

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E.
HUMPHREY; ROBERT POVILAT and
MILTON PERSINGER; MEREDITH
MILLER and ANNA LISA CARMICHAEL;
and KRISTY SIMMONS and MARSHAY
SAFFORD,

Plaintiffs,

v.

LUTHER STRANGE, in his official
capacity as Attorney General for
the State of Alabama, DON DAVIS,
in his official capacity as Probate Judge of
Mobile County, Alabama,

Defendants.

Civil Action No. 14-0424-CG-C

**PLAINTIFFS' MOTION FOR
(1) LEAVE TO FILE SECOND AMENDED COMPLAINT ADDING ADDITIONAL
PARTIES AND PLAINTIFF AND DEFENDANT CLASSES;
(2) CERTIFICATION OF PLAINTIFF AND DEFENDANT CLASSES; AND
(3) PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs James N. Strawser and John E. Humphrey, Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay Safford respectfully file this motion seeking leave to file a Second Amended Complaint ("SAC") that adds Kristi Ogle and Jennifer Ogle, Keith Ingram and Albert Halloway Pigg III, Gary Wayne Wright II and Brandon Mabrey (collectively, the "Named Plaintiffs"), individually and on behalf of other similarly situated persons, as Plaintiffs, adds Tim Russell, in his official capacity as Probate Judge of Baldwin County, as representative of a Defendant Class of similarly situated probate judges in the State of Alabama, and adds Defendant

Davis as a named representative of the Defendant Class. A copy of the proposed Second Amended Complaint is attached hereto as Exhibit A.

Plaintiffs further move the Court, pursuant to Federal Rule of Civil Procedure 23, for certification of a Plaintiff Class and a Defendant Class in this matter. The Plaintiff Class is defined as: “All persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and to have that marriage recognized under Alabama law, and who are unable to do so because of the enforcement of Alabama’s laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages.”

The Defendant Class is defined as: “All Alabama county probate judges who are enforcing or in the future may enforce Alabama’s laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages.”

Finally, pursuant to Federal Rule of Civil Procedure 65, Plaintiffs seek a preliminary injunction to direct proposed Defendant Russell, Defendant Davis, and the Defendant Class to issue marriage licenses to Plaintiffs and the Plaintiff Class, and to direct Defendants and the Defendant Class to refrain from enforcing all Alabama laws and orders that prohibit same-sex couples from marrying or that deny recognition of the marriages of same-sex couples.

Because of the important Constitutional protections at stake and the breadth and severity of the harms caused by the challenged laws to Plaintiffs and the Plaintiff Class, Plaintiffs request expedited consideration of these motions.

MEMORANDUM

On January 23, 26, and 28, 2015, in this case and in another case, *Searcy v. Strange*, No. 14-0208-CG-N, this Court entered a series of Orders declaring Alabama’s laws excluding same-sex couples from marriage unconstitutional and requiring issuance of marriage licenses to same-

sex couples and recognition of valid marriages of same-sex couples for all purposes. The Court stayed its Orders until February 9, 2015, in order to allow Defendant Luther Strange, Attorney General of Alabama, to seek a further stay from the federal appellate courts. Both the Eleventh Circuit and the Supreme Court of the United States denied Defendant Strange's requests for a further stay.

This Court's Orders of January 23, 26, and 28, 2015, enjoined Defendant Strange from enforcing Alabama's laws barring same-sex couples from marriage and refusing to recognize their marriages. In a subsequent order clarifying the Court's judgment in *Searcy*, this Court advised that:

[A] clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees. ... The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.

Searcy Order Clarifying Judgment, Doc. 65, p. 3 (quoting *Brenner v. Scott*, No. 4:14cv107–RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan 1, 2015)).

On February 9, Plaintiffs filed an Emergency Motion to File an Amended Complaint to add Mobile County Probate Court Judge Don Davis as a Defendant and to obtain a preliminary injunction compelling him to issue marriage licenses to same-sex couples.¹ Doc. 43. The motion to amend was granted the next day, and a preliminary injunction hearing, held on February 12,

¹ Judges of probate are authorized to issue marriage licenses in Alabama, *see* Ala. Code § 30-1-7, in the same way that court clerks are empowered to issue marriage licenses in other states. These duties are ministerial in nature, and not part of any judicial or discretionary function.

resulted in an order compelling Defendant Davis to issue marriage licenses to the current Plaintiffs and to recognize valid same-sex marriages. *See* Order, Doc. 55.

On March 3, the Alabama Supreme Court issued an order that essentially stopped same-sex marriage in Alabama, despite this Court's repeated determinations that Alabama's prohibitions violate the Fourteenth Amendment to the U.S. Constitution. *See* Doc. 71-1. Consequently, same-sex couples in Alabama are currently being denied the right to obtain marriage licenses by virtually all of Alabama's probate judges.² Consequently, Plaintiffs seek to avail themselves of the recourse described in this Court's January 28 Order Clarifying Judgment (*Searcy* Doc. 65) by seeking leave to file the attached Second Amended Complaint, which adds: (1) additional Plaintiffs both individually and as class representatives; (2) Tim Russell, in his official capacity as County Probate Judge of Baldwin County, as representative of a Defendant Class of similarly situated county probate judges in the State of Alabama; and (3) Defendant Davis as a named representative of the Defendant Class. Plaintiffs further seek certification of a Plaintiff Class of their claims and a Defendant Class of their defenses in this matter, as well as a preliminary injunction requiring the Defendant Class to issue marriage licenses without regard to the sexual orientation or gender of the applicants and to give equal recognition to the marriages of same-sex couples, as required by the Fourteenth Amendment to the United States Constitution.

I. The Court Should Grant Leave To Amend the Complaint.

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." Reasonable requests to amend should be viewed

² Plaintiffs have been given until March 13 to respond to Defendant Davis' Emergency Motion for Stay (Doc. 70). *See* Order, Doc. 72. In their response to the Emergency Motion, Plaintiffs will demonstrate to the Court why the Alabama Supreme Court order is no impediment to this Court's ability to grant the relief Plaintiffs seek herein.

with favor by the Court. *See* Wright and Miller, *Federal Practice and Procedure*, §1484, p. 417 and cases cited therein. Leave to amend should normally be granted unless the moving party is guilty of undue delay, bad faith, dilatory motive, or the proposed amendment will be futile or cause undue prejudice to the opposing party. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

The requested amendment will not disturb the schedule set by the Court in these cases. At all times in this action, Plaintiffs have acted in good faith and without delay. No prejudice will be experienced by any opposing party.

II. The Court Should Certify the Plaintiff and Defendant Classes.

A. A Plaintiff Class Should Be Certified.

Plaintiffs seek to certify a plaintiff class pursuant to Rules 23(a), 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. The rules' requirements are satisfied. First, the Plaintiff Class includes thousands of Alabamians, and joinder would be difficult. Second, the Named Plaintiffs' and Plaintiff Class members' claims present the common legal question of whether Defendants' enforcement of Alabama's laws excluding same-sex couples from marriage and refusing to recognize their marriages violate the Fourteenth Amendment to the U.S. Constitution. Third, the claims of the Named Plaintiffs are typical of – indeed, identical to – the claims of Plaintiff Class members because they arise from the enforcement of the same unconstitutional marriage laws. Fourth, the Named Plaintiffs are not adverse to any class member, and will adequately represent the class. Finally, because there is the risk of inconsistent or varying adjudications with respect to individual class members and because Defendants have declined to issue marriage licenses to same-sex couples for reasons that apply generally to the class, relief is appropriate respecting the class as a whole pursuant to Rule 23(b)(1)(A) and 23(b)(2).

1. The Plaintiffs Meet All of the Requirements for Certification of a Class Under Rule 23(a).

a. The Plaintiff Class Satisfies the Numerosity Requirement and Joinder is Impracticable.

The numerosity requirement of Rule 23(a) is satisfied when the number of potential plaintiffs is “so numerous that joinder of all members” of the class would be “impracticable.” Fed. R. Civ. P. 23(a)(1). Although there is no fixed number required to demonstrate numerosity, “generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.” *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *see also LaBauve, v. Olin Corp.*, 231 F.R.D. 632, 665 (S.D. Ala. 2005) (“Numerosity is generally presumed when a proposed class exceeds 40 members.”).

To meet this requirement, “a plaintiff need not show the precise number of members in the class.” *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983). “Estimates as to the size of the proposed class are sufficient for a class action to proceed,” *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 537 (N.D. Ala. 2001) (citations omitted), and “the court may make ‘common sense assumptions’ to support a finding of numerosity.” *Susan J. v. Riley*, 254 F.R.D. 439, 458 (M.D. Ala. 2008) (citing *Evans*, 696 F.2d at 930)). Furthermore, “[w]here the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity.” *Evans*, 696 F.2d at 930. Finally, the relevance of the numerosity requirement may be less significant where class-wide discrimination has been alleged, as is the case here. *See, e.g., id.*

Plaintiffs easily satisfy the numerosity requirement. According to 2010 Census data, Alabama is home to approximately 6,582 same-sex couples. *See* Declaration of Scott D. McCoy, Ex B. This data establishes a “reasonable inference” that more than forty of these individuals wish to, but cannot, obtain a marriage license. *See Ass’n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211

F.R.D. 457, 462 (S.D. Fla. 2002) (drawing inferences from U.S. Census Bureau Population Reports).

The Court may also consider the impracticability of joinder as supporting class certification. “Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion.” *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). Assessing impracticability requires “a common-sense approach which takes into account the objectives of judicial economy and access to the legal system.” *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993). Impracticable does not mean impossible.” *D.W. by M.J. v. Poundstone*, 165 F.R.D. 661, 670 n.3 (M.D. Ala. 1996). The potential class members in this case are geographically dispersed across the state in all three federal districts and in every county of Alabama, making joinder difficult. *See* Ex. B.

Therefore, based independently and collectively on the number of class members and the impracticability of joinder, the numerosity requirement of Rule 23(a)(1) is easily met here.

b. Named Plaintiffs’ and Plaintiff Class Members’ Claims Present Common Legal Questions – Namely, Whether Defendants’ Refusals to Issue Marriage Licenses Violate Their Fundamental Right to Marry and Right to Equal Protection.

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” This requirement is expressed in the disjunctive and is satisfied by a showing of either a common question of law *or* fact. Fed. R. Civ. P. 23(a)(2). The threshold for satisfying the commonality prerequisite is “not high.” *Groover v. Michelin N. Am., Inc.*, 187 F.R.D. 662, 666 (M.D. Ala. 1999) (citation omitted).

To meet the commonality requirement, there must be some issues that are susceptible to class-wide treatment. *Cooper v. Southern Co.*, 390 F.3d 695, 714 (11th Cir. 2004); *see also Nat’l*

Broad. Co. v. Cleland, 697 F. Supp. 1204, 1216 (N.D. Ga. 1988) (certifying defendant class where there was “one significant question of law” that was “common to the entire defendant class”); *Fla. Businessmen for Free Enter. v. Florida*, 499 F. Supp. 346, 350 n.3 (N.D. Fla. 1980) (“There is one question of law, and it is common to all members of the class.”). That is, “[t]heir claims must depend upon a common contention [that is] of such a nature that it is capable of classwide resolution.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). But while the claims of the class members must arise from the same event or practice and be based on the same legal theory, *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), the commonality requirement does not require that all class members’ claims be identical. *D.W.*, 165 F.R.D. at 670. “[F]actual differences among the claims of the putative class members do not defeat certification.” *Cooper*, 390 F.3d at 714.

