substantive-due-process cases. 521 U.S. at 721, 117 S.Ct. 2258. Although it is undeniable that the institution of **marriage** is fundamental, [28] it is also undeniable that several aspects of **marriage** are not treated as fundamental. [29] The United States Supreme Court observed in *Windsor* that

> "**[m]arriage** laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare Vt. Stat. Ann., Tit. 18, § 5142 (2012), with N.H.Rev.Stat. Ann. § 457:4 (West Supp.2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see Iowa Code § 595.19 (2009); Wash. Rev.Code § 26.04.020 (2012)—prohibit the practice)."

***33** *Windsor*, — U.S. at —, 133 S.Ct. at 2691–92. No one contends (yet) that state age and consanguinity requirements violate a fundamental right to **marriage** even though such requirements clearly limit a person's choices as to whom the person may marry. What differs, then, about the claims of same-sex partners? What of their relationship rises to the level of a constitutional right with which the states allegedly may not interfere?

One possible answer is the act of sex, albeit absent potential procreative consequences. The United States Supreme Court has stated that sexual intercourse is protected by the right to privacy allegedly embedded in the "substantive" component of the Due Process Clause. Indeed, this was the constitutional basis for the Court's striking down state sodomy laws in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). But the *Lawrence* Court did so under the rationale that government had no interest in interfering with the sexual conduct of consenting adults in the privacy of their bedrooms. [30] That rationale does not work here because same-sex partners expressly seek *public state-government approval* of their relationships. In other words, in *Lawrence* the protected constitutional interest was personal privacy, but here the *Searcy I* plaintiffs alleged that there is a constitutional interest in the public recognition of unions between couples of the same sex that overrides any interest Alabama has in limiting such unions to opposite-sex couples. Neither *Lawrence*, nor *Windsor*, nor any other decision of the United States Supreme Court has found such a fundamental right, and such a right cannot with any logic be embedded in the so-called right to *privacy* that has been trumpeted by the Supreme Court since *Griswold*.

Another possible answer to the question is love. Under this theory, a person has a right to marry the person he or she loves regardless of that person's gender. This notion has broad public appeal and is, perhaps, the mantra most repeated in public discussions of this matter. But although love may be an important factor in a lasting **marriage**, civil **marriage** has no public interest in whether the people seeking a **marriage license** love one another. "[N]o State in the country requires couples, whether gay or straight, to be in love." *DeBoer*, 772 F.3d at 407. State governments do not inquire about whether couples love each other when they seek a **marriage license**, nor do governments have any justifiable reason to do so. Moreover, if love was the *sine qua non* of **marriage**, then polygamy also would be constitutionally protected because

> "there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of **marriage**, it must be constitutionally irrational to stand by the monogamous definition of **marriage**." [31]

***34** *Id.*

Proponents of the new definition of **marriage** therefore leave us with an untenable contradiction. On the one hand, they insist that expanding the definition of **marriage** to include relationships between members of the same sex constitutes nothing more than offering **marriage licenses** to another class of individuals. It is akin to modifying the age of consent for **marriage** or changing the length of residency required in

a state before one can receive a **marriage license**, changes that are wholly within state government's power to modify, without altering the nature of **marriage**. On the other hand, proponents of same-sex **marriage** contend that this new definition of **marriage** is so fundamental that the Constitution prohibits states from maintaining the traditional definition of **marriage**, yet they are unable to articulate a fundamental element of their definition of **marriage** that would justify government sponsorship of it. Thus, under their own theory, either the aspect of **marriage** the same-sex partners insist should be included in the institution is not fundamental to its nature, in which case Alabama's laws enforcing the traditional definition of **marriage** are not unconstitutional, or **marriage** is a fundamental right but the characteristics upon which same-sex partners necessarily must hinge their definition of **marriage** fail to explain government's interest in **marriage**.

Having discarded several candidates for what aspect of **marriage** is so fundamental that it warrants constitutional protection—age, consanguinity, sex, or love—we are left with the characteristic that has remained unchanged throughout history: **marriage** has always been between members of the opposite sex. The obvious reason for this immutable characteristic is nature. Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union between men and women (often) produces children.[32] **Marriage** demonstrably channels the results of sex between members of the opposite sex—procreation—in a socially advantageous manner.[33] It creates the family, the institution that is almost universally acknowledged to be the building block of society at large because it provides the optimum environment for defining the responsibilities of parents and for raising children to become productive members of society. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256–57, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) ("The institution of **marriage** has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.... [A]s part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family."); *Smith v. Organization of Foster Families For Equal. & Reform*, 431 U.S. 816, 843–44, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) ("[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children.") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972))); *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("The **marriage** relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems...."). In short, government has an obvious interest in offspring and the consequences that flow from the creation of each new generation, which is only naturally possible in the opposite-sex relationship, which is the primary reason **marriage** between men and women is sanctioned by State law.

***35** In his dissent in *Goodridge*, Judge Cordy summarized well many of the public purposes of traditional **marriage**, and, therefore, why traditional **marriage** is a rational state policy:

> "Civil **marriage** is the institutional mechanism by which societies have sanctioned and recognized particular family structures, and the institution of **marriage** has existed as one of the fundamental organizing principles of human society. See C.N. Degler, The Emergence of the Modern American Family, in The American Family in Social–Historical Perspective 61 (3d ed.1983); A.J. Hawkins, Introduction, in Revitalizing the Institution of **Marriage** for the Twenty–First Century: An Agenda for Strengthening **Marriage** xiv (2002); C. Lasch, Social Pathologists and the Socialization of Reproduction, in The American Family in Social–Historical Perspective, [61,] at 80 [(3d ed.1983)]; W.J. O'Donnell & D.A. Jones, **Marriage** and Marital Alternatives 1 (1982); L. Saxton, The Individual, **Marriage**, and the Family 229–230, 260 (1968); M.A. Schwartz & B.M. Scott, **Marriages** and Families: Diversity and Change 4 (1994); Wardle, '*Multiply and Replenish': Considering Same–Sex* ***Marriage*** *in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 777–780 (2001); J.Q. Wilson, The **Marriage** Problem: How Our Culture Has Weakened Families 28, 40, 66–67 (2002). **Marriage** has not been merely a contractual arrangement for legally defining the private relationship between two individuals (although that is certainly part of any **marriage**). Rather, on an institutional level, **marriage** is the 'very basis of the whole fabric of civilized society,' J.P. Bishop, Commentaries on the Law of **Marriage** and Divorce, and Evidence in Matrimonial Suits § 32 (1852), and it serves many important political, economic, social, educational, procreational, and personal **functions**.

"Paramount among its many important **functions**, the institution of **marriage** has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. See *Milford v. Worcester*, 7 Mass. 48, 52 (1810) (civil **marriage** 'intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species'). See also P. Blumstein & P. Schwartz, American Couples: Money, Work, Sex 29 (1983); C.N. Degler, supra at 61; G. Douglas, **Marriage**, Cohabitation, and Parenthood—From Contract to Status?, in Cross Currents: Family Law and Policy in the United States and England 223 (2000); S.L. Nock, The Social Costs of De–Institutionalizing **Marriage**, in Revitalizing the Institution of **Marriage** for the Twenty–First Century: An Agenda for Strengthening **Marriage**, supra at 7; L. Saxton, supra at 239–240, 242; M.A. Schwartz & B.M. Scott, supra at 4–6; Wardle, supra at 781–796; J.Q. Wilson, supra at 23–32. Admittedly, heterosexual intercourse, procreation, and child care are not necessarily conjoined (particularly in the modern age of widespread effective contraception and supportive social welfare programs), but an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of **marriage** is that mechanism.

***36** "The institution of **marriage** provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a **marriage** are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. See G.L. c. 209C, § 6 ('a man is presumed to be the father of a child ... if he is or has been married to the mother and the child was born during the **marriage**, or within three hundred days after the **marriage** was terminated by death, annulment or divorce'). Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of **marriage** fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. See J.Q. Wilson, supra at 23–32. See also P. Blumstein & P. Schwartz, supra at 29; C.N. Degler, supra at 61; G. Douglas, supra at 223; S.L. Nock, supra at 7; L. Saxton, supra at 239–240, 242; M.A. Schwartz & B.M. Scott, supra at 4–6; Wardle, supra at 781–796. The alternative, a society without the institution of **marriage**, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.

"The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of **marriage** encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children. See P. Blumstein & P. Schwartz, supra at 26; C.N. Degler, supra at 61; S.L. Nock, supra at 2–3; C. Lasch, supra at 81; M.A. Schwartz & B.M. Scott, supra at 6–7. More macroscopically, construction of a family through **marriage** also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built. See M. Grossberg, Governing the Hearth: Law and Family in Nineteenth–Century America 10 (1985); C. Lasch, supra; L. Saxton, supra at 260; J.Q. Wilson, supra at 221."

Goodridge, 440 Mass. at 381–84, 798 N.E.2d at 995–96 (Cordy, J., dissenting) (footnote omitted). [34]

Ultimately, these are the purposes of **marriage** that relate to government. Government is concerned with public effects, not private wishes. The new definition of **marriage** centers on the private concerns of adults, while the traditional definition focuses on the benefits to society from the special relationship that exists between a man and a woman, i.e., the effects for care of children, the control of passions, the division of wealth in society, and so on.

***37** The federal district court and other courts that have struck down traditional **marriage** laws have stated that states cannot distinguish traditional **marriage** on the basis of procreation and the beneficial effects the institution provides to children because some married couples cannot or do not have children, and yet government recognizes their **marriages**. This argument is nothing more than an attempt

to use the exception to disprove the rule.[35] The fact that many people do not vote in elections does not invalidate the value of using elections to allow people to chose their government leaders. "**Marriage** laws are not aimed at making all married sex procreative but only seek to encourage that all man-woman sex occurs in **marriage**, as a protection for when such sex *is* procreative—a protection for the baby, the often vulnerable mother, and society generally." Stewart, 31 Harv. J.L. & Pub. Pol'y at 344–45.[36]

The federal district court's memorandum opinion in *Searcy I* states that "[t]he Attorney General fails to demonstrate any rational, much less 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." But " 'the relevant inquiry here is not whether excluding same-sex couples from **marriage** furthers [the state's] interest in steering man-woman couples into **marriage**.' Rather, the relevant inquiry is whether also recognizing same-sex **marriages** would further [the state's] interests." *Bostic*, 760 F.3d at 394 (Niemeyer, J., dissenting) (quoting state-appellant's brief). In other words, the state simply has to show that recognizing and encouraging **marriage** between men and women promotes responsible procreation, not that excluding same-sex couples from **marriage** encourages heterosexuals to marry. Even if preventing homosexuals from marrying will not increase the likelihood that children are born in wedlock, this does not address the fact that offering **marriage** solely to heterosexuals indisputably serves as a tool to prevent out-of-wedlock pregnancies. Moreover, the state's policy need only advance a rational goal; it does not need to demonstrate that it is the only way to advance the goal or even that it is the best way to do so. "[R]ational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges." *DeBoer*, 772 F.3d at 405.

[19] Under United States Supreme Court precedent, another potential method of finding traditional **marriage** unconstitutional is the notion that Alabama's limitation of **marriage** to heterosexual unions is based solely on animus toward homosexuals and that, therefore, the laws violate both the Equal Protection Clause and the Due Process Clause. The federal district court did not expressly articulate this position, but doing so would require reliance upon *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), *Lawrence*, and *Windsor*.

***38** In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution that "prohibit[ed] all legislative, **executive** or judicial action at any level of state or local government designed to protect" the status of persons based on their " 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.' " 517 U.S. at 624, 116 S.Ct. 1620. The Court did so because the amendment "singl[ed] out a certain class of citizens for disfavored legal status," 517 U.S. at 633, 116 S.Ct. 1620, and "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 517 U.S. at 634, 116 S.Ct. 1620. In short, the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." 517 U.S. at 635, 116 S.Ct. 1620.

In *Lawrence*, the Court struck down a Texas law criminalizing sodomy because, it said, homosexuals "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." 539 U.S. at 578, 123 S.Ct. 2472.

In *Windsor*, the Court struck down a portion of the Federal Defense of **Marriage** Act ("DOMA") because Congress's intrusion into a traditional state-law area demonstrated that DOMA was "motived by an improper animus." —— U.S. at ——, 133 S.Ct. at 2693. The Court explained that DOMA's aim was to "interfere[ ] with the equal dignity of same-sex **marriages**" conferred by New York's laws on **marriage**. *Id.* The Court added that "DOMA's principal effect is to identify a subset of state-sanctioned **marriages** and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency." —— U.S. at ——, *Id.* at 2694. In short, "the principal purpose and the necessary effect of [DOMA] are to demean those persons who are in a lawful same-sex **marriage**." —— U.S. at ——, *Id.* at 2695.[37]

The theme from *Romer*, *Lawrence*, and *Windsor* that government cannot single out a group for disfavored treatment solely on the basis of hatred for that particular group does not apply to Alabama's **marriage** laws. Although Alabama's limitation of **marriage** to opposite-sex couples prevents homosexual couples from receiving **marriage licenses**, the laws do not do so for the purpose of singling out same-sex partners for disfavored status. As we have already seen, the **marriage** laws undeniably have several purposes that have absolutely nothing to do with attempting to treat a

particular group in an unequal fashion. The laws attempt to protect children produced in opposite-sex relationships; they fashion a system for parental legal responsibilities; and they encourage family structure and enable formative education and socialization of children. The limitation of **marriage** to opposite-sex couples has so long existed in law that ascribing its existence solely to hatred toward homosexuals is simply absurd on its face. See *Lawrence*, 539 U.S. at 570, 123 S.Ct. 2472 ("American laws targeting same-sex couples did not develop until the last third of the 20th century."). Even Alabama's **marriage** amendment, which is of a more recent vintage,

> ***39** "codified a long-existing, widely held social norm already reflected in state law. '[**M**]**arriage** between a man and a woman,' as the Court reminded us just last year, 'had been thought of by most people as essential to the very definition of that term and to its role and **function** throughout the history of civilization.' *Windsor*, 133 S.Ct. at 2689."

DeBoer, 772 F.3d at 408. Alabama's longstanding and continued embrace of traditional **marriage** is not due to be struck down on an animus rationale.

If Alabama's **marriage** laws do not violate the Equal Protection Clause or the fundamental right to marry under the Due Process Clause, and if they are not solely the product of animus toward homosexuals, then Supreme Court precedent provides only one other course to justify the conclusion reached by the federal district court: The notion that **marriage** confers a certain dignity on its participants that the law cannot deprive individuals of simply because they desire to marry a person of the same sex. This line of reasoning comes from *Windsor*. In *Windsor*, the Court stated:

> "Here [New York's] decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.
>
> "....
>
> "... DOMA undermines both the public and private significance of state-sanctioned same-sex **marriages**; for it tells those couples, and all the world, that their otherwise valid **marriages** are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier **marriage**. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, 123 S.Ct. 2472, and whose relationship the State has sought to dignify."

Windsor, — U.S. at —, 133 S.Ct. at 2692, 2694; see also — U.S. at —, 133 S.Ct. at 2693 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex **marriages**, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.").

Several courts that have declared state **marriage** laws unconstitutional have relied on *Windsor's* "equal dignity" language. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.2014) (emphasizing *Windsor's* statement that " 'no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its **marriage** laws, sought to protect in personhood and dignity' " (quoting *Windsor*, — U.S. at —, 133 S.Ct. at 2696; further citation omitted)); *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir.2014) (stating that "freedoms [such as **marriage**] support the dignity of each person, a factor emphasized by the *Windsor* Court"); *Garden State Equal. v. Dow*, 434 N.J.Super. 163, 206, 82 A.3d 336, 361 (Ch.Div.2013) (relying on *Windsor's* language that a " '[s]tate's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import' " (quoting *Windsor*, — U.S. at —, 133 S.Ct. at 2705)).

***40** *Windsor's* "equal dignity" rationale contains several problems. First, there is no "equal dignity" provision in the text of the United States Constitution. Instead, what this notion appears to be is a legal proxy for invalidating laws federal judges do not like, even though no actual constitutional infirmity exists.[38] Since the notion is not textual, it is at least incumbent upon federal courts employing it to strike down state-**marriage** laws to describe in concrete terms what "dignity" state-sanctioned **marriage** confers and therefore exactly what same-sex couples are deprived of by traditional **marriage** laws.[39] But those courts merely repeat the generalized language of *Windsor*. Does a paper **license** that publicly recognizes the relationship confer "dignity" upon those who obtain it? Is it the fact that government recognition of same-sex relationships declares them to be "the same as" opposite-sex relationships that confers dignity? The United States Supreme Court has held that damage to reputation is not a cognizable interest protected by the Fourteenth Amendment. See *Paul v. Davis*, 424 U.S. 693,

712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding that "the interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). So presumably this notion must be something more than reputation, but it is apparently too difficult for the judges relying on it to describe what it is. If the notion of "equal dignity" is a backdoor way of according fundamental-right status to the new definition of **marriage**, it utterly fails to cabin that right in any meaningful way.

Furthermore, emphasizing the "dignity" of the public recognition of a **marriage** places the focus on the adult relationship, again assuming the conclusion as a premise for the question. It constitutes an implicit adoption, without acknowledgment, of the new definition of **marriage** based solely on a special relationship between two adults—as opposed to the traditional definition of **marriage**, which aligns with the historically recognized purpose relating to procreation and the "rights and obligations between the couple and any children the union may produce." Maggie Gallagher, *What Is **Marriage** for? The Public Purposes of **Marriage** Law*, 62 La. L.Rev. 773, 781 (2002).

> "Plaintiffs seek to bring the right to marry the person of their choosing regardless of gender within the protection of the well-recognized fundamental right to marry (see *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673 [(1978)]; *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 [(1967)]; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [(1942)]). *However, we find merit in defendants' assertion that this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, a redefinition of **marriage**. The cornerstone cases acknowledging **marriage** as a fundamental right are laced with language referring to the ancient recognized nature of that institution, specifically tying part of its critical importance to its role in procreation and, thus, to the union of a woman and a man....*"

***41** *Samuels v. State Dep't Of Health*, 29 A.D.3d 9, 14–15, 811 N.Y.S.2d 136, 140–41 (N.Y.App.Div.2006) (footnote omitted), aff'd sub nom., *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

Related to the fact that *Windsor* implicitly adopts the new definition of **marriage** is the fact that *Windsor's* "equal dignity" rationale necessarily makes a moral judgment about adult sexual relationships, even though the Supreme Court in *Lawrence* and lower courts addressing the **marriage** issue have purported to disclaim ascribing any merit to moral or religious considerations.[40] By asserting that denying same-sex couples the status of **marriage** deprives them of "a dignity and status of immense import," —— U.S. at ——, 133 S.Ct. at 2692, the *Windsor* Court made a moral judgment that a married couple has more dignity than an unmarried couple.[41] Many people would agree with such an assessment, but it is not, strictly speaking, a *legal* judgment—at least according to several courts that have invalidated traditional **marriage** laws.[42] It seems at least disingenuous to find a constitutional infirmity with traditional **marriage** laws by way of a moral judgment when states have been forced to defend those laws apart from any moral or religious basis, an especially difficult task given that American ideas of **marriage** indisputably have been shaped by the Jewish and Christian religions. See Charles P. Kindregan, Jr., *Same–Sex **Marriage**: The Cultural Wars and the Lessons of Legal History*, 38 Fam. L.Q. 427, 428 (2004) (detailing the intertwining history of religious and civil **marriage** in America and stating that "[t]he Western concept of **marriage** has been strongly influenced by Judeo–Christian theology"). Moreover, because the *Windsor* Court's moral judgment is (one must assume) not based on religion, then it must be asked what standard is being used to judge that **marriage** is better than nonmarriage, that it contains some kind of higher dignity than other relationships?[43] Because the notion is not contained in the Constitution, one may question whether it is nothing more than intuitions.[44] At any rate, it is not a legal basis for striking down a validly enacted law.

In the end, however, even if one were to accept that **marriage** carries with it a "dignity" that compels its availability to all, would we not meet ourselves coming? Under that construct, such dignity no doubt would be something gained from the very nature of traditional **marriage**, the foundation for the family unit within which children may be born and have imparted to them by a mother and father the values needed for responsible citizenship and the furtherance of society.

> "*To remove from '**marriage**' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state* (see e.g. *Griswold v. Connecticut*, 381 U.S. 479, 486[, 85 S.Ct. 1678, 14 L.Ed.2d 510] [1965]) *would, to a certain extent, extract some of the 'deep[ ]*

root[s]' that support its elevation to a fundamental right."

***42** *Samuels v. State Dep't of Health,* supra.

Finally, an open question exists as to whether *Windsor's* "equal dignity" notion works in the same direction toward state laws concerning **marriage** as it did toward DOMA. The *Windsor* Court stated that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex **marriages**, a dignity *conferred by the States in the exercise of their sovereign power,* was more than an incidental effect of the federal statute." *Windsor,* ---- U.S. at ----, 133 S.Ct. at 2693. In *Windsor,* New York's law allowed same-sex couples to obtain **marriage licenses**. Thus, the "dignity" was conferred by the state's own choice, a choice that was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." ---- U.S. at ----, 133 S.Ct. at 2692. The problem with DOMA was that it interfered with New York's "sovereign" choice. Alabama "used its historic and essential authority to define the marital relation" and made a different "sovereign" choice than New York. *Id.* If New York was free to make that choice, it would seem inconsistent to say that Alabama is not free to make its own choice, especially given that "[t]he recognition of civil **marriages** is central to state domestic relations law applicable to its residents and citizens." ---- U.S. at ----, 133 S.Ct. at 2691.

To all of this, proponents of same-sex **marriage** often retort that there is no reason both the traditional definition and the new definition of **marriage** cannot coexist. On one level, that argument makes the erroneous assumption that the two definitions are not making different claims as to why **marriage** exists. On another level, it simply assumes that the definitions are not mutually exclusive. [45]

Redefining **marriage** by definition implies that the traditional definition is inaccurate. In point of fact, we are concerned here with two different, mutually exclusive definitions. One that **marriage** is *only* between a man and a woman, and one that does not include this limitation. Both definitions cannot be true at the same time. Insisting that the law must legitimize one definition necessarily delegitimizes the other.

Throughout the entirety of its history, Alabama has chosen the traditional definition of **marriage**. Some other states, like New York, have more recently chosen the new definition. The United States Constitution does not require one definition or the other because, as the *Windsor* Court noted, "[b]y history and tradition," and one should add, by the text of the Constitution, "the definition and regulation of **marriage** ... has been treated as being within the authority and realm of the separate States." ---- U.S. at ----, 133 S.Ct. at 2689–90. That fact does not change simply because the new definition of **marriage** has gained ascendancy in certain quarters of the country, even if one of those quarters is the federal judiciary. [46]

***43** As it has done for approximately two centuries, Alabama law allows for "**marriage**" only between one man and one woman. Alabama probate judges have a ministerial duty not to issue any **marriage license** contrary to this law. Nothing in the United States Constitution alters or overrides this duty.

IV. Order

The named respondents are ordered to discontinue the issuance of **marriage licenses** to same-sex couples. Further, and pursuant to relator Judge Enslen's request that this Court, "by any and all lawful means available to it," ensure compliance with Alabama law with respect to the issuance of **marriage licenses**, each of the probate judges in this State other than the named respondents and Judge Davis are joined as respondents in the place of the "Judge Does" identified in the petition. Within five business days following the issuance of this order, each such probate judge may file an answer responding to the relator's petition for the writ of mandamus and showing cause, if any, why said probate judge should not be bound hereby. Subject to further order of this Court upon receipt and consideration of any such answer, each such probate judge is temporarily enjoined from issuing any **marriage license** contrary to Alabama law as explained in this opinion.

As to Judge Davis's request to be dismissed on the ground that he is subject to a potentially conflicting federal court order, he is directed to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, as to whether he is bound by any existing federal court order regarding the issuance of any **marriage license** other than the four **marriage licenses** he was ordered to issue in *Strawser.*

PETITION GRANTED; WRIT ISSUED.

STUART, BOLIN, PARKER, MURDOCK, WISE, and BRYAN, JJ., concur.

MAIN, J., concurs in part and concurs in the result.

SHAW, J., dissents.

MAIN, Justice (concurring in part and concurring in the result).

I concur fully in the main opinion except for Part II.B. As to Part II.B., I concur in the result only. Consistent with my dissent from the Court's earlier decision to order answer and briefs in this matter, I continue to harbor concerns regarding some of the procedural aspects of this highly unusual case. Nevertheless, given the unique facts of this case and the intervention of Probate Judge John Enslen, I am persuaded that Judge Enslen has a sufficient interest in these proceedings to satisfy the criteria necessary for standing.

SHAW, Justice (dissenting).

***43** I do not believe that this case can be filed in this Court at this time; as discussed below, I do not believe that this Court yet has jurisdiction.

It is unfortunate that the federal judiciary has refused to stay the order striking down Alabama's **marriage**-protection laws until the Supreme Court of the United States can conclusively rule on the issue within the next few months. The federal district court's order did nothing less than change the very definition of the institution of **marriage** in Alabama. Such a drastic change in Alabama law warranted the granting of a stay. The lack of a stay has resulted in much unnecessary confusion and costly litigation. Because I do not believe the case before this Court is properly filed, I cannot, at this time, express my opinion as to whether the federal court's decision was correct.

***44** Against this backdrop, I write to express my concern that, in an attempt to reduce confusion and to restore order, the main opinion has deviated from certain principles of law that undermine its rationale for assuming jurisdiction of, and extending relief to, the petitioners here. This deviation from the law, I fear, will have unforeseen consequences in future cases. For that reason, I cannot join the main opinion. My concerns are as follows:

1. ***This Court does not have jurisdiction in this case.***

Normally, this Court hears appeals from lower court decisions. Here, public-interest groups have filed a petition directly with this Court in an attempt to invoke its "original" jurisdiction, which is rare. "Original jurisdiction" is "[a] court's power to hear and decide a matter before any other court can review the matter." *Black's Law Dictionary* 982 (10th ed.2014).

This Court's original jurisdiction is described in the Constitution: "The supreme court shall have original jurisdiction ... to issue such remedial writs or orders as may be necessary to give it general supervision and control of *courts* of inferior jurisdiction...." Ala. Const.1901, Art. VI, § 140(b)(2) (emphasis added). Alabama Code 1975, § 12–2–7(2), states that this Court has authority to exercise "original jurisdiction" in determining and issuing *writs of mandamus* in matters where "no other court has jurisdiction." So, if another court has jurisdiction over this *mandamus petition,* the plain language of § 12–2–7(2) provides that this Court cannot exercise original jurisdiction. Circuit courts are courts of general jurisdiction whose judgments may be appealed to this Court and that, under § 12–2–7(2), cannot be bypassed. This Court is applying a different rule in *this* case.

This Court routinely hears petitions challenging a lower court's *decision* in a *pending* case; this does not constitute hearing a matter "before another court" gets that opportunity and is not an exercise of original jurisdiction. Alabama Code 1975, § 12–2–7(3), states that this Court has authority to issue "remedial and original writs as are necessary to give to it a general superintendence and control of courts of inferior jurisdiction." There is no indication in the plain language of this Code section that the reference to "original writs" encompasses "original jurisdiction"; rather, the language refers to writs that review interlocutory decisions of the lower courts:

> "Other procedures by which decisions of a supervised court are brought to a supervising court for review are provided by the writs of certiorari, mandamus, and prohibition. Known variously as 'prerogative writs,' 'peremptory writs,' 'extraordinary writs,' 'supervisory writs,' and 'original writs,' these writs are not, when appropriately employed,

> alternatives to appeal, but lie under circumstances in which an appeal does not lie. One or another of these writs can, under prescribed circumstances, be used to invoke supervisory review of interlocutory decisions that could not be appealed."

***45** Jerome A. Hoffman, *Alabama Appellate Courts: Jurisdiction in Civil Cases*, 46 Ala. L.Rev. 843, 852 (Spring 1995).

Advising a probate *judge* how to issue government **marriage licenses** is not "superintendence and control" of an inferior *court* 's performance of a judicial **function**. Instead, it is instructing a State official acting in a nonjudicial capacity on how to perform a ministerial act. Specifically, probate courts are courts of limited jurisdiction.[47] The jurisdiction of those *courts* is specified in Ala.Code 1975, § 12–13–1, which lists the types of cases and controversies the *courts* may hear. Issuing **marriage licenses** is not a **function** of the *court* or of its judicial power—the *court* has no *judicial* power to issue a **marriage license**.[48] Instead, it is something the legislature has instructed that probate *judges* "may" do.[49] Ala.Code 1975, § 30–1–9; *Ashley v. State*, 109 Ala. 48, 49, 19 So. 917, 918 (1896) ("The issuance of a **marriage license** by a judge of probate is a ministerial and not a judicial act."). There is no exercise of a probate *court's* jurisdiction when a probate *judge* issues a **marriage license** because the source of the probate judge's authority to issue such a **license** does not stem from the jurisdiction of the *court*. By acting in this case, this Court is not correcting a legal mistake by a judicial officer; it is not supervising or correcting a *court*. Section 140(b), Ala. Const.1901, and § 12–2–7(3), Ala.Code 1975, are simply inapplicable in this case.

Furthermore, the decision in *Ex parte Alabama Textile Products Corp.*, 242 Ala. 609, 7 So.2d 303 (1942), provides no exception. In that case, this Court purported to hear the petition under what is now § 12–2–7(3) and not § 12–2–7(2). A subsequent decision, *State v. Albritton*, 251 Ala. 422, 424, 37 So.2d 640, 642 (1948), notes that § 12–2–7(3)[50] allows the Court to supervise only the *exercise of judicial power:* "It is clear from [§ 12–2–7(3)] that the justices of the supreme court are limited in the issuance of these extraordinary writs as necessary to give general superintendence and control of inferior jurisdictions. *That is, to supervise persons and bodies clothed with judicial power in the exercise thereof.*" (Emphasis added.) It further notes that *Alabama Textile* involved a review of a "judicial action" of "an inferior tribunal vested with judicial or quasi judicial power," *and is thus also so limited. Id.* In other words, *Alabama Textile* does not provide this Court with original jurisdiction to supervise the nonjudicial **functions** of probate judges. See also *Russo v. Alabama Dep't of Corr.*, 149 So.3d 1079, 1081 (Ala.2014) ("This Court does not have original jurisdiction to issue writs against State officers and employees other than to the lower courts."), and *Ex parte Anderson*, 112 So.3d 31, 35 (Ala.2012) (on application for rehearing) (Murdock, J., concurring specially) ("In her application for rehearing, Anderson ... [argues] that her petition to this Court did *not* seek a writ directed to the circuit court requiring it to enforce its original orders but, instead, was a petition asking this Court to issue a writ directly to the State comptroller. I am not persuaded that such a petition is within the *original* jurisdiction of this Court...."). [51] This Court is applying a different rule in *this* case.

2. *The public-interest groups cannot sue in the State's name.*

***46** The public-interest groups here are attempting to pursue this case "in the name of the State." Citizens can sometimes sue in the name of the State to compel a public officer to perform a legal duty in which the public has an interest. But they cannot do this when "the matter concerns the sovereign rights of the State...." *Morrison v. Morris*, 273 Ala. 390, 392, 141 So.2d 169, 170 (1962).[52] I must respectfully disagree with the conclusion that this case does not concern the sovereign rights of this State. The relief requested and the relief granted touch directly on Alabama's sovereign authority to define the institution of **marriage**. This Court is applying a different rule in *this* case.

3. *The public-interest groups do not have standing.*

Not just anyone can file a lawsuit; the person or entity filing the action must have "standing," meaning the person or entity must have a sufficient stake in the controversy to be allowed to file the case.[53] The legal test this Court would *normally* use to determine whether "standing" exists is found in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), which this Court has adopted.[54] In *Lujan*, certain environmental groups alleged that the Secretary of the Interior was not correctly applying the law, and they wanted the courts to order

the Secretary to apply the law in a different way. The Supreme Court of the United States held, among other things, that, in order for those interest groups to sue, they must have been "injured": "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' " 504 U.S. at 560, 112 S.Ct. 2130 (footnote and citations omitted). The injury suffered must impact the plaintiff "in a personal and individual way." 504 U.S. at 560 n. 1, 112 S.Ct. 2130. Using this logic, this Court has held in the following cases that groups of interested people claiming that they have been broadly or generally harmed by allegedly unconstitutional or unauthorized governmental acts did not show the required injury: *Ex parte King,* 50 So.3d 1056 (Ala.2010); *Town of Cedar Bluff v. Citizens Caring for Children,* 904 So.2d 1253 (Ala.2004); and *Kid's Care, Inc. v. Alabama Dep't of Human Res.,* 843 So.2d 164 (Ala.2002). The public-interest groups' alleged injuries in this case are not personal or individual in nature. Their injuries are no different than the injuries alleged in the above cases, where standing was rejected by this Court. Their disagreement with the probate judges, alone, does not provide sufficient standing. Government officials cannot be sued simply because a person thinks the officials are doing something wrong; the thing they are doing must result in "concrete and particularized" and "actual or imminent" harm to the person seeking judicial relief.

This Court is applying a different rule in *this* case. Here, the Court is recognizing an exception to *Lujan* when a party simply claims that it is acting on behalf of a public interest. If such recitation in the complaint is all that is required to avoid running afoul of *Lujan,* then *Lujan* is meaningless. The implications of such a holding are troublesome.

4. *This mandamus petition is procedurally deficient.*

***47** "When this Court considers a petition for a writ of mandamus, the only materials before it are the petition and the answer and any attachments to those documents." *Ex parte Guaranty Pest Control, Inc.,* 21 So.3d 1222, 1228 (Ala.2009). When a party seeks mandamus review of a lower court decision, it must attach to the petition "[c]opies of any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition." Rule 21(a)(1)(E), Ala. R.App. P. There is no record below in this case because there is no lower court proceeding. Although the petition includes various documents issued by the federal district court, we cannot take judicial notice of another court's records. *Green Tree–AL LLC v. White,* 55 So.3d 1186, 1193 (Ala.2010). We are in a position similar to that of a circuit court hearing an original petition filed in that court. Those courts, however, have the benefit of Ala.Code 1975, § 6–6–640(a), which requires mandamus petitions to be "verified by affidavit."[55] Thus, the public-interest groups have provided us with no competent evidence upon which we can determine whether they have proven their case. *Ex parte Ocwen Fed. Bank, FSB,* 872 So.2d 810, 814 n. 6 (Ala.2003) ("The petitioner has the responsibility of supplying the Court with those parts of the record that are essential to an understanding of the issues set forth in the mandamus petition."). Normally, this Court would not grant relief in such a situation. *Ex parte Allianz Life Ins. Co. of North America,* 25 So.3d 411 (Ala.2008). This Court is applying a different rule in *this* case.

5. *This Court is addressing issues not presented.*

The public-interest groups have not asked this Court to rule on the constitutionality of Alabama's **marriage**-protection laws. *Van Voorst v. Federal Express Corp.,* 16 So.3d 86, 92–93 (Ala.2008) (noting that issues not briefed are waived). They have not presented an argument as to that issue. See Rule 21(a)(1)(C), Ala. R.App. P. (providing that a mandamus petition shall contain a statement of the issues presented and the relief sought). The briefs of the respondents appear to operate on the assumption that the constitutionality of the **marriage**-protection laws will not be addressed. Indeed, our order for answers and briefs may have misled them to believe that no argument as to this issue was required:

> "The respondents are ordered to file answers and, if they choose to do so, briefs, *addressing issues raised by the petition,* including, but not limited to, any issue relating to standing or otherwise relating to this Court's subject-matter jurisdiction, and any issue relating to the showing necessary for temporary relief as requested in the petition."

(Emphasis added.) The *petition* does not demonstrate "a clear legal right" to relief as to this issue because it does not even argue it. This Court would normally not perform a party's legal research. *Dykes v. Lane Trucking, Inc.,* 652 So.2d 248, 251 (Ala.1994) ("[I]t is not the **function** of this Court to do a party's legal research...."). This Court is applying a different

rule in *this* case, and, for all practical purposes, is issuing an advisory opinion on this issue to two public-interest groups. Again, this is something that this Court has held it cannot do. *Stamps v. Jefferson Cnty. Bd. of Educ.*, 642 So.2d 941, 944 (Ala.1994).

***48** For the foregoing reasons, I believe that this case is not properly before this Court. As the main opinion notes, this case is both unusual and of great public interest; however, I do not see a way for this Court to act at this time. By overlooking this Court's normal procedures; by stretching our law and creating exceptions to it; by assuming original jurisdiction, proceeding as a trial court, and reaching out to speak on an issue that this Court cannot meaningfully impact because the Supreme Court of the United States will soon rule on it; and by taking action that will result in additional confusion and more costly federal litigation involving this State's probate judges, this Court, in my view, is venturing into uncharted waters and potentially unsettling established principles of law. Therefore, I must respectfully dissent.

All Citations

--- So.3d ----, 2015 WL 892752

Footnotes

1 The petition notes that 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 ... Act, passed in 1998, and the ... Amendment, which was approved by 81% of Alabama voters in 2006."

The petition notes that ACAP

> "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 [Alabama]. In addition to lobbying the Alabama Legislature on behalf of churches and individuals who desire a family-friendly environment in Alabama, [ACAP] provides a communication link between Alabama legislators and their constituents. After passage of the ... Act, [ACAP] vigorously promoted passage of the ... Amendment to both legislators and citizens, making [ACAP] instrumental in the resulting 81% vote approving the ... Amendment in 2006."

2 Realignment of the parties in civil actions in Alabama is not uncommon. See, e.g., *Richards v. Izzi*, 819 So.2d 25, 28 (Ala.2001) ("Jefferson County, although originally a defendant, was realigned as a plaintiff."). Realignment is not uncommon, even when the jurisdiction of the court is called into question. Indeed, when cases are removed to federal court based on diversity jurisdiction, federal courts allow *post-removal realignment* of parties in order to create diversity. See *Lott v. Scottsdale Ins. Co.*, 811 F.Supp.2d 1220, 1223 (E.D.Va.2011) (noting that "[t]he first question presented—whether post-removal party realignment to create diversity is permissible—is easily answered in the affirmative based on settled authority in this circuit and elsewhere" and providing footnote citing multiple authorities). In this regard, the United States Court of Appeals for the Eleventh Circuit has observed:

> "[F]ederal courts are required to realign the parties in an action to reflect their interests in the litigation. The parties themselves cannot confer diversity jurisdiction upon the federal courts by their own designation of plaintiffs and defendants. *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69, 62 S.Ct. 15, 17, 86 L.Ed. 47 (1941). This Court concludes that the converse of this principle—that parties cannot avoid diversity by their designation of the parties—is also true. Rather it is the 'duty ... of the lower federal courts[ ] to look beyond the pleadings and arrange the parties according to their sides in the dispute,' *Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6, 16 n. 5, 110 S.Ct.

297, 302 n. 5, 107 L.Ed.2d 223 (1989) (citations and quotations omitted), as determined by 'the principal purpose of the suit' and 'the primary and controlling matter in dispute,' *City of Indianapolis*, 314 U.S. at 69, 62 S.Ct. 15."

City of Vestavia Hills v. General Fid. Ins. Co., 676 F.3d 1310, 1313–14 (11th Cir.2012) (emphasis omitted). As the Eleventh Circuit explained, it is a court's duty to align the parties on their proper sides without regard to the effect of the realignment on jurisdiction. By doing so, we merely " ' "look beyond the [nomenclature of the] pleadings and arrange the parties according to their sides in the dispute." ' " *Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6, 16 n. 5, 110 S.Ct. 297, 107 L.Ed.2d 223 (1989) (quoting other cases).

3 "For better, for worse, or for more of the same, **marriage** has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world."

DeBoer v. Snyder, 772 F.3d 388, 395–96 (6th Cir.2014).

As Blackstone stated: "[T]he most universal relation in nature" is that between a parent and child, and that relationship proceeds from the first natural relation, that between husband and wife." 1 William Blackstone, *Commentaries* *446. The "main end and design of **marriage**" is "to ascertain and fix upon some certain person, to whom the care, protection, the maintenance, and the education of the children should belong." *Id.* at *455. And those duties are duties of natural law. *Id.* at *447–50.

4 The history of the *Searcy* litigation appears to be yet another manifestation of the confusion that has been generated by this matter. According to the complaint in *Searcy I*, the plaintiffs, C.D.S. and K.M., a same-sex couple, had been married in California, and K.S. was K.M.'s biological son. In December 2011, C.D.S. filed a petition in the Mobile Probate Court seeking to adopt K.S. under a provision of Alabama's adoption code that allows a person to adopt a "spouse's child." § 26–10A–27, Ala.Code 1975.

In April 2012, the Mobile Probate Court, acting through Judge Don Davis, entered a final judgment denying C.D.S.'s petition for adoption as a matter of law based on the Amendment and the Act. C.D.S. appealed, and the Court of Civil Appeals affirmed the April 2012 judgment. See *In re K.R.S.*, 109 So.3d 176 (Ala.Civ.App.2012). C.D.S. did not seek further appellate relief.

