

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

JAMES N. STRAWSER and JOHN E.)
HUMPHREY; ROBERT POVILAT and)
MILTON PERSINGER; MEREDITH)
MILLER and ANNA LISA CARMICHAEL;)
and KRISTY SIMMONS and MARSHAY)
SAFFORD,)

Plaintiffs,)

v.)

Civil Action No. 14-0424-CG-C

LUTHER STRANGE, in his official)
capacity as Attorney General for)
the State of Alabama, DON DAVIS,)
in his official capacity as Probate Judge of)
Mobile County, Alabama,)

Defendants.)

**PLAINTIFFS’ MOTION FOR
(1) LEAVE TO FILE SECOND AMENDED COMPLAINT ADDING ADDITIONAL
PARTIES AND PLAINTIFF AND DEFENDANT CLASSES;
(2) CERTIFICATION OF PLAINTIFF AND DEFENDANT CLASSES; AND
(3) PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs James N. Strawser and John E. Humphrey, Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay Safford respectfully file this motion seeking leave to file a Second Amended Complaint (“SAC”) that adds Kristi Ogle and Jennifer Ogle, Keith Ingram and Albert Holloway Pigg III, Gary Wayne Wright II and Brandon Mabrey (collectively, the “Named Plaintiffs”), individually and on behalf of other similarly situated persons, as Plaintiffs, adds Tim Russell, in his official capacity as Probate Judge of Baldwin County, as representative of a Defendant Class of similarly situated probate judges in the State of Alabama, and adds Defendant

Davis as a named representative of the Defendant Class. A copy of the proposed Second Amended Complaint is attached hereto as Exhibit A.

Plaintiffs further move the Court, pursuant to Federal Rule of Civil Procedure 23, for 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 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.”

Finally, pursuant to Federal Rule of Civil Procedure 65, Plaintiffs seek a preliminary injunction to direct proposed Defendant Russell, Defendant Davis, and the Defendant Class to issue marriage licenses to Plaintiffs and the Plaintiff Class, and to direct Defendants and the Defendant Class to refrain from enforcing all Alabama laws and orders that prohibit same-sex couples from marrying or that deny recognition of the marriages of same-sex couples.

Because of the important Constitutional protections at stake and the breadth and severity of the harms caused by the challenged laws to Plaintiffs and the Plaintiff Class, Plaintiffs request expedited consideration of these motions.

MEMORANDUM

On January 23, 26, and 28, 2015, in this case and in another case, *Searcy v. Strange*, No. 14-0208-CG-N, this Court entered a series of Orders declaring Alabama’s laws excluding same-sex couples from marriage unconstitutional and requiring issuance of marriage licenses to same-

sex couples and recognition of valid marriages of same-sex couples for all purposes. The Court stayed its Orders until February 9, 2015, in order to allow Defendant Luther Strange, Attorney General of Alabama, to seek a further stay from the federal appellate courts. Both the Eleventh Circuit and the Supreme Court of the United States denied Defendant Strange's requests for a further stay.

This Court's Orders of January 23, 26, and 28, 2015, enjoined Defendant Strange from enforcing Alabama's laws barring same-sex couples from marriage and refusing to recognize their marriages. In a subsequent order clarifying the Court's judgment in *Searcy*, this Court advised 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.

Searcy Order Clarifying Judgment, Doc. 65, p. 3 (quoting *Brenner v. Scott*, No. 4:14cv107–RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan 1, 2015)).

On February 9, Plaintiffs filed an Emergency Motion to File an Amended Complaint to add Mobile County Probate Court Judge Don Davis as a Defendant and to obtain a preliminary injunction compelling him to issue marriage licenses to same-sex couples.¹ Doc. 43. The motion to amend was granted the next day, and a preliminary injunction hearing, held on February 12,

¹ Judges of probate are authorized to issue marriage licenses in Alabama, *see* Ala. Code § 30-1-7, in the same way that court clerks are empowered to issue marriage licenses in other states. These duties are ministerial in nature, and not part of any judicial or discretionary function.

resulted in an order compelling Defendant Davis to issue marriage licenses to the current Plaintiffs and to recognize valid same-sex marriages. *See* Order, Doc. 55.

On March 3, the Alabama Supreme Court issued an order that essentially stopped same-sex marriage in Alabama, despite this Court's repeated determinations that Alabama's prohibitions violate the Fourteenth Amendment to the U.S. Constitution. *See* Doc. 71-1. Consequently, same-sex couples in Alabama are currently being denied the right to obtain marriage licenses by virtually all of Alabama's probate judges.² Consequently, Plaintiffs seek to avail themselves of the recourse described in this Court's January 28 Order Clarifying Judgment (*Searcy* Doc. 65) by seeking leave to file the attached Second Amended Complaint, which adds: (1) additional Plaintiffs both individually and as class representatives; (2) Tim Russell, in his official capacity as County Probate Judge of Baldwin County, as representative of a Defendant Class of similarly situated county probate judges in the State of Alabama; and (3) Defendant Davis as a named representative of the Defendant Class. Plaintiffs further seek certification of a Plaintiff Class of their claims and a Defendant Class of their defenses in this matter, as well as a preliminary injunction requiring the Defendant Class to issue marriage licenses without regard to the sexual orientation or gender of the applicants and to give equal recognition to the marriages of same-sex couples, as required by the Fourteenth Amendment to the United States Constitution.

