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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

APRIL AARON-BRUSH and GINGER AARON-BRUSH, Plaintiffs, vs. LUTHER STRANGE in his official capacity as Attorney General of Alabama; et al., Defendants.	Civil Action No. 2:14-cv-01091-RDP

Plaintiffs' Response to Defendants' Notice (Doc. 28)

A. *Obergefell* has not given Plaintiffs the relief they seek, but provides a map to the destination.

In *Obergefell v Hodges*, ___ S.Ct. ____, 2015 WL 2473451 (2015), the Supreme Court struck down marriage bans and anti-recognition laws in Michigan, Kentucky, Ohio and Tennessee. While *Obergefell*'s reasoning is binding Supreme Court precedent that will ultimately dictate the outcome of this case because of the similarity of both the challenged laws and the legal questions, it simply did not declare **Alabama's** marriage bans and anti-recognition laws to be unconstitutional, nor did it order **Alabama** to stop enforcing its

unconstitutional marriage laws. The Supreme Court could not do so even if it wanted to because this case—challenging **Alabama's** marriage laws—was not on review before the Court.

Notably, in other marriage equality cases, plaintiffs proceeded to final judgment after binding precedent was established by different cases that challenged different marriage laws. See, e.g., *Fisher-Borne v. Smith,* 14 F. Supp. 3d 695 (M.D.N.C. 2014) (holding North Carolina marriage laws unconstitutional because of 4th Circuit ruling on Virginia marriage laws); *Rolando v. Fox,* 23 F. Supp. 3d 1227 (D. Mont. 2014) (holding Montana marriage laws unconstitutional under 9th Circuit ruling on marriage laws of Idaho and Nevada).

The Fifth Circuit was hearing appeals in same-sex marriage cases from Louisiana, Mississippi, and Texas. Within a week of *Obergefell,* the Court "REMANDED for entry of judgment in favor of the plaintiffs" in all three cases. *Robicheaux v. Caldwell,* --- F.3d ----, 2015 WL 4032118 at *2 (5th Cir. 2015); *De Leon v. Abbott,* --- F.3d ----, 2015 WL 4032161 at *2 (5th Cir. 2015); *Campaign for Southern Equality v. Bryant,* --- F.3d ----, 2015 WL 4032186 at *2 (5th Cir. 2015).

If Defendants in this case were correct, the Fifth Circuit should have declared all the cases moot.

B. The burden of persuasion on mootness is "formidable" and "heavy."

In *Doe v. Wooten,* 747 F.3d 1317, 1322-23 (11th Cir. 2014), the Eleventh Circuit summarized the law of mootness:

> It is well settled that when a defendant chooses to end a challenged practice, this choice does not always deprive a federal court of its power to decide the legality of the practice. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Id. at 190, 120 S.Ct. at 709. The Supreme Court has applied this same standard in cases involving government actors. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 719, 127 S.Ct. 2738, 2751, 168 L.Ed.2d 508 (2007); Adarand Constructors, [Inc. v. Slater, 528 U.S. 216, 224, 120 S.Ct. 722, 726, 145 L.Ed.2d 650 (2000) (per curiam).]
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> In keeping with these Supreme Court decisions, this Court also employs this standard, even for government actors. *Harrell v. Fla. Bar,* 608 F.3d 1241, 1268 (11th Cir.2010) (reaffirming the principle that the initial "heavy" burden remains with the government actor to show "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (internal quotation marks omitted)). Because of

the unique characteristics of public defendants, *Troiano [v. Supervisor of Elections]*, 382 F.3d [1276,] 1283 (11th Cir.2004), this Court often gives government actors "more leeway than private parties in the presumption that they are unlikely to resume illegal activities," *Coral Springs St. Sys., Inc., v. City of Sunrise,* 371 F.3d 1320, 1328–29 (11th Cir.2004). We have called this leeway that we extend to government actors a "rebuttable presumption," *Troiano*, 382 F.3d at 1283, or a "lesser burden," *Rich v. Sec'y, Fla. Dep't of Corr.,* 716 F.3d 525, 531 (11th Cir.2013). This presumption is particularly warranted in cases where the government repealed or amended a challenged statute or policy—often a clear indicator of unambiguous termination. *See Troiano,* 382 F.3d at 1283–84.

