

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,)
)
Petitioners,)
)
v.)
)
ALAN L. KING, in his official)
capacity as Judge of Probate)
for Jefferson County, Alabama,)
et al.,)
)
Respondents.)

PETITION FOR DECLARATORY JUDGMENT, ORDER, AND DECREE
THAT ALABAMA WILL HONOR SAME-SEX MARRIAGE LICENSES ONLY
IF ISSUED UNDER THE EXCLUSIVE LICENSING AUTHORITY OF
THE UNITED STATES GOVERNMENT OR SISTER STATES WHOSE
STATE LAWS RECOGNIZE SAME-SEX MARRIAGES

Comes now John E. Enslin, in his official capacity as the Probate Judge of Elmore County, Alabama, (hereinafter "Petitioner Enslin") and petitions this Supreme Court of the State of Alabama to issue a declaratory judgment, order, and decree holding that the State of Alabama will honor and recognize same-sex marriage licenses that are duly issued by the federal government of these United States, or duly issued by a state government that has adopted the civil right of same-sex marriage as a matter of that state's law, but further holding that the State of Alabama will not issue state same-sex marriage licenses or recognize purported state same-sex marriage licenses that have been issued in contradiction to the current Constitution of the State of Alabama or the current state law of any other sister state. As grounds for this petition, Petitioner Enslin would show unto this Honorable Court as follows:

1. The government of these United States is no stranger to issuing and administering federally-created

licenses that have their jurisdictional origin in the United States Constitution. In other words, federally created civil rights arising under the wording of the United States Constitution, or federal judicial interpretations thereof, have always been administered exclusively by the federal government.

2. A search of the Code of Federal Regulations reveals that there are 19,169 sections that contain the word "license," "certification," "permit," or a combination thereof. Federal agencies, boards, and commissions have been established by the federal government to regulate the exclusive issuance and administration of a multitude of federal licenses.

3. Pursuant to authority granted under the United States Constitution, or judicial interpretations thereof, Congress has created various federal agencies that oversee the exclusive issuance and administration of the following licenses, among many others:

a. The Bureau of Alcohol, Tobacco, Firearms, and Explosives¹ exclusively oversees the issuance and administration of licenses to import, manufacture, or deal in firearms, import or export ammunition, and conduct business at a gun show.²

b. The Federal Aviation Administration³ exclusively oversees the issuance and administration of pilot and pilot-instructor licenses.⁴

c. The United States Fish and Wildlife Service⁵ exclusively oversees the issuance and administration of permits to import and export,⁶ band or mark,⁷ and collect for science⁸ migratory birds, take⁹ or remove¹⁰ eagle nests, and to import polar bear sport-hunted trophy.¹¹

¹ 28 U.S.C. § 599A (2006).

² 18 U.S.C. § 923 (2002).

³ 49 U.S.C. § 106 (2012).

⁴ 14 C.F.R. § 61.19 (2009).

⁵ 16 U.S.C. § 742b (1974).

⁶ 50 C.F.R. § 21.21 (2008).

⁷ 50 C.F.R. § 21.22 (1989).

⁸ 50 C.F.R. § 21.23 (1998).

⁹ 50 C.F.R. § 22.25 (1999).

¹⁰ 50 C.F.R. § 22.27 (2009).

¹¹ 50 C.F.R. § 18.30 (2014).

d. The Federal Communications Commission exclusively oversees the issuance and administration of licenses to broadcast a children's television program and to become a commercial radio operator.¹²

e. The Environmental Protection Agency exclusively oversees the issuance and administration of certain licenses dealing with activities that relate to air,¹³ water,¹⁴ pesticides,¹⁵ and hazardous waste.¹⁶

4. Many more exclusive federal-license examples could be cited, but the obvious point is that the federal government and its many agencies are accustomed to issuing and administering licenses that have for their creative basis a grant of authority that is grounded in the federal constitution or a judicial interpretation thereof.

¹² 47 U.S.C. § 307 (2004).

¹³ 40 C.F.R. § 68.215 (1996).

¹⁴ 40 C.F.R. § 122.34 (1999).

¹⁵ 40 C.F.R. § 158.2170 (2007); 40 C.F.R. § 158.2080 (2007); 40 C.F.R. § 158.220 (2008).

¹⁶ 40 C.F.R. § 270.250 (2005).

5. Despite the June 26, 2015 ruling by the Supreme Court of the United States in Obergefell v. Hodges,¹⁷ the **issuance** of same-sex marriage licenses in Alabama, as opposed to the **recognition** of duly licensed same-sex marriages, remains illegal and unconstitutional in the State of Alabama.¹⁸ Admittedly, the Obergefell ruling gave birth to a new, federally-created, U.S. Constitution-based, civil right to same-sex marriage or, as some have referred to it, sodomy-based marriage.¹⁹ But the recognition of a new, federal civil right is an entirely different matter from the federal government's authority to compel the State of Alabama, or any other state, to issue that particular type of federal-based marriage license. This petition relates

¹⁷ 135 S.Ct. 2584 (2015).

