Case No. 1140460

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 ,

PETITIONERS,

v.

ALAN L. KING, in his official Capacity as Judge of Probate for Jefferson County, Alabama et al.,

RESPONDENTS.

Amicus Curiae Brief of the Charismatic Episcopal Church for Life

William P. Gray, Jr.
John David Gray
Gray & Associates, LLC
3800 Colonnade Pkwy., Ste 350
Birmingham, Alabama 35243
Telephone: (205) 968-0900
Facsimile: (205) 968-6534
Email: wgratty@aol.com

Attorneys for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION 2

SUMMARY OF THE ARGUMENT 15

ARGUMENT 18

I. **OPINIONS OF THE UNITED STATES SUPREME COURT, NOT MADE IN PURSUANCE OF THE CONSTITUTION, ARE NOT BINDING UPON THIS COURT** 18

II. ***OBERGEFELL* FAILS TO ADDRESS THE ELEMENTS OF STRICT SCRUTINY ANALYSIS** 25

A. THERE IS NO FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE 25

B. THE STATE OF ALABAMA'S INTEREST IS COMPELLING 28

1. There is No Infringement of the Fundamental Right to Marry 32

2. Any Infringement is in Furtherance of a Compelling State Interest 34

III. **THE SUPREME COURT HAS NO AUTHORITY TO MANDATE STATE ACTION** 40

CONCLUSION 45

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

Cases — Page

Ableman v. Booth, 62 U.S. 506, 517-18 (1858) 40

Bowen v. Gilliard, 483 U.S. 587, 614 (U.S. 1987) 36

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) 46

Brown v. Allen, 344 U.S. 443, 540, (U.S. 1953) 18

Bynum v. City of Oneonta, No. 1130305, 2015 WL 836700, at *4 (Ala. Feb. 27, 2015) 43

C.E.G. v. A.L.A., 2015 WL 4715542, at *4 (Ala. Civ. App. Aug. 7, 2015) 26

Ex parte Davis, No. 1140456, 2015 WL 567479, at *3 (Ala. Feb. 11, 2015) 6

Ex parte State ex rel. Alabama Policy Inst., No. 1140460 at *6 (Ala. Mar. 3, 2015) 38

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) 29

In re Adoption of K.R.S., 109 So. 3d 176, 178 (Ala. Civ. App. 2012) 35

In re Booth, 3 Wis. 157, 193-94 (Wis. 1854) 7

Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) 12

Jernigan v. Crane, 796 F. 3d 976 (8th Cir. 2015) 32

Lawrence v. Texas, 539 U.S. 558, 582 (2003) 10

Loving v. Virginia, 388 U. S. 1, 12 (1967) 38

Marbury v. Madison, 5 U.S. 137, 138 (1803) 8, 22-24

Martin v. Hunter's Lessee, 14 U.S. 304, 323 (1816) 18

Maynard v. Hill, 125 U.S. 190, 211 (1888) 38

McInnish v. Bennett, 150 So. 3d 1045, 1068-69 (Ala. 2014) 23

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) 38

Obergefell v. Hodges, 135 S. Ct. 2584, 2638, 192 L. Ed. 2d 609 (2015) .....passim

Opinion of the Justices, 148 So. 3d 58, 60 (Ala. 2014) 25

Reno v. Flores, 507 U.S. 292, 302 (1993) 25, 26

Roe v. Wade, 410 U.S. 179, 222 (1973) (J. White, dissenting) 46

Romer v. Evans, 517 U.S. 620, 640-41 (1996) 46

Rosenbrahn v. Daugaard, 799 F. 3d 918 (8th Cir. 2015) 32

Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 541 (1942) 39

Strange v. Searcy, 135 S. Ct. 940, 941, 191 L. Ed. 2d 149 (2015) 6

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) 26

Waters v. Ricketts, 798 F. 3d 682 (8th Cir. 2015) 32

Statutory Authority

U.S. Constitution, Art. VI, Cl. 2 2-3

U.S. Const. Amend. X 19, 48

Art. I, § 279, Ala. Const. 1901 3

Art. I, § 2, Ala. Const. 1901 3

Other Authority

Paine, Thomas. *Common Sense*. 1776. USHistory.org. http://www.ushistory.org/paine/commonsense.....2

Hamilton, Alexander. The Federalist, No. 78. The Library of Congress, Thomas. http://thomas.loc.gov/home/histdox/fedpapers.html.....20, 21, 41

Madison, James. The Federalist, No. 47. The Library of Congress, Thomas. http://thomas.loc.gov/home/histdox/fedpapers.html.....22

Blackstone, Sir William. *Commentaries on the Laws of England,* Vol. 1, §2, "Of the Nature of Laws in General"[1] 9

Adams, John. Letter to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts. 1798. Libertyfund.org. http://oll.libertyfund.org/titles/2107#lf1431-09_head_222.....9

Story, Joseph, *Commentaries on the Constitution of the United States*, § 1838, (1833).....24

The Book of Mark (English Standard Version) 43

[1] As re-printed in "One Nation Under God", published February 11, 2014, by Roy S. Moore.

STATEMENT OF INTEREST

The CEC for Life is a pro-life organization associated with the International Communion of the Charismatic Episcopal Church. CEC for Life believes that life is precious and that children, born and unborn, being the most defenseless individuals in our great nation, deserve our attention and protection. CEC for Life seeks to educate and motivate our culture to understand what it means to believe in the Sanctity of Human Life. In appropriate cases, CEC for Life undertakes to address issues of importance to its members and the broader pro-life community by seeking leave to appear as Amicus Curiae before this Court and others. Although it has no direct interest in the specific outcome of the present case, CEC for Life and its members have a direct interest in preserving predictability and consistency in the application of the United States Constitution to so called "fundamental" rights and the states' interest in these rights.

Introduction

In January 1776, Thomas Paine penned his famous pamphlet, appropriately titled *Common Sense*, wherein he stated that "[i]n America, *the law is king*. For as in absolute governments the King is law, so in free countries the law ***ought*** to be king; and there ought to be no other." Contemporaries of Paine subscribed to this same ideal of the sovereignty and immutability of law over the opinions of man, which are like chaff blowing in the wind. By September 21, 1788, the idea that the will of the people is the supreme governing authority was ratified and incorporated as the supreme law of this land. It is, therefore, law and not man nor his opinions that rules this Country.

