E-Filed
07/07/2015 @ 04:55:33 PM
Honorable Julia Jordan Weller
Clerk Of The Court

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,	)	CASE NO. 1140460
Petitioner,	)	
v.	)	
ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, et al.,	)	
Respondents.	)	

MOTION OF RESPONDENT PROBATE JUDGE NICK WILLIAMS TO CONTINUE IN FORCE AND EFFECT THIS COURT'S EXISTING ORDERS

COMES NOW Respondent Probate Judge Nick Williams and for response to this Court's Order of June 29, 2015, inviting "motions or briefs addressing the effect of the Supreme Court's decision in Obergefell on this Court's existing orders" states as follows:

On June 10, 2015, Judge Williams filed his response to the June 2, 2015, motion.[1] Judge Williams adopts as if set out in full herein his June 10, 2015, filing insofar as it affects the specific question raised by this Court's June 29, 2015, Order.[2] Further, Judge Williams adopts the API/ACAP brief filed July 6, 2015, to the extent not inconsistent herewith.

Judge Williams contends that Obergefell v. Hodges, 2015 WL 213646 (2015), has no force or effect on this Court's existing orders for the reasons set forth herein, including his June 2, 2015, submission. Assuming Obergefell is allowed some measure of intrusive effect by this Court on the citizens of Alabama, Judge Williams urges that its import be as narrowly applied as possible to continue to effectuate the will of Alabama's electorate. Alternatively, assuming Obergefell binds the universe of

[1] A corrected copy of Judge Williams' motion was refiled on June 11, 2015, at 11:46 a.m. at the request of the Clerk's office.

[2] A corrected Order of June 29, 2015, followed the original Order and was approved by seven of the nine justices of this Court, excluding Chief Justice Moore and Justice Shaw.

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probate judges in Alabama as asserted by the Southern District Court rulings, Judge Williams' rights under the First Amendment of the United States Constitution permit him and others similarly situated to exercise their rights of free exercise while prohibiting the State from mandating a violation of a core tenet of their religious beliefs. History, and the public's response to one case in particular, illuminates the Court's misstep in Obergefell.

I. Dred Scott versus Obergefell

When is a man not a man? When he is a slave. See Dred Scott v. Sandford, 60 U.S. 393 (1857). When is marriage not a marriage? When it involves persons of the same sex. Oh, but that changed with Obergefell. Or did it? When the United States Supreme Court declared that a slave was not a "person," did that make it so? See Dred Scott, supra. Every person with a functioning conscience, on the left and right, argued that Dred Scott's conclusion should not be followed. Civil disobedience produced the Underground Railroad. Citizens, businesses, and governments grew in their overt opposition to the application of the Dred Scott

decision.[3] With thoughtful reflection, our nation looks back on it with shame.

What is the difference today? Like it or not, at least, for Dred Scott, thousands of years of historical understanding about the races, stations of persons and slavery gave underpinning to the decision. Here, with Obergefell, where is even the thinnest thread of historical support? As the dissenters in Obergefell clearly established, such underpinning does not exist. So why then with a better historic foundation for Dred Scott was it rejected as a violation of the natural law of man while the decision in Obergefell, with no underlying historic support, is supposed to equal modern day enlightenment?

This Court should see Obergefell for what it is: A case in contradistinction to all natural law and the foundation of civilized society. They had it right once before. Consider the following observation of the true nature of marriage, which the United States Supreme Court ruled in 1885:

> "For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a

[3] See API/ACAP brief at 27-28, discussing Ableman v. Booth, 11 Wis. 498 (1859).

> free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the 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; the best guarantee of that reverent morality which is the source off beneficent progress in social and political improvement."

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Obergefell did not overrule Murphy. The majority in Obergefell conveniently overlooked it. However, it was not lost on the minority in Obergefell as Chief Justice Roberts cited it with approval in his dissent. Obergefell, supra, at *27 (Roberts, C.J., dissenting). This Court needs to acknowledge the existing force and import of Murphy and urge Alabama's probate judges and the citizens of this State to continue to follow its rationale.

So, one may argue, history was on the side of slavery. We rejected it. History has been on the side of heterosexual marriage; Obergefell rejects that. Why is Obergefell not parallel with Dred Scott? The determination that became almost universally accepted in the years following Dred Scott was that slavery was awful. People called it evil, a sin, a blight on humanity. The list goes on. Yet, marriage has been defined from time immemorial as

beautiful, holy, special, unique, blessed, sanctified, even a sacrament. Thus, the end product of our intellectual pursuit in comparing the two cases is not the determination that traditional marriage is awful and should be jettisoned. To the contrary, Obergefell wrongly and wrongfully determined that because marriage is so uniquely special and so sacramental that no two persons should be excluded from participating in it. It is so good, let us change it. That is the antithesis of post-Dred Scott logic.