I. The Court Should Grant Leave To Amend the Complaint.

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." Reasonable requests to amend should be viewed

² Plaintiffs have been given until March 13 to respond to Defendant Davis' Emergency Motion for Stay (Doc. 70). *See* Order, Doc. 72. In their response to the Emergency Motion, Plaintiffs will demonstrate to the Court why the Alabama Supreme Court order is no impediment to this Court's ability to grant the relief Plaintiffs seek herein.

with favor by the Court. *See* Wright and Miller, *Federal Practice and Procedure*, §1484, p. 417 and cases cited therein. Leave to amend should normally be granted unless the moving party is guilty of undue delay, bad faith, dilatory motive, or the proposed amendment will be futile or cause undue prejudice to the opposing party. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

The requested amendment will not disturb the schedule set by the Court in these cases. At all times in this action, Plaintiffs have acted in good faith and without delay. No prejudice will be experienced by any opposing party.

II. The Court Should Certify the Plaintiff and Defendant Classes.

A. A Plaintiff Class Should Be Certified.

Plaintiffs seek to certify a plaintiff class pursuant to Rules 23(a), 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. The rules' requirements are satisfied. First, the Plaintiff Class includes thousands of Alabamians, and joinder would be difficult. Second, the Named Plaintiffs' and Plaintiff Class members' claims present the common legal question of whether Defendants' enforcement of Alabama's laws excluding same-sex couples from marriage and refusing to recognize their marriages violate the Fourteenth Amendment to the U.S. Constitution. Third, the claims of the Named Plaintiffs are typical of – indeed, identical to – the claims of Plaintiff Class members because they arise from the enforcement of the same unconstitutional marriage laws. Fourth, the Named Plaintiffs are not adverse to any class member, and will adequately represent the class. Finally, because there is the risk of inconsistent or varying adjudications with respect to individual class members and because Defendants have declined to issue marriage licenses to same-sex couples for reasons that apply generally to the class, relief is appropriate respecting the class as a whole pursuant to Rule 23(b)(1)(A) and 23(b)(2).

1. The Plaintiffs Meet All of the Requirements for Certification of a Class Under Rule 23(a).

a. The Plaintiff Class Satisfies the Numerosity Requirement and Joinder is Impracticable.

The numerosity requirement of Rule 23(a) is satisfied when the number of potential plaintiffs is “so numerous that joinder of all members” of the class would be “impracticable.” Fed. R. Civ. P. 23(a)(1). Although there is no fixed number required to demonstrate numerosity, “generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.” *Cox v. Am. 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.”).

To meet this requirement, “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 v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 537 (N.D. Ala. 2001) (citations omitted), and “the court may make ‘common sense assumptions’ to support a finding of numerosity.” *Susan J. v. Riley*, 254 F.R.D. 439, 458 (M.D. Ala. 2008) (citing *Evans*, 696 F.2d at 930)). Furthermore, “[w]here the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity.” *Evans*, 696 F.2d at 930. Finally, the relevance of the numerosity requirement may be less significant where class-wide discrimination has been alleged, as is the case here. *See, e.g., id.*

Plaintiffs easily satisfy the numerosity requirement. According to 2010 Census data, Alabama is home to approximately 6,582 same-sex couples. *See* Declaration of Scott D. McCoy, Ex B. This data establishes a “reasonable inference” that more than forty of these individuals wish to, but cannot, obtain a marriage license. *See Ass’n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211

F.R.D. 457, 462 (S.D. Fla. 2002) (drawing inferences from U.S. Census Bureau Population Reports).

The Court may also consider the impracticability of joinder as supporting class certification. “Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion.” *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). Assessing impracticability requires “a common-sense approach which takes into account the objectives of judicial economy and access to the legal system.” *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993). Impracticable does not mean impossible.” *D.W. by M.J. v. Poundstone*, 165 F.R.D. 661, 670 n.3 (M.D. Ala. 1996). The potential class members in this case are geographically dispersed across the state in all three federal districts and in every county of Alabama, making joinder difficult. *See* Ex. B.

Therefore, based independently and collectively on the number of class members and the impracticality of joinder, the numerosity requirement of Rule 23(a)(1) is easily met here.

b. Named Plaintiffs’ and Plaintiff Class Members’ Claims Present Common Legal Questions – Namely, Whether Defendants’ Refusals to Issue Marriage Licenses Violate Their Fundamental Right to Marry and Right to Equal Protection.

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” This requirement is expressed in the disjunctive and is satisfied by a showing of either a common question of law *or* fact. Fed. R. Civ. P. 23(a)(2). The threshold for satisfying the commonality prerequisite is “not high.” *Groover v. Michelin N. Am., Inc.*, 187 F.R.D. 662, 666 (M.D. Ala. 1999) (citation omitted).