The members of this Court have sworn an oath of office to uphold the law, defined as "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI, cl. 2. These "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding." U.S. Const. art. VI, cl. 2.

The allegiance of the members of this Court is twofold, as our own state constitution also provides that the members of this Court must swear an oath of office to "support ... ***the Constitution of the State of Alabama ...*** So help me God." (emphasis added). Art. I, § 279, Ala. Const. 1901.

The Alabama Constitution further provides that "all political power is inherent in the people, and all free governments are founded on their authority." Art. I, § 2, Ala. Const. 1901. It is, afterall, a truth deemed "self-evident" that "Governments are instituted among Men, deriving their just powers from the consent of the governed." Justice Kennedy's libertarian ideals, notwithstanding, the power of the judiciary is limited by the consent of the governed. It is this on-going experiment in self-government that is at stake in this Court.

If this Court -not the individual members with their individual beliefs and opinions, but the office of the highest court in the State of Alabama- is bound to uphold the United States Constitution, and supposing that *Obergefell* is in conflict, what, then, is this Court to do?

If an opinion of the United States Supreme Court is repugnant to the plain meaning of the United States Constitution –or even repugnant to previous Supreme Court decisions on point- is this Court left to blindly comply? Shall the unelected members of the United States Supreme Court don the ficticious powers of "Judge Dredd", theatrically declaring: "I am the law?"

Or, might there be occasions imaginable where it becomes necessary for the state governments, in seeking to protect their own sovereignty guaranteed by the enumerations of the Constitution itself, and looking to the Constitution as the supreme law, therefore reach a differing result from the will asserted by the highest judiciary of the central government? If such occasions may ever exist, this may be one of them.

This Court faces no easy task; a task which this Amicus neither takes lightly nor envies. Time may very well show that, no matter the decision made here in this Court, there is no political "win" that may be had for the individual members of this Court. This Court, nevertheless, has before it a critical question that ***must be decided***.

Through an unprecedented act of democracy, the people

of ***this*** sovereign state voted to approve an Amendment to the Alabama Constitution, another rule of law which the members of this Court have sworn to uphold. In approving this amendment, three-fifths of all members elected to both houses of the state legislature approved proposed amendments to the Alabama Constitution. These proposals were voted upon by the state electorate, at large, and once approved by a majority of the voters, legally became a part of the Alabama constitution. An overwhelming majority, 81% of the electorate approved the act in Alabama.[1]

The People of Alabama are not alone. Only 19 years ago, within the lifetime of the overwhelming majority of the national voting population[2], Congress (presumably with the approval of their constituency) passed the Defense of Marriage Act, limiting "marriage" to the union of one man and one woman. The United States House of Representatives voted in favor of the bill by a margin of 342 to 67, while the United States Senate voted in favor of the bill with an

---

[1] By way of comparison, during the same 2006 election, Republican gubernatorial candidate, Bob Riley, won with a percentage of only 57.45%.

[2] In fact, as of the time this brief was filed, 100% of the population who have had occasion to vote in a national election, were alive when DOMA was passed.

unprecedented margin of 85-14. The judicial branch has since struck down the law as unconstitutional.

Other State legislatures have passed similar provisions. "[State] Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States ***have put the question to the People themselves***. In 32 of those 35 States, [including this one,] the People have opted to retain the traditional definition of marriage." (emphasis added) *Obergefell v. Hodges*, 135 S. Ct. 2584, 2638, 192 L. Ed. 2d 609 (2015) (J. Thomas' dissent).

Yet, finding the traditional definition of marriage to be repugnant to the Constitution, the *Obergefell* opinion has completely bull-rushed and undermined the democratic process. The United States Supreme Court has exhibited an "increasingly cavalier attitude toward the States.... without any regard for the people who approved those laws in popular referendums or elected the representatives who voted for them." *Strange v. Searcy*, 135 S. Ct. 940, 941, 191 L. Ed. 2d 149 (2015) (Justice Thomas's dissent; cited by *Ex parte Davis*, No. 1140456, 2015 WL 567479, at *3 (Ala. Feb. 11, 2015)). If ever there was a time to act on behalf of the people of Alabama to assert on their behalf, their

right to self-government, this Amicus contends the time is now.

In ***refusing*** to support the cause of slavery and the legislative agenda of the southern "slave states," Justice Abram D. Smith, of the Supreme Court of Wisconsin, exhibited one of the few occasions wherein a state court dared to challenge the authority of the United States Supreme Court. History ultimately has shown that Justice Smith was in the right. Smith argued, that "[i]f, therefore, it is the duty of the state to guard and protect the liberty of its citizens, it must necessarily have the right and power to inquire into any authority by which that liberty is attempted to be taken away," noting further that "the power to inquire, includes the power to decide." *In re Booth*, 3 Wis. 157, 193-94 (1854).

While it is true that the opinions of the United States Supreme Court are commonly regarded as the law of the United States, this Court should consider why that may be the case. The Constitution provides that such laws are the "law of the land" only so long as the laws "shall be made in pursuance [of the Constitution]." The uneducated and layman understandings of the general public aside, it is as

incumbent upon ***this*** Court to uphold the principles of the Constitution, as it is for the United States Supreme Court.

If state governments are instituted among men to uphold the "unalienable right" of self government, then this Court is no exception. This Court must decide, then, not merely whether it is bound by *Obergefell*, as the "law of the land," though certainly that is a relevant question. This Court must also decide whether the *Obergefell* opinion upholds the Constitution of the United States, and whether the law which the opinion has made was "made in pursuance thereof." If "[a]n act of congress repugnant to the constitution cannot become a law," *Marbury v. Madison*, 5 U.S. 137, 138 (1803), then how could an act of the Supreme Court, equally repugnant to the Constitutional provisions of federalism and separation of powers, be any more the law? Where else may the citizens of this state turn but to their own state leaders to stand for the rights not enumerated in the Constitution, thus reserved to the state? If *Obergefell* does not uphold the Constitution of the United States, or conflicts with the provisions of the Constitution, then responsibility falls to this Court to reconcile Alabama law with the United States Constitution.