In May 2014, C.D.S. and K.M. filed their complaint in *Searcy I;* the defendants included Attorney General Strange and Mobile Probate Judge Davis, among others. The complaint sought an order requiring, among other things, that the defendants grant the adoption of K.S. by C.D.S. The claims against Judge Davis were subsequently dismissed with prejudice. It is unclear to this Court whether the claims against Judge Davis were dismissed because he would **function** as a court of law, rather than as an **executive** minister of the law, in relation to any petition within the state judicial system seeking an adoption. (Alternatively, it is unclear whether the claims against Judge Davis were dismissed because the final judgment he entered in April 2012, based as it was on a matter of law, represented a res judicata bar to the relief being sought in the federal court in *Searcy I*.) By the same token, it is unclear on what basis a "case or controversy" existed between the plaintiffs in *Searcy I* and the Attorney General given the Attorney General's lack of authority to affect the actions of the court of law responsible for adjudicating adoption cases. See also note 16, infra.

5 The opinion in *Alabama Textile* did note that the parties agreed that it was necessary to complete relief that the Court act, but as discussed below, that agreement was considered by the Court only in making the discretionary determination delegated by law to the Court with respect to whether action by it was necessary to provide the relief needed. Ultimately, and most importantly as to this point, the Court was quite clear in its conclusion that such consent is neither necessary nor sufficient to such a determination.

6 In *Ex parte Jim Walter Resources, Inc.*, 91 So.3d 50 (Ala.2012), the Court considered the question whether it had original jurisdiction over an original petition filed in this Court seeking a writ of mandamus to direct a probate judge to record a mortgage document. The Tuscaloosa County Probate Court had refused to record the mortgage documents filed by Jim Walter Resources ("JWR") unless a recordation tax was first paid. See § 40–22–2, Ala.Code 1975. We explained that "imposing the recordation tax on a mortgage recorded in a county is part of the administrative duties of the probate judge of the county and, as such, is a ministerial **function**," and that "[a] writ of mandamus will lie to compel a court to perform ministerial duties." *Jim Walter*, 91 So.3d at 53. Further, we explained our ability to exercise our original jurisdiction over the petition filed with us by explaining that a circuit court's appellate jurisdiction over probate matters is limited under § 12–22–21, Ala.Code 1975, and did not include the taxing issue involved in that case. *Id.*

7 Rarely, if ever, could a party attempt to bring a viable public-interest action in the name of the state for the purpose of *challenging* the state's laws, because the state normally would have no interest in such an action. Thus, public-interest standing generally is limited to cases in which a relator seeks on behalf of the state to secure the *enforcement* of the

state's laws. See discussion of cases below. Where a party seeks to halt enforcement of a duty otherwise owed to the public, as is common in an action seeking to invalidate a state statute, he or she generally must be able to show a private interest to be vindicated. See, e.g., *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So.2d at 1256 (action seeking to invalidate a state statute) (noting that "[i]n *Jones v. Black*, 48 Ala. 540 (1872), this Court first articulated a test for determining whether a party has the necessary standing," and explaining that " '[a] party who seeks to have an act of the legislature declared unconstitutional, must ... show that he is, or will be injured by it' " (quoting *Jones*, 48 Ala. at 543)); *Alabama Alcoholic Beverage Control Board v. Henri–Duval Winery, L.L.C.*, 890 So.2d at 74 (stating that "[a] party establishes standing to bring a challenge" to a state statute when it demonstrates the *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), elements). Compare, e.g., *State ex rel. Highsmith v. Brown Serv. Funeral Co.*, 236 Ala. 249, 251, 182 So. 18, 19 (1938) (allowing the suit to go forward on other grounds, but agreeing with the defendants' general assertion that "relator shows no interest in the controversy, and that one without interest cannot attack an act of the Legislature because it is unconstitutional, which is the attack here made").

8 See also *State ex rel. Bronster v. Yoshina*, 84 Hawai'i 179, 185, 932 P.2d 316, 322 (1997) ("[S]tanding barriers should not serve to bar cases of public interest under our jurisdiction. More specifically, 'federal justiciability standards are inapplicable in state court declaratory judgment actions involving *matters of great public importance*.' " (citation omitted)); *State ex rel. Twenty–Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo.1992) ("The threshold requirement for standing is extremely low where mandamus is brought to enforce a nondiscretionary duty allegedly required of a public official.... Even a private citizen was held to have 'the sesame which unlocks the gates of mandatory authority whenever an officer whose **functions** are purely ministerial refuses to perform his office.' " (citation omitted)); and *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974) ("[I]t has been clearly and firmly established that even though a private party may not have standing to invoke the power of this Court to resolve constitutional questions and enforce constitutional compliance, *this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.*" (emphasis added)).

9 Though it may appear that the duty involved in *Rodgers* was one owed to the government, i.e., to the circuit clerk, the purpose of requiring the sheriff to file the reports was because the public had an interest in knowing who had been committed to and discharged from the prisons.

10 The fact that two of the relators here are public-interest, nonprofit corporate entities rather than natural persons does not disqualify them as plaintiffs. See, e.g., *Marone*, 967 N.Y.S.2d at 589, 39 Misc.3d at 1041 ("The public interest standing of a citizen has been extended to corporations as well as other organizations."); *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 168, 127 Cal.Rptr.3d 710, 720, 254 P.3d 1005, 1013 (2011) ("[C]orporate entities should be as free as natural persons to litigate in the public interest."); *State ex rel. Ohio Motorists Ass'n v. Masten*, 8 Ohio App.3d 123, 129, 456 N.E.2d 567, 573 n. 4 (1982) ("We are persuaded that an Ohio corporation may have as great an interest as a natural person in seeking the just enforcement of state laws, and may be considered to be a citizen of the state of Ohio entitled to institute an action in mandamus."); cf. *Jackson Sec. & Inv. Co. v. State*, 241 Ala. 288, 292, 2 So.2d 760, 764 (1941) ("The general rule is recognized everywhere that a corporation is a citizen, resident or inhabitant of the state under whose laws it was created."); and § 10A–1–2.11, Ala.Code 1975 ("[W]hether or not expressly stated in its governing documents, a domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs.").

11 In a different sense of the public's "interest," the intensity of the public's interest in preserving the institution of **marriage** as it has always been understood, a union between one man and one woman, is evidenced by the ratification of the Amendment in 2006 by 81% of Alabama voters. Certification of Constitutional Amendment Election Results (June 6, 2006), http://www.alabamavotes.gov/downloads/election/2006/primary/ProposedAmendments–OfficialResultsCertification–06–28–2006.pdf (last visited March 2, 2015; a copy of the Web page containing this information is available in the case file of the Clerk of the Alabama Supreme Court).

12 Other matters that arguably fall into the category of a state's sovereign rights include the power of eminent domain, see *West River Bridge Co. v. Dix*, 47 U.S. 507, 533, 6 How. 507, 12 L.Ed. 535 (1848) (recognizing that "the power [of eminent domain] ... remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall be ... deemed commensurate with public necessity"), and the power to enforce criminal laws, see *United States v. Wheeler*, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (observing that both the federal and state governments had "the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other' ") (quoting *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314 (1922)).

13 Even *Lujan* itself, at least on its facts, is not inconsistent with the understanding that a private right is needed when one seeks to assert a claim based on a duty owed to the government as such. Clearly, *Lujan* is not easily assessed, and some have questioned the consistency of application of the principles expressed therein, even in federal cases. See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 641–42, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) (Souter, J., dissenting) (stating that " 'the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition,' leaving it impossible 'to make application of the constitutional standing requirement a mechanical exercise.' " (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, —— U.S. ——, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014))); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L.Rev. 301, 302–04 (2002) (observing that *Lujan* 's "easily-stated formula hides much of the complexity of modern case or controversy analysis). (Of course, a state is free to reject or modify *Lujan* as it may see fit. See, e.g., *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) ("[T]he state judiciary here chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts.").) One possible explanation for the seemingly disparate results achieved is that some cases, including *Lujan* and the cases upon which it relies, may be understood as involving attempts by private litigants to state a cause of action by relying upon duties actually owed to a governmental unit, commonly by another governmental unit, whereas others involve what may be understood as seeking to enforce a duty more directly owed to the public. Compare *Lujan; Fairchild v. Hughes*, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499 (1922); *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, —— U.S. ——, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); and *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (duty sued upon was owed to a person other than the plaintiff), with *Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)(seeking to require compliance with anti-pollution laws); and *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (recognizing standing in several environmental groups seeking to enforce a duty imposed on the EPA to regulate certain carbon-dioxide emissions). See generally *Union Pac. R.R. v. Hall*, 91 U.S. 343, 23 L.Ed. 428 (1875) (holding that a member of the public may bring a mandamus petition *to enforce a public duty* and need not possess a particularized interest in the duty).

14 *Mooring v. State*, 207 Ala. 34, 91 So. 869 (1921), and *Tarver v. Commissioners' Court*, 17 Ala. 527, 531 (1850), are among the examples of cases implicating the State's sovereign right of taxation in which a private party was permitted to bring a mandamus petition to force a government entity to collect a tax precisely because the party had a private interest in the tax collected. At issue in *Tarver* was a statute that provided:

> " 'That it shall be lawful for the commissioners' court of roads and revenue of the county of Tallapoosa to impose such tax in addition to the tax levied for county purposes, as may be necessary to pay any amount of money that the court-house commissioners of said county may be liable to pay for building the court-house and jail.' Under the authority of these several acts, [Tarver] with the other commissioners contracted with Cameron & Mitchell for the erection of the county buildings, agreeing to pay them $18,000. The buildings were completed and were received and used by the county. The [Commissioners Court of Tallapoosa County] paid from the proceeds of the sale of the lots the amount agreed on, less the sum of thirty-five hundred dollars. This amount they declined paying on the ground that the work was not completed according to contract. A suit was instituted against [Tarver and the other commissioners] and a judgment finally rendered for twenty-five hundred dollars. The commissioners' court has levied a tax and paid a part of this judgment, but refuses to pay any more or to levy a tax for that purpose."

17 Ala. at 531. All the commissioners besides Tarver at the time the contract was executed died or left the State, and consequently execution of the judgment was made solely against Tarver. Tarver brought a mandamus petition under the authority of the statute to force the current Commissioners of the Court of Tallapoosa County to levy a tax to pay the judgment against him. The circuit court dismissed the petition. On appeal, this Court granted the petition, stating:

> "We think it very clear that it is the duty of the commissioners' court under these facts to levy and collect a tax sufficient to pay the amount of the judgment still unpaid, as well as such amount as may be justly due to the petitioner, and that he has the legal right to demand of them the performance of this duty."

17 Ala. at 531.

15 Nor would it be of any import for purposes of this proceeding that it was initiated only by the associational relators and not also Judge Enslen. Judge Enslen is a proper party before this Court and has been properly realigned as a relator on behalf of petitioner State of Alabama. Under the circumstances presented, we are clear to the conclusion that, to the extent our precedents applicable to actions filed in trial courts require their dismissal if filed by a party without standing, those precedents have no application here. Our supervisory authority is sufficient to enable us to effect that realignment and accept jurisdiction over the resulting adversarial proceeding in furtherance of our responsibility to restore and maintain order within our judicial system, particularly where as here the State was originally named petitioner and continues as the petitioner and the realignment of Judge Enslen would, at most, effect merely a substitution of the relating person to speak on its behalf.

16 That is, a lower federal court, which has no appellate authority over any state court judge acting in a judicial capacity, has no authority or jurisdiction over a state court's rulings as to cases before that state court judge acting in his or her judicial capacity, including as to questions of law. That would be the case, for example, as to a probate judge handling an adoption case or an estate-administration case, as opposed to acting in a ministerial capacity to record a deed or to issue a **license**. The proper avenue, indeed the only avenue, for appellate review of a final trial court judgment in such a case is "upward" through the coordinate state court system, of which that trial court is a part, followed thereafter by a petition for a writ of certiorari to the United States Supreme Court if necessary. By way of example, the plaintiff in *Searcy I* filed at least one previous petition seeking approval of the adoption of the child at issue. As has been noted, in April 2012, Mobile Probate Judge Davis entered a final trial court order denying that petition on the ground that the requested adoption was not permitted under the Amendment and the Act. C.D.S., as was the proper course, sought relief within the appellate courts of this state. See *In re K.R.S.*, 109 So.3d 176 (Ala.Civ.App.2012).

17 " '[R]egulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.' " *United States v. Windsor*, —— U.S. at ——, 133 S.Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)). The *Windsor* Court also observed that " '[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.' " —— U.S. at ——, 133 S.Ct. at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942)).

We note that *Windsor's* acknowledgment of the states' sovereign authority over **marriage** refers to the powers of the states vis-à-vis the federal government. Our discussion in Part II.B of this opinion notes that **marriage** is a duty owed to the public rather than what on-relation cases such as *Kendrick* have described as "sovereign rights of the state," which are duties "owed to the government as such." The fact that, as between the federal government and the states, the law of **marriage** falls within the sovereign powers of the states does not affect whether **marriage licensing** is a duty owed to the public rather than one owed to the government as such.

18 Laws that include the concept of **marriage** as the union of one man and one woman, however, predate the inception of Alabama as a state in 1819. In 1805,—when Alabama was still a part of the Mississippi Territory—the legislature of the Mississippi Territory passed an act imbuing orphans' courts with the power to grant and issue **marriage licenses**. H. Toulmin, *Digest of the Laws of Alabama,* tit. 42, ch. 1, § 4 (1823). That act remained in force after the creation of Alabama as a state in 1819 and contained language referring to persons joined together as "man and wife." See H. Toulmin, *Digest of the Laws of Alabama,* tit. 42, ch. 1, § 6 (1823). Furthermore, in 1805, the plain, ordinary, and commonly understood meaning of the word "**marriage**" was "the act of joining: man and woman." Webster, *A Compendious Dictionary of the English Language,* 185 (1806). Following Alabama's becoming a state in 1819, Alabama law continued to include the concept of **marriage** as the union of one man and one woman. See *Hunter v. Whitworth*, 9 Ala. 965, 968 (1846) ("**Marriage** is considered by all civilized nations as the source of legitimacy; the qualities of *husband* and *wife* must be possessed by the parents in order to make the offspring legitimate, where the municipal law does not otherwise provide." (emphasis added)). In 1850, the Alabama Legislature conferred the power to issue **marriage licenses** to the newly created probate courts. 1850 Ala. Laws 26. This power was officially codified in 1852. See Ala.Code 1852, § 1949.

19 Few courts that have ordered the issuance of **marriage licenses** to same-sex couples appear to have contemplated this issue. The alternative, however, appears to allow the judiciary to declare by judicial fiat a new statutory scheme in place of the old, rather than leaving it to the legislative branch to decide what should take the place of the scheme being stricken, all contrary to well established state and federal principles of judicial review. As we observed in *King v. Campbell*, 988 So.2d 969, 981–83 (Ala.2007):

"This Court addressed the standard for ascertaining severability in *Newton v. City of Tuscaloosa*, 251 Ala. 209, 217, 36 So.2d 487, 493 (1948):

" '... *The act "ought not to be held 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." A. Bertolla & Sons v. State, 247 Ala. 269, 271, 24 So.2d 23, 25 [(1945)]; *Union Bank & Trust Co. v. Blan,* 229 Ala. 180, 155 So. 612 [(1934)]; 6 R.C.L. 125, § 123.'

"(Emphasis added.)

"....

" '... It is also to be said, in the nature of limitation of the rule stated, that *the whole statute will be stricken if the valid and invalid parts are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the Legislature would have passed the one without the other, or where the striking of the invalid would cause results not contemplated or intended by the lawmakers, or where that invalid is the consideration or inducement of the whole act,* or where the valid parts are ineffective and unenforceable in themselves, according to the legislative intent.'

"[*Springer v. State ex rel. Williams,* 229 Ala. 339,] 342–43, 157 So. [219,] 222 (1934) (emphasis added). See also *City of Birmingham v. Smith,* 507 So.2d 1312, 1317 (Ala.1987), describing the test as *whether the legislature would have enacted the statute without the void provision.*"

(Final Emphasis added.) See also Robert L. Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L.Rev. 76, 76 (1937), explaining that

"the United States Supreme Court, the state courts, and secondary authorities all appear to agree that the test for whether the invalidity of part of a law or of some of its applications will not affect the remainder is '(1) if the valid provisions or applications are capable of being given legal effect standing alone, *and (2) if the legislature would have intended them to stand with the invalid provisions stricken out.'* "

20 For that matter, it has existed in history since ancient times. See, e.g., Charles P. Kindregan, Jr., *Same–Sex* ***Marriage****: The Cultural Wars and the Lessons of Legal History,* 38 Fam. L.Q. 427, 428 (2004) (noting that "[t]he Code of Hammurabi, 1780 B.C., provided that 'if a man take a wife and does not arrange with her the proper contracts, that woman is not his legal wife' ").

21 The issue in *Lofton* was whether a Florida statute prohibiting adoption by practicing homosexuals violated the equal-protection and due-process rights of homosexual persons desiring to adopt. The United States Court of Appeals for the Eleventh Circuit determined that no fundamental right to private sexual intimacy existed and, thus, that the Florida statute was subject to rational-basis analysis. It was significant to the Eleventh Circuit in *Lofton* that "the involved actors are not only consenting adults, but minors as well." 358 F.3d at 817. Such is the case with the underlying action before the Mobile Probate Court.

22 Compare *DeBoer,* 772 F.3d at 400 (observing that "[o]nly the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions 'until such time as the Court informs [us] that [we] are not' " and that "[t]he Court has yet to inform us that we are not" to follow *Baker*), with *Baskin v. Bogan,* 766 F.3d 648, 660 (7th Cir.2014) (stating that "*Romer v. Evans,* 517 U.S. 620, 634–36, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Lawrence v. Texas,* 539 U.S. 558, 577–79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative").

23 The *Searcy I* plaintiffs might respond that defining **marriage** inherently as available only to members of the opposite sex is also circular, but that argument ignores the fact that millennia of practice stand behind the traditional definition. Such a mistake is similar to an employee's complaining that his boss cannot tell him what to do because no one informed him that being an employee meant that he would have to do what someone else told him to do. To state that being an employee means that a person works for someone else is not circular reasoning: it is just describing the nature of an "employee." Likewise, as will be explained more fully in the text below, to state that being married involves two people of the opposite sex joining in a special relationship is not circular: it merely describes the nature of being "married."

24 This not-so-subtle redefinition of "**marriage**" is an example of what law professor Steven D. Smith calls "smuggling," which "implies that an argument is tacitly importing something that is left hidden or unacknowledged—some undisclosed assumption or premise." Steven D. Smith, *The Disenchantment of Secular Discourse* 35 (2010). Smith goes on to explain that such a tactic is "illicit" when making the undisclosed premise

> "explicit would be controversial: you would have to defend the premise, and you don't want to do that. Or your premise might be illicit because you yourself do not believe it: you like your conclusion, maybe, but you don't actually believe what would be necessary to support this particular argument for that conclusion. Perhaps, if you were to make your unstated premise explicit, you would be convicted of inconsistency, because you have contradicted that premise

> on other occasions. Or your premise might be illicit because the conventions of the discourse you are engaging in purport to exclude it."

Id. at 36.

In this instance, the first two reasons Smith offers for "smuggling" are the most likely to apply. Proponents of the new definition of **marriage** do not want to have to defend the premise behind their change of definition because doing so would necessarily require the introduction of legislation to effect the change rather than a court order. Also, as is explained in note 31 and the accompanying text, the new definition of **marriage** put forward by proponents of same-sex **marriage** carries implications that proponents themselves either do not believe or do not want explicitly revealed at this time because they know that a large majority of the populace is not ready to accept those implications.

25 See also *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 365–66, 798 N.E.2d 941, 984 (2003) (Cordy, J., dissenting):

> "This feat of reasoning succeeds only if one accepts the proposition that the definition of the institution of **marriage** as a union between a man and a woman is merely 'conclusory' ..., rather than the basis on which the 'right' to partake in it has been deemed to be of fundamental importance. In other words, only by assuming that '**marriage**' includes the union of two persons of the same sex does the court conclude that restricting **marriage** to opposite-sex couples infringes on the 'right' of same-sex couples to 'marry.' "

26 The *Bostic* Court, among others, asserted that "*Glucksberg* 's analysis applies only when courts consider whether to recognize new fundamental rights" and that including same-sex couples in the right to marry does not create a new right, and so, conveniently, it did not matter that there is no historical tradition of same-sex **marriage.** 760 F.3d at 376. The *Bostic* Court noted that the Supreme Court did not contend that it was creating a new fundamental right to interracial **marriage** when it struck down Virginia's miscegenation statute as unconstitutional in *Loving. Id.* at 376–77. This point ignores the fact that the *Loving* Court did not need to create a new fundamental right in order to subject Virginia's statute to strict-scrutiny analysis because the statute discriminated on the basis of race, which is an express suspect classification in the Fourteenth Amendment.

27 In contrast to the assertion that **marriage** is "wholly secular," plaintiffs in some actions seeking to nullify state laws limiting **marriage** to its traditional understanding have contended that those laws violate the Establishment Clause of the First Amendment to the United States Constitution. See, e.g., *Love v. Beshear,* 989 F.Supp.2d 536, 541 (W.D.Ky.2014); *Brenner v. Scott,* 999 F.Supp.2d 1278, 1284 (N.D.Fla.2014); *Love v. Pence,* (No. 4:14–CV–00015–RLY–TA, Sept. 16, 2014) —— F.Supp.3d —— (S.D.Ind.2014).

So which is it? Is **marriage** a purely civil institution or is it a hybrid of religious and civil acknowledgments of a relationship? So far no court has declared that laws recognizing that **marriage** exists only between a husband and wife violate the Establishment Clause. Presumably, the issue thus far has been avoided at least in part because the notion that traditional **marriage** laws violate the Establishment Clause borders on the absurd. Just recently, the United States Supreme Court concluded that the practice of opening legislative meetings with prayer does not violate the Establishment Clause solely because the same practice occurred during the period the First Amendment was framed and ratified. See *Town of Greece v. Galloway,* —— U.S. ——, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). It seems safe to assume that the Founders similarly perceived no Establishment Clause problem with state **marriage** laws.

Regardless of the chance of succeeding on such a claim on its merits today, the fact that some proponents of same-sex **marriage** now contend that traditional **marriage** laws violate the Establishment Clause suggests that some of the same precepts upon which the proponents rely in the current debate may be renewed in arguments over successive issues yet to come.

28 As has been noted, the United States Supreme Court stated in *Maynard v. Hill,* 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), that **marriage** is "the most important relation in life," *id.* at 205, 8 S.Ct. 723, and that it is "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.* at 211, 8 S.Ct. 723.

29 Judge Cordy in his dissenting opinion in *Goodridge* observed:

> "Casting the right to civil **marriage** as a 'fundamental right' in the constitutional sense is somewhat peculiar. It is not referred to as such in either the State or Federal Constitution, and unlike other recognized fundamental rights (such as the right to procreate, the right to be free of government restraint, or the right to refuse medical treatment), civil **marriage** is wholly a creature of State statute. If by enacting a civil **marriage** statutory scheme [a state] has created a fundamental right, then it could never repeal its own statute without violating the fundamental rights of its inhabitants."

440 Mass. at 366 n. 3, 798 N.E.2d at 985 n. 3 (Cordy, J., dissenting).

The *DeBoer* Court provided an extensive explanation as to why categorizing the right to marry as fundamental in the constitutional sense

> "makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a **marriage**. Start with the duration of a **marriage**. For some, **marriage** is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. See Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. See Lynn D. Wardle, *No–Fault Divorce and the Divorce Conundrum,* 1991 BYU L.Rev. 79, 90. The Court has never subjected these policy fits and starts about who may leave a **marriage** to strict scrutiny.
>
> "Consider also the number of people eligible to marry. As late as the eighteenth century, '[t]he predominance of monogamy was by no means a foregone conclusion,' and '[m]ost of the peoples and cultures around the globe' had adopted a different system. Nancy F. Cott, *Public Vows: A History of **Marriage** and the Nation* 9 (2000). Over time, American officials wove monogamy into **marriage's** fabric. Beginning in the nineteenth century, the federal government 'encouraged or forced' Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; see *Reynolds v. United States,* 98 U.S. 145, 8 Otto 145, 25 L.Ed. 244 (1878). The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex **marriage** not apply to plural **marriages**?
>
> "Consider finally the nature of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid–1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. See Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent **Marriage**,* 92 B.U. L.Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of **marriage** between cousins, a union deemed 'desirable in many parts of the world'; indeed, around '10 percent of **marriages** worldwide are between people who are second cousins or closer.' Sarah Kershaw, *Living Together: Shaking Off the Shame,* N.Y. Times (Nov. 25, 2009).... Even in the United States, cousin **marriage** was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. See Diane B. Paul & Hamish G. Spencer, *'It's Ok, We're Not Cousins by Blood': The Cousin **Marriage** Controversy in Historical Perspective,* 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi,* 998 So.2d 731, 749 (La.Ct.App.2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so."

DeBoer v. Snyder, 772 F.3d 388, 412–13 (6th Cir.2014)(emphasis omitted).

These observations take issue with the United States Supreme Court's designation of **marriage** as a fundamental constitutional right. Perhaps the strongest recommendation for this view is the simple fact that the United States Constitution does not mention **marriage**. Indeed, the Supreme Court has observed that "the states, at the time of the adoption of the Constitution, possessed full power over the subject of **marriage** and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of **marriage** and divorce." *Haddock v. Haddock,* 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906), overruled on other grounds, *Williams v. North Carolina,* 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942).

Saying that **marriage** is not a fundamental constitutional right would not demean its importance because "something can be fundamentally important without being a fundamental right under the Constitution." *DeBoer,* 772 F.3d at 411. It would simply mean that the Constitution does not dictate policy on the matter.

30 See *Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472 ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

31 For that matter, if love is the defining criterion for **marriage**, then why must it be limited to **marriage** between two persons who are both adults, or for that matter between two persons? Where is the definitional limitation in such a criterion? What other limitations that we assume will continue to be true of **marriage** would logically yield to this criterion?

32 See *DeBoer,* 772 F.3d at 404 ("One starts from the premise that governments got into the business of defining **marriage**, and remain in the business of defining **marriage**, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse.").

33 One need only consider paternity to name one obvious example of the ways in which **marriage** organizes social relations. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 263, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (noting that "[t]he most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal **marriage** and govern its consequences").

34 In a footnote of its opinion, the federal district court rejected several of these purposes of traditional **marriage** laws —the history and tradition of **marriage**, encouraging responsible procreation, promoting optimal child-rearing—as not constituting "compelling" state interests by simply citing *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.2014). *Bostic* sidelined the importance of these purposes of **marriage** by taking the view that **marriage** is not just about procreation; rather it is concerned with the happiness of a relationship between two adults. See *Bostic*, 760 F.3d 352, 380 ("[T]he Supreme Court rejected the view that **marriage** is about only procreation in *Griswold v. Connecticut*, in which it upheld married couples' right not to procreate and articulated a view of **marriage** that has nothing to do with children."). There are at least three problems with this tactic.

First, no one is saying that "**marriage** is about *only* procreation." *Bostic*, 760 F.3d at 380 (emphasis added). The State is simply stating that a primary public purpose of **marriage** concerns procreation and that this is sufficient justification to make a distinction in law as to the types of couples who can marry. The fact that **marriage** encompasses more than procreation does not by itself invalidate procreation as an interest in the State's **marriage** policy.

Second, the decision in *Griswold* was not based on a "right to marry"; it was based on a right to privacy. See *Griswold*, 381 U.S. at 486, 85 S.Ct. 1678 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.") As with the discussion above about *Lawrence*, the problem in *Griswold* was government's *interference* with an intimate aspect of an existing relationship, in which the *Griswold* Court clearly was referring to the traditional **marriage** relationship. (Why else would contraception even be an issue?) The issue here concerns the government's public recognition of a relationship that until 2002 was unknown in history as being categorized as "**marriage**."

Third, the *Bostic* Court's cavalier rejection of the purposes of traditional **marriage** fails to acknowledge that the Court made a moral judgment that the new definition of **marriage** is superior to the traditional view. As Steven Smith has noted:

> "[H]ow can we argue about the desirability or justice of restrictions on abortion, or **marriage**, or drug use, without somehow drawing upon our larger vision of the good life, and upon the religious or philosophical assumptions that give rise to and inform those visions? It is a large question. But the short answer, it seems, is that we cannot."

Steven D. Smith, *Disenchantment*, at 105. The *Bostic* Court's opinion is replete with moral assertions made as statements of fact:

> "[S]ame-sex couples [arguably] want access to **marriage** so that they can take advantage of its hallmarks, including faithfulness and permanence, and that allowing loving, committed same-sex couples to marry and recognizing their out-of-state **marriages** will strengthen the institution of **marriage**."

760 F.3d at 381.

> "[T]he Proponents imply that, by marrying, infertile opposite-sex couples set a positive example for couples who can have unintended children, thereby encouraging them to marry."

Id.

> "[B]y preventing same-sex couples from marrying, the Virginia **Marriage** Laws actually harm the children of same-sex couples by stigmatizing their families...."

Id. at 383.

Regardless of whether one agrees or disagrees with these assertions, the fact remains that they represent the imposition of the *Bostic* (and *Searcy I*) Court's moral views upon the State under the guise of legal reasoning. It is not reasoning of "a" plus "b" equals "c"; it is the declaration of social policy through judicial fiat under the guise of constitutional law.

35 > "Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule, and adoption, the form of child-rearing in which same-sex couples may typically participate together, is not an alternative means of creating children, but rather a social backstop for when traditional biological families fail. The perpetuation of the human race depends upon traditional procreation

> between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil **marriage** between one man and one woman."

Sevcik v. Sandoval, 911 F.Supp.2d 996, 1015 (D.Nev.2012).

36 The *DeBoer* Court noted:

> "*Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional **marriage** laws (even though some straight couples don't have kids and many gay couples do)?"

DeBoer, 772 F.3d at 407.

37 One commentator characterizes the Court's approach in these cases as amounting to name-calling on a scholarly level:

> "Typically, judicial decisions invalidating challenged laws ultimately boil down to peremptory assertions by judges that the law in question has no 'rational basis' or is the product of prejudice or 'animus.' Thus, citing 'a substantial number of Supreme Court decisions, involving a range of legal subjects, that condemn public enactments as being expressions of prejudice or irrationality or invidiousness,' Robert Nagel shows how 'to a remarkable extent, our courts have become places where the name-calling and exaggeration that mark the lower depths of our political debate are simply given more acceptable, authoritative form.' "

Steven D. Smith, *The Disenchantment of Secular Discourse,* 9 (2010) (quoting Robert F. Nagel, *Name–Calling and the Clear Error Rule,* 88 Northwestern Univ. L.Rev. 193, 199 (1993)).

38 This is what one law professor has deftly labeled " 'The Not–Nice School of Constitutional Law,' " by which he meant that "the Constitution is taken simply to prohibit any state or federal action that is not nice. Whatever the text may actually provide, this school transforms it into an engine of political wish-fulfillment. What we don't like in government, the Constitution outlaws." Craig A. Stern, *Things Not Nice: An Essay on Civil Government,* 8 Regent U.L.Rev. 1, 2 (1997). See also *Robicheaux v. Caldwell,* 2 F.Supp.3d 910, 925 (E.D. La. 2014) ("The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos. Courts that, in the words of Justice Scalia in a different context in *Bond v. United States,* ––U.S. ––––, ––––, 134 S.Ct. 2077, 2094, 189 L.Ed.2d 1 (2014) (concurring opinion), appear to have assumed the mantle of a legislative body.").

39 As already noted, the Supreme Court's substantive-due-process cases require "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg,* 521 U.S. at 720–21, 117 S.Ct. 2258 (quoting *Reno,* 507 U.S. at 302, 113 S.Ct. 1439).

40 The *Lawrence* Court stated that "this Court's obligation is to define the liberty of all, not to mandate its own moral code." *Lawrence,* 539 U.S. at 559, 123 S.Ct. 2472. Interestingly, in her special writing in *Lawrence,* Justice O'Connor stated: "Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other *reasons exist to promote the institution of* ***marriage*** *beyond mere moral disapproval of an excluded group.*" *Lawrence,* 539 U.S. at 585, 123 S.Ct. 2472 (O'Connor, J., concurring in the judgment)(emphasis added).

41 The *Windsor* Court also stated that DOMA "places same-sex couples in an unstable position of being in a second-tier **marriage**." –– U.S. at ––––, 133 S.Ct. at 2694. Justice Scalia responded:

> "It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex **marriage** is not at issue here —when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex **marriage** is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will 'confine' the Court's holding is its sense of what it can get away with."

–– U.S. at ––––, 133 S.Ct. at 2709 (Scalia, J., dissenting, joined by Thomas, J.).

42 Several courts have inveighed that people's moral or religious views of **marriage** can have nothing to do with the legality of the institution. See, e.g., *Baskin v. Bogan,* 766 F.3d 648, 669 (7th Cir.2014) ("To be the basis of legal or moral concern ... the harm must be tangible, secular, material—physical or financial, or, if emotional, focused and direct—rather than moral or spiritual.... Similarly, while many heterosexuals (though in America a rapidly diminishing number) disapprove of same-

sex **marriage**, there is no way they are going to be hurt by it in a way that the law would take cognizance of."); *Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009) ("State government can have no religious views, either directly or indirectly, expressed through its legislation.... As a result, civil **marriage** must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals."); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 251, 957 A.2d 407, 475 (2008) ("Because, however, **marriage** is a state sanctioned and state regulated institution, religious objections to same sex **marriage** cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex **marriage**."); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 312, 798 N.E.2d 941, 948 (2003) ("Many people hold deep-seated religious, moral, and ethical convictions that **marriage** should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us.").

This divorce of moral and religious ideas from legal debate is now common:

> "In [the classical] view, the **function** of moral reasoning is to determine what actions, or what kind of life, conform to a normative order inherent in nature itself.... A good deal of thinking about suicide, and about moral questions generally, still operates on some such assumption. In much public discourse, however, and especially in academic and legal contexts, explicit appeals to normative dimensions in nature are typically deemed inadmissible. Moral reasoning is supposed to operate without reliance on religious or metaphysical premises."

Smith, *Disenchantment*, at 60.

43 "The secular philosophical tradition speaks of inalienable rights, inalienable human dignity and of persons as ends in themselves. These are, I believe, ways of whistling in the dark, ways of trying to make secure to reason what reason cannot finally underwrite." Raimond Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* 5 (Routledge 2000) (1998).

44 "[T]here is no apparent reason why anyone *should* be persuaded [by intuitions]. After all, what credentials can these intuitions claim? Whether intuitions are reliable is, of course, always a question, but in this case the problem goes deeper: it is not at all clear exactly what the intuitions are even *about*. Suppose I do have a 'moral' intuition (whatever that is) that, say, polygamous relationships are 'wrong' (whatever that means). So what? I may also harbor an obsessive fear of traveling on airplanes, or an abiding premonition that something horrible will happen if I leave the house on Friday the thirteenth, or a sense of profound disgust when I look down at my plate and see that the peas have gotten mixed with the potatoes. Unless these feelings, intimations, or intuitions are grounded in something rational and objectively real, the proper response in each case, it seems, would be therapeutic in nature; it would be a response calculated to help me and anyone else subject to such debilitating feels and intuitions 'Get over it!'

"Conversely, insofar as contemporary deontological thinkers forego therapeutic response and instead treat such intuitions with utmost respect, it is hard to resist the suspicion that they are acting on lingering assumptions—their own, possibly, or perhaps those of the people whose intuitions provide them with their material—about an intrinsic normative order."

Smith, *Disenchantment*, at 66 (footnotes omitted).

45 "Acceptance of the broad description requires rejection of two salient aspects of the narrow description of **marriage**. First, it requires rejecting the notion that **marriage** is no more than what the narrow model describes. Although genderless **marriage** proponents rarely, if ever, expressly state that notion of 'no more than,' the notion is always implicit in their arguments.[103] Second, the broad description also requires rejecting the idea that children are not 'the *sine qua non* of civil **marriage**' and that '**marriage** and children are not really connected.' The broad description portrays **marriage** as primarily a child-protective and child-centered institution, with most of the institution's social goods pertaining to the quality of child-rearing. Conversely, the narrow model describes an adult-centered 'partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it.'

" [103] ... This phenomenon merits close examination for two reasons. First, the notion itself goes to the heart of the veracity of the narrow and broad descriptions; if the 'no more than' notion is factually accurate, it must follow that what the broad description depicts beyond the narrow description's scope is factually false. Conversely, if the 'no more than' notion is erroneous as a matter of fact, that error would be established by the validation of the broad description's additional depictions. Second, if—as demonstrated elsewhere—the 'no more than' notion is always

or nearly always implicit and therefore not expressly stated and defended, that aspect is also important. *Id.* It is important because it constitutes probative evidence about how defensible the 'no more than' notion is."

Monte Neil Stewart, ***Marriage*** *Facts,* 31 Harv. J.L. & Pub. Pol'y 313, 337–38 (2008) (most footnotes omitted; emphasis omitted).

46 According to the National Conference of State Legislatures, only 11 states have accepted same-sex **marriage** as a result of choices made by the people or their elected representatives. The 26 other states that, to any extent, now have same-sex **marriage** do so because it has been imposed on them by court order (21 of these by federal courts). See http://www.ncsl.org/research/human-services/same-sex-**marriage**-laws.aspx# 1 (last visited March 2, 2015; a copy of the Web page containing this information is available in the case file of the Clerk of the Alabama Supreme Court).

47 The jurisdiction of probate courts is limited to matters provided by statute. *AltaPointe Health Sys., Inc. v. Davis,* 90 So.3d 139, 154 (Ala.2012).

48 See *Alabama Power Co. v. Citizens of State,* 740 So.2d 371, 381 (Ala.1999) (defining "judicial power" vested by the Constitution as "the special competence to decide discrete cases and controversies involving particular parties and specific facts").

49 Probate judges are entrusted with performing numerous nonjudicial tasks, such as maintaining corporate records, Ala.Code 1975, § 10A–1–4.02; issuing driver's **licenses,** Ala.Code 1975, § 32–6–4; and, in some counties, serving as the chairperson of the county commission, Ala.Code 1975, § 11–3–1(c). I submit that this Court would not, pursuant to its original jurisdiction, attempt to review a probate judge's performance of any of these tasks.

50 *Albritton* discusses the predecessor statute to what is now § 12–2–7(3).

51 I am not stating that a probate judge's decision to issue a **marriage license** can never be challenged in the Alabama Supreme Court. I am stating that the case must first be filed in circuit court and then appealed to this Court, where our decision would then have statewide application.

52 See also Ala.Code 1975, § 36–15–21 ("All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General.").

53 This Court has held that standing must exist at the *commencement* of the litigation and cannot be cured by subsequently adding to the case a party that has the requisite standing. *Cadle Co. v. Shabani,* 4 So.3d 460, 462–63 (Ala.2008). Therefore, this Court's recognition and alignment of additional petitioners *after* the case was *commenced* cannot cure the standing problem.

54 I have argued in the past that *Lujan* does not apply in Alabama in certain circumstances; this Court has not agreed with me. See *McDaniel v. Ezell,* [Ms. 1130372, January 30, 2015] —— So.3d —— (Ala.2015) (Shaw, J., dissenting), and *Ex parte Alabama Educ. Television Comm'n,* 151 So.3d 283 (Ala.2013) (Shaw, J., dissenting). Nevertheless, even I agree that *Lujan* applies in a case such as this: "I believe that in ... general challenges to government action, the *Lujan* analysis is helpful." *Ex parte Alabama Educ. Television,* 151 So.3d at 294 n. 11 (Shaw, J., dissenting).

55 That Code section, we have held, does not apply to mandamus petitions governed by the Alabama Rules of Appellate Procedure. See *Ex parte Johnson,* 485 So.2d 1098 (Ala.1986). The plain language of the Code section does not contain such a restriction. I question whether *Ex parte Johnson* excuses the filing of an unverified petition when this Court's original, and not appellate, jurisdiction is invoked, but I see no need to belabor that issue at this point.

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EXHIBIT
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KeyCite Blue Flag – Appeal Notification
Appeal Filed by TIM RUSSELL v. JAMES STRAWSER, ET AL., 11th Cir., June 4, 2015

307 F.R.D. 604
United States District Court,
S.D. Alabama,
Southern Division.

James N. **STRAWSER** et al., Plaintiffs,
v.
Luther STRANGE, et al., Defendants.

Civil Action No. 14–0424–CG–C.
|
Signed May 21, 2015.

Synopsis
Background: Persons in Alabama who wished to obtain a marriage license in order to marry a person of the same sex filed putative class action against county probate judges who were enforcing Alabama's laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages, seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and an injunction barring their enforcement. Plaintiffs moved for class certification.

Holdings: The District Court, Callie V.S. Granade, J., held that:

[1] plaintiff class was sufficiently numerous;

[2] plaintiff class was ascertainable;

[3] defendant class was sufficiently ascertainable;

[4] plaintiff class met commonality requirement;

[5] defendant class met commonality requirement;

[6] plaintiff class met typicality requirement;

[7] defendant class met typicality requirement; and

[8] single county probate judge was adequate to represent defendant class.

Motion granted.

