No. 1140460

IN THE SUPREME COURT OF ALABAMA

EX PARTE STATE EX REL. ALABAMA POLICY INSTITUTE AND ALABAMA CITIZENS ACTION PROGRAM,
Petitioner,

v.

ALAN L. KING, IN HIS OFFICIAL CAPACITY AS JUDGE OF PROBATE FOR JEFFERSON COUNTY, ALABAMA, ROBERT M. MARTIN, IN HIS OFFICIAL CAPACITY AS JUDGE OF PROBATE FOR CHILTON COUNTY, ALABAMA, TOMMY RAGLAND, IN HIS OFFICIAL CAPACITY AS JUDGE OF PROBATE FOR MADISON COUNTY, ALABAMA, STEVEN L. REED, IN HIS OFFICIAL CAPACITY AS JUDGE OF PROBATE FOR MONTGOMERY COUNTY, ALABAMA, AND JUDGE DOES ##1-63, EACH IN HIS OR HER OFFICIAL CAPACITY AS AN ALABAMA JUDGE OF PROBATE,
Respondents.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

BRIEF FOR *AMICI CURIAE* EAGLE FORUM OF ALABAMA EDUCATION FOUNDATION AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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STATEMENT OF JURISDICTION

This Court has original jurisdiction "as may be necessary to give it general supervision and control of courts of inferior jurisdiction." Art. VI, § 140(b), ALA. CONST. 1901; § 12-2-7(3), ALA. CODE 1975. The petitioner State of Alabama has obvious standing to protect its laws, *Diamond v. Charles*, 476 U.S. 54, 62-65 (1986), and this Court has the independent duty to supervise Alabama's lower courts. Insofar as this action seeks to enforce the respondents' clear public duties, the private relators have authority to bring this action on behalf of the State:

> A mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty, affecting a private interest merely, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public, unless the matter concerns the sovereign rights of the State, in which event it must be instituted on the relation of the Attorney General, the law officer of the State.

Gray v. State ex rel. Garrison, 231 Ala. 229, 230, 164 So. 293, 294 (Ala. 1935) (relators require "public interest" to proceed in State's name); *Jackson v. State ex rel. Tillman*, 143 Ala. 145, 147, 42 So. 61, 62 (Ala. 1904) (*citing*

Montgomery v. State ex rel. Enslen, 107 Ala. 372, 18 So. 157 (Ala. 1894)) (members of the public filing as relators may challenge a judge's right to hold office); *Bd. of Educ. of Jefferson Cty. v. State ex rel. Kuchins*, 222 Ala. 70, 74, 131 So. 239, 242 (Ala. 1930) (collecting cases) (relators have "community interest in the subject-matter"). The general public has a sufficient interest in the respondents' enforcing Alabama's marriage laws to bring this action in the State's name. *Compare Rodgers v. Meredith*, 274 Ala. 179, 186, 146 So. 2d 308, 314-15 (Ala. 1962) (sufficient public interest in reporting prison statistics) *with Morrison v. Morris*, 273 Ala. 390, 392, 141 So. 2d 169, 170 (Ala. 1962) (insufficient public interest in third-parties' tax assessments). The respondents' actions affect the entire Alabama public and are not uniquely sovereign issues such as third parties' tax assessments. As an original action brought to contest actions that arose circa January 23-26, 2015, the filing of the petition was timely.

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

EXHIBITS

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amici curiae Eagle Forum of Alabama Education Foundation and Eagle Forum Education & Legal Defense Fund (collectively, "*Amici*"), seek leave to file this brief by the accompanying motion. For more than 30 years, *Amici* have defended traditional American values, including traditional marriage defined as the union of husband and wife. For these reasons and those set forth in the accompanying motion, *Amici* have direct and vital interests in the issues raised here.

