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 BRIEF ADDRESSING THE EFFECT OF *OBERGEFELL* ON THIS COURT'S EXISTING ORDERS

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*

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

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

Attorneys for Relators
Alabama Policy Institute and
Alabama Citizens Action Program

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THIS COURT SHOULD CONSIDER SEVERAL IMPORTANT FACTORS IN DETERMINING THE EFFECT OF *OBERGEFELL* ON THIS COURT'S EXISTING ORDERS. 2

A. The majority opinion in *Obergefell* is an assault on the Rule of Law. 2

B. The majority opinion in *Obergefell* is an assault on Alabamian and American Democracy 6

C. The majority opinion in *Obergefell* is an assault on Natural Law. 8

D. The majority opinion in *Obergefell* diminishes the constitutional right of Free Exercise of Religion. 16

E. There is precedent for the highest court of a state to reject a U.S. Supreme Court mandate which is unlawful. 19

II. THIS COURT SHOULD PROTECT the CONSTITUTIONAL RIGHTS OF ALABAMA PROBATE JUDGES 31

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

CASES

Ableman v. Booth,
62 U.S. 506 (1858) 24,27

Ableman v. Booth,
11 Wis. 498 (1859) 28

Dred Scott v. Sandford,
60 U.S. 393 (1856) 28

Goodrich v. Goodrich,
44 Ala. 670 (1870) 11,12

In re Booth,
3 Wis. 1 (1854) 19,20,21,22,23,24,27

In re Booth,
3 Wis. 157 24,25,26,27,29,30

Maynard v. Hill,
125 U.S. 211 (1888) 12

Murphy v. Ramsey,
114 U.S. 15 (1885) 12

Obergefell v. Hodges,
No. 14-556, 2015 WL 2473451 (U.S. June 26, 2015) ...*passim*

Sch. Dist. Of Abington Twp., Pa. v. Schempp,
374 U.S. 203, 225 (1963) 31,32

Torcaso v. Watkins,
367 U.S. 488 (1961) 32,33

United States v. Windsor,
133 S. Ct. 2675 (2013) 4,5,12

Wallace v. Jaffree,
472 U.S. 38 (1985) 31

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 31

U.S. Const. art. VI 27,31

STATUTES

N.C. Gen. Stat. § 51-5.5 (2015) 33

OTHER AUTHORITIES

Brief for Scholars of History and Related Disciplines as *Amici Curiae* 15

Brief for Ryan T. Anderson as *Amicus Curiae* 15

Declaration of Independence 10

Martin Luther King, Jr., *Letter from a Birmingham Jail*, Apr. 16, 1963 16

Oxford Dictionary 11

Robert P. George, *Law and Moral Purpose*, First Things, Jan. 2008 13,14

Robert P. George *et al.*, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 270 (2011) 13,14

William Blackstone, *Commentaries on the Laws of England*, (1765) 14

Wisconsin Court System, *Famous cases of the Supreme Court*, http://wicourts.gov/courts/supreme/famouscases.htm 19

INTRODUCTION

On June 29. 2015, this Court entered its Corrected Order an order inviting the parties "to submit any motions or briefs addressing the effect of the Supreme Court's decision in *Obergefell* on this Court's existing orders." Relators ALABAMA POLICY INSTITUTE and ALABAMA CITIZENS ACTION PROGRAM file this brief in response to the Court's Corrected Order.

SUMMARY OF ARGUMENT

"**[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. . . . Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.**" *Obergefell v. Hodges*, 2015 WL 2473451, *24 (2015) (Roberts, C.J., dissenting) (emphasis added).

In determining the effect of the U.S. Supreme Court's *Obergefell* decision on this Court's prior orders, this Court should consider several important factors. These include the decision's substantial assault on the Rule of Law, Democracy, and Natural Law, and its necessary diminishment of the constitutional right to Free Exercise of Religion. Furthermore, this Court should consider existing precedent

for a state's highest court to reject an unlawful mandate from the U.S. Supreme Court.

Finally, this Court should ensure the protection of the constitutional rights of Alabama probate judges in light of *Obergefell*.

