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Honorable Julia Jordan Weller
Clerk Of The Court

No. 1160002
IN THE SUPREME COURT OF ALABAMA

RE: ROY S. MOORE, CHIEF	*	
JUSTICE OF THE SUPREME	*	
COURT OF ALABAMA	*	
APPELLANT	*	
	*	CASE NO. 1160002
v.	*	
	*	
ALABAMA JUDICAIL INQUIRY	*	
COMMISSION	*	
APPELLEE	*	

****

BRIEF OF AMICUS CURIAE RICHARD LAWRENCE

****

APPEAL FROM THE
COURT OF THE JUDICIARY
CASE NO. 46

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STATEMENT REGARDING ORAL ARGUMENT

The Amicus Curiae does not request to participate in Oral Argument.

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SUMMARY OF ARGUMENT

The United States Supreme Court, when it issued the opinion of *Obergefell v. Hodges*, __ U.S. __, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), assumed it had federal question jurisdiction without considering whether it lacked jurisdiction due to the 'domestic relations' exception to federal court jurisdiction. If the Court lacked jurisdiction, then the decision of *Obergefell* may be of limited effect. At the time of Justice Roy Moore's January 6, 2016, Administrative Order to the Probate Judges, the Alabama Supreme Court was poised to address the effect that *Obergefell* had on the State case of *Ex parte Alabama Policy Institute*. Arguably, the Alabama Supreme Court may have addressed the United States Supreme Court's questionable jurisdiction of the case. Such should be given consideration when addressing the reasonableness of Justice Moore's January 6, 2016, Administrative Order.

ARGUMENT

This amicus brief is submitted to raise the question of whether the United States Supreme Court had subject matter jurisdiction when it issued the opinion of *Obergefell v.*

Hodges, __ U.S. __, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).[1] The Alabama Supreme Court is now considering the appeal of the charges against Justice Roy Moore based upon a January 6, 2016, Administrative Order by Justice Moore to Probate Judges. The Alabama Supreme Court had before it at the time of the issuing of the Administrative Order the case of *Ex parte Alabama Policy Institute*, case no. 1140460, decided March 3, 2015, for which the Alabama Supreme Court had issued requests for briefs on the effect of *Obergefell* on the opinion. The requests for briefs had been made on June 29, 2015, three days after the decision in *Obergefell*.[2] Amicus submits that the Alabama Supreme Court reasonably could have given consideration to whether the United States Supreme Court had subject matter jurisdiction when it issued *Obergefell*. If such is true, then that should reflect on the view this Court gives to the January 6, 2016, Administrative Order. While the Alabama Supreme

[1] Aspects of *Obergefell* involving recognition of a marriage *valid* in another state are not addressed in this brief.
[2] Quoting from the September 30, 2016, Final Judgment of the Court of the Judiciary Case no. 46, page 8: "Three days later, on June 29, 2015, the Alabama Supreme Court issued an order inviting the parties in *API* 'to submit any motions or briefs addressing the effect of the Supreme Court's decision in *Obergefell* on this Court's existing order in [*API*].'" (Brackets in original.)

Court subsequently issued an opinion dated March 4, 2016, dismissing all pending motions and petitions regarding *Ex parte Alabama Policy Institute,* that would not change the reasonableness of the January 6, 2016, Administrative Order at the time it was written.

In *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675, 2691 (2013), the Court made the following statement, quoting from *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906): "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." (Brackets in original in *Windsor*.) This was a statement of jurisdiction.

This statement taken from *Haddock* is consistent with such statements in other cases. In *Barber v. Barber*, 62 U.S. 582, 584, 16 L.Ed. 226 (1859), the Court states: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one

from bed and board." In *Ex parte Burrus*, 136 U.S. 850, 593-594, 10 S.Ct. 850, 34 L.Ed. 500 (1890), the Court stated: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."

The jurisdiction of the federal courts arises from Article III, Sections 1 and 2.

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. …."
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. …."

In addressing the question on limitations of federal jurisdiction, there are two recognized exclusions, or in other words, exceptions, to federal court jurisdiction, to

wit: “Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history.” *Marshall v. Marshall*, 547 U.S. 293, 299, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006).