In applying this presumption, we have held that once a government actor establishes unambiguous termination of the challenged conduct, the controversy "will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." Id. at 1285. Consistent with our precedent, we emphasize that the government actor is entitled to this presumption only after it has shown unambiguous termination of the complained of activity. *Harrell*, 608 F.3d at 1267–68 ("[W]e are unable to say that the Board, through its decision, 'unambiguously terminated' the challenged application of Rule 4–7.2(c)(2) to Harrell's slogan, as required to invoke the presumption we identified in *Troiano*.").

In conducting both the initial inquiry of unambiguous termination as well as the following evaluation about whether there is a reasonable basis the challenged conduct will recur, this Court has considered the following factors: (1) "whether the termination of the offending conduct was unambiguous;" (2) "whether the

> change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction;" and (3) "whether the government has 'consistently applied' a new policy or adhered to a new course of conduct." *Rich*, 716 F.3d at 531–32 (quoting *Nat'l Ass'n of Bds. of Pharmacy,* 633 F.3d at 1310). The timing and content of the cessation decision are also relevant in evaluating whether the defendant's stopping of the challenged conduct is sufficiently unambiguous. Id. We are also "more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a continuing practice or was otherwise deliberate." *Atheists of Fla., Inc. v. City of Lakeland,* 713 F.3d 577, 594 (11th Cir.2013) (internal quotation marks omitted). These factors are not exhaustive and the analysis may vary depending on the facts and circumstances of a particular case. *See Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941) (noting the difficulty in fashioning a precise test of universal application for determining whether a request for declaratory relief has become moot).

Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1184-88 (11th Cir. 2007), discussed the burden of proof on the non-revival assertion:

> The "formidable," "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 190, 189, 120 S.Ct. 693 (alteration, internal quotation marks, and citation omitted); *see also Sec'y of Labor v. Burger King Corp.,* 955 F.2d 681, 684 (11th Cir.1992) (describing the defendant's burden as "heavy"). A defendant's assertion

that it has no intention of reinstating the challenged practice "does not suffice to make a case moot" and is but "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." [*United States v.*] *W.T. Grant Co.,* [345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)]; *see also Hall v. Bd. of Sch. Comm'rs of Conecuh County,* 656 F.2d 999, 1001 (5th Cir. Unit B Sept.1981) ("To defeat jurisdiction ..., defendants must offer more than their mere profession that the conduct has ceased and will not be revived."). Although government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur, private citizens are not entitled to this legal presumption. See *Troiano*, 382 F.3d at 1283 (courts are "more apt to trust public officials than private defendants to desist from future violations"). ...

First, it comes as no surprise that courts are more likely to find that the challenged behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly. Conversely, we are more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a "continuing practice" or was otherwise deliberate. *See, e.g., W.T. Grant,* 345 U.S. at 632 n. 5, 73 S.Ct. 894 ("When defendants are shown to have settled into a continuing practice or entered into a conspiracy ..., courts will not assume that it has been abandoned without clear proof." (internal quotation marks omitted)); *Troiano*, 382 F.3d at 1285–86 (fact that challenged behavior "was a good-faith effort to deal with an administrative dilemma" that was "not likely to be present in the future" supported finding of mootness); *Burger King Corp.,* 955 F.2d at 684 ("five-year history of violations" cut against finding of mootness); *Hall*, 656 F.2d at 1000

("longstanding practice" cut against finding of mootness). ...

Second, we are more likely to find that cessation moots a case when cessation is motivated by a defendant's genuine change of heart rather than his desire to avoid liability. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 109, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("presumption" of future injury when cessation occurs in response to suit); *Iron Arrow Honor Soc'y v. Heckler,* 464 U.S. 67, 71–72, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983); *W.T. Grant*, 345 U.S. at 632 n. 5, 73 S.Ct. 894 ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit ...."); *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir.2005) (per curiam) ("[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction."); *Troiano*, 382 F.3d at 1285 (in moot case, cessation occurred prior to suit); *Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1331–32 (11th Cir.2004) (same); Dow Jones & Co. v. Kaye, 256 F.3d 1251, 1255 n. 4 (11th Cir.2001) (same); *Burger King Corp.,* 955 F.2d at 684 (in non-moot case, cessation came "on the eve of trial"); *Nat'l Adver. Co. v. City of Fort Lauderdale,* 934 F.2d 283, 286 (11th Cir.1991) (in non-moot case, cessation came six weeks after suit followed the next day by motion to dismiss); *Jager v. Douglas County Sch. Dist.,* 862 F.2d 824, 833–34 (11th Cir.1989) (in non-moot case, cessation came only "[u]nder the imminent threat of the [plaintiffs'] lawsuit"); *Hall*, 656 F.2d at 1000 (same); *City of Waco v. Envtl. Prot. Agency,* 620 F.2d 84, 86–87 & n. 10 (5th Cir.1980) (in non-moot case, cessation came "only six days before oral argument"). ...