ARGUMENT

I. THIS COURT SHOULD CONSIDER SEVERAL IMPORTANT FACTORS IN DETERMINING THE EFFECT OF *OBERGEFELL* ON THIS COURT'S EXISTING ORDERS.

A. The majority opinion in *Obergefell* is an assault on the Rule of Law.

"**[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. . . . Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.**" *Obergefell v. Hodges*, 2015 WL 2473451, *24 (2015) (Roberts, C.J., dissenting) (emphasis added).

The *Obergefell* majority's assault on the Rule of Law is manifest. And one need look no further than the four *Obergefell* dissents to comprehend the assault's expanse.

It perhaps cannot be said more succinctly than Chief Justice Roberts above. But he was constrained to further explain what should not need explaining: "this Court is not a legislature. . . . Under the Constitution, judges have power

to say what the law is, not what it should be." *Id.* at *23. The Chief Justice continued, exasperated, "**The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. . . . Just who do we think we are?**" *Id.* at *24 (emphasis added). "[A]s a judge, I find the majority's position indefensible as a matter of constitutional law." *Id.* at *28.

Each of the other dissenting justices took a turn eulogizing the rule of law:

> Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.

Id. at *57 (Alito, J., dissenting).

> The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. . . . Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic.

Id. at *46 (Thomas, J., dissenting).

> This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. . . .
>
> . . . .
>
> But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since.

Id. at *43-44 (Scalia, J., dissenting).

The willful act of the five lawyers in the majority is particularly egregious in light of what the **same majority** said **only two years ago** in *United States v. Windsor*:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. **The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities. The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce and the Constitution**

> **delegated no authority to the Government of the United States on the subject of marriage and divorce.**
>
> Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. . . .
>
> The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for **when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.**

133 S. Ct. 2675, 2691 (2013) (emphasis added) (internal quotations and citations omitted).[1]

Justice Roberts provides an appropriate conclusion: "The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to . . . ." *Id.* at *35. "[T]his approach is dangerous for the rule of law." *Id.* at 37.

---

[1] Egregious, though sadly predicted by Justice Scalia in his *Windsor* dissent, looking ahead to the Supreme Court's inevitable marriage decision: "**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).

B. The majority opinion in *Obergefell* is an assault on Alabamian and American Democracy.

"The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it." *Id.* at *39 (Roberts, J., dissenting).

As recognized by Chief Justice Roberts above, the *Obergefell* majority's assault on Alabamian and American Democracy is not only willful, but also frontal. "Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges." *Id.* at *39 (Roberts, C.J., dissenting).

Justice Scalia likens the majority's usurpation to the high crime of robbery:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, **robs the People of the**

> **most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.**

Id. at *42. Justice Alito too: "Today's decision **usurps the constitutional right of the people to decide** whether to keep or alter the traditional understanding of marriage." *Id.* at *56 (emphasis added).

Chief Justice Roberts likewise calls it stealing:

> "But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. **Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.**
>
> . . . .
>
> . . . . The majority today neglects that restrained conception of the judicial role. **It seizes for itself a question the Constitution leaves to the people . . . .**

Id. at *24.

This Court has itself recognized the damage to democracy caused by judicial redefinition of marriage:

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

(Order, March 3, 2015 (the "Mandamus Order") at 16-17.)

C. The majority opinion in *Obergefell* is an assault on Natural Law.

The five-lawyer majority opinion in *Obergefell* openly violates the natural law governing marriage. Five lawyers opined that "[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited

by our basic charter." *Obergefell*, 2015 WL 2473451, at *16 (Kennedy, J.) Incredibly, these five lawyers proclaim that "our basic charter" (presumably, the Constitution) demands and compels same-sex marriage in all States, despite the indisputable biological differences between marriage and same-sex marriage and the undeniable fact that no State at the founding of this nation or at the time of the Civil War Amendments (nor any country at those times or in the preceding millennia of recorded history and civilization) recognized marriage as such, *id.* at *24 (Roberts, C.J., dissenting), nor could they. Indeed, the institution of marriage predates the lifetime of these five lawyers, not to mention the 239-year old United States of America, the 226-year old United States Constitution, or the 147-year old Fourteenth Amendment.