Allegations of common discriminatory “policies” or “practices” that treat an entire class unlawfully, such as are alleged here, easily satisfy the commonality requirement. *Cox*, 784 F.2d at 1557-58; *D.W.*, 165 F.R.D. at 670 (“commonality requirement has clearly been met” where “Plaintiff, through his complaint, has launched a systematic attack on the standard admissions procedure of the Alabama [Department of Mental Health] for children who are committed due to mental illness”). Courts are further inclined to find commonality to be satisfied where, as here, the plaintiffs are requesting declaratory and injunctive relief enjoining a common course of conduct. See 7a Charles A. Wright, *et al.*, Fed. Prac. & Proc. Sec. 1763, at 226 (3d ed. 2005) (“[C]lass suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)”; see also *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 47 (3d Cir. 1994) (commonality satisfied “where plaintiffs request declaratory and injunctive relief against a

defendant engaging in a common course of conduct toward them, and there is therefore no need for individualized determinations of the propriety of injunctive relief.”).

Here, Defendant Russell, Defendant Davis, and the proposed Defendant Class are enforcing Alabama’s laws prohibiting the issuance of marriage licenses to same-sex couples and thus have refused to issue marriage licenses to same-sex couples. *See supra* at 1-2 and *infra* at 15 (identifying defendant class members and practices). The refusal to issue marriage licenses to same-sex couples applies with equal force to all of the proposed Plaintiff Class members, and all have suffered the same injury: an inability to obtain a marriage license and to enter into a legally recognized marriage because they and their intended spouses are of the same sex.

Moreover, all of the Plaintiff Class members have the same legal claims – namely, that the enforcement of Alabama’s laws barring them from marriage violate their fundamental rights to marry and to equal protection of the laws under the Fourteenth Amendment. Classwide resolution of these claims “will resolve an issue that is central to the validity of each one of the [plaintiffs’] claims in one stroke.” *Wal-Mart Stores*, 131 S. Ct. at 2551.

Because the Plaintiff Class members present common – indeed, entirely overlapping – injuries and questions of law, they have satisfied the requirements of Rule 23(a)(2).

c. The Claims of the Named Plaintiffs Are Typical of the Class.

The Named Plaintiffs’ claims are also “typical of the claims . . . of the class,” thereby satisfying Fed. R. Civ. P. 23(a)(3). To establish typicality, the Named Plaintiffs must show that there is a “nexus between the class representative’s claims or defenses and the common questions of fact or law which unite the class.” *Kornberg*, 741 F.2d at 1337. “A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.” *Id.*

Each of the Named Plaintiff couples seeks to marry but is being refused a marriage license because they are of the same sex. Ogle Decl. (Ex. C) ¶¶ 2-4; Ingram Decl. (Ex. D) ¶¶ 3-4; Wright Decl. (Ex. E) ¶¶ 3-4. Their injury is shared by all unnamed members of the Plaintiff Class: the inability to obtain a marriage license in violation of the federal Constitution. *Kornberg*, 741 F.2d at 1337 (typicality satisfied when named plaintiffs' claims "arise from the same event or pattern or practice" as the claims of class members); *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 327 (S.D. Fla. 1996) (typicality satisfied when challenging "unified fraudulent scheme"); *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1357 (11th Cir. 2009) ("A class representative must . . . suffer the same injury as the class members in order to be typical under Rule 23(a)(3).") (quotation and citation omitted).

Because the Named Plaintiffs' injuries and legal claims are typical of the injuries and claims of the Plaintiff Class, the typicality requirement of Rule 23(a)(3) is satisfied.

d. The Named Plaintiffs Will Adequately Protect the Interests of the Class.

The Named Plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This adequacy of representation analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (quotation and citation omitted).

First, the Named Plaintiffs have no interests antagonistic to those of the class. All of the putative class members have a common interest in the relief sought in this case – the ability to obtain a marriage license from any probate court judge in Alabama. The relief sought by the Named Plaintiffs does not in any way conflict with the interests of the class.

Second, the Named Plaintiffs will adequately prosecute this action because each Named Plaintiff wishes to obtain a marriage license and to enter into a legally recognized marriage under Alabama law, and is being denied the opportunity to do the same. Furthermore, class counsel are qualified and prepared to adequately prosecute this action on behalf of the class. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (“The inquiry into whether named plaintiffs will represent the potential class with sufficient vigor to satisfy the adequacy requirement of Rule 23(a)(4) most often has been described to involve questions of whether plaintiffs’ counsel are qualified, experienced, and generally able to conduct the proposed litigation”) (quotations, citations, and alterations omitted). The attorneys representing the Named Plaintiffs are experienced in handling class actions and civil rights litigation, and have expertise in issues relating to the rights of same-sex couples. Class counsel are employed by four nationally recognized and highly respected organizations: National Center for Lesbian Rights (“NCLR”), Southern Poverty Law Center (“SPLC”), Americans United for Separation of Church and State (“AU”), and American Civil Liberties Union of Alabama (“ACLU”). These organizations have sufficient experienced personnel and financial resources to litigate this matter.

Because there is no conflict between the Named Plaintiffs and class members, and because class counsel has sufficient expertise to represent the class, Rule 23(a)(4) is satisfied.

2. The Requirements of Rule 23(b)(1)(A) and 23(b)(2) Are Satisfied.

Certification under Rule 23(b)(1)(A) is proper because prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama same-sex couples having access to marriage, or recognition for their valid marriage, and others not. In addition, prosecution of separate actions by individual members could result in adjudications with respect to individual members that, as a practical matter, would substantially

impair the ability of other members to protect their interests. *See, e.g., Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 303 (D. Neb. 2010) (certifying class under Rule 23(b)(1)(A) given need for a uniform determination of whether defendant's conduct violated the law); *Pichler v. UNITE*, 228 F.R.D. 230, 254 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d Cir. 2008) (certification proper under Rule 23(b)(1)(A) given risk of serial lawsuits and conflicting interpretations of the law).

Certification under Rule 23(b)(2) is also proper because Defendants and the proposed Defendant Class have “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Civil rights cases “against parties charged with unlawful, class-based discrimination,” like this matter, “are prime examples” of Rule 23(b)(2) class actions. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997).

“Two basic requirements must be met” to satisfy Rule 23(b)(2): “(1) the class members must have been harmed in essentially the same way by the defendant's acts; and (2) the common injury may properly be addressed by class-wide injunctive or equitable remedies.” *Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685, 693-94 (M.D. Ala. 2006) (citing *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983)). Both requirements are satisfied here.

The term “generally applicable” does not require “that the party opposing the class . . . act directly against each member of the class.” *Anderson v. Garner*, 22 F. Supp. 2d 1379, 1386 (N.D. Ga. 1997) (quotation and citation omitted). Rather, the key is whether the defendants' actions “would affect all persons similarly situated so that [their] acts apply generally to the whole class.” *Id.* Here, Defendant Russell, Defendant Davis, and the proposed Defendant Class have engaged in the constitutionally invalid action of enforcing Alabama's marriage ban and thus denying marriage

licenses to same-sex couples, thereby preventing those couples from exercising their fundamental right to marry and depriving them of equal protection of the laws. *See supra* at 1-2, 9, *infra* at 15 (identifying defendant class members and practices). This unlawful practice applies with equal force to all members of the proposed Plaintiff Class, placing Plaintiffs' claims "squarely within the ambit of Rule 23(b)(2)." *See Williams*, 237 F.R.D. at 693; *see also Holmes*, 706 F.2d at 1155 n.8 ("Injuries remedied through the (b)(2) actions are really group, as opposed to individual injuries."). Thus the first requirement of Rule 23(b)(2) is satisfied.

Further, the Named Plaintiffs seek declaratory and injunctive relief on behalf of the class. Second Amended Complaint (proposed, Ex. A). The requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58; *see also Ass'n for Disabled Ams.*, 211 F.R.D. at 465 (finding class certification under Rule 23(b)(2) appropriate when "the Class Plaintiffs sought exclusively injunctive relief based on their allegations"). Because the Plaintiff Class seeks only declaratory and injunctive relief, certification pursuant to Rule 23(b)(2) is appropriate.

3. The Proposed Plaintiff Class is Sufficiently Definite.

A class must also be "adequately defined and clearly ascertainable." *De Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "In other words, the class must meet a minimum standard of definiteness which will allow the trial court to determine membership in the proposed class," although "it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Earnest v. GMC*, 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)); *see also Neumont v. Monroe County, Fla.*, 198 F.R.D. 554, 558 (S.D. Fla. 2000) ("Case law is clear that there is no requirement

that every class member, other than the named plaintiffs, be identified at the outset of the litigation,” so long as class definition is “objective.”).

The proposed plaintiff class is objective and ascertainable. It consists of all persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and to have that marriage recognized under Alabama law, and who are unable to do so because of the enforcement of Alabama’s laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages. It will be a simple matter to determine whether any given individual is or is not a member of the class. *Id.*

B. The Defendant Class Should Be Certified.

Defendant class actions are authorized by Rule 23 of the Federal Rule of Civil Procedure, which provides that a class member “may sue or be sued” on behalf of a class. Fed. R. Civ. P. 23(a). Defendant classes have frequently been used to remedy civil rights violations. *See, e.g., Harris v. Graddick*, 593 F. Supp. 128, 137 (M.D. Ala. 1984) (underrepresentation of black poll officials); *Tucker v. Montgomery Bd. of Comm’rs*, 410 F. Supp. 494, 499 (M.D. Ala. 1976) (court costs for indigent parties); *Washington v. Lee*, 263 F. Supp. 327, 330-31 (M.D. Ala. 1966) (three judge court) (segregation in state penal system); *Hadnot v. Amos*, 295 F. Supp. 1003, 1005 (M.D. Ala. 1968), *rev’d on other grounds*, 394 U.S. 358 (1969) (voting rights); *Sims v. Frink*, 208 F. Supp. 431, 432 (M.D. Ala. 1962) (Alabama apportionment statutes). The practice is common when a plaintiff is challenging a law executed by multiple defendants at a local (rather than centralized state) level, like county magistrates, county sheriffs, local prosecutors, and voting officials.³

³ *See, e.g., Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972) (defendant class of justices of the peace, sheriffs and state troopers); *Monaco v. Stone*, 187 F.R.D. 50 (E.D.N.Y. 1999) (local criminal court judges); *Ragsdale v. Turnock*, 734 F. Supp. 1457 (N.D. Ill. 1990) (all State Attorneys), *aff’d*, 941 F.2d 501 (7th Cir. 1991); *Akron Ctr. for Reprod. Health v. Rosen*, 110 F.R.D.