Third, under controlling law, a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains. *See W.T. Grant,* 345 U.S. at 632, 73 S.Ct. 894 (noting that the "public interest in having the legality of the practices settled[ ] militates against a mootness conclusion"); *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43, 65 S.Ct. 11, 89 L.Ed. 29 (1944) (controversy remains where defendant "has consistently urged the validity of the [practice] and would presumably be free to resume [it] were not some effective restraint made"); *United States v. Trans–Mo. Freight Ass'n,* 166 U.S. 290, 308, 17 S.Ct. 540, 41 L.Ed. 1007 (1897) ("[M]ere [cessation] is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the [challenged practice] .... [Defendants] do not admit ... illegality ..., nor [promise] not to enter into a similar [practice]. On the contrary, by their answers, the defendants claim that the agreement is ... perfectly proper ...."); *see also Coral Springs St. Sys.*, 371 F.3d at 1332–33 (in moot case, defendant "expressly disavowed any intention of defending" the ceased conduct); *ACLU v. Fla. Bar,* 999 F.2d 1486, 1494–95 (11th Cir.1993) (in non-moot case, defendant was not "bound by its court statements," had "the discretion to change its policy" back, and reasonably might do so where it continued to assert the old policy's validity); *Jager*, 862 F.2d at 833–34 (in non-moot case, defendants "never promised not to resume the prior practice" and "continue to press on appeal that the voluntarily ceased conduct should be declared constitutional"); *Hall*, 656 F.2d at 1000 (in non-moot case, defendants "disputed the constitutionality of the practice up to the day of trial, when defense counsel for the first time indicated they had no intention of reviving [it]"); *United States v. Bob Lawrence Realty, Inc.,* 474 F.2d 115, 127 (5th Cir.1973)

> ("[I]n the face of appellant's own inability to recognize his transgressions of the Act, we decline to assume that he will not violate the Act in the future."). ...

C. Defendants have not met their heavy burden here.

The Defendants' Notice (Doc. 28) states *Obergefell* "is the law of the land and is binding on them." As we noted at the beginning of this memo, the Supreme Court decision may be binding precedent, but its mandate will not issue to this Court or the other U.S. districts court in Alabama. Other courts in the same mid-litigation position as this Court have entered injunctions or remanded with instructions to enter injunctions. The Attorney General does not say what **action** he will take to effectuate "the law of the land." The other two Defendants state how they will treat Plaintiffs. And, while Plaintiffs' counsel understood the position of the Attorney General to be that <u>all</u> state officials will follow *Obergefell* because it is the law of the land, the Notice (Doc. 24) filed by the named Defendants stops well short of that promise. As agreed by the parties, and affirmed by the Court, the Governor's dismissal as a Defendant was in exchange for a promise that the Governor and other agents and employees of the Governor, as well as his successors in

office, would be bound by final injunctive relief in this action. *See* Doc. 22, Doc. 23.

Even if these Defendants follow through, they cannot affect the conduct of future State officials. Some elected officials have claimed that anyone who is not a party to the marriage cases decided by the Supreme Court in *Obergefell* is not bound by the Court's decision. *See* Complete Transcript: Senator Ted Cruz interview with NPR News, available at http://www.npr.org/about-npr/418600824/complete-transcript-senator-ted-cruz-interview-with-npr-news. Defendants have not demonstrated — nor can they — that it is "absolutely clear" that future state officials will not share Sen. Cruz's view. Plaintiffs' need for the State's recognition of their marriages is ongoing. It affects how they pay their income taxes **every year**, it affects employee health benefits they are receiving if they are employed, and it has an enormous impact on the financial security of widows when their spouses pass. Therefore, that the State agrees to recognize their marriages today does not afford them complete relief. Plaintiffs need the certainty that their marriages will be recognized by the State throughout their lives and at the time of their deaths.