Contrary to the five-lawyer majority opinion in *Obergefell*, marriage between a man and a woman is not a mirage that only "*seemed* natural and just" for millennia (*i.e.*, from the beginning of civilization), only to shed its deceiving skin after the eyes of five lawyers were allegedly opened with newfound "knowledge." Instead, this conjugal view of marriage (as a comprehensive and complementary union of a man and a woman that naturally creates families) was (and is), in

fact, "natural and just" for it mirrored (and continues to mirror to this day) the intrinsic nature of marriage regardless of the five lawyers' newly-laid foundation for this universal institution. Prior attempts at changing the true nature of the institution of marriage were explicitly rebuffed by this Court.

As recently as March 3, 2015, this Court firmly recognized the nature of marriage as an institution designed only for a man and a woman without exception or limitation. According to this Court, prior court decisions and the body of statutory law in this State relating to and supporting the institution of marriage "**reflect**[]" the following "**truths**": marriage is (1) a "union between one man and one woman" and (2) the "fundamental unit of society." (Mandamus Order at 20 (emphasis added).) The foregoing conclusions are especially illuminating in light of the five lawyers' stated beliefs about "marriage" in *Obergefell* that contravene "the Laws of Nature and of Nature's God." *See* Declaration of Independence, July 4, 1776.

In the first instance, this Court's prior conclusions demonstrate that, when it comes to the institution of marriage, existing statutes and multiple decisional laws from

this Court (as well as earlier Supreme Court opinions) merely "reflect," or "show an image of," cast back or "throw back" from, or embody "a sign of the nature" of certain "truths" about marriage. *See* Oxford Dictionary, accessible online at http://www.oxforddictionaries.com/us/definition/learner/reflect. As a reflection of "truths" then, the law simply reproduced the preexistent and self-evident nature of marriage, which preceded legislative enactment or judicial recognition. Said another way, these laws did not create the institution of marriage and then define the contours of it. Instead, they recognized its unwritten nature and then codified it. This leads to the second indissoluble aspect of this Court's conclusions about marriage.

Only four months ago, this Court described in detail what marriage, in fact and truth, **is**. And, critically, that recognition of what marriage is was not hinged to five lawyers' personal musings but instead fastened to the enduring nature, universal and procreative significance, and conjugal meaning of marriage. As it did 145 years earlier, this Court unambiguously identified the "fundamental nature" of marriage as the union of one man and one woman that begets the family, the "building block of society." (Mandamus Order

at 20, 57-58, 91 n.23, 97, 104-05.) *See also Goodrich v. Goodrich*, 44 Ala. 670, 672-75 (1870).

Certainly, prior Supreme Court decisions supported this "axiomatic nature of marriage." (Mandamus Order at 17.) *See also, e.g., Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is . . . the foundation of the family and of society, without which there would be neither civilization nor progress."); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (recognizing that the family "consist[s] in and spring[s] from union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization"). To be sure, just two years ago in *Windsor*, the same majority who decided *Obergefell* recognized, "until recent years . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. at 2689. *See also Obergefell*, 2015 WL 2473451, at *27 (Roberts, C.J., dissenting) ("This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning.").

But the distinctive nature of marriage--the "foundation of the family," which is, in turn, the "fundamental unit of society," (Mandamus Order at 14)--is no more dependent upon these statements (which accurately project its image) than a pronouncement from five living lawyers that rejects, deforms and conceals it. As this Court stated, the one man, one woman characteristic of marriage is "immutable." (Mandamus Order at 104. Said differently, it is the "core structure" or "core meaning" of marriage. *See Obergefell*, 2015 WL 2473451, at *27 (Roberts, C.J., dissenting).

As a result, to this day, this "obvious" and natural foundation of marriage remains absolute, undeniable, and unchanging:

> "Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union between men and women (often) produces children. Marriage demonstrably channels the results of sex between members of the opposite sex—procreation—in a socially advantageous manner. It creates the family, the institution that is almost universally acknowledged to be the building block of society at large because it provides the optimum environment for defining the responsibilities of parents and for raising children to become productive members of society."

