IN THE SUPREME COURT OF ALABAMA

Ex parte STATE of ALABAMA ex rel. ALABAMA POLICY INSTITUTE, ALABAMA CITIZENS ACTION PROGRAM, and JOHN E. ENSLEN, in his official capacity as Judge of Probate for Elmore County, Petitioner, v. ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, et al., Respondents. _____/	**CASE NO. 1140460** **RELATORS ALABAMA POLICY INSTITUTE AND ALABAMA CITIZENS ACTION PROGRAM'S MOTION FOR CLARIFICATION AND REAFFIRMATION OF THE COURT'S ORDERS UPHOLDING AND ENFORCING ALABAMA'S MARRIAGE LAWS** **AND INCORPORATED MEMORANDUM OF LAW**

Relators ALABAMA POLICY INSTITUTE ("API") and ALABAMA CITIZENS ACTION PROGRAM ("ALCAP"), pursuant to Rule 27, Alabama Rules of Appellate Procedure, move the Court for an order clarifying and affirming the continued effectiveness and binding nature of this Court's orders upholding and enforcing Alabama's marriage laws. Relators are constrained to file this motion by a pair of orders entered May 21, 2015, by the Honorable Callie V.S. Granade, a judge of the United States District Court for the Southern District of Alabama, in the case *Strawser v. Strange*, No. 14-0424-CG-C, which orders mount a direct assault on this Court's sovereignty, jurisdiction and prior Orders vindicating the strong public

interest of the People of Alabama in enforcement of the State's duly enacted marriage laws. Relators state as follows in support of this motion:

THE *STRAWSER* INJUNCTION AND THIS COURT'S MANDAMUS ORDER

1. On January 26, 2015, in *Strawser*, Judge Granade entered an order (the "*Strawser* Injunction") purporting to hold 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"), unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

2. On March 3, 2015, this Court entered an Order (the "Mandamus Order") granting Relators' Emergency Petition for Writ of Mandamus (the "Petition"), and enjoining all Alabama probate judges "from issuing any marriage license contrary to Alabama law as explained in this opinion." (Mandamus Ord. at 133-34; 2015 WL 892752 at *43.) Summarizing the legal basis for granting the Petition, this Court held:

> 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.

(Mandamus Ord. at 133; 2015 WL 892752 at *43 (emphasis added).) In reaching its holding, this Court systematically and convincingly rejected the various rationales employed by the several federal courts which have held the United States Constitution to require states to redefine marriage to include same-sex couples, including the *Strawser* court, whether on Equal Protection or Due Process grounds. (Mandamus Ord. at 77-133; 2015 WL 892752 at *28-43.)[1]

THE NEW *STRAWSER* ORDERS

3. On May 21, 2015, Judge Granade entered a pair of orders purporting to **overrule** this Court's Mandamus Order enjoining Respondents to comply with Alabama's marriage laws. *See Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 2449251 (S.D. Ala. May 21, 2015) ("*Strawser* Certification Order"); *Strawser v. Strange*, No. 14-0424-CG-C, 2015 WL 2449468 (S.D. Ala. May 21, 2015) ("*Strawser* Class Injunction").

4. In the *Strawser* Certification Order, a copy of which is attached hereto as Exhibit A, Judge Granade purportedly

[1] On March 12, 2015, this Court entered an Order making the injunction of the prior Mandamus Order permanent as to all Respondents.

certified plaintiff and defendant classes with respect to the plaintiffs' claims that Alabama's marriage laws violate the Fourteenth Amendment to the United States Constitution. (Strawser Cert. Ord. at 17, 2015 WL 2449251 at *7.) The plaintiff class apparently consists of all persons who want to be married to a person of the same sex under Alabama law. (*Id.*) The defendant class supposedly consists 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 . . . .

(*Id.*)

5. In certifying the defendant class of all Alabama probate judges (who are currently bound by this Court's Mandamus Order), Judge Granade reasoned,

> 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.**

(Strawser Cert. Ord. at 10-11, 2015 WL 2449251 at *5 (emphasis added).)

6. In the *Strawser* Class Injunction, a copy of which is attached hereto as Exhibit B, Judge Granade relied on the same reasoning she employed in the original *Strawser* Injunction, holding the Marriage Amendment and the Marriage Act unconstitutional under the Fourteenth Amendment, and purported to preliminarily enjoin the enforcement of the laws by the defendant class of all Alabama probate judges. (*Strawser* Class Inj. at 5-7, 13, 2015 WL 2449468 at *3, 6.)