STATEMENT OF THE CASE

In *Searcy v. Strange,* No. 1:14-208-CG-N (S.D. Ala. Jan. 23, 2015) (Pet. Ex. A), and *Strawser v. Strange,* No. 1:14-424-CG-C (S.D. Ala. Jan. 26, 2015) (Pet. Ex. B), federal district judge Callie Granade enjoined the Alabama Attorney General from enforcing Alabama's Sanctity of Marriage Amendment, Art. I, § 36.03, ALA. CONST. 1901 and the Alabama Marriage Protection Act, § 30-1-19, ALA. CODE 1975 (collectively, "Alabama's Marriage Laws") as a violation of the Fourteenth Amendment to the United States Constitution. Because the Attorney General has no authority to enforce Alabama's Marriage Laws, the *Searcy* and *Strawser* cases both

violate Alabama's sovereign immunity as unconsented-to suits against the State in federal court. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Alden v. Maine*, 527 U.S. 706, 728 (1999); U.S. CONST. amend. XI. Significantly, the *Ex parte Young* officer-suit exception to sovereign immunity applies only to "enjoining state officers 'who threaten and are about to commence proceedings.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (*quoting Ex parte Young*, 209 U.S. 123, 156 (1908)); *see also Summit Medical Ass'n, P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) ("the doctrine of *Ex parte Young* cannot operate as an exception to Alabama's sovereign immunity where no defendant has any connection to the enforcement of the challenged law"). The *Ex parte Young* exception to Alabama's immunity is, therefore, plainly inapposite because the defendant officer lacks authority to implement the challenged state law.

In the action before this Court, the State of Alabama on the relation of two Alabama public-interest groups (hereinafter, "Alabama") seeks to enjoin the respondent probate judges (hereinafter, the "Probate Judges") from violating Alabama law – and thereby exceeding their

authority – by issuing same-sex marriage licenses based on Judge Granade's *Searcy-Strawser* orders against the Alabama Attorney General.

Over the weekend, one of the respondents here – Judge King – moved to intervene in the *Strawser* litigation:

> Judge King faces an imminent risk of being subjected to a state court Order that will put him in the position of having to choose either to disregard the United States Constitution, which he is sworn to uphold, thereby subjecting him to liability and perhaps personal liability for damages and attorney fees, or to disregard a state court Order thereby subjecting him to contempt proceedings, sanctions and/or possible impeachment under Alabama law. Judge King seeks relief from this Court.

Strawser, No. 1:14-424-CG-C, Emergency Verified Motion by Jefferson County Probate Judge Alan King for Leave to Intervene as a Party as of Right or, in the Alternative, by Permission, at 3 (Feb. 15, 2015). Although nominally seeking leave to intervene "as a party Defendant," *id.* at 1, Judge King nonetheless asks the district court to "provide all other further relief to which Judge King may be entitled." *Id.* at 3.

STATEMENT OF ISSUES

In addition to the issues set forth in Alabama's

petition, *Amici* respectively submit that this Court must consider whether the Probate Judges have a basis on which collaterally to challenge Judge Granade's orders and, if so, whether the Probate Judges have a duty under Alabama law to do so before violating Alabama's Marriage Laws.

In addition, with respect to Judge King's attempt to evade this Court's jurisdiction by moving to intervene into the *Strawser* litigation, this Court should consider whether efforts at "friendly litigation" to evade the popular will of the People of Alabama require further actions by this Court. *See, e.g.,* ALA. RULES OF PROF'L CONDUCT, Rule 8.4(d).

STANDARD OF REVIEW

This Court's review of issues of both Alabama law and federal law is *de novo:* "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Am. Elec. Power Co. v. Connecticut,* 131 S.Ct. 2527, 2540 (2011); *Dolgencorp, Inc. v. Taylor,* 28 So. 3d 737, 744 n.5 (Ala. 2009) ("United States district court decisions are not controlling authority in this Court"). Moreover, as relevant here, this Court reviews the jurisdiction of the federal court over Alabama *de novo. Travelers Indem. Co. v.*

Bailey, 557 U.S. 137, 152-53 & n.6 (2009).