(Mandamus Order at 104-105 (internal footnotes omitted); 14-15 (citing favorably to the underpinnings of marriage as a "'prepolitical' 'natural institution' 'not created by law,'

but nonetheless recognized and regulated by law in every culture") (citing Robert P. George, *Law and Moral Purpose*, First Things, Jan. 2008, and Robert P. George *et al.*, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 270 (2011).) *See also* 1 William Blackstone, *Commentaries on the Laws of England*, at 410 (1765) (describing the relationship of "husband and wife" as "founded in nature").

This natural foundation to marriage was recognized by the dissenting justices in *Obergefell*. In the principal dissenting opinion, Chief Justice Roberts, joined by two other justices, stated that "[t]his universal definition of marriage as the union of a man and a woman" is not the result of any "moving force of world history" but instead "arose in the nature of things." *Obergefell*, 2015 WL 2473451, at *25 (Roberts, C.J., dissenting). Justice Alito, in his dissenting opinion joined by two other justices, recognized that "[f]or millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate." *Id.* at *55 (Alito, J., dissenting). Justice Thomas, in his dissent joined by the Chief Justice and another justice, further explained that "[t]he traditional definition of marriage has prevailed in every society that has recognized marriage

throughout history, was born "out of a desire 'to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world,'" and "has existed in civilizations containing all manner of views on homosexuality." *Id.* at *50 n.5 (Thomas, J., dissenting) (citing Brief for Scholars of History and Related Disciplines as *Amici Curiae* at 1, 8, and Brief for Ryan T. Anderson as *Amicus Curiae* at 11-12).

Five lawyers' protestations against the natural and intrinsic foundation of marriage do not transmogrify the very "nature of being 'married.'" (Mandamus Order at 91 n.23.) Indeed, the nature of marriage and its "truths"--which have been powerfully recognized by this Court--cannot be unwound, unbound, or untied from their foundation without displacing the institution itself and all that naturally proceeds therefrom. This "fundamental" nature of marriage--which, as indicated above, is rooted in biology, comprehensive in its union, engendered for the proliferation of families and societies, and observable and traceable across recorded history and cultures--demands continued adherence as a just and natural law already (and consistently) recognized by this

Court. *See* Martin Luther King, Jr., *Letter from a Birmingham Jail*, Apr. 16, 1963 (distinguishing between a "just law," which consists of a "man made code that squares with the moral law or the law of God" and in response to which "[o]ne has not only a legal but a moral responsibility to obey," and an "unjust law," which consists of a "human law that is not rooted in eternal law and natural law" and thus is "no law at all," and in response to which "one has a moral responsibility to disobey").

D. The majority opinion in *Obergefell* diminishes the constitutional right of Free Exercise of Religion.

"Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect." *Obergefell*, 2015 WL 2473451, at *52 (Thomas, J., dissenting) (emphasis added). Justice Thomas further explained the unavoidable religious liberty problem with the *Obergefell* decision:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to

> participate in and endorse civil marriages between same-sex couples.
>
> The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons. . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." **Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.**

Id. at *52-53 (citations omitted).

Justice Alito was likewise unpersuaded by the majority's perfunctory nod to religious liberty, expressing concern for the effect of the majority opinion on the treatment of religious persons:

> It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.
>
> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will

> soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

Id. at *57 (citations omitted).

Chief Justice Roberts shared Justice Alito's concern for the treatment of religious persons in light of the majority's thinly-veiled animus:

> By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.

Id. at *41 (citations omitted).