Having a state official saying, "I will obey the *Obergefell* decision," binds only that official during his or her term. The next official may repudiate that decision, the same way a successful Republican presidential candidate can use "the presidency's executive authority to reimpose suspended U.S. sanctions on Iran and withdraw[] from panels involved in implementing the accord."[1]

The challenged law has not been repealed. Alabama's Marriage Prohibitions remains part of the state Constitution and the Code. Plaintiffs need the certainty of a declaratory judgment declaring Alabama's Marriage Prohibitions unconstitutional and an injunction they can enforce to ensure that their marriages will be recognized for all purposes going forward. They still have a "need of the judicial protection that [they] sought." *See Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 224 (2000). This case is not moot, and Plaintiffs may proceed to a final judgment.

Having an injunction in place protects Plaintiffs because it would allow them to go to the court to seek enforcement if necessary;

[1] Nahal Toosi, "How a Republican president could kill the Iran deal," Politico, July 14, 2015, http://www.politico.com/story/2015/07/gop-president-iran-deal-kill-120077.html#ixzz3g4oHMvTC.

without it, they would have to initiate a new lawsuit. As the Alabama Supreme Court held, "[W]hile [federal district court decisions] bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties." *Ex parte State ex rel. Alabama Policy Institute,* --- So.3d ---, 2015 WL 892752 at *26 (Ala., Mar. 3, 2015), quoting *Anderson v. Romero,* 72 F.3d 518, 525 (7th Cir.1995). For this reason, Plaintiffs need an injunction against the Commissioner of Revenue and the Public Safety Director to make sure they and their successors are bound. And, as noted above, such injunction would further bind the Governor and his successors.

The wrongful behavior is not only reasonably expected to recur, it is still ongoing. Various officials of Alabama are throwing roadblocks in the way of relief, are providing legal arguments or talking points, or are slow-walking their compliance.

- Alabama Chief Justice Roy Moore wrote to Gov. Bentley in January urging him to resist implementation of Judge V.S. Granade's injunction against enforcement of the Marriage Prohibitions. The Chief Justice said, "As Chief Justice of the Alabama Supreme Court, I will continue to recognize the Alabama Constitution and the will of the

people overwhelmingly expressed in the Sanctity of Marriage Amendment. … I ask you to continue to uphold and support the Alabama Constitution with respect to marriage, both for the welfare of this state and for our posterity. Be advised that I stand with you to stop judicial tyranny and any unlawful opinions issued without constitutional authority."[2]

- Moore told AL.com, "What the [Alabama Supreme Court] order means is that within that 25-day period no (probate judge) has to issue a marriage license to a same sex couple."[3]

- The next day, Moore advised public officials they could be held accountable for following wrong and immoral laws in Germany during World War II, just as German officials were at the Nuremburg Trials.[4] Justice Moore also "called the Supreme Court's ruling to legalize gay and lesbian nuptials nationwide 'even worse' than the Court's 19th century decision to uphold racial segregation. 'I believe it's worse because it affects our entire system of morality and family values,' Roy Moore told CNN in a phone interview Friday."[5]

- Moore recently referred to the U.S. Supreme Court as the "federal beast" and told an audience "that he joined the

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[2] Mike Cason, "Alabama Chief Justice Roy Moore says he will continue to recognize ban on same-sex marriage," AL.com, Jan. 27, 2015, http://www.al.com/news/index.ssf/2015/01/alabama_chief_justice_roy_moor_1.html.

[3] Charles J. Dean, "Roy Moore: Alabama judges not required to issue same-sex marriage licenses for 25 days," AL.com, June 29, 2015, http://www.al.com/news/index.ssf/2015/06/roy_moore_gay_marriage.html.

[4] Charles J. Dean, "Alabama Chief Justice Moore: Gay marriage 'not in accordance with Constitution'," June 30, 2015, http://www.al.com/news/index.ssf/2015/06/alabama_chief_justice_moore_ga.html.