To meet the commonality requirement, there must be some issues that are susceptible to class-wide treatment. *Cooper v. Southern Co.*, 390 F.3d 695, 714 (11th Cir. 2004); *see also Nat’l*

Broad. Co. v. Cleland, 697 F. Supp. 1204, 1216 (N.D. Ga. 1988) (certifying defendant class where there was “one significant question of law” that was “common to the entire defendant class”); *Fla. Businessmen for Free Enter. v. Florida*, 499 F. Supp. 346, 350 n.3 (N.D. Fla. 1980) (“There is one question of law, and it is common to all members of the class.”). That is, “[t]heir claims must depend upon a common contention [that is] of such a nature that it is capable of classwide resolution.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). But while the claims of the class members must arise from the same event or practice and be based on the same legal theory, *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), the commonality requirement does not require that all class members’ claims be identical. *D.W.*, 165 F.R.D. at 670. “[F]actual differences among the claims of the putative class members do not defeat certification.” *Cooper*, 390 F.3d at 714.

Allegations of common discriminatory “policies” or “practices” that treat an entire class unlawfully, such as are alleged here, easily satisfy the commonality requirement. *Cox*, 784 F.2d at 1557-58; *D.W.*, 165 F.R.D. at 670 (“commonality requirement has clearly been met” where “Plaintiff, through his complaint, has launched a systematic attack on the standard admissions procedure of the Alabama [Department of Mental Health] for children who are committed due to mental illness”). Courts are further inclined to find commonality to be satisfied where, as here, the plaintiffs are requesting declaratory and injunctive relief enjoining a common course of conduct. *See* 7a Charles A. Wright, *et al.*, *Fed. Prac. & Proc. Sec.* 1763, at 226 (3d ed. 2005) (“[C]lass suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)”; *see also Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 47 (3d Cir. 1994) (commonality satisfied “where plaintiffs request declaratory and injunctive relief against a

defendant engaging in a common course of conduct toward them, and there is therefore no need for individualized determinations of the propriety of injunctive relief.”).

Here, Defendant Russell, Defendant Davis, and the proposed Defendant Class are enforcing Alabama’s laws prohibiting the issuance of marriage licenses to same-sex couples and thus have refused to issue marriage licenses to same-sex couples. *See supra* at 1-2 and *infra* at 15 (identifying defendant class members and practices). The refusal to issue marriage licenses to same-sex couples applies with equal force to all of the proposed Plaintiff Class members, and all have suffered the same injury: an inability to obtain a marriage license and to enter into a legally recognized marriage because they and their intended spouses are of the same sex.

Moreover, all of the Plaintiff Class members have the same legal claims – namely, that the enforcement of Alabama’s laws barring them from marriage violate their fundamental rights to marry and to equal protection of the laws under the Fourteenth Amendment. Classwide resolution of these claims “will resolve an issue that is central to the validity of each one of the [plaintiffs’] claims in one stroke.” *Wal-Mart Stores*, 131 S. Ct. at 2551.

Because the Plaintiff Class members present common – indeed, entirely overlapping – injuries and questions of law, they have satisfied the requirements of Rule 23(a)(2).

c. The Claims of the Named Plaintiffs Are Typical of the Class.

The Named Plaintiffs’ claims are also “typical of the claims . . . of the class,” thereby satisfying Fed. R. Civ. P. 23(a)(3). To establish typicality, the Named Plaintiffs must show that there is a “nexus between the class representative’s claims or defenses and the common questions of fact or law which unite the class.” *Kornberg*, 741 F.2d at 1337. “A sufficient nexus is established 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.” *Id.*

Each of the Named Plaintiff couples seeks to marry but is being refused a marriage license because they are of the same sex. Ogle Decl. (Ex. C) ¶¶ 2-4; Ingram Decl. (Ex. D) ¶¶ 3-4; Wright Decl. (Ex. E) ¶¶ 3-4. Their injury is shared by all unnamed members of the Plaintiff Class: the inability to obtain a marriage license in violation of the federal Constitution. *Kornberg*, 741 F.2d at 1337 (typicality satisfied when named plaintiffs' claims "arise from the same event or pattern or practice" as the claims of class members); *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 327 (S.D. Fla. 1996) (typicality satisfied when challenging "unified fraudulent scheme"); *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1357 (11th Cir. 2009) ("A class representative must . . . suffer the same injury as the class members in order to be typical under Rule 23(a)(3).") (quotation and citation omitted).

Because the Named Plaintiffs' injuries and legal claims are typical of the injuries and claims of the Plaintiff Class, the typicality requirement of Rule 23(a)(3) is satisfied.

d. The Named Plaintiffs Will Adequately Protect the Interests of the Class.

The Named Plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This adequacy of representation analysis "encompasses two separate 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) (quotation and citation omitted).

First, the Named Plaintiffs have no interests antagonistic to those of the class. All of the putative class members have a common interest in the relief sought in this case – the ability to obtain a marriage license from any probate court judge in Alabama. The relief sought by the Named Plaintiffs does not in any way conflict with the interests of the class.

