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.	)	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION

This Court is not obligated to follow a lawless decision, because that decision is "not law."

The most eminent writer on Constitutions and the jurisprudence that gives them effect (Cooley, p. 88) has said, what all must know, that the court which permits public sentiment to influence a construction of a Constitution that is not warranted by its intent "would be justly chargeable with reckless disregard of official oath and public duty"-a charge that represents the acme of odium and the superlative of infidelity. Now, as ever before, ***the penalty for the violation of the Constitution is that the product of the offense is a nullity.***

Johnson v. Craft, 87 So. 375, 399 (1921) (emphasis added).

The Declaration of Independence - the foundation of American liberty and law - explicitly recognizes the Creator as the source of the inalienable rights of mankind - life, liberty and the pursuit of happiness - under the Rule of Law, consistent with the created order. Natural Marriage consistent with the created order - the "Law of Nature and Nature's God" - has always consisted of one man and one woman. Natural Marriage has been recognized in the Constitution and Laws of Alabama, consistent with the written United States Constitution, and higher Natural Law.[1] Will this Court repeat that recognition?

> The sons of Alabama who with honor to their state served in the World War, under the colors of a nation that stood, as always, for the supremacy of right over might, for the observance of the obligations of duty to constitutional government, and for fidelity to the institutions of state that protect the dearest interests of those subject to its blessings and bearing its burdens, desire, we apprehend, the fearless maintenance and

[1] Dr. Martin Luther King, Jr., famously stated similarly, that "a just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law." Martin Luther King, Jr., Letter from a Birmingham Jail, *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html last visited September 10, 2015.

> vindication of the Constitution of Alabama, regardless of the popularity or unpopularity of the result of the performance of that duty."

Johnson, 87 So. at 386.

The United States Constitution defines the powers of the federal government, and gives no branch of the federal government power to redefine marriage. The Fourteenth Amendment never withdrew from the various states the authority to maintain Natural Marriage as an exclusively monogamous heterosexual institution (and no state ratifying the Fourteenth Amendment recognized sodomy as lawful at the time of ratification, much less sodomy-based marriage).

For these reasons, the Obergefell decision is wholly lacking in lawful Supreme Court authority. The decision was reached by illegitimate means, in that two Justices who had a duty to recuse, because they had previously glorified homosexual unions and performed same-sex marriages, refused to recuse themselves, for the obvious reason that their votes were needed to obtain a 5-4 majority, all of which has the markings more of a political coup than a judicial decision.

Furthermore, the decision is utterly devoid of constitutional underpinning. Nowhere prior to Obergefell

have dissenting Supreme Court justices stated in such strong terms that the majority was completely lawless and without authority for its claims:

Chief Justice Roberts:

> The majority's decision is ***an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent.***

Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (emphasis added).

> The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. In reality, however, the majority's approach has ***no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking . . . .***

Id. at 2615-16 (emphasis added).

> Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners."

Id. at 2619.

> In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as* ***traditionally defined*** violate due process…" and "…the privacy cases provide no support for the majority's position, because petitioners do not seek privacy.

Id. at 2619-20 (emphasis in original).

> The truth is that today's ***decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry*** because they want to . . . .

Id. at 2621 (emphasis added).

Justice Thomas:

> The flaw in that reasoning, of course, is that ***the Constitution contains no "dignity" Clause,*** and even if it did, the government would be incapable of bestowing dignity.

Id. at 2639 (emphasis added).

> Our Constitution — like the Declaration of Independence before it — was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from — not provided by — the State. ***Today's decision casts that truth aside.*** In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, ***disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded.*** Its decision will have inestimable consequences for our Constitution.

Id. at 2639-40 (emphasis added).

Justice Alito:

> ***If a bare majority of Justices can invent a new right and impose that right on the rest of the country,*** the ***only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.*** Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Id. at 2643 (emphasis added).

Justice Scalia:

> But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds— minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly— could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices know that limiting marriage to one man and one woman is contrary to reason; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

Id. at 2630.

The dissents in Obergefell could not be more strident or more clear: this is a lawless decision. It makes "law" where none exists.

Nearly a century ago, this Court analyzed the effort of counsel determining it to be one advocating an amendment to the Constitution apart from the prescribed methods for such. In rejecting the veiled invitation to end-run the document, it stated:

> Viewed as the work of a surgeon, [amending the Constitution as urged] would separate the heart from the body, leaving the body without the impulse of life. The heart of the simple, complete, separately provided, distinct system for amending the Constitution . . . is that which is lifeless, viz a favorable election by the people on the amendment proposed.