In *Ankenbrandt v. Richards*, 504 U.S. 689, 700-701, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992), the Court addressed the issue of the domestic relations exception under the statutory grant of diversity jurisdiction, 28 USC §1332. Based upon the above quotation from *Barber v. Barber*, 62 U.S. 582, 584, 16 L.Ed. 226 (1859), there had historically developed a “domestic relations” exception to federal jurisdiction. *Ankenbrandt v. Richards,* 504 U.S. at 693.

The statement from *Barber v. Barber*, 62 U.S. 582, 584, reads: “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.” This statement

had been followed for more than 130 years. The Court reasoned that that statement was therefore the legislative intent. “Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction.” *Ankenbrandt*, 504 U.S. at 694-695.

The *Ankenbrandt* Court based its conclusion on the interpretation of the statutory grant of diversity jurisdiction in 28 USC §1332. That statutory grant reads as follows: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between- (1) citizens of different States ….” Prior to 1948, the “civil actions” read as "all suits of a civil nature, at common law or in equity" (*Ankenbrandt* 504 U.S. at 698). (1996 Public Law 104-317 substituted $75,000 for $50,000.) The phrase “at common law or in equity” was the clause of interest because it was traditionally understood that the ecclesiastical courts of England handled the core domestic relations and core probate matters, not the common law or equity courts.

The 1948 amendment to the statute regarding 28 USC §1332 was interpreted as not causing any change in the meaning.

> "When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that 'no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957)."

Ankenbrandt v. Richards, 504 U.S. at 700-701.

The parties in *Barber* were a husband and wife who had been granted a divorce from bed and board (divorced *a mensa et thoro*) which is not a complete divorce (divorce *a vincola*); the parties are still married, just legally separated. The divorce from bed and board was granted in New York. Alimony was granted as part of the divorce from bed and board. The husband moved to Wisconsin allegedly to avoid the alimony. The Court addressed two issues. The

first issue was whether the wife who is still married can, under the peculiarities of divorce law, establish a domiciliation in a State different from her husband. The second issue was whether "a court of equity is not a proper tribunal for a remedy in such a case." *Id.* 62 U.S. at 584.

The Court in *Barber* began with the statement: "Our first remark is--and we wish it to be remembered--that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The [federal] court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud." *Id.* 62 U.S. at 584. After working through the nuances of "divorced" parties, the Court concluded that the wife could have a different domicile, New York, than her husband, Wisconsin. *Id*. 62 US at 597-598. Having reached that conclusion, the Court further concluded that the allegations made by the wife fell outside the domestic relations exception, suing for alimony already decreed against a husband that had left the state, thus giving the federal court jurisdiction to hear the case. *Id*. at 599-600.

Three justices dissented. They disputed whether under the facts a wife can have a different domiciliation and whether the alimony was an absolute debt. They would hold that a federal court, as courts of chancery, cannot take cognizance of cases of alimony. Of particular interest, though, is the dissents' understanding of limitations on the federal courts of equity:

> "It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States in equity are not to be governed by the practice in the State courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. (Citations omitted) Now, it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance."

Id. at 62 U.S. at 604. The dissent further concluded:

> "From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all

> power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded."

Id. 62 U.S. at 605.

The majority in *Barber* and the dissent were in agreement that there existed a domestic relations exception to the law and equity jurisdiction of a federal court. They disagreed as to the extent of the exception. The dissent would have included within the exception (and hence, outside the jurisdiction of the court) an action for alimony, even where the alimony had been already been established by the state court. The majority, while holding that there exists a domestic relations exception, determined that a collection action for the already established alimony was not within the exception. Thus, where the alimony becomes an established debt as any other debt or the matter becomes a tort – committing fraud by leaving the state to avoid alimony – the federal district court would then have diversity jurisdiction, but not where the matter involves pure marriage or divorce. The interpretation given was from the recognized chancery practice, as practiced in England. Looking to England for the extent of the chancery practice provided a uniform rule

of law to be used in all federal courts. In *Boyle v. Zacharie and Turner*, 31 U.S. 648, 658, 6 Peters 648, 658 (1832), a case cited by the dissent in *Barber*, the court stated:

> "The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, …."