7. Judge Granade attempted to mask the new Class Injunction's obvious direct assault upon this Court's Mandamus Order with two sophomoric arguments which, as shown below, do not withstand even the slightest scrutiny. Said Judge Grenade:

> 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.**
>
> . . . . **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.** However, the choice should be simple. Under the Supremacy Clause, the laws of the United States are "the supreme Law of the Land."

(*Strawser* Class Inj. at 10, 2015 WL 2449468 at *4 (emphasis added).)

8. Then, in the portion of the Class Injunction granting preliminary relief, Judge Granade brazenly purported to directly **overrule** this Court's Mandamus Order:

> 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. . . . [T]he members of the Defendant Class may not deny [members of the plaintiff class] 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.**

(*Strawser* Class Inj. at 13, 2015 WL 2449468 at *6 (second emphasis added).)

CONTINUED EFFECTIVENESS OF THIS COURT'S MANDAMUS ORDER

9. As this Court recognized in the Mandamus Order, neither the lower federal courts nor state courts have the authority to review the decisions of the other "coordinate system" on federal questions. (Mandamus Ord. at 73.) "'Legal

principles and holdings from inferior federal courts have no controlling effect here . . . .'" (*Id.* at 74 (quoting *Glass v. Birmingham So. R.R.*, 905 So. 2d 789, 794 (Ala. 2004), and citing similar cases.) Ultimately, "[t]he 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.'" (*Id.* at 76 (quoting *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989).)

10. In the Mandamus Order, this Court rendered a binding judicial decision that rested on its own interpretation of the United States Constitution:

> 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.**

(Mandamus Ord. at 133; 2015 WL 892752 at *43 (emphasis added); *see also* Ord., Mar. 12, 2015, at 1, 2.)

11. To be sure, this Court's (correct) answer to the federal question was different from Judge Granade's (wrong) answer. This Court did not, however, purport to overrule the *Strawser* Injunction because the *Strawser* Injunction enjoined

only **one probate judge**, and only with respect to marriage licenses for **plaintiffs in that case**. (Ord., Mar. 10, 2015, at 4-9.)[2]

12. Judge Granade's new *Strawser* Class Injunction, by contrast, purports to overrule this Court's Mandamus Order by explicitly ordering all Alabama probate judges (the *Strawser* defendant class) to disregard and contemptuously violate this Court's Mandamus Order. (*Strawser* Class Inj. at 13, 2015 WL 2449468 at *6.)[3]

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[2] The original *Strawser* Injunction only enjoined the Alabama Attorney General from enforcing the Marriage Amendment and Marriage Act. Respondent Judge Don Davis was added as a defendant in *Strawser* after the original *Strawser* Injunction was issued, and enjoined to issue marriage licenses only to the same-sex couples who were plaintiffs in the case. 44 F. Supp. 3d 1206, 1208, 1210.

[3] Judge Granade devoted little discussion to the several federal abstention doctrines which counsel against unnecessary conflict with state court rulings. (*Strawser* Class Inj. at 10, 2015 WL 2449468 at *4 ("Defendants have not shown that any abstention doctrine applies to this case.") Judge Granade did not explain why, for example, the *Burford* doctrine should not be invoked: "Burford established that there are circumstances in which a federal court should decline to hear at all a case of which it has jurisdiction in order to avoid needless conflict with the states . . . ." 17A Charles Alan Wright, et al., Fed. Prac. & Proc. § 4241 (3d ed.).

Analysis of abstention principles might have, at least, counseled Judge Granade to declare her contrary view of the federal question but not enjoin the probate judges to commit contempt of this Court's Mandamus Order: "There may be unusual circumstances in which an injunction might be withheld

13. As shown above, Judge Granade has no authority to overrule a decision of this Court on a federal question. (*See supra*, ¶ 9.) Moreover, Judge Granade attempts to hide or justify her improper order upon two fallacies:

> **Fallacy #1: That the new *Strawser* Class Injunction is superior to this Court's Mandamus Order because the original *Strawser* Injunction was entered first.**

The original *Strawser* Injunction preceded the Mandamus Order in time, but unlike the Mandamus Order, Judge Granade's

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because . . . the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief." *Samuels v. Mackell*, 401 U.S. 66, 73 (1971); *see also Steffel v. Thompson*, 415 U.S. 452, 471 (1974) ("Though [a declaratory judgment] may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.").

Judge Granade did stay her Class Injunction "until the Supreme Court issues its ruling" in *Obergefell v. Hodges* and related Sixth Circuit cases. (*Strawser* Class Inj. at 14, 2015 WL 2449468 at *6.) However, it is unknowable whether the Supreme Court will affirm or reverse a state's right to define marriage, or whether it will do so on broad or narrow grounds. Thus, there is no basis to conclude that the Supreme Court's ruling on four cases from the Sixth Circuit will be self-executing as to *Strawser* or any other case pending outside the Sixth Circuit. Therefore, Judge Granade's stay falls short of ensuring the absence of conflict with this Court's Mandamus Order following the Supreme Court's impending ruling.