E. There is precedent for the highest court of a state to reject a U.S. Supreme Court mandate which is unlawful.

To this day, the Wisconsin Supreme Court celebrates its adherence to the U.S. Constitution in openly defying an unlawful federal statute and an unlawful U.S. Supreme Court mandate:

> What has come to be known as the Booth case is actually a series of cases from the Wisconsin Supreme Court and one from the U.S. Supreme Court. In the midst of the pre-Civil War states' rights movement, the Wisconsin Supreme Court boldly defied federal judicial authority and nullified the federal fugitive slave law (which required northern states to return runaway slaves). **The U.S. Supreme Court overturned the state Supreme Court which, in a final act of defiance, never filed the mandates.**[2]

The first Wisconsin "Booth case" arose from the 1854 escape of fugitive slave Joshua Glover from federal custody. *In re Booth*, 3 Wis. 1 (1854) ("*Booth I*"). Glover, who allegedly had fled from his owner in Missouri, subsequently had been captured in Wisconsin by the U.S. Marshal. *Id.* at 4-5. When Glover escaped from the Marshal's custody, one Sherman

---

[2] Wisconsin Court System, *Famous cases of the Supreme Court*, http://wicourts.gov/courts/supreme/famouscases.htm (last visited July 4, 2015) (emphasis added).

Booth was criminally charged, under the federal Fugitive Slave Act of 1850, with aiding and abetting Glover's escape. *Id.* Booth was taken into custody by the Marshal, but petitioned a justice of the Wisconsin Supreme Court for a writ of *habeas corpus*. *Id.* at 2-4. Justice Abram D. Smith issued the writ compelling the Marshal to produce Booth and justify his detention. *Id.* at 6.

Following a hearing, Justice Smith entered an order discharging Booth from federal custody on two grounds: (1) the warrant pursuant to which the U.S. Marshal took Booth into custody failed to state a crime cognizable under the Fugitive Slave Act, and (2) the Act was unconstitutional because, among other reasons, the Act improperly delegated enforcement proceedings to non-judicial officers, and denied fugitive slaves the right to trial by jury. *See id.* at 6, 22, 39, 47.

In holding the detention of Booth illegal, Justice Smith did not espouse rejection of federal authority *per se*; rather, he espoused rejection of the exercise of federal authority which is unlawful under the United States Constitution:

> The constitution of the United States is the fundamental law of the land. It emanated from the very source of sovereignty as the same is recognized in

> this country. It is the work of our fathers, but adopted and perpetuated by all the people, through their respective state organizations, and thus becomes our own. . . . He has, by his vote, mediate or immediate, established it as the great charter of his rights, and by which all his agents or representatives in the conduct of the government, are required to square their actions. **By the standard of the constitution, he has a right to judge of the acts of every officer or body whose existence as such is provided for by it.**
>
> **I recognize most fully the right of every citizen to try every enactment of the legislature, every decree or judgment of a court, and every proceeding of the executive or ministerial department, by the written, fundamental law of the land.** . . . [N]o law is so sacred, no officer so high, no power so vast, that the line and the rule of the constitution may not be applied to them. It is the source of all law, the limit of all authority, the primary rule of all conduct, private as well as official, and the citadel of personal security and liberty.

Booth I, 3 Wis. at 13 (emphasis added).

Justice Smith also recognized that state judges are duty bound to resist unconstitutional federal usurpations of authority by their solemn oaths to their states:

> But believing as I do, that every state officer who is required to take an oath to support the constitution of the United States as well as of his own state, was designedly placed by the federal constitution itself as a sentinel to guard the outposts as well as the citadel of the

> great principles and rights which it was intended to declare, secure and perpetuate, I cannot shrink from the discharge of the duty now devolved upon me. I know well its consequences, and appreciate fully the criticism to which I may be subjected. **But I believe most sincerely and solemnly that the last hope of free, representative and responsible government rests upon the state sovereignties and fidelity of state officers to their double allegiance, to the state and federal government; and so believing, I cannot hesitate in performing a clear, an indispensable duty.** Seeking and enjoying the quiet and calm, so peculiar to the position in which I am placed, I desire to mingle no farther in the political discussions of the times, than the clear suggestions of official obligation require. But he who takes a solemn oath to support the constitution of the United States, as well as the state . . . is bound by a double tie to the nation and his state. Our system of government is two fold, and so is our allegiance. . . . To yield a cheerful acquiescence in, and support to every power constitutionally exercised by the federal government, is the sworn duty of every state officer; **but it is equally his duty to interpose a resistance, to the extent of his power, to every assumption of power on the part of the general government, which is not expressly granted or necessarily implied in the federal constitution.**

Id. at 22-23 (emphasis added).