This Court need not wade into the fray of the debate on "traditional values" versus the more progressive "full promise of liberty." Admittedly, This Amicus cannot pretend to advocate anything other than the traditional values of marriage between one man and one woman, which mimics the marriage between Jesus Christ and his bride, the Church. As Sir William Blackstone reasoned in his *Commentaries on the Laws of England*, Vol. 1, §2, "Of the Nature of Laws in General", all human laws depend upon the law of nature and the law of revelation as their foundation. This is especially true where laws governing moral or social issues are concerned. "If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God." *Id.* But man does not live in a state of nature. Thus, we have laws "necessary for the benefit of society to be restrained within certain limits." *Id.*

In writing to the officers of the First Brigade, Third Division, of the Militia of Massachusetts, another of our Nation's fathers, John Adams, emphasized that "our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any

other." To be sure, no less than the hearts and minds of the citizens of this State, and indeed the citizens of this Country, are at stake. When Justice Kennedy determined, without precedent, that "the promotion of morality" is not a legitimate state interest, *Lawrence v. Texas*, 539 U.S. 558, 582 (2003), and more recently recognized in *Obergefell* "the rapidly shifting public opinion" as justification for his ruling, it becomes clear that the law is no longer king. The opinion in *Obergefell* is undoubtedly a result of the breakdown between our Constitution, made for a moral and religious people, and the morality of the Court claiming sole authority to interpret it.

Even so, when the "full promise of liberty" label is applied, more questions than answers arise. Where can a sovereign state ever draw the line, if the "full promise of liberty" is the only Constitutional measure? By way of example only, what becomes of laws prohibiting the marriage of two, consenting, adult siblings whose liberties are infringed by laws against incestuous relationships? Or what of polygamous relationships between consenting adults? Are not the same fears of loneliness, hopes for companionship, and dreams of caring for each other equally valid? Do not

these groups deserve the same opportunity to validate their intimacy to move beyond the label of "outlaw to outcast" to the "full promise of liberty?"

If the maximization of personal liberty is to be the measuring stick, then on what basis may a state ever criminalize anything "consensual?" There is nothing more fundamental than being permitted to eat and drink what you please. Yet, is there an infringement upon the individual's "full promise of liberty" to choose and ingest one's own food and drink, by statutes prohibiting the ingestion of food laced with marijuana? While some might argue that marijuana is harmful to one's physical health, therefore (arguably) distinguishable, what of laws concerning possession alone? On what basis may a state ever enforce decency laws wherein they infringe upon the fundamental right to choose one's own clothing and dress him or her self? Perhaps more importantly, is a state limited to protecting only the physical health of the human animal, without regard to the spiritual and social welfare of the human being?

Other, perhaps more extreme, "relationships" could be

explored.[3] And advocates for same-sex marriage may argue that such examples are incomparable, absurd, bigoted and demeaning to the rights of homosexuals. At a minimum, however, such examples illustrate that in civilized society, there is and must always be a line of morality drawn somewhere.

The question for this Court is who decides where and why to draw this line? Traditionally, the answer to this question has been found in the state legislatures, in what is termed the "police power" of the states, through the right of the democratically elected representatives to make law through legislation. *Obergefell* would prescribe that a majority of the nine member court gets to decide where and why to draw the line on issues of morality. In an

---

[3] A recent article published by The Atlantic, tells the story of a man going by the moniker "Davecat" (also featured on TLC's "My Strange Addiction") who, along with other members of a subculture that consider themselves "technosexual", advocates his own desire to marry inanimate, but anatomically correct, dolls. Without some recognition that the dependence of legislation on an understanding of the natural and revealed laws is a legitimate foundation for the rule of law, who is to say that Davecat's liberty to marry one of his dolls is any less fundamental than another. Otherwise, in analyzing "fundamental rights" the judicial branch must resort to the use of Justice Stewart's famous line regarding obscenity: "I know it when I see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

unprecedented violation of the ideals of federalism and separation of powers, the majority opinion did not merely declare a law unconstitutional, but purportedly mandated how the law must be administered.

Some will argue that these same arguments were used to justify the oppression of the African American people group, based solely on skin color less than a century ago. The heinous treatment of human beings as property, once exhibited in this state and others, and in some cases continuing throughout this nation, is certainly disappointing and supremely regrettable. Nevertheless, such historical scars should have little bearing on the issue of same-sex marriage. The two are not related.

This Court need not rely upon tradition alone, or personal biases, to reach its decision. Surely, however, all reasonable people can see the distinction between the color of one's skin and the gratification of one's sexual appetite. Lest there be any question as to the distinction between such issues, the 13th and 14th amendments were passed specifically for the purpose of ensuring that people of all ethnicities would receive equal treatment, no matter the color of their skin. No such amendment exists to

guarantee a right to marry whomever one chooses, regardless of gender.

Of course, the question before this Court need not necessarily turn on a question of the morality or unrighteousness of a same-sex lifestyle. In fact, those who affirm Judeo-Christian values in this state can rest assured that the same "Supreme Judge", to whom our forefathers raised daily prayers in the Assembly Room of the Pennsylvania State House "for the divine protection", and to whom the members of this Court ultimately answer, has undeniably declared His own opinions on the matter. And, while "reasonable and sincere" minds may disagree "in good faith" as to what is the opinion of the "Supreme Judge," our Lord is still sovereign over all matters, and it is only He who will be the final and ultimate arbiter on the issue.

The issue before *this* Court is solely a question of how this Court may reconcile the will and consent of the people of the state of Alabama, with the legal decisions of an unelected few. First, a few loose references to equal protection and due process does not make a "fundamental right." Second, even assuming the Court has authority to

declare the existence of a new "fundamental" right, strict-scrutiny analysis mandates an examination of the competing state interests.

Justice Kennedy's majority opinion is rife with references to the rapidly shifting public opinion on marriage. But no strict-scrutiny analysis can be found in *Obergefell*. Of course, when 32 of these 50 states have voted to define marriage in the traditional sense, as well as nearly 85% of the 104th Congress, one has to wonder whose public opinion Justice Kennedy is examining. Nevertheless, public opinion may very well mold and shape what the law ***should*** be, through the democratic process. But rapidly shifting public opinion has ***no place*** in the understanding of what the law ***is***. If the power of the courts is to determine what the law is, and not to make law by determining what the law ought to become, then the majority opinion from *Obergefell* has unequivocally overstepped its bounds.

Summary of the Argument

The Charmismatic Episcopal Church for Life, is a pro-life organization, concerned with the *Obergefell* majority opinion's cavalier definition of a "fundamental right."

Just as a "fundamental right" to privacy should not give justification to an alleged "right" to terminate an unborn child, neither should a "fundamental right" to marry be twisted into an unlimited right to marry whomever one chooses. Certain limitations on state sanctioned marriage have purpose beyond some alleged disparate treatment of individual liberty.