West Headnotes (26)

[1] **Federal Civil Procedure**
Discretion of court

Whether to certify a class is a matter within the discretion of the district court. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**
Evidence: pleadings and supplementary material

The initial burden of proof to establish the propriety of class certification rests with the advocate of the class. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

Cases that cite this headnote

[3] **Federal Civil Procedure**
Class Actions

Chief among the justifications for class certification is its efficiency; adjudication of a properly-constituted class action generally has res judicata effect and saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

Cases that cite this headnote

[4] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

While no bright-line test exists for determining numerosity, as required for class action certification, and although the determination rests on the court's practical judgment in light of the facts of the case, generally less than 21 is inadequate, more than 40 adequate, with

numbers between varying according to other factors. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

To meet numerosity requirement for class action certification, plaintiff need not show the precise number of members in the class; rather, estimates as to the size of the proposed class are sufficient for a class action to proceed. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

On motion for class action, court may make common sense assumptions to support a finding of numerosity. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

When the numerosity question is a close one on motion for class action certification, a balance should be struck in favor of a finding of numerosity, since the court has the option to later decertify the class. Fed.Rules Civ.Proc.Rule 23(a)(1), (c)(1), 28 U.S.C.A.

Cases that cite this headnote

[8] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Particular Classes Represented

Even if census data estimating that Alabama was home to approximately 6,582 same-sex couples was off by an order of magnitude, numerosity requirement for class action certification was still plainly met in suit brought against county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

Cases that cite this headnote

[9] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Particular Classes Represented

Proposed class of gay and lesbian individuals who wished to obtain a marriage license in order to marry a person of the same sex was ascertainable, as required for certification of their class action against Alabama's county probate judges seeking declaratory and injunctive relief striking down Alabama laws banning same-sex marriage, since any same-sex couples who attempted to apply for a marriage license plainly would qualify as members of the proposed class; identification of class members would not require any individualized fact-finding, nor was it based on unknowable or unascertainable information. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

1 Cases that cite this headnote

[10] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity
Federal Civil Procedure
Identification of class; subclasses

The fact that class members are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[11] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure

Particular Classes Represented

Defendant class of Alabama county probate judges was sufficiently numerous, and thus, certifiable on this basis, in class action brought against the judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; putative defendant class of 68 judges was readily identifiable, joinder of all judges was impractical, and class adjudication would save the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

Cases that cite this headnote

[12] **Federal Civil Procedure**

Common interest in subject matter, questions and relief; damages issues

Commonality, as required for class action certification, requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members; common contention must be of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[13] **Federal Civil Procedure**

Common interest in subject matter, questions and relief; damages issues

Commonality, as required for class action certification, does not require that the class have all the same issues in common; rather, claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[14] **Declaratory Judgment**

Representative or class actions

Federal Civil Procedure

Particular Classes Represented

Questions of law or fact were common to class, and adjudication would clearly resolve claims class-wide, in one stroke, as required for certification of class action brought against county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; even though some class members had already been issued same-sex marriage licenses and others were waiting to do so, common question involved the validity of same-sex marriage licenses, in general, and the state's recognition of rights stemming from these licenses. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[15] **Declaratory Judgment**

Representative or class actions

Federal Civil Procedure

Particular Classes Represented

Questions of law or fact were common to defendant class, as required for certification of class action brought against county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; question common to the entire 68-member defendant class of judges was whether their enforcement of Alabama's laws barring same-sex couples from marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and resolution of this question would resolve the claims against all of judges in one stroke. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

Cases that cite this headnote

[16] **Federal Civil Procedure**

Representation of class; typicality; standing in general

Federal Civil Procedure
⇐ Common interest in subject matter, questions and relief; damages issues

Although the issues of commonality and typicality are separate, the proof required for each tends to merge on motion for certification of a class. Fed.Rules Civ.Proc.Rule 23(a)(2, 3), 28 U.S.C.A.

Cases that cite this headnote

[17] Federal Civil Procedure
⇐ Representation of class; typicality; standing in general

Federal Civil Procedure
⇐ Common interest in subject matter, questions and relief; damages issues

In context of class actions, traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class. Fed.Rules Civ.Proc.Rule 23(a)(2, 3), 28 U.S.C.A.

Cases that cite this headnote

[18] Federal Civil Procedure
⇐ Representation of class; typicality; standing in general

The claim of a class representative is typical, as required for certification of class action, if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

Cases that cite this headnote

[19] Declaratory Judgment
⇐ Representative or class actions

Federal Civil Procedure
⇐ Particular Classes Represented

Claims of class representatives were typical of those of class, as required for certification of class action brought against Alabama county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; proposed class representatives and class members all sought to marry or have their marriages recognized, but had been refused because they were of the same sex, and their inability to be married or have their marriages recognized arose from the same event or pattern or practice of events occurring before county probate judges. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

Cases that cite this headnote

[20] Declaratory Judgment
⇐ Representative or class actions

Federal Civil Procedure
⇐ Particular Classes Represented

Defendant class representatives had typical defenses to class action claims, as required for certification of class action brought against Alabama county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; judges all operated under the same statutory framework, they had the same ministerial duties, their defenses arose from the same course of events involving non-issuance of marriage licenses or non-recognition of prior marriages, and each defendant class member would make the same legal arguments to defend against plaintiffs' allegations. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

Cases that cite this headnote

[21] Federal Civil Procedure
⇐ Representation of class; typicality; standing in general

The adequacy of representation requirement for class action certification encompasses two inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class, and (2) whether the representatives will adequately prosecute the action. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

Cases that cite this headnote

[22] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Particular Classes Represented

Single Alabama county probate judge was adequate to represent defendant class of 68 judges, as required for certification of class action brought against Alabama county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement; any perceived weaknesses in defendant class representative's status stemming from his professed neutrality was offset by the inclusion of Alabama's Attorney General as an additional named defendant who was defending the statutes' constitutionality, and whatever their personal positions were on the constitutionality of Alabama's marriage laws, it was their common obligation to carry out their ministerial duties that gave rise to a common defense. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

Cases that cite this headnote

[23] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Factors, grounds, objections, and considerations in general
Federal Civil Procedure
Common interest in subject matter, questions and relief; damages issues

Because the risk that judicial action will create incompatible standards of conduct is low when a party seeks compensatory damages, only actions seeking declaratory or injunctive relief can be certified under provision of class action rule providing for class adjudication where there is a risk that inconsistent or varying judgments in separate lawsuits would establish incompatible standards of conduct for the party opposing the class. Fed.Rules Civ.Proc.Rule 23(b)(1)(A), 28 U.S.C.A.

Cases that cite this headnote

[24] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Particular Classes Represented

Certification of class action brought against county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement was proper under provision of federal class action rule providing for class adjudication where there is a risk that inconsistent or varying judgments in separate lawsuits would establish incompatible standards of conduct for the party opposing the class; plaintiffs did not seek compensatory damages, and the prosecution of separate actions by these individuals created a high risk of inconsistent decisions by county probate judges who had been interpreting the law differently. Fed.Rules Civ.Proc.Rule 23(b)(1)(A), 28 U.S.C.A.

Cases that cite this headnote

[25] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Particular Classes Represented

Certification of class action brought against county probate judges by gay and lesbian individuals seeking declaratory judgment striking down Alabama's laws banning same-sex marriage and injunction barring their enforcement was proper under provision of federal class action rule providing for class adjudication where the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; defendants' actions in refusing to issue same-sex marriage licenses was directed against all plaintiffs, it was uniform in its application, all plaintiffs had been harmed by either being denied the ability of obtaining a marriage license or

failure of probate judges to recognize same-sex marriage, and their injury could be properly addressed by class-wide injunctive or equitable relief. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

[26] **Declaratory Judgment**
Representative or class actions
Federal Civil Procedure
Common interest in subject matter, questions and relief; damages issues

For class certification under provision of federal class action rule providing for class adjudication where the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, two basic requirements must be met: (1) the class members must have been harmed in essentially the same way by the defendant's acts, and (2) the common injury may properly be addressed by class-wide injunctive or equitable remedies. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

***608** Christopher F. Stoll, San Francisco, CA, Randall C. Marshall, ACLU of Alabama Foundation, Inc., David Dinielli, Scott D. McCoy, Montgomery, AL, Heather Rene Fann, Boyd, Fernambucq, Dunn & Fann, P.C., Birmingham, AL, Shannon P. Minter, Ayesha Khan, Zachary Alan Dietert, Washington, DC, for Plaintiffs.

James W. Davis, Office of the Attorney General, Laura Elizabeth Howell, Andrew L. Brasher, Jamie Helen Kidd, Kendrick E. Webb, Webb & Eley, P.C., Montgomery, AL, Joseph Michael Druhan, Jr., Johnston Druhan, LLP, Harry V. Satterwhite, Satterwhite & Tyler, LLC, Lee L. Hale, Hale and Hughes, Mobile, AL, Mark S. Boardman, Boardman, Carr, Bennett, Watkins, Hill & Gamble, P.C., Clay Richard Carr, Boardman, Carr & Hutcheson, P.C., Teresa Bearden Petelos, Chelsea, AL, John David Whetstone, Gulf Shores, AL, for Defendants.

ORDER

CALLIE V.S. GRANADE, District Judge.

This matter is before the Court on Plaintiffs' motion for class certification (Doc. 76), opposition filed by Defendants Luther Strange (Docs. 78, 99) and Judge Don Davis (Doc. 90), and Plaintiffs' reply (Doc. 100). For the reasons explained below, the Court finds that Plaintiffs' motion for class certification should be granted.

DISCUSSION

Plaintiffs move for class certification of a Plaintiff Class and a Defendant Class in this matter. The Plaintiff Class is defined as:

> All 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.

The proposed Defendant Class is defined 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."

[1] [2] [3] Whether to certify a class is a matter within the discretion of the court. *Moore v. Am. Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1241 (11th Cir.2000), cert. denied, 533 U.S. 950, 121 S.Ct. 2592, 150 L.Ed.2d 751 (2001). "The initial burden of proof to establish the propriety of class certification rests with the advocate of the class." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir.2000), cert. denied, 532 U.S. 919, 121 S.Ct. 1354, 149 L.Ed.2d 285 (2001). Chief among the justifications for class certification is its efficiency: adjudication of a properly-constituted class action generally has res judicata

effect and "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano v. Yamasaki,* ***609** 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must satisfy all four of the threshold requirements set forth in Federal Rule of Civil Procedure 23(a) and then show that the action is maintainable under at least one of the three provisions of Rule 23(b). *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613–14, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Turner v. Beneficial Corp.,* 242 F.3d 1023, 1025 (11th Cir.2001) (en banc), cert. denied, 534 U.S. 820, 122 S.Ct. 51, 151 L.Ed.2d 21 (2001). The four threshold requirements are (1) numerosity: "the class is so numerous that joinder of all members is impractical;" (2) commonality: "there are questions of law or fact common to the class;" (3) typicality: "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and" (4) adequacy: "the representative parties will fairly and adequately protect the interests of the class." FED.R.CIV.P. 23(a); *Turner,* 242 F.3d at 1025 n. 3; *Pickett v. Iowa Beef Processors,* 209 F.3d 1276, 1279 (11th Cir.2000). Rule 23(b) requires a party to show that either (1) prosecution by separate actions would create a risk of inconsistent results; or (2) defendants have acted in ways generally applicable to the class, making declaratory or injunctive relief appropriate; or (3) common questions of law or fact predominate over individual issues. *Moore,* 216 F.3d at 1241.

A. Rule 23(a)

1. Numerosity

[4] **[5]** **[6]** **[7]** For a class to meet the first requirement of Rule 23(a), it must be "so numerous that joinder of all members is impracticable." FED.R.CIV.P. 23(a)(1). "[N]o bright-line test for determining numerosity" exists and the "determination rests on the Court's practical judgment in light of the facts of the case." *Wright v. Circuit City Stores, Inc.,* 201 F.R.D. 526, 537 (N.D.Ala.2001) (citations omitted). However, it has been held that "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir.1986); *see also LaBauve v. Olin Corp.,* 231 F.R.D. 632, 665 (S.D.Ala.2005) ("Numerosity is generally presumed when a proposed class exceeds 40 members." citations omitted). "[A] plaintiff need not show the precise number of members in the class." *Evans v. U.S. Pipe & Foundry Co.,* 696 F.2d 925, 930 (11th Cir.1983). "Estimates as to the size of the proposed class are sufficient for a class action to proceed." *Wright,* 201 F.R.D. at 537 (citation omitted). "Furthermore, this Court may make common sense assumptions to support a finding of numerosity." *Dujanovic v. MortgageAmerica, Inc.,* 185 F.R.D. 660, 666 (N.D.Ala.1999) (citations and internal quotations omitted). "[W]here the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity, since the court has the option to decertify pursuant to Rule 23(c)(1)." *Evans,* 696 F.2d at 930 (citations omitted).

[8] To support their numerosity claim with regard to the proposed Plaintiff Class, Plaintiffs cite to census data from 2010 indicating that Alabama is home to approximately 6,582 same-sex couples. (Doc. 76–2). Hundreds of gays and lesbians married statewide in Alabama following entry of this Court's previous orders and the experience of other states indicates that when they are allowed to do so, many same-sex couples will continue to marry well after their right to do so was first recognized. M.V. Lee Badgett & Christy Mallory, *The Windsor Effect on Marriages by Same–Sex Couples,* The Williams Institute, 1 (Dec. 2014), http:bit.ly/1Cx57w6 (reporting that despite the fact that same-sex marriage had been available in these states since at least 2010, in Connecticut there were 668 same-sex marriages in 2012 and 1355 same-sex marriages in 3013, in New Hampshire there were 389 same-sex marriages in 2012 and 566 same-sex marriages in 2013, and in Vermont there were 472 same-sex marriages in 2012 and 980 same-sex marriages in 2013). When presented with similar evidence the District Court for the Western District of Virginia found that numerosity had plainly been met, explaining as follows:

> ***610** Plaintiffs here ground their good faith estimate on the 2010 United States Census, which reported over 15,000 same-sex households in the Commonwealth. Br. in Supp. re Mot. to Certify Class, Dkt. No. 27, at 5. While defendants question the reliability of the census data cited by plaintiffs, there can be little doubt that the numerosity requirement is satisfied. Defendants' argument is akin to the one rejected by the Court in *Thomas v. Louisiana–Pacific Corp.,* 246 F.R.D. 505 (D.S.C.2007). "Although Defendants contest numerosity, Defendants in substance simply argue Plaintiffs' estimate is incorrect. Even assuming the accuracy of Defendants' estimates, the numerosity requirement is satisfied[.]" *Id.* at 509. The same is true in this case. Even if the census data is off by an order of magnitude, the numerosity requirement is plainly met. *See, e.g., Gunnells v. Healthplan Servs., Inc.,*

348 F.3d 417, 425 (4th Cir.2003) (noting with approval the district Court's observation that "1400 employees plus their families" "easily" satisfied Rule 23(a)(1)'s numerosity requirement). Recent experience in Utah makes this point clear. In an article posted on January 8, 2014, CNN reported that "[o]fficials say more than a thousand marriage licenses between gay and lesbian couples were issued in the 17 days between the initial ruling and the high court's Monday order blocking enforcement." Bill Mears, *Utah Will Not Recognize Same—Sex Marriages Performed Before High Court Stay,* CNN Political Ticker (Jan. 8, 2014, 1:17 PM), http://politica/ticker.blogs.cnn.com/2014/01/08/utah-will-not-recognize-same-sex-marriages-performed-before-high-court-stay/. The 2010 census data, coupled with the actual experience in Utah, amply supports the conclusion that the number of same-sex couples in Virginia seeking to be married under the laws of the Commonwealth far exceeds any number which would be practical for joinder. Plaintiffs' good faith estimate meets the numerosity requirement.

Harris v. Rainey, 299 F.R.D. 486, 490 (W.D.Va.2014). Although the estimated number of same-sex households in Alabama is considerably less than in Virginia, the number estimated in Alabama still far exceeds the amount needed to satisfy the numerosity requirement. The Court is also aware of the considerable confusion that followed this Court's entry of orders finding that Alabama's laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages were unconstitutional. Although hundreds of same-sex couples were reportedly able to obtain marriage licenses, there were many more, like the new named Plaintiffs in this case, that were denied marriage licenses or did not attempt to apply for a license for fear of being turned away or because it was difficult to make firm wedding plans not knowing if they could obtain a marriage license. As reported above, the number of same-sex couples that sought marriage licenses well after the initial allowance of such marriages in Connecticut, New Hampshire and Vermont—states with smaller populations than Alabama, far exceeded any number that would be practical for joinder. Thus, even if there had been no confusion over the issuance of marriage licenses in Alabama, the experience of these other states indicates that the number of same-sex couples who would seek marriage licenses in the coming years if they were permitted to do so would far exceed the number that would be practical for joinder. Accordingly, this Court finds that the 2010 census data coupled with the actual experience in other states amply supports the conclusion that the number of same-sex couples in Alabama seeking to be married far exceeds any number which would be practical for joinder.

[9] Defendants contend that the Plaintiff Class is too vague because it is based on subjective standards—whether a couple desires a marriage license. However, as Plaintiffs point out, probate judges would have no difficulty identifying those affected by the requested injunction since any same-sex couples who attempt to apply for a marriage license plainly qualify as members of the proposed class. In a similar case, the Western District of Virginia was presented with a similar objection to a proposed class and found that the potential plaintiffs' application ***611** for a marriage license was observable and objective. *Harris,* 299 F.R.D. at 496–497 ("Here, observable and objective actions determine whether couples fall within the class definition by virtue of their application for a marriage license or request for recognition of an out-of-state marriage."). As in *Harris,* the proposed class definition here "will not require any individualized fact-finding, nor is it based on unknowable or unascertainable information. As such, it meets the requirement of ascertainability." *Id.* at 497.

[10] The fact that the class members "are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable." *Doe v. Charleston Area Med. Ctr., Inc.,* 529 F.2d 638, 645 (4th Cir.1975); *see also Meyer v. Citizens and Southern Nat. Bank,* 106 F.R.D. 356, 360 (M.D.Ga.1985) ("Difficulty in identifying class members makes joinder more impractical and certification more desirable." citing *Charleston Area Med. Ctr., Inc. supra* and *Jack v. American Linen Supply Co.,* 498 F.2d 122, 124 (5th Cir.1974)). Nor is it a problem that seeking to obtain a marriage license involves an element of choice. As Plaintiff correctly points out, courts have routinely certified classes defined by characteristics of choice. *See e.g. Pederson v. Louisiana State University,* 213 F.3d 858, 865 (5th Cir.2000) (class consists of female students who seek to participate in varsity intercollegiate athletics); *Carpenter v. Davis,* 424 F.2d 257, 260 (5th Cir.1970) (class includes all who wish or expect to write for, publish, sell or distribute the newspaper in the future); *Charleston Area Med. Ctr., Inc.,* 529 F.2d at 645 (class consists of persons seeking abortions).

[11] As to the proposed Defendant Class, Plaintiffs seek to certify as defendants, 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. There are

68 probate judges in Alabama, all of which have refused, or may in the future refuse, to issue marriage licenses to same-sex couples based on Alabama's laws. As discussed above, "[n]umerosity is generally presumed when a proposed class exceeds 40 members." *LaBauve*, 231 F.R.D. at 665. Although the members of the Defendant Class are readily identifiable, the Court finds that joinder of all of them is impractical. As stated previously, one of the primary reasons for certifying a class is its efficiency. Adjudication of this case as to all 68 probate judges "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano*, 442 U.S. at 701, 99 S.Ct. 2545. Plaintiffs identify many courts that have certified defendant classes of local or county-level official in cases that challenge a law executed at a local level. *See e.g. Callahan v. Wallace*, 466 F.2d 59 (5th Cir.1972) (defendant class of justices of the peace, sheriffs and state troopers); *Monaco v. Stone*, 187 F.R.D. 50 (E.D.N.Y.1999) (local criminal court judges); *Ragsdale v. Turnock*, 734 F.Supp. 1457 (N.D.Ill.1990) (all State Attorneys), aff'd, 941 F.2d 501 (7th Cir.1991); *Akron Ctr. for Reprod. Health v. Rosen*, 110 F.R.D. 576 (N.D.Ohio 1986) (state prosecutors); *Harris v. Graddick*, 593 F.Supp. 128 (M.D.Ala.1984) (county officials responsible for appointing poll officials). Courts in Alabama have even certified the same defendant class requested in this case—all Alabama probate judges. *See e.g. Hadnott v. Amos*, 295 F.Supp. 1003, 1005 (M.D.Ala.1968) rev'd on other grds., 394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 (1969) (certifying a class of defendants composed of the Judges of Probate of all counties in Alabama); *Sims v. Frink*, 208 F.Supp. 431 (M.D.Ala.1962) aff'd, sub nom., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (same). The Court finds that while all 68 probate judges are known, it is impracticable to join them all and their inclusion in the class will serve the interests of judicial economy.

2. Commonality

[12] **[13]** **[14]** Commonality requires the presence of questions of law or fact common to the class. FED.R.CIV.P. 23(a)(2). Commonality requires "that there be at least one issue whose resolution will affect all or a significant number of the putative class members." ***612** *Bussey v. Macon County Greyhound Park, Inc.*, 562 Fed.Appx. 782, 788 (11th Cir.2014) (citation and internal quotations omitted). "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal—Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). In this case, only same-sex couples who seek a marriage license and to have that marriage recognized under Alabama law are included as members of the Plaintiff Class. Judge Davis contends that commonality is not met because some of the named plaintiffs have already obtained partial relief in that they were issued marriage licenses in Alabama. Judge Davis's argument seems to be more a question of standing, which this Court has previously addressed. Commonality does not require that the class have all the same issues in common. "The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.1986). The validity of the marriage licenses that have been issued to same-sex couples in Alabama is still at issue. If probate judges view Plaintiffs' marriage documents as invalid or void, probate Court records could reflect that the Plaintiffs who have received marriage licenses are not validly married. Additionally, if probate judges refuse to recognize same-sex marriages the plaintiffs' rights will be affected when petitioning for adoption or when their estates are being probated. Plaintiffs' claims are based on the same legal theories as those of the absent class members. Whatever factual nuances may exist among putative class members, the legal relief sought is the same: a declaratory judgment striking down Alabama's laws banning same-sex marriage and an injunction barring their enforcement. Such relief rests on identical questions of law and would clearly resolve the claims class-wide and in one stroke.

[15] Similarly, there are common questions of law that would be resolved as to all of the members of the proposed Defendant Class. The proposed Defendant Class consists of 68 probate judges who are enforcing Alabama's laws barring same-sex couples from marrying. The question common to the entire Defendant Class is whether their enforcement of Alabama's laws barring same-sex couples from marriage violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The resolution of this question will resolve the claims against all of members of the class in one stroke. Thus, the Court finds that the Defendant Class meets the commonality requirement of Rule 23(a).

3. Typicality

[16] **[17]** **[18]** **[19]** **[20]** Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FED.R.CIV.P. 23(a)(3). Although the issues of commonality and typicality are

separate, the proof required for each tends to merge. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir.1996) (citation omitted). "Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1346 (11th Cir.2001) (citation omitted). "The claim of a class representative is typical if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir.2009). In the instant case, Plaintiffs ask this Court to appoint Kristi Ogle and Jennifer Ogle, Keith Ingram and Albert Holloway Pigg III, Gary Wayne Wright II and Brandon Mabrey as class representatives. The proposed class representatives seek to marry and have their marriages recognized, but have been refused a marriage license because they are of the same sex. Their inability to be married and have their marriages recognized because they are of the same sex is shared by all members of the proposed Plaintiff Class and arises from the same event or pattern or practice of events. Similarly, the Defendant class representatives have typical defenses to ***613** those claims. The Defendants all operate under the same statutory framework and have the same ministerial duties. Their defenses arise from the same course of events and each class member may make the same legal arguments to defend against the Plaintiffs' allegations. Because the injuries, claims and defenses of the named Plaintiffs and Defendants in this case are typical of the injuries, claims of the entire proposed classes, the typicality requirement of Rule 23(a) is met.

4. Adequacy

[21] Adequacy of representation requires that "the representative parties will fairly and adequately protect the interests of the class." FED.R.CIV.P. 23(a)(4). The adequacy of representation requirement encompasses two inquiries: "(1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir.2003) (citation omitted). Defendants do not seriously challenge the assertion that the named Plaintiffs and their counsel will vigorously prosecute this action. Additionally, because the Court has determined that the named Plaintiffs and the putative class share commonality and typicality, it follows, that "the named plaintiff[s'] claim[s] and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 131 S.Ct. at 2551 n. 5 (noting that commonality and typicality determinations tend to merge with the adequacy-or-representation requirement); *see also Amchem Prods., Inc.*, 521 U.S. at 620, 117 S.Ct. 2231 ("The adequacy-of-representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." citations omitted). The Court finds that Plaintiffs have no substantial conflict of interest with the class and that Plaintiffs will adequately prosecute this action on behalf of the Plaintiff Class.

[22] As to the Defendant Class adequacy of representation, Defendant Davis asserts that he cannot be an effective class representative because there is no unified position of the 68 probate judges on the constitutionality of denying marriage licenses to same-sex couples and because he has never made public statements or taken a public stance on the matter. However, the issuance of marriage licenses is a purely ministerial act. *See Ex parte State ex rel. Alabama Policy Institute*, — So.3d ——, ——, 2015 WL 892752, *4, *8 (Ala., March 3, 2015) (discussing and referring to the probate judges' "ministerial act of licensing marriages"). None of the Defendant Class members are charged with discretion or judgment in carrying out this ministerial duty. Whatever their personal positions are on the constitutionality of Alabama's marriage laws, it is their common obligation to carry out their ministerial duties that give rise to a common defense. *See Sherman ex rel. Sherman v. Township High School Dist.*, 540 F.Supp.2d 985, 992 (N.D.Ill.2008) ("Whatever the position of any individual school district on the constitutionality of the Act, the common obligation to implement it gives rise to a common defense."); *see also National Broadcasting Co., Inc. v. Cleland*, 697 F.Supp. 1204, 1217 (N.D.Ga.1988) ("Because the Fulton County Board has the same duties and responsibilities as all other county Superintendents of Elections, the Fulton County Board, as class representative, can fairly and adequately protect the interests of the defendant class of Superintendents."). "Rule 23(a)(4) does not require a willing representative, [but] merely an adequate one." *Cleland*, 697 F.Supp. at 1217. Additionally, "any perceived weaknesses in [Judge Davis's] status as class representative stemming from [his] professed neutrality" "are offset by the inclusion of [Attorney General Strange] as a named defendant" who is defending the statutes constitutionality. *Sherman*, 540 F.Supp.2d at 992; *see also Redhail v.*

Zablocki, 418 F.Supp. 1061, 1066 (D.C.Wis.1976) ("Not only is defendant Zablocki's interest identical to that of the other county clerks, but the attorney representing him is from ***614** the Milwaukee County Corporation Counsel's office which is experienced in conducting federal litigation. Furthermore, the Attorney General of Wisconsin has taken an active part in this action, urging that the challenged statute be upheld."). In light of the foregoing reasons, the Court finds that each of the four Rule 23(a) requirements is satisfied for both the proposed Plaintiff and Defendant Classes.

B. Rule 23(b)

In addition to meeting the requirements of Rule 23(a), a class must also qualify under one of the three "types" of classes set forth in Rule 23(b). Plaintiffs contend certification under both 23(b)(1)(A) and 23(b)(2) are proper.

[23] **[24]** Federal Rule of Civil Procedure 23(b)(1)(A) provides for class adjudication where there is a risk that inconsistent or varying judgments in separate lawsuits "would establish incompatible standards of conduct for the party opposing the class." FED.R.CIV.P. 23(b)(1)(A). Because the risk that judicial action will create incompatible standards of conduct is low when a party seeks compensatory damages, only actions seeking declaratory or injunctive relief can be certified under Rule 23(b)(1)(A). *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir.1987). In the instant case, Plaintiffs do not seek compensatory damages and it is clear that the prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications. Defendants' only real argument against certification under 23(b)(1)(a) is that the issues will only really be resolved when the United States Supreme Court has the final say on these inconsistencies. This Court has already considered Defendants' requests to stay this case pending the Supreme Court's ruling and has denied said requests. A class-wide ruling by this Court would definitively determine the issues as to all of the Plaintiffs' claims against all 68 probate judges in Alabama. This Court is aware that the Supreme Court of the United States will ultimately have the final say on these issues, but until that time this Court must consider the claims and rights of the parties before this Court. The Court finds certification is proper under Rule 23(b)(1)(A).

[25] **[26]** The Court also finds that certification is proper under Rule 23(b)(2). Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED.R.CIV.P. 23(b)(2). "The 'generally applicable' language signifies 'that the party opposing the class does not have to act directly against each member of the class.' " *Harris*, 299 F.R.D. at 494 (quoting WRIGHT & MILLER § 1775). "Instead, '[t]he key is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class.' " *Id.* (citations omitted). For class certification under 23(b)(2), "[t]wo basic requirements must be met: (1) the class members must have been harmed in essentially the same way by the defendant's acts; and (2) the common injury may properly be addressed by class-wide injunctive or equitable remedies." *Williams v. Nat. Sec. Ins. Co.*, 237 F.R.D. 685, 693 (M.D.Ala.2006) (citing *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir.1983)). Defendants' alleged conduct is directed against a specific class of people, same-sex couples, and is uniform in its application. All Plaintiff Class members have been harmed by being denied the ability of obtaining a marriage license and their injury can be properly addressed by class-wide injunctive relief. Thus, this case falls squarely within the ambit of Rule 23(b)(2).

CONCLUSION

For the reasons explained above:

1. Plaintiffs' motion to certify a Plaintiff Class consisting of all persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and 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 is **GRANTED.**

***615** **2.** The Court **APPOINTS** Kristi Ogle and Jennifer Ogle, Keith Ingram and Albert Holloway Pigg III, Gary Wayne Wright II and Brandon Mabrey as Lead Plaintiffs and Plaintiff Class representatives.

3. The Court **APPOINTS** the National Center for Lesbian Rights, Americans United for Separation of Church and State, the Southern Poverty Law Center, and ACLU Foundation of Alabama as Co–Lead Counsel for Lead Plaintiffs and the Plaintiff Class.

4. Plaintiffs' motion to certify a Defendant Class consisting of 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 is **GRANTED.**

5. The Court **APPOINTS** Judge Don Davis and Judge Tim Russell as Lead Defendants and Defendant Class representatives.

6. The Court **APPOINTS** Lee L. Hale, Satterwhite, Druhan, Gaillard & Tyler, LLC, and Boardman, Carr, Bennett, Watkins, Hill & Gamble, P.C. as Co–Lead Counsel for Lead Defendants and the Defendant Class.

All Citations

307 F.R.D. 604, 91 Fed.R.Serv.3d 1515

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EXHIBIT
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KeyCite Blue Flag – Appeal Notification
Appeal Filed by JAMES STRAWSER, ET AL v. TIM RUSSELL, 11th Cir., June 4, 2015

105 F.Supp.3d 1323
United States District Court,
S.D. Alabama,
Southern Division.

James N. **STRAWSER**, et al., Plaintiffs,
v.
Luther STRANGE, in his official capacity as Attorney General for the State of Alabama, et al., Defendants.

Civil Action No. 14–0424–CG–C.
|
Signed May 21, 2015.

Synopsis
Background: Same-sex couples filed class action against state and county officials alleging that Alabama laws prohibiting and refusing to recognize same-sex marriage violated their constitutional rights. Plaintiffs moved to preliminary injunction.

Holdings: The District Court, Callie V.S. Granade, J., held that:

[1] plaintiffs were entitled to class-wide preliminary injunction against enforcement of state marriage laws prohibiting same-sex marriage;

[2] *Rooker–Feldman* doctrine did not bar action; and

[3] state supreme court decision upholding state's prohibition against same-sex marriage did not preclude district court from entering preliminary injunction.

Motion granted.

West Headnotes (5)

[1] **Injunction**
⇐ Grounds in general; multiple factors

Court may grant preliminary injunction only if plaintiff demonstrates: (1) substantial likelihood of success on merits; (2) substantial threat that irreparable injury will occur absent issuance of injunction; (3) that threatened injury outweighs potential damage requested injunction may cause non-moving parties; and (4) that injunction would not be adverse to public interest.

Cases that cite this headnote

[2] **Injunction**
⇐ Marriage and divorce
Marriage
⇐ Same-Sex and Other Non-Traditional Unions

Same-sex couples were likely to prevail on merits of their claim that Alabama laws prohibiting and refusing to recognize same-sex marriage violated their equal protection and due process rights and their inability to exercise their fundamental right to marry caused them irreparable harm that outweighed any injury to state and county officials, and thus were entitled to class-wide preliminary injunction against enforcement of state marriage laws prohibiting same-sex marriage. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[3] **Courts**
⇐ Constitutional questions, civil rights, and discrimination in general

Rooker–Feldman doctrine did not bar same-sex couples' class action challenging constitutionality of Alabama laws prohibiting and refusing to recognize same-sex marriage, even though state court mandamus proceeding was pending in state court to enforce challenged statute, where couples were not party to state court action, and court's finding that Alabama's marriage sanctity laws were unconstitutional predated state court mandamus action.

Cases that cite this headnote

[4] **Courts**

⇐ Assumption and exercise of conflicting jurisdiction in general

Injunction

⇐ Marriage and divorce

Alabama Supreme Court decision upholding state's prohibition against same-sex marriage did not preclude federal district court from entering preliminary injunction barring state and county officials from enforcing Alabama laws prohibiting or failing to recognize same-sex marriage, based on its determination that laws likely violated Equal Protection and Due Process Clauses. U.S.C.A. Const. Art. 6, cl. 2; Ala.Code 1975, § 30–1–19.

Cases that cite this headnote

[5] **Constitutional Law**

⇐ Marriage and divorce in general

Constitutional Law

⇐ Same-sex marriage

Marriage

⇐ Power to regulate and control

Marriage

⇐ Same-Sex and Other Non-Traditional Unions

Alabama's Sanctity of Marriage Amendment and Alabama Marriage Protection Act violated Due Process Clause and Equal Protection Clause. U.S.C.A. Const.Amend. 14; Ala.Const. Art. 1, § 36.03; Ala.Code 1975, § 30–1–19.

Cases that cite this headnote

West Codenotes

Held Unconstitutional

Ala.Code 1975. § 30–1–19; Ala.Const. Art. 1, § 36.03

Attorneys and Law Firms

***1324** Christopher F. Stoll, San Francisco, CA, David Dinielli, Scott D. McCoy, Randall C. Marshall, ACLU of Alabama Foundation, Inc., Montgomery, AL, Heather Rene Fann, Boyd, Fernambucq, Dunn & Fann, P.C., Birmingham, AL, Shannon P. Minter, Ayesha Khan, Zachary Alan Dietert, Washington, DC, for Plaintiffs.

James W. Davis, Office of the Attorney General, Laura Elizabeth Howell, Andrew L. Brasher, Jamie Helen Kidd, Kendrick E. Webb, Webb & Eley, P.C., Montgomery, AL, Joseph Michael Druhan, Jr., Johnston Druhan, LLP, Harry V. Satterwhite, Satterwhite & Tyler, LLC, Lee L. Hale, Hale and Hughes, Mobile, AL, Teresa Bearden Petelos, Mark S. Boardman, Clay Richard Carr, Boardman, Carr & Hutcheson, P.C., Chelsea, AL, John David Whetstone, Gulf Shores, AL, for Defendants.

ORDER

CALLIE V.S. GRANADE, District Judge.

This matter is before the court on Plaintiffs' motion for preliminary injunction (Doc. 76), opposition thereto filed by Attorney General Strange (Doc. 78, 99) and Judge Don Davis (Doc. 90), and Plaintiffs' reply (Doc 100). For the reasons explained below, the Court finds that Plaintiffs' motion for preliminary injunction should be granted, but stayed pending the ruling of the U.S. Supreme Court in *Obergefell v. Hodges* and related cases.

[1] 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. ***1325** *Id.*, 287 F.3d at 1329; *see also McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir.1998). "In this 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.)

The claims in this case are brought by persons in Alabama who wish to marry a person of the same-sex and to have that marriage recognized under Alabama law. This court previously issued preliminary injunctions in this case prohibiting the Alabama Attorney General, Probate

Judge Don Davis, and their "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 that prohibit same-sex marriage" from enforcing the Alabama laws which prohibit same-sex marriage. (Docs. 29, 55). The first preliminary injunction against Attorney General Luther Strange, was initially stayed, but went into effect on Monday, February 9, 2015, after the Eleventh Circuit Court of Appeals and the Supreme Court of the United States denied Attorney General Strange's request to extend the stay. (Doc. 40, Exh. 1; Doc. 43, p. 2). This Court also denied subsequent requests by Defendants to stay. (Doc. 88). The Court allowed Plaintiffs to amend their complaint to add both named parties and class claims (Doc. 92), and has today certified both a Plaintiff Class and a Defendant Class. Plaintiffs now seek a third preliminary injunction that would apply to the new named parties and both Plaintiff and Defendant Classes.

The named Plaintiffs report that they are all over the age of 19 and want to get married and feel demeaned and humiliated by Alabama's refusal to treat them on a basis equal to that of opposite sex couples. (Doc. 76–3, ¶¶ 1, 3; Doc. 76–4, ¶¶ 1, 3; Doc. 76–5, ¶¶ 1, 5). Plaintiffs Kristie Ogle and Jennifer Ogle have been in a committed, loving relationship for 22 years and have a child who was born in 2002 in Alabama. (Doc. 76–3, ¶ 2). Kristie and Jennifer Ogle want to provide their son and their family with the stability and legal protections that marriage provides. (Doc. 76–3, ¶ e). They experience uncertainty about whether they will be treated as family members in the event of an emergency. (Doc. 76–3, ¶ 3). Kristie and Jennifer Ogle went to Mobile County Probate Court to obtain a marriage license on March 4, 2015, but the Probate Office was not issuing licenses and they were unable to obtain one. (Doc. 76–3, ¶ 4). On March 5, 2015 Kristie Ogle called the Baldwin County Probate Judge's office and was told that while they are issuing marriage licenses to opposite-sex couples, they are not issuing licenses to same-sex couples. (Doc. 76–3, ¶ 4).

Plaintiffs Keith Ingram and Albert Holloway Pigg III have been in a committed, loving relationship for approximately one year. (Doc. 76–4, ¶ 2). Ingram and Pigg want to marry to make their family legal and to declare their commitment for each other before their loved ones and their community. (Doc. 76–4, ¶ 3). Each day that they are not permitted to be married, they experience uncertainty about whether they will be treated as family members in the event of an emergency. (Doc. 76–4, ¶ 3). They are particularly anxious because Ingram has seen many doctors over the past several months for an undiagnosed illness. (Doc. 76–4, ¶ 3). Ingram and Pigg drove to the probate office in Houston County on February 9, 2015 to obtain a marriage license, but were told by the clerk that the probate judge, Judge Patrick Davenport, would not issue them a ***1326** marriage license. (Doc. 76–4, ¶ 4). They drove to the Houston County Probate Office again on February 17, 2015 and were again informed that Judge Davenport would not issue them a marriage license. (Doc. 76–4, ¶ 5). On March 5, 2015, Ingram called the office of Baldwin County Probate Judge Tim Russell and asked if they could get a marriage license, but was informed that Judge Russell's office was only issuing marriage licenses to "traditional" different-sex couples. (Doc. 76–4, ¶ 6).

Plaintiffs Gary Wayne Wright II and Brandon Mabrey have lived together in Alabama for six years and have been in a committed, loving relationship for eighteen years. (Doc. 76–5, ¶¶ 1, 2). Wright was honorably discharged from the U.S. Navy in 1991 after 17 years of service for being gay. (Doc. 76–5, ¶ 3). Wright has a muscular disorder that leaves him dependent on a wheelchair. (Doc. 76–5, ¶ 4). Wright receives less veteran's benefits and coverage than he would if he were married. (Doc. 76–5, ¶ 4). Wright and Mabrey want to get married to make their family legal and to declare their commitment to each other before their loved ones and community. (Doc. 76–5, ¶ 5). Each day that they are not permitted to marry, they experience uncertainty about whether they will be treated as family members in the event of an emergency and they want to receive the legal protections and responsibilities that marriage provides. (Doc. 76–5, ¶ 5). On February 12, 2015, Mabrey called the Marshall County Probate Office, but was told that the office was not issuing marriage licenses to anyone. (Doc. 76–5, ¶ 6). Wright sent an email to Marshal County Probate Judge, Tim Mitchell, on February 18, 2015, requesting that his office issue marriage licenses to same-sex couples, but received no response. (Doc. 76–5, ¶ 7). On March 2, 2015, Wright went to the Marshall County Probate Office to obtain a marriage license and the clerk told him that the probate judge would not issue marriage licenses to anyone. (Doc. 76–5, ¶ 8). On March 5, 2015, they called the Baldwin County Probate Office to ask if they could obtain a marriage license, but were told that the Baldwin County Probate Office was issuing licenses only to "traditional" different-sex couples. (Doc. 76–5, ¶ 9).