Marriage ceases to become marriage when the definition is changed. Thus, allowing homosexuals to participate in something that, by definition, they cannot participate in, changes the character, nature, and essential structure of the institution. The spiritual and supernatural result of one man and one woman from the "language" causes them to "become one" in Biblical parlance. Never in the history of jurisprudence or religious tenets (even secular philosophy until the last 20 years) has anyone ever asserted, with a straight face, that a sanctified, set apart, holy and unique spiritual union can occur between homosexuals and be called marriage. It might be called something but not marriage. If the once-lost-but-now-found Obergefell

definition of marriage is correct, how then could state after state for centuries have declared sodomy a crime? See generally Lawrence v. Texas, 539 U.S. 558 (2003).

Consider Lincoln's view of the issue post-Dred Scott in his First Inaugural:

> "And while it is obviously possible that such decision [sic] may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions to political purposes."

First Inaugural Address, Abraham Lincoln, March 4, 1861, http://avalon.law.yale.edu/19th_century/lincoln1.asp (emphasis added and italics in original). Was he right? His words light the path this Court is on. President Lincoln's inaugural address embraced the foundation upon which the Constitution was drafted - the tripartite form of

government and the necessary separation of powers - and illuminates the path for why the decision in Obergefell blurs the separation of the three co-equal branches of government.

II. Separation of Powers Prohibits the Obergefell Five Action

In his previous filing, Judge Williams invited this Court to discern and recognize the glaring fallacy of taking Marbury v. Madison to its logical extreme - a result which strips meaning from the separation of powers and undermines the core principles of Federalism. In his article, John C. Eastman recognizes that "the controversy over judicial review is as current as recent headlines." John C. Eastman, Judicial Review of Unenumerated Rights" does Marbury's Holding Apply in a Post-Warren Court World?, 28 HARV. J.L. & PUB. POL'Y, 713, 725 (Summer 2005). Eastman asks the following question which should be answered by this Court's response to Obergefell:

> "When a Court's resolution of an issue before it is concededly grounded in neither constitutional text nor the original principles and practice of those who drafted it, can the claim of judicial supremacy that has been attributed to Chief Justice Marshall still be made without fundamentally altering the very nature of our republican form of government?"

Id. at 716. Eastman notes that the Court's "recent unenumerated rights jurisprudence exacerbates the judicial supremacy problem." Id. at 736. His conclusion is eerily predictive of today:

> "The right solution, of course, is for the courts to turn back to a jurisprudence grounded in the natural law principles of the Declaration of Independence - Justice Clarence Thomas has at times embarked upon just such a task. But absent a recourse to such principles, the Courts should not be surprised if legislators, executives and even the people themselves give less and less credence to their dictates. A 'Rule of Law' that is, itself, lawless is not the kind of 'law' that generates (or deserves) respect. In other words, we can expect many more Judge Roy Moores unless and until the Holmesian heresy is finally defeated and the 'least dangerous branch' taken down from its pedestal and restored to its co-equal station in the government, exercising judgment and not will."

Id. at 740. The minority in Obergefell have each articulated the above, yet with each's own critical eye of the majority's opinion.

One has to ask, can the Supreme Court ever act unconstitutionally? The other two branches of government certainly can. The States certainly can. Eastman is not alone in concluding that "the judiciary would not be just as susceptible to tyranny as other branches; indeed, the very independence of the courts might well make them more

susceptible to tyrannical tendencies." Id. at 725.[4] In short, Obergefell has "usurped power over matters that the Constitution wisely left to ordinary political processes."[5]

What is seen in Obergefell and that which should be opposed by this Court has been prophesied for centuries. As early as 1859, this Court recognized that a "controlling purpose" of the founders of our representative system "to prevent abuse and oppression" was the incorporation "into the fundamental law a nicely adjusted system of checks and balances." Sadler v. Langham, 34 Ala. 311, 321 (1859).

> "Each of these bodies is, separately and for itself, charged with the protection and preservation of the inalienable rights of the citizen? And while we freely concede that it is the duty, and doubtless the pleasure of each, to presume that the others will keep within the bounds of constitutional authority, yet that presumption is not conclusive; nor should we, in its indulgence, forget that there is committed to us, equally with the other departments, the trust of guarding and protecting the life, liberty and

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[4] Eastman cites Thomas Jefferson, James Madison, Abraham Lincoln and, more recently, Former Attorney General Edwin Meese, III, each uniquely recognizing the danger of defining "supremacy" supremely or, as Justice Scalia noted in his Obergefell dissent, by "The Ruler." Doing so, the judiciary then becomes a despotic branch. See Eastman, supra, at 726.

[5] See Mary Ann Glendon, The End of Democracy? A discussion Continued, First Things (January 1997 pp. 19, 23).

> property of the citizen, as guaranteed by the constitution."

Id. at 322.

Our bill of rights was incorporated into the fundamental law because it was feared that all the departments of the government "might fail or be unable to protect the citizens in the rightful enjoyment of their property." Id. at 327.

> "It implied no distrust of one department more than another, but a jealous watchfulness of individual rights and a prudent apprehension based on the melancholy examples furnished by the experience of mankind, that unbridled power is too apt to merge individual right in national strength and greatness. The oppressions, then fresh in their recollection, which had forced our ancestors to sever all political connection with the mother country, had taught them that the surest and best mode of installing and preserving a noble government was to enfranchise and ennoble the people, whose virtue and happiness should be the first object of all rational government."