Indeed, several courts in the Eleventh Circuit have certified a defendant class of probate judges and other court officials under Rule 23.⁴

Plaintiffs seek to certify a Defendant Class, pursuant to Rules 23(a) and 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure, comprised of all Alabama probate judges who now refuse or will refuse in the future to issue marriage licenses to same-sex couples. This request meets the rules' requirements. First, the Defendant Class consists of 67 persons, and joinder would be difficult because these individuals are dispersed throughout three federal judicial districts and every county in the State of Alabama. Second, all Defendant Class members are faced with questions common to the entire class, namely whether their refusal to issue marriage licenses to same-sex couples violates the Plaintiff Class members' federal constitutional rights. Third, Defendant Russell and Defendant Davis operate under the same statutory scheme as the Defendant Class, so their defenses will be typical of the defenses that would be asserted by the Defendant Class.⁵ Fourth, Defendant Russell and Defendant Davis will adequately represent the class by defending their denials by reference to the Alabama marriage laws. Finally, because there is the risk of inconsistent or varying adjudications with respect to individual class members and because Defendants are enforcing the common state-wide marriage laws, certification under Rule 23(b)(1)(A) and 23(b)(2) is appropriate.

576 (N.D. Ohio 1986) (state prosecutors); *Harris*, 593 F. Supp. 128 (county officials responsible for appointing poll officials).

⁴ See, e.g., *Doss v. Long*, 93 F.R.D. 112, 120 (N.D. Ga. 1981) (defendant class of municipal judges and justices of the peace); *Tucker*, 410 F. Supp. at 499 (municipal court presiding officials); *Ruocco v. Brinker*, 380 F. Supp. 432, 433 (S.D. Fla. 1974) (state court clerks); *Hadnot*, 295 F. Supp. at 1005 (Alabama probate judges); *Sims*, 208 F. Supp. at 432 (Alabama probate judges).

⁵ Moreover, because there is no county residency requirement to obtain a marriage license in Alabama, any Plaintiff Class member may seek a marriage license at any Defendant Class member's office.

1. The Proposed Defendant Class Satisfies the Prerequisites of Rule 23(a).

A proposed defendant class must meet the same prerequisites under Rule 23(a) that a plaintiff class must satisfy: numerosity, commonality of questions of law or fact, typicality, and adequacy of representation. *Harris*, 593 F. Supp. at 137. Unlike a plaintiff class, however, a defendant class focuses on “the defendants’ anticipated defenses” to plaintiffs’ claims. 2 William B. Rubenstein, *Newberg on Class Actions* § 5:9 at 423 (5th ed. 2012) (hereinafter “*Newberg*”); *see also Harris*, 593 F. Supp. at 137 (noting that since claim was based on state-wide circumstances, “any defenses to the claim would be state-wide, and would be common and typical for all members of the class.”). In addition, a defendant class does “not require a voluntary representative, but merely an adequate one.” *Doss v. Long*, 93 F.R.D. 112, 117-18 (N.D. Ga. 1981); *see also 2 Newberg* § 5:11 at 432. These requirements are satisfied here.

a. The Defendant Class Satisfies the Numerosity Requirement and Joinder is Impracticable.

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable” Fed. R. Civ. P. 23(a)(1). “[T]he requirements of Rule 23(a)(1) are applied more liberally when certifying a defendant class than when certifying a plaintiff class.” *Alvarado Partners, L.P. v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *see also 2 Newberg* § 5:6 at 415 (“courts may certify defendant classes with fewer members, and such classes typically contain fewer members”). The Defendant Class easily satisfies Rule 23(a)(1).

First, the number of proposed Defendant Class members is sufficient to establish numerosity. *See supra* at 6-7 (discussing cases). Here, the Defendant Class consists of 67 probate judges. *See supra* at 1-2, 15 (identifying defendant class members). The numerosity requirement may therefore be presumed. *LaBauve*, 231 F.R.D. at 665.

Second, the geographic dispersion of the proposed class supports certification. *See supra* at 6-7 (discussing case law). The potential Defendant Class members in this case span 67 counties and the state's three federal judicial districts, making joinder difficult. *See supra* at 1-2, 15 (identifying defendant class members).

Third, Rule 23(a)(1) is satisfied because an order certifying the Defendant Class fosters judicial economy. *See supra* at 7 (discussing cases); *see also* 2 *Newberg* § 5.5 at 414 ("Perhaps because allowing suits to proceed as defendant class actions where Rule 23's other criteria are satisfied avoids a multiplicity of suits, Rule 23(a)(1) is rarely deemed problematic in defendant class actions."). Here, certification of the Defendant Class would consolidate all parties and defenses in a single proceeding, thus preventing the re-litigation of identical issues in multiple suits around Alabama. The Defendant Class will also eliminate the need for ancillary or follow-up legal proceedings against many defendants throughout the State once the core determination of the legal issues is made by this Court. *See Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968) ("The larger the potential class, the more advantageous it is for the litigants (on both sides), and the courts generally, to have common issues resolved finally in a single action.").

For these reasons, the proposed Defendant Class satisfies Rule 23(a)(1).

b. There are Questions of Law and Fact Common to the Named Defendant and the Defendant Class.

Rule 23(a)(2) requires there to be "questions of law or fact common to the class." *See supra* at 7-9 (discussing cases). In this case, Defendant Russell, Defendant Davis, and the proposed Defendant Class have engaged, and are currently engaging, in practices that share the same common purpose or effect: they are all enforcing Alabama's laws barring same-sex couples from marriage. *See supra* at 1-2, 9, 15 (identifying defendant class members and practices).

Russell and Davis's refusals to issue marriage licenses to same-sex couples raise the same legal questions that are common to the entire Defendant Class: does their enforcement of Alabama's laws barring same-sex couples from marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

These questions are common to the entire Defendant Class, so the requirements of Rule 23(a)(2) are met.

c. The Defenses of the Defendants are Typical of the Defendant Class.

Rule 23(a)(3) requires that the "defenses of the representative parties are typical of the . . . defenses of the class." Fed. R. Civ. P. 23(a)(3). "Rule 23(a)(3) is satisfied when each class member's defense arises from the same course of events, and each class member makes similar legal arguments to defend against the plaintiff's allegations." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (quotation, citation, and alterations omitted); *see also supra* at 9-10 (discussing cases). While the defenses of the class representative must be typical, they "need not be identical to those raised by other class members, and it is only when there is a unique defense forwarded by the representative which will consume the merits of the case that a court should refuse to certify a class based on a lack of typicality." *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 588 (S.D. Ohio 1987); *see also Thillens, Inc. v. Cmty. Currency Exch. Ass'n.*, 97 F.R.D. 668, 678 (N.D. Ill. 1983) ("substantial similarity is sufficient"); 2 *Newberg* § 5:10 at 427 ("[t]he representative's defenses need not be identical to or coextensive with those of the class, only similar . . .").

The defenses of Defendant Russell and Defendant Davis will be typical of the defenses of the proposed Defendant Class because all of the class members operate under the same statutory framework and have the same ministerial duties, so the requirements of Rule 23(a)(3) are satisfied.

d. The Defendants Will Adequately Protect the Interests of the Defendant Class.

Defendant Russell and Defendant Davis will fairly and adequately represent the interests of the Defendant Class. The adequacy of representation analysis in a defendant class, like a plaintiff class, is a two-part inquiry: (1) whether there is any antagonism between the defendant class representative and the class members; and (2) whether the class representative will adequately defend the action. *Harris*, 593 F. Supp. at 137.

The first prerequisite is satisfied in this case because there is no conflict between Defendant Russell and Defendant Davis and the other Defendant Class members. “Only a conflict that goes to the essential subject matter of the litigation – to the heart of the controversy – will defeat a claim of representative status.” *Doss*, 93 F.R.D. at 118 (quotations omitted). Here, the legal interests of all Defendant Class members coincide. The lodestar of this litigation is the constitutionality of the marriage laws that deny marriage licenses to same-sex couples. Because Defendant Russell’s and Defendant Davis’s ministerial actions in enforcing Alabama’s laws excluding same-sex couples from marriage have the same legal effect and are legally indistinguishable from the ministerial actions of other state probate judges in enforcing those laws, a defense of their own practices will necessarily serve as a defense of the practices of the other probate judges. Russell and Davis are thus adequate representatives for the class as a whole.

The second prerequisite of Rule 23(a)(4) is satisfied because Defendant Davis has retained qualified counsel who are capable of vigorously defending this case.⁶ Defendant Russell is represented by attorneys who sought clarification of his obligations from the Alabama Supreme

⁶ While Plaintiffs do not know yet who will be representing Defendant Russell, they are confident that he will have able counsel and will be able to consult and coordinate with Defendant Davis’ counsel.

Court prior to the preliminary injunction hearing, *see Ex parte Davis*, --- So.3d ----, 2015 WL 567479 (Ala. Feb. 11, 2015), and who have continued to assert Defendant Davis' interests in complying with the law. *See, e.g.*, Doc. 71 and attachments. Moreover, Defendant Russell and Defendant Davis will adequately represent the class even if they do so unwillingly. *See Doss*, 93 F.R.D. at 117-18 ("Rule 23(a)(4) does not require a voluntary representative, but merely an adequate one."); *Marcera v. Chinlund*, 595 F.2d 1231, 1239 (2d Cir. 1979) ("[T]o permit a [defendant class representative] to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread abuse."), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979); *Research Corp. v. Pfister Assoc. Growers, Inc.*, 301 F. Supp. 497, 499 (N.D. Ill. 1969) ("This factor of 'desire' as opposed to ability should not be given more than token weight."). In fact, Defendant Davis has already been adequately representing his interests in this case to date. Thus, Rule 23(a)(4) is satisfied.

2. The Requirements of Rule 23(b)(1)(A) and 23(b)(2) Are Satisfied.

Certification under Rule 23(b)(1)(A) is proper because prosecution of separate actions against individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama probate judges being required to issue marriage licenses to same-sex couples and required to respect the marriages of same-sex couples, and others not. In addition, prosecution of separate actions against class members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests. *See, e.g., CBS, Inc. v. Smith*, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (certifying defendant class action pursuant to Rule 23(b)(1)(A)).

Certification under Rule 23(b)(2) is also proper. For a defendant class to be certified under Rule 23(b)(2), "the defendants must have acted on grounds generally applicable to the plaintiff

class.” *Doss*, 93 F.R.D. at 119 (quotations omitted). As discussed above, this requirement is satisfied because the challenged action here – the ministerial enforcement of the same state laws prohibiting the issuance of marriage licenses to same-sex couples – is common to all defendants and inflicts the same constitutional harms on each member of the plaintiff class. *See supra* at 12-13. For example, in *Callahan v. Wallace*, 466 F.2d 59, 60 (5th Cir. 1972), a class action challenged the practice in Alabama of having traffic violations tried before a magistrate who retained part of the fee as recompense. The lawsuit was instituted against a defendant class consisting of all Alabama justices of the peace, sheriffs, and state troopers who had participated in the practice. *Id.* The court upheld both the plaintiff and defendant classes, and issued an injunction against all defendants who engaged in the unlawful practice. *Id.* at 62.