Unless the *Obergefell* opinion is issued "in pursuance of" the United States Constitution, then it is not binding on this Court. This Amicus is equally concerned with the failure of the Supreme Court to apply strict scrutiny analysis, failing to recognize the interest of the state that has, for millennia, compelled the western world to treat marriage as a union of one man and one woman. This Amicus is concerned with the effects that the *Obergefell* decision will have, and the opportunity this Court has before it, concerning the best interests of all children in this state, born and unborn.

The single most important factor in the life and wellbeing of a child is the existence of healthy parenting in the child's life. There can be no denying that conflicting reports exist concerning the effect of the

sexual orientation of a child's care-givers on the health and wellness of the child. As other Amici have submitted, there is no question that some children can and do thrive in "non-intact" as well as non-"traditional" families. However, any argument that research proves, or even vaguely suggests, that there are ***no differences*** between the effects had on a child's wellbeing by same-sex parents versus a parental unit consisting of one mother and one father is absolutely false. To use the parlance of the day, such an argument would not be grounded in science.

The studies advanced by other Amici before this Court lead one to conclude that the enduring, healthy, harmonious marriage between one man and one woman not only benefits the child, but is in fact the single most beneficial influence serving the best interests of the children raised under the protection of an intact marriage. If this Court is bound to accept the new "fundamental liberty" laid down by *Obergefell*, this Court is no less duty bound to examine the competing and compelling state interests in abridging this liberty. Finally, this Amicus is concerned with the severability of the traditional definition of marriage, which *Obergefell* finds repugnant to the U.S. Constitution,

from other laws in this state related to a traditional definition of marriage.

ARGUMENT

I. OPINIONS OF THE UNITED STATES SUPREME COURT NOT MADE IN PURSUANCE OF THE CONSTITUTION, ARE NOT BINDING UPON THIS COURT.

There is no question that this Court must be circumspect in its treatment of, and deference to, the legal opinions of the United States Supreme Court. As early as *Martin v. Hunter's Lessee*, 14 U.S. 304, 323 (1816), the United States Supreme Court has assumed upon itself, its own authority as the final arbiter of what is "the law of the land." For nearly 200 years, this right and authority of the Court has been generally accepted. As Justice Jackson reasoned on behalf of the Court, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540, (U.S. 1953).

They are not, of course, infallible. Surely finality alone, in this Country, does not give the Court its own self justification for trampling the very rights which the "mummeries and straining-to-be-memorable passages of the opinion" loosely attempt to uphold. The Constitution

expressly provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. The rulings of the United States Supreme Court are only the "law of the land" so long as they "shall be made in pursuance [of the Constitution]."

This Court need not stand by, idly, and indeed ***must not***, while the United States Supreme Court abuses the rights and privileges reserved to the states. Nowhere is this more true, than when the United States Supreme Court finds a never before recognized, "unenumerated" right denying or disparaging the plainly "enumerated" rights promised and retained in the people of this state, as guaranteed by the tenth amendment.

As Alexander Hamilton argued, in support of ratifying the Constitution, "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes

before them." *Federalist Paper* No. 78.[4] Justice Kennedy appears to have dismissed the Court's previous rules and precedents, as well as the express provisions of the Consitution itself, substituting in their place the "rapidly changing public opinion."

The majority's ruling in *Obergefell* appears to never have even considered the effect of the 10th Amendment, and the rights reserved to the States therein. The majority opinion wholly and completely fails to reconcile the State's retention of those rights not expressly enumerated in the Constitution with the "fundamental rights" of equal protection or due process. As a governmental body, sworn to uphold the Constitution, and the protections afforded therein, this Court must strongly consider the prior precedent of the United States Supreme Court, analyzing the alleged infringement of a fundamental right under strict-scrutiny analysis.

The Supreme Court's majority opinion has completely disregarded its prior decisions by ignoring the compelling

[4] It should go without saying that the Federalist Papers are a respected and persuasive authority on Constitutional Construction. As early as Chief Justice Marshall's landmark opinion in *Marbury v. Madison*, the Federalist Papers were twice cited therein, and the guiding principles Hamilton set out are referenced throughout as authoritative.

state interests involved, instead calling upon "the rapidly shifting public opinion" on marriage to support its ruling. In doing so, the Court has substituted "public opinion", in place of the limits of the Constitution as the "supreme law of the land."

As Alexander Hamilton explained, "there is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." *Federalist Paper* No. 78. In speaking of the interplay between Congressional legislation and the Constitution, Hamilton went on to explain: "If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *Id.* Is the same not true of the laws created by the judiciary itself? This Court may be assured that Hamilton would agree, since he further explains: "The courts must declare the sense of the law; ***and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution***

of their pleasure to that of the legislative body." *Id*; *See*, *also*, *Federalist Paper* No. 47 (James Madison, discussing Montesquieu's theories on the separation of powers between the judiciary and legislative branches in support of ratification of the Constitution).

Can the Court's majority opinion be any more an exercise of "judgment" rather than "will" simply because the majority declares it so? Whether it is the case here or not, certainly the answer to this question must be a resounding "No!" Without addressing at this instance whether there is, in fact, conflict between the majority's opinion and the Constitution, the conclusion must be that if the decision does conflict, then this Court is no more bound by it than the judiciary at large is bound by the unconstitutional enactments of the legislative branch.

This Court is equally sworn to uphold the Constitution. Thus, the same logic applied by Justice Marshall in *Marbury v. Madison*, applies here: "[W]hy otherwise does [the Constitution] direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the

instruments, ***and the knowing instruments***, for violating what they swear to support! ... Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" (emphasis added). *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). This Court has taken no oath to uphold the judgments of the Supreme Court[5]; but only an oath to uphold the Constitution. If the members of this Court cannot make a reasoned "judgment" concerning his duty to uphold the Constitution, then why take the oath? *See, also, McInnish v. Bennett*, 150 So. 3d 1045, 1068-69 (Ala. 2014) (C.J. Moore's dissent, discussing the importance of the oath of office).