Id. at 329. "Every officer in the government, from the executive to the humblest magistrate, is charged, to the extent of his sphere, with the preservation of Constitutional rights." Id.

This Court acknowledged that the application of separation of powers to all three branches of government may result in difficulty and lack of expedience. "We are

not unmindful of the inconvenience which must ensue from the enunciation of these principles. The remedy is not with us, but with the legislature, save as ***that body, in common with this, is under constitutional restraints***." Id. at 334-35 (emphasis added). Immediately thereafter, the Sadler Court adopted "as [its] own the following language":

> "It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office on themselves, or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be more than useless.
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> Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power--some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But, if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon

> the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Id. at 335 (citing Oakley v. Aspinwall, 3 Comstock 547, 568 (1850).[6]

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[6] The case quoted by the Sadler Court, Oakley v. Aspinwall, supra, recognized that it is

> "the design of the law to maintain the purity and impartiality of the courts and to ensure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. . . . [C]ourts should be free from reproach . . . . The fact would still remain that the people adopted the instrument as it is; and whatever may be its defects, it is still the fundamental law, which no power but the people themselves has the right to amend or alter."

Id. at 552, 566-67.

The irony in Oakley v. Aspinwall is palpable. Although discussing separation of powers and judicial review of unconstitutional legislative acts, Oakley dealt with the obligation of judicial recusal in the event of a conflict. Marbury v. Madison was written by Chief Justice Marshall whose own failure (while still secretary of state) to deliver Marbury's midnight commission was that which generated the controversy in the first place. See Eastman, supra, at 714.

Does this Court mean that? Is there equal constitutional restraint on every branch of government? Is the reserved power of the State passé? A thing of the past? This Court must explicitly skirt the rationale of Sadler v. Langham if it pleases to follow Obergefell, as urged by the Petitioners.

III. Marriage is a State Issue

Marriage is not mentioned in the Constitution. But, the Ninth, Tenth, and Eleventh Amendments certainly reserve and preserve the rights of unenumerated and non-granted powers to the States. As recent as two years ago, the United States Supreme Court recognized that it did not have the authority to interfere with the domestic institution of marriage because it was historically known to be governed within the providence of each state.[7] See United States v.

[7] Interestingly, if the right now recognized by Obergefell is so federally "fundamental," why did the United States Supreme Court dismiss the appeal from the Minnesota Court in Baker v. Nelson, 409 U.S. 810 (1972), "for want of a substantial federal question"? A due process and equal protection challenge was made to Minnesota's statutory definition of marriage as solely limited to the tradition of one man and one woman. Its Supreme Court had rejected a challenge by two homosexual men who had been denied a license to "marry." Baker is also important because it came to the Supreme Court on mandatory appeal rather than on a discretionary writ of certiorari. Id.

Windsor, 133 S. Ct. 2675, 2691 (2013). Yet, the result of Obergefell was prophetically predicted by Alabama's Governor, R.M. Patton, in 1866, when he maintained that Section 1 of the Fourteenth Amendment

> would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important or however trivial, which could arise under State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress. It matters not what might be the character of his case. . . . Upon a simple complaint that his rights, either of person or property, had been infringed, it would be the bounden duty of the tribunal to which he made his application to hear and determine his case. The granting of such an immense power as this over the State tribunals would, at the very best, subordinate them to a condition of comparative unimportance and insignificance.

See Mobile Advertiser and Register, Nov. 13, 1866, at 2, col. 8, quoted in Earl M. Maltz, Individual Rights and State Autonomy, 12 HARV. J.L. & PUB. POL'Y 163, 180 (1989).

Without conceding that marriage should not universally be appreciated by the entire nation as it has historically

been known since time immemorial, at a minimum, that domestic institution should be left to each state for application of its public policy scope as it best suits the citizenry of those individual communities.

Application of the reforms urged by Judge Williams is not intended to encourage states to reflexively or cavalierly nullify federal court rulings; to the contrary, following the path urged herein (and consistent with this Court's March 3, 2015, decision) will rightly involve "advancing an understanding of Court and Constitution in which important social questions are not permanently resolved by ideologically-driven Court rulings . . . [O]ffice holder and citizen alike [would thereby be] emboldened to reacquire their independent constitutional judgment" See The Federalist Today, supra, at 5-6. Blind dependence on the "rationale" for the Obergefell Court's decision is too far removed from this State's (and this nation's) history, tradition, and beliefs.

IV. When is Judicial Supremacy not Supreme?

When it is an exercise of the function of one or both of the other branches. Some, in fact most, argue that pronouncements from the United States Supreme Court are

themselves the Supreme law of the land, which improperly creates the impression that the Court is empowered "to determine—or even to create—the meaning of the Constitution." See Carson Holloway, Constitutional Conservatism Rejects Judicial Supremacy, Public Discourse, available at, www.the publicdiscourse.com/2015/02/14410/.