Thus, Justice Smith reasoned, resistance to overreaching federal power both flows from and is felicitous to a solemn oath to uphold the U.S. Constitution, not contrary to it.

Even more, Justice Smith concluded, such resistance is a necessary preservative of state sovereignty:

> In view of the vastly increasing power of the federal government, and the relatively diminishing importance of the state sovereignties respectively, **the duty of the latter to watch closely and resist firmly every encroachment of the former, becomes every day more and more imperative, and the official oath of the functionaries of the states becomes more and more significant.** As the power of the federal government depends solely upon what the states have granted, expressly or by implication, and as no common judge has been provided for, to determine when the one or the other shall be proved unfaithful to the compact, the solemn pledge of faith exacted from both has been deemed an effectual guaranty . . . .

Id. at 24 (emphasis added).

The U.S. Marshal who had detained Booth petitioned the entire Wisconsin Supreme Court to review Justice Smith's writ and order. *Id.* at 49. The court granted review, and **the full court unanimously affirmed Justice Smith's holding that Booth's detention was illegal**. *Id.* at 49, 58, 64. Justice Smith himself, writing *seriatim*, provided a final (and prophetic) observation on the state high court's duty to guard against unconstitutional federal judicial decisions: "The subjection of judicial decisions to elementary criticism will never be denounced as audacious, but by those who are content

to follow precedent, **even though precedent overleap the law, and become the mere pretext for usurpation**. *Id.* at 89 (Smith, J.) (emphasis added).

The second *Booth* case also centered on a *habeas corpus* petition by Booth. *In re Booth*, 3 Wis. 157 (1854) ("*Booth II*").[3] After Booth's discharge from federal custody as a result of *Booth I*, Booth was nonetheless indicted, tried, and convicted in federal court under the Fugitive Slave Act. *Id.* at 171. Upon his incarceration, Booth once again petitioned the Wisconsin Supreme Court for a writ of *habeas corpus* challenging his detention. *Id.* at 172. Booth's alternative grounds in his petition were the lack of a charge or conviction of any crime cognizable under the Fugitive Slave

---

[3] *Booth II* involved the identical *habeas* petitions of both Booth and one John Rycraft; however, the court referred primarily to Rycraft's petition. *See* 3 Wis. at 158 ("These two applications are the same in all respects . . . ."), 189 ("The case of *Sherman M. Booth,* which was argued and considered in connection with this case, is substantially disposed of in the foregoing opinion." (Crawford, J.)), 190 ("The facts in these two cases are essentially the same, and any observations which I feel called upon to make will apply to both cases alike, and, therefore, for the sake of convenience, mention will be made of the petition of *Rycraft* only." (Smith, J.)). Conversely, the U.S. Supreme Court, in its review of *Booth I* and *II*, only referred to Booth's petition from *Booth II*. *See Ableman v. Booth*, 62 U.S. 506, 509-511 (1858).

Act, such that the federal court lacked jurisdiction over him, and the unconstitutionality of the Act. *Id.* at 158-161. The court granted the petition and held a hearing. *Id.* at 172, 174.

In *seriatim* opinions, the same three justices who had decided *Booth I* unanimously held Booth's later federal detention unlawful on the grounds that Booth was not indicted or convicted of any cognizable crime under the Act, and therefore the federal court lacked jurisdiction over him. *Id.* at 175 (Whiton, C.J.), 189 (Crawford, J.), 216-17 (Smith, J.).[4] The court "ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty." *Ableman*, 62 U.S. at 511.

Though the reasons for the *Booth II* holding were largely the same as given in *Booth I*, the *Booth II* court expounded upon the constitutional principles underpinning the decisions. With respect to a state court's duty to protect

---

[4] Though unnecessary to the court's holding, two of the three justices maintained their conclusions that the Act also was unconstitutional. *Id.* at 175 (Whiton, C.J.), 211-12 (Smith, J.).

the liberties of its own citizens from federal encroachment, Justice Smith concluded, "If, therefore, it is the duty of the state to guard and protect the liberty of its citizens, it must necessarily have the right and power to inquire into any authority by which that liberty is attempted to be taken away. But the power to inquire, includes the power to decide." *Booth II*, 3 Wis. at 193-94.