[5] Jeremy Diamond, "Alabama chief justice: Marriage ruling worse than segregation decision," CNN, June 28, 2015, http://www.cnn.com/2015/06/26/politics/roy-moore-conservatives-gay-marriage-alabama-react/.

views of the four Supreme Court justices who dissented in the case who Moore said called the ruling lawless and not based on constitutional law, God's law or natural law." He also "Moore warned the crowd that the recent ruling on same-sex marriage strikes at the very heart of religious freedom."[6]

- "Alabama Supreme Court Chief Justice Roy Moore told a church crowd on Sunday that the U.S. Supreme Court 'destroyed the institution of God' by legalizing same-sex marriage. … 'How do they come out now and say that marriage, which is ordained by God, doesn't mean what it's always meant, between a man and woman?' Moore said. 'Not between two men, two women, or three women and one man.'"[7]

- Even though Chief Justice Moore will not explicitly call for resistance to the *Obergefell* ruling, his statements are "dog whistles" to those opposed to same-sex marriage.[8]

- Gov. Bentley is talking with legal experts "about the potential impact of the ruling on churches and religious organizations."[9]

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[6] Charles J. Dean, "Roy Moore tells radical anti-abortion, anti-gay rights group that America is under attack," AL.com, July 12, 2015, http://www.al.com/news/index.ssf/2015/07/roy_moore_tells_radical_anti-a.html.

[7] Casey Toner, "Alabama Supreme Court Chief Justice Roy Moore: Same-sex marriage ruling 'destroyed the institution of God,'" AL.com, July 12, 2015, http://www.al.com/news/mobile/index.ssf/2015/07/alabama_supreme_court_chief_ju.html.

[8] "Dog-whistle politics is political messaging employing coded language that appears to mean one thing to the general population but has an additional, different or more specific resonance for a targeted subgroup." See Wikipedia article, "Dog whistle politics," https://en.wikipedia.org/wiki/Dog-whistle_politics, quoting, among others, the late William Safire.

[9] Brian Lyman, "Supporters, opponents of same-sex marriage look ahead," Montgomery Advertiser, June 30, 2015, http://on.mgmadv.com/1LT6wis.

- Win Johnson, director of the legal staff of the Administrative Office of Courts, has posted on Facebook an open letter to all public officials in Alabama, exhorting them to resist any change in the Alabama Marriage Prohibitions: "Public official, what will you do? Will you stand up for the law of Alabama, for the people, for the weak and vulnerable, for the law of God? Or will you capitulate? Will you become complicit in the takeover by the wicked?" Johnson sent a copy of his open letter to David Byrne, Governor Bentley's legal advisor, stating, "[P]lease remind the governor that in spite of what the U.S. Supreme Court said today, AL's case has not been ruled on yet by the Eleventh Circuit. There's no reason to rush to surrender."[10] Even though Johnson has been reprimanded by Chief Justice Moore and has apologized to Gov. Bentley, his "minister of God" statement has been widely publicized.[11]

- Chip Beeker, a member the Alabama Public Service Commission, posted a press release on his Facebook page, including the following statement by himself: "Last Friday, five unelected and unaccountable justices imposed their will on the people of Alabama and the United States. This was an assault on God, on Christian heritage, and on our culture."[12] He was quoted by AL.com as adding to this statement, "The runaway judiciary is a bigger threat to the United States than Isis [sic]. Liberal judges have done

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[10] Charles J. Dean, "Roy Moore's lawyer to Gov. Bentley: Public officials are ministers of God,'" AL.com, June 30, 2015 (updated July 1, 2015), http://blog.al.com/news_impact/print.html?entry=/2015/06/roy_moores_lawyer_to_gov_bentl.html.

[11] Charles J. Dean, "Alabama Chief Justice Roy Moore reprimands staffer for 'minister of God' letter," AL.com, July 1, 2015, http://www.al.com/news/index.ssf/2015/07/chief_justice_roy_moore_reprim.html.

[12] https://www.facebook.com/chipbeeker2014 (last viewed on July 2, 2015).

harm to our country and our constitution than Al Qaeda."[13]

- AL.com reported on July 1, "Probate offices in Elmore County, Tuscaloosa County, and Escambia County are not issuing the same-sex marriage licenses. And, the probate offices in Randolph County, Colbert County, and Lauderdale County are not issuing any marriage licenses. Explaining their actions, many of these probate office officials cited Alabama Supreme Court Chief Roy Moore's controversial claim that no probate judge has to issue a same-sex marriage license for 25 days during a rehearing period for the U.S. Supreme Court decision."[14]

- "Lauderdale County Probate Judge Will Motlow [on June 30] said that his office will not be issuing marriage licenses until further notice."[15]

Marriage discrimination against gays and lesbians was adopted by a large majority of the voters of Alabama in 2006.[16] It cannot be said to be "isolated" or "unintentional" action. *Sheely,* 505 F.3d at 1184.