In this case, just as in *Callahan*, all defendant class members have engaged in the same constitutionally invalid conduct, *i.e.*, denial of marriage licenses to same-sex couples, which apply generally to the plaintiff class. Each Defendant Class member’s refusal to issue marriage licenses to same-sex couples prevents plaintiffs from exercising their fundamental right to marry and denies them equal protection of law. *See supra* at 1-2, 9, 15 (identifying defendant class members and practices). These unlawful practices apply with equal force to all members of the Plaintiff Class. *Id.*; *see Williams*, 237 F.R.D. at 693 (“[C]onduct . . . uniformly harming a specific class of people, falls squarely within the ambit of Rule 23(b)(2)”). For these reasons, and because the sole remedy requested is declaratory and injunctive relief, *see supra* at 13, certification pursuant to Rule 23(b)(2) is warranted.

3. The Proposed Defendant Class is Sufficiently Definite.

To be certified, a class must be sufficiently definite. *See supra* at 13-14. The proposed Defendant Class here consists of all Alabama probate judges who have refused or may refuse

marriage licenses to same-sex couples. Plaintiffs have already identified the 67 probate judges who are class members. *See supra* at 1-2, 15 (identifying defendant class members). This definition is sufficiently definitive, and the membership is ascertainable. *See supra* at 13-14.

III. The Court Should Issue A Preliminary Injunction Requiring Proposed Defendant Russell, Defendant Davis, and Members of the Proposed Defendant Class To Issue Marriage Licenses To Plaintiffs and Members of the Proposed Plaintiff Class and To Refrain From Enforcing Alabama Laws and Orders Excluding Same-Sex Couples From Marriage.

A. The Court Should Issue a Preliminary Injunction.

As the accompanying declarations from proposed Plaintiffs Kristi Ogle and Jennifer Ogle, Keith Ingram and Gary Wayne Wright II, (Exs. C-E) establish, they sought marriage licenses from proposed Defendant Russell, Defendant Davis, or other members of the Defendant Class. Proposed Plaintiffs Kristi Ogle and Jennifer Ogle were unable to obtain a marriage license in Baldwin and Mobile Counties. *See* Ogle Decl. (Ex. C) ¶ 4. Proposed Plaintiffs Keith Ingram and Albert Pigg were unable to obtain a marriage license in Houston and Baldwin Counties. Ingram Decl. (Ex. D) ¶ 4. Proposed Plaintiffs Gary Wright and Brandon Mabrey were unable to obtain a marriage license in Marshall and Baldwin Counties. Wright Decl. (Ex. E) ¶ 4.

In its January 26 Order, this Court found that “the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act [Ala. Const., art. I, § 36.03 and Ala. Code § 30-1-19] restrict the Plaintiffs’ fundamental marriage right and do not serve a compelling state interest,” and therefore violate Plaintiffs’ rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by prohibiting same-sex marriage.” Order, Doc. 29, at 3. The Court also found that a preliminary injunction was warranted because, in addition to establishing that they will prevail on the merits, Plaintiffs have met the other preliminary injunction factors. Among other things, “Plaintiffs’ inability to exercise their

fundamental right to marry has caused them irreparable harm which outweighs any injury to defendant.” *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, “it is always in the public interest to protect constitutional rights.” *Id.* (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

On February 10, 2015, the Court granted Plaintiffs’ motion to file a First Amended Complaint adding Plaintiffs Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay Safford and Defendant Davis. (Doc. 46). After a hearing on February 12, 2015, the Court issued its Order, dated the same day, granting Plaintiffs’ motion for preliminary injunction. (Doc. 55). Relying on its prior decision and January 26 Order (Doc. 29), the Court once again declared the Alabama marriage laws prohibiting same-sex marriage unconstitutional and enjoined Defendant Davis “from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage.” *Id.* at 7.

Entry of an additional preliminary injunction order against the new proposed Defendant and Defendant Class and in favor of the existing Plaintiffs, proposed new Plaintiffs and Plaintiff Class is warranted for the same reasons that this Court granted its earlier injunctions against Defendant Strange and Defendant Davis. First, all proposed Plaintiffs are likely to prevail on the merits for the same reasons this Court has addressed in its previous Orders. Second, without an injunction, all proposed Plaintiffs and members of the Plaintiff Class would suffer irreparable injury due to the deprivation of constitutional rights, as well as suffering additional harms that are representative of those suffered by other same-sex couples who are denied the dignity, security, and legal protections of marriage. *See, e.g.*, Ogle Decl. (Ex. C) ¶¶ 2-3. Third, proposed Defendant Russell and members of the Defendant Class have only a ministerial interest in enforcing Alabama’s laws barring same-sex couples from marriage and would suffer no harm from an

injunction. In contrast, as this Court already has determined, the constitutional, dignitary, and practical harms suffered by same-sex couples who are unable to marry or whose marriages are denied recognition are severe. Fourth, the public interest always favors vindication of constitutional rights. In sum, the considerations that justified granting the preliminary injunction in *Searcy* and in the claims brought by the original Plaintiffs' in *Strawser* apply with equal force to a preliminary injunction protecting the proposed Plaintiff Class. Plaintiffs therefore respectfully request that the Court order Defendant Russell and the members of the Defendant Class to issue marriage licenses to qualified same-sex couples without delay and to refrain from enforcing Alabama laws and orders excluding same-sex couples from marriage and refusing to recognize their marriages.

B. The Court Should Issue the Preliminary Injunction Without Delay.

Regardless of the timing of the formal certification of the proposed plaintiff and defendant classes, the Court may exercise its equitable power to issue the preliminary injunction without delay. Courts routinely grant class-wide preliminary injunctive relief where, as here, a *prima facie* showing of the requirements of Rule 23 has been made, even absent notice to class members⁷ and class discovery or an evidentiary hearing,⁸ and prior to full-fledged class certification. *See Carrillo*

⁷ Because both the proposed plaintiff and defendant classes are brought pursuant to Rule 23(b)(1)(A) and 23(b)(2), notice to the class is discretionary. Fed. R. Civ. P. 23(c)(2)(A).

⁸ The decision to hold an evidentiary hearing on class certification is discretionary as well. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1009 (11th Cir. 1996) (“A court *may* hold an evidentiary hearing prior to certifying a class. The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially.”) (emphasis in original). There is no need for such a hearing here, where the claims of the proposed plaintiff class are premised on a law that expressly targets a particular class of persons, where the proposed defendant class consists of government officials charged with the ministerial duty of enforcing that law, and where, as a result, no facts relevant to the class certification are subject to dispute. *See* 3 Newberg § 7:15 at 74-75.

v. Schneider Logistics, Inc., No. CV-11-8557 CAS DTBX, 2012 WL 556309, at *8-9 (C.D. Cal. Jan. 31, 2012) (citing cases and noting that courts routinely grant class-wide preliminary injunctions if they are satisfied that the Rule 23 requirements are met), *aff'd*, 501 F. App'x 713 (9th Cir. 2012); *see also Kaiser v. Cnty. of Sacramento*, 780 F. Supp. 1309, 1312 (E.D. Cal. 1991) (granting class-wide injunctive relief before certifying class); *Rosado v. Bowen*, No. H 85-171, 1986 WL 12433, *12 n. 2 (D. Conn. Apr. 25, 1986) (noting that the court had previously certified the class at the hearing on plaintiff's motion for preliminary injunction); *Harris*, 593 F. Supp. at 137-38 (certifying a plaintiff and defendant class concurrently with issuing a preliminary injunction); *Clean-Up '84 v. Heinrich*, 582 F. Supp. 125, 127 (M.D. Fla. 1984) (certifying class "for the narrow purpose of effectuating [the] preliminary injunction"); *Thomas v. Johnston*, 557 F. Supp. 879, 916 (W.D. Tex. 1983) (certifying class for purposes of preliminary injunctive relief and noting that "[i]t appears to be settled, however, that a district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon . . . its general equity powers.").

CONCLUSION

In sum, Plaintiffs respectfully request that their motion for leave to file the Second Amended Complaint be granted. Plaintiffs further request that the Court certify the requested Plaintiff and Defendant Classes and appoint the undersigned counsel as class counsel pursuant to Federal Rule of Civil Procedure 23(g), and that the Court issue an preliminary injunction (1) directing Defendant Davis, proposed Defendant Russell and members of the Defendant Class to issue marriage licenses to proposed Plaintiffs and members of the Plaintiff Class, and (2) directing Defendant Davis, proposed Defendant and members of the Defendant Class to refrain from enforcing all Alabama laws that prohibit same-sex couples from marrying or that deny recognition

of the marriages of same-sex couples. Finally, Plaintiffs request that the Court consider these motions on an expedited basis because of the ongoing irreparable harm that the Plaintiff Class is suffering.

DATED: March 6, 2015

Respectfully submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS

By: /s/ Shannon P. Minter

Shannon P. Minter *
Christopher F. Stoll*
National Center for Lesbian Rights
1100 H Street, NW, Suite 540 Washington, DC 20005
Tel: (202) 734-3545
Fax: (415) 392-8442
Email: sminter@nclrights.org
Email: cstoll@nclrights.org

Heather Fann
Boyd, Fernambucq, Dunn & Fann, P.C.
3500 Blue Lake Drive, Suite 220
Birmingham, AL 35243
Tel.: (205) 930-9000
Fax: (205) 930-9010
Email: hfann@bfattorneys.net

Randall C. Marshall (MARSR3023)
ACLU Foundation of Alabama
P.O. Box 6179
Montgomery, Alabama 36106-0179
Tel: (334) 420-1741
Fax: (334) 269-5666
Email: rmarshall@aclualabama.org

David Dinielli**
Cal. Bar No. 177904
Scott D. McCoy**
N.Y. Bar No. 3970803
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104

Tel: (334) 956-8200
Fax: (334) 956-8481
Email: david.dinielli@splcenter.org
Email: scott.mccoy@splcenter.org

Ayesha N. Khan**
D.C. Bar No. 426836
Zachary A. Dietert**
D.C. Bar No. 1003784
Americans United for Separation of Church and State
1901 L Street, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 466-3234
Email: khan@au.org
Email: dietert@au.org

Attorneys for Plaintiffs

* Appearing *pro hac vice*

** Motions for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system on March 6, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

Luther Strange
Attorney General
Andrew L. Brasher
Solicitor General
James W. Davis
Laura Howell
Assistant Attorneys General
State of Alabama
Office of Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Tel: (334) 353-2609

Lee L. Hale (HAL026)
501 Church Street
Mobile, AL 36602
Phone: (251) 433-3671 ext 2

J. Michael Druhan, Jr. (Druh2816)
Harry V. Satterwhite (Satth4909)
SATTERWHITE, DRUHAN, GAILLARD & TYLER, LLC
1325 Dauphin Street
Mobile, Alabama 36604
(251) 432-8120 (phone)
(251) 405-0147 (fax)
mike@satterwhitelaw.com
harry@satterwhitelaw.com

Mark S. Boardman (ASB-8572-B65M)
Clay R. Carr (ASB-5650-C42C)
Teresa B. Petelos (ASB-8716-L66T)
BOARDMAN, CARR, BENNETT, WATKINS, HILL & GAMBLE, P.C.
400 Boardman Drive
Chelsea, Alabama 35043-8211
Telephone: (205) 678-8000

Attorneys for the Hon. Don Davis, Judge of the Probate Court, Mobile County, Alabama

/s Randall C. Marshall

PLAINTIFFS' EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**JAMES N. STRAWSER and JOHN E.
HUMPHREY; ROBERT POVILAT and
MILTON PERSINGER; MEREDITH
MILLER and ANNA LISA CARMICHAEL;
KRISTY SIMMONS and MARSHAY
SAFFORD; KRISTIE OGLE and JENNIFER
OGLE; KEITH INGRAM and ALBERT
HALLOWAY PIGG III; GARY WAYNE
WRIGHT II and BRANDON MABREY,
individually and as Class Representatives,**

Plaintiffs,

v.

