

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

**RESPONDENT PROBATE JUDGE NICK WILLIAMS' EMERGENCY PETITION  
FOR DECLARATORY JUDGMENT AND/OR PROTECTIVE ORDER  
IN LIGHT OF JAILING OF KENTUCKY CLERK KIM DAVIS<sup>1</sup>**

The jailing of Kentucky Clerk Kimberly B. Davis put at immediate risk the liberty interest of all faithful and religiously sincere public officials in Alabama whose office has responsibility for making decisions as to whether to give sanction and honor to homosexual

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<sup>1</sup> Judge Williams supports this Emergency Petition with a legal memorandum filed shortly following. Further, although Judge Williams is "petitioning" for this emergency relief, for consistency of reference, he will maintain the nomenclature of "Respondent" herein.

relationships to include the issuance of a license to engage in sodomy. These officers need this Court's declaration that their sincerely held religious beliefs do not disqualify them from holding their office. This Court should also protect the rights of those officeholders who are threatened to abandon their religious principles in favor of taking action that would give state sanction to behavior their faith condemns.

In light thereof, Respondent Probate Judge Nick Williams moves this Court for an order declaring the efficacy of this Court's orders upholding and enforcing the Alabama Constitution and Alabama's marriage laws, notwithstanding the decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).<sup>2</sup> Further, Judge Williams requests a ruling declaring the free exercise rights for himself and others like him under the First Amendment of the U.S. Constitution and Amendment 622 of the Alabama Constitution, Alabama's Religious Freedom Amendment ("ARFA").

Judge Williams contends that Obergefell has no force or effect on this Court's existing orders for the reasons set

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<sup>2</sup> As argued heretofore, Murphy v. Ramsey, 114 U.S. 15 (1885), has never been overruled and remains the law of the land.

forth in his pleadings to date, including his June 11, 2015, July 7, 2015 and August 3, 2015, submissions, which this Court has before it, as well as the pleadings of Relators API and ALCAP. With full deference to the ongoing deliberation and labors of this honorable Court, given the nature of the relief requested herein, Judge Williams is compelled by events occurring during the pendency of this Court's decision to file this motion for an expedited declaration<sup>3</sup>.

Chief Justice Roberts proved prophetic in noting that the Obergefell decision finding a "Constitutional right" to sodomy-based "marriage" would inevitably result in conflict with religious liberty:

The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. Ante, at 2607. The First Amendment guarantees, however, the freedom to "exercise" religion. **Ominously, that is not a word the majority uses.**

Obergefell, 135 S. Ct. at 2625 (2015) (Emphasis added).

Within 90 days of that prediction, for the first time in American history, a duly elected, sitting, County Clerk

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<sup>3</sup> S.B. 21 which, as argued by some, would have taken Probate Judges out of marriage business died in the Special Session of the Alabama Legislature on September 15, 2015.

has been **jailed** for refusing to violate her conscience and religious beliefs about the nature of marriage. No accommodation was offered, despite the fact that there was no conflict between her religious beliefs and the duties of her office at the time she entered it. Application of the Obergfell holding acts unconstitutionally as an *ex post facto* law (Art. 1, §10, cl. 1) retroactively criminalizing religious conviction and imposing Court - legislated criminal conduct on those whose oath, when taken, had no such burden. See generally Calder v. Bull, 3 U.S. 386 (1798).<sup>4</sup>

Justice Scalia in a four-justice dissent has condemned such retroactive criminalization of behavior as violative of due process whether by legislative or judicial means:

"I find it impossible to believe, as the Court does, that this strong sentiment attached only to retroactive laws passed by the legislature, and would not apply equally (or indeed with even greater force) to a court's production of the same result through disregard of the traditional limits upon judicial power."

Rogers v. Tennessee, 532 U.S. 451, 477 (2001).

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<sup>4</sup> It is "the effect, not the form, of the law that determines whether it is *ex post facto*." Weaver v. Graham, 450 U.S. 24, 30 (1981).

While Clerk Davis has had the courage of conviction to go to jail rather than deny her faith under a *de facto* "religious test"<sup>5</sup> - one that did not exist when she took her oath of office - she should not have been placed in that position. See U.S. Const. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.") The conflict for Clerk Davis is not over by far, nor for the numerous similarly-situated Alabama probate judges. The threat is ominous.

Clerk Davis would not have been placed in that position had a bare majority of five justices on the United States Supreme Court not chosen to substitute their own will as superior to the written United States Constitution, the will of the People as expressed in more than 36 state constitutions, and the common wisdom of our forebears in

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<sup>5</sup> Although this clause originally applied only to federal offices, compelling all government actors who have any responsibilities in the solemnization, celebration, or issuance of marriage licenses (e.g., probate judges or clerks) to participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding office.

more than 220 years of American history, and millennia of our Anglo-Western heritage.

"[T]he Judge should never be the legislator: because then the will of the Judge would be the Law: and this tends to a State of Slavery."

Rogers, 532 U.S. at 476 (Scalia, J., dissenting) (quoting Massachusetts Chief Justice Hutchison as set out in 1 M. Horwitz, Transformation of American Law 1780-1860, p. 5 (1977)).

This Court has set forth the legal and historic position of the Nation and the State of Alabama on marriage in its March 3, 2015 order and opinion. The reasoning of that opinion cannot be gainsaid. The opinion's recitation of legal and societal history, and the historic grounds for natural marriage is not just an "opinion;" it is truth. Natural marriage consistent with the created order and the law of nature and nature's God is only between a man and a woman, and is in no way equivalent to sodomy-based "marriage."