Plaintiffs contend that Alabama's laws prohibiting same-sex marriage [1] violate their rights under the United States Constitution ***1327** to Due Process and Equal Protection. This Court determined, in another case, *Searcy v. Strange*, 81

F.Supp.3d 1285, 2015 WL 328728 (S.D.Ala. Jan. 23, 2015), that Alabama's marriage 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 Constitution. In *Searcy,* this Court found that those laws restrict the Plaintiffs' fundamental marriage right and do not serve a compelling state interest. Although the Plaintiffs in this case seek to marry in Alabama, rather than have their marriage in another state recognized in Alabama, the Court, as it previously did in issuing the preliminary injunctions against Attorney General Strange and Judge Don Davis, 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 sanctity 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. Because this Court has continued to find that said laws are unconstitutional, the Court also finds that the new named Plaintiffs and the Plaintiff Class are likely to succeed on the merits of their claims.

Although Davis contends that he is entitled to qualified immunity and Eleventh Amendment Immunity, such immunities do not shield Davis from official capacity suits seeking declaratory and injunctive relief.[2] ***1328** Accordingly, Davis's immunity claims do not alter this courts conclusion that the Plaintiffs are likely to succeed on the merits of their claims.

[2] After considering the circumstances of this case and in light of the finding that the laws in question are unconstitutional, the Court finds that Plaintiffs have met the preliminary injunction factors. Entry of an additional preliminary injunction order against the new Defendant and Defendant Class is warranted for the same reasons that the Court granted the previous preliminary injunctions. The named Plaintiffs are likely to prevail and their inability to exercise their fundamental right to marry has caused them irreparable harm that 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."). Because the issuance of marriage licenses is a purely ministerial act, Judge Davis, Judge Russell and the members of the Defendant Class have only a ministerial interest in issuing marriage licenses and would suffer little if any actual harm from the injunction. Additionally, "it is always in the public interest to protect constitutional rights." *Phelps–Roper v. Nixon,* 545 F.3d 685, 690 (8th Cir.2008). The Court finds that Defendants have not shown why these conclusions should not apply to all of the named parties as well as the Plaintiff and Defendant Classes. The named Plaintiffs' claims are representative of the claims of the entire Plaintiff Class and the newly added Defendant and Defendant Class have the same defenses as Judge Davis.

[3] Defendant Strange urges this Court to avoid unnecessary conflict. Strange concedes that this case may not fit squarely within the *Rooker–Feldman* doctrine because the plaintiffs are not parties to the state court proceedings, but argues that this Court, in its discretion, could abstain to avoid tension between state and federal courts. However, as Strange notes, Plaintiffs were not party to the state-court mandamus proceeding. As such, Plaintiffs are not bound by the conclusions of the Alabama Supreme Court. A mandamus proceeding in a state court against state officials to enforce a challenged statute does not bar injunctive relief in a United States district court. *Hale v. Bimco Trading,* 306 U.S. 375, 377–378, 59 S.Ct. 526, 527, 83 L.Ed. 771 (1939). Actions attacking the constitutionality of such statutes can be brought by parties who are strangers to the state court action. *Id.* The *Hale* Court held that strangers to a state court proceeding are not barred by the Anti–Injunction Statute, which was a precursor of the Anti–Injunction Act, from challenging the constitutionality of a statute in federal court when the statute is also under litigation in the state courts. Courts since then have agreed. *See e.g. Chezem v. Beverly Enterprises–Texas, Inc.,* 66 F.3d 741, 742 (5th Cir.1995) ("As the Supreme Court has taught, the Anti–Injunction Act has no application herein because Carriage House and its residents were neither parties nor privies of parties to the state court action."); *Pelfresne v. Village of Williams Bay,* 917 F.2d 1017, 1020 (7th Cir.1990) ("Only a party, or, what amounts to the same thing in contemplation of the law, one who is in privity with a party, is barred by the Anti–Injunction Act." Citations omitted); *Munoz v. Imperial County,* 667 F.2d 811 (9th Cir.1982) (holding that federal plaintiffs were strangers to state-court proceedings and affirming entry of injunction against county officials). Defendants have not shown that any abstention doctrine applies to this case. Moreover, this court's finding that Alabama's marriage sanctity laws were unconstitutional predates the state court mandamus action.

***1329 [4]** Davis also argues that an additional preliminary injunction would be in direct contradiction to the order issued by the Alabama Supreme Court in *Ex parte State,* — So.3d ——, 2015 WL 892752 (Ala. March 3, 2015). It is true that if this Court grants the preliminary injunction

the probate judges will be faced with complying with either Alabama's marriage laws that prohibit same-sex marriage as they have been directed by the Alabama Supreme Court or with complying with the United States Constitution as directed by this Court.[3] However, the choice should be simple. Under the Supremacy Clause, the laws of the United States are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. As the Supreme Court very recently explained:

> It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. *Gibbons v. Ogden,* 9 Wheat. 1, 210 [6 L.Ed. 23] (1824).
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> * * *
>
> For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits. See, *e.g., Pennsylvania v. Nelson,* 350 U.S. 497, 499, 509 [76 S.Ct. 477, 100 L.Ed. 640] (1956). Similarly, a court may not hold a civil defendant liable under state law for conduct federal law requires. See *e.g., Mutual Pharmaceutical Co. v. Bartlett,* 570 U.S. ——, ——–——, [133 S.Ct. 2466, 2476–77, 186 L.Ed.2d 607] (2013) (slip op., at 13–14). And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted. *Ex parte Young,* 209 U.S. 123, 155–156 [28 S.Ct. 441, 52 L.Ed. 714] (1908).
>
> * * *
>
> It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. See, *e.g., Osborn v. Bank of United States,* 9 Wheat. 738, 838–839, 844 [6 L.Ed. 204] (1824); *Ex parte Young, supra,* at 150–151 [28 S.Ct. 441] (citing *Davis v. Gray,* 16 Wall. 203, 220 [21 L.Ed. 447] (1873)).
>
> * * *
>
> What our cases demonstrate is that, "in a proper case, relief may be given in a court of equity ... to prevent an injurious act by a public officer." *Carroll v. Safford,* 3 How. 441, 463 [11 L.Ed. 671] (1845).
>
> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L.Q. Rev. 345 (1956).

Armstrong v. Exceptional Child Center, Inc., —— U.S. ——, 135 S.Ct. 1378, 1383, 1384, 191 L.Ed.2d 471 (2015). Judge Davis and the other probate judges cannot be held liable for violating Alabama state law when their conduct was required by the United States Constitution.

Defendant Strange argues that the members of the Defendant Class should be provided notice and an opportunity to respond ***1330** before the Court considers issuing a preliminary injunction against them. However, when monetary damages are not sought, notice is discretionary to classes certified under Rule 23(b)(1) or (b)(2), like the classes in this case. *See* FED.R.CIV.P. 23(c)(2)(A); *Penson v. Terminal Transport Co., Inc.,* 634 F.2d 989, 993 (5th Cir.1981). Courts in this District and others have previously issued a preliminary injunction concurrently with certifying a class or even prior to fully certifying a class. *See e.g. Harris v. Graddick,* 593 F.Supp. 128 (M.D.Ala.1984) (certifying a plaintiff and defendant class concurrently with issuing a preliminary injunction); *Kaiser v. County of Sacramento,* 780 F.Supp. 1309, 1312 (E.D.Cal.1991) (granting class-wide injunctive relief even though the court had only provisionally certified the class and had not yet fully addressed defendants class certification arguments); *Thomas v. Johnston,* 557 F.Supp. 879, 916 n. 29 (W.D.Tex.1983) ("It appears to be settled ... that a district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers."). Here, Plaintiffs are not seeking monetary damages and the court has given Attorney General Strange and Judge Davis ample opportunity to address the preliminary injunction issues. The Court finds that no further briefing or evidentiary materials are necessary. Plaintiffs have clearly met their burden for issuance of a class-wide preliminary injunction against the enforcement of state marriage laws prohibiting same-sex marriage.

Accordingly, the Court makes the following declaration:

[5] It is **ORDERED** and **DECLARED** that ALA. CONST. art. I, § 36.03 (2006) and ALA.CODE 1975 § 30–1–19

are unconstitutional because they violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs' motion for preliminary injunction (Doc 76) is **GRANTED** and Judge Don Davis, Judge Tim Russell and the members of the Defendant Class are hereby **ENJOINED** from enforcing the Alabama laws which prohibit or fail to recognize same-sex marriage. If the named Plaintiffs or any members of the Plaintiff Class take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, Judge Don Davis, Judge Tim Russell and the members of the Defendant Class may not deny them a license on the ground that they are same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order, including any injunction issued by the Alabama Supreme Court pertaining to same-sex marriage. This injunction binds all the officers, agents, servants and employees, and others in active concert or participation with Judge Don Davis, Judge Tim Russell or any of the members of the Defendant Class who would seek to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage.

Plaintiffs are **ORDERED** to provide notice of this order and the order granting class certification to each member of the Defendant Class by mailing copies of both orders by certified mail to each class member at his or her office. [4] The notices ***1331** should be mailed on or before May 26, 2015.

It is **FURTHER ORDERED** that because the issues raised by this case are subject to an imminent decision by the United States Supreme Court in *Obergefell v. Hodges* and related cases [5], the above preliminary injunction is **STAYED** until the Supreme Court issues its ruling.

All Citations

105 F.Supp.3d 1323

Footnotes

1 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.

2 Plaintiffs deny that Judge Davis is entitled to qualified immunity. Regardless, even if Judge Davis is entitled to qualified immunity, qualified immunity does not bar declaratory or injunctive relief. *D'Aguanno v. Gallagher,* 50 F.3d 877, 879 (11th Cir.1995) (citing *Fortner v. Thomas,* 983 F.2d 1024, 1029 (11th Cir.1993)). Eleventh Amendment Immunity also does not protect Judge Davis from claims for "prospective injunctive relief in order to end a continuing violation of federal law." *Tindol v. Alabama Dept. of Revenue,* 2015 WL 350623, *10 (M.D.Ala. Jan. 23, 2015) (quoting *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)); *see also Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (holding that the Eleventh Amendment does not bar prospective injunctive relief against a state officer (as distinct from the State itself) on the theory that a state official engaged in unconstitutional actions is stripped of his official representative capacity.); *Welch v. Estes,* 2014 WL 7369424, *3 (N.D.Ala. Dec. 29, 2014) ("Although Eleventh Amendment immunity protects state officials from suits for money damages, actions against a state official for prospective injunctive relief are outside the protection offered by the Eleventh Amendment." citations omitted).

3 Probate Judges also have a third choice: they could choose to issue no marriage licenses and comply with both orders, as Judge Davis has reportedly done.

4 While the court is confident that all of the probate judges will be notified almost immediately of this order through the news media and other avenues, the Court finds formal notice to be prudent. Notice does not need to be mailed to Judge Davis or Judge Russell as they will receive electronic notice of these orders.

5 These cases were argued on April 28, 2015, and a decision is expected by the end of this term.

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EXHIBIT
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IV

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Morris v. Brandenburg, N.M.App., August 11, 2015

135 S.Ct. 2584
Supreme Court of the United States

James **OBERGEFELL**, et al., Petitioners
v.
Richard HODGES, Director, Ohio Department of Health, et al.;
Valeria Tanco, et al., Petitioners
v.
Bill Haslam, Governor of Tennessee, et al.;
April DeBoer, et al., Petitioners
v.
Rick Snyder, Governor of Michigan, et al.; and
Gregory Bourke, et al., Petitioners
v.
Steve Beshear, Governor of Kentucky.

Nos. 14–556, 14–562, 14–571, 14–574.

Argued April 28, 2015.

Decided June 26, 2015.

Synopsis

Background: Same-sex couple brought action alleging that voter-approved Michigan Marriage Amendment (MMA), which prohibited same-sex marriage, violated Equal Protection and Due Process Clauses. The United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 973 F.Supp.2d 757, entered judgment in couple's favor, and state appealed. Same-sex couples married in jurisdictions that provided for such marriages brought actions alleging that Ohio's ban on same-sex marriages violated Fourteenth Amendment. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 14 F.Supp.3d 1036, entered judgment in couples' favor, and state appealed. Same-sex spouses, who entered legal same-sex marriages in Maryland and Delaware, and Ohio funeral director sued Ohio officials responsible for death certificates that denied recognition of spouses' same-sex legal marriages after death of their partners, seeking declaratory judgment and permanent injunction. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 962 F.Supp.2d 968, entered judgment in plaintiffs' favor, and state appealed. Same-sex couples validly married outside Kentucky brought § 1983 actions challenging constitutionality of Kentucky's marriage-licensing law and denial of recognition for valid same-sex marriages. The United States District Court for the Western District of Kentucky, John G. Heyburn II, J., 996 F.Supp.2d 542, entered judgment in couples' favor, and state appealed. Same-sex couples who were legally married in other states before moving to Tennessee brought action challenging constitutionality of Tennessee's laws that voided and rendered unenforceable in Tennessee any marriage prohibited in state. The United States District Court for the Middle District of Tennessee, Aleta Arthur Trauger, J., 7 F.Supp.3d 759, granted couples' motion for preliminary injunction, and state appealed. The United States Court of Appeals for the Sixth Circuit, Sutton, Circuit Judge, 772 F.3d 388, reversed. Cases were consolidated and certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

[1] The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty, overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, *Adams v. Howerton*, 673 F.2d 1036, and other cases, and

[2] States must recognize lawful same-sex marriages performed in other States.

Reversed.

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice Scalia filed a dissenting opinion, in which Justice Thomas joined.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined.

West Headnotes (22)

[1] **Constitutional Law**
Bill of Rights in general

Constitutional Law
Liberties and liberty interests

The fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment include most of the rights enumerated in the Bill of Rights, and in addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[2] **Constitutional Law**
Fundamental rights

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution, but that responsibility has not been reduced to any formula; rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.

1 Cases that cite this headnote

[3] **Constitutional Law**
Fundamental rights

History and tradition guide and discipline courts when identifying interests of the person so fundamental that the State must accord them its respect, but do not set its outer boundaries; that method respects our history and learns from it without allowing the past alone to rule the present.

2 Cases that cite this headnote

[4] **Constitutional Law**
Bill of Rights or Declaration of Rights

Constitutional Law
Fourteenth Amendment in general

Constitutional Law
Personal liberty

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning; when new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[5] **Marriage**
Nature of the obligation

Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men.

1 Cases that cite this headnote

[6] **Constitutional Law**
Marital Relationship

The right to marry is fundamental under the Due Process Clause. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[7] **Marriage**
Nature of the obligation

The right to personal choice regarding marriage is inherent in the concept of individual autonomy.

1 Cases that cite this headnote

[8] **Marriage**
Nature of the obligation

Marriage
Same-Sex and Other Non-Traditional Unions

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy,

and spirituality, and this is true for all persons, whatever their sexual orientation.

2 Cases that cite this headnote

[9] **Marriage**
Nature of the obligation

The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.

2 Cases that cite this headnote

[10] **Constitutional Law**
Intimate association; dating relationships in general

Same-sex couples have the same right as opposite-sex couples to enjoy intimate association.

42 Cases that cite this headnote

[11] **Marriage**
Nature of the obligation

Marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.

2 Cases that cite this headnote

[12] **Constitutional Law**
Fundamental rights

If fundamental rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.

2 Cases that cite this headnote

[13] **Constitutional Law**
Relationship to equal protection guarantee

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles; rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other, and in any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[14] **Constitutional Law**
Marriage and divorce in general

The Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[15] **Constitutional Law**
Marriage and civil unions

Constitutional Law
Same-sex marriage

Marriage
Same-Sex and Other Non-Traditional Unions

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty; overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, *Adams v. Howerton*, 673 F.2d 1036, and other cases. U.S.C.A. Const.Amend. 14.

19 Cases that cite this headnote

[16] **Constitutional Law**
Fundamental rights

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.

3 Cases that cite this headnote

[17] **Constitutional Law**
Constitutional Rights in General
Constitutional Law
Right of access to the courts and a remedy for injuries in general

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power; thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking, and this holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

3 Cases that cite this headnote

[18] **Constitutional Law**
Persons Entitled to Raise Constitutional Questions; Standing
Constitutional Law
Requirement that complainant be injured

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right; the Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter, and an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.

Cases that cite this headnote

[19] **Constitutional Law**
Purposes of constitutions

The idea of the Constitution was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.

Cases that cite this headnote

[20] **Constitutional Law**
Fundamental rights

Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Cases that cite this headnote

[21] **Constitutional Law**
Marriage; bigamy

Religions, and those who adhere to religious doctrines, may advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned; the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[22] **Marriage**
Effect of foreign union

There is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

24 Cases that cite this headnote

West Codenotes

Held Unconstitutional
Ky.Const. § 233A; KRS 402.005, ***2588** 402.020(1)(d), 402.040(2), 402.045; M.C.L.A. Const. Art. 1, § 25; M.C.L.A. §§ 551.1, 551.271, 551.272; Ohio Const. Art. 15, § 11; Ohio R.C. § 3101.01; T.C.A. Const. Art. 11, § 18; T.C.A. § 36-3-113.

Recognized as Unconstitutional
1 U.S.C.A. § 7

Syllabus *

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 2593 – 2608.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 2593 – 2598.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. Pp. 2593 – 2595.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." ***2589** *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 2595 – 2598.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 2597 – 2607.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349; *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g., Lawrence, supra*, at 574, 123 S.Ct. 2472. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the

right to marry has been long protected. See, *e.g., Eisenstadt, supra,* at 453–454, 92 S.Ct. 1029. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 2597 – 2599.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception, 381 U.S., at 485, 85 S.Ct. 1678, and was acknowledged in *Turner, supra,* at 95, 107 S.Ct. 2254. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra,* at 567, 123 S.Ct. 2472.

***2590** A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g., Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 2598 – 2602.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 460–461, 101 S.Ct. 1195, 67 L.Ed.2d 428, and confirmed the relation between liberty and equality, see, *e.g., M.L.B. v. S.L.J.,* 519 U.S. 102, 120–121, 117 S.Ct. 555, 136 L.Ed.2d 473.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence,* 539 U.S., at 575, 123 S.Ct. 2472. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are

denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial ***2591** works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 2602 – 2605.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 2604 – 2605.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 2605 – 2607.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 2607 – 2608.

772 F.3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Attorneys and Law Firms

Mary L. Bonauto, for the petitioners.

Donald B. Verrilli, Jr., Solicitor General, for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

John J. Bursch, Grand Rapids, MI, for the respondents.

Douglas Hallward–Driemeier, Washington, DC, for the petitioners.

Susan L. Sommer, M. Currey Cook, Omar Gonzalez–Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY, for Henry Petitioners.

***2592** James D. Esseks, Steven R. Shapiro, Joshua A. Block, Chase B. Strangio, Ria Tabacco Mar, Louise Melling, American Civil Liberties, Union Foundation, New York, NY, for **Obergefell** Petitioners.

Alphonse A. Gerhardstein, Counsel of Record, Jennifer L. Branch, Jacklyn Gonzales Martin, Adam Gingold Gerhardstein, Gerhardstein & Branch Co. LPA, Cincinnati, OH, Jon W. Davidson, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, Paul D. Castillo, Lambda Legal Defense and Education Fund, Inc., Dallas, TX, Camilla B. Taylor, Lambda Legal Defense and Education Fund, Inc., Chicago, IL, Ellen Essig Katz, Greenberger & Norton, LLP, Cincinnati, OH, for Henry Petitioners.

Freda J. Levenson, Drew S. Dennis, ACLU of Ohio, Inc., Cleveland, OH, for **Obergefell** Petitioners.

Lisa T. Meeks, Newman & Meeks Co., LPA, Cincinnati, OH, for All Petitioners.

Michael Dewine, Attorney General of Ohio, Eric E. Murphy, Counsel of Record, State Solicitor, Stephen P. Carney, Peter T. Reed, Deputy Solicitors, Columbus, OH, for Respondent.

Abby R. Rubenfeld, Rubenfeld Law Office, PC, Nashville, TN, William L. Harbison, Phillip F. Cramer, J. Scott Hickman, John L. Farringer, Sherrard & Roe, PLC, Nashville, TN, Maureen T. Holland, Holland & Assoc., PC, Memphis, TN, Regina M. Lambert, Knoxville, TN, Douglas Hallward–Driemeier, Counsel of Record, Ropes & Gray LLP, Washington, DC, Christopher Thomas Brown, Justin G. Florence, Ropes & Gray LLP, Boston, MA, Shannon P. Minter, David C. Codell, Christopher F. Stoll, Amy Whelan, Asaf Orr, National Center for Lesbian Rights, San Francisco, CA, Paul S. Kellogg, Ropes & Gray LLP, New York, NY, Samira A. Omerovic, Emerson A. Siegle, John T. Dey, Ropes & Gray LLP, Washington, DC, Joshua E. Goldstein, Ropes & Gray LLP, Boston, MA, for Valeria Tanco, et al., Petitioners.

Herbert H. Slatery III, Attorney General, State of Tennessee, Joseph F. Whalen, Associate Solicitor General, Counsel of Record, Martha A. Campbell, Kevin G. Steiling, Deputy Attorneys General, Alexander S. Rieger, Assistant Attorney General, Office of the Attorney General, Nashville, TN, for William Haslam, et al., Respondents.

Kenneth M. Mogill, Mogill, Posner & Cohen, Lake Orion, MI, Dana M. Nessel, Nessel & Kessel Law, Detroit, MI, Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, Boston, MA, Carole M. Stanyar, Counsel of Record, Ann Arbor, MI, Robert A. Sedler, Wayne State University Law School, Detroit, MI, for April Deboer, et al., Petitioners.

Bill Schuette, Michigan Attorney General, Aaron D. Lindstrom, Solicitor General, B. Eric Restuccia, Deputy Solicitor General, Ann Sherman, Assistant Solicitor General, John J. Bursch, Special Assistant Attorney General, Counsel of Record, Lansing, MI, for Richard Snyder, Governor, State of Michigan, in his official capacity, et al., Respondents.

James D. Esseks, Steven R. Shapiro, Joshua A. Block, Chase B. Strangio, Leslie Cooper, Louise Melling, American Civil Liberties, New York, NY, Jeffrey L. Fisher, Brian Wolfman, Stanford Law School, Supreme Court Litigation Clinic, Stanford, CA, William E. Sharp, American Civil Liberties Union of Kentucky, Louisville, KY, Daniel J. Canon, Counsel of Record, Laura E. Landenwich, L. Joe Dunman, Clay Daniel Walton Adams, PLC, Louisville, KY, Shannon Fauver, Dawn Elliott, Fauver Law Office, PLLC, Louisville, KY, for Gregory Bourke, et al., and Timothy Love, et al., Petitioners.

***2593** Leigh Gross Latherow, Counsel of Record, William H. Jones, Jr., Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, KY, for Steve Beshear, in His Official Capacity as Governor of Kentucky, Respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.*, Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder*, 772 F.3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2015). The first, presented by the cases

from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history *2594 reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James **Obergefell**, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, **Obergefell** and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit **Obergefell** to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation **Obergefell** deems "hurtful for *2595 the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and

abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. ***2596** Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of

human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea [n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to ***2597** strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at ——, 133 S.Ct., at 2689.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–868 (C.A.8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State–by–State Supp. (2015).

III

[1] Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition these liberties extend to

certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.*, ***2598** *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[2] **[3]** The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

[4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

[5] **[6]** Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold, supra*, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*, ***2599** *Lawrence*, 539 U.S., at 574, 123 S.Ct. 2472; *Turner, supra*, at 95, 107 S.Ct. 2254; *Zablocki, supra*, at 384, 98 S.Ct. 673; *Loving, supra*, at 12, 87 S.Ct. 1817; *Griswold, supra*, at 486, 85 S.Ct. 1678. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g.*, *Eisenstadt, supra*, at 453–454, 92 S.Ct. 1029; *Poe, supra*, at 542–553, 81 S.Ct. 1752 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

[7] A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817; see also *Zablocki, supra*, at 384, 98 S.Ct. 673 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among

the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki, supra,* at 386, 98 S.Ct. 673.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge,* 440 Mass., at 322, 798 N.E.2d, at 955.

[8] The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2693–2695. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra,* at 12, 87 S.Ct. 1817 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

[9] A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S.Ct. 1678. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose ***2600** as any involved in our prior decisions." *Id.,* at 486, 85 S.Ct. 1678.

And in *Turner,* the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U.S., at 95–96, 107 S.Ct. 2254. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor, supra,* at ——, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[10] As this Court held in *Lawrence,* same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[11] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer,* 262 U.S., at 399, 43 S.Ct. 625. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki,* 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer, supra,* at 399, 43 S.Ct. 625). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows 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, supra,* at ——, 133 S.Ct., at 2694–2695. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted

and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue ***2601** here thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America ... [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace.... [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been " 'a great public institution, giving character to our whole civil polity.' " *Id.,* at 213, 8 S.Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor,* 570 U.S., at —— – ——, 133 S.Ct., at 2690–2691. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes ***2602** marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which called for a " 'careful description' " of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg,* 521 U.S., at 752–773, 117 S.Ct. 2258 (Souter, J., concurring in judgment); *id.,* at 789–792, 117 S.Ct. 2258 (BREYER, J., concurring in judgments).

[12] That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving,* 388 U.S., at 12, 87 S.Ct. 1817; *Lawrence,* 539 U.S., at 566–567, 123 S.Ct. 2472.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[13] The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection ***2603** Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M.L.B.,* 519 U.S., at 120–121, 117 S.Ct. 555; *id.,* at 128–129, 117 S.Ct. 555 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S., at 12, 87 S.Ct. 1817. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki.* There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383, 98 S.Ct. 673. It was the essential nature of the marriage right, discussed at

length in *Zablocki,* see *id.,* at 383–387, 98 S.Ct. 673, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

[14] Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra,* at 2595, invidious sex-based classifications in marriage remained common through the mid–20th century. See App. to Brief for Appellant in *Reed v. Reed,* O.T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her ***2604** separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Califano v. Westcott,* 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (plurality opinion); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Like *Loving* and *Zablocki,* these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L.J.,* the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119–124, 117 S.Ct. 555. In *Eisenstadt v. Baird,* the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446–454, 92 S.Ct. 1029. And in *Skinner v. Oklahoma ex rel. Williamson,* the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538–543, 62 S.Ct. 1110.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S.Ct. 2472. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid. Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.,* at 578, 123 S.Ct. 2472.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki, supra,* at 383–388, 98 S.Ct. 673; *Skinner,* 316 U.S., at 541, 62 S.Ct. 1110.

[15] These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that ***2605** same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F.3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

[16] **[17]** Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U.S. ——, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at ——– ———, 134 S.Ct., at 1636–1637. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.*, at ——, 134 S.Ct., at 1636. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.*, at ——, 134 S.Ct., at 1637. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

[18] **[19]** **[20]** The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of ***2606** the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U.S., at 186, 190–195, 106 S.Ct. 2841. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199, 106 S.Ct. 2841 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214, 106 S.Ct. 2841 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U.S., at 578, 123 S.Ct. 2472. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers,* would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James **Obergefell** now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection ***2607** between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert,* 755 F.3d 1193, 1223 (C.A.10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

[21] Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of **Obergefell** and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams v. North Carolina,* 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

[22] As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue

marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It ***2608** follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Appendix A

APPENDICES

A

State and Federal Judicial Decisions Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. Howerton, 673 F.2d 1036 (C.A.9 1982)

Smelt v. County of Orange, 447 F.3d 673 (C.A.9 2006)

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (C.A.8 2006)

Windsor v. United States, 699 F.3d 169 (C.A.2 2012)

Massachusetts v. Department of Health and Human Services, 682 F.3d 1 (C.A.1 2012)

Perry v. Brown, 671 F.3d 1052 (C.A.9 2012)

Latta v. Otter, 771 F.3d 456 (C.A.9 2014)

Baskin v. Bogan, 766 F.3d 648 (C.A.7 2014)

Bishop v. Smith, 760 F.3d 1070 (C.A.10 2014)

Bostic v. Schaefer, 760 F.3d 352 (C.A.4 2014)

Kitchen v. Herbert, 755 F.3d 1193 (C.A.10 2014)

DeBoer v. Snyder, 772 F.3d 388 (C.A.6 2014)

Latta v. Otter, 779 F.3d 902 (C.A.9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. Howerton, 486 F.Supp. 1119 (C.D.Cal.1980)

Citizens for Equal Protection, Inc. v. Bruning, 290 F.Supp.2d 1004 (Neb.2003)

Citizens for Equal Protection v. Bruning, 368 F.Supp.2d 980 (Neb.2005)

Wilson v. Ake, 354 F.Supp.2d 1298 (M.D.Fla.2005)

Smelt v. County of Orange, 374 F.Supp.2d 861 (C.D.Cal.2005)

Bishop v. Oklahoma ex rel. Edmondson, 447 F.Supp.2d 1239 (N.D.Okla.2006)

Massachusetts v. Department of Health and Human Services, 698 F.Supp.2d 234 (Mass.2010)

Gill v. Office of Personnel Management, 699 F.Supp.2d 374 (Mass.2010)

***2609** *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal.2010)

Dragovich v. Department of Treasury, 764 F.Supp.2d 1178 (N.D.Cal.2011)

Golinski v. Office of Personnel Management, 824 F.Supp.2d 968 (N.D.Cal.2012)

Dragovich v. Department of Treasury, 872 F.Supp.2d 944 (N.D.Cal.2012)

Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y.2012)

Pedersen v. Office of Personnel Management, 881 F.Supp.2d 294 (Conn.2012)

Jackson v. Abercrombie, 884 F.Supp.2d 1065 (Haw.2012)

Sevcik v. Sandoval, 911 F.Supp.2d 996 (Nev.2012)

Merritt v. Attorney General, 2013 WL 6044329 (M.D.La., Nov. 14, 2013)

Gray v. Orr, 4 F.Supp.3d 984 (N.D.Ill.2013)

Lee v. Orr, 2013 WL 6490577 (N.D.Ill., Dec. 10, 2013)

Kitchen v. Herbert, 961 F.Supp.2d 1181 (Utah 2013)

***Obergefell** v. Wymyslo*, 962 F.Supp.2d 968 (S.D.Ohio 2013)

Bishop v. United States ex rel. Holder, 962 F.Supp.2d 1252 (N.D.Okla.2014)

Bourke v. Beshear, 996 F.Supp.2d 542 (W.D.Ky.2014)

Lee v. Orr, 2014 WL 683680 (N.D.Ill., Feb. 21, 2014)

Bostic v. Rainey, 970 F.Supp.2d 456 (E.D.Va.2014)

De Leon v. Perry, 975 F.Supp.2d 632 (W.D.Tex.2014)

Tanco v. Haslam, 7 F.Supp.3d 759 (M.D.Tenn.2014)

DeBoer v. Snyder, 973 F.Supp.2d 757 (E.D.Mich.2014)

Henry v. Himes, 14 F.Supp.3d 1036 (S.D.Ohio 2014)

Latta v. Otter, 19 F.Supp.3d 1054 (Idaho 2014)

Geiger v. Kitzhaber, 994 F.Supp.2d 1128 (Ore.2014)

Evans v. Utah, 21 F.Supp.3d 1192 (Utah 2014)

Whitewood v. Wolf, 992 F.Supp.2d 410 (M.D.Pa.2014)

Wolf v. Walker, 986 F.Supp.2d 982 (W.D.Wis.2014)

Baskin v. Bogan, 12 F.Supp.3d 1144 (S.D.Ind.2014)

Love v. Beshear, 989 F.Supp.2d 536 (W.D.Ky.2014)

Burns v. Hickenlooper, 2014 WL 3634834 (Colo., July 23, 2014)

Bowling v. Pence, 39 F.Supp.3d 1025 (S.D.Ind.2014)

Brenner v. Scott, 999 F.Supp.2d 1278 (N.D.Fla.2014)

Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D.La.2014)

General Synod of the United Church of Christ v. Resinger, 12 F.Supp.3d 790 (W.D.N.C.2014)

Hamby v. Parnell, 56 F.Supp.3d 1056 (Alaska 2014)

Fisher–Borne v. Smith, 14 F.Supp.3d 695 (M.D.N.C.2014)

Majors v. Horne, 14 F.Supp.3d 1313 (Ariz.2014)

Connolly v. Jeanes, —— F.Supp.3d ——, 2014 WL 5320642 (Ariz., Oct. 17, 2014)

Guzzo v. Mead, 2014 WL 5317797 (Wyo., Oct. 17, 2014)

Conde–Vidal v. Garcia–Padilla, 54 F.Supp.3d 157 (P.R.2014)

Marie v. Moser, 65 F.Supp.3d 1175, 2014 WL 5598128 (Kan., Nov. 4, 2014)

***2610** *Lawson v. Kelly*, 58 F.Supp.3d 923 (W.D.Mo.2014)

McGee v. Cole, 66 F.Supp.3d 747, 2014 WL 5802665 (S.D.W.Va., Nov. 7, 2014)

Condon v. Haley, 21 F.Supp.3d 572 (S.C.2014)

Bradacs v. Haley, 58 F.Supp.3d 514 (S.C.2014)

Rolando v. Fox, 23 F.Supp.3d 1227 (Mont.2014)

Jernigan v. Crane, 64 F.Supp.3d 1260, 2014 WL 6685391 (E.D.Ark., Nov. 25, 2014)

Campaign for Southern Equality v. Bryant, 64 F.Supp.3d 906, 2014 WL 6680570 (S.D.Miss., Nov. 25, 2014)

Inniss v. Aderhold, — F.Supp.3d —, 2015 WL 300593 (N.D.Ga., Jan. 8, 2015)

Rosenbrahn v. Daugaard, 61 F.Supp.3d 862 (S.D.2015)

Caspar v. Snyder, — F.Supp.3d —, 2015 WL 224741 (E.D.Mich., Jan. 15, 2015)

Searcey v. Strange, 2015 U.S. Dist. LEXIS 7776 (S.D.Ala., Jan. 23, 2015)

Strawser v. Strange, 44 F.Supp.3d 1206 (S.D.Ala.2015)

Waters v. Ricketts, 48 F.Supp.3d 1271 (Neb.2015)

State Highest Court Decisions

Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)

Jones v. Hallahan, 501 S.W.2d 588 (Ky.1973)

Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993)

Dean v. District of Columbia, 653 A.2d 307 (D.C.1995)

Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999)

Brause v. State, 21 P.3d 357 (Alaska 2001) (ripeness)

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004)

Li v. State, 338 Or. 376, 110 P.3d 91 (2005)

Cote–Whitacre v. Department of Public Health, 446 Mass. 350, 844 N.E.2d 623 (2006)

Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006)

Andersen v. King County, 158 Wash.2d 1, 138 P.3d 963 (2006)

Hernandez v. Robles, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1 (2006)

Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007)

In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008)

Strauss v. Horton, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Griego v. Oliver, 2014–NMSC–003, — N.M. —, 316 P.3d 865 (2013)

Garden State Equality v. Dow, 216 N.J. 314, 79 A.3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, — So.3d —, 2015 WL 892752 (Ala., Mar. 3, 2015)

***2611 Appendix B**

B

State Legislation and Judicial Decisions Legalizing Same–Sex Marriage

Legislation

Del.Code Ann., Tit. 13, § 129 (Cum. Supp. 2014)

D.C. Act No. 18–248, 57 D.C. Reg. 27 (2010)

Haw.Rev.Stat. § 572 –1 (2006) and (2013 Cum. Supp.)

Ill. Pub. Act No. 98–597

Me.Rev.Stat. Ann., Tit. 19, § 650–A (Cum. Supp. 2014)

2012 Md. Laws p. 9

2013 Minn Laws p. 404

2009 N.H. Laws p. 60

2011 N.Y. Laws p. 749

2013 R.I. Laws p. 7

2009 Vt. Acts & Resolves p. 33

2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. Department of Public Health, 440 Mass. 309. 798 N.E.2d 941 (2003)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135. 957 A.2d 407 (2008)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Griego v. Oliver, 2014–NMSC–003, — N.M. —, 316 P.3d 865 (2013)

Garden State Equality v. Dow, 216 N.J. 314, 79 A.3d 1036 (2013)

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ***2612** ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante,* at 2598, 2605. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York,* 198 U.S. 45, 76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.,* at 69, 25 S.Ct. 539 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante,* at 2603. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante,* at 2594, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece v. Galloway,* 572 U.S. ——, ——, 134 S.Ct. 1811, 1819, 188 L.Ed.2d 835 (2014).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante,* at 2594. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante,* at 2594; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). ***2613** As the Court explained two Terms ago, "until recent years, ... marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2689, 186 L.Ed.2d 808 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J.Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." *Ante,* at 2595. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§ 78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of

marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." ***2614** *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2691 (quoting *In re Burrus,* 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890)). There is no dispute that every State at the founding —and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder,* 772 F.3d 388, 396–399 (C.A.6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones v. Hallahan,* 501 S.W.2d 588, 589 (Ky.App.1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, ... promoting domestic felicity, and ... securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy v. Ramsey,* 114 U.S. 15, 45, 5 S.Ct. 747, 29 L.Ed. 47 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); see *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki v. Redhail,* 434 U.S. 374, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving,* 388 U.S., at 6–7, 87 S.Ct. 1817.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante,* at 2595. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right ***2615** that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante,* at 2595.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving,* a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving,* and this Court summarily dismissed an appeal. *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972).

In the decades after *Baker,* greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the

Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F.3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante,* at 2599. In reality, however, ***2616** the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante,* at 2594, 2600. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation

marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States ... could hardly be dignified with the name of due process of law." *Id.,* at 450. In a dissent that has outlasted the majority opinion, Justice ***2617** Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.,* at 621.

Dred Scott 's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York,* this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U.S., at 60, 61, 25 S.Ct. 539. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.,* at 58, 25 S.Ct. 539.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.,* at 72, 25 S.Ct. 539 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.,* at 75, 25 S.Ct. 539 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory.... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." *Id.,* at 75–76, 25 S.Ct. 539.