**LUTHER STRANGE, in his official
capacity as Attorney General for
the State of Alabama; DON DAVIS,
in his official capacity as Probate Judge of
Mobile County, Alabama, individually and as
Class Representative; and TIM RUSSELL, in
his official capacity as Probate Judge of
Baldwin County, Alabama, individually and as
Class Representative,**

Defendants.

Civil Action No. 14-0424-CG-C

**[PROPOSED] SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

CLASS ACTION

1. Alabama law denies the issuance of marriages licenses to same-sex couples, and refuses to recognize the marriages of same-sex couples lawfully entered in other jurisdictions. *See* Ala. Const., art. I, § 36.03; Ala. Code § 30-1-19. In so doing, Alabama violates the guarantees of the Fourteenth Amendment to the Constitution of the United States.

2. The Named Plaintiffs and the members of the Plaintiff Class¹ are same-sex couples who live in Alabama. The situations faced by these couples are similar to those faced by many other same-sex couples in Alabama who are denied the basic rights, privileges, and protections of marriage for themselves and their children. The Named Defendants and the members of the Defendant Class² are Alabama state officials whose duties include enforcement, under color of state law, of Alabama's prohibition on the issuance of marriages licenses to same-sex couples and its refusal to recognize the lawful marriages of same-sex couples.

3. Alabama, like other states, encourages and regulates marriage through hundreds of laws that provide benefits to and impose obligations upon married couples. In exchange, Alabama receives the well-established benefits that marriage brings: stable, supportive families that create loving homes for children and contribute to both the social and economic well-being of Alabama.

4. Alabama's refusal to permit same-sex couples to marry and to recognize the existing marriages of same-sex couples violates the Due Process and Equal Protection Clauses of the United States Constitution. This Court should so declare and issue an injunction requiring Named Defendants Davis and Russell and the members of the Defendant Class to issue marriage licenses to Plaintiffs and members of the Plaintiff Class without regard to their status as same-sex couples, and requiring all members of the Defendant Class to recognize the marriages of same-sex couples for all purposes under state law.

5. Named Plaintiffs James N. Strawser and John E. Humphrey, Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay

¹ The Plaintiff Class is defined in paragraph 38 below. The Named Plaintiffs and the members of the Plaintiff class are collectively referred to herein as "Plaintiffs."

² The Defendant Class is defined in paragraph 45 below. The Named Defendants and the members of the Defendant Class are collectively referred to herein as "Defendants."

Safford are same-sex couples who have married in Alabama, pursuant to marriage licenses duly issued by an Alabama probate judge as a result of the Court's preliminary injunction in this action. Named Plaintiffs Kristie Ogle and Jennifer Ogle, Keith Ingram and Albert Halloway Pigg III, Gary Wayne Wright II and Brandon Mabrey, are unmarried same-sex couples in committed relationships who live in Alabama and desire to marry in their home state. Plaintiffs meet all the requirements Alabama imposes for the issuance of marriage licenses and the recognition of lawful marriages except that they are same-sex couples.

6. Plaintiffs wish to publicly declare their love and commitment before their family, friends, and community; to join their lives together and to enter into a legally binding commitment to one another; and to share in the protections and security that marriage provides. Plaintiffs have strong ties to Alabama and marriage is of immense personal importance to them. Plaintiffs are spouses in every sense except for their inability to legally marry under Alabama law.

7. Alabama's exclusion of same-sex couples from marriage and refusal to respect the marriages of legally married same-sex couples adversely impact the Plaintiff couples in real and significant ways. When Alabama withholds a marriage license from a same-sex couple, or refuses to recognize a same-sex couple's valid marriage, it circumscribes the affected individuals' basic life choices, classifies the affected individuals and couples in a manner that denies them the public recognition and myriad benefits of marriage, prevents the couple from making a legally binding commitment to one another and from being treated by the government and by others as a family rather than as unrelated individuals, and harms society by burdening and disrupting committed families and preventing couples from being able to fully protect and assume responsibility for one another and their children.

8. Alabama's exclusion of same-sex couples from marriage and refusal to respect existing marriages undermines the Plaintiff couples' ability to achieve their life goals and dreams, disadvantages them financially, and denies them "dignity and status of immense import." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Alabama's disparate treatment of same-sex couples "tells those couples and all the world that their [relationships] are unworthy" of recognition. *Windsor*, 133 S. Ct. at 2694. By singling out same-sex couples and their families and excluding them from any type of marital protection, Alabama "humiliates . . . children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

9. Alabama's exclusion of same-sex couples from marriage and its refusal to respect the marriages of same-sex couples deprive the Plaintiffs of their fundamental right to marry and infringe upon their constitutionally protected interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association.

10. Alabama's treatment of Plaintiffs is subject to strict scrutiny because it burdens fundamental constitutional rights. Alabama's treatment of Plaintiffs cannot survive any level of constitutional scrutiny, however, because it does not rationally further any legitimate government interest, but serves only to injure and humiliate same-sex couples and their families.

11. Plaintiffs seek a declaration from this Court that Ala. Const., art. I, § 36.03 and Ala. Code § 30-1-19 violate the Fourteenth Amendment to the United States Constitution, and a judgment permanently enjoining Defendants from enforcing those provisions and any other Alabama laws or orders that prohibit same-sex couples from marrying within the state or that prohibit recognition of valid marriages of same-sex couples.

12. Specifically, Plaintiffs seek: (a) a declaration that Alabama's prohibition of marriage for same-sex couples violates the Due Process and Equal Protection Clauses of the United States Constitution; (b) a declaration that Alabama's refusal to recognize the marriages of same-sex couples under state law violates the Due Process and Equal Protection Clauses of the United States Constitution; and (c) a temporary restraining order and/or preliminary injunction, as well as a permanent injunction, (i) preventing Defendant Class members from denying Plaintiffs and Plaintiff Class members the right to marry, (ii) directing Named Defendants Davis and Russell and the members of the Defendant Class to issue marriage licenses to all same-sex couples who otherwise satisfy the qualifications for marriage under Alabama law; and (iii) directing Defendants to recognize for all purposes the marriages of all same-sex couples validly entered into pursuant to marriage licenses issued in Alabama or any other jurisdiction at any time.

13. Plaintiffs further seek attorney fees pursuant to 42 U.S.C. § 1988.

14. Plaintiffs state the below causes of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

15. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant's officers, employees, and agents; and against all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control.

JURISDICTION AND VENUE

16. This action arises under the Constitution and laws of the United States, including Article III, Section 1, of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is

conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction supporting Plaintiffs' claims for attorneys' fees is conferred by 42 U.S.C. § 1988.

17. Venue is proper in the Southern District of Alabama pursuant to 28 U.S.C. § 1391(b). All of the events alleged herein occurred within the State of Alabama, and all of the parties are and were residents of the State of Alabama at all relevant times.

PARTIES

A. The Named Plaintiffs

18. Named Plaintiffs James Strawser and John Humphrey, who reside in Mobile County, Alabama, applied for a marriage license in that county but were denied a license because of Alabama's constitutional and statutory prohibitions on marriage for same-sex couples. Plaintiff Strawser is facing health issues requiring surgery that put his life at great risk. Prior to previous hospitalizations for surgery, Plaintiff Strawser had given Plaintiff Humphrey a medical power of attorney, but was told by the hospital that the facility would not honor the document because Humphrey was not a family member or spouse. In addition, Plaintiff Strawser's mother faces health issues, and he is concerned that Humphrey will not be permitted to assist his mother with her affairs should Strawser pass away in the near future. On February 9, 2015, the effective date of this Court's entry of an order and preliminary injunction declaring Alabama's marriage ban for same-sex couples unconstitutional, Plaintiffs Strawser and Humphrey again appeared at Defendant Davis's office in Mobile, Alabama, to apply for a marriage license, but were unable to obtain a license because Defendant Davis elected to cease issuance of marriage licenses in Mobile County until this Court clarified his legal obligations. As a result of this Court's further order of February 12, 2015, granting a preliminary injunction in this action, Plaintiffs Strawser and Strange married in Alabama pursuant to a marriage license issued by Defendant Davis.

19. Named Plaintiffs Robert Povilat and Milton Persinger have been in a committed relationship for two years and reside in Mobile County, Alabama. Plaintiff Povilat has survived two bouts of prostate cancer and fears that he could be diagnosed with cancer again. The couple wishes to be married in Alabama, because, among other things, it is extremely important to them that Plaintiff Persinger be permitted to care for Plaintiff Povilat should further health problems arise. On February 9, 2015, Plaintiffs Povilat and Persinger appeared at Defendant Davis's office in Mobile, Alabama, to apply for a marriage license, but were unable to obtain a license because Defendant Davis elected to cease issuance of marriage licenses in Mobile County until this Court clarified his legal obligations. As a result of this Court's further order of February 12, 2015, granting a preliminary injunction in this action, Plaintiffs Povilat and Persinger married in Alabama pursuant to a marriage license issued by Defendant Davis.

20. Named Plaintiffs Meredith Miller and Anna Lisa Carmichael have been in a committed relationship for almost 9 years and reside in Mobile County, Alabama. The couple hope to have children, but are concerned that if they are not married, their children will be exposed to the damaging message that their family is not as worthy of dignity and respect as other families in Alabama and that their children will be denied important legal protections that come with marriage. On February 9, 2015, Plaintiffs Miller and Carmichael appeared at Defendant Davis's office in Mobile, Alabama, to apply for a marriage license, but were unable to obtain a license because Defendant Davis elected to cease issuance of marriage licenses in Mobile County until this Court clarified his legal obligations. As a result of this Court's further order of February 12, 2015, granting a preliminary injunction in this action, Plaintiffs Miller and Carmichael married in Alabama pursuant to a marriage license issued by Defendant Davis.

21. Named Plaintiffs Kristy Simmons and Marshay Safford have been in a committed relationship for more than 2 years and reside in Mobile County, Alabama. The couple are raising together three of Plaintiff Simmons's children from a prior relationship. They want to get married in order to have a legal family relationship and to build stability for their children. In addition, Simmons has been diagnosed with Wegener's Granulomatosis, a rare disorder that causes her blood vessels to become inflamed and that can damage major organs. Being able to marry is especially important to the couple that Plaintiff Safford and their children have legal protections in the event that Plaintiff Simmons becomes ill or incapacitated. On February 9, 2015, Plaintiffs Simmons and Safford appeared at Defendant Davis's office in Mobile, Alabama, to apply for a marriage license, but were unable to obtain a license because Defendant Davis elected to cease issuance of marriage licenses in Mobile County until this Court clarified his legal obligations. As a result of this Court's further order of February 12, 2015, granting a preliminary injunction in this action, Plaintiffs Simmons and Safford married in Alabama pursuant to a marriage license issued by Defendant Davis.