SUMMARY OF ARGUMENT

At the outset, the substantive merits of Judge Granade's holdings on same-sex marriage conflict with the U.S. Supreme Court's controlling decision in *Baker v. Nelson*, 409 U.S. 810 (1972), which rejected the same claims asserted in the *Searcy-Strawser* litigation as lacking a substantial federal question. In any event, Alabama's Marriage Laws clearly prohibit the Probate Judges from issuing same-sex marriage licenses, and U.S. district courts' orders are not controlling on Alabama Courts.

Significantly, both Constitution and the statutes that define the lower federal courts' jurisdiction confine the federal courts to cases at law and equity. While that may sound broad, it is not complete. Under the court structure in England at the time that the Framers drafted Article III and Congress defined the lower federal courts' subject-matter jurisdiction, the question of what constituted a legal marriage was neither a case at law nor a case in equity. Since those law-and-equity limits continue to apply directly under the Constitution and indirectly under the grants of jurisdiction to the lower federal courts, the

"domestic-relations exception" to federal jurisdiction – which courts have long recognized – denies jurisdiction to the federal district court. Moreover, under the domestic-relations exception to federal jurisdiction, as well as Alabama's sovereign immunity from unconsented-to suits in federal court, the Probate Judges may collaterally attack Judge Granade's jurisdiction in the event that anyone seeks to enforce her orders. Given that defense, the Probate Judges have the obligation to defend Alabama's Marriage Laws before acquiescing to a baseless federal order. To ensure compliance with Alabama law and complete equitable relief, this Court should retain exclusive jurisdiction over this original action.

ARGUMENT

I. ALABAMA'S MARRIAGE LAWS ARE CONSTITUTIONAL

Before discussing the jurisdictional constraints on both the Probate Judges and the lower federal courts, *Amici* first emphasize that – in addition to acting without jurisdiction – Judge Granade also is simply wrong on the merits. The U.S. Supreme Court already has considered and rejected the concept that the Fourteenth Amendment's Due Process and Equal Protection Clauses include a federal

right to same-sex marriage. In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971), the plaintiffs, a same-sex couple, sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and the U.S. Supreme Court dismissed their appeal for want of a substantial federal question. *Baker v. Nelson,* 409 U.S. 810 (1972). The Supreme Court has not reversed *Baker* – despite the opportunity to have done so in *U.S. v. Windsor,* 133 S.Ct. 2675 (2013) – and, of course, the Constitution has not been amended in any material way since *Baker* was decided in 1972.

Because the Supreme Court resolved *Baker* summarily and dismissed for want of a substantial federal question, the issues "presented and necessarily decided" in *Baker* are binding on the lower federal courts. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). Given that *Baker* remains on point for same-sex marriages, the lower federal courts have an obligation to follow that authority and leave it to the U.S. Supreme Court to reverse *Baker:*

> "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the

> prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). Accordingly, "lower courts are bound by summary decisions by [the U.S. Supreme] Court until such time as the Court informs [them] that [they] are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (interior quotations omitted). Of course, *Windsor* presented an obvious opportunity for the Supreme Court to have done so, if the Supreme Court believed that its *Windsor* reasoning against *federal* marriage laws applied to *state* marriage laws. The Court's failure to reject *Baker* speaks volumes and forecloses the conclusion that *Baker* is no longer controlling.[1]

II. THE PROBATE JUDGES LACK AUTHORITY TO VIOLATE ALABAMA'S MARRIAGE LAWS, AND THE FEDERAL COURTS LACK AUTHORITY TO COMMAND OTHERWISE

Amici respectfully submit that the Probate Judges lack

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[1] The *Baker* jurisdictional statement plainly presented the question whether denying same-sex marriage violates the Constitution's equal-protection and due-process rights that Plaintiffs here assert. *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (U.S. Oct. Term 1972). Under *Mandel* and *Hicks* then, *Baker* necessarily decided that there is no basis under federal equal-protection or due-process analysis to support the claim that same-sex relationships deserve the same recognition, rights, or benefits as husband-wife marriage.

authority to issue same-sex marriage licenses in violation of Alabama law, notwithstanding the district court's orders. Moreover, because the federal court lacks jurisdiction for its orders, the Probate Judges have the obligation to attack the orders collaterally if and when anyone attempts to enforce the orders.