According to Justice Story, the oath to support the Constitution, "results from the plain right of society to require some guaranty from ***every [state] officer***, that he

[5] There is no specific provision in the Constitution giving opinions of the United States Supreme Court binding authority over matters arising in this Court. Admittedly, tradition and custom have interpreted the Court's "appellate Jurisdiction, both as to Law and Fact" as implying this authority. However, the same custom and tradition justifying the binding nature of the precedent set by the Supreme Court, has for the entire existence of this Country, supported the same fundamental understanding of what marriage is, or even ***ought*** to be. The two cannot be separated.

will be ***conscientious*** in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being." (emphasis added) III Joseph Story, *Commentaries on the Constitution of the United States* § 1838 (1833).

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; ***and not the laws of the United States generally***, but ***those only which shall be made in pursuance of the constitution***, have that rank." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Thus, "the Constitution of the United States confirms and strengthens the principle ... that a law repugnant to the constitution [including law created by the Supreme Court itself] is void; and that *courts,* as well as other departments, are bound by that instrument [the United States Constitution]." *Id.*

This Court recently postulated that "Constitutional revision should not be initiated by a body that is itself a creation of the very constitution it seeks to revise and that thus may seek to mold the document to serve its own

parochial institutional interests. Instead, revision belongs to the people themselves, the rightful creators of the Constitution." *Opinion of the Justices*, 148 So. 3d 58, 60 (Ala. 2014). If the majority holding in *Obergefell* is in conflict with the express provisions of the United States Constitution, and this Amicus contends that it is, then the holding of *Obergefell* is void. Thus, it falls to this Court, in the "conscientious" discharge of its sworn duty, to address the case in front of it, attempting to reconcile existing state law, with that of the United States Constitution.

II. *OBERGEFELL* FAILS TO ADDRESS THE ELEMENTS OF STRICT SCRUTINY ANALYSIS.

A. There is no Fundamental Right to Same-Sex Marriage.

According to precedent, the 14th amendment forbids the government "to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The substantive due process analysis concerning same-sex marriage must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-

restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Id.* It is axiomatic that "[f]undamental rights are only those 'rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition"' and '"implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]"'" *C.E.G. v. A.L.A.*, 2015 WL 4715542, at *4 (Ala. Civ. App. Aug. 7, 2015) (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997)).

In *Reno*, cited above, for example, the United States Supreme Court found that "the mere novelty" of a claim to an alleged fundamental right, was "reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 303. A right cannot be "fundamental", unless it has some basis rooted in the traditional understanding of mankind.

As stated earlier, this Amicus is particularly concerned with the Supreme Court's declaration of a fundamental right, where none previously existed. Justice

Kennedy's comparison of marriage, to the acts of procreation, contraception, family relationships, and childrearing, *Obergefell*, 135 S. Ct. at 2599, is illustrative of the majority's substitution of its own personal will for reasoned judgment, and particularly its substitution of its own will for that of the legislative branch. Respectfully, Justice Kennedy's analysis is misplaced because, on the one hand, procreation, contraception, the family relationship, and childrearing are innately private matters. Marriage, on the other hand, is an inherently public matter.

Indeed, it is the public recognition and acceptance, inherent to a state sanctioned marriage that same-sex couples seek, and to which they claim unequal treatment. In this vein, proper framing of the majority's opinion is necessary. Any fundamental right that may exist is in the right to "marry", as that term has been defined from the beginning of creation. Broadly speaking, Kennedy's opinion could be considered to create a "fundamental right to marry the person of your choice," a right that is more palatable. Yet even this right is not wholly unlimited, and the state has always maintained an interest in regulating marriage to

some degree.

Nearly all would agree that marriage is still limited to two individuals, as well as to two individuals who are unrelated (consanguinity). For this reason, this Court's previous order is exactly right, "[any suspect "classification"] is one based on sexual orientation, not gender." *See, Ex parte State ex rel. Alabama Policy Inst.*, No. 1140460 at *30 (Ala. Mar. 3, 2015). Thus, it is clear that the "fundamental right," which Justice Kennedy found, is a so called fundamental right to the specific act of "same sex" marriage, which has never before existed.

The "mere novelty" of the asserted right before this Court is enough to suggest it is not fundamental. Nevertheless, even assuming that this right is "fundamental," this Court must still perform a strict scrutiny analysis of Alabama's laws on marriage, where the United States Supreme Court failed.

B. THE STATE OF ALABAMA'S INTEREST IS COMPELLING.

If there is no "fundamental right" to same-sex marriage, then the appropriate analysis is the "rational basis" test. "In areas of ***social*** ... ***policy***, a statutory classification that neither proceeds along suspect lines

nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (emphasis added) *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

While studies have been submitted by numerous amici to suggest that no difference exists in the outcomes of children raised in same-sex marriages versus children raised in traditional marriages, other studies reflect the exact opposite. Reminiscent of an expert, hired to testify on behalf of his client, so too, it has been shown that many of these studies commissioned on the topic seek to advance a pre-supposition based on political leanings. Such is natural in the human condition. And, just as a jury is to distinguish between the testimony of two experts, so too, the legislative branch is tasked with weighing public benefit, detriment, interest, and concerns related to the effect of particular policies. But, the Constitution is not furthered when the will of the judiciary is substituted for that of the legislative body.

That there is disagreement on this point cannot be disputed. Therein lies the problem with *Obergefell*. The

dispute over such matters is a matter for the legislative branch, and not the will of five members of a judicial body in a distant place.

In applying the rational basis test, the 11th Circuit Court of Appeals has reasoned that questions concerning the enactment of public policies in the best interests of a child fall squarely upon the duties of the legislature. Thus, while there may, very well be some disagreement over the prudence of same-sex marriage, particularly as it benefits the child, it is up to the legislature, not the judiciary to consider these matters:

> We must assume, for example, that the legislature might be aware of the critiques of the studies cited by appellants-critiques that have highlighted significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents. Alternatively, the legislature might consider and credit other studies that have found that children raised in homosexual households fare differently on a number of measures, doing worse on some of them, than children raised in similarly situated heterosexual households. Or the legislature might consider, and even credit, the research cited by appellants, but find it premature to rely on a very recent and still developing body of research, particularly in light of the absence of longitudinal studies following child subjects into adulthood and of studies of adopted, rather than natural, children

of homosexual parents.

Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 825 (11th Cir. 2004).

However, even assuming for these purposes, that *Obergefell* created a new "fundamental right" to same-sex marriage "in pursuance" of the United States Constitution, even though such right is neither mentioned in the Constitution nor "fundamental" – that is, a right so "deeply rooted in this Nation's history and tradition ... such that neither liberty nor justice would exist if they were sacrificed" - this Amicus is compelled to address alleged infringement of this right though strict scrutiny analysis, addressing whether any infringement of the right to marry is in pursuance of a compelling interest of the State of Alabama.