22. Named Plaintiffs Kristie Ogle and Jennifer Ogle have been in a committed, loving relationship for 22 years and have lived in Alabama for most of the last 14 years. They have a child who was born in the state in 2002. They wish to marry in order to obtain legal recognition for their family and to build stability for their child. Each day that they are not permitted to marry, they and their child experience uncertainty about whether they will be treated as family members in the event of an emergency. On March 4, 2015, they went to Defendant Davis's office in Mobile County to obtain a marriage license but were unable to obtain one. On March 5, 2015, Kristie Ogle called Defendant Russell's office in Baldwin County and was told that while Defendant

Russell is issuing marriage licenses to opposite-sex couples, he is not issuing licenses to same-sex couples.

23. Named Plaintiffs Keith Ingram and Albert Halloway Pigg III, have been in a committed, loving relationship for approximately one year. They moved together to Dothan, Alabama, the town in which Plaintiff Ingram grew up, to be near his family. They wish to marry in order to obtain legal recognition for their family and to declare their commitment to each other before their loved ones and community. Each day that they are not permitted to be married, they experience uncertainty about whether they will be treated as family members in the event of an emergency. Plaintiffs Ingram and Pigg drove to the probate office in the county in which they live, Houston County, on February 10, 2015, and again on February, 17, 2015, to obtain a marriage license, but were refused. On March 5, 2015, Plaintiff Ingram called Defendant Russell's office in Baldwin County and was told that while Defendant Russell is issuing marriage licenses to opposite-sex couples, he is not issuing licenses to same-sex couples.

24. Named Plaintiffs Gary Wayne Wright II and Brandon Mabrey have been in a committed, loving relationship for eighteen years and have lived together in Alabama for six years. Plaintiff Wright served in the U.S. Navy and was honorably discharged under the federal government's now-repealed Don't Ask, Don't Tell policy when he was asked to reveal his sexual orientation and admitted that he is gay. Since that time, the couple have fought together to receive veteran's benefits and coverage for Wright, including coverage for treatment for a muscular disorder that leaves him dependent on a wheelchair. They wish to marry in order obtain legal recognition for their family legal and to declare their commitment to each other before their loved ones and community. Each day that they are not permitted to be married, they experience uncertainty about whether they will be treated as family members in the event of an emergency.

After this Court declared Alabama's exclusion of same-sex couples from civil marriage unconstitutional, the couple drove to the probate office in Marshall County, the county in which they live, to obtain a marriage license. When they arrived, they were told that the Marshall County Probate Judge refused to issue marriage licenses to same-sex couples, although he would continue to issue marriage licenses to couples of different sexes. Plaintiff Wright visited the Marshall County Probate Judge's Office again on March 2, 2015, to obtain a marriage license, and a clerk told him that the probate judge would no longer issue marriage licenses to anyone. On March 5, 2015, Plaintiffs Wright and Maybrey called Defendant Russell's office in Baldwin County and were told that while Defendant Russell is issuing marriage licenses to opposite-sex couples, he is not issuing licenses to same-sex couples.

B. The Named Defendants

25. Named Defendant Luther Strange is Attorney General of the State of Alabama. Defendant Strange is responsible for enforcing and ensuring compliance with the state constitution and statutes prescribed by the legislature, including Alabama's law barring same-sex couples from marriage. Attorney General Strange was acting under color of state law at all times relevant to this complaint. He is sued in his official capacity.

26. Named Defendant Don Davis is Probate Judge of Mobile County, Alabama. Under Alabama law, his administrative duties include issuance of marriage licenses. His duties in issuing marriage licenses are ministerial in nature, and not part of any judicial or discretionary function. Defendant Davis was acting under color of state law at all times relevant to this complaint. He is sued in his official capacity.

27. Named Defendant Tim Russell is Probate Judge of Baldwin County, Alabama. Under Alabama law, his administrative duties include issuance of marriage licenses. His duties in

issuing marriage licenses are ministerial in nature, and not part of any judicial or discretionary function. Defendant Russell was acting under color of state law at all times relevant to this complaint. He is sued in his official capacity.

28. Defendants, through their respective duties and obligations, are responsible for enforcing Alabama's laws barring same-sex couples from marriage and Alabama's policy of refusing to recognize the valid marriages of same-sex couples. Each Defendant, and those subject to their supervision and control, have caused the harms alleged, and will continue to injure Plaintiffs if not enjoined. Accordingly, the relief requested is sought against all Defendants, as well as all persons under their supervision and control, including their officers, employees and agents.

GENERAL ALLEGATIONS

Alabama's Laws Barring Same-Sex Couples from Marriage

29. The "Sanctity of Marriage Amendment" to the Alabama Constitution provides, among other things, that "[n]o marriage license shall be issued in the State of Alabama to parties of the same sex," and that "[t]he State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued." Ala. Const., art. I, § 36.03. The Alabama Code contains identical provisions. Ala. Code § 30-1-19.

Harms Caused by Alabama's Laws Barring Same-Sex Couples from Marriage

30. Plaintiffs are residents of Alabama who experience the same joys and challenges of family life as their neighbors, co-workers, and other community members who may marry freely and whose legal marriages are respected under Alabama law. The Plaintiffs are productive,

contributing citizens who are denied the same legal shelter, dignity, and respect afforded by Alabama to other families through access to the universally celebrated status of marriage.

31. Alabama's exclusion of the Plaintiffs from marriage, and Defendants' enforcement of that exclusion, as well as Alabama's refusal to respect the marriages of legally married same-sex couples, subject the Plaintiff couples to an inferior "second class" status as Alabama citizens relative to the rest of the community. These laws deprive the Plaintiff couples of equal dignity, security, and legal protections afforded to other Alabama families.

32. In addition to stigmatizing an entire class of Alabama's population as second-class citizens, Alabama's prohibition on marriage by same-sex couples, and its refusal to recognize valid marriages from other jurisdictions, deprive same-sex couples of critically important rights and responsibilities that married couples rely upon to secure their marriage commitment and safeguard their families

33. In reliance on this Court's orders of January 23, 26, and 28, 2015, which declared Alabama's laws excluding same-sex couples from marriage unconstitutional and made clear that the federal Constitution requires Alabama officials to issue marriage licenses to same-sex couples and to recognize the valid marriages of same-sex couples for all purposes, Named Plaintiffs James N. Strawser and John E. Humphrey, Robert Povilat and Milton Persinger, Meredith Miller and Anna Lisa Carmichael, and Kristy Simmons and Marshay Safford appeared in person at the offices of Defendant Davis on February 9, 2015, to apply for a marriage license. Each couple was unable to obtain a license. The reason each couple was unable to obtain a marriage license from Defendant Davis was that they are a same-sex couple, and Defendant Davis elected to close the marriage licensing office in Mobile until this Court issued further clarifications concerning his legal obligations with respect to issuance of marriage licenses to same-sex couples. As a result of this

Court's further order and preliminary injunction issued on February 12, 2015, each of these couples was able to marry in Alabama pursuant to a marriage license issued by Defendant Davis.

34. Named Plaintiffs Kristi Ogle and Jennifer Ogle, Keith Ingram and Albert Halloway Pigg III, Gary Wayne Wright II and Brandon Mabrey have been unable to obtain a marriage license from Defendant Russell. The reason each couple was unable to obtain a marriage license from Defendant Russell was that they are a same-sex couple. Defendant Russell is not issuing marriage licenses to same-sex couples.

35. Named Plaintiffs Kristi Ogle and Jennifer Ogle attempted to obtain a marriage license from Defendant Davis but were unable to do so because he has ceased issuing marriage licenses.

36. In addition, in the absence of the preliminary injunction previously entered by the Court in this action, Defendant Strange would continue to deny recognition to the marriages of the Named Plaintiffs or other same-sex couples validly entered into in Alabama or any other jurisdiction. A permanent injunction is therefore warranted to ensure that Defendant Strange will recognize any marriage that Plaintiffs enter into as a result of this Court's orders in this action.

37. Like the Named Plaintiffs, each member of the Plaintiff Class either has been unable to marry his or her same-sex partner in Alabama because of the marriage ban or has validly married a partner of the same sex but is treated as a legal stranger to his or her spouse under Alabama law.

CLASS ALLEGATIONS

The Plaintiff Class

38. Named Plaintiffs bring this action for themselves and, pursuant to Rules 23(a), 23(b)(1), and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all same-sex couples

who are injured by Alabama's marriage ban (the "Plaintiff Class"). The Plaintiff Class, as proposed by Named Plaintiffs, consists of all persons in Alabama who wish to obtain a marriage license in order to marry a person of the same sex and to have that marriage recognized under Alabama law, and who are unable to do so because of the enforcement of Alabama's laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages.

39. The class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Upon information and belief, there are thousands of same-sex couples in Alabama who are married or would marry if Alabama law permitted them to do so. Alabama's marriage ban, and Defendants' enforcement of it, prevents all of those couples from either marrying or having their valid marriage from another jurisdiction recognized in the State.

40. There are questions of law and fact common to the members of the class. Fed. R. Civ. P. 23(a)(2). Such questions include, but are not limited to:

- a. whether Alabama's marriage ban violates the Fourteenth Amendment's guarantee of due process by denying Plaintiffs the fundamental right to marry, and by depriving them of constitutionally protected interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association;
- b. whether Alabama's marriage ban violates the Fourteenth Amendment's guarantee of equal protection by discriminating on the basis of sex and sexual orientation; and
- c. the level of constitutional scrutiny applicable to governmental discrimination based on sexual orientation.

41. The claims of Named Plaintiffs are typical of those of the Plaintiff Class, as their claims all arise from Alabama's marriage ban and are based on the same constitutional provisions and arguments.

42. Named Plaintiffs are capable of fairly and adequately protecting the interests of the Plaintiff Class because they do not have any interests antagonistic to the class. Named Plaintiffs and the Plaintiff Class both seek to enjoin enforcement of Alabama's marriage ban and obtain a declaration that the ban violates the guarantees of the Fourteenth Amendment. Moreover, Named Plaintiffs are represented by counsel experienced in complex civil rights litigation, including litigation seeking the freedom to marry for same-sex couples in many states across the nation.

43. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because prosecution of separate actions by individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama same-sex couples having access to marriage, or recognition for their valid marriage, and others not. In addition, prosecution of separate actions by individual members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests.

44. This action is also maintainable as a class action under Fed. R. Civ. P. 23(b)(2) because Defendants' enforcement of the marriage ban applies generally to the class, by precluding all class members from marrying or having a valid marriage from another jurisdiction recognized. The injunctive and declaratory relief sought is appropriate respecting the class as a whole.