A. Alabama's Constitution Denies Alabama's Probate Judges the Authority to Issue Same-Sex Marriage Licenses

Amici wholly support Alabama's argument that Alabama's Marriage Laws prohibit the Probate Judges from issuing same-sex marriage licenses in response to the *Searcy-Strawser* litigation. *See* Pet. at 11-19. Moreover, because the lower federal courts lack jurisdiction, Section II.B, *infra,* and their orders are open to collateral attack, Section II.C, *infra, Amici* respectfully submit that this Court must not only assert its jurisdiction here, but also must retain exclusive jurisdiction until this matter is finally resolved. *See* Section III, *infra.*

B. Federal Courts Lack Authority over the Right to Marry under State Law

In Alabama, the common law prevails except as abrogated by the Constitution, the Legislature, or an Alabama court. *State v. Cawood,* 2 Stew. 360, 362 (Ala. 1830). As with most

American jurisdictions, Alabama's common law was adopted from the English common law, *id.*, and Alabama therefore naturally looks to English cases as authoritative on common-law issues. *Burt v. State*, 39 Ala. 617, 629 (Ala. 1866). In English common law, marriage was defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 343, 798 N.E.2d 941 (Mass. 2003) (*quoting Hyde v. Hyde*, [1861-1873] All E.R. 175 (1866)). Thus, the definition of marriage in Alabama has always been the current definition.

Reflecting our federal structure, in which the states remain sovereign in the spheres not delegated to the Federal Government, the U.S. Supreme Court has long recognized a "domestic-relations" exception to federal jurisdiction:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In re Burrus, 136 U.S. 586, 593 (1890). Indeed, the U.S. Supreme Court previously had "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, … either as an original proceeding in

chancery or as an incident to divorce *a vinculo*." *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859). That exception has both a *statutory* and a *constitutional* component, and it concerns both where litigation starts and where it ends.

The statutory and constitutional questions pose the same etymological issue, but the statutory one focuses not on the outer limits of the federal judicial power but on the limits that Congress intended when it created the lower federal courts. Of course, the two are not the same thing. The "Article III … power to hear cases 'arising under' federal statutes… is not self-executing," and Congress need not provide the lower federal courts with the full scope of judicial power that Article III makes available to this Court." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986). The *statutory* issue is whether Congress included this type of domestic-relations issue when it created the federal courts and established their jurisdiction over federal-question and civil-rights cases in law and equity. The *constitutional* question is whether Article III's grant of jurisdiction over cases in law and equity encompasses issues of domestic relations. As explained below, the litigation before Judge Granade may

present only the statutory question of where litigation starts – *e.g.*, state or federal court – without addressing whether the U.S. Supreme Court has power to intervene in such cases under the federal Constitution when those cases arise from state courts.

As the U.S. Supreme Court has stated often in analogous Article III contexts, these questions go to the proper role of courts in our democracy:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation "is founded in concern about the proper – and properly limited – role of the courts in a democratic society."

Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"). *Amici* respectfully submit that the correct answer to the question here is that – whether or not the

U.S. Supreme Court has jurisdiction over an appeal from a state court – the lower federal courts lack jurisdiction here.

1. Article III's Grant of Authority to the Federal Judiciary Excludes Jurisdiction over Marriage Cases

Constitutionally, there is a question as to the scope of the judicial power conveyed to federal courts (including the Supreme Court) by Article III, §2:

> The judicial power shall extend to all cases, *in law and equity,* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, §2 (emphasis added). The uncertainty lies in the term of art "cases in law and equity," which did not include marriage-related issues when the states ratified the Constitution. Specifically, cases at law were heard before the Court of King's Bench or the Court of

Common Pleas, and cases in equity were heard before the Court of Exchequer or the Court of Chancery. In 1787, only Ecclesiastical Courts could hear marriage-related cases like the ones before Judge Granade: "upon the separation of the ecclesiastical courts from the civil[,] the ecclesiastical [was] supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage." *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878); *accord Barber*, 62 U.S. at 597; *cf. Maynard v. Hill*, 125 U.S. 190, 206 (1888). Although *Amici* raise this issue, the Court need not decide it in deciding *this case* because the statutory issue likely resolves the jurisdictional question presented.