While most can agree that the majority opinion in *Obergefell* at least found a "fundamental right" to same-sex marriage, any strict scrutiny analysis is decidedly absent from the opinion. In fact, an analysis of whether the Court's holding is "in pursuance" of the Constitution is an analysis almost as simple as the fact that the phrase, "strict scrutiny" appears ***only once***, in the entire opinion.

Even then, the one appearance of the legal standard by which a judicial body must examine whether fundamental rights have been infringed with due process is not used to analyze any state's Constitution. The legal standard is mentioned solely in a passing reference to an opinion by the Supreme Court of Hawaii, which happened to have conducted a strict scrutiny analysis.

The majority opinion may have found a "fundamental right", but it made no determination of whether ***Alabama***'s laws concerning marriage are narrowly tailored to further a compelling state interest.[6] This Amicus believes, and asserts here, that Justice Kennedy's failure in this regard leaves the door open for this Court to examine whether any alleged "infringement" upon the right of same-sex individuals to marry ***each other***, even if assumed to be "fundamental", is justified in light of the compelling state interests involved in infringing said right. If the state constitutional provision is narrowly tailored to the goal of furthering Alabama's interests, then Alabama's

[6] It is noteworthy at this juncture that the 8th Circuit has recently recognized that *Obergefell* did not overturn any laws other than those of Michigan, Kentucky, Ohio, and Tennessee. *See*, *Waters v. Ricketts*, 798 F. 3d 682 (8th Cir. 2015); *Jernigan v. Crane*, 796 F. 3d 976 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 799 F . 3d 918 (8th Cir. 2015).

definition of "marriage" is Constitutionally permissible.

1. There is No Infringement of the Fundamental Right to Marry.

This Amicus contends that the true "fundamental right," if there is one, is an ***individual*** right to ***marriage***, generally; marriage traditionally being an act between one man and one woman. The majority's framing of the opinion as a ***couple's*** right to marry ***each other*** is novel, to say the least. As an individual, however, nothing about this right is infringed by Alabama law for homosexual individuals. Nor is it "unequal" in treatment. A right to marry is only "infringed" if it is viewed as a right held by two people. This has never been the case.

The ability for one man to marry one woman, or vice versa, is not dependent on sexual preferences, or even love and affection. No man, heterosexual or otherwise, may marry another man; and no woman may marry another woman. For example, the marriage laws in Alabama equally prohibit two male, heterosexual roommates, having no romantic interest in each other, from obtaining a paper marriage simply for the tax benefits of filing their tax returns jointly. Likewise, two heterosexual, female, college roommates can't marry simply for the advantages of married student housing.

In the same respect, nothing would prohibit a person who identifies as homosexual from "marrying" a person of the opposite gender, simply for the purpose of obtaining tax or even housing benefits. Two heterosexuals in Alabama can just as easily engage in a "marriage of convenience," and occasionally do.

Nothing about Alabama's marriage laws prohibits a same-sex couple from associating or cohabitating. Nothing about Alabama's marriage laws prevents a same-sex couple from entering into a contract together, owning property together, or writing each other or their children into their wills. There simply is no infringement.

2. Any Infringement is in Furtherance of a Compelling State Interest.

Going through these "liberties" leads one to the logical conclusion that the State of Alabama provides the right and rite of marriage for the sole purpose of protecting the traditional family unit providing for procreation, and the maintenance of children under the natural parentage of one man and one woman. Alabama law does not require ***any*** couples, or even individuals (heterosexual, homosexual, or otherwise), to marry in order to have children. But Alabama has put in place a system

resolving issues from rights of survivorship in ownership of property all the way to intestate succession, whereby if two individuals are to be married in the eyes of the law, Alabama policy encourages it to be a marriage ***more likely*** to produce children and to ensure their healthy existence. This Court cannot say that this is not a compelling state interest.

Indeed, there is no justification more compelling than the best interests of the children born in this state. Indeed, this Amicus is particularly compelled by and files this brief in support of the best interests of all children, born and unborn, whose own "full promises of [life]" is at stake. Who else, but this Court, can further the state's interest in raising its children in an intact household. For example, adoptive rights in Alabama are affected by the definition of marriage as an act between one man and one woman. *See, e.g., In re Adoption of K.R.S.*, 109 So. 3d 176, 178 (Ala. Civ. App. 2012).

As it is biologically impossible for any child to ever come naturally from a homosexual relationship, leaving adoption as the only option, does the state not have an interest in ensuring - or at least encouraging - that such

adoptions take place in a complete household, and that the adopted child is placed in an environment where he or she is ***most likely*** to thrive? Of course it does! The state has equal interest in ensuring that children in need of adoption, are placed in households best able to care for a child. Again, such determinations of "what is best" are for the legislative branch.

This Amicus is uniquely well aware that the interests of a child, who has no say, are repeatedly tossed aside by the judiciary in this Country in favor of the self interests of adults. That traditional marriage plays a fundamental role in the best interests of a child almost goes without saying. Nevertheless, Justice Brennan has previously argued that "considerable scholarly research ... indicates that "[t]he optimal situation for the child is to have both an involved mother and an involved father." *Bowen v. Gilliard*, 483 U.S. 587, 614 (U.S. 1987).

For millennia, marriage has meant an act of commitment between one man and one woman. For millennia, raising a child has been a duty of one man and one woman. Resolution of child support and custody issues is premised on this assumption. If, it is in the best interests of society,

this State, and particularly children residing in this state –and the state legislature, and indeed the electorate of this state say it is- to preserve the fundamental and "immutable" nature of marriage between one man and one woman, then the state has a compelling interest in preserving that right.

The state government cannot, should not, and never has forced marriage upon the parents of children. But when the state is called upon, at the requests of its citizens, to sanction the environment in which a child is raised as a product of marriage, the interest of the state is supremely compelling to ensure that the marriage environment resulting for the child is most conducive to the child's well being.

This is, afterall, the very reason why state laws concerning matters such as consanguinity plays a factor in state sanctioned marriage. Such laws obviously do not prevent the birth of children as a product of incest, but they do ***encourage*** the natural relationship of unrelated individuals, and discourage incestuous ones.