The Defendant Class

45. Plaintiffs bring this action against the Named Defendants both individually and, pursuant to Rules 23(a), 23(b)(1), and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all Alabama probate judges who are or may enforce Alabama's marriage ban (the "Defendant

Class”). The Defendant Class, as proposed by Named Plaintiffs, consists of all Alabama county probate judges who are enforcing or in the future may enforce Alabama’s laws barring the issuance of marriage licenses to same-sex couples and refusing to recognize their marriages.

46. The class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Upon information and belief, more than sixty (60) county probate judges in Alabama currently are enforcing the marriage ban and are declining to issue marriage licenses to otherwise qualified same-sex couples. Defendants’ enforcement of the marriage ban prevents same-sex couples from either marrying or having their valid marriage from another jurisdiction recognized in the State.

47. There are questions of law and fact common to the members of the class. Fed. R. Civ. P. 23(a)(2). Such questions include, but are not limited to:

- a. whether Alabama’s marriage ban violates the Fourteenth Amendment’s guarantee of due process by denying Plaintiffs the fundamental right to marry, and by depriving them of constitutionally protected interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association;
- b. whether Alabama’s marriage ban violates the Fourteenth Amendment’s guarantee of equal protection by discriminating on the basis of sex and sexual orientation; and
- c. the level of constitutional scrutiny applicable to governmental discrimination based on sexual orientation.

48. The claims against the Named Defendants are typical of those of the claims against the Defendant Class, as their claims all arise from Alabama’s marriage ban and are based on the

same constitutional provisions and arguments. The defenses expected to be asserted by the Named Defendants likewise are common to the members of the Defendant Class.

49. Named Defendants are capable of fairly and adequately protecting the interests of the Defendant Class because they do not have any interests antagonistic to the class. Named Defendants and the Defendant Class both assert that they are bound to enforce Alabama's marriage ban. Moreover, the Attorney General of Alabama is named herein as a Defendant, asserts that the marriage ban does not violate the guarantees of the Fourteenth Amendment, and is capable of fairly and adequately protecting the interests of the Defendant Class.

50. This action is maintainable as a class action under Fed. R. Civ. P. 23(b)(1) because prosecution of separate actions against individuals would create a risk of inconsistent and varying adjudications, resulting in some Alabama probate judges being required to issue marriage licenses to same-sex couples and required to respect the marriages of same-sex couples, and others not. In addition, prosecution of separate actions against class members could result in adjudications with respect to individual members that, as a practical matter, would substantially impair the ability of other members to protect their interests.

51. This action is also maintainable as a class action under Fed. R. Civ. P. 23(b)(2) because Plaintiffs' desire to obtain marriage licenses and to have their marriages respected applies generally to the Defendant Class, as Alabama couples may request marriage licenses from any county probate judge or may seek to have a valid marriage from another jurisdiction recognized by any probate judge. The injunctive and declaratory relief sought is appropriate respecting the class as a whole.

CLAIMS FOR RELIEF

First Claim for Relief:

**Alabama's Ban on Marriage by Same-Sex Couples Deprives
Plaintiffs of Their Fundamental Right to Marry under the Due Process and Equal
Protection Clauses of the United States Constitution**

52. Plaintiffs incorporate by reference and re-allege all of the preceding paragraphs of this complaint as though fully set forth herein.

53. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process or law." U.S. CONST. AMEND. XIV § 1. The Due Process Clause protects individuals from arbitrary government intrusion into life, liberty, and property.

54. Under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex; accordingly Ala. Const., art. I, § 36.03, Ala. Code § 30-1-19, and any other Alabama law, regulation, policy, or practice that excludes same-sex couples from marriage do not withstand constitutional scrutiny.

55. As Alabama's Attorney General, Defendant Strange's duties and actions to enforce Alabama's exclusion of same-sex couples from marriage, violate Plaintiffs' fundamental right to marry and fundamental interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association.

56. As Probate Judge of Mobile County, Alabama, Defendant Davis ensures compliance with Alabama's exclusion of same-sex couples from marriage by, for example, refusing to issue marriage licenses to same-sex couples. This violates Plaintiffs' fundamental right

to marry and fundamental interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association.

57. As Probate Judge of Baldwin County, Alabama, Defendant Russell ensures compliance with Alabama's exclusion of same-sex couples from marriage by, for example, refusing to issue marriage licenses to same-sex couples. This violates Plaintiffs' fundamental right to marry and fundamental interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association.

58. Defendants cannot satisfy the requirements of due process because Alabama's exclusion of same-sex couples from marriage is not rationally related to any legitimate governmental interest and thus cannot survive even rational basis review, much less the strict level of scrutiny that applies to deprivation of the fundamental right to marry and interference with fundamental interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association.

59. The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. There is no relevant distinction between same-sex couples and opposite-sex couples with respect to marriage.

60. Alabama's exclusion of same-sex couples from marriage is subject to heightened scrutiny under the Equal Protection Clause because it discriminates on the basis of sexual orientation and gender, and because it selectively deprives a class of persons of fundamental rights.

61. Defendants cannot satisfy the requirements of equal protection because Alabama's exclusion of same-sex couples from marriage is not rationally related to any legitimate governmental interest and thus cannot survive even rational basis review, much less the heightened level of scrutiny that applies.

62. Ala. Const., art. I, § 36.03, Ala. Code § 30-1-19, and any other Alabama law, regulation, policy, or practice that excludes same-sex couples from marriage violate the Due Process and Equal Protection guarantees of the United States Constitution, both facially and as applied to the Plaintiff couples.

63. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm, and Plaintiffs are entitled to declaratory and injunctive relief on this basis.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

64. Declaring that the provisions of and enforcement by Defendants of Alabama's laws excluding same-sex couples from marriage, including Ala. Const., art. I, § 36.03, Ala. Code § 30-1-19, and any other sources of state law that exclude same-sex couples from marrying violate Plaintiffs' rights under the Due Process and Equal Protection Clauses of the United States Constitution;

65. Declaring that the practice, by Defendants and their subordinates, of refusing to recognize the marriages of same-sex couples violates Plaintiffs' rights under the Due Process and Equal Protection Clauses of the United States Constitution;

66. Declaring that the any marriages validly entered into by Plaintiffs in any jurisdiction, including Alabama, are valid in the State of Alabama;

67. Temporarily, preliminarily, and permanently enjoining enforcement by Defendants of Ala. Const., art. I, § 36.03, Ala. Code § 30-1-19, and any other sources of state law, policy, or practice that exclude Plaintiffs from marriage or that refuse recognition of the marriages of Plaintiffs;

68. Requiring Named Defendants Davis and Russell and the members of the Defendant Class to issue marriage licenses to Plaintiffs and members of the Plaintiff Class, pursuant to the same restrictions and limitations applicable to opposite-sex couples, and without regard to the gender or sexual orientation of the applicants, and to recognize the marriages thereby validly entered into;

69. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 42 U.S.C. § 1988 and other applicable laws;

70. Awarding pre- and post-judgment interest at the lawful rate as allowed by law; and

71. Granting such other and further relief as the Court deems just and proper and any other relief as allowed by law.

DATED: March 6, 2015

Respectfully submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS

By: /s/ Shannon P. Minter

Shannon P. Minter *
Christopher F. Stoll*
National Center for Lesbian Rights
1100 H Street, NW, Suite 540
Washington, DC 20005
Telephone: (202) 734-3545
Facsimile: (415) 392-8442
Email: sminter@nclrights.org
Email: cstoll@nclrights.org

Heather Fann
Boyd, Fernambucq, Dunn & Fann, P.C.
3500 Blue Lake Drive, Suite 220
Birmingham, AL 35243
Telephone: (205) 930-9000
Facsimile: (205) 930-9010
Email: hfann@bfattorneys.net

Randall C. Marshall (MARSR3023)
ACLU Foundation of Alabama

P.O. Box 6179
Montgomery, Alabama 36106-0179
Tel: (334) 420-1741
Fax: (334) 269-5666
Email: rmarshall@actualalabama.org

David Dinielli**
Cal. Bar No. 177904
Scott D. McCoy**
N.Y. Bar No. 3970803
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
334-956-8200
david.dinielli@splcenter.org
scott.mccoy@splcenter.org

Ayesha N. Khan**
D.C. Bar No. 426836
Zachary A. Dietert**
D.C. Bar No. 1003784
Americans United for Separation of Church and State
1901 L Street, N.W., Suite 400
Washington, D.C. 20036
202-466-3234
email: khan@au.org
email: dietert@au.org

Attorneys for Plaintiffs

*Admitted *pro hac vice*

** Motions for admission *pro hac vice* forthcoming

PLAINTIFFS' EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E.)
HUMPHREY; ROBERT POVILAT and)
MILTON PERSINGER; MEREDITH)
MILLER and ANNA LISA)
CARMICHAEL; and KRISTY SIMMONS)
and MARSHAY SAFFORD,)

Plaintiffs,)

v.)

Civil Action No. 14-0424-CG-C

LUTHER STRANGE, in his official)
capacity as Attorney General for)
the State of Alabama, DON DAVIS,)
in his official capacity as Probate Judge of)
Mobile County, Alabama,)

Defendants.)

**DECLARATION OF SCOTT D. MCCOY IN SUPPORT OF
PLAINTIFFS' MOTION FOR (1) LEAVE TO FILE SECOND AMENDED COMPLAINT
ADDING ADDITIONAL PARTIES AND PLAINTIFF AND DEFENDANT CLASSES;
(2) CERTIFICATION OF PLAINTIFF AND DEFENDANT CLASSES; AND
(3) PRELIMINARY INJUNCTION**

I, Scott D. McCoy, state the following:

1. I am one of the attorneys for the Plaintiffs in this action.

2. Attached hereto as Exhibit 1 is a true and correct copy of the "Alabama Census Snapshot: 2010." This is a report by the Williams Institute at the University of California Los Angeles School of Law which presents and analyzes 2010 census data regarding same-sex couples in Alabama.

3. The potential members of the Plaintiff Class are geographically dispersed across the state in all three federal districts and in every county of Alabama, making joinder impracticable.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 6, 2015.