The opinion of five lawyers in Obergefell, in contrast, is utter fantasy, with no foundation in the Constitution or in ultimate reality. What proponents of same-sex so-called "marriage" would have this Court do (along with millions of

Americans - including Clerk Davis in Kentucky, and the probate judges of Alabama) is give their assent to what is at its essence, a lie. For those where the conflict is real, not theoretical, that assent is demanded upon pain of imprisonment and financial ruin. <sup>6</sup> Nonetheless, a lie thus promulgated is not law, and this Court must not assent to it.

Indeed, "Lies can only persist by violence," wrote Aleksandr Solzhenitsyn, and Clerk Davis proves it: proponents of a false equivalency between sodomy-based so-called marriage, and natural marriage, **are willing to send a woman to jail, rather than accommodate her simple request to abstain from participating in a lie,** through her name and title.

Kim Davis said "no," based upon her sincerely held religious beliefs; based upon her state's marriage laws which have not been repealed; and based upon her oath to uphold and defend the constitution of her state and the

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<sup>6</sup> Even after her release from jail and return to her post this week, Clerk Davis' free exercise liberty interests are being impaired by the ever-present chilling effect of jail time as, by judicial imposition, she violates her religious beliefs in permitting her subordinates to issue homosexual licenses.

United States. Like Kim Davis, there are numerous Alabama probate judges, including Judge Williams, who take seriously that same oath, and who hold as sincerely the same beliefs about marriage, based upon the obvious order of nature and their religious and moral convictions. This Court must act to prevent the imprisonment and financial ruin of this state's probate judges who maintain fidelity to their oath of office and their faith.

**Consequences of Obergefell Extend Beyond State Officials**

Obergefell's effects will not strike only probate judges in Alabama and county clerks in other states; it will shrink the sincerely religious employee in every recording office and bludgeon their beliefs into submission. While its furthest reaches are yet unknown, even now it is retroactively creating confusion and disruption to pre-Obergefell situations in the areas of family law and estates.

In Mississippi, a valid marriage between a man and a woman, entered in Alabama in 2013, has been attacked by an ex-lesbian partner claiming that her 2009 "marriage" in Massachusetts is now controlling, for purposes of



Mississippi bigamy laws, because of Obergefell.<sup>7</sup> The ex-partner now seeks custody of minor children with no biological relation to her, who are living in a stable, two-parent home consisting of a mother and a stepfather. Mississippi never recognized out-of-state sodomy-based "marriages," and Mississippi residents were entitled to conduct themselves accordingly. They were entitled to marry under the laws of Alabama where the marriage license was obtained, which was granted full faith and credit by Mississippi, because it was consistent with Mississippi law. The validity of a natural marriage legal in both Mississippi and Alabama at the time of entrance is now called into question, if Obergefell is given force and effect.

In Alabama, the order of inheritance and probate are retroactively being called into question. A non-related homosexual partner in a purported sodomy-based so-called "marriage" unknown to Alabama law seeks now to deprive the

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<sup>7</sup> Harrison County Chancery Court, Action No. 24 CH 1:15-cv-02030. When the defendant in that situation renounced the lesbian lifestyle and left her same-sex partner, she contemplated filing for divorce, but was told she could not do so because Mississippi could not grant a divorce from a marriage Mississippi did not recognize, and Massachusetts had a one-year residency requirement.

elderly mother of his deceased intestate partner of the rightful support she is due in her old age.<sup>8</sup> These situations are but the tip of the iceberg. But they are the natural consequences of a lawless decision made without regard for the upheaval it will cause to the social order, an order truly founded on natural marriage.

Respondent therefore urges this Court to follow the light laid down by Chief Justice Collier in 1838:

"As a man, cherishing, I trust, an elevated patriotism, I could wish to see the different departments of government kept within their legitimate spheres of action, - - as a magistrate, I could know no discretion, but to follow the line of duty."

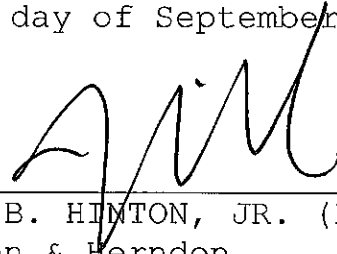
In re Dorsey, 7 Port. 293, 419 (1838).

Would this Court follow its line of duty and declare the rights of Judge Williams and those like him as requested herein. Would it act upon the Motion filed by him on July 7, 2015 and rule that the Order of this Court entered on March 3, 2015, remains in full force and effect. Would this Court protect his sincerely held religious beliefs.

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<sup>8</sup> Hard v. Bentley, et al., 2015 WL 1043159, Case No. 2:13-CV-922 (M.D. Ala.). This decision has been appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 16th day of September, 2015.



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**CERTIFICATE OF SERVICE**

I certify that I have this 16th day of September, 2015, served copies of this Motion, by email transmission, as follows:

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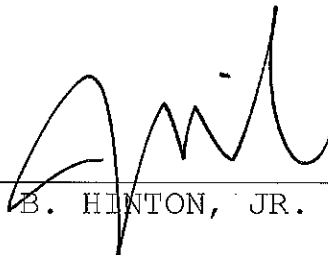
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