Indeed, "the natural law", as well as the revealed law of scriptures, including but not limited to the Christian

Bible, places great importance on the relationship developed between a child and his male and female parents. This Court has already recognized 200 years of countless legal precedent that is consistent with what this Court has called the "axiomatic nature of marriage." *Ex parte State ex rel. Alabama Policy Inst.*, No. 1140460 at *6 (Ala. Mar. 3, 2015). "[Marriage] is…the foundation of the family and of society, without which there would be neither civilization or progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). "[The family] consist[s] in and spring[s] from 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." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The Supreme Court of the United States has "described marriage as 'fundamental to our very existence and survival,' an understanding that necessarily implies a procreative component. *Loving v. Virginia*, 388 U. S. 1, 12 (1967); *see Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942)." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2614 (2015) (C.J. Roberts, dissenting).

"Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union

between men and women (often) produces children. Marriage demonstrably channels the results of sex between members of the opposite sex –procreation– in a socially advantageous manner. It creates the family, the institution that is almost universally acknowledged to be the building block of society at large because it provides the optimum environment for defining the responsibilities of parent s and for raising children to become productive members of society." *Ex parte State ex rel. Alabama Policy Inst.*, No. 1140460 at *34.

If such interests are not compelling, then none are. If this state has no authority to govern the welfare of its citizens, and to exercise its enumerated right to self-government, then what purpose does state government serve. What is best for Californians, may not always be best for Alabamians. This is the beauty of our Constitution, and the grand design of sovereign states united under it. Where states are permitted to govern themselves, they are free to provide for the social and spiritual welfare of their own citizens, in the way in which their citizens deem most appropriate.

III. THE SUPREME COURT HAS NO AUTHORITY TO MANDATE STATE ACTION.

This Court may and should be mindful of the admonition of the United States Supreme Court in *Ableman v. Booth,* 62 U.S. 506, 517-18 (1858), recognizing that our system attempts to maintain an orderly operation of law, and the inherent duty of the federal judicial branch to maintain harmony within the Union[7]. It cannot be disregarded however, that while the Supreme Court may have the passive power to strike down a state law as unconstitutional, it does not enjoy the power of active legislative mandates. It is, as the founders intended, supposed to be the weakest of the branches.

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the

[7] It cannot be overlooked, however, that while there are divisions in the laws, as applied between the states, the overwhelming majority of states have passed and supported laws defining marriage in the traditional sense. While the majority in *Obergefell* may cloak themselves in the spirit of interstate harmony, the fact is they have created more disharmony in a matter traditionally left to the states.

> contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.
>
> It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.

Federalist, No. 78.

This Amicus would point out that just last month the federal judiciary once again overstepped its bounds in a ruling concerning state funding of Planned Parenthood. In effect, this ruling does not merely provide that a state must not prevent access to abortion, but must actually ***ensure*** access to abortion.

While reasoned arguments can and do exist concerning the province of the United States Supreme Court, and the federal judiciary generally, to declare unconstitutional the laws of this state defining an institution as “fundamental” as traditional marriage, no support exists for any argument that the Supreme Court has the power to

replace the law it strikes down with its own rules to be applied. The US Supreme Court has no power to declare the traditional and "fundamental" definition of marriage "repugnant to the Constitution" with one hand, and then mandate the issuance of same-sex marriage licenses with the other. The judiciary is not supposed to have the power "over the sword" nor "active resolution." Such an act violates the principles of federalism and separation of powers inherent from the outset of Constitutional case law.

If this Court is inclined to recognize the authority of the decision in *Obergefell*, striking down provisions of the state constitutions of a number of other states, wherein legal marriage is defined as an act of one man and one woman, then this Court should examine the severability of the provisions deemed unconstitutional. If the definitions of marriage, inherent to the common law of Alabama and passed by the people of the multiple states offends the right to equality, then perhaps the only appropriate answer is for this Court to eliminate state-sanctioned marriage, altogether. It can never be appropriate, however, for the United States Supreme Court to mandate the issuance of a marriage license to anyone, no matter their sexual

orientation.

> One of the tests used to determine whether an act is or is not severable, so that a portion may be rejected, is that it ought not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional. Where the valid and invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.

Bynum v. City of Oneonta, No. 1130305, 2015 WL 836700, at *4 (Ala. Feb. 27, 2015).

Since December 14, 1819, the government of this State has treated marriage as an act of union between one man and one woman. Indeed, in what Judge William Blackstone termed the "law of revelation," our Lord Jesus, when questioned by the Pharisees, said "But from the beginning of creation, 'God made them male and female.' 'Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.' So they are no longer two but one flesh. What therefore God has joined together, let not man separate." Mark 10:6-9 (ESV). Nearly every law in this state, from child support and child custody, tax collection, marital homestead laws, intestate succession, and even rules of evidence (marital privilege), depend in

some way on a definition of marriage – and for almost two hundred years, this state has defined marriage as the same thing: an act between one man and one woman.

The same arguments raised to defend the so-called "fundamental right" to a state-sanctioned marriage applies equally to issues of child custody and child support, intestate succession, tax benefits and beyond. Suppose that domestic relations judges of this state, upon hearing the evidence offered, made a determination that the best interests of the child are served by placing the child with his heterosexual mother, instead of his now homosexual and/or transgender father? Are such decisions now subject to review and potential reversal by five unelected officials in Washington, D.C.? Such potential smacks of "refus[ing] Assent to Laws, the most wholesome and necessary for the public good," and "forbid[ing the State legislatures] to pass Laws of immediate and pressing importance, unless suspended in their operation till [the Court's] Assent should be obtained."

Nevertheless, the legal benefits and ramifications of marriage, are "so mutually connected with and dependent on [the definition of marriage], as conditions,

considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole." With this in mind, the effect of *Obergefell*, may have been to declare Alabama's marriage laws unconstitutional. However, there is no power or precedent for replacing these unconstitutional laws with laws that conform to the Supreme Court's understanding of constitutionality. Based on *Obergefell,* it may be that this Court must consider whether the probate judges of this state have authority to issue ***any*** marriage licenses at all, since the only marriage licenses authorized by Alabama law are those issued under a definition of marriage which the United States Supreme Court finds repugnant to the Constitution.

Conclusion

Justice William O. Douglas once described the due process clause as a "wildcard to be put to such use as the judges choose." Justice White recognized that the tendency of the Supreme Court is to exercise a power, threatening to the states, in matters of social reform: "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an

improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." *Roe v. Wade*, 410 U.S. 179, 222 (1973) (J. White, dissenting).