In the decades after *Lochner,* the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins v. Children's Hospital of D.C.,* 261 U.S. 525, 570, 43 S.Ct. 394, 67 L.Ed. 785 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a ... legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); see *Day–Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405. 96 L.Ed. 469 (1952) ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony ***2618** with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner* 's error of converting personal preferences into constitutional mandates,

our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg,* 521 U.S., at 720–721, 117 S.Ct. 2258 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg,* many other cases both before and after have adopted the same approach. See, *e.g., District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009); *Flores,* 507 U.S., at 303, 113 S.Ct. 1439; *United States v. Salerno,* 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); see also *id.,* at 544, 97 S.Ct. 1932 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel v. Granville,* 530 U.S. 57, 96–101, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (KENNEDY, J., dissenting) (consulting " '[o]ur Nation's history, legal traditions, and practices' " and concluding that "[w]e owe it to the Nation's domestic relations legal structure ... to proceed with caution" (quoting *Glucksberg,* 521 U.S., at 721, 117 S.Ct. 2258)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante,* at 2602. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins,* 503 U.S., at 125, 112 S.Ct. 1061, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore,* 431 U.S., at 504, n. 12, 97 S.Ct. 1932 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante,* at 2597 – 2598, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold v. Connecticut,* 381 U.S. 479, 501, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades ***2619** of precedent and returns the Court to the unprincipled approach of *Lochner.*

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante,* at 2593 – 2594, 2594, 2595, 2608. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley,* 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Zablocki,* 434 U.S., at 383, 98 S.Ct. 673; see *Loving,* 388 U.S., at 12, 87 S.Ct. 1817. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving,* the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki,* restrictions based on child support debts did not suffice. In *Turner,* restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a

woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison.*" Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race.*" See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post,* at 2636 – 2637, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante,* at 2598.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2715 (ALITO, J., dissenting) ("What Windsor and the United States seek ... is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante,* at 2598. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold,* 381 U.S., at 486, 85 S.Ct. 1678. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.,* at 485–486, 85 S.Ct. 1678. The Court stressed the invasive nature of the ban, ***2620** which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.,* at 485, 85 S.Ct. 1678. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt v. Baird,* 405 U.S. 438, 453–454, n. 10, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (internal quotation marks omitted); see *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior ... in the most private of places, the home." *Id.,* at 562, 567, 123 S.Ct. 2472.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante,* at 2608. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.,* at 542, 81 S.Ct. 1752. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up ... form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.,* at 546, 81 S.Ct. 1752.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *San Antonio*

Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *post*, at 2635 – 2637 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights ***2621** taken by this Court in *Glucksberg*. *Ante*, at 2602 (quoting 521 U.S., at 721, 117 S.Ct. 2258). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 2593. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 2599. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U.S., at 58, 25 S.Ct. 539 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 2597 – 2598, 2598. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 2602. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U.S., at 61, 25 S.Ct. 539 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals ... to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 2606. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, 947 F.Supp.2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," ***2622** *ante*, at 2599, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 2600, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 2604, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting

First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante,* at 2607. This argument again echoes *Lochner,* which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U.S., at 57, 25 S.Ct. 539.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner,* the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade* : Judge Friendly's Draft Abortion Opinion, 29 Harv. J.L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down ***2623** democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante,* at 2598. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante,* at 2603. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante,* at 2603.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante,* at 2604 – 2605. Yet the majority

fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U.S., at 585, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to ***2624** license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom ... apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 2596 – 2597.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante*, at 2597, 2597 – 2598, 2605. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 2602. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 2596. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN*, 572 U.S. ——, —— – ——, 134 S.Ct. 1623, 1637, 188 L.Ed.2d 613 (2014).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing ***2625** course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples,

and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 2627 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving ..., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade,* 63 N.C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante,* at 2607. The First Amendment guarantees, however, the freedom to "*exercise* " religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student ***2626** housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante,* at 2602 – 2603. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante,* at 2602. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage —have acted to "lock ... out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante,* at 2601 – 2602, 2602 – 2603, 2604, 2606. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post,* at 2642 – 2643 (ALITO, J., dissenting). Moreover,

they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante,* at 2602.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements ***2627** it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. [1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work. [2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," [3] denying "Full Faith and Credit" to the "public Acts" of other States, [4] prohibiting the free exercise of religion, [5] abridging the freedom of speech, [6] infringing the right to keep and bear arms, [7] authorizing unreasonable searches and seizures, [8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" [9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author ***2628** of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." [10]

> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." [11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision —such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. [12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect. [13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions...." [14] One would think that sentence would continue: "... and therefore they provided for a means by which the People could amend the Constitution," or perhaps "... and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." [15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view,* prohibit States from defining marriage as an institution consisting of one man and one woman. [17]

***2629** This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers [18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans [19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges,* answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not.* And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when ***2630** that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

***2631** Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that

human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald v. Chicago*, 561 U.S. 742, 811–812, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U.S. Const., Amdt. 14, § 1. Worse, it invites judges to do exactly what the majority has done here—" 'roa[m] at large in the constitutional field' guided only by their personal views" as to the " 'fundamental rights' " protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953, 965, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 502, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of ***2632** this Court, *ante*, at 2606, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all —whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson v. New Orleans*, 96 U.S. 97, 101–102. 24 L.Ed. 616 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g., ibid.,* William Blackstone referred to this provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.,* at 125. He defined "the right of personal liberty" as "the power of locomotion, of changing situation, ***2633** or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.,* at 125, 130. [2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." [3] State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.,* at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.,* at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado v. California,* 110 U.S. 516, 534–535, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Indeed, this Court has previously commented, "The conclusion is ... irresistible, that when the same phrase was employed in ***2634** the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois,* 94 U.S. 113, 24 L.Ed. 77 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.,* at 123–124, and implicitly rejected the dissent's argument that " 'liberty' " encompassed "something more ... than mere freedom from physical restraint or the bounds of a prison," *id.,* at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, § 4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.,* § 97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.,* § 22, at 13. [4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example,

declared that "Liberty in the *State of* ***2635** *Nature* " was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from,* not freedom *to,* freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint.*" R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government § 13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or ... restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra,* at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges ***2636** and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages —on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke § 77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding

"that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.,* at 2–3, 87 S.Ct. 1817.[5] They ***2637** were each sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.,* at 3, 87 S.Ct. 1817.[6] In a similar vein, *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.,* at 387, 98 S.Ct. 673; see *id.,* at 377–378, 98 S.Ct. 673. And *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.,* at 82, 107 S.Ct. 2254. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find ... liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante,* at 2593. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define ... liberty," *ante,* at 2602,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,' " *Reid v. Covert,* 354 U.S. 1, 9, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke § 99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.,* § 22, at 13; see also Hey §§ 52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents ***2638** of a State would agree. See Locke § 98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U.S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*; Conn. Gen.Stat. § 52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh–Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante,* at 2607. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons ... as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice. [7]

***2639** Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 2593 – 2594, 2599, 2606, 2608. [8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have

no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to ***2640** mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. [1] The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are " 'deeply rooted in this Nation's history and tradition.' " *Washington* v. *Glucksberg*, 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U.S. ——, ——, 133 S.Ct. 2675, 2714–2715, 186 L.Ed.2d 808 (2013) (ALITO, J., dissenting). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.
>
> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id.*, at ——, 133 S.Ct., at 2715 (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in ***2641** the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides

emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women. [2] This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to ***2642** recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor* :

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.
>
> "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U.S., at ——, 133 S.Ct., at 2715–2716 (dissenting opinion) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional

understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. *E.g., ante,* at 2598 – 2599. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante,* at 2606 – 2607. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat ***2643** those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

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

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

All Citations

135 S.Ct. 2584, 99 Empl. Prac. Dec. P 45,341, 192 L.Ed.2d 609, 115 A.F.T.R.2d 2015-2309, 83 USLW 4592, 2015-1 USTC P 50,357, 15 Cal. Daily Op. Serv. 6817, 2015 Daily Journal D.A.R. 7322, 25 Fla. L. Weekly Fed. S 472

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Brief for Respondents in No. 14–571, p. 14.

2 Accord, *Schuette v. BAMN*, 572 U.S. ——, ——– ———, 134 S.Ct. 1623, 1636–1637, 188 L.Ed.2d 613 (2014) (plurality opinion).

3 U.S. Const., Art. I, § 10.

4 Art. IV, § 1.

5 Amdt. 1.

6 *Ibid.*

7 Amdt. 2.

8 Amdt. 4.

9 Amdt. 10.

10 *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2691, 186 L.Ed.2d 808 (2013) (internal quotation marks and citation omitted).

11 *Id.,* at ——, 133 S.Ct., at 2691.

12 See *Town of Greece v. Galloway,* 572 U.S. ——, —— – ——, 134 S.Ct. 1811, 1818–1819, 188 L.Ed.2d 835 (2014).

13 *Ante,* at 2598.

14 *Ante,* at 2598.

15 *Ibid.*

16 *Ante,* at 2598.

17 *Ante,* at 2598 – 2602.

18 The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

19 See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

20 *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (2003).

21 *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2714–2715 (ALITO, J., dissenting).

22 If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

23 *Ante,* at 2599.

24 *Ante,* at 2602.

25 *Ibid.*

* * *

26 The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

1 The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante,* at 2602. Despite the "synergy" it finds "between th[ese] two protections," *ante,* at 2603, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

2 The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* ... principally regards and taketh Care of," as "*Life, Liberty* and *Estate,*" and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g., id.,* at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g., id.,* at 185, 200.

3 Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S.C. Const., Art. XLI (1778), in 6 *id.,* at 3257; N.C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.,* at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.,* at 1891; see also N.H. Const., pt. I, Art. XV (1784), in 4 *id.,* at 2455.

4 Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry,* —— U.S. ——, 135 S.Ct. 2076, —— L.Ed.2d ——, 2015 WL 2473281 (2015) (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks

fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have ... to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.*, at 147–148.

5 The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between " 'freeborne English women' " and " 'Negro Sla[v]es' " was passed as part of the very act that authorized lifelong slavery in the colony. *Id.*, at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

6 The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia*, O.T. 1966, No. 395, pp. 12–16.

7 Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va.Code Ann. § 20–60 (1960).

8 The majority also suggests that marriage confers "nobility" on individuals. *Ante*, at 2594. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

1 I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

2 See, *e.g.*, Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

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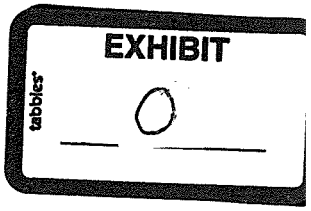

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CIVIL ACTION NO. 14-0424-CG-C**
	)	
LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiffs' motion for clarification. (Doc. 144) in which they seek a clarification as to whether the preliminary injunction entered on May 21, 2015, (Doc. 123) is currently in effect and binding upon all probate court judges. In that preliminary injunction order the Court stated "that because the issues raised by this case are subject to an imminent decision by the United States Supreme Court in Obergefell v. Hodges and related cases, the above preliminary injunction is **STAYED** until the Supreme Court issues its ruling." (Doc. 123, p. 14 (footnote omitted)). The United States Supreme Court issued its ruling on June 26, 2015. Obergefell v. Hodges, 576 U.S. ____ (2015). Accordingly, by the language set forth in the order, the preliminary injunction is now in effect and binding on all members of the Defendant Class.

Plaintiffs' motion for clarification is therefore **GRANTED** as set forth above.

DONE and **ORDERED** this 1st day of July, 2015.

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12508-CC

JAMES N. STRAWSER,
JOHN E. HUMPHREY,
ROBERT POVILAT,
ANNA LISA CARMICHAEL,
KRISTY SIMMONS, et al.,

Plaintiffs-Appellees,

versus

STATE OF ALABAMA, et al.,

Defendants,

TIM RUSSELL,
in his official capacity as Probate Judge
of Baldwin County, Alabama,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

Before: TJOFLAT, HULL, and WILSON, Circuit Judges

BY THE COURT:

Alabama Probate Judge Tim Russell appeals from the following three district court orders: (1) the court's April 23, 2015 order denying Judge Russell's motion to dismiss; (2) the court's May 21, 2015 order denying Judge Russell's motion to alter or amend the order denying his motion to dismiss; and (3) the court's May 21, 2015 order granting a preliminary injunction

that requires Alabama probate judges to issue marriage licenses to same-sex couples. Judge Russell argues that he was entitled to quasi-judicial immunity due to an order of the Alabama Supreme Court enjoining all Alabama probate judges from issuing marriage licenses to same-sex couples. He also argues that the district court's preliminary injunction was improper because of the conflicting order from the Alabama Supreme Court. He also contends that he was never served with the motion for a preliminary injunction, and was not allowed an opportunity to respond to that motion.

Since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause, and that bans on same-sex marriage are unconstitutional. Therefore, the arguments supporting Judge Russell's motion to dismiss are now moot. See Soliman v. United States, 296 F.3d 1237, 1242 (11th Cir. 2002). Moreover, the other arguments Judge Russell seeks to raise with respect to his motion to dismiss are not properly before this Court. See Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980)[1] (holding that the issue of attorneys' fees does not "salvage[ ] an otherwise moot case"); S & Davis Int'l, Inc. v. Yemen, 218 F.3d 1292, 1297 (11th Cir. 2000) (holding that this Court can consider other arguments presented in a motion to dismiss only where they are "'inextricably intertwined' with an issue that is properly before this Court on interlocutory appeal"). Accordingly, to the extent that Judge Russell seeks review of the district court's April 23, 2015 order denying his motion to

---

[1] See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

dismiss and the May 21, 2015 order denying his motion to alter or amend the order denying his motion to dismiss, this appeal is DISMISSED AS MOOT. See Soliman, 296 F.3d at 1242.

Additionally, Judge Russell's assertions about not being served with the motion for a preliminary injunction are contradicted by the record. An affidavit filed with the district court certified that he was served with a summons, a copy of the amended complaint, a copy of the plaintiffs' motion for a preliminary injunction, and various other documents relating to the motion two months prior to the district court's order granting the motion. In the intervening two months, Judge Russell filed his motion to dismiss the complaint, which requested a preliminary injunction among other forms of relief. Accordingly, in light of the record and Obergefell, the district court's May 21, 2015 order granting a preliminary injunction requiring the issuance of marriage licenses to same-sex couples is SUMMARILY AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Amy C. Nerenberg
Acting Clerk of Court

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October 20, 2015

Charles R. Diard Jr.
U.S. District Court
113 SAINT JOSEPH ST
STE 123
MOBILE, AL 36602

Appeal Number: 15-12508-CC
Case Style: James Strawser, et al v. Tim Russell
District Court Docket No: 1:14-cv-00424-CG-C

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

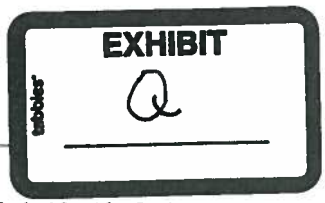
Sincerely,

AMY C. NERENBERG, Acting Clerk of Court

Reply to: Joe Caruso
Phone #: (404) 335-6177

Enclosure(s)

DIS-4 Multi-purpose dismissal letter



2016 WL 859009
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte STATE of Alabama ex rel. ALABAMA POLICY INSTITUTE, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County. (In re Alan L. King, in his official capacity as Judge of Probate for Jefferson County, et al.).

1140460.

March 4, 2016.

ORDER

***1** IT IS ORDERED that all pending motions and petitions are DISMISSED.

WISE and BRYAN, JJ., concur.

MOORE, C.J., and STUART, BOLIN, PARKER, MURDOCK, SHAW, and MAIN, JJ., concur specially.

MOORE, Chief Justice (statement of nonrecusal).

On February 11, 2015, the State of Alabama on relation of the Alabama Policy Institute and the Alabama Citizens Action Program initiated this case by filing in this Court an "Emergency Petition for Writ of Mandamus." The petition sought 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."

In its statement-of-facts section the petition described the federal injunctions in *Searcy v. Strange,* 81 F.Supp.3d 1285 (S .D.Ala.2015), and *Strawser v. Strange* (Civil No. 14–0424–CG–C) (S.D.Ala. Jan. 26, 2015), which 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"). The petition further stated:

> "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."

Attached to the petition as Exhibit C was a copy of the referenced administrative order. In subsequent paragraphs the petition identified by name four respondent Alabama probate judges who allegedly were issuing marriage licenses to same-sex couples "in violation of the Marriage Amendment, the Marriage Act, *and the Administrative Order.*" (Emphasis added.) The petition also named as respondents 63 Judge Does "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."

The petition argued that the writ should issue because (1) the marriage amendment and the marriage act were consistent with the United States Constitution and (2) this Court was not bound by a federal district court's interpretation of the United States Constitution. Alternatively, the petition stated:

> "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 [with] 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."

***2** Because the petition requested, as an alternative to the determination of the constitutional issues, that this Court order the enforcement of the administrative order, I abstained from voting on this Court's order of February 13, 2015, that ordered the respondents to file answers and permitted them to file briefs. I also abstained from voting on the opinion and order of March 3, 2015, that granted the petition and ordered the named probate judges "to discontinue the issuance of marriage licenses to same-sex couples." On March 3, 2015, I explained in a note to my fellow Justices:

> "I have decided to abstain from voting in this case to avoid the appearance of impropriety in light of the memorandum of February 3, 2015, and the administrative order of February 8, 2015 that I provided to Alabama probate judges in my role as administrative head of the Unified Judicial System."

I likewise have abstained from voting on subsequent orders in this case.

In *Ex parte Hinton,* 172 So.3d 348 (Ala.2012), Justice Shaw addressed the question whether he could sit on a case "given that it was previously before me when I was a judge on the Court of Criminal Appeals." 172 So.3d at 353. Canon 3.C.(1), Ala. Canons of Jud. Ethics, states: "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned...." Justice Shaw noted that " 'a reasonable person has a reasonable basis to question the impartiality of a judge who sits in [an appellate court] to review his own decision as a trial judge.' " 172 So.3d at 354–55 (quoting *Rice v. McKenzie,* 581 F.2d 1114, 1117 (4th Cir.1978)). See § 12–1–13, Ala.Code 1975. For an analogous reason I declined to vote in this case when my administrative order was potentially under review. Compare *Rexford v. Brunswick–Balke–Collender Co.,* 228 U.S. 339 (1913) (construing federal law and noting that an appellate judge should not pass upon "the propriety, scope, or effect of any ruling of his own made in the progress of the cause in the court of first instance").

Justice Shaw identified, however, an exception to the principle that a judge should not review a case in which the judge had participated below: "The principle that a judge must recuse himself or herself in an appeal where the judge ruled in the case while a member of a lower court has been held not to apply if the issue on appeal is different from the issue ruled upon below." 172 So.3d at 355. In my administrative order, I addressed the issue whether probate judges in Alabama were bound by the orders in *Searcy* and *Strange* when they were not parties to those cases. This Court's order of March 3, 2015, which held that the United States Constitution did not require a state to recognize same-sex marriage, mooted that issue.

The issuance of the opinion in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584 (2015), on June 26, 2015, has sufficiently altered the posture of this case to cause me to reconsider my participation. The effect of *Obergefell* on this Court's writ of mandamus ordering that the probate judges are bound to issue marriage licenses in conformity with Alabama law is a *new* issue before this Court. The controlling effect of *Obergefell* was not at issue when I earlier abstained from voting. The issue then addressed was the effect of the order of a federal district court, which I had addressed in my administrative order. In his analysis of the recusal issue in *Hinton,* Justice Shaw said:

> ***3** "Participation in the instant case does not involve a determination of the correctness, propriety, or appropriateness of what I did as a member of the Court of Criminal Appeals in *Hinton v. State,* because we are now faced with an issue that had not been decided by the trial court in the case that was before the Court of Criminal Appeals while I was serving on that court. My impartiality cannot be questioned because I am not called upon to review my prior decision...."

172 So.3d at 355. Likewise in this case, the issue now before the Court "does not involve a determination of the correctness, propriety, or appropriateness" of my administrative order.

In joining this case to consider the effect of *Obergefell,* I am not sitting in review of my administrative order, nor have I made any public statement on the effect of *Obergefell* on this Court's opinion and order of March 3, 2015. My

expressed views on the issue of same-sex marriage are also not disqualifying.

> " 'A judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, even if such views are strongly held. After all, judges commonly come to a case with personal views on the underlying subject matter.... Far from necessarily warranting recusal, typically such views merely mark an active mind.' "

Barber v. Jefferson Cty. Racing Ass'n, Inc., 960 So.2d 599, 618 (Ala.2006) (Stuart, J., statement of nonrecusal) (quoting *United States v. Snyder*, 235 F.3d 42, 48 (1st Cir.2000) (citations omitted)).

In *Barber*, the defendants were charged with "operating illegal gambling devices at the Birmingham Race Course." 960 So.2d at 601. They sought Justice Bolin's recusal because a voter guide for the 2004 election listed him as opposing gambling. Justice Bolin responded as follows:

> "My position on that issue is consistent with the law of Alabama; gambling is illegal in this State. I also oppose other acts that violate the laws of the State of Alabama, such as murder, rape, and robbery, but *my personal opposition to the above acts does not prevent me from fairly and unbiasedly participating in cases involving such acts.*"

Barber, 960 So.2d at 620 (Bolin, J., statement of nonrecusal) (emphasis added). See also *Barber*, 960 So.2d at 618 (Stuart, J ., statement of nonrecusal) (stating that her "decision in a case [is] based on the application of the law to the facts in that particular case, regardless of my personal opinion").

Although I have made public comments critical of *Obergefell* in which I quoted extensively from the four dissenting Justices in that case, " 'a judge's expressing a viewpoint on a legal issue is generally not deemed to be disqualifying in and of itself; this is usually true without regard to where such judicial views are expressed, and even if they are expressed somewhat prematurely or harshly.' " *Ex parte Ted's Game Enters.*, 893 So.2d 376, 392 (Ala.2004) (See, J., statement of nonrecusal) (quoting Richard E. Flamm, *Judicial Disqualification* § 10.7 (1996)). Most noteworthy, I have not publicly commented on the question whether this Court is bound to follow *Obergefell* or on the effect of *Obergefell* on this Court's March 3, 2015, order. [1]

***4** Furthermore, my job as Chief Justice requires me to participate in every case in which I am qualified to sit.

> "By establishing a Supreme Court consisting of nine Justices, Alabama law presumes that those Justices have something of value to contribute to the resolution of a case. Consequently, when a Justice recuses himself or herself unnecessarily, the recusal deprives the parties and the public of the benefit of the Justice's participation and the Justice fails to do the job he or she was elected to do."

Jones v. Kassouf & Co., 949 So.2d 136, 145 (Ala.2006) (Parker, J., statement of nonrecusal). Even when issues are difficult and controversial, a judge must decide. "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). See also *Federated Guar. Life Ins. Co. v. Bragg*, 393 So.2d 1386, 1389 (Ala.1981) (stating that " 'it is the duty of the judge to adjudicate the decisive issues involved in the controversy ... and to make binding declarations concerning such issues, thus putting the controversy to rest' " (quoting 26 C.J.S. *Declaratory Judgments* § 161 (1956))); *McGough v. McGough*, 47 Ala.App. 223, 226, 252 So.2d 646, 648–49 (Ala.Civ.App.1970) ("If a judge is not disqualified or incompetent under statute, constitution or common law, it is his duty to sit, a duty which he cannot delegate or repudiate.").

Because it is a judge's duty to decide cases, a judge may participate in a case after initially not sitting if the issues that prompted that abstention have changed. A recent case illustrates the application of this procedure. The petition for a writ of certiorari in *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. ——, 134 S.Ct. 2498 (2014), according to the Supreme Court docket sheet, was filed October 11, 2013. The Court granted the petition on January 10, 2014. The docket sheet contains a notation that Justice Alito did not participate in the decision to grant certiorari. On March 3, 2014, the Court denied a motion to intervene. The docket sheet shows that Justice Alito did not participate in that

decision either. Under the date of April 16, 2014, however, the docket sheet states: "Justice Alito is no longer recused in this case." Justice Alito participated in the oral argument on April 22 and dissented when the opinion was released on June 25. Thus, in *Aereo,* Justice Alito recused himself and then unrecused himself. The same scenario played out in *Stoneridge Investment Partners LLC v. Scientific–Atlanta, Inc.,* 552 U.S. 148 (2008). Chief Justice Roberts, who did not vote on the decision to grant certiorari on March 26, 2007, "unrecused" himself on September 20 in time to participate in the oral argument on October 9 and in the final decision. [2]

As explained above, I abstained from voting in this case to avoid sitting in review of my own administrative order. Because that order is no longer at issue in this case, I may appropriately sit on the case to review a different issue. A federal court noted that in certain instances a trial judge who had disqualified himself "could resume direction or even decide the issues.... But the reason for resuming control should be more than a second reflection *on the same facts* which the trial judge considered originally disqualified him." *Stringer v. United States,* 233 F.2d 947, 948 n.2 (9th Cir.1956). The relevant facts in this case are not the same because my administrative order is no longer at issue, having been superseded by orders of the entire Court.

MOORE, Chief Justice (concurring specially).

***5** On June 26, 2015, by a bare 5–4 majority, the United States Supreme Court declared that all states must now recognize a fundamental right to "same-sex marriage." *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584 (2015). Because the Alabama Supreme Court had previously issued orders in this case directing the probate judges of this State not to issue marriage licenses to couples of the same sex, the Court requested briefing on the effect of *Obergefell* on those orders. See *Ex parte State ex rel. Alabama Policy Inst.,* [Ms. 1140460, March 3, March 10, & March 12, 2015] —— So.3d —— (Ala.2015). Today this Court by order dismisses all pending motions and petitions and issues the certificate of judgment in this case. That action does not disturb the existing March orders in this case or the Court's holding therein that the Sanctity of Marriage Amendment, art. I, § 36.03, Ala. Const.1901, and the Alabama Marriage Protection Act, § 30–1–9, Ala.Code 1975, are constitutional. Therefore, and for the reasons stated below, I concur with the order.

In particular, I agree with the Chief Justice of the United States Supreme Court, John Roberts, and with Associate Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, that the majority opinion in *Obergefell* has no basis in the law, history, or tradition of this country. *Obergefell* is an unconstitutional exercise of judicial authority that usurps the legislative prerogative of the states to regulate their own domestic policy. Additionally, *Obergefell* seriously jeopardizes the religious liberty guaranteed by the First Amendment to the United States Constitution.

I. Amending the United States Constitution by Judicial Fiat

Based upon arguments of "love," "commitment," and "equal dignity" for same-sex couples, five lawyers, as Chief Justice Roberts so aptly describes the *Obergefell* majority, have declared a new social policy for the entire country. As the Chief Justice and Associate Justices Scalia, Thomas, and Alito eloquently and accurately demonstrate in their dissents, the majority opinion in *Obergefell* is an act of raw power with no ascertainable foundation in the Constitution itself. The majority presumed to legislate for the entire country under the guise of interpreting the Constitution.

A. Amending the Constitution in Violation of Article V

In reality, the *Obergefell* majority presumes to amend the United States Constitution to create a right stated nowhere therein. That is a lawless act. The Constitution in Article V provides the only means for amending its provisions:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose *Amendments* to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, *shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof* ...."

***6** U.S. Const., art. V (emphasis added). The amendment process requires the ratification of three-quarters of the states, not a mere 5 out of 9 Justices on the Supreme Court. The *Obergefell* majority states that the Founders anticipated that

the Constitution might require alteration. Employing Justice Anthony Kennedy's signature rhetoric, the opinion states:

> "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."

576 U.S. at ——, 135 S.Ct. at 2598. I submit that our Founders knew a lot more about freedom than this passage indicates. They secured the freedoms we enjoy, not in judicial decrees of newly discovered rights, but in the Constitution and amendments thereto. That a majority of the Court may identify an "injustice" that merits constitutional correction does not dispense with the means the Constitution has provided in Article V for its own amendment.

Although the Court could suggest that the Constitution would benefit from a particular amendment, the Court does not possess the authority to insert the amendment into the Constitution by the vehicle of a Court opinion and then to demand compliance with it. In 1965 Justice Hugo Black, in a critique of such judicial activism, commented on the Court's discovery of a heretofore unknown constitutional right for married couples to use contraception—a right supposedly found in the "penumbra" of the Bill of Rights. He stated:

> "The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me."

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting). In 1983, Brevard Hand, the Chief Judge of the United States District Court for the Southern District of Alabama, stated: "Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men." *Jaffree v. Board of Sch. Comm'rs of Mobile Cty.*, 554 F.Supp. 1104, 1126 (S.D.Ala.1983), rev'd *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir.1983). George Washington warned against attempts to usurp the Article V revision process:

> "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. *But let there be no change by usurpation;* for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

***7** Farewell Address (September 17, 1796), 12 *The Writings of George Washington* 226 (Jared Sparks ed., 1838) (emphasis added).

Novel departures from the text of the Constitution by the Court are customarily accompanied by pretentious language employed to conceal the illegitimacy of its actions. Justice Scalia in his *Obergefell* dissent refers to this abandonment of "disciplined legal reasoning" as a descent into "the mystical aphorisms of the fortune cookie." 576 U.S. at —— n.22, 135 S.Ct. at 2630 n.22. Among some of the more ostentatious phrases used in the majority opinion that might be more suitable to a romance novel are the following:

- "Marriage responds to the universal fear that a lonely person might call out only to find no one there." 576 U.S. at ——, 135 S.Ct. at 2600.
- The "hope [of homosexuals] is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions." 576 U.S. at ——, 135 S.Ct. at 2608.
- "A truthful statement by same-sex couples of what was in their hearts had to remain unspoken." 576 U.S. at ——, 135 S.Ct. at 2596.

The opinion appeals more to emotion than law, reminding one of the 1974 song "Feelings" by Morris Albert, which begins: "Feelings, nothing more than feelings...." The Court's opinion speaks repeatedly of homosexuals being humiliated, demeaned, and denied "equal dignity" by a state's refusal to issue them marriage licenses. The majority seeks to invoke the grief, sorrow, and compassion associated with a Greek

tragedy. Riding a tidal wave of emotion, the ensuing tears and pathos then suffice to fertilize a new constitutional right nowhere mentioned in the Constitution itself.

Abandoning the role of interpreting the written Constitution, the majority has instead decided to become the supposed "voice" of the people, discerning the people's sentiments and updating the document accordingly. The function of keeping the Constitution up with the times, however, has not been delegated to the Court—or to Congress or the President; that function is reserved to the states under Article V. Alexander Hamilton stated: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act." *The Federalist No. 78,* at 527–28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). *Obergefell* is a clear example of such "presumption." Consider the following quotations from the majority opinion:

- "When *new insight* reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." 576 U.S. at ——, 135 S.Ct. at 2598 (emphasis added).

- "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is *now manifest.*" 576 U.S. at ——, 135 S.Ct. at 2602 (emphasis added).

***8** - "[Rights] rise, too, from *a better informed understanding* of how constitutional imperatives define a liberty that remains urgent in our own era." 576 U.S. at ——, 135 S.Ct. at 2602 (emphasis added).

- "*[N]ew insights and societal understandings* can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 576 U.S. at ——, 135 S.Ct. at 2603 (emphasis added).

- "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment ... entrusted to future generations a charter protecting the right of all persons to enjoy liberty *as we learn its meaning.*" 576 U.S. at ——, 135 S.Ct. at 2598 (emphasis added).

An updating of the Constitution based on new insights and better informed societal understandings that are now manifest as we learn its meaning must arise solely from a "solemn and authoritative act" of the people pursuant to Article V, not from judicial innovation based on a "presumption, or even knowledge, of their sentiments." *The Federalist No. 78.*

B. The True Meaning of Liberty

The *Obergefell* majority's theory of constitutional law also overlooks the reality that the purpose of law is to restrain behavior for the public good.

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

Throughout the majority opinion Justice Kennedy speaks of the "dignity" of marriage and blatantly asserts that "[t]here is dignity in the bond between two men or two women who seek to marry." 576 U.S. at ——, 135 S.Ct. at 2599. Historically, consummation of a marriage always involved an act of sexual intimacy that was dignified in the eyes of the law. An act of sexual intimacy between two men or two women, by contrast, was considered "an infamous crime against nature" and a "disgrace to human nature." 4 William Blackstone, *Commentaries on the Laws of England* *215. Homosexuals who seek the dignity of marriage must first forsake the sexual habits that disqualify them from admission to that hallowed institution. Surely more dignity attaches to participation in a fundamental institution on the terms it prescribes than to an attempt to wrest its definition to serve inordinate lusts that demean its historic dignity. A "disgrace to human nature" cannot be cured by stripping the institution of holy matrimony of its inherent dignity and redefining it to give social approval to behaviors unsuited to its high station. Sodomy has never been and never will be an act by which a marriage can be consummated.

The Declaration of Independence identifies the source of "liberty" under the American system of government:

> ***9** "We hold these truths to be self-evident, that all men are created equal,

> that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...."

The Declaration of Independence para. 2 (U.S.1776).[3] "Liberty," an unalienable right, is an endowment of the Creator. "The God who gave us life gave us liberty at the same time...." Thomas Jefferson, *A Summary View of the Rights of British America,* at 23 (1774). Government exists to secure that right. Because liberty is a gift of God, it must be exercised in conformity with the laws of nature and of nature's God. "[T]he natural liberty of mankind ... consists properly in a power of acting as one thinks fit, without any restraint or control, *unless by the law of nature* ...." 1 Blackstone, *Commentaries* *121 (emphasis added).

Liberty in the American system of government is not the right to define one's own reality in defiance of the Creator. The libertarian creed of unbridled self-definition is capsulized in Justice Kennedy's oft-quoted statement: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851 (1992). But the human being, as a dependent creature, is not at liberty to redefine reality; instead, as the Declaration of Independence states, a human being is bound to recognize that the rights to life, liberty, and the pursuit of happiness are endowed by God. Those rights are not subject to a redefinition that rejects the natural order God has created.

"Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being." 1 Blackstone, *Commentaries* *39. Part of that natural order is the institution of marriage as the union of a man and a woman. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." *Genesis* 2:24. The *Obergefell* majority's false definition of marriage arises, in great part, from its false definition of liberty. Separating man from his Creator, the majority plunges the human soul into a wasteland of meaninglessness where every man defines his own anarchic reality. In that godless world nothing has meaning or consequence except as the human being desires. Man then becomes the creator of his own reality rather than a subject of the Creator of the Declaration. See *Romans* 1:25 (identifying those "[w]ho changed the truth of God into a lie, and worshipped and served the creature more than the Creator").

This false notion of liberty, which permeates the majority opinion in *Obergefell,* is the ultimate fallacy upon which it rests. In a world with God left out, the moral boundaries of Scripture disappear, and man's corrupt desires are given full rein. The end of this experiment in anarchic liberty is yet to be seen. The great sufferers will be the children—deprived of either a paternal or a maternal presence—who are raised in unnatural families that contradict the created order. A political scientist states: " '[T]he traditional family, the embodiment and expression of the "laws of nature and of nature's God," as the foundation of a free society, has become merely one of many "alternative lifestyles." ... A free people who succumbs to such a teaching cannot long endure.' " Samuel H. Dresner, *Can Families Survive in Pagan America?* 99 (1995) (quoting Harry V. Jaffa, *Homosexuality and the Natural Law* 38 (1990)). As Thomas Jefferson stated:

> ***10** "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever...."

"Notes on the State of Virginia" (1787), in 8 *The Writings of Thomas Jefferson* 404 (H.A. Washington ed., 1854).

C. Abuse of the Fourteenth Amendment

The invocation of "equal dignity" to justify the invention of a heretofore unknown constitutional right is just another judicial mantra to rationalize the invalidation of state laws that offend the policy preferences of a five-person majority. The notion of "equal dignity," as this Court recently stated, "is a legal proxy for invalidating laws federal judges do not like, even though no actual constitutional infirmity exists." *Ex parte State ex rel. Alabama Policy Institute* [Ms. 1140460, March 3, 2015] —— So.3d ——, —— (Ala.2015) ("*API* "). Justice Black once stated: "There is ... no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed 'unreasonable' or

contrary to the Court's notion of civilized decencies...." *Rochin v. California,* 342 U.S. 165, 176 (1952) (Black, J., concurring). In 1930, in the waning days of his judicial career, Justice Oliver Wendell Holmes expressed his alarm at the elastic qualities the Supreme Court had ascribed to the Fourteenth Amendment to satisfy the Court's desire to exercise plenary supervision over state legislation: "I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri,* 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

As late as 1986, the United States Supreme Court specifically declared:

> "There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance."

Bowers v. Hardwick, 478 U.S. 186, 195 (1986), overruled by *Lawrence v. Texas,* 539 U.S. 558 (2003). The "claimed right" of which the Court spoke in *Bowers* was the "right" to commit sodomy. Although the Court in 1986 adamantly refused to recognize any such right in the United States Constitution, the *Lawrence v. Texas* opinion did just that 17 years later. Nevertheless, the Supreme Court's admonition in 1986 that expanding the substantive reach of the Fifth and Fourteenth Amendments to redefine fundamental rights like marriage would give the Court "further authority to govern the country without express constitutional authority," 478 U .S. at 195, is still true and can clearly be seen in *Obergefell.*

***11** The "fundamental right" to marriage the Supreme Court has invoked in previous cases always involved the right of a man and a woman to marry. *Loving v. Virginia,* 388 U.S. 1 (1967), cited as a precedent for constitutional review of state marriage laws by the *Obergefell* majority, 576 U.S. at ——, 135 S.Ct. at 2598–99, did not change this fact, but only removed a race-based barrier to participation in that institution. No one doubts that the Fourteenth Amendment was designed to remove such civil disabilities. Equally indisputable is that the states that ratified the Fourteenth Amendment in 1868 did not remotely intend to empower the federal courts to redefine marriage to include same-sex marriage.

The majority opinion in *Obergefell* represents the culmination of a change in our form of government from one of three separate-but-equal branches to one in which the judicial branch now exercises the power of the legislative branch.[4] President George Washington asserted that this "spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism." *Farewell Address,* at 226. And thus by the weapon of judicial usurpation, free government is destroyed.

The Constitution limits the power of the federal government in order to protect the right of the people to govern themselves. See U.S. Const. amends. IX & X.[5] In his criticism of the Court's invention of a constitutional right to bring contraceptive devices into the marital chamber, Justice Potter Stewart stated:

> "If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books."
> *Griswold,* 381 U.S. at 531 (Stewart, J., dissenting).
> The *Obergefell* majority, presuming to know better than the people themselves how to order the fundamental domestic institution of society, has usurped the legislative prerogatives of the people contrary to the Ninth and Tenth Amendments.

II. The Dissenters' Critique

The four dissenters in *Obergefell* convincingly detail the illegitimacy of the majority opinion.

A. Chief Justice Roberts

The Chief Justice describes the pretended judicial acts of the majority as a form of theft. "Five lawyers have ... enacted their own vision of marriage as a matter of constitutional law. *Stealing this issue from the people* will for many cast a

cloud over same-sex marriage...." 576 U.S. at ——, 135 S.Ct. at 2612 (emphasis added). He states flatly: "The right [the majority] announces has no basis in the Constitution or this Court's precedent." *Id.* He accuses the majority of "order[ing] the transformation of a social institution that has formed the basis of human society for millennia" based on "its desire to remake society according to its own 'new insight' into 'the nature of injustice.' " *Id.* In short, the majority acts not as a court of law but as a band of social revolutionaries. The Chief Justice, amazed at this presumption, exclaims: "Just who do we think we are?" *Id.*

***12** The Chief Justice underscores the serious consequences of acquiescence to the majority's assumption of illegitimate power. The majority, he states, "seizes for itself a question the Constitution leaves to the people." 576 U.S. at ——, 135 S.Ct. at 2612. The real issue, he explains, "is about whether, in our democratic republic, that decision [regarding the definition of marriage] should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law." *Id.* He also points out that all previous decisions of the Supreme Court that treated marriage as a fundamental right rested on "the core structure of marriage as the union between a man and a woman." 576 U.S. at ——, 135 S.Ct. at 2614.

"[T]he majority's approach," states the Chief Justice, "has no basis in principle or tradition except for the unprincipled tradition of judicial policymaking." 576 U.S. at ——, 135 S.Ct. at 2616. Thus, "the majority's position [is] indefensible as a matter of constitutional law." *Id.* In support of this point, the Chief Justice draws on Justice Benjamin Curtis's dissent in *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857). Remonstrating against the *Dred Scott* majority's novel effort at enforcing a *pax judicatus* on the slavery issue, Justice Curtis warned that, when the " 'fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control' " the meaning of the Constitution, " 'we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.' " 576 U.S. at ——, 135 S.Ct. at 2617 (quoting *Dred Scott,* 60 U.S. (19 How.) at 621).

The Chief Justice's quotation of Justice Curtis's *Dred Scott* dissent merits serious consideration. If acquiescence to *Obergefell* indicates that "we have no longer a Constitution," then the legitimacy of *Obergefell* is subject to grave doubt. If five Justices of the Supreme Court may at will redefine the Constitution according to their own policy preferences, the mechanism of judicial review, designed originally to protect the rights of the people from runaway legislatures, has morphed into the right of five lawyers to rule the people without their consent.

By employing the Constitution as a license to create social policy for the nation, the Court, states the Chief Justice, becomes "a legislative chamber." 576 U.S. at ——, 135 S.Ct. at 2617 (quoting Learned Hand, *The Bill of Rights, The Oliver Wendell Holmes Lectures, 1958* 42 (1977)). Are the true legislative bodies of this country obligated to respect such a usurpation of their own prerogatives? The Chief Justice quotes Justice Byron White as follows: " 'The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.' " 576 U.S. at ——, 135 S.Ct. at 2618 (quoting *Moore v. City of East Cleveland,* 431 U.S. 494, 544 (1977) (White, J., dissenting)).[6] Such is the reality of the majority opinion in *Obergefell.*

***13** Other concerns, states Chief Justice Roberts, appear in the wake of the majority's "freewheeling notion of individual autonomy." 576 U.S. at ——, 135 S.Ct. at 2621. If the opinion reflects no more than "naked policy preferences," *id.,* with no basis in the Constitution, what is to restrain the Court from inventing other new "liberties" the majority may imagine? The Chief Justice sees nothing in the majority opinion that would be incompatible with the declaration of a constitutional right to polygamy. The majority, he states, "offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not." 576 U.S. at ——, 135 S.Ct. at 2621. Polygamy, he notes, has more of a tradition in the world's cultures than same-sex marriage. "If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one." *Id.* Indeed, as the Chief Justice warns, the plenary power the majority asserts to redefine the fundamental institutions of society offers no assurance that it will not give birth to yet further attacks on the social order.

The majority ostensibly relies on the Due Process Clause of the Fourteenth Amendment to justify its mandate for an unprecedented social revolution. But, as the Chief Justice states: "The majority's understanding of due process lays out a tantalizing vision of the future for Members of this

Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?" 576 U.S. at ——, 135 S.Ct. at 2622. Noting that the majority's actions are "dangerous for the rule of law," *id.*, the Chief Justice states that by undermining respect for the Court's judgments, the majority draws into question the Court's legitimacy. Decrying "the majority's extravagant conception of judicial supremacy," 576 U.S. at ——, 135 S.Ct. at 2624, he notes its absence of humility or restraint. "Over and over," he states, "the majority exalts the role of the judiciary in delivering social change." *Id.*

> "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges."

Id.

If, as the Chief Justice demonstrates, a governing majority of the Supreme Court has departed from the vision of the Founders, are the rest of us also required to depart from the founding principles of this republic? Or should we adhere to the principles of representative government—government by the people—and repudiate the judicial majority that orders otherwise? The Chief Justice emphasizes that the majority's actions have no basis in law: "Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right [to same-sex marriage]. None exists...." 576 U.S. at ——, 135 S.Ct. at 2619. Contemplating the role of the Constitution in the opinion of the majority, he concludes: "It had nothing to do with it." 576 U.S. at ——, 135 S.Ct. at 2626. If, as the Chief Justice asserts, the opinion of the majority is not based on the Constitution, do state judges have any obligation to obey that ruling? Does not their first duty lie to the Constitution? Otherwise, as Justice Curtis stated in his *Dred Scott* dissent, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." 60 U.S. (19 How.) at 621.

B. Justice Scalia

***14** Justice Scalia, who joined in full the dissent of Chief Justice Roberts, echoes the theme of a threat to our republican form of government. He notes the demise of constitutional government in the ashes of the majority's opinion razing the institution of marriage. "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 576 U.S. at ——, 135 S.Ct. at 2627. Justice Scalia underscores this point: "This practice of constitutional revision by an unelected committee of nine ... *robs the People* of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." 576 U.S. at ——, 135 S.Ct. at 2627 (emphasis added).