Second, the Named Plaintiffs will adequately prosecute this action because each Named Plaintiff wishes to obtain a marriage license and to enter into a legally recognized marriage under Alabama law, and is being denied the opportunity to do the same. Furthermore, class counsel are qualified and prepared to adequately prosecute this action on behalf of the class. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (“The inquiry into whether named plaintiffs will represent the potential class with sufficient vigor to satisfy the adequacy requirement of Rule 23(a)(4) most often has been described to involve questions of whether plaintiffs’ counsel are qualified, experienced, and generally able to conduct the proposed litigation”) (quotations, citations, and alterations omitted). The attorneys representing the Named Plaintiffs are experienced in handling class actions and civil rights litigation, and have expertise in issues relating to the rights of same-sex couples. Class counsel are employed by four nationally recognized and highly respected organizations: National Center for Lesbian Rights (“NCLR”), Southern Poverty Law Center (“SPLC”), Americans United for Separation of Church and State (“AU”), and American Civil Liberties Union of Alabama (“ACLU”). These organizations have sufficient experienced personnel and financial resources to litigate this matter.

Because there is no conflict between the Named Plaintiffs and class members, and because class counsel has sufficient expertise to represent the class, Rule 23(a)(4) is satisfied.

2. The Requirements of Rule 23(b)(1)(A) and 23(b)(2) Are Satisfied.

Certification under Rule 23(b)(1)(A) is proper because prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama same-sex couples having access to marriage, or recognition for their valid marriage, and others not. In addition, prosecution of separate actions by individual members could result in adjudications with respect to individual members that, as a practical matter, would substantially

impair the ability of other members to protect their interests. *See, e.g., Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 303 (D. Neb. 2010) (certifying class under Rule 23(b)(1)(A) given need for a uniform determination of whether defendant's conduct violated the law); *Pichler v. UNITE*, 228 F.R.D. 230, 254 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d Cir. 2008) (certification proper under Rule 23(b)(1)(A) given risk of serial lawsuits and conflicting interpretations of the law).

Certification under Rule 23(b)(2) is also proper because Defendants and the proposed Defendant Class have "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). Civil rights cases "against parties charged with unlawful, class-based discrimination," like this matter, "are prime examples" of Rule 23(b)(2) class actions. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997).

"Two basic requirements must be met" to satisfy Rule 23(b)(2): "(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'l Sec. Ins. Co.*, 237 F.R.D. 685, 693-94 (M.D. Ala. 2006) (citing *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983)). Both requirements are satisfied here.

The term "generally applicable" does not require "that the party opposing the class . . . act directly against each member of the class." *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1386 (N.D. Ga. 1997) (quotation and citation omitted). Rather, the key is whether the defendants' actions "would affect all persons similarly situated so that [their] acts apply generally to the whole class." *Id.* Here, Defendant Russell, Defendant Davis, and the proposed Defendant Class have engaged in the constitutionally invalid action of enforcing Alabama's marriage ban and thus denying marriage

licenses to same-sex couples, thereby preventing those couples from exercising their fundamental right to marry and depriving them of equal protection of the laws. *See supra* at 1-2, 9, *infra* at 15 (identifying defendant class members and practices). This unlawful practice applies with equal force to all members of the proposed Plaintiff Class, placing Plaintiffs' claims "squarely within the ambit of Rule 23(b)(2)." *See Williams*, 237 F.R.D. at 693; *see also Holmes*, 706 F.2d at 1155 n.8 ("Injuries remedied through the (b)(2) actions are really group, as opposed to individual injuries."). Thus the first requirement of Rule 23(b)(2) is satisfied.

Further, the Named Plaintiffs seek declaratory and injunctive relief on behalf of the class. Second Amended Complaint (proposed, Ex. A). The requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58; *see also Ass'n for Disabled Ams.*, 211 F.R.D. at 465 (finding class certification under Rule 23(b)(2) appropriate when "the Class Plaintiffs sought exclusively injunctive relief based on their allegations"). Because the Plaintiff Class seeks only declaratory and injunctive relief, certification pursuant to Rule 23(b)(2) is appropriate.

3. The Proposed Plaintiff Class is Sufficiently Definite.

A class must also be "adequately defined and clearly ascertainable." *De Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "In other words, the class must meet a minimum standard of definiteness which will allow the trial court to determine membership in the proposed class," although "it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Earnest v. GMC*, 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)); *see also Neumont v. Monroe County, Fla.*, 198 F.R.D. 554, 558 (S.D. Fla. 2000) ("Case law is clear that there is no requirement

that every class member, other than the named plaintiffs, be identified at the outset of the litigation,” so long as class definition is “objective.”).

The proposed plaintiff class is objective and ascertainable. It consists 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. It will be a simple matter to determine whether any given individual is or is not a member of the class. *Id.*

B. The Defendant Class Should Be Certified.

Defendant class actions are authorized by Rule 23 of the Federal Rule of Civil Procedure, which provides that a class member “may sue or be sued” on behalf of a class. Fed. R. Civ. P. 23(a). Defendant classes have frequently been used to remedy civil rights violations. *See, e.g., Harris v. Graddick*, 593 F. Supp. 128, 137 (M.D. Ala. 1984) (underrepresentation of black poll officials); *Tucker v. Montgomery Bd. of Comm’rs*, 410 F. Supp. 494, 499 (M.D. Ala. 1976) (court costs for indigent parties); *Washington v. Lee*, 263 F. Supp. 327, 330-31 (M.D. Ala. 1966) (three judge court) (segregation in state penal system); *Hadnot v. Amos*, 295 F. Supp. 1003, 1005 (M.D. Ala. 1968), *rev’d on other grounds*, 394 U.S. 358 (1969) (voting rights); *Sims v. Frink*, 208 F. Supp. 431, 432 (M.D. Ala. 1962) (Alabama apportionment statutes). The practice is common when a plaintiff is challenging a law executed by multiple defendants at a local (rather than centralized state) level, like county magistrates, county sheriffs, local prosecutors, and voting officials.³

³ *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.