Judge Smith continued, "As, therefore, the STATES *delegated,* and the federal government *took* power, limited in character and extent, **the latter is at all times answerable to the former, and may be required to exhibit the constitutional warrant by which it claims to do, or refuses to perform, any given act** . . . ." *Id.* at 195 (emphasis added).

To illuminate the foundation of his conclusions, Justice Smith invoked the Supremacy Clause of the Constitution itself:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Justice Smith explained the clause's meaning:

> Here is a distinct recognition of the power and duty of state judges, not to be bound by all the acts of congress, **or by the judgments and decrees of the supreme federal court**, or by their interpretation of the constitution and acts of congress, **but by "*this constitution*,"** "*and the laws made in pursuance thereof.*"

Booth II, 3 Wis. at 196 (emphasis added) (italics in original).

Applying his conclusions specifically to federal judicial power, Justice Smith elucidated, "From these views, it is clear to me . . . that the judicial power of the union is as much circumscribed by the constitution as every other department of the federal government; [and] that **a judicial determination without the constitutional sphere, would be no judgment or decree** . . . ." *Id.* at 204.

The federal case in the *Booth* line of cases was *Ableman v. Booth*, 62 U.S. 506 (1858), in which the U.S. Supreme Court reviewed *Booth I* and *II* on the petition filed by the U.S. Marshal who had detained Booth. Chief Justice Roger Taney, writing for the Court, purported to reverse both *Booth I* and *Booth II* on the grounds that state courts cannot interfere, by *habeas corpus* proceedings, with any confinement which

occurs under federal authority. *Id.* at 523-26. Chief Justice Taney also opined, perhaps not surprisingly in light of his *Dred Scott* opinion, that the Fugitive Slave Act was constitutionally sound.[5] *Id.* at 526.

In the nearly 157 years since the U.S. Supreme Court's purported reversal of *Booth I* and *II*, the Wisconsin Supreme Court has never filed or accepted the U.S. Supreme Court's mandates. *Famous cases*, *supra* note 1. In the final *Booth* case before the Wisconsin Supreme Court, *Ableman v. Booth*, 11 Wis. 498 (1859) ("*Booth III*"), the court denied the United States' motions to file the Supreme Court's mandates, thus completing the Wisconsin high court's rejection--in fidelity to the U.S. Constitution--of the unlawful acts of the federal judiciary. *Booth III*, 11 Wis. at 498-99.

---

[5] In 1856, Chief Justice Taney delivered his infamous *Dred Scott* opinion, in which he espoused with conviction his view that black persons "whose [African] ancestors were imported into this country, and sold as slaves" were constitutionally inferior humans, even mere property. *Dred Scott v. Sandford*, 60 U.S. 393, 403, 416, 452 (1856). The American People ultimately rejected *Dred Scott* "on the battlefields of the Civil War and by constitutional amendment after Appomattox." *Obergefell*, 2015 WL 2473451, at *30 (Roberts, C.J., dissenting).

Writing previously in *Booth II*, Justice Smith thoroughly contemplated that "collisions" such as those between the Wisconsin Supreme Court and the U.S. Supreme Court in *Booth III* would be infrequent, but nonetheless healthy and beneficial towards preserving the mutual state and federal sovereignties:

> The obligations of the state and federal governments are herein perceived to be mutual and reciprocal. The one to abstain from all interference, whenever it perceives the subject matter to be within the attached jurisdiction of the other, and that other to show that the authority which it claims to exercise is within the powers delegated, and one which it may rightfully exercise. There is little danger of troublesome collision, so long as each shall be willing to measure its functions by the standard created for the guide of both. **But, if to avoid collision, an absolute unquestioning submission on the one hand is requisite, and on the other, a perfect immunity to claim and usurp all powers, and to be the sole and ultimate judge of the extent and validity of its own claims; and to enforce its decisions upon the states, then collision is the preferable alternative, because collision invokes the arbitrament of the people themselves, the ultimate source of political power, whose judgments and decrees are made and pronounced through the peaceful and constitutional modes and means which they had the wisdom and foresight to provide in the organization of the present system of government.** "Collisions" of this kind are by no means new in this government. They have occurred