The opinion of the majority, he further states, "lacks even a thin veneer of law." 576 U.S. at ——, 135 S.Ct. at 2628. Thus, "[t]he naked judicial claim to legislative—indeed, *super*-legislative—power [is] fundamentally at odds with our system of government," and "makes the People subordinate to a committee of nine unelected lawyers." 576 U.S. at ——, 135 S.Ct. at 2629. Contending that the majority opinion lacks legal legitimacy, he terms it "a social upheaval," i.e., a social revolution. *Id.* The right to change the form of government in this country belongs to the people themselves through the amendment process, not to judicial oligarchs. Justice Scalia describes the majority's ruling as a "judicial Putsch." *Id.* A "putsch" is "a secretly plotted and suddenly executed attempt to overthrow a government." *Merriam–Webster's Collegiate Dictionary* 1013 (11th ed.2009). The word is most commonly associated with Adolf Hitler's 1923 attempt to seize power in Germany. Justice Scalia's use of this term underscores the revolutionary nature of the majority's presumptive exercise of judicial power to remake the social order.

Justice Scalia concludes that "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: *no social transformation without representation.*" 576 U.S. at ——, 135 S.Ct. at 2629 (emphasis added). Justice Scalia's estimation that the majority's social revolution is a more outrageous abuse of power than the events that immediately triggered the American Revolution is very sobering. The judiciary, he states, " 'must ultimately depend upon the aid of the executive arm' and the States, 'even for the efficacy of its

judgments.' " 576 U.S. at ——, 135 S.Ct. at 2631 (quoting *The Federalist No. 78,* at 522–23 (Alexander Hamilton) (J. Cooke ed., 1961)). He thus intimates that the refusal of the states to recognize the legitimacy of the *Obergefell* decision, "one that is unabashedly based not on law," would be a healthy reminder of the Court's "impotence" in the face of a refusal to acquiesce to its systematic destruction of popular government. 576 U.S. at ——, 135 S.Ct. at 2631.[7]

C. Justice Thomas

***15** Justice Thomas adds his analysis to the fusillade of criticism of the majority opinion. He attacks in particular the invocation of the doctrine of "substantive due process" that allows the Court to invent new rights out of the word "liberty" in the Due Process Clause. Like Chief Justice Roberts and Justice Scalia, he sounds the alarm at this rending of the fabric of our country: "By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority." 576 U.S. at ——, 135 S.Ct. at 2631. He notes that this expansive and "imaginary" use of the Due Process Clause "wip[es] out with a stroke of the keyboard the results of the political process in over 30 States." 576 U.S. at ——, 135 S.Ct. at 2632 and n.1. The entitlement to a marriage license with the accompanying government benefits, he notes, is inconsistent with the historic meaning of "liberty" as a "freedom from physical restraint." 576 U.S. at ——, 135 S.Ct. at 2633. Neither the Founders nor the authors of the Fourteenth Amendment considered that the right not to be deprived of liberty without due process of law encompassed a positive entitlement to governmental benefits. "In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement." 576 U.S. at ——, 135 S.Ct. at 2634. Thus, "receiving governmental recognition and benefits has nothing to do with any understanding of 'liberty' that the Framers would have recognized." 576 U.S. at ——, 135 S.Ct. at 2636.

D. Justice Alito

Justice Alito notes that the majority's definition of "liberty" has "a distinctively postmodern meaning" in which "five unelected Justices ... impos [e] their personal vision of liberty upon the American people." 576 U.S. at ——, 135 S.Ct. at 2640. He recognizes that the fundamental purpose of marriage historically has been to provide for the welfare of children and not merely to contribute to the well-being of adults. The rising rate of out-of-wedlock pregnancy has contributed to the decay of marriage by fraying the tie between marriage and procreation.[8] 576 U.S. at ——, 135 S.Ct. at 2641. Many states legitimately worry that abandoning the traditional definition "may contribute to marriage's further decay." 576 U.S. at ——, 135 S.Ct. at 2642. Thus, "[it] is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed ... all around the globe." *Id.*

Justice Alito, like the other dissenters, points out that the majority has created a constitutional right out of thin air:

> " '[T]he Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.' "

***16** 576 U.S. at ——, 135 S.Ct. at 2642 (quoting *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2716 (2013) (Alito, J., dissenting)). In harmony with his dissenting colleagues, Justice Alito asserts that "[t]oday's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage." 576 U.S. at ——, 135 S.Ct. at 2642.

> "If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate....
>
> "Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed.... What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation."

576 U.S. at ——, 135 S.Ct. at 2643

E. Summing Up Obergefell: *An Unlawful and Illegitimate Decision*

The dissenting Justices have accurately described in detail the illegitimacy of the majority's decision in *Obergefell.* Their criticisms go far beyond mere disagreement with the philosophical and public-policy arguments upon which the majority opinion relies. Instead, the dissenting Justices employ strong language and vivid metaphors to portray the seriousness of the majority's bold attack on the foundations of representative government and the collateral damage to religious liberty.

Their language is stirring and forthright:

Chief Justice Roberts portrays the majority as thieves who are "stealing" the marriage issue from the people. Justice Scalia uses a similar metaphor, stating that the majority "robs the People of ... the freedom to govern themselves." These metaphors identify the essence of the majority's actions: an illegal displacement and usurpation of the democratic process. Chief Justice Roberts accuses the majority of imposing "naked policy preferences" that have "no basis in the Constitution." Accordingly, the majority's "extravagant conception of judicial supremacy" is "dangerous for the rule of law." The unmistakable theme that emerges from these critiques is lawlessness. A body whose reason for being is to apply the law has instead forsaken the law for a lawless imposition of the latest postmodern assault on the natural order. The majority are judges in name only, having in fact forsaken the judicial role to engage in "remaking society" and transforming—without legal authority—the most fundamental social institution.

Justice Scalia also emphasizes the revolutionary character of the majority's assault on the social order—elevating the "crime against nature" into the equivalent of holy matrimony. [9] This decision, "unabashedly not based on law," represents a "social upheaval" and a "judicial Putsch." Justice Alito sounds the same themes. The Court has not unwittingly tread into forbidden territory; instead, it has acted "far beyond the outer reaches" of its authority, boldly trampling the right of the people "to control their own destiny."

III. The Precursors to Obergefell

***17** For the last 50 years, the Supreme Court has consistently misused the Fourteenth Amendment to destroy state laws that protect the marital relation and its offspring. *Obergefell* is the latest fruit of this corrupt tree. *Matthew* 7:17–18.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court found in "penumbras, formed by emanations" from the "specific guarantees in the Bill of Rights," a right of "privacy" for married couples to use contraceptives. *Id.* at 484. That opinion, explained a dissenter, "prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.' " *Id.* at 510 n.1 (Black, J. dissenting). By holding unconstitutional a law that was not forbidden by a specific provision of the Constitution, the Court quietly assumed the power to negate any state legislation of which it disapproved. As Justice Black stated:

> "[N]o provision of the Constitution ... either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. *The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts* which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time *threaten to take away much of the power of States to govern themselves* which the Constitution plainly intended them to have."

381 U.S. at 520–21 (Black, J., dissenting) (emphasis added).

Speaking 50 years before the issuance of the majority opinion in *Obergefell,* Justice Black presciently anticipated its reasoning:

> "I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical

> strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes."

381 U.S. at 522.[10] Assuredly, Justice Black would not have agreed with Justice Kennedy's grandiloquent "nature-of-injustice" passage and his invocation of the right of the Court to draw limitless new rights out of the bottomless depths of the Due Process Clause "as we learn its meaning."[11] Truly, the less basis the majority has for its innovations upon the Constitution, the grander is the language employed to justify them, as if high-blown rhetoric could compensate for the absence of constitutional substance.

Griswold was the first car on the illicit and unconstitutional train that led from contraception to abortion and then on to sodomy and same-sex marriage. In 1972, the Court extended the penumbral right of contraception to the unmarried, deconstructing the union of husband and wife that infused *Griswold* into merely "an association of two individuals." *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972). "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453. Venturing beyond "the sacred precincts of marital bedrooms," *Griswold,* 381 U.S. at 485, the Court anointed with constitutional protection the use of contraceptive devices by the unmarried, setting its seal of approval upon fornication. And if anyone found the extension of *Griswold* to the unmarried to be less than convincing, the Court had ready at hand an additional rationale: Allowing the use of such devices by the married, but not the unmarried, violated the Equal Protection Clause. The married and the unmarried, the Court amazingly held, were "similarly situated" in regard to contraceptive use. Thus, "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons." *Eisenstadt,* 405 U.S. at 454. See John Hart Ely, *The Wages of Crying Wolf, A Comment on Roe v. Wade,* 82 Yale L.J. 920, 929 n.68 (1973) (commenting on "the *Eisenstadt* Court's obviously strained performance respecting the Equal Protection Clause").[12]

***18** Chief Justice Warren Burger dissented. Seeing nothing in the Fourteenth Amendment that prohibited a state from regulating the distribution of contraceptives, he noted that the Court had "seriously invade[d] the constitutional prerogatives of the States" and "passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections." 405 U.S. at 467, 472 (Burger, C.J., dissenting).

In *Carey v. Population Services International,* 431 U.S. 678 (1977), the Court took a further step down the road of immorality by crowning with constitutional dignity not only the general provision of contraceptives *to minors* but also the requirement that they be available over the counter. Thus saith the Due Process Clause. Justice William Rehnquist mused on the likely reaction of those who fought the Revolutionary War to establish the Bill of Rights and the Civil War to enact the Fourteenth Amendment:

> "If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction."

431 U.S. at 717 (Rehnquist, J., dissenting). Declining to engage in detailed analysis of the majority's patently "indefensible result," Justice Rehnquist explained that "no logic chopping can possibly make the fallacy of the result more obvious." 431 U.S. at 718.

Having served the sexual revolution in the area of contraception, the Court then made constitutional the taking of the life of an unborn child. In *Roe v. Wade,* 410 U.S. 113 (1973), as it did in *Griswold* and *Eisenstadt,* and later in *Carey,* the Court tackled the difficulty of rationalizing the creation of a new constitutional right that had no colorable basis in the Constitution. The Court ultimately asserted that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty ... or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe,* 410 U.S. at 153.

Justice Stewart, concurring, 410 U.S. at 167–71, suggested abandoning the effort to cobble together "right-of-privacy" emanations from the Bill of Rights and instead urged sole reliance on the word "liberty" in the Due Process Clause, an infinitely malleable term that has enabled the Court to generate custom-designed constitutional rights. Justice Rehnquist in dissent stated that *Roe* "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." 410 U.S. at 174. "To reach its result," he added, "the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* Justice White, writing in the companion case to *Roe,* agreed: "I find nothing in the language or history of the Constitution to support the Court's judgment." *Doe v. Bolton,* 410 U.S. 179, 221 (1973) (White, J., dissenting). As one commentator observed: "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution," Ely, *Wages,* at 935, and "is *not* constitutional law and gives almost no sense of an obligation to try to be." *Id.* at 947.

***19** *Obergefell* is but the latest example of the Court's creation of constitutional rights out of thin air in service of the immorality of the sexual revolution. Like *Roe, Obergefell* is no more than "an exercise of raw judicial power ... an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." *Doe,* 410 U.S. at 222 (White, J., dissenting).

The incorporation of the sexual revolution into the Constitution continued in *Lawrence v. Texas,* 539 U.S. 558 (2003), which used the Fourteenth Amendment to find a right to commit sodomy that the high court had specifically rejected only 17 years earlier in *Bowers v. Hardwick,* 478 U.S. 186 (1986). Citing as "authority" *Griswold, Eisenstadt, Roe,* and *Carey*—a gallery of constitutional absurdities—the Court stated that "our laws and traditions in the past half century" "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence,* 539 U.S. at 571–72. [13] Thus, the Court relied on a series of malformed decisions to justify yet another bizarre departure from moral sanity—and all in defiance of the right of the people to govern themselves.

In language similar to that used in *Obergefell,* Justice Kennedy, the author of the majority opinion in *Lawrence,* stated:

> "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Lawrence, 539 U.S. at 578–79. Justice Kennedy unfortunately omitted the key consideration highlighted by Justice Black in his *Griswold* dissent: Amendments to the Constitution are the business of the people pursuant to Article V; they are not the business of the Court under Article III. Truth may not always be clearly seen, but the majority's reasoning should not blind us to the reality that the Court seems determined to alter this nation's organic law.

Justice Scalia, dissenting in *Lawrence,* criticized the Court's discovery of yet another sexual-freedom right in the Constitution: "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change." 539 U.S. at 603 (Scalia, J., dissenting). He also exposed the fallacy in Justice Kennedy's "search-for-greater freedom" passage:

> "It is indeed true that 'later generations can see that laws once thought necessary and proper in fact serve only to oppress' ...; and when that happens, later generations can repeal those laws. But it is the premise of our system that *those judgments are to be made by the people, and not imposed by a governing caste that knows best.*"

***20** 539 U.S. at 603–04 (emphasis added).

The *Obergefell* case is but the latest in "a history of repeated injuries and usurpations." Declaration of Independence para. 2. Among the "long train of abuses and usurpations" cited in

the Declaration of Independence was Parliament "declaring themselves invested with power to legislate for us in all cases whatsoever." *Id. Obergefell* is the culmination, beginning with *Griswold* in 1965, of 50 years of *judicial* usurpation of the right of the people to govern themselves and, in particular, of the states to protect from attack "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey,* 114 U.S. 15, 45 (1885).

IV. The Unavoidable Collision with Religious Liberty

Religious liberty is the gift of God. The Virginia Act for Establishing Religious Freedom (1786), authored by Thomas Jefferson and considered one of his more notable achievements, begins:

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do...."

12 William Waller Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619,* at 84 (Richmond 1823) ("12 Hening, *Statutes* "). The Virginia Act then explains that to allow a "civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once *destroys all religious liberty.*" 12 Hening, *Statutes,* at 85 (emphasis added).

The definition of marriage as the union of one man and one woman has existed for millennia and has never been considered an "ill tendency." By contrast, the Court's attempt to redefine marriage is "*a dangerous fallacy which at once destroys all religious liberty.*" As Justice Thomas explained in his dissent in *Obergefell*: "The Court's decision today is at odds not only with the Constitution but with the principles upon which our Nation was built." 576 U.S. at ——, 135 S.Ct. at 2631. Further, "the majority's decision threatens the religious liberty our Nation has long sought to protect." 576 U.S. at ——, 135 S.Ct. at 2638.

In former times, the Court showed greater respect for God's gift of religious freedom and deliberated more seriously on the subject. Upholding the denial of an application for citizenship based on conscientious objection to military service, Justice George Sutherland, writing for the Court, stated: "We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." *United States v. Macintosh,* 283 U.S. 605, 625 (1931). In a dissent joined by three of his brethren, Chief Justice Charles Evans Hughes noted that the oath to uphold the Constitution administered to legislators and "all executive and judicial Officers," U.S. Const., art. VI, ¶ 3, was similar to the naturalization oath. Yet the constitutional oath had not been regarded "as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God." *Macintosh,* 283 U.S. at 630 (Hughes, C.J., dissenting).

***21** Chief Justice Hughes recognized the serious issues presented when governmental power clashes with individual conscience:

> "[W]ith many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise."

283 U.S. at 631. Chief Justice Hughes further explained:

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.... One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God."

Macintosh, 283 U.S. at 633–34. The *Obergefell* majority, conspicuously overlooking the "essential and historic significance" of the connection between religious liberty and "supreme allegiance to the will of God," failed to appreciate the seriousness of imposing a new sexual-revolution mandate that requires Alabama public officials to disobey the will of God.

Fifteen years after *Macintosh* was decided, the Court adopted the reasoning of Chief Justice Hughes in his *Macintosh* dissent. Justice William O. Douglas, writing for the Court, stated:

> "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Girouard v. United States, 328 U.S. 61, 68 (1946). The *Obergefell* majority gives scant consideration to these concerns, even though they were presented by amici curiae. See, e.g., brief of amicus curiae Agudath Israel of America, at 17 ("The recognition of same-sex marriage poses a threat to the liberty of religious organizations and individuals whose faith prevents them from acting in accordance with that recognition."); brief of amici curiae the General Conference of Seventh–Day Adventists and the Becket Fund for Religious Liberty, at 36 (stating that "adopting same-sex marriage will have significant negative effects on the ability of religious conscientious objectors to participate fully in society").

In the following passage the *Obergefell* majority vainly attempts to deflect attention from its egregious assault on religious liberty:

> "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may *continue to advocate* with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment insures that religious organizations and persons are given proper protection as they *seek to teach* the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."

***22** 576 U.S. at ——, 135 S.Ct. at 2607 (emphasis added). Religious liberty, however, is about more than just "teaching" and "advocating" views of marriage. The majority condescendingly approves religious *speech* against same-sex marriage but not religious *practice* in conformity with those beliefs. As Chief Justice Roberts states in his dissent: "The First Amendment guarantees ... the freedom to *'exercise* ' religion. Ominously, this is not a word the majority uses." 576 U.S. at ——, 135 S.Ct. at 2625. Justice Thomas similarly notes that religious liberty "is about freedom of action in matters of religion generally," not merely a right to speak and teach. 576 U.S. at ——, 135 S.Ct. at 2638.

The seemingly unnecessary affirmation of a right to speak and teach one's faith conceals an unstated implication that such speech is to have no practical effect on public policy. As Justice Alito comments: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools ." 576 U.S. at ——, 135 S.Ct. at 2642–43. Chief Justice Roberts states:

> "Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples.... Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."

576 U.S. at ——, 135 S.Ct. at 2625–26. Justice Alito concludes: "By imposing its own views on the entire country, the majority facilitates the marginalization of the many

Americans who have traditional ideas." 576 U.S. at ——, 135 S.Ct. at 2643.

Significantly, *Obergefell* is a more serious threat to religious liberty than the contraception and abortion decisions. Although *Roe* granted the mother immunity from prosecution for hiring an abortionist to kill her unborn child, *Roe* did not compel any medical professional, who conscientiously opposed the practice, to participate in an abortion. In 1973, in the wake of *Roe,* Congress passed the Church Amendments, which protect individuals and entities who receive certain federal funding from participating in abortion or sterilization procedures contrary to their "religious beliefs or moral convictions." 42 U.S.C. § 300a–7. Subsequent federal laws confirmed or expanded this protection. See Jody Feder, Cong. Research Serv., RS21428, *The History and Effect of Abortion Conscience Laws* (2005). Most states have adopted similar conscience-clause legislation. "[Forty-five] states allow some health care providers to refuse to provide abortion services." Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services* (July 1, 2015). [14]

***23** *Obergefell* promises to breach the legal protections that have shielded believers from participating in acts hostile to their faith. As Chief Justice Roberts points out, the *Obergefell* majority piously declaims that people of faith may believe what they want and seek to persuade others, but it says nary a word about them practicing or exercising their faith as the Free Exercise Clause provides. A leading scholar of the Religion Clause states: "A right to believe a religion, but no right to act on its teachings, would be a hollow right indeed. Belief without practice was the conception of religious liberty that Oliver Cromwell offered to the Catholics of Ireland." Douglas Laycock, *Religious Liberty and the Culture Wars,* 2014 U. Ill. L.Rev. 839, 841 (2014). Cromwell stated that he would " 'meddle not with any man's conscience,' " but that Catholics would not be permitted to say the mass. *Id.* at 841 n.3 (quoting Christopher Hill, *God's Englishmen: Oliver Cromwell and the English Revolution* 121 (1970)).

Because the issuance of marriage licenses is a state function, the individuals in this State whose conscience rights are implicated by *Obergefell* and any implementing orders are the probate judges and their staffs. The "must issue" order of the federal district court in Mobile potentially requires those probate judges who conscientiously object to issuing *faux* marriage licenses to violate their consciences or suffer civil penalties of fines and contempt. See *Strawser v. Strange,* 105 F.Supp.3d 1323 (S.D.Ala.2015). Justice Thomas in his dissent spoke of these looming enforcement measures as "civil restraints" with "potentially ruinous consequences." 576 U.S. at ——, 135 S.Ct. at 2638–39. In his "Emergency Petition for Declaratory Judgment and/or Protective Order," Probate Judge Nick Williams echoed that concern, stating: "This Court must act to prevent the imprisonment and financial ruin of this state's probate judges who maintain fidelity to their oath of office and their faith."

Probate Judge John E. Enslen, realigned as a relator, adopted in full Judge Williams's emergency filing and requested from this Court a forthright statement that *Obergefell* will not be allowed to impair his First Amendment rights under the Free Exercise Clause. He stated:

> "I, the undersigned, possess the following sincere religious beliefs which I hold sacred. I seek from this Court a pronouncement of the full range of available legal protections for my First Amendment Rights relating to my following sincerely held religious beliefs:
>
> "I believe that marriage was created by the Divine Creator of all mankind to be the sanctuary for the procreative act, regardless of whether or not said act results in the birth of children.
>
> "I believe that our Divine Creator, by revelations to his chosen prophets throughout the ages, has instructed and commanded mankind, who are his spiritual offspring, to abstain from procreative activities and pseudo-procreative activities of any type outside of the bounds of a natural marriage between a man and a woman. I believe that the complementary anatomy of the male and female body is a tactical revelation of that truth from our Divine Creator.
>
> ***24** "I believe that authentic marriage is a natural child-creating and natural child-rearing institution. I believe that as an institution, marriage should not be, and never has been, about satisfying the emotional needs of adults, and that marriage should not be reduced to a mere symbol of social inclusion.
>
> "I believe that over time the adverse ramifications and consequences of ignoring the foregoing Divine mandate will be irreversibly profound. I believe that children are this nation's most important asset, and that our laws should foster the ideal family life where biological parents rear their children, and our laws should make exceptions only where absolutely necessary due to unavoidable circumstances.

> "I believe that homosexuality is not an immutable physical or biological character trait disconnected from one's moral agency or ability to choose one's course of personal conduct and behavior.
>
> "I respectfully request this court to uphold my First Amendment Rights and thereby protect me from diversified litigious attacks against my rights to believe, teach, practice, share, and live my sincere religious beliefs, both in the public square and elsewhere. Unlike the new right of sodomy-based marriage, those First Amendment Rights were foundational to the original establishment of this nation, indeed conditional to the original establishment of this nation, and have priority over other rights newly created by federal judicial fiat."

As Judge Enslen explains, the Free Exercise Clause, an *express* constitutional provision, logically takes precedence over a pretended constitutional right formulated from whole cloth by "five lawyers," as Chief Justice Roberts termed them, *Obergefell,* 576 U.S. at ——, 135 S.Ct. at 2612, 2624 (Roberts, C.J., dissenting), who have embarked on an unauthorized frolic in the field of public policy.

The Virginia Act for Establishing Religious Freedom further explained:

> "[T]he proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right...."

12 Hening, *Statutes,* at 85. If the natural tendency of *Obergefell* is to mandate that no citizen with religious scruples against same-sex marriage can hold the office of probate judge in Alabama, then that citizen has been deprived of "those privileges and advantages to which in common with his fellow-citizens he has a natural right."

After the ruling in *Obergefell* was announced, the entire staff of a Tennessee County Clerk's Office resigned to avoid violating their Christian convictions. A county clerk in Mississippi likewise resigned rather than issue marriage licenses to same-sex couples. Nicole Hensley, *Entire Tennessee County Clerk Staff Resigns over Supreme Court's Gay Marriage Decision,* N.Y. Daily News, July 4, 2015. [15] Here in Alabama some probate judges stopped issuing all marriage licenses. In Kentucky a county clerk, who decided in the wake of *Obergefell* to cease issuing all marriage licenses, was ordered by a federal district judge to issue marriage licenses to same-sex couples in violation of her religious principles. *Miller v. Davis* (No. 15–44–DLB, Aug 12, 2015) (E.D.Ky.2015). A chaplain at a Kentucky Juvenile Detention Center, after 12 years of ministering to juveniles, was banned from the facility because he would not agree to abide by a regulation that prohibits mentioning that homosexuality is a sin. Todd Starnes, *The Christian Purge has Begun: Chaplains Banned from Preaching that Homosexuality is a Sin,* FoxNews.com, Aug. 11.2015. [16]

***25** As James Madison stated in 1785:

> "[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

"A Memorial and Remonstrance," in 1 *Letters and Other Writings of James Madison* 163 (1865) ("*Letters and Writings* "). Joining a decision to repudiate the Fugitive Slave Act, Justice Abram Smith of the Wisconsin Supreme Court expressed similar sentiments: "It is much safer to resist unauthorized and unconstitutional power, at its very commencement, when it can be done by constitutional means, than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution." *In re Booth,* 3 Wis. 157, 201 n.a1 (1854) (Smith, J., concurring), rev'd sub nom. *Abelman v. Booth,* 62 U.S. 506 (1858). [17]

Foreseeing the dire consequences for religious freedom in the principle that same-sex marriage must be given equal stature with holy matrimony and foreseeing the inevitable pressure to compel religious institutions, businesses, and practitioners of professions to conform to that unreality, it would be imprudent to wait for the onset of these persecutions, to stand

idle until *Obergefell*'s "usurped power had strengthened itself by exercise, and entangled the question in precedents." Rather "the axe [must be] laid unto the root of the trees," *Matthew* 3:10, and the consequence avoided by denying the principle. To allow a simple majority of the United States Supreme Court to "create" a constitutional right that destroys the religious liberty guaranteed by the First Amendment violates not only common sense but also our duty to the Constitution.

V. The Supreme Law of the Land

Less than two weeks after *Obergefell* was released, the Louisiana Supreme Court relied on it to determine that the Louisiana law defining marriage as the union of a man and a woman could no longer be enforced. *Costanza v. Caldwell,* 167 So.3d 619 (La.2015). The Louisiana court stated that United States Supreme Court opinions " 'must be obeyed in order to maintain the law in its majesty of final decision.' " *Id.* at 621 (quoting *State v. Nichols,* 216 La. 622, 633, 44 So.2d 318, 321 (1950)). One Justice concurred but only because "*I am constrained to follow the rule of law* set forth by a majority of the nine lawyers appointed to the United States Supreme Court." 167 So.3d at 622 (Knoll, J., additionally concurring) (emphasis added). That Justice vigorously expressed her disagreement:

> "This is not a constitutionally-mandated decision, but *a super-legislative imposition* of the majority's will over the solemn expression of the people evidenced in their state constitutional definitions of marriage.
>
> ***26** "Moreover, the five unelected judges' declaration that the right to marry whomever one chooses is a fundamental right is *a mockery* of those rights explicitly enumerated in our Bill of Rights. Simply stated, it is *a legal fiction* imposed upon the entirety of this nation because these five people think it should be....
>
> "It is a sad day in America when five lawyers beholden to none and appointed for life can *rob the people* of their democratic process.... *I wholeheartedly disagree* and find that, rather than a triumph of constitutionalism, the opinion of these five lawyers is *an utter travesty* as is my constrained adherence to their *'law of the land'* enacted not by the will of the American people but by five judicial activists."

Id. (emphasis added).

I appreciate this Justice's critique of *Obergefell,* which parallels those of its four dissenters. Although this critique is devastating, I disagree with the conclusion that the "rule of law" requires judges to follow as the "law of the land" a precedent that is "a super-legislative imposition," "a mockery," "a legal fiction," and "an utter travesty."[18]

A. Do Supreme Court Decisions Automatically Become the "Law of the Land"?

Does an opinion of the United States Supreme Court, like *Obergefell,* which blatantly affronts the Constitution, automatically become the "rule of law" and the "law of the land?" Sir William Blackstone's *Commentaries on the Laws of England* became the "manual of almost every student of law in the United States"[19] during this nation's formative years. Blackstone stated that "*the law,* and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law ." 1 *Commentaries* *71. Blackstone understood that judges may make mistakes, but in *Obergefell,* according to the forceful dissents, the majority did not merely make a mistake of law, but instead judged not by the law, but by their own will. As Alexander Hamilton stated: "[I]f [the courts] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *The Federalist No. 78,* at 526.

Article VI, ¶ 2, of the United States Constitution defines "the supreme law of the land."

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

By the plain language of Article VI, state judges are bound to obedience to the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, *not* to the opinions of the United States Supreme Court.[20] Justice Joseph Story stated: "In the ordinary use of language it will hardly be contended that the decisions of

Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." *Swift v. Tyson,* 41 U.S. (16 Pet.) 1, 18 (1842), overruled by *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938).

***27** Alexander Hamilton, surely an authority on the Constitution, responding to arguments that the Supremacy Clause would allow the new national government to trample on the rights of the states, put the matter very plainly: "If a number of political societies enter into a larger political society," he wrote, "the laws which the latter may enact, *pursuant to the powers intrusted to it by its constitution,* must necessarily be supreme over those societies, and the individuals of whom they are composed." *The Federalist No. 33,* at 207 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). But if those powers were abused, the corresponding laws were *not* supreme.

> "But it will not follow from this doctrine that acts of the large society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such."

Id. Hamilton emphasized: "It will not, I presume, have escaped observation, that [the Supremacy Clause] *expressly* confines this supremacy to laws made *pursuant to the constitution* ...." *Id.* Thus, in the plainest terms and employing emphasis, Hamilton declared that acts of the federal government that invade the reserved rights of the states are "acts of usurpation" that deserve to be treated as such. Such acts "would not be the supreme law of the land, but an usurpation of power not granted by the Constitution." *The Federalist No. 33,* at 208.

The Supremacy Clause, quite obviously, by this chain of reasoning, does not give the United States Supreme Court or any other agency of the federal government the authority to make its every declaration by that very fact the supreme law of the land. If the Court's edicts do not arise from powers delegated to the federal government in the Constitution, they are to be treated not as the supreme law of the land but as mere usurpation. Hamilton offered an example of an invasion of the reserved powers of the states that is very close to the pretense of authority set forth in the opinion of the *Obergefell* majority.

> "Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?"

The Federalist No. 33, at 206. The laws of inheritance are inseparable from those laws that define the family and in particular the marital relationship. Writing in 1788, over two centuries before *Obergefell,* Hamilton understandably could not easily imagine the "forced constructions" of federal authority in that case that altered the very definition of marriage. But his example from the law of descent, intended to illustrate an absurdity, makes it clear that *Obergefell* is an act of usurpation that "will deserve to be treated as such."

***28** Nevertheless, so as not to be misunderstood, I emphasize that *judges are ordinarily obligated* to regard the opinions of the high court as valid precedent that should be followed. Blackstone eloquently stated the general rule that judges are to follow precedent:

> "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, has now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgments, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."

1 *Commentaries* *69. But he also stated a vital exception to that rule.

> "*Yet this rule admits of exception,* where the former determination is most evidently *contrary to reason;* much more if it be *contrary to the divine law.* But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is *manifestly absurd or unjust,* it is declared, not that such a sentence was *bad law,* but that it was *not law* ...."

Id. *69–70 (some emphasis added). Thus, if precedents are "manifestly absurd or unjust," "contrary to reason," or "contrary to the divine law," they are not to be followed.

Applying Blackstone's analysis, which is compatible with that of Hamilton, one must conclude that the *Obergefell* opinion is manifestly absurd and unjust, as demonstrated convincingly by the four dissenting Justices in *Obergefell* and the writings of two Justices of the Louisiana Supreme Court in *Costanza.* Basing its opinion upon a supposed fundamental right that has no history or tradition in our country,[21] the opinion of the *Obergefell* majority is "contrary to reason" as well as "contrary to the divine law." See *Murphy v. Ramsey,* 114 U.S. at 45 (defining "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the *holy* estate of matrimony" (emphasis added)); *Smith v. Smith,* 141 Ala. 590, 592, 37 So. 638, 638 (1904) (describing marriage as a "sacred relation"); *Goodrich v. Goodrich,* 44 Ala. 670, 675 (1870) (quoting a treatise for the proposition that " ' "[t]he relation of marriage is founded on the will of God, and the nature of man" ' " (quoted in *API,* —— So.3d at ——)).[22] The *Obergefell* opinion, being manifestly absurd and unjust and contrary to reason and divine law, is *not* entitled to precedential value.

B. The Military Analogy: The Duty to Disregard Illegal Orders

***29** I took my first oath to support the Constitution of the United States in 1965 at the United States Military Academy on the banks of the Hudson River at West Point, New York. On this very site General George Washington defended the northwest territory against British invasion during the Revolutionary War. I repeated that oath many times during my military service in Western Europe, Vietnam, and locations in the continental United States. Following my military service and upon graduation from the University of Alabama School of Law, I again took an oath to "uphold and support" the United States Constitution. As a private practitioner, deputy district attorney, circuit judge, and Chief Justice of the Alabama Supreme Court on two separate occasions, I took that oath and have administered it to other Judges, Justices, Governors, and State and local officials. In both civilian and military life the oath of loyalty *to the Constitution* is of paramount importance.

Although the United States military depends for its effectiveness on obedience to the chain of command, the principle that a subordinate has a duty to resist illegal orders is also well established. The duty to obey the orders of a superior is absolute "unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." United States Manual for Courts–Martial, Part II Rules for Courts–Martial, Chapter IX, Rule 916(d) ("Obedience to orders"). The oath I took as a cadet at the United States Military Academy at West Point stated, in part, "that I will at all times obey the *legal* orders of my superior officers, and the Uniform Code of Military Justice." 57 *Bugle Notes,* at 5 (1965) (emphasis added). Later, as a company commander in Vietnam, I knew the importance of following orders. The success or failure of a mission and the lives of others depended on strict adherence to the chain of command. The principle of obedience to superior orders is also crucial to the proper functioning of a court system. Nevertheless, the principle of obedience to superior officers is based on the premise that the order given is a *lawful* one.

At his court-martial, Lt. William Calley, a unit commander at My Lai in Vietnam who was convicted of killing 22 innocent civilians, defended himself by claiming that he was following the orders of his superior, Captain Ernest Medina. The military tribunal that considered Lt. Calley's appeal rejected his superior-order defense on the ground that the order he claimed to be following was clearly unlawful. Even if Lt. Calley had acted in obedience to orders, "he would nevertheless not automatically be entitled to acquittal. Not every order is exonerating". *United States v. Calley,* 46 C.M.R. 1131, 1183 (1973). "Military effectiveness depends upon obedience to orders. On the other hand *the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person.*" *United States v. Calley,* 48 C.M.R. 19, 26 (1973) (emphasis added).

***30** " '[T]he only exceptions recognized to the rule of obedience are cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness....

" 'Except in such instances of *palpable illegality,* which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly....' "

Calley, 48 C.M.R. at 28 (quoting William Winthrop, *Military Law and Precedents* 296–97 (2d ed. 1920 Reprint) (emphasis added)).

The same principle, engraved on a plaque at Constitution Corner at West Point, states: "Our American Code of Military Obedience requires that, should orders and the law ever conflict, our officers must obey the law. Many other nations have adopted our principle of loyalty to the basic law." Lt. Calley's conviction confirmed that the basic law remained intact. The same plaque in Constitution Corner reiterates this point even more emphatically: "The United States boldly broke with the ancient military custom of swearing loyalty to a leader. Article VI required that American Officers thereafter swear loyalty to our basic law, the Constitution."

Over 150 years ago, Justice Abram Smith of the Wisconsin Supreme Court, addressing the Fugitive Slave Act, 9 Stat. 462, expressed the same sentiment. Acknowledging his oath of loyalty under Article VI to uphold the Constitution, Justice Smith stated that "the duty of the [states] to watch closely and resist firmly every encroachment of the [federal government] becomes every day more and more imperative, and the official oath of the functionaries of the states becomes more and more significant." *In re Booth,* 3 Wis. 1, 24 (Smith, J.). Justice Smith recognized that state judges have a duty to resist unconstitutional federal usurpations of power:

> "But believing as I do, that every state officer who is required to take an oath to support the Constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the great principles and rights which it was intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. I know well its consequences, and appreciate fully the criticism to which I may be subjected. But I believe most sincerely and solemnly that the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty."

In re Booth, 3 Wis. at 22–23. President Andrew Jackson made the same point: "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." "Veto Message, July 10, 1832," 3 *A Compilation of the Messages & Papers of the Presidents* 1145 (James D. Richardson ed., 1897).

***31** If, as an individual who is sworn to uphold and support the United States Constitution, I were to place a court opinion that manifestly and palpably violates the United States Constitution above my loyalty to that Constitution, I would betray my oath and blatantly disregard the Constitution I am sworn to uphold. Acquiescence on my part to acts of "palpable illegality" would be an admission that we are governed by the rule of man and not by the rule of law. Simply put, the Justices of the Supreme Court, like every American soldier, are under the Constitution, not above it. James Madison warned that "the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution." *Madison's Report on the Virginia Resolutions,* in 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Jonathan Elliot ed., 1836) (hereinafter "*Elliot's Debates* "). As Chief Justice John Marshall explained in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 179–80 (1803): "[T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?" One scholar plainly states: "The courts are constitutional agents, and as such occupy an inferior position to the Constitution itself." Edward J. Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education,* 8 Harv. J.L. & Pub. Pol'y 399, 408 (1985).

In the *Dred Scott* case, "the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied right of slaveholders." *Obergefell,* 576 U.S. at ——, 135 S.Ct. at 2616 (Roberts, C.J., dissenting) (citing *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857)). The Court's holding that blacks could not be American citizens certainly was absurd and unjust, but no less so than the holding in *Obergefell* that "marriage" can now be defined as the union of two persons of the same gender.

C. Abraham Lincoln and the Limits of Judicial Power

In his First Inaugural Address, President Abraham Lincoln stated that the "evil effect" of an erroneous Supreme Court decision is bearable because the effects are limited to that one case:

> "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, *being limited to that particular case,* with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice."

***32** *Letters and Addresses of Abraham Lincoln* 195–96 (H.W. Bell ed., 1903) (emphasis added). The idea that Supreme Court decisions instantly become the "law of the land," however, he considered to be not only erroneous, but also dangerous to free government:

> "At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions *the people will have ceased to be their own rulers,* having to that extent practically resigned their Government into the hands of that eminent tribunal."

Id. at 196 (emphasis added).

Unless, as Lincoln taught, the "evil effect" of *Obergefell* is limited to the parties in that case, the people "have ceased to be their own rulers," having surrendered their government into the hands of a majority on the United States Supreme Court. As Justice Scalia states: "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." 576 U.S. at ——, 135 S.Ct. at 2627. Justice Ruth Bader Ginsburg, one of that majority, was quoted in a subsequent interview as candidly admitting that the Supreme Court in *Obergefell* intended to make or "establish" the law. The report of the interview quotes her as stating: "The law that the Supreme Court establishes is the law that [judges, lawyers, and the public] must live by...." Samantha Lachman & Ashley Alman, *Ruth Bader Ginsburg Reflects on a Polarizing Term One Month Out,* HuffingtonPost.com (July 29, 2015).[23] But, as stated above, the Supreme Court does not make law. That power belongs to legislatures or to the formal processes for enacting and amending constitutions.

Indeed, the Supreme Court in recent history has emphasized Lincoln's observation that judicial power is the power to decide particular cases, not to make general law. As envisioned by the Constitution, "[t]he Judiciary would be, 'from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution' ... *because the binding effect of its acts was limited to particular cases and controversies.*" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 223 (1995) (emphasis added) (quoting *The Federalist No. 78,* at 522). Indeed, Hamilton considered the judiciary to be the "least dangerous" branch and the damage caused by judicial overreaching to be inherently limited precisely because the impact of its decisions was confined to the case before it. "Thus, 'though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: ... so long as the judiciary remains truly distinct from both the legislative and executive.' " *Plaut,* 514 U.S. at 223 (quoting *The Federalist No. 78,* at 523). The presumption of the *Obergefell* majority to legislate for the entire nation on a

"vital question" by making a decision in a particular case is exactly the assumption of legislative power that Hamilton warned would endanger "the general liberty of the people" and Lincoln identified with the demise of self-government.

D. The Fallacy of Judicial Supremacy

***33** The general principle of blind adherence to United States Supreme Court opinions as "the law of the land" is a dangerous fallacy that is inconsistent with the United States Constitution.[24] Labeling such opinions as "the rule of law" confuses the law itself—the Constitution—with an opinion that purports to interpret that document.

Article VI, by its plain terms, binds "the judges in every state" to obedience to the Constitution itself, not to unconstitutional and illegitimate opinions of the United States Supreme Court. Just as the little boy in Hans Christian Andersen's tale pointed out that the Emperor, contrary to the assertions of his courtiers, was actually stark naked,[25] so also the "judges in every state" are entitled to examine Supreme Court opinions to see if they are clothed in the majesty of the law of the Constitution itself rather than in naked propositions of men with no cognizable covering from that document. As one political scientist observed: "[N]o fiction, however noble, can forever cloak a philosopher king with moral respectability. Soon or late, it seems, his nakedness appears; then we must begin again the struggle for law—for government by something more suitable than the will of those who for the moment hold high office." Wallace Mendelson, *Sex and the Singular Constitution: What Remains of Roe v. Wade?,* 26 PS: Political Science and Politics 206, 208 (1993).