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[13] Mike Cason, "Christian speakers denounce same-sex marriage decision," AL.com, June 29, 2015 (updated June 30), http://www.al.com/news/index.ssf/2015/06/christian_speakers_denounce_sa.html.

[14] Casey Toner, Several Alabama counties witholding gay marriage licenses despite federal order," AL.com, July 1, 2015, http://www.al.com/news/index.ssf/2015/07/several_alabama_counties_witho.html.

[15] Mary Sell, "Judge: No marriage licenses in Lauderdale until further notice," TimesDaily, June 30, 2015, http://www.timesdaily.com/news/local/judge-no-marriage-licenses-in-lauderdale-until-further-notice/article_5c823996-593b-5233-b4c5-c123ca323abd.html.

[16] Certification of Constitutional Amendment Election Results, http://www.alabamavotes.gov/downloads/election/2006/primary/ProposedAmendments-OfficialResultsCertification-06-28-2006.pdf.

Although the Defendants in this action are three Executive Branch officials, the voters of Alabama are authors of this discrimination. It cannot be said that the voters have shown "a genuine change of heart." *Sheely,* 505 F.3d at 1185. If the Court holds that the named Defendants must be the ones to show a genuine change of heart rather than [a] desire to avoid liability," the evidence shows that Defendants did not change their position until after the Supreme Court's *Obergefell* decision. General Strange filed an amicus brief in the *Obergefell* case supporting the state defendants.[17] General Strange's statement immediately after the decision showed no change of heart, but a reluctant acceptance of the rule of law.[18]

Defendants have not "acknowledge[d] wrongdoing." *Sheely,* 505 F.3d at 1187. Instead, the Attorney General just changed the focus of

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[17] Ruthann Robson, "Guide to the Amicus Briefs in Obergefell v. Hodges," http://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html#more.

[18] Erin Edgemon, "Attorney General Luther Strange: SCOTUS overturned 'will of the citizens,'" AL.com, June 26, 2015, http://www.al.com/news/index.ssf/2015/06/attorney_general_luther_strang_6.html ("Alabama Attorney General Luther Strange said today's U.S. Supreme Court ruling overturning gay marriage bans "overturned centuries of tradition and the will of the citizens of a majority of the states. "While I do not agree with the opinion of the majority of the justices in their decision, I acknowledge that the U.S. Supreme Court's ruling is now the law of the land," he said in a statement today."); "Alabama Attorney General Strange's Statement In Response To U.S. Supreme Court Decision On Same-Sex Marriage," http://www.ago.state.al.us/News-660.

the resistance to "continu[ing] to defend the religious liberties of Alabamians and ensur[ing] that people and businesses honoring their religious beliefs are protected."[19] This dovetails with Chief Justice Moore's warning about the threat to religious liberty.[20]

Finally, the Court should note that none of the other same-sex marriage cases in Alabama have sued the Commissioner of Revenue or the Director of the Department of Public Safety (now subsumed within the Alabama Law Enforcement Agency [ALEA]). This case sought relief against each based on allegations in the Complaint (Doc. 1) at ¶¶ 31-33. Relief against them is still needed. Moreover, relief afforded Plaintiffs from these Defendants will also bind the Governor, his employees, agents, and successors in office. *See* Joint Motion to Dismiss, Doc. 22 (granted by the Court, Doc. 23). Defendants' recent notice (Doc. 28) stated that only the currently named Defendants are covered by their pledge that *Obergefell* is the law of the land. By entering final relief (as prayed below), all executive departments that answer to the Governor

[19] See note 18.

[20] See text at note 6.

will similarly be bound, as would the Governor himself and his successor in office.