> "Needless to say, this understanding is incompatible with the Rule of Law. It would also be inconsistent with the founding commitment to separation of powers, since that doctrine can hardly be maintained if one branch of the three is held to have an unanswerable authority to determine the powers of the other two.

Id. In other words, constitutional supremacy is not the same thing as judicial supremacy. See, e.g., Edwin Meese III, The Law of the Constitution, 61 Tulane L. Rev. 979 (1987).

When decisions by the Supreme Court are based on a requirement of "redefining the category of rights deemed fundamental," Bowers v. Hardwick, 478 U.S. 186, 195 (1986), the actions of the third branch deserve to be called what they are - an extra-constitutional legislative act. "The obvious objection to judicial supremacy is that it does what mere judicial review does not; assert the "superiority of the judiciary to the legislative [and executive] power."

See The Federalist Today, Court and Constitution: The Argument against Judicial Supremacy, available at www.federalist.com/2015/02/02/Court-and-Construction-the-argument-against, *3 (citing Federalist 78 Alexander Hamilton).

As a general matter, the Due Process Clause prohibits the government from infringing upon a fundamental right unless that infringement is necessary to further a compelling governmental interest. Justice Kennedy gave the debate no such distinguishing characteristics in Obergefell. Although Loving v. Virginia, 388 U.S. 1 (1967), was a "freedom to marry" case, it was decided on racial classification grounds. It was not decided based on the fundamental right of any person to marry any other person. Regardless, Loving defined marriage as one of the "basic civil rights of man, fundamental to our very existence and survival." Id. at 12. Yet, that definition is fundamentality rooted in the biological complementarity of the sexes - the formal recognition of the unique union through which children are produced. In fact, Loving recognized the right to procreation as grounds for the holding that marriage was a fundamental right. See Loving

388 U.S. at 12 (citing Skinner vs. Oklahoma, 36 U.S. 535 (1942)). Thus, using Loving to reach the Obergefell conclusion is illegitimate as the exercise unconstitutionally delinks the conclusion from the underlying premise on which marriage is based. This is especially true since the Supreme Court has cautioned time and again against the recognition of new "fundamental" rights lest it continue to substitute its own judgment for that of the people and the various states.

How can Loving be a correct statement of law when it ties "fundamentality" to our "very existence and survival," and, yet, Obergefell be good law when it is biologically impossible for the survival of the species to continue with the recognition of homosexual "marriage" being similarly "fundamental?" Making the step from Loving - based on a racial classification involving strict scrutiny - to Obergefell is a quantum and unparalleled leap of logic. The Court has never declared homosexuality a fundamental right or a suspect classification. Never has the Court applied strict scrutiny to homosexuality. "[U]nless one wants to attribute infinite plasticity to our constitutional tradition, it would be important for the developing case

law to remain organically connected to the animating principles of the historic constitution." David M. Smolin, Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to *Stenberg v. Carhart*, 24 HARV. J.L. & PUB. POL'Y. 3, 824 (Summer 2001).

The caution that must be exercised by the Court in creating a new right or establishing a new classification cannot be overstated. Such an exercise is easily one that invades the province of the legislative branch or a state's right to act for the good of its citizenry. This argument is not novel nor should it be dismissed out of hand as esoteric advocacy.

> "When the judicial department in construing a statute imposes its own meaning upon the statute rather than interpreting the statute as the legislature intended, or when the judicial department misplays the constitutional trump card by crossing the fine line between proclaiming unconstitutional an act that violates the Constitution on one side and unconstitutionally exercising legislative power on the other side, the judicial department unconstitutionally concentrates the legislative and judicial powers into one institution. Such a concentration of power misshapes our government into a government of men and not of laws--a result that the drafters of the 1901 Constitution, like the drafters of the United States Constitution, never intended and made every effort to prevent."

Justice J. Gorman Houston, Jr., A Government of Law and Not of Men: Judicial Restraint and the Doctrine of Separation of Powers, 59 Ala. Law. 166 (May 1998).[8]

The Equal Protection Clause of the Fourteenth Amendment requires that all persons similarly situated be treated equally. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985). However, nowhere in our jurisprudence nor in our Constitution is it required that different situations be treated the same. As this Court noted in its API opinion, there is no discrimination in limiting marriage limited to one man and one woman. Everyone is equal under the law and has the same right to participate in the same institution. In other words, everyone "similarly situated" is treated alike. Ex parte API, 2015 WL 892752 *29. Although the issues in Windsor and Hollingsworth considered whether homosexual and heterosexual relationships are "similarly situated," the Obergefell Court simply whitewashed the distinction with

[8] Only 11 of the 55 delegates to the constitutional convention, according to Madison's notes, expressed an opinion on the desirability of judicial review. Of those that did so, only 9 generally supported the idea and 2 opposed it. UMKC.Edu/Facility/Projects/Ftrials/Conlaw/JudicialREV.HTM, last accessed July 3, 2015.

flowery language and sleight of hand that Justice Scalia called "fortune cookie" jurisprudence. Obergefell, supra, at *44 n.22 (Scalia, J., dissenting).