2. The Domestic-Relations Exception to Federal Jurisdiction Denies the Lower Federal Courts Jurisdiction over Marriage Cases

At least initially, all relevant acts of Congress to provide jurisdiction to the lower federal courts were limited to actions at law or in equity, and Congress conclusively did not intend the 1948 modernization of that text to confer additional powers not already conferred: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such

changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957).[2] What Congress meant by "cases in law and equity" excluded marriage-related cases, even if the U.S. Supreme Court subsequently finds that that same phrase in Article III includes them:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.

Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). The Court in *Ankenbrandt* suggests a narrowing of the domestic-relations exception to cases "involving the issuance of a divorce, alimony, or child custody decree," but not to torts such as fraud. *Id.* at 704. As far as it goes, that distinction supports including the right to marriage in the domestic-relations exception (an issue that *Ankenbrandt* had no reason to decide), in contrast to recognized federal jurisdiction over torts at law and in equity.

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[2] *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (repeals by implication disfavored); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision").

Under the foregoing analysis, it appears that limitations on the lower federal courts' jurisdiction require same-sex plaintiffs to begin their challenges to state marriage laws in state courts, which have general jurisdiction over these issues. Importantly, denying a federal forum for this suit would not deny all relief, insofar as plaintiffs could bring these federal claims in state court under the doctrine of concurrent jurisdiction. *Haywood v. Drown*, 556 U.S. 729, 735 (2009).

The fact that virtually all currently practicing lawyers assume that federal-question jurisdiction is available for any federal claim does not make it so. As Justice Holmes recognized in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), sometimes "a page of history is worth a volume of logic." Until 1875, the lower federal courts did not have federal-question jurisdiction.[3] *Merrell Dow Pharm.*, 478 U.S. at 807. As that historical example

[3] Indeed, until 1980, federal-question jurisdiction itself had an amount-in-controversy requirement that likely would have precluded suits over marriage rights under §1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (*citing* Pub. L. No. 94-574, 90 Stat. 2721 (1976)) (eliminating amount-in-controversy minima for suits against federal agencies and officers); Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980) (same for other suits).

shows, unexamined assumptions cannot and do not accurately define the bounds of the lower federal courts' jurisdiction. As creatures of statute, the lower courts have only the jurisdiction that Congress gave them, which need not extend to the full limits – whatever they may be – of the judicial power under Article III.

By way of background, a plaintiff without a statutory right of action who seeks to enforce federal law against a conflicting state law can consider two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity. *Perez v. Ledesma,* 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343. *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* In both statutes, however, Congress adopted the phrasing of Article III by extending jurisdiction only to "suits at law or in equity." *Id.* As indicated, the revision of the phrase to "civil actions" in 1948, 28 U.S.C. §§1331, 1343, did not expand the scope of the jurisdiction conferred on the lower federal courts. *Fourco Glass,* 353 U.S. at 227; *Nat'l Ass'n of Home Builders,* 551 U.S. at 662; *Chem. Mfrs. Ass'n,* 470 U.S. at

128. At the very least, the domestic-relations exception seriously undermines Judge Granade's jurisdiction.

Finally, one cannot assume that the failure of Congress to expand federal-question and civil-rights jurisdiction under §1331 and §1343 has been a mere oversight that courts might ignore in the interest of perceived justice to the same-sex couples' federal claims. The Constitution establishes a federal structure of dual state-federal sovereignty, *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990), which the states entered with their retained "sovereignty intact." *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 751-52 (2002); U.S. CONST. amend. X. Certainly nothing precludes same-sex couples from initiating their marriage-rights suits in state court, and Congress (at least) has precluded such suits in the lower federal courts.