Johnson, 87 So. at 389. The Obergefell action is lifeless; it separates the heart from the body. It feigns constitutional amendatory authority where none exists.

The dissenters, however, are not the first to acknowledge that the U.S. Supreme Court's power depends upon the legitimacy of its decisions. This Court should heed their alarm. In contrast to Obergefell, acknowledgement of the Court's foundation of legitimacy, at one time, garnered majority support:

> The Court is most vulnerable and comes nearest to ***illegitimacy*** when it deals with judge-made constitutional law having ***little or no cognizable roots in the language or design of the Constitution***. . . . There should be, therefore,

> great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. ***Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.***

Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986) (emphasis added), overruled by Lawrence v. Texas, 539 U.S. 558 (2003). Justice Sandra Day O'Connor recognized in Planned Parenthood v. Casey, 505 U.S. 833 (1992) that:

> [t]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it ***cannot independently coerce obedience*** to its decrees. ***The Court's power lies, rather, in its legitimacy.*** . . . The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that ***a decision without principled justification would be no judicial act at all.*** . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, ***as grounded truly in principle,*** not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. ***Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.***

505 U.S. at 865-866 (emphasis added). If the U.S. Supreme Court can lose its legitimacy, which even the Court itself

acknowledges, then do illegitimate decisions control? Surely the founders did not intend for there to be arbitrary and unchecked power in one branch of the federal government, with the other branches and the States powerless to act.[2]

The founders provided among the Bill of Rights the Tenth Amendment. But the Tenth Amendment can neither exert nor defend itself. The federal government and federal judges have shown that it and they care not one iota for the States' reservation of powers under the Tenth Amendment. But, the U.S. Constitution never removed from the State of Alabama or the other States their Tenth Amendment powers to maintain natural marriage. This Court must assert the Tenth Amendment powers of the State of Alabama.

This Court Must Recognize the Historic Moment to Return Balance to Our System of Federalism and Restrain Lawlessness

What is the duty of this Court under the Tenth Amendment, in response to the judicial power grab of five lawyers who have substituted their will for law, and who

[2] Federalist 78 – The judiciary has "no influence over either the sword or the purse, ...It may truly be said to have neither FORCE nor WILL, but merely judgment."

have authored a lawless decision in which they have usurped the authority vested by the Constitution in the people and their elected representatives? Princeton University Professor of Jurisprudence Robert P. George eloquently answered:

> By letting Abraham Lincoln be our guide. Faced with the Supreme Court's Dred Scott decision, Lincoln declared the ruling to be illegitimate and vowed that he would treat it as such. He squarely faced Chief Justice Roger Brooke Taney's claim to judicial supremacy and firmly rejected it. To accept it, he said, would be for the American people "to resign their government into the hands of that eminent tribunal."
>
> Today we are faced with the same challenge. Like the Great Emancipator, [this Court] must reject and resist an egregious act of judicial usurpation. [This Court] must, above all, tell the truth: Obergefell v. Hodges is an illegitimate decision. What Stanford Law School Dean John Ely said of Roe v. Wade applies with equal force to Obergefell: 'It is not constitutional law and gives almost no sense of an obligation to try to be.' What Justice Byron White said of Roe is also true of Obergefell: It is an act of 'raw judicial power.' The lawlessness of these decisions is evident in the fact that they lack any foundation or warrant in the text, logic, structure, or original understanding of the Constitution. The justices responsible for these rulings, whatever their good intentions, are substituting their own views of morality and sound public policy for those of the people and their elected representatives. They have set themselves up as superlegislators possessing a kind of plenary power to impose their judgments on the nation. What could be more unconstitutional—more anti-constitutional—than that?

> The rule of law is not the rule of lawyers—even lawyers who are judges. Supreme Court justices are not infallible, nor are they immune from the all-too-human temptation to unlawfully seize power that has not been granted to them. Decisions such as Dred Scott, Roe v. Wade, and Obergefell amply demonstrate that. In thinking about how to respond to Obergefell, we must bear in mind that it is not only the institution of marriage that is at stake here—it is also the principle of self-government.

Robert P. George, After Obergefell: A First Things Symposium, available at http://www.firstthings.com/web-exclusives/2015/06/after-obergefell-a-first-things-symposium, last visited September 10, 2015.