¹⁸ Ala. Code § 30-1-19 (1998); In 2006, the people of Alabama ratified an amendment to the Alabama Constitution known as the Alabama's "Sanctity of Marriage Amendment," § 36.03, Ala. Const. 1901, which prohibits same-sex marriage.

¹⁹ Respondent Nick Williams, "Emergency Petition For Declaratory Judgment and/or Protective Order In Light Of Jailing Of Kentucky Clerk Kim Davis and Memorandum In Support Of Emergency Motion", Case No. 1140460.

to the proper manner in which to enforce the United States Supreme Court's ruling in Obergefell.

Could the federal government compel a state to set up a state agency for the issuance of a federal license in any of the licensing categories that are presently occupied exclusively by the federal government? For instance, could the federal government compel a state to set up a state agency for the issuance of licenses to those who intend to acquire explosive materials from a licensee in another state or from a foreign country?²⁰ The manner in which the federal government asserts preemption in the area of immigration provides a likely answer.

6. Born solely from a strained interpretation of the U.S. Constitution,²¹ the new same-sex marriage license is a child of the federal government, not the State of Alabama. James Madison, in *Federalist 43*,

²⁰ 27 C.F.R. § 555.45 (2014).

²¹ Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (Roberts, C.J., dissenting) ("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.")

stated, "A right implies a remedy; and where else would the remedy be deposited, than where it is deposited by the Constitution?, meaning, as the context shows, in **the government of the United States.**"²² Justice Story explained, "If, indeed, the constitution guarantees the right . . . the natural inference certainly is, that the **national government** is clothed with the appropriate authority and functions to enforce it."²³

7. Therefore, the recognition of same-sex marriage as a civil right under the United States Constitution vests the U.S. Congress with the authority and responsibility to enforce the right and to provide the appropriate licensing, the same as it exclusively does in many other areas of federal law.

8. An analogy can be drawn from the creation of new, federal constitutional-based civil rights in the anti-racial discrimination movement of the late 1950's and thereafter. Congress enacted the Civil Rights Act

²² Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-16 (1842).

²³ Id. at 615.

of 1964²⁴ and the Voting Rights Act of 1965.²⁵ It was the federal government and not the state governments that undertook to supervise and oversee the enforcement of these newly recognized civil rights. Federal statutory schemes were put in place for the recognition and enforcement of these rights.

9. The historical forerunner of the modern civil rights movement was the Civil Rights Act of 1866²⁶ ("CRA"). The CRA prohibited the states from infringing upon certain federal constitutional rights. The CRA bill's House Floor Manager, James Wilson, applied James Madison's and Justice Story's understanding of Congress's constitutional authority and responsibility when he proclaimed:

Now, sir, in relation to the great fundamental rights embraced in the bill of rights, the citizen being possessed of them is entitled to a remedy. That is the doctrine as laid down by the

²⁴ 88 P.L. 352, 78 Stat. 241.

²⁵ 89 P.L. 110, 79 Stat. 437.

²⁶ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § § 1981-1982 (2000)).

courts. There can be no dispute about this. The possession of the rights by the citizen raises by implication the power in **Congress** to provide appropriate means for their protection; in other words, to supply the needed remedy.²⁷

10. The modernly-used statutory scheme for the enforcement of federal civil rights is a federal statutory scheme, not a state-enacted statutory scheme. For example, 42 U.S.C. § 1981 creates a cause of action for citizens to enforce in federal court certain federal civil rights, i.e., federal civil rights created by the U.S. Constitution or by federal statute.²⁸ Today, when an Alabama citizen's federal civil rights are violated, the Alabama citizen generally looks to the U.S. Constitution and the federal courts for redress.

²⁷ The account is taken from CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Mar. 9, 1866) (quoting Prigg, 41 U.S. (16 Pet.) at 615).

²⁸ Albright v. Oliver, 510 U.S. 266 (1994); Graham v. Connor, 490 U.S. 386 (1989); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Baker v. McCollan, 443 U.S. 137 (1979).

11. As a probate judge, I am currently compelled, and I believe wrongfully, to issue federally-created same-sex marriage licenses or face an onerous federal civil rights action under 42 U.S.C. § 1983.

12. In enforcing and protecting federal civil rights, both historically and in modern times, the federal government has exercised the authoritative oversight, and there is no federal constitutional authority for the federal government to transfer the economic and emotional burden of their exclusive oversight to the states.

13. Wherefore the premises considered, Petitioner Enslin requests this Supreme Court of the State of Alabama to issue a declaratory judgment, order, and decree holding that the State of Alabama will honor and recognize same-sex marriage licenses that are duly issued by the federal government of these United States, or duly issued by a state government that has adopted the civil right of same-sex marriage as a matter of that state's law, but further holding that

the State of Alabama will not issue state same-sex marriage licenses or recognize purported state same-sex marriage licenses that have been issued in contradiction to the current Constitution of the State of Alabama or the current state law of any other sister state.

Respectfully submitted this 5th day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that I have this 5th day of October, 2015, served copies of the foregoing pleading by email transmission, as follows:

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