Indeed, several courts in the Eleventh Circuit have certified a defendant class of probate judges and other court officials under Rule 23.⁴

Plaintiffs seek to certify a Defendant Class, pursuant to Rules 23(a) and 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure, comprised of all Alabama probate judges who now refuse or will refuse in the future to issue marriage licenses to same-sex couples. This request meets the rules' requirements. First, the Defendant Class consists of 67 persons, and joinder would be difficult because these individuals are dispersed throughout three federal judicial districts and every county in the State of Alabama. Second, all Defendant Class members are faced with questions common to the entire class, namely whether their refusal to issue marriage licenses to same-sex couples violates the Plaintiff Class members' federal constitutional rights. Third, Defendant Russell and Defendant Davis operate under the same statutory scheme as the Defendant Class, so their defenses will be typical of the defenses that would be asserted by the Defendant Class.⁵ Fourth, Defendant Russell and Defendant Davis will adequately represent the class by defending their denials by reference to the Alabama marriage laws. Finally, because there is the risk of inconsistent or varying adjudications with respect to individual class members and because Defendants are enforcing the common state-wide marriage laws, certification under Rule 23(b)(1)(A) and 23(b)(2) is appropriate.

576 (N.D. Ohio 1986) (state prosecutors); *Harris*, 593 F. Supp. 128 (county officials responsible for appointing poll officials).

⁴ See, e.g., *Doss v. Long*, 93 F.R.D. 112, 120 (N.D. Ga. 1981) (defendant class of municipal judges and justices of the peace); *Tucker*, 410 F. Supp. at 499 (municipal court presiding officials); *Ruocco v. Brinker*, 380 F. Supp. 432, 433 (S.D. Fla. 1974) (state court clerks); *Hadnot*, 295 F. Supp. at 1005 (Alabama probate judges); *Sims*, 208 F. Supp. at 432 (Alabama probate judges).

⁵ Moreover, because there is no county residency requirement to obtain a marriage license in Alabama, any Plaintiff Class member may seek a marriage license at any Defendant Class member's office.

1. The Proposed Defendant Class Satisfies the Prerequisites of Rule 23(a).

A proposed defendant class must meet the same prerequisites under Rule 23(a) that a plaintiff class must satisfy: numerosity, commonality of questions of law or fact, typicality, and adequacy of representation. *Harris*, 593 F. Supp. at 137. Unlike a plaintiff class, however, a defendant class focuses on “the defendants’ anticipated defenses” to plaintiffs’ claims. 2 William B. Rubenstein, *Newberg on Class Actions* § 5:9 at 423 (5th ed. 2012) (hereinafter “*Newberg*”); see also *Harris*, 593 F. Supp. at 137 (noting that since claim was based on state-wide circumstances, “any defenses to the claim would be state-wide, and would be common and typical for all members of the class.”). In addition, a defendant class does “not require a voluntary representative, but merely an adequate one.” *Doss v. Long*, 93 F.R.D. 112, 117-18 (N.D. Ga. 1981); see also 2 *Newberg* § 5:11 at 432. These requirements are satisfied here.

a. The Defendant Class Satisfies the Numerosity Requirement and Joinder is Impracticable.

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable” Fed. R. Civ. P. 23(a)(1). “[T]he requirements of Rule 23(a)(1) are applied more liberally when certifying a defendant class than when certifying a plaintiff class.” *Alvarado Partners, L.P. v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); see also 2 *Newberg* § 5:6 at 415 (“courts may certify defendant classes with fewer members, and such classes typically contain fewer members”). The Defendant Class easily satisfies Rule 23(a)(1).

First, the number of proposed Defendant Class members is sufficient to establish numerosity. See *supra* at 6-7 (discussing cases). Here, the Defendant Class consists of 67 probate judges. See *supra* at 1-2, 15 (identifying defendant class members). The numerosity requirement may therefore be presumed. *LaBauve*, 231 F.R.D. at 665.

Second, the geographic dispersion of the proposed class supports certification. *See supra* at 6-7 (discussing case law). The potential Defendant Class members in this case span 67 counties and the state's three federal judicial districts, making joinder difficult. *See supra* at 1-2, 15 (identifying defendant class members).

Third, Rule 23(a)(1) is satisfied because an order certifying the Defendant Class fosters judicial economy. *See supra* at 7 (discussing cases); *see also* 2 *Newberg* § 5.5 at 414 ("Perhaps because allowing suits to proceed as defendant class actions where Rule 23's other criteria are satisfied avoids a multiplicity of suits, Rule 23(a)(1) is rarely deemed problematic in defendant class actions."). Here, certification of the Defendant Class would consolidate all parties and defenses in a single proceeding, thus preventing the re-litigation of identical issues in multiple suits around Alabama. The Defendant Class will also eliminate the need for ancillary or follow-up legal proceedings against many defendants throughout the State once the core determination of the legal issues is made by this Court. *See Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968) ("The larger the potential class, the more advantageous it is for the litigants (on both sides), and the courts generally, to have common issues resolved finally in a single action.").