Injunction did not constitute a binding ruling on all probate judges regarding the issuance of marriage licenses to persons not parties to *Strawser*. Thus, the timing of the *Strawser* Injunction has no effect whatsoever on the effectiveness of the Mandamus Order.

> **Fallacy #2: That the new *Strawser* Class Injunction is superior to this Court's Mandamus Order because the former is grounded on the United States Constitution while the latter is grounded on Alabama law.**

In the Class Injunction, Judge Granade posits a patently false dichotomy facing Alabama probate judges: "complying with either Alabama's marriage laws [or] the United States Constitution as directed by this Court." (*Strawser* Class Inj. at 10, 2015 WL 2449468 at *4.) No reasonable reader of this Court's Mandamus Order, however, could erroneously conclude, as did Judge Granade, that this Court premised it solely upon Alabama law, and did not decide the federal question **under the United States Constitution**: "Nothing in the United States Constitution alters or overrides this duty." (Mandamus Ord. at 133; 2015 WL 892752 at *43.)

15. There is, therefore, no legal justification for Judge Granade's unprecedented attack upon the integrity of this Court. Judge Granade's new orders cast unnecessary

confusion upon Alabama's probate judges, which this Court can and should correct.

WHEREFORE, Relators API and ALCAP respectfully request this Court to enter an order clarifying and reaffirming the continued effectiveness of the Mandamus Order despite entry of the conflicting *Strawser* Class Injunction.[4]

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[4] This Court has recognized that its decisions on federal questions are subject to **review** by the United States Supreme Court. (Mandamus Ord. at 73, 2015 WL 892752 at *26.) However, if the Supreme Court holds that the United States Constitution requires all fifty states to redefine marriage, such a decision will not necessarily end the conflict between the *Strawser* Class Injunction and this Court's Mandamus Order. Given the self-evident reasoning against such a holding, rehearsed by this Court in the Mandamus Order, such a decision by the Supreme Court would naturally and immediately raise a question of legitimacy.

As Justice Sandra Day O'Connor candidly acknowledged in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992):

> 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. . . .** 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.**

505 U.S. at 865-866 (emphasis added).

Just years before, the Supreme Court had invoked legitimacy as a restraining principle in rejecting the creation of new fundamental rights in *Bowers v. Hardwick*:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is 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 design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, 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.**

478 U.S. 186, 194-95 (1986) (emphasis added), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

However, by the time the Supreme Court decided *United States v. Windsor*, __ U.S. __, 133 S. Ct. 2675, Justice Antonin Scalia appeared not wholly confident in the Court's

sense of legitimacy as applied to an inevitable decision on same-sex marriage, causing him to "promise . . . : **The only thing that will 'confine' the Court's holding is its sense of what it can get away with.**" 133 S. Ct. at 2709 (Scalia, J., dissenting) (emphasis added).

The Utah Supreme Court, in *Dyett v. Turner*, 439 P.2d 266 (1968), felt constrained to protest what it viewed as illegitimate usurpations of state sovereignty by the Warren Supreme Court:

> 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 do not believe that justices of once free and independent states should surrender their constitutional powers without being heard from. We would betray the trust of our people if we sat supinely by and permitted the great bulk of our powers to be taken over by the federal courts without at least stating reasons why it should not be so.** By attempting to save the dual relationship which has heretofore existed between state and federal authority and which is clearly set out in

> the Constitution, we think we act in the best interest of our country.
>
> We feel like galley slaves chained to our oars by a power from which we cannot free ourselves, but like slaves of old we think we must cry out when we can see the boat heading into the maelstrom directly ahead of us; and by doing so, we hope the master of the craft will heed the call and avert the dangers which confront us all. But by raising our voices in protest we, like the galley slaves of old, expect to be lashed for doing so. We are confident that we will not be struck by 90 per cent of the people of this Nation who 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. We shall not complain if those who berate us belong to that small group who refuse to take an oath that they will not overthrow this government by force. When we bare our legal backs to receive the verbal lashes, we will try to be brave; and should the great court of these United States decide that in our thinking we have committed error, then we shall indeed feel honored, for we will then be placed on an equal footing with all those great justices who at this late date are also said to have been in error for so many years.

439 P.2d at 267-68 (emphasis added).

This Court's Mandamus Order, and perhaps its disposition of this motion, may well inform the United States Supreme Court's sense of legitimacy, and "what it can get away with," in its impending marriage decision.