> from time to time as the supposed exigincies of the country have called into exercise new powers, or have seemed to require the adoption of new measures. **They are the rightful and healthful operations of those necessary checks and balances which are indispensable in a government of divided or distributed powers. But such "collisions" have, all along our history, found their appropriate remedy in the awakening of inquiry, in a recurrence to primary and fundamental principles, and in a return of the erring to the constitutional sphere.** And so will it ever be, until one or another shall repudiate these constitutional checks and balances, and rashly and madly rush on to extremities, in defiance of constitutional obligations and remedies.

Booth II, 3 Wis. at 208-09 (emphasis added).

And, as predicted by Justice Smith, the *Booth* "collision" did not dissolve the union, but was perhaps timely to preserve it:

> It is much safer to resist unauthorized and unconstitutional power, at its very commencement, when it can be done by constitutional means, than to wait until the evil is so deeply and firmly rooted that the only remedy is revolution. If collisions between the departments of the same government have heretofore occurred without dissolution, may we not hope that it will be able to stand yet awhile, in spite of an occasional difference and discussion between the state and federal functionaries?

Id. at 201 n.a1.

II. THIS COURT SHOULD PROTECT THE CONSTITUTIONAL RIGHTS OF ALABAMA PROBATE JUDGES.

Religious conscience protections for individuals (including state officials) are mandated by the First Amendment. *See* U.S. Const. amend I (requiring that government must not "prohibit[] the free exercise" of religion); *see also Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.").

In addition to First Amendment protection, state official's religious conscience is further protected by the Religious Test Clause of the Constitution. *See* U.S. Const. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). Compelling all government actors who have any responsibilities in the solemnization, celebration, or issuance of marriage licenses (*e.g.*, probate judges or clerks) to participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding office. However, government may not "oppos[e] or

show[] hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Many individuals who believe and practice certain religions (and who hold public office in this State) also believe that marriage is sacred and foundational to their religious beliefs. To require those individuals to participate in the solemnization and celebration of same-sex marriage is repugnant and antithetical to their religious convictions and conscience.

Some may contend that such religious persons (who accepted their public employment job before *Obergefell*) must either participate without exception in the issuance of same-sex marriages (their consciences be damned) or resign if they refuse to participate since holding public office is that person's choice (their livelihood and commitment to public service be damned). To those not yet serving in those public roles, they are told to cast aside their deep religious convictions before entering the door of public service. But the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."

Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (striking down as unconstitutional Maryland's religious test for public office). Indeed, the very idea that religious persons "need not apply" for these public positions that have historically been accessible to them constitutes an unmistakable religious litmus test. By imposing on all public employees a mandate to participate in same-sex marriage, without any protection for religious conscience, government violates the First Amendment and Religious Test Clause of the Constitution.

At a minimum, this Court must ensure that these constitutional protections are recognized and left in place for the current public employees of this State who are serving as probate judges, clerks, and their support personnel, as well as all religious persons aspiring to someday serve the public in these and other similar capacities.[6]

---

[6] *See, e.g.*, N.C. Gen. Stat. § 51-5.5 (2015) ("(a) Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection. . . (b) Every assistant register of deeds and deputy register of deeds has the right to recuse from issuing all lawful marriage licenses under this Chapter based upon any sincerely held religious objection. . . (d) No magistrate, assistant register of deeds, or deputy register of deeds may be charged or convicted under G.S. 14-230 or G.S. 161-27, or subjected to a disciplinary action, due to a good-faith recusal under this section.")

Respectfully Submitted,

s/ Mathew D. Staver

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*

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

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

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that I have this 6th day of July, 2015, served copies of this brief, 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