It is clear that the Obergefell Court failed to employ basic rules of constitutional interpretation and in doing so stepped outside their sphere of authority.

> "[T]the historical evidence relevant to the original meaning of Equal Protection Clause confirms [the] theoretical observation that when competing definitions of a constitutional amendment's provisions overlap, the more narrow (or most narrow) definition was probably the only meaning consented to by a Constitution - amending super majority."

Kenyon Bunch, If Racial Segregation Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment, 28 HARV. J.L. & PUB. POL'Y, 781, 853-54 (Summer 2005);[9] see also Smolin, supra, at 838-39 ("A Supreme Court

[9] In a debate for another day, the "super majority" referenced in Bunch's quote as well as the sweeping larger-than-life import that the Supreme Court has given the 14th Amendment presumes much about the adoption of the 14th Amendment. See http://www.abbevilleinstitute.org/review/was-the-fourteenth-amendment-constitutionally-adopted/. "The final vote in the House of Representatives was 120 to 32, with 32 abstentions-far more than the requisite two-thirds majority. But the 11 states of the erstwhile confederacy were entitled to and had elected 61 representatives who had been denied seats, all of whom would doubtless have voted in the negative. Had their votes been cast, the majority would have been only 56%."

jurisprudence of unencumbered abstraction in the interest of ideology ill serves the nation and dishonors her history."). Thus, the Obergefell Court's failure to give meaning to the Constitution through the accepted practice of defining the contours of its newly established "fundamental" right and providing reasoned, logical support for such a right in the Constitution is the epitome of the Court acting as the "Constitution-amending super majority" and thus undermines the supremacy of the Obergefell decision.

Respectfully, the United States Supreme Court has invited the approach Judge Williams urges this Court to exercise - a declaration that "the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands" exceeds the "legitimacy" of its Constitutional authority, a decree, obedience to which cannot be "independently coerce[d]" See Planned Parenthood v. Casey, 505 U.S. 865, 866 (1992).

V. Valid Analysis of Marriage Cannot be Divorced from the Reality of Historical Biblical Important

In the trial record of Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), is found evidence of the centuries of philosophical underpinning, not just for the idea of

marriage, but for its essential makeup of one man and one woman.[18]

> "These cases [analyzing traditional marriage] are not anomalies; rather, they carry forward a long and rich historical and philosophical tradition. Henri de Bracton wrote in his 13th-century treatise, for example, that from the jus gentium, or "law of nations," comes "the union of man and woman, entered into by the mutual consent of both, which is called marriage" and also "the procreation and rearing of children." William Blackstone, the great expositor of the law, described the relationship of "husband and wife" as "founded in nature, but modified by civil society; the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." He then described the relationship of "parent and child" as being "consequential to that of marriage, being its principal end and design." And John Locke, whose influence on the American constitutional order may be unsurpassed, described the purpose of marriage, "the end of the conjunction of the species," as "being not barely procreation, but the continuation of the species."
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> . . .
>
> "The work of the late Claude Lévi-Strauss, the "father of modern anthropology" and former dean of the Académie Française, . . . includes this observation: "[T]he family-based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children – appears to be ***practically universal phenomenon***, present in

[18] This section borrows heavily from the Amicus Curiae Brief filed by Liberty Counsel, Inc. and Campaign for Children and Families in Hollingsworth v. Perry, supra.

> every type of society." Marriage is thus "a social institution with a biological foundation," he wrote in another work. Historian G. Robina Quale's comprehensive sociological survey of the development of marriage from prehistoric times to the present . . . reveals that "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."
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> . . . "[T]he plaintiffs' own expert admitted at the Hollingsworth trial that redefining marriage to include same-sex couples ***would profoundly alter the institution of marriage.*** That is also why Yale Law Professor William Eskridge, a leading gay rights activist, has noted that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new." In short, "[s]ame-sex marriage is ***a breathtakingly subversive idea.***"

John C. Eastman, The Constitutionality of Traditional Marriage, available at http://report.heritage.org/lm90 (emphasis added) (internal citation omitted).

Even the Obergefell five recognize marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." See Maynard v. Hill, 125 U.S. 190, 211 (1888); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man, marriage and procreation are fundamental to the very existence and survival of the race.").

In Reynolds v. United States, 98 U.S. 145, 166 (1878), the Court acknowledged that the legal redefinition of marriage (in the context of polygamy) would significantly impact the social structure of the nation, emphasizing the authority of the legislature to choose one form of marriage over another: "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." Reynolds, 98 U.S. at 166.[11]

The cultural significance of redefining marriage is not limited to the context of polygamy. Throughout the history of Western civilization, and certainly since the founding of the United States more than 200 years ago, the marriage-based familial structure has provided the basis of civil society, as parents infuse their own children with the education, values, and training necessary for continued self-government. Marriage is a normative social institution; it is not primarily a way of expressing

[11] Whatever that "form of constitution" was in 1878 is not a different form today.

approval for an infinite variety of human affectional or sexual ties. Rather, it consists, by definition, of isolating and preferring one type of union over any other. By socially defining and supporting a particular kind of sexual union, the state defines for its citizens – as it is constitutionally entitled to do – what the preferred relationship is and what purposes it serves.