For these reasons, the proposed Defendant Class satisfies Rule 23(a)(1).

b. There are Questions of Law and Fact Common to the Named Defendant and the Defendant Class.

Rule 23(a)(2) requires there to be "questions of law or fact common to the class." *See supra* at 7-9 (discussing cases). In this case, Defendant Russell, Defendant Davis, and the proposed Defendant Class have engaged, and are currently engaging, in practices that share the same common purpose or effect: they are all enforcing Alabama's laws barring same-sex couples from marriage. *See supra* at 1-2, 9, 15 (identifying defendant class members and practices).

Russell and Davis’s refusals to issue marriage licenses to same-sex couples raise the same legal questions that are common to the entire Defendant Class: does their enforcement of Alabama’s laws barring same-sex couples from marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

These questions are common to the entire Defendant Class, so the requirements of Rule 23(a)(2) are met.

c. The Defenses of the Defendants are Typical of the Defendant Class.

Rule 23(a)(3) requires that the “defenses of the representative parties are typical of the . . . defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Rule 23(a)(3) is satisfied when each class member’s defense arises from the same course of events, and each class member makes similar legal arguments to defend against the plaintiff’s allegations.” *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (quotation, citation, and alterations omitted); *see also supra* at 9-10 (discussing cases). While the defenses of the class representative must be typical, they “need not be identical to those raised by other class members, and it is only when there is a unique defense forwarded by the representative which will consume the merits of the case that a court should refuse to certify a class based on a lack of typicality.” *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 588 (S.D. Ohio 1987); *see also Thillens, Inc. v. Cmty. Currency Exch. Ass’n.*, 97 F.R.D. 668, 678 (N.D. Ill. 1983) (“substantial similarity is sufficient”); 2 *Newberg* § 5:10 at 427 (“[t]he representative’s defenses need not be identical to or coextensive with those of the class, only similar . . .”).

The defenses of Defendant Russell and Defendant Davis will be typical of the defenses of the proposed Defendant Class because all of the class members operate under the same statutory framework and have the same ministerial duties, so the requirements of Rule 23(a)(3) are satisfied.

d. The Defendants Will Adequately Protect the Interests of the Defendant Class.

Defendant Russell and Defendant Davis will fairly and adequately represent the interests of the Defendant Class. The adequacy of representation analysis in a defendant class, like a plaintiff class, is a two-part inquiry: (1) whether there is any antagonism between the defendant class representative and the class members; and (2) whether the class representative will adequately defend the action. *Harris*, 593 F. Supp. at 137.

The first prerequisite is satisfied in this case because there is no conflict between Defendant Russell and Defendant Davis and the other Defendant Class members. “Only a conflict that goes to the essential subject matter of the litigation – to the heart of the controversy – will defeat a claim of representative status.” *Doss*, 93 F.R.D. at 118 (quotations omitted). Here, the legal interests of all Defendant Class members coincide. The lodestar of this litigation is the constitutionality of the marriage laws that deny marriage licenses to same-sex couples. Because Defendant Russell’s and Defendant Davis’s ministerial actions in enforcing Alabama’s laws excluding same-sex couples from marriage have the same legal effect and are legally indistinguishable from the ministerial actions of other state probate judges in enforcing those laws, a defense of their own practices will necessarily serve as a defense of the practices of the other probate judges. Russell and Davis are thus adequate representatives for the class as a whole.

The second prerequisite of Rule 23(a)(4) is satisfied because Defendant Davis has retained qualified counsel who are capable of vigorously defending this case.⁶ Defendant Russell is represented by attorneys who sought clarification of his obligations from the Alabama Supreme

⁶ While Plaintiffs do not know yet who will be representing Defendant Russell, they are confident that he will have able counsel and will be able to consult and coordinate with Defendant Davis’ counsel.

Court prior to the preliminary injunction hearing, *see Ex parte Davis*, --- So.3d ----, 2015 WL 567479 (Ala. Feb. 11, 2015), and who have continued to assert Defendant Davis' interests in complying with the law. *See, e.g.*, Doc. 71 and attachments. Moreover, Defendant Russell and Defendant Davis will adequately represent the class even if they do so unwillingly. *See Doss*, 93 F.R.D. at 117-18 (“Rule 23(a)(4) does not require a voluntary representative, but merely an adequate one.”); *Marcera v. Chinlund*, 595 F.2d 1231, 1239 (2d Cir. 1979) (“[T]o permit a [defendant class representative] to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread abuse.”), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979); *Research Corp. v. Pfister Assoc. Growers, Inc.*, 301 F. Supp. 497, 499 (N.D. Ill. 1969) (“This factor of ‘desire’ as opposed to ability should not be given more than token weight.”). In fact, Defendant Davis has already been adequately representing his interests in this case to date. Thus, Rule 23(a)(4) is satisfied.