Even if plaintiffs in the Southern Districts cases received full injunctive relief, the Revenue Commissioner, the Drivers' License Division of ALEA, and the Governor would not be enjoined. This case is not moot because Plaintiffs have not received full relief. *Suter v. Artist M.,* 503 U.S. 347, 351-354 n. 6 (1992) (case not moot because relief was sought for a different group of plaintiffs than those receiving relief in another case); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 760 F.2d 1347, 1364-1365 (2d Cir. 1985), judgment aff'd on other grounds, 476 U.S. 409 (1986) (although government had obtained consent decree in related litigation, private plaintiffs' claim seeking injunctive relief would not be mooted if they could show entitlement to relief going beyond the limits of the government decree).

D. The Court should enjoin the Attorney General.

Even though the Attorney General Defendant is already enjoined by an injunction in *Searcy v. Strange,* S.D. Ala. Civil Action No. 14-0208-CG-N, Doc. 53, an injunction is warranted against him in this case. Plaintiffs are strangers to the *Searcy* litigation and have no

legal authority to invoke the Court's jurisdiction to enforce the Searcy injunction. *See, e.g., In re Emp't Discrimination Litig. Against the State,* 213 F.R.D. 592, 601 (M.D. Ala. 2003) (Fed. R. Civ. P. 71 does not provide basis for enforcement of court orders by non-party plaintiffs); *see also Salter v. Douglas MacArthur State Technical Coll.,* 929 F. Supp. 1470, 1481 (M.D. Ala. 1966) (non-party has no standing to enforce terms of consent decree); *Sims v. Montgomery Cnty. Comm'n,* 873 F. Supp. 585, 599 (M.D. Ala. 1994) (same). Thus, the *Searcy* injunction does not provide Plaintiffs with any means to obtain relief against Defendant Strange, the Governor, or their successors in office should further relief or enforcement become necessary.

E. Conclusion.

At the status conference on July 13, 2015, the Court suggested that Plaintiffs want "an obey-the-law injunction." But "obey the law" injunctions are off limits because they fail to comply with Rule 65(d)'s specificity requirements, which ensure that "those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law." *Fla. Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dept. of Health and Rehabilitative Servs.,* 225

F.3d 1208, 1223 (11th Cir. 2000). Here, the injunctive relief sought by Plaintiffs is specific, targeted, and clear.

Since Defendants have agreed that there are no facts in dispute and they make no legal arguments against relief (except to suggest mootness), Plaintiffs respectfully request this Court:

1. Enter a declaratory judgment that Ala. Code § 30-1-19 and Ala. Constitution §36.03 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as they refuse to treat same-sex couples legally married in other jurisdictions the same as different-sex couples;

2. Enter a declaratory judgment that Ala. Code § 30-1-19 and Ala. Constitution §36.03 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution insofar as they refuse to treat same-sex couples legally married in other jurisdictions the same as different-sex couples;

3. Enter a permanent injunction directing Robert Bentley, in his official capacity as Governor of Alabama; Luther Strange, in his official capacity as Attorney General of the State of Alabama; Julie

Magee, in her official capacity as Commissioner of Revenue of the State of Alabama; and John Richardson, in his official capacity as Acting Director of the Alabama Department of Public Safety, their successors, officers, agents, servants, employees and others in active concert or participation with any of them to recognize marriages validly entered into by Plaintiffs and other same-sex couples outside of the State of Alabama;

4. Enter a permanent injunction enjoining Robert Bentley, in his official capacity as Governor of Alabama; Luther Strange, in his official capacity as Attorney General of the State of Alabama; Julie Magee, in her official capacity as Commissioner of Revenue of the State of Alabama; and John Richardson, in his official capacity as Acting Director of the Alabama Department of Public Safety, their successors, officers, agents, servants, employees and others in active concert or participation with any of them from enforcement of Ala. Code § 30-1-19 and Ala. Constitution §36.03 (insofar as those provisions refuse to treat same-sex couples legally married in other jurisdictions the same as different-sex couples);

5. Award costs of suit, including reasonable attorneys' fees under 42 U.S.C. § 1988, to be paid by Luther Strange, in his official capacity as Attorney General of the State of Alabama; Julie Magee, in her official capacity as Commissioner of Revenue of the State of Alabama; and John Richardson, in his official capacity as Acting Director of the Alabama Department of Public Safety; and

6. Enter all further relief to which Plaintiffs may be justly entitled.

Submitted by,

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CERTIFICATE OF SERVICE

I certify that on _____, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorneys:

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