The majority opinion in *Ankenbrandt*, after analyzing the domestic relations exception, concluded that the Court had jurisdiction because the case involved a tort removing it from the domestic relations exception. Ankenbrandt, a citizen of Missouri, had brought suit on behalf of her daughters against Richards (ex-husband and father) and Kesler (friend of ex-husband), citizens of Louisiana, seeking monetary damages alleging sexual and physical

abuse. 504 U.S. at 691. Hence, there was diversity jurisdiction.

The majority opinion in *Ankenbrandt* stated:

> "An examination of Article III, *Barber* itself, and our cases since *Barber* makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts.
> "….
> "This section [Article III, § 2] delineates the absolute limits on the federal courts' jurisdiction. But in articulating three different terms to define jurisdiction -- "Cases, in Law and Equity," "Cases," and "Controversies" -- this provision contains no limitation on subjects of a domestic relations nature."

Id. 504 U.S. at 695. The Court then based its conclusion, that there is a domestic relations exception to jurisdiction in diversity cases, on the historical understanding of the statute, 28 USC § 1332. "We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber,* divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Id.* 504 U.S. at 703.

Justice Blackmon wrote a concurring opinion; he concurred in the judgment, but not in the reasoning. Justice Blackmon would have based the opinion on a theory

of abstention rather than on a theory of jurisdiction. He argued, inter alia, that by the majority basing their opinion on interpretation of the statute granting diversity jurisdiction, 28 USC § 1332, and the clause referencing law and equity that a similar interpretation would apply to the constitutional grant of federal question jurisdiction, to wit:

> "Like the diversity statute, the federal question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal question cases to "Cases, in Law and Equity." Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal question jurisdiction (as under 28 U.S.C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody."

Id. at 715, fn. 8.

In *Blackstone's Commentaries,* under the general topic of Husband and Wife, on how marriages may be made, *Blackstone* states:

> "Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the matrimonial law: The temporal courts not having jurisdiction to consider unlawful marriages as a sin,

> but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *Pro salute animae* …. And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law."

1 *William Blackstone Commentaries* *434-435.[3]

In addressing the disabilities or incapacities to contract, Blackstone further states:

> "Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso factor* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation of blood; and affinity, or relation by marriage; and some particular corporal

[3] *Blackstone's Commentaries* were written by Sir William Blackstone, an Englishman, in the 1700's. The *Commentaries* are a treatise giving the English Common Law in a four volume set. They have been regularly referenced by the United State Supreme Court from before and including *Marbury v. Madison*, 5 U.S. 137, 163-169, 2 L.Ed. 60 (1803) through the majority and dissenting opinions in the case of *Obergefell*. Citations in this brief are from the St. George Tucker Edition (1803), as published by Rothman Reprints, Inc. and Augustus M. Kelley Publishers, 1969.

> infirmities. … These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them."

1 *William Blackstone Commentaries* *434-435.

In *Reynolds v. U.S.*, 98 U.S. 145, 165, 25 L.Ed. 244 (1879), the Court stated: "[U]pon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons."

Matters that went to the capacity to marry, eg. consanguinity, are dealt with in the ecclesiastical court. *Blackstone*, in addressing the dissolution of marriages stated: "A total divorce, *a vinculo matrimonii*¸ must be for some of the canonical causes of impediment before-mentioned; and those, existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards,* as may be the case in affinity or corporal imbecility." 1 *William Blackstone Commentaries* *440.

The area of probate brings on similar considerations. Probate matters in England were in the jurisdiction of the

Ecclesiastical Courts. III *Blackstone's Commentaries *65-66.* *In Case of Broderick's Will*, 88 U.S. 503, 22 L.ED 599 (1875) the Supreme Court considered whether the federal court had jurisdiction of a bill to set aside the probate of a will in the Probate Court of the City and County of San Francisco on the ground of forgery and fraud. There the court stated: "It seems, therefore, to be settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. It will only act in cases where the latter court can furnish no adequate remedy." *Id.* 88 U.S. at 512.

Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006) addressed the 'probate exception'. Justice Ginsberg, writing for the Court, noted that *Ankenbrandt* had "reined in" (547 U.S. at 299) the 'domestic relations exception' but yet acknowledged that divorce, alimony, and child custody decrees "remain outside federal jurisdictional bounds." 547 U.S at 308. *Marshall* also noted that *Markham v. Allen*, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946) had similarly attempted to "curtail"

(*Marshall*, 547 U.S. at 299) the 'probate exception'. Yet, the probate exception remains to reserve "to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Marshall, 547* U.S. at 311-312.[4]

Judge Posner, in *Jones v. Brennan*, 465 F.3d, 304, 307 (7th Cir. 2006), addressed the question of whether the probate exception would apply to issues presented under federal question jurisdiction. The Seventh Circuit held that the probate exception did apply to federal question jurisdiction[5], to wit:

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[4] The Court's jurisdiction in *Marshall* was premised on an underlying bankruptcy case and 28 U.S.C. § 1334. The Court did not determine whether there existed a probate exception in bankruptcy matters because the claim fell outside the probate exception. "We therefore need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under § 1334." *Marshall*, 547 U.S. at 308-309.

[5] Other circuits have held that the domestic relation exception applies only to cases under federal diversity jurisdiction. See e.g. *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008).

> "When Congress in the Judiciary Act of September 24, 1789, § 11, 1 Stat. 73, conferred on the federal courts a diversity jurisdiction limited to 'all suits of a civil nature at common law or in equity,' which is narrower than Article III's definition of the federal judicial power, probate and domestic relations were, the courts interpreting the statute held, excluded because they were thought to be part of neither common law nor equity. (Citations omitted)
> "Congress used the same language when in the Judiciary Act of March 3, 1875, § 1, 18 Stat. 470, it conferred a general federal-question jurisdiction on the federal courts, by which time the probate and especially the domestic-relations exceptions had become established in the case law. (Citations omitted) The implication is that the exceptions were probably intended to apply to federal-question cases too."

Id. at 307. The court concluded that there was no reason to give a different meaning to the identical language in the diversity and federal question statutes. *Id.* at 307

Obergefell came to the Supreme Court from the Sixth Circuit Court of Appeals, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), from a decision based upon the Fourteenth Amendment. *DeBoer* was a consolidation of district court cases from the states of Michigan, Ohio, Tennessee, and Kentucky. The district courts statutory grants of jurisdiction would be found in 28 USC §1331 (Federal

Question) or 28 USC §1343 (Civil Rights). The case came to the Supreme Court by certiorari (28 U.S.C. § 1254) as one of the Article III, Section 2, "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made."[6]

The district courts statutory grant for Federal Question jurisdiction at 28 USC §1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Prior to 1948, the "civil actions" read as "all suits of a civil nature, at common law or in equity". June 25, 1948, ch. 646, 62 Stat. 930; Judiciary Act of March 3, 1875, § 1, 18 Stat. 470[7]. This is true as to 28 USC §1343 as well. June 25, 1948, ch. 646, 62 Stat. 932; Mar. 3, 1911, c. 231, § 24, pars. 12, 13, 14, 36 Stat. 1092[8]. Thus, the same logic that Judge Posner applied in

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[6] As noted in footnote 1, aspects of *Obergefell* involving recognition of a marriage *valid* in another state are not addressed in this brief.

[7] Forty-Third Congress. Sess II Chap. 137, March 3, 1875.

[8] Sixty-First Congress. Sess. III. Ch. 231, Chapter 2 Sec. 24, par. 14 reads: "The district courts shall have original jurisdiction as follows: … Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage

Jones v. Brennan to the probate exception would apply to the domestic relations exception. The federal court would lack jurisdiction where the domestic relations exception applied notwithstanding that there might otherwise seem to be federal question jurisdiction.

In *Obergefell* the Court did not address the issue of jurisdiction, but assumed that the district courts had jurisdiction pursuant to the grants in 28 USC §§ 1331 or 1343, and its grant to take appeals, 28 USC § 1254(1)[9]. "When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)[10].

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of any State, of any right, privilege, or immunity, secured by the Constitution of the United States …."