Specifically in relation to homosexual conduct, Justice Scalia has recognized that "In *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions." *Romer v. Evans*, 517 U.S. 620, 640-41 (1996).

Prophetically, Justice Scalia went on to acknowledge that

> [t]he problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities,... have high disposable income... and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, [these gay rights proponents] devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See,

> e.g., Jacobs, The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991, 72 Neb. L.Rev. 723, 724 (1993) ("[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation").

(some internal citations to the record omitted) *Id.* at 645-46.

Obergefell marks the judicial branch's last step in its process and design to force acceptance of the same-sex agenda on the people of this nation. The people of this state have enacted this law with an intent to preserve a common understanding of "marriage" that transcends most cultural and spiritual divides, and has done so for all of recorded history. If this Court is inclined to resist the Supreme Court's ruling in *Obergefell*, it will in all likelihood, be overturned on appeal.[8] But this Amicus sees

[8] It may, indeed, be appropriate for this Court to defer to the highest court in the land. Nevertheless "We the People" are not without power against the rule of a mere majority of the Supreme Court, applying its will instead of its judgment. As George Washington pointed out, while our Constitution is "sacredly obligatory upon all", there is, nevertheless, a way for its provisions, including interpretations of an unelected majority of justices, to be "changed by an explicit and authentic act of the whole people." Perhaps it is time for the people of this state to press for a national Convention to propose an Amendment to the Constitution explicitly permitting states to govern marriage for themselves.

no basis through which this Court can do anything other than to uphold the rule of law as it stands in Alabama.

Such "raw judicial power" must be kept in check in some way, and this Amicus sees that it falls to this Court to protect Alabamians from those who fail to follow precedent, and instead see the Constitution as changing "to suit current fashions." To the extent that the Supreme Court has made an "improvident and extravagant exercise of the power of judicial review," this Amicus is reminded of Andrew Jackson's famous rebuff: "Justice Marshall has made his decision. Now let him enforce it." In protecting the right of the State of Alabama to reserve, unto itself, those rights "not delegated to the United States by the Constitution, nor prohibited by it to the States", U.S. Const. Amend. X, this Court has an opportunity to draw a line in the proverbial sand; to say that in Alabama, "we dare to defend our rights."

Respectfully submitted,

/s/ William P. Gray, Jr.
William P. Gray, Jr. (ASB-5268-R78W)
John David Gray (ASB-0797-N52G)
Attorneys for Amicus, CEC for Life

OF COUNSEL:
GRAY & ASSOCIATES, L.L.C.
3800 Colonnade Parkway, Ste. 350
Birmingham, AL 35243
Telephone: (205) 968-0900

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the above and foregoing pleading upon counsel of record by electronic means, on this the 11th day of November 2015:

Attorneys for Resp. Reed

Esq.Robert D. Segall, Esq.
Copeland, Franco, Screws & Gill, P.A.
P.O. Box 347
Montgomery, AL 36101-0347
segall@copelandfranco.com

Thomas T. Gallion, III, Esq.
Constance C. Walker, Esq.
Haskell Slaughter Gallion, LLC
8 Commerce Street, Ste 1200
Montgomery, AL 36104
ttg@hsg-law.com
ccw@hsg-law.com

Samuel H. Heldman, Esq.
The Garner Firm, P.C.
2805 31st Street, N.W.
Washington, D.C. 20008
sam@heldman.net

Tyrone C. Means, Esq.
H. Lewis Gillis, Esq.
Kristen Gillis, Esq.
P.O. Box 5058
Montgomery, AL 36103-5058
tcmeans@meansgillislaw.com
hlgillis@meansgillislaw.com
kjgillis@meansgillislaw.com

John Mark Englehart,
Englehart Law Offices
9457 Alsbury Place
Montgomery, AL 36117
jmenglehart@gmail.com

Attorneys for Resp. King

Gregory H. Hawley, Esq.
Christopher J. Nicholson, Esq.
G. Douglas Jones, Esq. &
Jones & Hawley, P.C.
2001 Park Place, Suite 830
Birmingham, AL 35203-2735
ghawley@joneshawley.com
cnicholson@joneshawley.com
djones@joneshawley.com

Jeffrey M. Sewell, Esq.
French A. McMillan
Sewell Sewell McMillan, LLC
1841 Second Avenue N., Ste 214
Jasper, AL 35501
jeff@sewellmcmillan.com
French@sewellmcmillan.com

Attorneys for Resp. Martin

Kendrick E. Webb, Esq.
Jamie Helen Kidd, Esq.
Fred L. Clements, Esq.
Webb & Eley, P.C.

P.O. Box 240909
Montgomery, AL 36124
kwebb@webbeley.com
jkidd@webbeley.com
fclements@webbeley.com

Attorneys for Resp. Ragland
George W. Royer, Jr., Esq.
Brad A. Chynoweth, Esq.
Lanier Ford Shaver & Payne, P.C.
P.O. Box 2087
Huntsville, AL 35804
gwr@lfsp.com
bac@lanierford.com
&
Hon. John E. Enslen, Pro Se
Probate Judge of Elmore County, Alabama
P.O. Box 10
Wetumpka, AL 36092
jeenslen@gmail.com

Attorneys for Hon. Don Davis
Lee L. Hale, Esq.
501 Church Street
Mobile, AL 36602
Lee.hale@comcast.net

J. Michael Druhan, Jr., Esq.
Harry V. Satterwhite, Esq.
Satterwhite Druhan Gaillard & Tyler, LLC
1325 Dauphin Street
Mobile, AL 36604
mike@satterwhitelaw.com
harry@satterwhitelaw.com

Mark S. Boardman, Esq.
Teresa B. Petelos, Esq.
Clay R. Carr, Esq.
Boardman Carr Bennett Watkins Hill Gamble, P.C.
400 Boardman Drive
Chelsea, AL 35043
mboardman@boardmancarr.com
tpetelos@boardmancarr.com
ccarr@boardmancarr.com

Attorneys for Hon. Valerie B. Davis
Albert L. Jordan, Esq.
Susan E. McPherson, Esq.
Wallace Jordan Ratliff & Brandt, LLC
P.O. Box 530910
Birmingham, AL 35253
bjordan@wallacejordan.com
smcpherson@wallacejordan.com

Luther Strange
Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130-0152
lkillough@ago.state.al.us

/s/ John David Gray
OF COUNSEL