2. The Requirements of Rule 23(b)(1)(A) and 23(b)(2) Are Satisfied.

Certification under Rule 23(b)(1)(A) is proper because prosecution of separate actions against individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama probate judges being required to issue marriage licenses to same-sex couples and required to respect the marriages of same-sex couples, and others not. In addition, prosecution of separate actions against class members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests. *See, e.g., CBS, Inc. v. Smith*, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (certifying defendant class action pursuant to Rule 23(b)(1)(A)).

Certification under Rule 23(b)(2) is also proper. For a defendant class to be certified under Rule 23(b)(2), “the defendants must have acted on grounds generally applicable to the plaintiff

class.” *Doss*, 93 F.R.D. at 119 (quotations omitted). As discussed above, this requirement is satisfied because the challenged action here – the ministerial enforcement of the same state laws prohibiting the issuance of marriage licenses to same-sex couples – is common to all defendants and inflicts the same constitutional harms on each member of the plaintiff class. *See supra* at 12-13. For example, in *Callahan v. Wallace*, 466 F.2d 59, 60 (5th Cir. 1972), a class action challenged the practice in Alabama of having traffic violations tried before a magistrate who retained part of the fee as recompense. The lawsuit was instituted against a defendant class consisting of all Alabama justices of the peace, sheriffs, and state troopers who had participated in the practice. *Id.* The court upheld both the plaintiff and defendant classes, and issued an injunction against all defendants who engaged in the unlawful practice. *Id.* at 62.

In this case, just as in *Callahan*, all defendant class members have engaged in the same constitutionally invalid conduct, *i.e.*, denial of marriage licenses to same-sex couples, which apply generally to the plaintiff class. Each Defendant Class member’s refusal to issue marriage licenses to same-sex couples prevents plaintiffs from exercising their fundamental right to marry and denies them equal protection of law. *See supra* at 1-2, 9, 15 (identifying defendant class members and practices). These unlawful practices apply with equal force to all members of the Plaintiff Class. *Id.*; *see Williams*, 237 F.R.D. at 693 (“[C]onduct . . . uniformly harming a specific class of people, falls squarely within the ambit of Rule 23(b)(2)”). For these reasons, and because the sole remedy requested is declaratory and injunctive relief, *see supra* at 13, certification pursuant to Rule 23(b)(2) is warranted.

3. The Proposed Defendant Class is Sufficiently Definite.

To be certified, a class must be sufficiently definite. *See supra* at 13-14. The proposed Defendant Class here consists of all Alabama probate judges who have refused or may refuse

marriage licenses to same-sex couples. Plaintiffs have already identified the 67 probate judges who are class members. *See supra* at 1-2, 15 (identifying defendant class members). This definition is sufficiently definitive, and the membership is ascertainable. *See supra* at 13-14.

III. The Court Should Issue A Preliminary Injunction Requiring Proposed Defendant Russell, Defendant Davis, and Members of the Proposed Defendant Class To Issue Marriage Licenses To Plaintiffs and Members of the Proposed Plaintiff Class and To Refrain From Enforcing Alabama Laws and Orders Excluding Same-Sex Couples From Marriage.

A. The Court Should Issue a Preliminary Injunction.

As the accompanying declarations from proposed Plaintiffs Kristi Ogle and Jennifer Ogle, Keith Ingram and Gary Wayne Wright II, (Exs. C-E) establish, they sought marriage licenses from proposed Defendant Russell, Defendant Davis, or other members of the Defendant Class. Proposed Plaintiffs Kristi Ogle and Jennifer Ogle were unable to obtain a marriage license in Baldwin and Mobile Counties. *See* Ogle Decl. (Ex. C) ¶ 4. Proposed Plaintiffs Keith Ingram and Albert Pigg were unable to obtain a marriage license in Houston and Baldwin Counties. Ingram Decl. (Ex. D) ¶ 4. Proposed Plaintiffs Gary Wright and Brandon Mabrey were unable to obtain a marriage license in Marshall and Baldwin Counties. Wright Decl. (Ex. E) ¶ 4.

In its January 26 Order, this Court found that “the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act [Ala. Const., art. I, § 36.03 and Ala. Code § 30-1-19] restrict the Plaintiffs’ fundamental marriage right and do not serve a compelling state interest,” and therefore 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.” Order, Doc. 29, at 3. The Court also found that a preliminary injunction was warranted because, in addition to establishing that they will prevail on the merits, Plaintiffs have met the other preliminary injunction factors. Among other things, “Plaintiffs’ inability to exercise their

fundamental right to marry has caused them irreparable harm which outweighs any injury to defendant.” *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, “it is always in the public interest to protect constitutional rights.” *Id.* (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008)).

On February 10, 2015, the Court granted Plaintiffs’ motion to file a First Amended Complaint adding Plaintiffs Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay Safford and Defendant Davis. (Doc. 46). After a hearing on February 12, 2015, the Court issued its Order, dated the same day, granting Plaintiffs’ motion for preliminary injunction. (Doc. 55). Relying on its prior decision and January 26 Order (Doc. 29), the Court once again declared the Alabama marriage laws prohibiting same-sex marriage unconstitutional and enjoined Defendant Davis “from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage.” *Id.* at 7.