The proposition that judgments of the United States Supreme Court are to be obeyed unquestioningly by a lower court regardless of their nonadherence to the Constitution, is known as the doctrine of judicial supremacy. A Princeton professor explains: "Judicial supremacy largely consists of the ability of the Supreme Court to erase the distinction between its own opinions interpreting the Constitution and the actual Constitution itself." Keith E. Whittington, *Political Foundations of Judicial Supremacy* xi (2007). By this alchemy the Court becomes the Constitution, and the actual content of the written charter becomes irrelevant except as literary decoration for its opinions.[26] "The constitutional text itself often plays only a subordinate role [in deciding cases]." Henry Paul Monaghan, *Supremacy Clause Textualism,* 110 Columbia L.Rev. 731, 793 (2010). This miracle of transforming Court opinions into constitutional substance "supposes a kind of transubstantiation whereby the Court's opinion of the Constitution ... becomes the very body and blood of the Constitution." Edward S. Corwin, *Court Over Constitution* 68 (1938). A political science professor states: "A formal constitutional oath to uphold the Constitution amounts, then, to an oath to follow the Court. This mirrors the subversion of the written Constitution: what began as a written fundamental law visible to all is translated into the ancient equivalent of legal french for the schooled few." George Thomas, *The Madisonian Constitution* 37 (2008).

***34** Opinions of the Supreme Court that interpret the Constitution are, as Lincoln said, "entitled to very high respect and consideration," but only insofar as they are faithful to that document. In a case like *Obergefell,* the "evil effects" Lincoln described should be confined to the unfortunate defendants in that case. We must protect the institution of marriage from judicial subversion and maintain loyalty to the principles upon which our nation was founded. Justice Sandra Day O'Connor, the first woman on the United States Supreme Court, stated: "A nation that docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely disappointed our founders." *The Majesty of the Law: Reflections of a Supreme Court Justice* 45 (2003).

Finally, we should reject the conversion of our republican form of government into an aristocracy of nine lawyers. Speaking at the North Carolina ratification convention in 1788, James Iredell, soon to be a Supreme Court Justice, explained that the Guarantee Clause[27] was placed in the Constitution so that "no state should have a right to establish an aristocracy or monarchy." 4 *Elliot's Debates,* at 195. If the Guarantee Clause is offended by a state's abandoning representative government, how much more is it offended by the judicial branch of the national government imposing an aristocratic form of government on every state in the union? The colonists, we should remember, charged King George III with "altering fundamentally the Forms of our Governments." Declaration of Independence para. 2.

E. Did Obergefell *Automatically Abrogate the March 2015 Orders in this Case?*

Lincoln taught that an order of the Supreme Court was limited to the parties in the case before the Court; beyond that it served merely as precedent. He agreed that *Dred Scott* as a

judicial judgment bound the parties to that case, but cautioned against granting it any broader scope. Likewise, following Lincoln's admonition, the ruling in *Obergefell* bound only the parties before the Court in that case. [28]

Some contend, however, that *Obergefell,* by its mere existence, abrogates the March 2015 orders in this case. Those orders, of course, were not the subject of review in *Obergefell.* On October 20, 2015, a panel of the United States Court of Appeals for the Eleventh Circuit summarily affirmed the order of the United States District Court for the Southern District of Alabama "requiring the issuance of marriage licenses to same-sex couples." *Strawser v. State* (No. 15–12508–CC, Oct. 20, 2015) (11th Cir.2015). "Since the filing of this appeal," the Eleventh Circuit stated, "the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in *Obergefell v. Hodges* .... " *Id* . That conclusion is plainly wrong.

For example, the United States Court of Appeals for the Eighth Circuit recently ruled that *Obergefell* did *not* directly invalidate the marriage laws of states under its jurisdiction. Applying *Obergefell* as precedent, the Eighth Circuit rejected the Nebraska defendants' suggestion that *Obergefell* mooted the case. The Eighth Circuit stated: "The [*Obergefell*] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee—*not Nebraska.* " *Waters v. Ricketts,* 798 F.3d 682, 685 (8th Cir.2015) (emphasis added). In two other cases the Eighth Circuit repeated its statement that *Obergefell* directly invalidated the laws of only the four states in the Sixth Circuit. See *Jernigan v.. Crane,* 796 F.3d 976, 979 (8th Cir.2015) ("not Arkansas"); *Rosenbrahn v. Daugaard,* 799 F.3d 918, 922 (8th Cir.2015) ("not South Dakota"). The United States District Court for the District of Kansas was even more explicit: " 'While *Obergefell* is clearly controlling Supreme Court precedent,' it 'did not directly strike down the provisions of the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses....' " *Marie v. Mosier,* [No. 14–cv–02518–DDC–TJJ, August 10, 2015] — F.Supp.3d —— (D.Kan.2015). Rejecting the Kansas defendants' claim that *Obergefell* mooted the case, the district court stated that "*Obergefell* did not rule on the Kansas plaintiffs' claims." *Id.*

***35** The opinion of the *Obergefell* majority initially agreed with this analysis, holding that "the State laws challenged by Petitioners *in these cases* are now held invalid." 576 U.S. at ——, 135 S.Ct. at 2605 (emphasis added). Toward the end of its opinion, however, the majority presumed to make its edict apply to the entire nation. "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry *in all States.*" 576 U.S. at ——, 135 S.Ct. at 2607 (emphasis added). But that holding is beyond its authority and should be regarded as dicta. As Lincoln observed in his first Inaugural Address and as Hamilton instructed in *Federalist No. 78,* a judicial decision is not a legislative enactment; it binds only the parties to the case. "Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them." *Additive Controls & Measurement Sys. v. Flowdata, Inc.,* 96 F.3d 1390, 1394 (Fed.Cir.1996). The Court had no jurisdiction to order nonparties to *Obergefell* to obey its judgment for they have not had an opportunity to appear and defend. "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." *Martin v. Wilks,* 490 U.S. 755, 762 (1989). Judge Learned Hand stated:

> "*[N]o court can make a decree which will bind any one but a party;* a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, *no matter how broadly it words its decree.* If it assumes to do so, the decree is pro tanto brutum fulmen, [29] and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court."

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832–33 (2d Cir.1930) (emphasis added).

Rule 65 of the Federal Rules of Civil Procedure, which governs the scope of the district court injunctions that were under review in *Obergefell,* states, in part:

> "(2) Persons Bound. *The order binds only the following* who receive actual notice of it by personal service or otherwise:
>
> "(A) the parties;
>
> "(B) the parties' officers, agents, servants, employees, and attorneys; and

> "(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."

Rule 65(d)(2), Fed.R.Civ.P. (emphasis added). No Alabama probate judges were parties to *Obergefell.* Neither were they officers, agents, or servants of any of the defendants in those cases, or in active concert or participation with any of them. The *Obergefell* defendants were state officials in the four states in the jurisdiction of the United States Court of Appeals for the Sixth Circuit, namely Kentucky, Michigan, Ohio, and Tennessee. Needless to say, Alabama probate judges were not agents, servants, or employees of any of those state officials. Nor were they in "active concert or participation" with any of them. Thus, the judgment in *Obergefell* that reversed the Sixth Circuit's judgment does not constitute an order to Alabama probate judges.

***36** Accordingly, the Eleventh Circuit was incorrect to hold that *Obergefell* abrogated the March orders in this case. Furthermore, this Court is " 'not bound by the decisions of the Eleventh Circuit.' " *API,* ——So.3d at —— (quoting *Ex parte Hale,* 6 So.3d 452, 458 n.5 (Ala.2008)). "Legal principles and holdings from inferior federal courts have no controlling effect here...." *API,* —— So.3d at —— (quoting *Glass v. Birmingham So. R.R.,* 905 So.2d 789, 794 (Ala.2004)). In a 1991 case, the United States Court of Appeals for the Ninth Circuit adopted a different position, holding that federal district court decisions did not bind state courts but that the decisions of the federal courts of appeal most likely did. "[T]here may be valid reasons not to bind the state courts to a decision of a single federal district judge-which is not even binding on the same judge in a subsequent action-that are inapplicable to decisions of the federal courts of appeals." *Yniguez v. State of Ariz.,* 939 F.2d 727, 736–37 (9th Cir.1991). On review, the United States Supreme Court termed this statement "a remarkable passage" and contrasted it with the following:

> "But cf. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617 (1989) ('state courts ... possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law'); *Lockhart v. Fretwell,* 506 U.S. 364, 375–376 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law)."

Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997). The Chief Judge of the Eleventh Circuit noted this commentary. Citing *Arizonans,* he stated: "The Supreme Court has rejected and disparaged as 'remarkable' a passage from a Ninth Circuit opinion saying that state courts are bound to follow rulings of the federal court of appeals in the circuit in which they are located." *Hittson v. GDCP Warden,* 759 F.3d 1210, 1278 (11th Cir.2014) (Carnes, J., concurring). Acknowledging that federal and state courts have independent and parallel obligations to interpret federal law, he stated: "[I]t is not the role of inferior federal courts, of which we are one, to sit in judgment of state courts on issues of federal law.... We have no more right to lecture state courts about federal law than they have to lecture us about it." *Id.* See also *Powell v. Powell,* 80 F.3d 464, 467 (11th Cir.1996) (noting "the dual dignity of state and federal court decisions interpreting federal law"). As the United States Supreme Court explained in *ASARCO v. Kadish,* 490 U.S. 605, 617 (1989): "Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law. U.S. Const., art. VI, cl. 2." 490 U.S. at 617.

***37** For the above reasons, the Eleventh Circuit is incorrect that *Obergefell* abrogated the March 2015 orders in this case. Additionally, a ruling of the Eleventh Circuit has no binding effect on this Court.

VI. Conclusion

The dissents of Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito provide ample justification to refuse to recognize *Obergefell* as a legitimate judicial judgment. *Obergefell* constitutes an unlawful purported amendment of the Constitution by a judicial body that possesses no such authority. As Chief Justice Roberts stated: "The right [*Obergefell*] announces has no basis in the Constitution or this Court's precedent ." 576 U.S. at ——, 135 S.Ct. at 2612.

In 1785, James Madison, widely recognized as the chief architect of the Constitution and who would later become the fourth President of the United States, wrote to the Virginia Assembly:

> "The preservation of a free Government requires, not merely that the metes and bounds which

> separate each department of power may be invariably maintained, but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves"

"A Memorial and Remonstrance," in 1 *Letters and Other Writings of James Madison* 163 (1865). In *Obergefell,* a bare majority of five Justices in the face of four vigorous and vehement dissents violated both requirements for "[t]he preservation of a free government." Rather than limiting themselves to the judicial function of applying existing law to the facts and parties before them, the *Obergefell* majority violated "the metes and bounds which separate each department of power" by purporting to rewrite the marriage laws of the several states to conform to their own view of marriage. Condemning this usurpation of the legislative function, Chief Justice Roberts in an adamant dissent explained that "this Court is not a legislature." 576 U.S. at ——, 135 S.Ct. at 2611. "Five lawyers," he lamented, "have closed the debate and enacted their own vision of marriage as a matter of constitutional law." 576 U.S. at ——, 135 S.Ct. at 2612.

Even more injurious to the rule of law, the *Obergefell* majority "overleap [ed] the great Barrier which defends the rights of the people" as expressed in the Free Exercise Clause of the First Amendment. The majority thus has jeopardized the freedom to worship God according to the dictates of conscience and the right to acknowledge God as the author and guarantor of true liberty. Justice Thomas in his dissent explained: "Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect." 576 U.S. at ——, 135 S.Ct. at 2638. Justice Joseph Story further explained: "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion." 2 Joseph Story, *Commentaries on the Constitution* § 1876 (2d ed. 1851).

***38** A vivid example of the practical effect of the unwarranted trampling of rights of conscience by the *Obergefell* majority is the jailing of a Kentucky county clerk for adhering to her religious conviction that God has ordained marriage as an institution that unites only a man and a woman. She stated: "To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience." Statement of Kentucky Clerk Kim Davis, Sept. 1, 2015.[30]

By transgressing "the metes and bounds which separate each department of power" and "overleap[ing] the great Barrier" which protects the rights of conscience, the *Obergefell* majority "exceed[s] the commission from which they derive their authority" and are "tyrants." By submitting to that illegitimate authority, the people, as Madison stated, become slaves. Free government, rather than being preserved, is destroyed.

Obergefell itself is the corrupt descendant of the Court's lawless sexual-freedom opinions that hearken back to *Griswold*—a "derelict in the stream of the law," *State Bd. of Ins. v. Todd Shipyards Corp.,* 370 U.S. 451, 457 (1962). The great irony of the Supreme Court's embrace of the homosexual campaign to redefine marriage is that the homosexual movement has embraced marriage only for the purpose of destroying it. The ultimate goal of that movement is to drive the nation into a wasteland of sexual anarchy that consumes all moral values.

Obergefell is completely without constitutional authority, a usurpation of state sovereignty, and an effort to impose the will of "five lawyers," as Chief Justice Roberts stated, 576 U.S. at ——, ——, 135 S.Ct. 2612, 2624, on the people of this country. Indeed, the *Obergefell* majority even presumes to override the Federal Rules of Civil Procedure, which limit the applicability of injunctions to parties, their agents, and those acting in concert with them.

Our forefathers would not have stood idly by to watch our liberties destroyed and our Constitution violated. James Madison stated in 1785 that "it is proper to take alarm at the first experiment on our liberties.... We revere this lesson too much, soon to forget it." "A Memorial and Remonstrance," in 1 *Letters and Writings,* at 163. I believe that in the *Obergefell* opinion and the response of many to it, we may have forgotten that lesson sooner than we ought.

In my legal opinion, *Obergefell,* like *Dred Scott* and *Roe v. Wade* that preceded it, is an immoral, unconstitutional, and tyrannical opinion. Its consequences for our society will be devastating, and its elevation of immorality to a special "right" enforced through civil penalties will be completely destructive of our religious liberty.

Why immoral?

> Because it elevates into a fundamental right that which was historically regarded by our law as "the infamous crime against nature," which fundamental right Justice Scalia ironically observes was "overlooked by every person alive at the time of ratification, and almost everyone else in the time since." 576 U.S. at ——, 135 S.Ct. at 2629.

Why unconstitutional?

> ***39** Because "the Constitution ... had nothing to do with it," 576 U.S. at ——, 135 S.Ct. at 2626 (Roberts, C.J., dissenting), and because it is a "distortion of our Constitution" that "ignores the text" of the Constitution. 576 U.S. at ——, 135 S.Ct. at 2631 (Thomas, J., dissenting).

Why tyrannical?

> Because the *Obergefell* opinion "shows that decades of attempts to restrain this Court's abuse of its authority have failed," 576 U.S. at ——, 135 S.Ct. at 2643 (Alito, J., dissenting), and because *Obergefell* "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" and "exploited by those who are determined to stamp out every vestige of dissent." 576 U.S. at ——, 135 S.Ct. at 2642 (Alito, J., dissenting).

In addition, *Obergefell* contradicts "the Laws of Nature and of Nature's God" that were invoked in the organic law upon which our country is founded. Declaration of Independence para. 1. To invariably equate a Supreme Court decision that clearly contradicts the Constitution with "the rule of law" is to elevate the Supreme Court above the Constitution and to subject the American people to an autocracy foreign to our form of government. Supreme Court Justices are also subject to the Constitution. When "that eminent tribunal" unquestionably violates the limitations set forth in that document, lesser officials—equally bound by oath to the Constitution—have a duty to recognize that fact or become guilty of the same transgression.

> " '[T]he central principle of a free society [is] that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from ... the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.' "

State v. Property at 2018 Rainbow Drive, 740 So.2d 1025, 1028 n.1 (Ala.1999) (quoting *United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 77 (1988)).

In face of the lawlessness of the *Obergefell* majority, I agree with the dissenting opinion of Chief Justice Roberts: "If you are among the many Americans ... who favor expanding same-sex marriage, by all means celebrate today's decision.... *But do not celebrate the Constitution. It had nothing to do with it.*" 576 U.S. at ——, 135 S.Ct. at 2626 (emphasis added).

As stated at the beginning of this special concurrence, the certificate of judgment in this case does not disturb the March 2015 orders of this Court that uphold the constitutionality of the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act. For that reason, as explained above, I concur.

STUART, Justice (concurring specially).

Motions and petitions are dismissed without explanation by this Court for numerous reasons as a matter of routine. When a Justice issues a writing concurring in or dissenting from an order summarily dismissing a pending motion or petition the writing expresses the explanation for the vote of *only* the Justice who issues the writing and of any Justice who joins the writing. Attributing the reasoning and explanation in a special concurrence or a dissent to a Justice who did not issue or join the writing is erroneous and unjust.

BOLIN and MAIN, JJ., concur.

BOLIN, Justice (concurring specially).

***40** In light of the United States Supreme Court's decision of *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584 (2015), in which a 5–4 majority declared, without

any constitutional basis, that same-sex applicants have a fundamental constitutional right to marriage, I concur in dismissing the "Motion for Clarification and Reaffirmation of the Court's Orders Upholding and Enforcing Alabama's Marriage Laws." I do not agree with the majority opinion in *Obergefell;* however, I do concede that its holding is binding authority on this Court. See *Howlett v. Rose,* 496 U.S. 356, 371 (1990)("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."). I am nevertheless bound by my conscience to write further to express my views concerning the *Obergefell* majority's lack of a legal basis for its opinion, as well as to recognize what I deem to be the possible effect of *Obergefell* upon Alabama's marriage-license laws left in its wake.

Moreover, as a preliminary matter, I would like to emphasize the seemingly obvious—that this Court's order, dismissing all pending motions and petitions in this case, is not an opinion of this Court. Rather, the order is simply a plain vanilla order of dismissal, with no accompanying explanation. A "dismissal order" or "order of dismissal" is defined as an order "ending a lawsuit without a decision on the merits." *Black's Law Dictionary* 1271 (10th ed.2014). Whereas, an order of "denial" is defined as "[a] refusal or rejection; esp., a court's refusal to grant a request presented in a motion or petition." *Black's Law Dictionary* 527 (10th ed.2014). Although arguably the difference between "dismissed" and "denied" is sometimes as semantic (i.e., in this proceeding) as it is substantive, I would posit that the more appropriate judicial order in this proceeding would be "denied." However, because I agree this case must end, I concur in this Court's "dismissal." I note also that there are six special writings attendant to this order of "dismissal." A special writing and, more specifically, a "special concurrence," is defined as "[a] vote cast by a judge in favor of the result reached, but on grounds different from those expressed in the opinion [if such be present] explaining the court's judgment or in order to state views not expressed by the court." *Black's Law Dictionary* 352 (10th ed.2014)(brackets added). In other words, a special concurrence is nothing more than a writing containing additional thoughts and/or commentary of the author, unless, of course, another Justice or Justices join in that special concurrence. I reiterate that of all the special writings generated by this Court's order of dismissal, *none of them, including this one, speaks the words of the Court.* In this regard, I join Justice Stuart's special writing commenting upon the same.

I. Fourteenth Amendment

***41** As Justice Scalia said in *Obergefell:*

> "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so....
>
> "... Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: *No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its 'reasoned judgment,' thinks the Fourteenth Amendment ought to protect.* ...
>
> "... States are free to adopt whatever laws they like, even those that offend the esteemed Justices' *'reasoned judgment.'* ..."

576 U.S. at ——, 135 S.Ct. at 2628–29 (Scalia, J., dissenting) (footnote omitted; some emphasis added). Apparently states are not always so free, because, as Justice Scalia further expressed:

> "They [the majority] have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since ."

576 U.S. at ——, 135 S.Ct. at 2629 (Scalia, J., dissenting).

The United States Supreme Court has stated that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997) (citations omitted). It is without dispute that the concept of same-sex marriage is not deeply rooted in either this Nation's or this State's history and tradition-or frankly anywhere. To the contrary, from its earliest days, circa 1800s, Alabama has, with little modification, provided a statutory scheme for the formal licensing and recognition of marriages as being between a man and a woman. In the decision previously issued by this Court that is the subject of the motions disposed of today, the

Court expounded on the genesis and historical framework of marriage:

> "Laws that include the concept of marriage as the union of one man and one woman, however, predate the inception of Alabama as a state in 1819. In 1805,—when Alabama was still a part of the Mississippi Territory—the legislature of the Mississippi Territory passed an act imbuing orphans' courts with the power to grant and issue marriage licenses. H. Toulmin, *Digest of the Laws of Alabama,* tit. 42, ch. 1, § 4 (1823). That act remained in force after the creation of Alabama as a state in 1819 and contained language referring to persons joined together as 'man and wife.' See H. Toulmin, *Digest of the Laws of Alabama,* tit. 42, ch. 1, § 6 (1823). Furthermore, in 1805, the plain, ordinary, and commonly understood meaning of the word 'marriage' was 'the act of joining: man and woman.' Webster, *A Compendious Dictionary of the English Language,* 185 (1806). Following Alabama's becoming a state in 1819, Alabama law continued to include the concept of marriage as the union of one man and one woman. See *Hunter v. Whitworth,* 9 Ala. 965, 968 (1846) ('Marriage is considered by all civilized nations as the source of legitimacy; the qualities of *husband* and *wife* must be possessed by the parents in order to make the offspring legitimate, where the municipal law does not otherwise provide.' (emphasis added)). In 1850, the Alabama Legislature conferred the power to issue marriage licenses to the newly created probate courts. 1850 Ala. Laws 26. This power was officially codified in 1852. See Ala.Code 1852, § 1949."

***42** *Ex parte State ex rel. Alabama Policy Inst.,* [Ms. 1140460, March 3, 2015] —— So.3d ——, —— n.18 (Ala.2015)("*API* "). Further, this Court made reference to

> "the provisions of Chapter 1 of Title 30 (and their predecessors dating back 200 years) by which the legislature has provided for the affirmative licensing and recognition of 'marriage,' including the provision in § 30–1–9 (and its predecessors) for the licensing of 'marriages' and the provisions in § 30–1–7 (and its predecessors) for the solemnization of 'marriages.' And it is clear that the term 'marriage' as used in all those laws always has been, and still is *(unless the courts can conjure the ability to retroactively change the meaning of a word after it has been used by the legislature),* a union between one man and one woman."

API, —— So.3d at —— (emphasis added).

In Alabama, in 1998 and 2006, the legislature and the people of this State, respectively, recommitted expressly to the vital nature of the meaning of marriage in our present statutory scheme:

> "Chapter 1 of Title 30, Ala.Code 1975, provides, as has its predecessor provisions throughout this State's history, a comprehensive set of regulations governing what these statutes refer to as 'marriage.' See, e.g., § 30–1–7, Ala.Code 1975 (providing for the solemnization of 'marriages'), and § 30–1–9, Ala.Code 1975 (authorizing probate judges to issue 'marriage' licenses). *In 1998, the Alabama Legislature added to this chapter the 'Alabama Marriage Protection Act,' codified at § 30–1–19, Ala.Code 1975 ('the Act'), expressly stating that '[m]arriage is inherently a unique relationship between a man and a woman' and that '[n]o marriage license shall be issued in the State of Alabama to parties of the same sex.'* § 30–1–19(b) and (d), Ala.Code 1975. *In 2006, the people of Alabama ratified [by 81 percent of the vote] an amendment to the Alabama Constitution known as the 'Sanctity of Marriage Amendment,' § 36.03, Ala. Const.1901 ('the Amendment'), which contains identical language.* § 36.03(b) and (d), Ala. Const.1901."

API, —— So.3d at —— (emphasis added).

Clearly, the State of Alabama has exercised its sovereign authority to define marriage as being inherently that relationship between a man and a woman by the authority that has exclusively been delegated to the states, including this State, to regulate, pursuant to the express language in the Ninth Amendment to the United States Constitution, part of the Bill of Rights (addressing the rights, retained by the people, that are not specifically enumerated in the Constitution) and the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Moreover, the people of Alabama have given voice to their sovereign state authority through ratification of the Sanctity of Marriage Amendment to the Alabama Constitution by an overwhelming 81 percent vote. Justice Kennedy, writing for the majority in *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675,

2691 (2013), acknowledged the above-mentioned authority when he referred to the well settled authority of each state to regulate its own laws regarding marriage and the definition of "marriage":

> ***43** "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina,* 317 U.S. 287, 298 (1942) ('Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders'). *The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' Ibid.* '[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] *the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.*' *Haddock v. Haddock,* 201 U.S. 562, 575 (1906); see also *In re Burrus,* 136 U.S. 586, 593–594 (1890) ('The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States')."

(Emphasis added.) Without comment concerning, or apology regarding, those words, only two years later the same Justice Kennedy, writing for the majority in *Obergefell,* reversed course and decreed that all states are now *required* by the Constitution to issue marriage licenses to same-sex couples. It bears repeating that this change of interpretation and direction came only two years after *Windsor* and in the words of the same Justice who authored that opinion. Although Justice Kennedy cited *Windsor* on six different occasions in *Obergefell,* he nonetheless made no attempt to distinguish his statement in *Windsor* that "[b]y history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Windsor,* 570 U.S. at ——, 133 S.Ct. at 2689–90. Rather, the *Obergefell* majority pulled from thin (legal) air a redefinition of marriage that is based not on any fundamental right deeply rooted in this Nation's history and tradition, but rather on its self-declared beliefs that same-sex couples should be allowed to marry because "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality"; "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there"; "[t]heir hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions"; "[t]hey ask for equal dignity in the eyes of the law"; and "[t]he Constitution grants them that right." 570 U.S. at ——, 135 S.Ct. at 2599, 2600, and 2608. Yielding to current social mores and temporal societal policy to recognize a fundamental constitutional right in a way not intended for the judicial branch of government, the majority in *Obergefell,* in the last phrase quoted above, is better understood to be saying: "We simply think that the Constitution should, and hereby does, grant them that right."

***44** The above-stated beliefs and accompanying conclusion, properly excoriated by the four *Obergefell* dissenters, are legislative rather than judicial in tone and nature and, again, ignore Supreme Court precedent to reach a desired societal result, which, as noted by Justice Scalia, "diminish[es] [the] Court's reputation for clear thinking and sober analysis." 576 U.S. at ——, 135 S.Ct. at 2630 (Scalia, J., dissenting). Rather,

> "[f]or today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right *simply because they believe that it is fundamental.*"

576 U.S. at ——, 135 S.Ct. at 2640–41. (Alito, J., dissenting) (emphasis added).

> "Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. *It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.*"

576 U.S. at ——, 135 S.Ct. at 2612 (Roberts, C.J., dissenting) (emphasis added).

Apparently the Constitution does leave doubt. Although I have many times not agreed with a decision of the United States Supreme Court, or a decision of the Alabama Supreme

Court for that matter, I have never criticized an opinion from any court in the manner in which I regrettably do so today. I am, however, able to count to five—and I know that five votes trump four; and, although that does not make it right, it does make it a majority opinion. In my humble judgment, the 5–4 majority does not make the *Obergefell* decision well reasoned or even based upon sound principles of established constitutional law. Rather, it only makes it binding authority for today-subject to being properly, and lawfully, reexamined and reconsidered in the future. In the meantime, it seems to me to be an opinion that defines the phrase *ipse dixit*—translated as meaning "he himself said it" or "[s]omething asserted but not proved." *Black's Law Dictionary* 956 (10th ed.2014). My translation—it is because, without foundation, they say it is.

II. Alabama Licensing Scheme—Aftermath

The foregoing being said, I am further compelled to concur specially to express my concern, which remains to be determined in future cases, that the *Obergefell* decision may have emasculated this State's entire statutory licensing scheme governing "marriage" to the point of rendering it incapable of being enforced prospectively. See Chapter 1, titled "Marriage," of Title 30, Ala.Code 1975. My concern arises because when some aspect of a law has been held to be unconstitutional, or unenforceable, due to some unforeseen practical difficulty or impossibility, or, as in this case, a judicially quickened version of the deliberative democratic process, it must be determined whether what is left can be enforced without the ineffective portion. In *API,* this Court acknowledged that

> ***45** "the contemplated change in the definition (or 'application' if one insists, although this clearly misapprehends the true nature of what is occurring) of the term 'marriage' so as to make it mean (or apply to) something antithetical to that which was intended by the legislature and to the organic purpose of Title 30, Chapter 1, would appear to require nothing short of striking down that entire statutory scheme."

—— So.3d at ——.

At this juncture, I express only my concern rather than my opinion because the issue of the future enforceability of Alabama's marriage-licensing statutes is not squarely before this Court. However, as it pertains to a state statute, the United States Supreme Court has, at least currently, observed that "*[s]everability [of a portion of a state statute] is of course a matter of state law.*" *Leavitt v. Jane L.,* 518 U.S. 137, 139 (1996) (emphasis added). This Court noted in *API* that to

> "allow the judiciary to declare by judicial fiat a new statutory scheme in place of the old, rather than leaving it to the legislative branch to decide what should take the place of the scheme being stricken, [is] contrary to well established state and federal principles of judicial review."

—— So.3d at —— n.19.

The issue of severability involves a question of statutory construction, which primarily involves ascertaining and giving effect to the intent of the legislature.

"This Court addressed the standard for ascertaining severability in *Newton v. City of Tuscaloosa,* 251 Ala. 209, 217, 36 So.2d 487, 493 (1948):

> " 'A criterion to ascertain whether or not a statute is severable so that by rejecting the bad the valid may remain intact is: The act "ought not to be held 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.*" *A. Bertolla & Sons v. State,* 247 Ala. 269, 271, 24 So.2d 23, 25 [(1945)]; *Union Bank & Trust Co. v. Blan,* 229 Ala. 180, 155 So. 612 [(1934)]; 6 R.C.L. 125, § 123.' "

King v. Campbell, 988 So.2d 969, 982 (Ala.2007) (emphasis added in *King*). The fallout from *Obergefell* may present a classic example of an inability to sever the remains of our statutory licensing scheme following the imposition of the newly crafted definition of "marriage" announced by the *Obergefell* majority. Arguably, this result appears inescapable, because the new definitional fiat is completely contrary to what this State's legislature has historically intended and enacted. Stated differently, Alabama's marriage-license provisions, Chapter 1 of Title 30, Ala.Code 1975, titled "Marriage," being the very heart and soul of our statutory licensing procedure, are dependent upon this State's

historical definition of "marriage" as a union of a man and a woman. Under the circumstances with which we are left and upon proper challenge, neither the probate judges, nor this Court, nor the other courts of this State, may have the practical ability to enforce our State licensing laws concerning the institution of marriage *in the manner contemplated by our legislature and our people.*

III. Conclusion

***46** The *Obergefell* majority declared that the constitutional authority and process for defining marriage is no longer a matter for the states; the *Obergefell* majority usurped both this authority and process, knowing what was best for us-an elitist view that is extrajudicial and condescending to the states under the 9th and 10th Amendments and to the citizenry and this country as a whole and, by the way, to the rule of law. With regard to this elitism and condescension, Justice Scalia succinctly noted that "[t]he opinion is couched in a style that is as pretentious as its content is egotistic." 576 U.S. at ——, 135 S.Ct. at 2630 (Scalia, J., dissenting), and that,

> "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresented panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation....
>
> "But what really astounds is the hubris reflected in today's judicial Putsch."

576 U.S. at ——, 135 S.Ct. at 2629 (Scalia, J., dissenting).

As tempting as it would be to reenact the type defiance the State of Georgia and President Andrew Jackson espoused when Georgia refused to comply with a Supreme Court order and President Jackson, decrying the Supreme Court and defending Georgia, purportedly stated: "[Chief Justice] John Marshall has made his decision, now let him enforce it"[31]—I cannot and will not go that far in defiance, because to do so would only placate the heart at the expense of the head; and, should anyone do so, our constitutional republic would begin to cease being a nation of laws and not of men; and, finally, to do so in this case could potentially render the licensing officials, i.e., the probate judges of the State, subject to personal civil liability for following their religious beliefs. And it is arguably not hyperbole to further contemplate that it could place those same licensing officials in the middle of an endgame stand-off with federal marshals and/or federalized national guardsmen on one side, with a contempt order from a federal court in hand, and state law-enforcement officers on the other, with a competing and conflicting state court order in hand. We have already had one war with kinsmen fighting kinsmen. We do not need another. Rather, we need to see that review of this wrong decision is done the right way—by constitutional means; otherwise, we would be in the same position as Chief Justice Roberts when he stated in the *Obergefell* decision: "Just who do we think we are?" 576 U.S. at ——, 135 S.Ct. at 2612 (Roberts, C.J., dissenting). In this regard, I join that portion of Part II of Justice Shaw's well reasoned special writing concerning defiance.

As respectfully as I can, albeit reluctantly, I concur in dismissing the petitioners' motions, and I further concur specially to note that the process of licensing of marriages in Alabama as we have known it may have been irreparably broken.

PARKER, Justice (concurring specially).

***47** I concur in the issuance of the certificate of judgment and in the dismissal of the pending motions and petitions. Dismissal, as distinct from denial, is not a decision on the merits. Thus, this Court is not denying on the merits matters of vital importance concerning the effect—or lack thereof—of *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584 (2015), on such issues as the issue of religious-liberty rights of individuals.

I concur specially to state that *Obergefell* conclusively demonstrates that the rule of law is dead. "Five lawyers"[32]—appointed to judgeships for life[33] and practically unaccountable[34] to the more than 320 million Americans they now arbitrarily govern—enlightened by "new insights" into the true meaning of the word "liberty," determined that "liberty" means that Americans have a new fundamental right only now discovered over 225 years since the Constitution was adopted. "Five lawyers," who have treated the Constitution as "a mere thing of wax ... which they may twist, and shape into any form they please,"[35] determined to impose their enlightenment on this nation in spite of the vast majority of the states having democratically refused again and again to redefine the divinely initiated institution of marriage. In marching this country "forward" to their moral ideal, the "five lawyers" composing the majority in *Obergefell* have trampled into the dust the last vestiges of the legitimacy of the United States Supreme Court.

Obergefell is not based on legal reasoning, history, tradition, the Court's own rules, or the rule of law, but upon the empathetic feelings of the "five lawyers" in the majority. What the late John Hart Ely said of another decision can be said of *Obergefell:* "It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 947 (1973). The majority in *Obergefell* does not set forth authorities that lead to its conclusion; it sets forth only sentiments that support its whim in this case to create a fundamental constitutional right. In order to reach this conclusion, the majority in *Obergefell,* having ascended to a new understanding of human liberty, threw off the restraints of the rule of law and history. Having by judicial will set themselves free from those "shackles," the majority then ushered in a new era of "liberty": court-pronounced dignity. Justice Hugo Black, an Alabamian, provided an apt description of what the United States Supreme Court has done in *Obergefell* in his dissent in *In re Winship,* 397 U.S. 358, 384 (1970):

> "When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.' "

***48** In *Cotting v. Godard,* 183 U.S. 79, 84 (1901), the United States Supreme Court stated:

> "It has been wisely and aptly said that this is a government of laws, and not of men; [36] that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

See also *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803)("The government of the United States has been emphatically termed a government of laws, and not of men."). By rejecting the rule of law, history, and the viewpoint of most states, the majority's approach in *Obergefell* explicitly rejects the idea that America is a government of laws and not of men. Instead, the majority illegitimately imposed its will upon the American people. We now appear to be a government not of laws, but of "five lawyers ."

In *Planned Parenthood v. Casey,* 505 U.S. 833, 865–66 (1992), a plurality of the United States Supreme Court stated:

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> "The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and *our contemporary understanding is such that a decision without principled justification would be no judicial act at all.* But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."

(Emphasis added.) See also *Michael H. v. Gerald D.,* 491 U.S. 110, 127 n. 6 (1989)("[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."). *Obergefell* is "no judicial act at all" because it is "without principled justification." *Casey,* 505 U.S. at 865. In

fact, it is without *any* legal justification at all. Accordingly, the United States Supreme Court's decision in *Obergefell* is without legitimacy. See *Republican Party of Minnesota v. White,* 536 U.S. 765, 793 (2002)(Kennedy, J., concurring) ("Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.").

***49** I also caution against the United States Supreme Court's inherent assertion in *Obergefell* that it is above the law, rather than being constrained to its constitutional function of interpreter of the law. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury,* 5 U.S. (1 Cranch) at 177–not to make it up as we go along. The majority in *Obergefell* was even so brash as to set aside the Supreme Court's own established rules in ignoring the requirement that, in order for a fundamental right to be recognized, it must be rooted in our nation's history. History has shown a proclivity to ignore the rules when they get in the way of a desired goal. Justice Joseph Story warned of such a practice:

> "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> "This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."

Joseph Story, *Commentaries on the Constitution of the United States* 127 (1833). Justice Sutherland stated the following in his dissent in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 404 (1937):

> "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections."

One should not be so naive to think that Justice Sutherland was warning of an event that has not already come to pass. In fact, *Obergefell* demonstratively evinces that the "mere moral reflections" of the judiciary's constitutional role no longer give any pause for reflection at all to a majority of the Justices on the United States Supreme Court. There appears to be no restraint on the judiciary, because "five lawyers" believe that they may simply decide, with no legal support whatsoever, that a particular fundamental right be created because they think it fair. This is not the rule of law, this is despotism [37] and tyranny. [38]

Despotism and tyranny were evils identified in the Declaration of Independence as necessitating the break with King George and Great Britain. In his dissent in *Loan Association v. Topeka,* 87 U.S. 655, 669 (1874), Justice Clifford defined judicial despotism as follows:

> "Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism."

***50** (Footnotes omitted; citing *Walker v. City of Cincinnati,* 21 Ohio St. 14, 8 Am. Rep. 24 (Ohio 1871).) Further, Montesquieu, in his enduring work "The Spirit of the Laws," stated:

> "*In despotic governments there are no laws; the judge himself is his own rule.* There are laws in monarchies; and where these are explicit, the judge conforms to them; where they are otherwise, he endeavours to

> investigate their spirit. In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honour, property, or life is concerned."

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans. 1752)(Kitchener 2001) (emphasis added).[39] *Obergefell* is the latest example of judicial despotism. It is a decision not based on law, but on the bare majority's philosophy of life. For the states to honor such a decision as legitimate is to bow our knee to the self-established judicial despots of America. "*[T]yranny is the exercise of power beyond right,* which no body can have a right to." John Locke, *Second Treatise of Government* 101 (C.B. Macpherson ed., 1980)(1690). As Thomas Jefferson wrote, "experience hath shewn, that even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny." Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, June 18, 1778, 2 *The Works of Thomas Jefferson* 414 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1904).

Edward S. Corwin, who popularized the term "judicial review," only settled on that wording for that phrase in 1909.[40] Corwin initially used the term "the doctrine of judicial paramountcy."[41] Corwin's original term captures the reality of judicial supremacy that has grown out of judicial review. But the version of judicial supremacy reflected in the majority's decision in *Obergefell* is far beyond earlier manifestations of judicial supremacy. As employed by the majority in *Obergefell,* it is the implicit claim to the supreme authority of the federal judiciary to decide any important political or social question confronting our country, whether the Constitution authentically addresses it or not (although the judges will contend that it does). Chief Justice Roberts refers to this as "the majority's extravagant conception of judicial supremacy." *Obergefell,* 576 U.S. at ——, 135 S.Ct. at 2624 (Roberts, C.J., dissenting). He describes the majority view of judicial supremacy as follows:

> "The role of the Court envisioned by the majority today ... is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making 'new dimensions of freedom ... apparent to new generations,' for providing 'formal discourse' on social issues, and for ensuring 'neutral discussions, without scornful or disparaging commentary.' *Ante,* at 2596–2597."
>
> ***51** *Id.* Chief Justice Roberts then puts this self-aggrandizing claim of power in historical context: "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges." 576 U.S. at ——, 135 S.Ct. at 2624. To use the term applied by Justice Scalia, this is an anti-constitutional "judicial Putsch." 576 U.S. at ——, 135 S.Ct. at 2629 (Scalia, J., dissenting).

As justices and judges on state courts around the nation, we have sworn an oath to uphold the United States Constitution. We have not sworn to blindly follow the unsubstantiated opinion of "five lawyers." As the Supreme Court of Utah boldly stated:

> "The United States Supreme Court, as at present constituted, has departed from the Constitution as it has been interpreted from its inception and has followed the urgings of social reformers in foisting upon this Nation laws which even Congress could not constitutionally pass. It has amended the Constitution in a manner unknown to the document itself. While it takes three fourths of the states of the Union to change the Constitution legally, yet as few as five men who have never been elected to office can by judicial fiat accomplish a change just as radical as could three fourths of the states of this Nation. As a result of the recent holdings of that Court, the sovereignty of the states is practically abolished, and the erst while free and independent states are now in effect and purpose merely closely supervised units in the federal system.
>
> "....
>
> "... We ... long for the return to the days when the Constitution was a document plain enough to be understood by all who read it, the meaning of which was set firmly like a jewel in the matrix of common sense and wise judicial decisions."

Dyett v. Turner, 20 Utah 2d 403, 405–06, 439 P.2d 266, 267–68 (1968). An illegitimate decision is due no allegiance; our allegiance as judges is to the United States Constitution.

The rule of law is of utmost importance to the sustainability of this nation and the foundation of American exceptionalism. Taking a line from the late Ronald Reagan, we as justices and judges have a crucial role to "preserve to our children this [constitutional republic based upon the rule of law], the last best hope of man on earth, or we'll sentence them to take the last step into a thousand years of darkness."[42]

MURDOCK, Justice (concurring specially).
I share many of the concerns expressed by my colleagues, not the least of which is the concern for religious liberty and the concern expressed by Justice Bolin in Part II of his writing. I write not to repeat those concerns, but to offer some related thoughts.

