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Honorable Julia Jordan Weller
Clerk Of The Court

IN THE SUPREME COURT OF ALABAMA

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

Petitioner,

v.

CASE NO. __________

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

Respondents.
_________________________________/

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF ISSUES

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

STATEMENT OF WHY WRITS SHOULD ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contrarily, probate judges are members of the judicial branch:

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

Art. VI, § 139(a), Ala. Const. 1901.

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

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

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

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

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

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

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

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

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

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

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

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

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

The required elements for mandamus relief are as follows:

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

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

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

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

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

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

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

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

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

2. Respondents refuse to perform an imperative duty.

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

3. Petitioner has no other remedy.

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

4. This Court's jurisdiction is properly invoked.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Respectfully Submitted,

s/ A. Eric Johnston

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CERTIFICATE OF SERVICE

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

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

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

MEMORANUM OPINION AND ORDER

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

I. Facts

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

EXHIBIT A

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

> (a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.
>
> (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
>
> (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
>
> (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
>
> (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.
>
> (f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
>
> (g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

ALA. CONST. ART. I, § 36.03 (2006).

The Alabama Marriage Protection Act provides:

> (a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."
>
> (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in

> order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.
>
> (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
>
> (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
>
> (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

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

II. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

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

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

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

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

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

JAMES N. STRAWSER and JOHN E. HUMPHREY,	)	
Plaintiffs,	)	
vs.	)	**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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.
>
> (d) No marriage license shall be issued in the State of Alabama to parties of the same sex.
>
> (e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.
>
> (f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.
>
> (g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

and

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

> (a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."
>
> (b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability

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

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

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

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

and

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

NOW THEREFORE, IT IS ORDERED AND DIRECTED THAT:

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

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

Should any Probate Judge of this state fail to

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

DONE on this 8th day of February, 2015.

____
Roy S. Moore
Chief Justice

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

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