Accordingly, there is ample basis for this Court not only to take but also to *retain* exclusive jurisdiction here to ensure that Alabama's Probate Judges do not submit to lower-federal court judgments that the lower federal courts lack jurisdiction to impose. Those actions would be consistent with *Baker v. Nelson,* 409 U.S. 810 (1972), the

U.S. Supreme Court's prior review of same-sex marriage, which found that not to present a substantial federal question.

3. The Lower Federal Courts' Authority over Marriage Rights May Be More Narrow than the Supreme Court's Authority under Article III

Even if the U.S. Supreme Court interprets Article III to include federal authority over marriage rights, that would not answer the statutory question. Indeed, the question of whether the U.S. Supreme Court would have jurisdiction under Article III to hear an appeal from a state court must await a petition for a writ of *certiorari* from a state court judgment.

The domestic-relations exception's application here may not foreclose the U.S. Supreme Court's hearing an appeal from a state court on the scope of the Fourteenth Amendment. Article III's scope is more broad than §1331's scope. *Compare, e.g., Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) *with Am. Well Works v. Layne*, 241 US 257, 259-60 (1916); *cf. Merrell Dow Pharm.*, 478 U.S. at 807. Moreover, other marriage-related cases would fall within the law-equity categories, even if a pure marriage-rights case does not.

For example, *Loving v. Virginia*, 388 U.S. 1 (1967), arose from a criminal action appealed from a state supreme court, *Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78 (Va. 1966), and *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), reached the U.S. Supreme Court from a federal district-court tax-refund action brought under 28 U.S.C. §1346(a)(1). In both cases, the suit was in equity (*Loving*) or law (*Windsor*), and the petitioner Loving and plaintiff Windsor did not seek the right to marry, having married under another jurisdiction's laws that implicated rights vis-à-vis the respondent Virginia and defendant United States. Accordingly, it is likely that a case eventually – or even soon – will reach the U.S. Supreme Court on the merits question that the *Searcy-Strawser* plaintiffs ask Judge Granade to decide.

Another group of U.S. Supreme Court decisions touch upon domestic-relations issues on direct review from state court systems under 28 U.S.C. §1257, with no discussion – for or against – a domestic-relations exception to Article III jurisdiction under the Constitution. For example, *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984), reviewed the "judgment of a state court divesting a natural mother of

the custody of her infant child because of her remarriage to a person of a different race." *See also Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (California Court of Appeal); *Troxel v. Granville*, 530 U.S. 57 (2000) (Supreme Court of Washington); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) (Supreme Court of South Carolina). In all of these decisions, the U.S. Supreme Court simply did not discuss a domestic-relations limit on Article III jurisdiction, which proves nothing.

> The short of the matter is that the jurisdictional character of the elements of the cause of action in [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987)] made no substantive difference …, had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort … have no precedential effect.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998). As such, these merits decisions do not rebut a domestic-relations exception to Article III jurisdiction.

C. Federal Judgments Are Open to Collateral Attack for Violating Alabama's Immunity from Suit in Federal Court, as Well as for Exceeding Federal Authority

The Probate Judges cannot avoid state law and its limits on their lawful authority merely because a federal

judge orders them to do so. Even assuming *arguendo* that the final judgment in the *Searcy-Strawser* litigation reflects Judge Granade's current views on same-sex marriage, the Probate Judges cannot merely acquiesce without challenging the federal court's jurisdiction over Alabama's marriage laws. As a matter of both state and federal law, that proscription applies even more emphatically to Judge King and his transparent attempt to circumvent Alabama law by invoking the protection of a friendly suit against Alabama's sovereignty.