* * *

A group of judges can declare all it wants that two people of the same sex can "marry," but in the words of *The Federalist No. 78,*[43] they cannot change "the nature and reason of the thing" called marriage. In *Brown v. Allen,* 344 U.S. 443 (1953), Justice Jackson warned that "it is prudent to assume that the scope and reach of the Fourteenth Amendment will continue to be unknown and unknowable, that what seems established by one decision is apt to be unsettled by another, and that *its interpretation will be more or less swayed by contemporary intellectual fashions and political currents.*" 344 U.S. at 534 (Jackson, J., concurring in the result)(emphasis added). He further observed that the Supreme Court "may look upon this unstable prospect complacently, but state judges cannot." *Id.*[44] Justice Jackson summarized the problem this way:

> ***52** "Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that *regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.*"
> 344 U.S. at 535 (emphasis added). Justice Jackson's words were prescient.

Among other things, Justice Jackson's concerns bring to mind this colloquy:

> " 'I don't know what you mean by "glory,' " Alice said.
>
> "Humpty Dumpty smiled contemptuously. 'Of course you don't—till I tell you. I meant "there's a nice knock-down argument for you!' "
>
> " 'But "glory" doesn't mean "a nice knock-down argument,' " Alice objected.
>
> " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less .'
>
> " 'The question is,' said Alice, 'whether you can make words mean different things.'
>
> " 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

Lewis Carroll, *Through the Looking–Glass, and What Alice Found There* (Macmillan and Co., London 1872).

At least Carroll's protagonist was undertaking only to declare contemporaneously the meanings of his own words, not proposing to change the meanings of words used by others at some time in the past. *At best,* the federal courts are applying a new meaning to words after they have been spoken and written by others, including the Supreme Court itself in earlier opinions, state legislatures, and the people themselves in organic state law. Even viewed in this manner, what the federal courts are doing has the gravest of consequences. If we cannot depend upon the meaning of words as understood at the time the words were chosen by their speaker or writer, the ability to communicate any idea from one time to another is lost. The ability to communicate any truth from one time to another is lost. And therewith the rule of law.

In reality, however, the federal courts, including the Supreme Court, are doing something even more radical than "merely" changing the meaning of the word "marriage" after its use by others. They purport to engage in alchemy. To declare, as if they could do so, a change in the essential nature of the thing itself. That they purport to do so is appropriately met with the consternation expressed by Chief Justice Roberts when he exclaimed: "Just who do we think we are?" *Obergefell v. Hodges,* 576 U.S. ——, ——, 135 S.Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

Governments did not and do not create the institution of marriage. A civil government can choose to recognize that institution; it can choose to affirm it; and it can even take steps to encourage it. Governments throughout history have done so. But governments cannot change its essential nature. Marriage is what it is. No less so than any naturally occurring element on the periodic table. [45]

***53** Yet, here we are. The courts undertake to change—or at least declare a change in—the essential nature of the thing itself. It is not *just* that the existence of such an ability would make it impossible to communicate and maintain a rule of law (which it does) or even to communicate truths from one person or time to another (which it also does). To assume the ability to declare such a change presumes there is no objectively ascertainable, universally applicable and immutable—"unalienable" in the words of the Declaration of Independence—truth about the thing.

The postmodern philosophy of truth this represents is that each individual can decide for himself or herself what is true. In contrast, the Declaration of Independence and the United States Constitution reflect, and the drafters of the one and framers and ratifiers of the other believed in, a philosophy of objectively ascertainable truth. Truth that is external to each of us. Truth that informs a common value system against which to consider one another's ideas and conduct. Only out of such a universal truth can there arise "certain rights" that can themselves be universal—and unalienable.

So, in the end, perhaps the real question is this: Can the United States Supreme Court decide upon some philosophy of truth different from that assumed by the framers of the Constitution and by the Constitution itself—the same Constitution that gives that Court its very existence and its authority to make decisions? And impose this different philosophy of truth upon the people of this country? Where is the authority for that?

SHAW, Justice (concurring specially).

I concur with this Court's dismissal of the various postjudgment motions and requests in this case that ask this Court to enter an order defying the decision of the Supreme Court of the United States in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584 (2015). As discussed below, this Court's decision, *Ex parte State ex rel. Alabama Policy Institute,* [Ms. 1140460, March 3, 2015] —— So.3d —— (Ala.2015) ("*API* "), no longer has a field of operation or any legal effect.

I. The procedural background of today's ruling

API ordered the probate court judges of this State *who were not subject to a contrary federal court injunction* to continue to follow Alabama's marriage laws. [46] As I stated in my dissent to that opinion, I am of the view that this Court never had jurisdiction in this case under Ala. Const.1901, Art. VI, § 140(b), or Ala.Code 1975, §§ 12–2–7(2) and (3). *API,* —— So.3d at —— (Shaw, J., dissenting). Furthermore, I am also of the view that the petitioners had no right under Alabama law to pursue the petition in their own names or in the name of the State. I further objected to addressing issues no party had raised. *Id.* In short, I concluded that the petition was never properly before this Court and should have been dismissed at the outset. I continue to adhere to those views and that conclusion.

***54** Subsequent to, and perhaps as a result of, this Court's decision in *API,* all of Alabama's probate court judges were sued in the United States District Court for the Southern District of Alabama. *Strawser v. Strange,* 307 F.R.D. 604 (S.D.Ala.2015). All are now subject to a federal class action and an injunction forbidding them from enforcing Alabama's ban on the issuance of same-sex government-marriage licenses. *Strawser v. Strange,* 105 F.Supp.3d 1323 (S.D.Ala.2015). [47] Because of that federal court injunction, this Court's decision in *API, by its own terms,* no longer applies to them. See note 46, supra.

After the decisions in *Strawser,* one of the parties in this case filed in this Court a request to clarify and "reaffirm" the decision in *API* "despite" the contrary injunctions issued by the federal district court in *Strawser.* The Supreme Court of the United States later issued its opinion in *Obergefell* and held that the United States Constitution barred restrictions on the issuance of same-sex government-marriage licenses. This Court "invited" the parties to submit motions or briefs to address the impact of *Obergefell.* I did not concur with that invitation. In response, several parties in this case and others have now requested this Court to address the impact of *Obergefell* on *API.* Among the suggestions are that this Court can ignore *Obergefell* and that, essentially, this Court can and should order all probate court judges to ignore it too. As a result, we are urged to order our probate court judges to defy the federal court injunction against them. I initially found these post-decision requests to be extraordinary in nature: As explained below, this Court does not ordinarily entertain motions to clarify past cases in light of new Supreme Court

decisions, and the law is well settled that this Court can do nothing to allow the probate court judges of this State to ignore a federal court injunction and a Supreme Court decision.

When the Supreme Court of the United States issues a decision calling into question prior decisions of state courts, those prior state court decisions generally are not reopened. The same is true if this Court issues a decision calling into question its own past judgments or past judgments of lower courts. Any new issues are resolved in new litigation, if that is allowed under law. Post-decision filings, other than an application for rehearing, do not demand the use of time and judicial resources by this Court. Cases must end, even if the law later changes. *Our decision today refuses to grant the relief requested and should not be construed to mean anything else.* [48]

Those requests—whether so intended—opened the door for additional opinions to be issued by any Justice of this Court wishing to expound on *Obergefell.* For the reasons explained above, I saw no need for this Court to respond to the resulting requests, and *this Court correctly took no action.*

***55** However, on January 6, 2016, Chief Justice Moore, who until now has not voted in this case, issued an "administrative order" directing probate court judges to take a course of action contrary to the federal court injunction against them. [49] This action on his part, which I view as unauthorized, [50] now requires a response by this Court to the petitioners' requests for clarification.

II. This Court cannot stop a federal court action

A decision by this Court cannot stop the issuance of federally mandated same-sex government-marriage licenses; as I have previously expressed, this Court has never been in a position definitively to rule on whether Alabama's laws prohibiting same-sex government-marriage licenses were constitutional. *Ex parte State ex rel. Alabama Policy Inst.,* (No. 1140460, February 13, 2015) (order calling for answers and briefs) (Shaw, J., dissenting), [51] and *API,* —— So.3d at —— (Shaw, J., dissenting). As is now demonstrated, Alabama's probate court judges have always been subject to a federal court action, and the rulings of the federal district court have always had the potential of being underpinned by the decision in *Obergefell,* which the federal courts would have certainly enforced over the protestations of this Court.

We have now been invited to order Alabama's probate court judges to violate a federal court injunction. Even if this Court had the authority or the inclination to issue such an order, which it does not, the order would accomplish nothing because, if our probate court judges actually followed such an order, their defiance of the federal court injunction would subject them to punitive fines, fees, and sanctions by the federal government, the price of which would have to be paid —at least in part—by the taxpayers and would not stop the enforcement of the federal court decisions. Further, such a course of action would damage the institution of the Alabama Supreme Court and the rule of law, and it would not stop the issuance of federally mandated same-sex government-marriage licenses.

A. All courts follow United States Supreme Court decisions

It has long been understood in American jurisprudence that the decisions of the Supreme Court of the United States are to be followed by lower courts. *Obergefell* has been decided, and, as this Court has previously acknowledged: "Under Article VI of the United States Constitution, we are bound by the decisions of the United States Supreme Court." *Ingram v. American Chambers Life Ins. Co.,* 643 So.2d 575, 577 (Ala.1994). It is the accepted legal doctrine and the historic legal practice in the United States to follow the decisions of the Supreme Court as authoritative on the meaning of federal law and the federal Constitution. Arguments have been put forth suggesting that this doctrine and this practice are incorrect. *Those arguments generally have not been accepted by the courts in this country.* For example, in *Cooper v. Aaron,* 358 U.S. 1 (1958), the Supreme Court of the United States rejected the argument by certain state officials that they were not bound by that Court's decisions. [52]

***56** The idea that decisions of the Supreme Court of the United States are to be followed is not something new or strange. Thus, the members of this Court who would follow the *Obergefell* decision would not, as either Chief Justice Moore or Justice Parker suggests, be "bow[ing their] knee[s] to the self-established judicial despots of America," "blindly follow[ing] the unsubstantiated opinion of 'five lawyers,' " " 'shrink[ing] from the discharge' " of duty, "betray[ing]" their oaths, "blatantly disregard[ing] the Constitution," standing "idly by to watch our liberties destroyed and our Constitution violated," participating in the "conversion of our republican

form of government into an aristocracy of nine lawyers," or be adhering to a perceived "evil." —— So.3d at ——, ——. They would, quite frankly, be doing what the vast majority of past and present judges and lawyers in this country have *always* assumed the Constitution requires, notwithstanding the unconvincing arguments found in the requests before us and in the specially concurring opinion of Chief Justice Moore. I charitably say the arguments are "unconvincing" because *virtually no one has ever agreed with their rationales.*

I would further suggest that the idea that a decision of the Supreme Court does not have application outside the parties to that particular case or outside the federal circuit from which it originated [53] is, to be blunt, just *silly.* [54] A statement by a high court as to how that court would rule in every case is one of the very basic definitions of "law": lower courts follow higher court decisions because they know they will be reversed by the higher court if they do not. The people, judges, and lawyers, in turn, rely on those decisions as statements of the "law." People do not need to have the Supreme Court of the United States rule against them *individually* to know what that Court considers legal or constitutional. It is, to say the least, rather nonsensical judicial hairsplitting to suggest that the law has no application to people because they never had a court specifically render a judgment against them on that particular issue. Do we really think that it makes a difference that *Obergefell* did not originate in Alabama or that Alabama probate court judges were not parties to it? This peculiar argument, raised in the context of such strong opposition to *Obergefell,* simply looks like an excuse to avoid a court decision because one disagrees with it.

Conjuring up specious arguments to contend that the courts of this State suddenly do not have to follow the Supreme Court —despite doing so for nearly 200 years—is embarrassing. It does nothing but injure public confidence in the integrity and impartiality of the judiciary.

I further reject any implication that the dissenting Justices in *Obergefell* have "intimate[d]" or implied that the decision should be defied. I note that in *Davis v. Miller* (No. 15–A250, August 31, 2015), a Kentucky state official, Kim Davis, applied in the Supreme Court of the United States for a stay of an injunction that required her to issue federally mandated same-sex government-marriage licenses. The application was denied without any written dissents. If the dissenting Justices in *Obergefell* were sending coded messages to invite state officials to defy *Obergefell,* then would they have not at least issued dissents to denying relief to Davis, who was such a state official? [55]

***57** At least one Justice who dissented in *Obergefell* has previously suggested that when a judge disagrees with the law, defiance is *not* an option. Justice Antonin Scalia, in an article titled "God's Justice and Ours," *First Things* (May 2002), discussed the options of a judge morally opposed to the death penalty but called upon to rule in such a case:

> "I pause here to emphasize the point that in my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty-and if that fails, lead a revolution. But rewrite the laws he cannot do."

If a judge finds that he or she cannot abide by a controlling decision of a higher court, then that judge should resign from office. He or she should not indulge in the pretense that rebelling against a superior court's decision is an accepted judicial response. Such conduct does not show respect for or comply with the law; it does not promote public confidence in the integrity or impartiality of the judiciary. Instead, I believe that defiance would bring the judicial office into disrepute.

Additionally, I find curious this idea put forth by Chief Justice Moore that " 'the judges in every state' " may personally weigh the correctness of any Supreme Court decision and, if they disagree with it, then they may ignore it. —— So.3d at ——. If this were indeed the case, the Constitution would in no way be protected; instead, it would mean that there would be a different Constitution for every judge based on varying legal opinions. In *McDonald v. Chicago,* 561 U.S. 742 (2010), a mere "five Justices" of the Supreme Court held that the restriction in the Second Amendment on the federal government's infringing on the right to keep and bear arms also, through the Fourteenth Amendment, restricted the states. I obey that decision, *and not simply because I happen*

to agree with it. If I did not agree with it, I would still reject the argument that such disagreement would give me the license to ignore it.[56] Further, this Court recently held that an Alabama Code section that banned the possession of a pistol on the property of another violated the Constitution. *Ex parte Tulley,* [Ms. 1140049, September 4, 2015] —So.3d —— (Ala.2015). If the lower court judge, in his "legal opinion," disagrees with the "five lawyers" who concurred with this Court's "opinion that purports to interpret" the Constitution, may he ignore it, lest he "betray" his "oath and blatantly disregard the Constitution"? —— So.3d at ——. I think that this Court's reaction to such defiance would swiftly squash any such notion.

B. This Court's opinion of the correctness of Obergefell *is not material to our probate court judges*

***58** Whether this Court defies the Supreme Court does not matter, of course, because it is not *Obergefell* that truly controls the probate court judges of this State. Instead, those probate court judges are bound by a federal court injunction that was issued pursuant to a federal statute, 42 U.S.C. § 1983, *before Obergefell was even decided.* Article VI of the Constitution, the "Supremacy Clause," states that "the laws of the United States" trump state law: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." So, even if one believes the notion that a Supreme Court decision is not a "law" the Supremacy Clause requires state judges to obey, the federal statute pursuant *to which the federal court injunction* was issued against Alabama probate court judges still trumps a contrary order by this State Court. When our probate court judges are faced with conflicting federal and state court orders—here a federal injunction issued pursuant to § 1983, and directed to parties in that case, versus this Court's writ of mandamus—the federal court's order controls. *This is why no probate court in this State is currently complying with* API *or the Chief Justice's January 6 administrative order and issuing government-marriage licenses to opposite-sex couples but not to same-sex couples.* Is it seriously to be suggested that a decision by the Supreme Court of Alabama issued on its own volition can override the decision in a federal court action where the parties are under the jurisdiction of the federal court? Perhaps it distracts too much from the rhetorical points about defying *Obergefell* to admit that the probate court judges *still have to comply with the federal court injunction, no matter what we do in this case.* Even if this Court were to *right now* reject the Supreme Court's longstanding role as the final arbiter of the meaning of the Constitution and purport to defy its decision in *Obergefell,* Alabama's probate court judges are still subject to a lawsuit in a federal district court that would not give a *whit* about this Court's actions. In any event, if anyone believes that this Court can issue a ruling on these requests that would allow our probate court judges to legally continue Alabama's prohibition on the issuance of same-sex government-marriage licenses, such belief is refuted by 200 years of law and practice. We can express our well founded frustration at the unprecedented nature of *Obergefell,* but we cannot stop its effect. Judges should not lead the people of this State to believe otherwise.

III. Challenges to Obergefell *cannot come from this Court*

The debate over the legal and moral propriety of same-sex government marriage will certainly continue; but that debate has necessarily shifted to the court of public opinion. The issue, for all practical purposes, is now a political one. The genius of our Founding Fathers is reflected in our constitutional form of government, which dictates that whether *Obergefell* stands the test of time or ultimately finds itself cast upon the trash heap of history depends upon *the people* of the United States, who serve as the ultimate repository of political power and whose collective voices can be heard through their elected representatives at both the federal and state levels. See U.S. Const., art. V (setting out the procedure for amending the Constitution). If there is to be a showdown with respect to this issue, it could never have been led by this Court. Such a showdown must pit the judicial will of the highest court in the land against the greater political will of the people of this country.

***59** "To every thing there is a season, and a time to every purpose under the heaven ... a time to keep silence, and a time to speak...." *Ecclesiastes* 3:1–7. In accordance with my views concerning this Court's lack of jurisdiction, I believe that this Court should have dismissed this case at the outset; however, it is now time for *the people* to speak their conscience on the issue of same-sex government marriage, if they so choose.

Chief Justice Moore and Justice Parker have assumed for themselves the mantle of authority to declare a decision of the Supreme Court of the United States an illegitimate nullity. Justice Parker goes further to declare that the rule of law is dead. These are bold declarations from "two lawyers" sitting

on a court subject to the decisions of that higher court. To me, the irony of doing this while failing to address this Court's own lack of jurisdiction and its failure to follow its own well established rules of review is inescapable.

Equally troubling to me are the veiled criticisms directed toward other Justices *of this Court*—quoted above—who, despite principled reservations to the contrary, might follow well recognized, uncontroversial precedents that require the acknowledgment of the binding impact of *Obergefell* on lower courts. I cannot speak for all judges who understand that the rule of law expressed by a court of competent jurisdiction, and not the contrary opinion of a lower court judge, is the bedrock upon which our legal system was established and upon which its stability depends. I can say, however, that I have proudly fulfilled my oath of office since the day the people of Alabama first honored me in 2001 with the title "Judge" and placed on me the great responsibilities that go along with that title and that I have spent over 31 years in the service of my State striving to vindicate the rule of law and not to legislate from the bench. I am certainly no apologist for the Supreme Court of the United States, whose decisions have sometimes confounded me over the years. [57] But there is a right way and a wrong way under Alabama law and the United States Constitution for that Court's decisions to be questioned and addressed. Judges should act like judges, not frustrated policymakers, or, as Justice Scalia has suggested, they should resign on principle. Failure to do either, in my opinion, degrades public confidence in the judiciary.

IV. Chief Justice Moore's statement of nonrecusal

Normally, the Justices of this Court would not comment on another Justice's reasons for declining to recuse himself or herself in a case. That is a matter for the recusing Justice's conscience, and unlike the federal courts, [58] this Court has no mechanism for disqualifying one of its own members. However, Chief Justice Moore has used my name and my rationale in *Ex parte Hinton,* 172 So.3d 348 (Ala.2012), as support for the position he takes in his statement of nonrecusal. I am thus compelled to take the unusual step of disassociating my prior words from his current position.

***60** Chief Justice Moore notes that he issued an administrative order on February 8, 2015, instructing the probate court judges that they were not required to comply with certain federal court injunctions in cases in which they were not named parties. In this case, one of the prior issues raised was whether the probate court judges were required to adhere to that administrative order.

In *Hinton,* I noted that there exists a reasonable basis to question a judge's impartiality when he sits in appellate review of his decision as a lower court judge. Chief Justice Moore states that, for an analogous reason, he declined to vote in the previous orders in this case because his February 8, 2015, order "addressed the issue whether probate judges in Alabama were bound by" certain federal court injunctions, which was one of the issues raised in the case. —— So.3d at ——.

I noted in *Hinton* that the requirement to recuse one's self did not apply when the issues in the new case were not the same as the issues in the prior case the judge had addressed. Chief Justice Moore states that the issue addressed in his February 8 order—whether the probate court judges were bound by certain federal court orders—was "mooted" by this Court's decision in *API.* The Chief Justice states that there now exists a "*new* " issue: "[T]he effect of *Obergefell* on this Court's mandamus order [the *API* decision] that the probate judges are bound to issue marriage licenses in conformity with Alabama law." The "issue now before the Court," he says, " 'does not involve a determination of the correctness, propriety, or appropriateness' " of his February 8 order. —— So.3d at ——.

The February 8, 2015, administrative order is not the only order Chief Justice Moore has issued. On January 6, 2016, he issued a second administrative order. While stating in that order that he was "not at liberty to provide any guidance to Alabama probate judges on the effect of *Obergefell* on the existing orders of the Alabama Supreme Court," he went on to make the same arguments he makes in his special writing to explain that *Obergefell* did not impact this Court's prior decision. He then ordered the probate court judges to continue to apply *API.* These are the very things the motions before us *argue and call upon the Court to address.* Whether it can be claimed that the January 6 order did not actually address the same issues is not material; the focus should be on the *appearance* of impropriety, even if disqualification is not required by law. See Canon 3.C.(1)("A judge should disqualify himself in a proceeding in which his disqualification is required by law *or his impartiality might reasonably be questioned* ...." (emphasis added)); *Hinton,* 172 So.3d at 354 (" '[A] reasonable person has a reasonable basis to question the impartiality of a judge who sits ... to review his own decision ....' " (quoting *Rice v. McKenzie,* 581 F.2d 1114, 1117 (4th Cir.1978) (emphasis added))). The ethical

considerations here involve judicial prudence and discretion, not technicalities. My statement in *Hinton* in no way provides Chief Justice Moore with justification to participate or vote in this case. Whether any participation or vote by him violates the Canons of Judicial Ethics is an issue I do not address.

BOLIN, J., concurs as to Part II.A.

All Citations

--- So.3d ----, 2016 WL 859009

Footnotes

1 By contrast, Supreme Court Justice Ruth Bader Ginsburg presided at a same-sex wedding while *Obergefell* was pending before the Supreme Court, thus demonstrating her view of the merits of that very case. Maureen Dowd, *Presiding at Same–Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word "Constitution,"* New York Times, May 18, 2015.

2 The docket sheets for *Aereo* (No. 13–461) and *Scientific–Atlanta* (No. 06–43) can be found on the Supreme Court Web site. See http://www.supremecourt.gov. Copies of those docket sheets printed from the Web site are available in the case file of the clerk of the Alabama Supreme Court.

3 The United States Code, "the official codification of the general and permanent laws of the United States," includes the Declaration of Independence in the section entitled "The Organic Laws of the United States of America." See *Black's Law Dictionary* 1274 (10th ed.2014) (defining "organic law" as "[t]he body of laws (as in a constitution) that define and establish a government").

4 Sir William Blackstone described as an "aristocracy" that form of government in which the sovereign power "is lodged in a council, composed of select members." 1 *Commentaries* *49.

5 "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend IX. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.

6 This warning was quoted virtually verbatim in Justice White's majority opinion in *Bowers v. Hardwick,* 478 U.S. 186, 194 (1986).

7 In a concurring opinion Justice Shaw states that a judge who "cannot abide by a controlling decision of a higher court" should resign. —— So.3d at ——. In support of this assertion, he quotes from an article in which Justice Scalia criticized Justices on the Supreme Court who let their personal views of the morality of the death penalty override constitutional and state law to the contrary. Antonin Scalia, *God's Justice and Ours,* 2002 First Things 123 (May 2002). In *Obergefell,* a majority of five Justices supplanted state marriage laws with no authority whatsoever in the Constitution. Under Justice Scalia's logic, the Justices who elevated *Obergefell* above the Constitution they swore to uphold should themselves resign, and not state judges who uphold that sacred document.

8 By constitutionalizing attacks on the procreative core of marriage, the Supreme Court has greatly contributed to the erosion of this institution. See *Griswold v. Connecticut,* 381 U.S. 479 (1965), and *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (contraception); *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992) (abortion).

9 The Bible likens marriage to the relationship between Christ and the church. *Ephesians* 5:22–27. The *Obergefell* majority creates an unnatural form of marriage whose participants delight in "vile affections." *Romans* 1:26.

10 Justice Black is describing this philosophy, not agreeing with it. "For myself, I must with all deference reject that philosophy." *Griswold,* 381 U.S. at 522 (Black, J., dissenting).

11 Justice Holmes referred to this tendency of the Court to discover constitutional novelties in the Fourteenth Amendment as "evoking a constitutional prohibition from the void of 'due process of law.' " *Baldwin v. Missouri,* 281 U.S. 586, 596 (1930) (Holmes, J., dissenting).

12 One may reasonably surmise that in the era of fears about a population explosion, the Court felt that its duty to limit the reproduction of the masses superseded any fealty to the text of the Constitution. *Eisenstadt* represented the Court's first sustained assault on sexual morality and laid the groundwork for future decisions that were consistent with a policy of reducing population growth, either through abortion (killing the conceived) or homosexuality (promoting nonreproductive sexuality). In a 2009 interview, Justice Ruth Bader Ginsburg stated: "Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of." Emily Bazelon, *The Place of Women on the Court,* New York Times Magazine (July 7, 2009).

13 "By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts, using the technique of interpretation, to operate as a 'continuing Constitutional convention.' " *Coleman v. Alabama,* 399 U.S. 1, 22–23 (1970) (Burger, C.J., dissenting). As two scholars have noted, "[E]stablishing a tradition through reliance on Supreme Court cases is bootstrapping." *Nelson Lund & John O. McGinnis, Lawrence v. Texas and Judicial Hubris,* 102 Mich. L.Rev. 1555, 1610 (2004).

14 http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. (On the date this special writing was released, this information could be found at the preceding Web address.)

15 http://www.nydailynews .com/news/national/tenn–county–clerk–staffresigns–gay–marriage–ruling–article–1.2281567. (On the date this special writing was released, this information could be found at the preceding Web address.)

16 http://www.foxnews.com /opinion/2015/08/11/chaplains-banned-frompreaching-that-homosexuality-is-sin.html. (On the date this special writing was released, this information could be found at the preceding Web address.)

17 Booth was an abolitionist whom federal authorities charged with assisting in the escape of a captured fugitive slave. The Wisconsin Supreme Court affirmed the issuance of a writ of habeas corpus to release Booth from federal custody.

18 One Justice indeed dissented outright and stated: "Marriage is not only for the parties. Its purpose is to provide children with a safe and stable environment in which to grow. It is the epitome of civilization. Its definition cannot be changed by legalisms." *Costanza,* 167 So.3d at 624 (Hughes, J., dissenting).

19 James Iredell's Charge to the Grand Jury, *Case of Fries,* 9 Fed. Cas. 826, no. 5, 126 (C.C.D.Pa.1799). Iredell served as a Justice of the United States Supreme Court from 1790 to 1799.

20 "Senators and Representatives [of the United States], and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support *this Constitution.*" U.S. Const., art. VI, ¶ 3 (emphasis added).

21 See *Windsor v. United States,* 699 F.3d 169, 188 (2d Cir.2012), aff'd, 570 U.S. ——, 133 S.Ct. 2675 (2013) (noting that "same-sex marriage is unknown to history and tradition").

22 "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." *Genesis* 2:24. "Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge." *Hebrews* 13:4.

23 http://www.huffingtonpost.com/entry/ruth-bader-ginsburgtk_55b97c68e4b0b8499b18536b. (On the date this special writing was released, this information could be found at the preceding Web address.)

24 Justice Shaw's concurrence reflects his errant judicial philosophy of blind adherence to an unlawful, illegitimate, and unconstitutional decision of the United States Supreme Court. Because Justice Shaw was the only Justice in this case who declined to affirm the validity of the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act *before* the United States Supreme Court decision in *Obergefell,* and thereafter recommended to this Court that it take no further official action in this case, even after this Court requested further briefing from the parties, he is understandably upset that this Court now proceeds to act.

25 "The Emperor's New Clothes," in *The Annotated Hans Christian Andersen* 3–16 (Maria Tatar ed., 2008).

26 Justice Abe Fortas, for example, according to one of his clerks, viewed legal analysis as a "necessary form of packaging that had to be provided for things he wanted to do." Laura Kalman, *Abe Fortas: A Biography* 271 (1990). After revising one memorandum, Fortas returned it to his clerk with the brief order: "Decorate it." *Id.* at 271–72.

27 "The United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. Const., art. IV, § 4.

28 Justice Shaw terms my arguments about the scope of federal court decisions "silly" and "nonsensical." —— So.3d at ——. His comments demean the office he holds and diminish the dignity of this Court. He fails to distinguish between the scope of a federal court *judgment* and the precedential effect of a federal court *opinion.* The first is binding *as to the parties;* the latter is only precedent for future cases and is legitimately subject to skepticism if it lacks any basis in the Constitution. The doctrine of judicial supremacy, as propounded by Justice Shaw, would remove all moral responsibility from judges, whose sole duty would be to follow the orders of their superiors. Nuremberg has taught the perniciousness of such a doctrine.

29 "Pro tanto brutum fulmen" means "to that extent," "an empty threat." *Black's Law Dictionary* 234, 1417 (10th ed.2014).

30 http://www.lc.org/news room/details/statement–of–kentucky–clerk–kimdavis–1. (On the date this special writing was released, this information could be found at the preceding Web address.)

31 President Jackson's confrontation with the Supreme Court resulted from that court's holding unconstitutional a Georgia statute that allowed non-Indians to live among Indians only if they got a license to do so and swore an oath of loyalty to the State of Georgia. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 577–78 (1832). Samuel Worcester, a white northern

missionary, was convicted because he refused to do either. The Supreme Court held the Georgia statute unconstitutional, overturned Worcester's conviction, and ordered Georgia to release him. Georgia refused to do so. Tradition has it that President Jackson declared: "John Marshall has made his decision, now let him enforce it." Amy Coney Barrett, *Symposium Stare Decisis and Nonjudicial Actors,* 83 Notre Dame L.Rev. 1147, 1154 (2008). "Jackson was saved from a direct collision with the Court by the fact that he appeared to lack the authority to act. Timing and a procedural quirk had prevented the Supreme Court from dispatching the federal marshal to execute the judgment, and a federal statute authorized the President to intervene only if the marshal failed." 83 Notre Dame L.Rev. at 1155.

32 Chief Justice Roberts referred to the *Obergefell* majority three times as "five lawyers," 576 U.S. at ——, 135 S.Ct. at 2612, 2624 (Roberts, C.J., dissenting), instead of Justices, thus caustically pointing out that the five were not acting in a judicial role.

33 The dissents in *Obergefell* refer eight times to "unelected" judges.

34 The dissents in *Obergefell* refer twice to the "unaccountable" judges.

35 Thomas Jefferson, Letter to Judge Spencer Roane, Sept. 6, 1819, 12 *The Works of Thomas Jefferson* 137 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1905).

36 The historic phrase "a government of laws and not of men" was used by John Adams in the Massachusetts Declaration of Rights, pt. 1, art. 30. The State of Alabama adopted John Adams's provision almost verbatim in Art. III, § 43, Ala. Const.1901, thus incorporating this phrase into our organic law.

37 Despotism has been defined as "[a]bsolute power; authority unlimited and *uncontrolled by* men, *constitution,* or laws, and depending alone on the will of the prince...." 1 N. Webster, *An American Dictionary of the English Language* 59 (1828) (emphasis added).

38 Tyranny has been defined as "[a]rbitrary or despotic exercise of power; exercise of power over subjects and others with a rigor not authorized by law or justice, or not requisite for the purposes of government." 2 N. Webster, *An American Dictionary of the English Language* 99 (1828).

39 Montesquieu was the most frequently cited source in the establishment of the three branches of government. Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution,* 18 Pepp. L.Rev. 1, 24 (1990). "Among the delegates to the Convention, Montesquieu's writings were taken as 'political gospel.' Many such delegates read Montesquieu as preparatory material. Indeed, besides studying Montesquieu himself, Madison translated sections of The Spirit of the Laws for George Washington. Washington's notes reveal that he also studied Montesquieu in preparation for the Convention." *Id.*

40 Matthew J. Franck, "Introduction to the Transaction Edition," Edward S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays,* at xxi n.46 (Transaction Publishers, 2014) (citing Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment,* 7 Mich. L.Rev. 643 (1909)).

41 Franck, supra, at xxi n.45 (citing Edward S. Corwin, *The Supreme Court and Unconstitutional Acts of Congress,* 7 Mich. L.Rev. 606 (1906)).

42 Ronald Reagan speech "A Time for Choosing" (also known as "A Rendezvous with Destiny"), October 27, 1964.

43 *The Federalist No. 78,* at 404 (Alexander Hamilton) (George W. Carey and James McClellan eds., Liberty Fund, 2001).

44 Indeed, state courts often, as here, are the ones left with the task of enforcing whatever is left of state law in the aftermath of a decision such as *Obergefell v. Hodges,* 576 U.S. ——, 135 S .Ct. 2584 (2015). See *Ex parte State of Alabama ex rel. Alabama Policy Inst.,* [Ms. 1140460, March 4, 2016] —— So.3d ——, —— (Ala.2015)(Bolin, J., concurring specially, Part II); *Ex parte State of Alabama ex rel. Alabama Policy Inst.,* [Ms. 1140460, March 3, 2015] —— So.3d ——, —— n.19 and accompanying text (Ala.2015); see also *Ex parte Davis,* [Ms. 1140456, Feb. 11, 2015] —— So.3d ——, —— (Ala.2015) (Murdock, J., concurring specially).

45 Man can recognize, for example, the presence of oxygen in the atmosphere. He can affirm that oxygen is a good thing, and perhaps even maintain vegetation to encourage its production. But man can not change what oxygen is. Man might declare that henceforth oxygen atoms will have some different number or arrangement of protons, neutrons, and electrons, but that will not make it so. Nature has made oxygen as it is; it has made marriage as it is.

As John Finnis put it:

> "[L]aw is both secondary or even subordinate to, while regulating, other social institutions which it does not institute, whether they be reasonable and good (like proper forms of marriage and family, or less ambitious kinds of promising, not to mention religious communities and practices), or unreasonable, vicious, and harmful (like prostitution, slavery, or the vendetta). We should not imagine that market institutions or marriages or corporations await the emergence of 'power-conferring' rules of law. Legal rules are often ratificatory and regulative rather than truly

> constitutive, whatever their legal form and their role in creating the law's versions of the social practices and institutions upon which it, so to speak, supervenes."

John Finnis, *Philosophy of Law: Collected Essays: Vol. IV* 118 (Oxford Univ. Press 2011).

46 This Court's decision applied only where probate court judges were not under a federal court injunction. Specifically, this Court noted that the decision did not apply to Judge Don Davis, who was under a federal court order:

> "The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State *who, unlike Judge Davis* in his ministerial capacity, are not bound by the order of the federal district court in *Strawser[v. Strange* (Civil Action No. 14–0424–CG–C, Jan. 26, 2015)]."

—— So.3d at —— (emphasis added). Although this Court could have purported to order Judge Davis to disregard the federal court injunction, it did not do so.

47 At this time, the issue of how much the taxpayers will have to pay as a result of this litigation is undetermined.

48 For purposes of this Court's order, no material distinction exists between the "dismissal," as opposed to the "denial," of the postjudgment motions and requests. Whether cast as a substantive rebuke on the merits or as the rejection of a request to further consider a concluded case, this Court's order expresses a clear refusal to enter an order defying *Obergefell.*

Furthermore, the issuance of a certificate of judgment, which is also dictated by the order issued today, is a routine administrative task that is normally accomplished automatically by the clerk of the Court and is not voted upon by the Justices. A certificate of judgment in a mandamus matter is generally issued after the application for rehearing has been overruled, which occurred on March 20, 2015. However, because this case *was not an appeal,* the usual procedures for issuing a certificate of judgment under the Alabama Rules of Appellate Procedure, Rule 41, were not utilized. It is not clear to me that this Court has a procedure for issuing a certificate of judgment in this type of case—an original petition for mandamus relief—or that, because this Court was sitting as a trial court, one is even needed. The issuance of a certificate of judgment is a rote entry. Further, as explained below, it does not, and cannot, mean that the parties in this case may defy *Obergefell* or any federal court injunction against them.

49 Chief Justice Moore's order stated that in *API* this Court "issued a lengthy opinion upholding the constitutionality of Article I, Section 36.03(b), Ala. Const.1901 ('the Sanctity of Marriage Amendment'), and Section 30–1–19(b), Ala.Code 1975 ('the Marriage Protection Act')." He further noted that in *API* this Court stated that " 'Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act].' " In *Strawser,* the federal court declared § 36.03 and § 30–1–19 unconstitutional, declared that the probate court judges were enjoined from enforcing them, and declared that the probate court judges could not deny a license "because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by ... any injunction issued by the Alabama Supreme Court [i.e., *API,*] pertaining to same-sex marriage." *Strawser,* 105 F.Supp.3d at 1330. The January 6 order "ordered and directed" that "the existing orders of the Alabama Supreme Court [i.e., *API,*] that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect." Ordering and directing *that Alabama probate court judges* had a "duty not to issue any marriage license contrary to the Sanctity of Marriage Amendment or the Marriage Protection Act" is contrary to the federal district court injunction, which said that the probate court judges could not enforce those provisions. The order did more than address the hypothetical impact of *Obergefell* on *API;* it ordered and directed that the probate court judges continue to follow *API,* a course of action that would be contrary to the federal court injunction. The failure of the order to mention the federal court injunction did not negate that reality.

50 Although the Chief Justice of the Supreme Court has certain authority to perform "administrative tasks," Ala. Const.1901, art. VI, § 149, it is *this Court* that possesses the authority to "govern[ ] the administration of all courts." Ala. Const.1901, art. VI, § 150. The Chief Justice does not have the authority, on his or her own, to interpret the substantive legal effect of a decision of *this Court* and then to seek to enforce that decision against the parties in that action; in this case, it is *this Court* that possesses the "authority to interpret, clarify, and enforce its own final judgments." *State Pers. Bd. v. Akers,* 797 So.2d 422, 424 (Ala.2000).

51 I stated:

> "In order to grant relief to the petitioners, this Court will have to conclude that a probate court is forbidden from following an Alabama federal district court's ruling ..., which ruling both a federal appellate court and the Supreme Court of the United States have refused to stay pending appeal. In my view, the petition does not provide an adequate foundation for reaching such a conclusion."

52 President Abraham Lincoln may have believed that he, as the head of a branch of the federal government, had the right to disavow a decision of the head of another coordinate branch of the federal government. President Lincoln was not a lower court judge. Further, I would be hesitant to cite President Lincoln as an authority for the idea that the states can rebel against the federal government.

53 To the extent it is suggested that various federal courts have held that *Obergefell* applied to only certain states, I disagree. In *Waters v. Ricketts,* 798 F.3d 682, 685 (8th Cir.2015), *Rosenbrahn v. Daugaard,* 799 F.3d 918 (8th Cir.2015), *Jernigan v. Crane,* 796 F.3d 976 (8th Cir.2015), and *Marie v. Mosier,* [No. 14–cv–02518–DDC–TJJ, Aug. 10, 2015] —— F.Supp.3d —— (D.Kan.2015), the courts stated that *Obergefell* explicitly applied to the laws of other states only to note that it did not moot the litigation in those underlying cases; nevertheless, those courts specifically held that *Obergefell* rendered unconstitutional the same-sex government-marriage-license prohibitions they were addressing. To say that these cases somehow indicate that *Obergefell* does not impact Alabama has no basis.

54 Although Alabama's probate judges are not parties in *Obergefell,* as noted above, they *are* parties to a lawsuit pending in a federal court that will enforce *Obergefell.* I find the suggestion that *Obergefell* somehow does not impact them strange.

55 Recently, the Supreme Court issued a decision with no dissents in *James v. City of Boise,* —— U.S. ——, 136 S.Ct. 685 (2016), stating:

> "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, *and the constitution of the United States* would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.' *Martin v. Hunter's Lessee,* 1 Wheat. 304, 348 (1816).
>
> "The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."

(Emphasis added.)

56 *McDonald* was not a decision originating from Alabama. I could not ignore it based on the argument that it did not apply to Alabama parties or that I remained ignorant of how the Supreme Court would rule on the issue.

57 To this day, I have expressed *no opinion* with respect to *Obergefell* or the legality of same-sex government-marriage licenses because, given my previously expressed views on this Court's lack of jurisdiction in this case, the law will not let me. I have made no public comment on a proceeding pending before this Court, which is barred by Canon 3.A.(6), Alabama Canons of Judicial Ethics ("A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control."), and the Commentary to Canon 2, Alabama Canons of Judicial Ethics ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety.... He must, therefore, accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."). Further, I have not conducted myself in a manner that calls into question my integrity and impartiality, and I have avoided conduct prejudicial to the administration of justice that would bring the judicial office into disrepute, which are barred by Canon 2.

58 See 28 U.S.C. §§ 351–364.

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