Declaring marriage as the union of one man and one woman as being no different than any other type of sexual coupling will have negative, societal consequences. Marriage is distinguished from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture in order to carry society into the next generation. Many courts continue to articulate this public understanding of marriage. See, e.g., Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003).

Although Obergefell rightly glorifies the importance of marriage, in the same breath, the five-member majority with deafening silence ignores the true motivation of the

homosexual activists as they seek a piece of the marriage game. Lesbian journalist Masha Gessen admitted the following:

> "It's a no-brainer that (homosexual activists) should have the right to marry, but I also think equally that **it's a no-brainer that the institution of marriage should not exist. . . .** [F]ighting for gay marriage generally involves lying about what we are going to do with marriage when we get there — because we lie that the institution of marriage is not going to change, and that is a lie.
>
> The institution of marriage is going to change, and it should change. And again, **I don't think it should exist.** And I don't like taking part in creating fictions about my life. That's sort of not what I had in mind when I came out thirty years ago.
>
> . . . I would like to live in a legal system that is capable of reflecting [the] reality [of my family with three kids having five parents including my partner's baby whose father is my brother] . . . and I don't think that's compatible with the institution of marriage."

http://wdtprs.com/blog/2013/04/what-homosexual-marriage-advocates-are-really-after/ last visited, July 3, 2015 (emphasis added).[12]

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[12] "Sex and its consequences – love, marriage and family – have finally become the theme of the national project and here the problem of nature, always present but always repressed in the reconstruction of man demanded by freedom and equality, becomes insistent." Allan Bloom, The Closing

When the traditional definition of marriage is eradicated to pave the way for other so-called "marriages," the state is left with little, if any, justification for other laws restricting marriage, adoption, procreation, divorce, child custody, and the list goes on. For example, some might argue that larger family groups (of 3 or more adults) would provide an even stronger private support network than the two-adult model. That argument is already being made. Or, marriage between certain close relatives would corral wealth, minimize the number of legal heirs, and minimize disputes over property distribution upon death. At a minimum, there is nothing inherent in polygamous or certain incestuous relationships (e.g., consenting adults who are related) that makes those unions less worthy of state recognition under the Obergefell criteria. Thus, without overruling legions of cases involving regulation of and restrictions on polygamy and incest, Obergefell cannot be constitutionally applied.

American society is better when marriages are strong. Marriage did not just drop out of the sky or pop into

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of the American Mind, (published by Simon & Schuster, Inc., 1987)

existence. Its Biblical roots are deep. See, e.g., Genesis 1:27-28;[13] Genesis 2:21-25; I Corinthians 7:2; I Samuel 18:20-21; Ruth 4:13; Ephesians 5:23-24, 32; Psalm 127:3; Proverbs 23:22; Mark 10:6-9. As are those pertaining to homosexuality. See, e.g., Leviticus 18:22; I Corinthians 6:9-11; Romans 1:26-28; Jude 1:7; I Timothy 1:8-11; Genesis 19:1-29; Revelation 21:8; I Corinthians 7:2-5.

> In redefining marriage, the law would teach that marriage is fundamentally about adults' emotional unions, not bodily union or children, with which marital norms are tightly intertwined. Since emotions can be inconstant, viewing marriage essentially as an emotional union would tend to increase marital instability - and it would blur the distinct value of friendship which is a union of hearts and minds.

Robert P. George, What is Marriage?, 34 HARV. J.L. & PUB. POL'Y, 244, 260-61 (Winter 2011) (internal citations omitted). What has now come to pass in Obergefell is that "these norms of marriage would make less and less sense. Less able to understand the rationale for these marital norms, people would feel less bound to live by them." Id.

Whether we believe the Bible is not the point; its impact on our laws and the foundation it provides for their

[13] All references to the Bible are New King James.

understanding is unparalleled and must be considered as we test these treacherous waters.

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between the man and religion, the State is firmly committed to a position of neutrality."

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 226 (1963).

VI. API and Obergefell Can Co-Exist

Assuming this Court chooses to permit homosexual marriage in Alabama, its decision in API can co-exist with the 5-4 decision in Obergefell. As stated herein, the liberty interests of probate judges and others who are arguably mandated pursuant to Obergefell to issue so-called marriage licenses in violation of eons of historical precedent and their own moral and religious conscience must be considered in the constitutional debate. Where there are opportunities within the jurisdiction of the State of Alabama to procure the license sought by homosexuals, Alabama's constitutional, statutory, and common law

regarding marriage can still co-exist. The record seems clear that there are probate judges across Alabama who are willing (some even desirous) to issue such licenses. Probate judges clearly have their own constitutional right to First Amendment free exercise liberties. Permitting that liberty to be exercised in the context of API and Obergefell does not interfere with a homosexual's right to procure a license. As Justice Holmes has acknowledged for the Court, there must be some "play in the joints" for government to work.