Under *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009), many assertions of jurisdiction by a federal court are not open to collateral attack in a later proceeding to enforce the federal court's judgment. Under *Bailey*, a party who had the opportunity to challenge jurisdiction in the first federal action generally is not entitled to challenge the first judgment's jurisdiction in a second action resisting the enforcement of the first judgment. The *Bailey* rule on collaterally attacking a court's jurisdiction has not only clear exceptions but also unsettled areas. As relevant here, sovereign immunity is an outright exception to the bar on collateral challenges,

id., and several potential exceptions remain undecided:

> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Id. (*citing* Restatement (Second) Judgments §12, interior quotations omitted). As indicated, the *Searcy-Strawser* cases violate Alabama's sovereign immunity and therefore cannot bind Alabama. In addition, *Amici* respectfully submit each of the Restatement's exceptions quoted in *Bailey* could apply here, particularly the second. Having the federal court decide an issue so central to an issue over which Alabama has exclusive or near-exclusive authority plainly "would substantially infringe the authority" of not only of this Court but also of the People of Alabama and their Legislature in deciding how to go forward in the event that the U.S. Supreme Court invents a right to same-sex marriage.

Quite simply, if Alabama cannot regulate marriage on her terms, neither a federal court nor even the United States can compel Alabama to regulate marriage at all:

> when the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Alabama could, therefore, redress Judge Granade's perceived constitutional violations by exiting the marriage field altogether. *Amici* do not argue that Alabama's government should (or should not) exit the field if the U.S. Supreme Court invalidates traditional husband-wife marriage. Rather, *Amici* merely argue that the decision is Alabama's alone. By venturing to foreclose Alabama's legitimate choices, the federal judgment "substantially infringe [Alabama's] authority" within the Restatement's meaning and, as such, is open to collateral challenge.

Finally, Judge King's actions to seek to evade this Court by invoking the jurisdiction of the federal court raise questions about his conduct, separate and apart from

the merits here vis-à-vis the other Probate Judges. Of course, Judge King lacks authority to waive Alabama's sovereign immunity, *Ala. Dep't of Corr. v. Montgomery County Comm'n*, 11 So. 3d 189, 191-92 (Ala. 2008), which poses a jurisdictional bar to the federal court's authority over Judge King's office. *Id.; cf. Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) (ability of state defendants to waive immunity is a question of state law). As such, the federal court lacks jurisdiction over Judge King's office.

Even if not strictly jurisdictional, federal courts prudentially should not decide "constitutional issues affecting legislation … in friendly, non-adversary proceedings[.]" *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568-69 (1947) (citations and interior quotations omitted). "It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344-45 (1892). *Amici* respectfully submit that Judge King's circumvention is "prejudicial to the administration of justice" within the meaning of Rule 8.4(d) and does not constitute a "good

faith effort to determine the validity, scope, meaning or application of the law" within the meaning of Rule 1.2(d).

III. IN ADDITION TO ALABAMA'S RELIEF REQUESTED, THIS COURT SHOULD RETAIN EXCLUSIVE JURISDICTION TO ENSURE COMPLIANCE WITH ALABAMA LAW

When a court grants equitable relief, it can retain jurisdiction to ensure a full remedy. *First Nat'l Bank v. Bradley*, 223 Ala. 22, 22-23, 134 So. 621, 622 (Ala. 1931); *Nelson Realty Co. v. Darling Shop of Birmingham, Inc.*, 267 Ala. 301, 311, 101 So. 2d 78, 86 (Ala. 1957); *accord Vasquez v. Harris*, 503 U.S. 1000 (1992). Only where the Legislature has precluded retaining jurisdiction has this Court refused to allow a court to retain jurisdiction. *Ex parte Kimberly-Clark Corp.*, 779 So. 2d 178, 182 (Ala. 2000). Here, nothing precludes this Court's retaining exclusive, continuing jurisdiction. Indeed, *Amici* respectfully submit that this Court's supervisory authority over the lower Alabama courts compels it.

CONCLUSION

This Court should issue the writ of mandamus requested by Alabama and retain exclusive, continuing jurisdiction over the case pending the resolution of all pending litigation related to the lawfulness of Alabama's marriage

laws.

Dated: February 17, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 17th day of February, 2015, served copies of the foregoing amicus brief, in conjunction with its accompanying motion for leave to file, on the following counsel for the parties and the Alabama Attorney General, by e-mail and U.S. Mail:

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