Entry of an additional preliminary injunction order against the new proposed Defendant and Defendant Class and in favor of the existing Plaintiffs, proposed new Plaintiffs and Plaintiff Class is warranted for the same reasons that this Court granted its earlier injunctions against Defendant Strange and Defendant Davis. First, all proposed Plaintiffs are likely to prevail on the merits for the same reasons this Court has addressed in its previous Orders. Second, without an injunction, all proposed Plaintiffs and members of the Plaintiff Class would suffer irreparable injury due to the deprivation of constitutional rights, as well as suffering additional harms that are representative of those suffered by other same-sex couples who are denied the dignity, security, and legal protections of marriage. *See, e.g.*, Ogle Decl. (Ex. C) ¶¶ 2-3. Third, proposed Defendant Russell and members of the Defendant Class have only a ministerial interest in enforcing Alabama’s laws barring same-sex couples from marriage and would suffer no harm from an

injunction. In contrast, as this Court already has determined, the constitutional, dignitary, and practical harms suffered by same-sex couples who are unable to marry or whose marriages are denied recognition are severe. Fourth, the public interest always favors vindication of constitutional rights. In sum, the considerations that justified granting the preliminary injunction in *Searcy* and in the claims brought by the original Plaintiffs' in *Strawser* apply with equal force to a preliminary injunction protecting the proposed Plaintiff Class. Plaintiffs therefore respectfully request that the Court order Defendant Russell and the members of the Defendant Class to issue marriage licenses to qualified same-sex couples without delay and to refrain from enforcing Alabama laws and orders excluding same-sex couples from marriage and refusing to recognize their marriages.

B. The Court Should Issue the Preliminary Injunction Without Delay.

Regardless of the timing of the formal certification of the proposed plaintiff and defendant classes, the Court may exercise its equitable power to issue the preliminary injunction without delay. Courts routinely grant class-wide preliminary injunctive relief where, as here, a *prima facie* showing of the requirements of Rule 23 has been made, even absent notice to class members⁷ and class discovery or an evidentiary hearing,⁸ and prior to full-fledged class certification. *See Carrillo*

⁷ Because both the proposed plaintiff and defendant classes are brought pursuant to Rule 23(b)(1)(A) and 23(b)(2), notice to the class is discretionary. Fed. R. Civ. P. 23(c)(2)(A).

⁸ The decision to hold an evidentiary hearing on class certification is discretionary as well. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1009 (11th Cir. 1996) (“A court *may* hold an evidentiary hearing prior to certifying a class. The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially.”) (emphasis in original). There is no need for such a hearing here, where the claims of the proposed plaintiff class are premised on a law that expressly targets a particular class of persons, where the proposed defendant class consists of government officials charged with the ministerial duty of enforcing that law, and where, as a result, no facts relevant to the class certification are subject to dispute. *See* 3 Newberg § 7:15 at 74-75.

v. Schneider Logistics, Inc., No. CV-11-8557 CAS DTBX, 2012 WL 556309, at *8-9 (C.D. Cal. Jan. 31, 2012) (citing cases and noting that courts routinely grant class-wide preliminary injunctions if they are satisfied that the Rule 23 requirements are met), *aff'd*, 501 F. App'x 713 (9th Cir. 2012); *see also Kaiser v. Cnty. of Sacramento*, 780 F. Supp. 1309, 1312 (E.D. Cal. 1991) (granting class-wide injunctive relief before certifying class); *Rosado v. Bowen*, No. H 85-171, 1986 WL 12433, *12 n. 2 (D. Conn. Apr. 25, 1986) (noting that the court had previously certified the class at the hearing on plaintiff's motion for preliminary injunction); *Harris*, 593 F. Supp. at 137-38 (certifying a plaintiff and defendant class concurrently with issuing a preliminary injunction); *Clean-Up '84 v. Heinrich*, 582 F. Supp. 125, 127 (M.D. Fla. 1984) (certifying class "for the narrow purpose of effectuating [the] preliminary injunction"); *Thomas v. Johnston*, 557 F. Supp. 879, 916 (W.D. Tex. 1983) (certifying class for purposes of preliminary injunctive relief and noting that "[i]t appears to be settled, however, 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 . . . its general equity powers.").

CONCLUSION

In sum, Plaintiffs respectfully request that their motion for leave to file the Second Amended Complaint be granted. Plaintiffs further request that the Court certify the requested Plaintiff and Defendant Classes and appoint the undersigned counsel as class counsel pursuant to Federal Rule of Civil Procedure 23(g), and that the Court issue an preliminary injunction (1) directing Defendant Davis, proposed Defendant Russell and members of the Defendant Class to issue marriage licenses to proposed Plaintiffs and members of the Plaintiff Class, and (2) directing Defendant Davis, proposed Defendant and members of the Defendant Class to refrain from enforcing all Alabama laws that prohibit same-sex couples from marrying or that deny recognition

of the marriages of same-sex couples. Finally, Plaintiffs request that the Court consider these motions on an expedited basis because of the ongoing irreparable harm that the Plaintiff Class is suffering.

DATED: March 6, 2015

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system on March 6, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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