> "By reaffirming the fundamental character of the right to marry, [the Supreme Court does] not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marriage relationship may legitimately be imposed."

Bain Peanut Co. of Texas v. Pinson, 282 U.S. 811 (1931); see also Zablocki v. Redhail, 434 U.S. 378, 386-87 (1978); Califano v. Jobst, 434 U.S. 47, n.12 (1978).

"[T]he law does all that is needed when it does all it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." Buck v.

Bell, 274 U. S. 200, 208 (1927) (opinion by Holmes, J.). Thus, so long as there are reasonable means to procure the sought-after license in Alabama, Alabama's marriage laws remain valid and enforceable and not violative of Obergefell. Alternatively, compelling all probate judges to issue same-sex marriage licenses creates a newfound-yet-not-unexpected quandary: the inalienable rights of probate judges themselves.

VII. The First Amendment Rights of Probate Judges

> "Because the state's value - neutrality on this question (of the proper contours and norms of marriage) is impossible if there is to be any marriage law at all, abolishing the conjugal understanding of marriage would imply that committed same-sex and opposite-sex romantic unions are equivalently real marriages. The state would thus be forced to view conjugal-marriage supporters as bigots who make groundless and invidious distinctions. In ways that have been cataloged by Marc Stern of the American Jewish Committee and by many other defenders of the rights of conscience, this would undermine religious freedom and the rights of parents to direct the education and upbringing of their children."

Robert P. George, supra, at 263-264 (internal citations omitted).

Certainly, for Judge Williams and others holding like views, the reversal of the social stigma and the overnight revolution calling good evil and evil good (claiming the

Constitution recognizes the right to sodomy as a fundamental right), imposes upon him an unconstitutional mandate. This is not hyperbole. It is not sophistry. Already, in Massachusetts, Catholics have been forced to give up adoption services rather than place children of homosexual couples in violation of their principles. Id. at 264.

In Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008), public schools were permitted to teach children that homosexual relations are morally good despite objections of parents who disagree. Id. Thus, in enlarging the "rights" of homosexuals, the Obergefell five shrank the rights of Judge Williams and others like him. This Court can and must protect those rights.

It will certainly be argued that the simple remedy to Judge Williams' violation of conscience problem is to resign his judgeship as some other civil magistrates have done since Obergefell. However, the constitutional remedy to a First Amendment violation is never the mandatory act of leaving public life unless it is equally constitutional for a state to invite homosexuals to just get a license one state over. There must be an accommodation of Judge

Williams' religious beliefs especially when shared by 80+ percent of voting Alabamians. Constitutional neutrality is not so stark that the entire public square has to be naked of religion. See generally Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America, (Eerdmans Publishing Co. 1984).

Alabama has already recognized the likelihood of federal and state laws which are otherwise "neutral" towards religion as potentially burdensome as surely as laws intended to interfere with religious exercise. See Alabama Religious Freedom Amendment ("ARFA"), Ala. Const. Article 1, Section 3.01, Amendment 622. In Amendment 622, Alabama required that governments "should not burden religious exercise without compelling justification." Id. Section II(3). Among other things, the ARFA was intended to guarantee a person's practice of his religion and "to provide a claim or defense to one whose religious freedom is burdened by government." Id. at Section III. Section V of the ARFA provides the method by which government may burden a person's freedom of religion. The only permissible way under the ARFA is (1) the application of the burden must be "in furtherance of a compelling governmental

interest" and (2) the burden imposed must be the least restrictive means of advancing the interest.

Thus, not only does Judge Williams have his First Amendment rights under the United States Constitution permitting him the free exercise of religion and prohibiting laws respecting the establishment of religion, he enjoys the privileges of the ARFA which permit him to refuse the issuance of the licenses contemplated by Obergefell. That freedom should also extend to the respective Judge's staff. It is no constitutional safe harbor for the Court's ruling to simply shift the responsibility for unconstitutional behavior to a subordinate member of the office.

VII. Reaffirming API Does Not Open up Pandora's Box

Lest one argue that a step down the road urged herein be a slippery slope from which chaos would ensue, consider the following: In Little v. Barreme, 6 U.S. 170 (1804), the United States Supreme Court ruled that military officers "act at their own peril" when obeying presidential orders when such orders are illegal. Why? The oath our military take is similar to the oath of our civilian political office holders. It states:

> "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."

5 U.S.C. § 3331 ("Oath of Office").

Those who fail to obey orders face serious and significant consequences. However, that obligation is not without limit. It does not require mindless submission. Article 92 of the Code of Military Justice makes it a crime to disobey any "lawful" order. So, the defense of "I was only following orders" has been unsuccessfully used in hundreds of cases from Nuremburg to Vietnam. Yet, is our military known for mass disobedience? Does chaos reign in the ranks when a soldier receives a lawful order from his commanding officer? Should we expect less from our elected civilian officers? Contrary to breeding rampant disregard for the law and the structure of our government, an approach which parallels our military brethren preserves and champions the

nature of man as our law recognizes individual liberties of the citizen in a free society.[14]