Not two decades ago, the Supreme Court re-explained the beauty of our federal system which Judge Williams asks this Court to restore:

> In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. Theirs was the unique insight that freedom is enhanced by the creation of two governments, not one. We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the

> Founders must yield to the politics of the moment. Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people's will. The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control. The Framers of the Constitution did not share our dissenting colleagues' belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so . . . .

Alden v. Maine, 527 U.S. 706, 758-59 (1999)

By rejecting Obergefell, this Court would stand not just with the example of the Founders, or of Lincoln, but with the Wisconsin Supreme Court, which to this day, celebrates its adherence to the U.S. Constitution in openly defying an unlawful federal statute and an unlawful U.S. Supreme Court mandate which abrogated the fundamental principle that all men are created equal:

> What has come to be known as the Booth case is actually a series of cases from the Wisconsin Supreme Court and one from the U.S. Supreme Court. In the midst of

> the pre-Civil War states' rights movement, the Wisconsin Supreme Court boldly defied federal judicial authority and nullified the federal fugitive slave law (which required northern states to return runaway slaves). ***The U.S. Supreme Court overturned the state Supreme Court which, in a final act of defiance, never filed the mandates.***

Wisconsin Court System, Famous cases of the Supreme Court, http://wicourts.gov/courts/supreme/famouscases.htm (last visited September 11, 2015) (emphasis added).

The Wisconsin Supreme Court's decisions in the In Re Booth cases spring from an understanding of U.S. Const. art. VI, cl. 2., that it is the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . ." which are "the supreme Law of the Land," not mere will or power, and not all claims of authority by federal judges. State courts are

> not to be bound by all the acts of congress, ***or by the judgments and decrees of the supreme federal court***, or by their interpretation of the constitution and acts of congress, ***but by "this constitution,"*** *"and the laws made in pursuance thereof."*

In re Booth, 3 Wis. 157, 196 (Wis. 1854) (emphasis added) (italics in original).[3]

CONCLUSION

This Court has recognized that its decisions on federal questions are subject to **review** by the United States Supreme Court. (Mandamus Ord. at 73, 2015 WL 892752 at *26). However, historic precedent and the dissenting opinions in Obergefell make it clear that this Court is not bound by decisions of the United States Supreme Court where it acts outside its authority and legitimacy.

Where five judges author "an opinion lacking even a thin veneer of law," which "is a naked judicial claim" to . . . super-legislative power; "a claim fundamentally at odds with our system of government";[4] the Supremacy Clause does not require this Court to give deference to that opinion.

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[3] What Judge Williams urges is more akin to law than what Justice Kennedy has urged lower federal judges to do. In speaking before the American Bar Association on August 9, 2003, Justice Kennedy could "accept neither the necessity nor . . . wisdom" of tough federal sentencing laws and described "federal judges who depart downward" as "courageous." So, when his view of the fairness of the law is offended, judges who refuse to follow it are "courageous."
http://www.jstor.org/stable10.1525/fsr.2003.16.2.126.

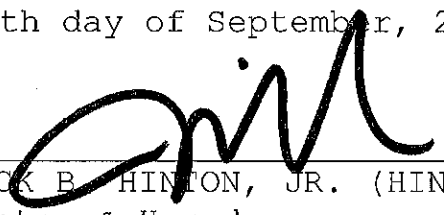
[4] Obergefell 135 S. Ct. 43 (Scalia, J., dissenting).

This Court is uniquely situated with the power and a controversy which cry out - - from the sanctuaries to the synagogues, from the breakfast tables to the counseling tables - - for it to address a ripe issue of critical national importance, not just for the issue of natural marriage, but for the fabric of our society: does the Rule of Law require obedience to illegitimate claims of authority? Does such faux authority extinguish Judge Williams' free exercise rights? The Founders would reject the opposite view - they fought a revolution over illegitimate claims of authority. Likewise, Abraham Lincoln rejected illegitimate claims of authority. Wisconsin and numerous states rejected illegitimate claims of authority by Congress and the U.S. Supreme Court. The Law of War rejects illegitimate claims of authority, and even *requires* disobedience to an unlawful order.

The Obergefell decision is an illegitimate claim of authority, and Judge Williams therefore urges this Court to grasp the historic opportunity presented to restore federalism and protect the religious free exercise rights of Alabama officials, by affording to Obergefell the respect it deserves, in light of its clear departure from

the Constitution, legal precedent, history and the Rule of Law. The right decision in this case will not be popular with those seeking to impose their will without authority or legitimacy. But this Court must do its duty, and make the right decision. The People of the State of Alabama and of the United States deserve no less.

Respectfully submitted this 16th day of September, 2015.



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