[9] The Court's subject matter jurisdiction was not questioned in the appellant briefs of the States, but the issue was raised in at least two amicus briefs. See the amicus briefs filed by Eagle Forum Education & Legal Defense Fund and by Richard Lawrence.

[10] In the area of Full Faith and Credit, within specific limitations, one court may question the jurisdiction of another court. "A State is not required, however, to afford full faith and credit to a judgment rendered by a court that 'did not have jurisdiction over the subject matter or the relevant parties.' *Underwriters Nat.*

The decision of who can marry is a matter that is totally matrimonial. The question of whether two men or two women may marry falls squarely into that category. *Ankenbrandt* addressed the jurisdictional issue in terms of interpretation of statute, 28 USC § 1332, rather than interpretation of Article III[11]. What is clear, though, is that there is a domestic relations exception from the jurisdiction of federal district courts in matters purely matrimonial. There is nothing more purely matrimonial than whether the joining of two men or two women can constitute a marriage.

In *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.ED.2d 210 (1998), the Court held that in all but the rarest of exception, the matter of jurisdiction shall be determined by the Court before any other matter including even whether the complaint states a

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Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U.S. 691, 705 (1982)." *V.L. v. E.L.*, __ U.S. __, 136 S.Ct. 1017, 1020, 194 L.Ed.2d 92 (2016).

[11] Note may be made of the constitutional-avoidance rule: The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. *Reading Law: The Interpretation of Legal Texts* by Antonin Scalia and Bryan A.Garner, page 426, Thomson/West 2012.

cause of action. In *Steel Co.* the Article III jurisdictional requirement of having a case and controversy was required to be determined before deciding whether the case stated a statutory cause of action. In rebutting a practice used by the Ninth Circuit of "assuming" jurisdiction for the purpose of deciding the merits, the Court stated:

> "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. … "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514 (1869). …"

Id. at 94. Moreover, if a lower court lacks jurisdiction, so does the appellate court.

> "'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' (Citations omitted) (brackets in original)."

Id. at 95. Additionally, the Court points out how very fundamental and important it is within our federal system that the Court determines its proper jurisdiction, to wit:

> "Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. [Citations omitted.] For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." (Parentheses in original; brackets added.)

Id. at 101-102.

When the domestic relations exception applies, it applies notwithstanding that there might otherwise seem to be jurisdiction under diversity or federal question. In the matter of *Obergefell,* if the Court lacked jurisdiction the Court acted "ultra vires" by the issuance of the opinion.

The decision of *Obergefell* changed the definition of marriage, as it had been known for eons of time. *Obergefell*, 135 S.Ct. at 2594. Where a federal lower court lacks jurisdiction, so does the appellant court. *Steel*

Co., 523 U.S at 95. Amicus submits that the United States Supreme Court lacked jurisdiction.[12]

CONCLUSION

Whether one agrees or disagrees with the above analysis is not the present issue. What is to be recognized is that there is a jurisdictional question to be addressed which had not been previously addressed and was not addressed in *Obergefell* as to whether the United States Supreme Court had jurisdiction over the subject matter of what constitutes and defines a marriage. Arguably, the Alabama Supreme Court may have questioned whether the United States Supreme Court had jurisdiction, or addressed the jurisdictional issue and the degree to which the *Obergefell* decision should be recognized. That being true, then that should be given consideration in this Court's decision on the alleged canon violations based upon the January 6,

[12] The question raised herein as to the subject matter jurisdiction of the United States Supreme Court in *Obergefell* would apply equally to the jurisdiction in the case of *Strawser v. Strange*, Civil Action No. 14-1424-CG-C in the United States District Court for the Southern District of Alabama. The extent to which parties to a case, class plaintiffs or class defendants, or non-parties are bound by decisions in which a court lacked jurisdiction is not addressed in this amicus brief.

2016, Administrative Order by Justice Roy Moore to the Alabama Probate Judges.

Done this the 5th day of December, 2016.

/s/*Richard A. Lawrence*
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following parties listed below by placing a copy of the same in the United States Mail, first class postage prepaid and properly addressed, or by electronic mail on this the 5th day of December, 2016:

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