Such an eye to the Constitution removes the mindless obedience rationale urged on "We the People" and substitutes in its place the rational and human approach applauded post-Dred Scott. Would one not reasonably argue that rigid adherence to the rule of law, i.e., commands of the supreme declarant ("The Ruler," according to Justice Scalia), is all the more important in military circles for the maintenance of order in combat? Why then should the free citizenry not be privileged if not obligated to disobey such a tenuous "Order" from the Obergefell Court? Even the Court's own members have declared that the Obergefell opinion is based on a false premise, id. at 43 (Scalia, J., dissenting), "newly discovered" rights, id. at 44 (Scalia, J., dissenting), "casting historic truths aside," id. at 54 (Thomas, J., dissenting). The rule seems a good one that a soldier cannot justify an unlawful act by

[14] See, e.g., Earl M. Maltz, Individual Rights and State Autonomy, 12 HARV. J.L. & PUB. POL'Y 1, 164 (Winter 1989), wherein it is argued that "any plausible theory of individual rights based on structural considerations [of the Constitution] must place heavy emphasis on the role of state autonomy."

the plea it was carried out under orders. See Little, 6 U.S. at 179. Why not follow it? In fact, it was Justice Marshall, writing for the Little Court, who stated: "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages . . . ." Little, 6 U.S. at 170.

This rule is not unknown to Alabama jurisprudence. It is entirely consistent with Justice Parker's special concurrence in Birmingham-Jefferson Civic Center authority vs. City of Birmingham, 912 So. 2d 204 (Ala. 2005) (hereinafter "BJCC"). Justice Parker noted that "it is reasonable to conclude that officers of each branch have a duty of constitutional interpretation." Id. at 222.

> "By what authority are the judges to be raised above the law and above the constitution? Where is the charter which placed the sovereignty of this country in their hands? Give them powers and the independence now contended for, and they will require nothing more; for your government becomes a despotism, and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being clothed with this

> arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this to be true, if this doctrine be established in the extent which is not contended for, the constitution is not worth the time we are now spending upon it. It is, as it has been called by its enemies, mere parchment. For those judges, thus rendered omnipotent, may overleap the constipation and trample on your laws; they may laugh the legislature to sworn and set the nation at defiance."

Id. at 223-24. Justice Parker went on to note Thomas Jefferson's belief that supreme judicial authority "would make the judiciary a despotic branch." Id. at 224. These words have come true in Obergefell if Alabama and her citizenry are left without any recourse but to mindlessly yield.

Remember, the supposed constitutional declaration of the Obergefell Court comes on the heels of multiple state legislatures legitimately passing laws pertaining to the definition of marriage. Many states also passed constitutional amendments on the issue to which Obergefell runs counter. Congress too passed DOMA describing marriage as between one man and one woman. While Congress has passed thousands of statutes over more than two centuries, the Supreme Court exercised its power to rule laws or portions of laws unconstitutional only about 150 times by

the early 2000s. Acts of Congress which have been invalidated have included everything from relatively minor laws to major enactments such as the Missouri Compromise. Interestingly, the Court invalidated only two statutes before the end of the Civil War. Why did it take so long for the Court to gain such momentum to strike down Acts of Congress? Why has the train of judicial oversight accelerated so since 2000? Because one branch of government has spilled over the banks of its authority. Judges are bound by the original meaning of the Constitution and may not, in the name of justice or the common good, exceed those bounds. See Alden v. Maine, 527 U.S. 706, 758-59 (1999).

President Andrew Jackson recognized the necessity of each branch's undertaking of its own constitutional interpretation. BJCC, supra, at 244 (Parker J., concurring specially). The principle at issue "directs legislators to keep their oaths of office by exercising their authority and responsibility to consider the constitutionality of every bill that comes before them." Id. at 225. A concomitant duty also remains in the chief executive.

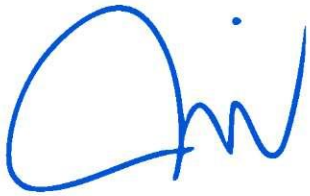
These discussions involve not only the separation of powers among the three co-equal branches of the federal government but also involve federalism principals as each state relates to the union which they joined.

Obergefell has again sanctioned the illegitimate presumption repeated by the United States Supreme Court that its decisions are sacrosanct, equal with the Constitution. That hubris ignores the remainder of Chief Justice Marshall's opinion in Marbury vs. Madison, 5 U.S. 137, 180-81 (1803), that "it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts . . . [and] that courts, as well as other departments, are bound by that instrument." As Justice Parker noted: "The turning away from our national compact by federal courts now threatens our country with a constitutional crisis." BJCC, supra, at 223 n.21.

CONCLUSION

WHEREFORE premises considered, Probate Judge Nick Williams respectfully requests that this Honorable Court rule consistent with this Motion.

Respectfully submitted this 7th day of June, 2015.



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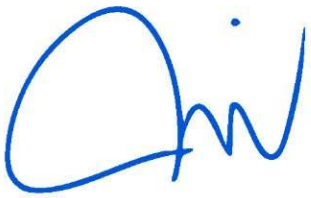

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