Respectfully submitted,

s/ Mathew D. Staver

Samuel J. McLure (MCL-056)
sam@theadoptionfirm.com
The Adoption Law Firm
PO Box 2396
Montgomery, AL 36102
334-612-3406

A. Eric Johnston (ASB-2574-H38A)
eric@aericjohnston.com
Suite 107
1200 Corporate Drive
Birmingham, AL 35242
(205)408-8893
(205)408-8894 FAX

Mathew D. Staver†
Fla. Bar No. 0701092
mstaver@LC.org
court@LC.org
Horatio G. Mihet†
Fla. Bar No. 0026581
hmihet@LC.org
Roger K. Gannam†
Fla. Bar No. 240450
rgannam@LC.org
LIBERTY COUNSEL
P.O. BOX 540774
Orlando, FL 32854-0774
(800) 671-1776
(407) 875-0770 FAX

†Admitted *Pro Hac Vice*

Attorneys for Relators

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of June, 2015, served copies of this motion, by e-mail transmission, as follows:

Attorneys for Resp. Reed

Robert D. Segall
segall@copelandfranco.com
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, AL 36101-0347

Thomas T. Gallion, III
ttg@hsg-law.com
Constance C. Walker
ccw@hsg-law.com
HASKELL SLAUGHTER & GALLION, LLC
8 Commerce Street, Suite 1200
Montgomery, AL 36104

Samuel H. Heldman
sam@heldman.net
THE GARDNER FIRM, P.C.
2805 31st St. NW
Washington, DC 20008

Tyrone C. Means
tcmeans@meansgillislaw.com
H. Lewis Gillis
hlgillis@meansgillislaw.com
Kristen Gillis
kjgillis@meansgillislaw.com
MEANS GILLIS LAW, LLC
P.O. Box 5058
Montgomery, AL 36103-5058

John Mark Englehart
jmenglehart@gmail.com
ENGLEHART LAW OFFICES
9457 Alysbury Place
Montgomery, AL 36117

Attorneys for Resp. King

Gregory H. Hawley
ghawley@joneshawley.com
Christopher J. Nicholson
cnicholson@joneshawley.com
G. Douglas Jones
djones@joneshawley.com
JONES & HAWLEY, PC
2001 Park Pl Ste. 830
Birmingham, AL 35203-2735

Jeffrey M. Sewell
jeff@sewellmcmillan.com
French A. McMillan
french@sewellmcmillan.com
SEWELL SEWELL MCMILLAN, LLC
1841 Second Avenue N.
Suite 214
Jasper, AL 35501

Attorneys for Resp. Martin

Kendrick E. Webb
kwebb@webbeley.com
Jamie Helen Kidd
jkidd@webbeley.com
Fred L. Clements
fclements@webbeley.com
WEBB & ELEY, P.C.
P. O. Box 240909
Montgomery, AL 36124

Attorneys for Resp. Ragland

George W. Royer, Jr.
gwr@lfsp.com
Brad A. Chynoweth
bac@Lanierford.com
LANIER FORD SHAVER & PAYNE, P.C.
P.O. Box 2087
Huntsville, AL 35804

Hon. John E. Enslen, *Pro Se*
jeenslen@gmail.com
PROBATE JUDGE OF ELMORE
COUNTY, ALABAMA
Post Office Box 10
Wetumpka, Alabama 36092

Luther Strange
ATTORNEY GENERAL,
STATE OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130-0152
smclure@ago.state.al.us

Attorneys for Hon. Don Davis
Lee L. Hale
Lee.hale@comcast.net
501 Church Street
Mobile, AL 36602

J. Michael Druhan, Jr.
mike@satterwhitelaw.com
Harry V. Satterwhite
harry@satterwhitelaw.com
SATTERWHITE, DRUHAN, GAILLARD
& TYLER, LLC
1325 Dauphin Street
Mobile, AL 36604

Mark S. Boardman
mboardman@boardmancarr.com
Teresa B. Petelos
Clay R. Carr
BOARDMAN, CARR, BENNETT,
WATKINS, HILL & GAMBLE, P.C.
400 Boardman Drive
Chelsea, AL 35043

Attorneys for
Hon. Valerie B. Davis
Albert L. Jordan
bjordan@wallacejordan.com
Susan E. McPherson
smcpherson@wallacejordan.com
WALLACE JORDAN RATLIFF &
BRANDT, LLC
Post Office Box 530910
Birmingham, AL 35253

s/ Roger K. Gannam
Roger K. Gannam
Attorney for Relators