Scott D. McCoy

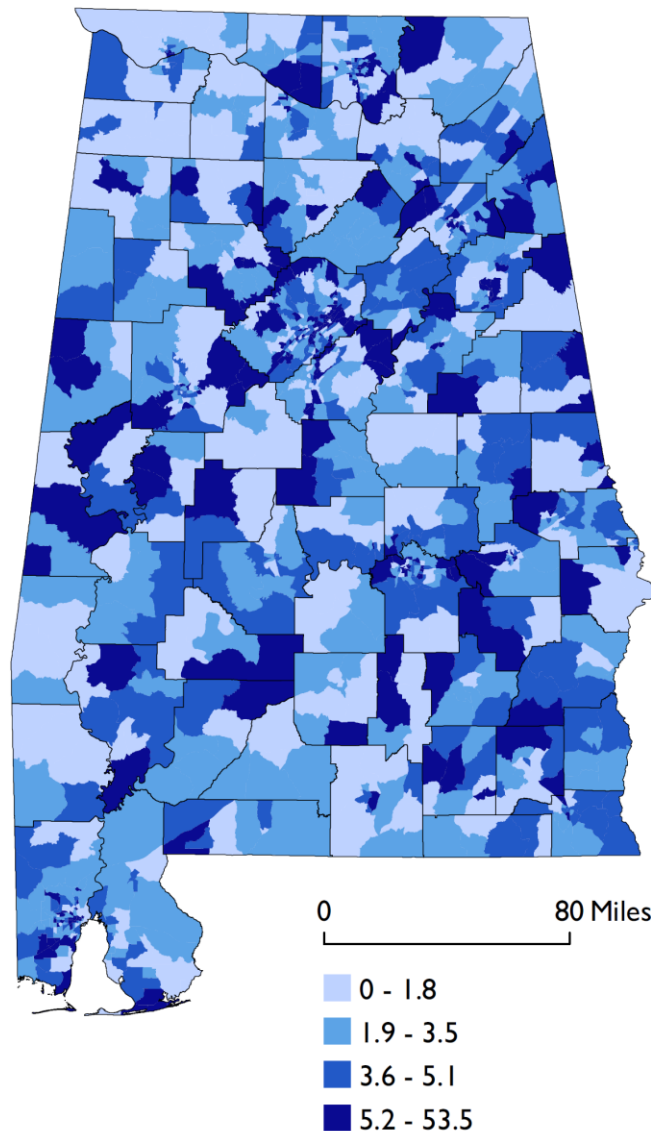
EXHIBIT 1



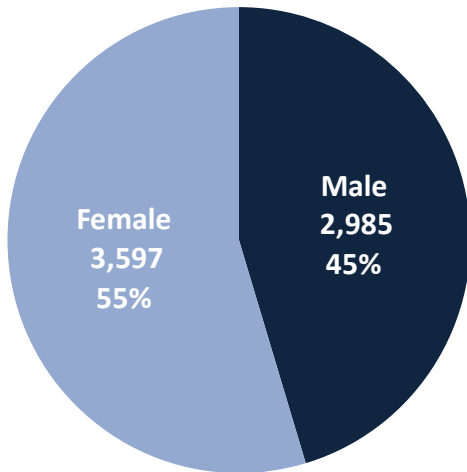
Alabama Census Snapshot: 2010

Same-sex couples	6,582	Same-sex couples per 1,000 households	3.5
Husband/wife	1,704	Same-sex "husband/wife" couples per 1,000 "husband/wife" couples	1.9
Unmarried partner	4,878	Same-sex "unmarried partner" couples per 1,000 "unmarried partner" couples	59.2

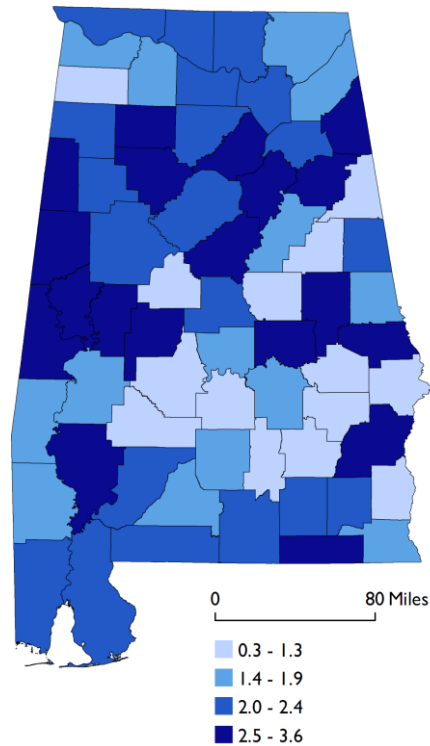
Same-sex couples per 1,000 households
by Census tract (adjusted)



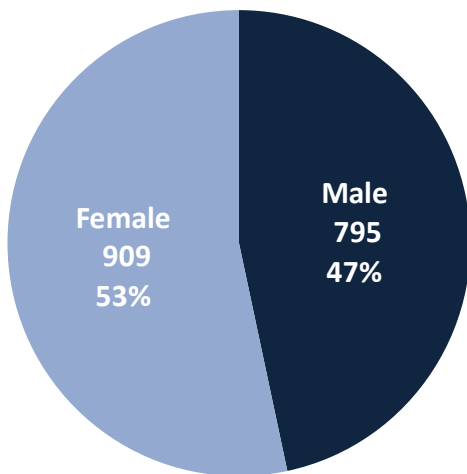
All Same-sex Couples



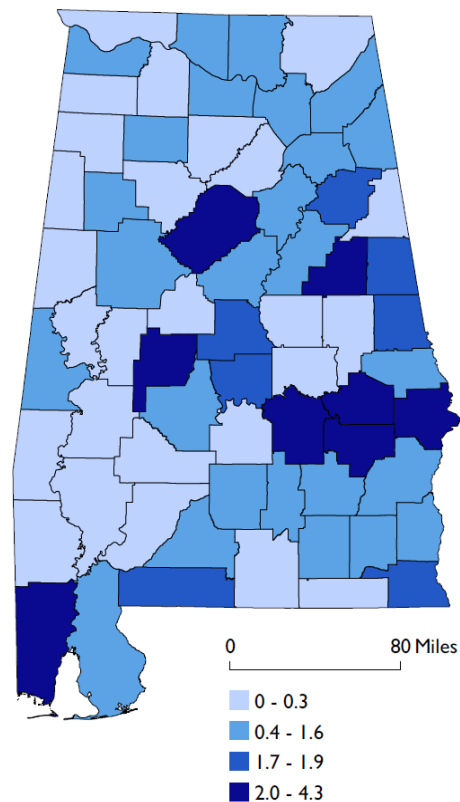
Same-sex female couples per 1,000 households by county (adjusted)



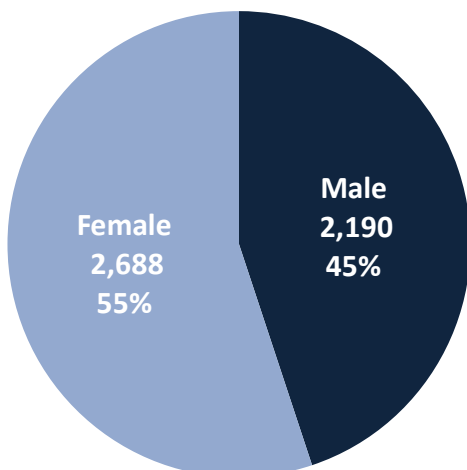
Same-sex couples who identify as spouses



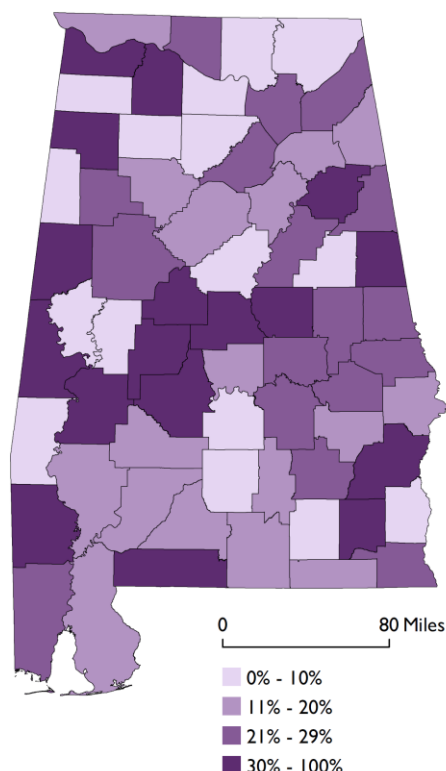
Same-sex male couples per 1,000 households by county (adjusted)



Same-sex couples who identify as unmarried partners

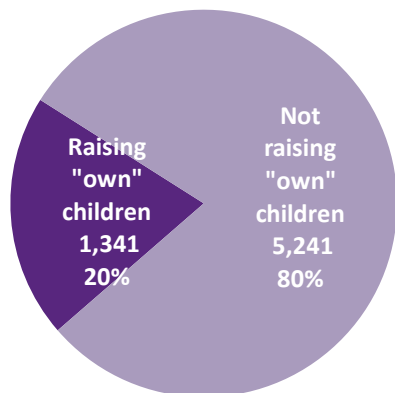


Percent of same-sex couples raising “own” children* by county (adjusted)

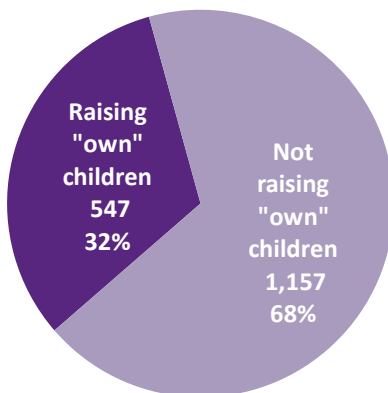


*“Own” children are never-married children under 18 who are sons or daughters of one partner or spouse (Person 1) by birth, marriage (stepchild), or adoption.

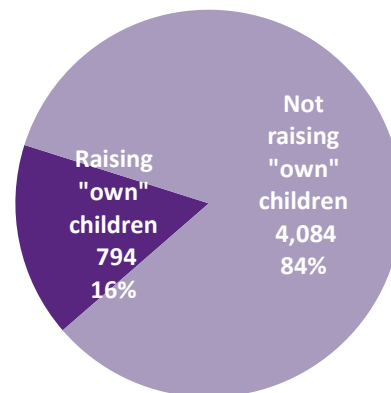
All Same-sex Couples



Same-sex couples
who identify as spouses



Same-sex couples
who identify as unmarried partners



Data and methodology

Data are compiled using the US Census Bureau’s state-level preferred estimates for same-sex couples found [here](#). Same-sex couples are identified in households where Person 1 describes his or her relationship with another adult of the same sex as either a “husband/wife” or “unmarried partner”. The Census Bureau preferred estimates adjust original Census tabulations reported in the Census 2010 SF-1, PCT15 to account for the likelihood that a small portion of different-sex couples miscode the sex of a spouse or partner and are incorrectly counted as a same-sex couple.

Adjusted data

The Census Bureau only released preferred estimates for states. County, city, and tract data used in this report are adjusted by the authors and do not represent official Census Bureau tabulations. Like the Census Bureau preferred estimates, the adjustment procedure accounts for the likelihood that a small portion of different-sex couples miscode the sex of a spouse or partner and are incorrectly counted as a same-sex couple.

Undercount

The adjusted figures do not take into account the possibility that some same-sex couples may not be counted in Census tabulations due to concerns about confidentiality or because neither partner was Person 1 in the household.

Go [here](#) for a complete description of the adjustment procedure.

Counties with 50+ same-sex couples ranked by same-sex couples per 1,000 households

State rank	US rank among 1,142 counties with 50+ same-sex couples	County	Same-sex couples (adjusted)	Same-sex couples per 1,000 households (adjusted)	Same-sex male couples (adjusted)	Same-sex female couples (adjusted)	% Raising "own" children among same-sex couples (adjusted)
1	279	Jefferson	1428	5.42	926	501	19%
2	526	Mobile	675	4.26	326	349	25%
3	541	Montgomery	377	4.19	260	117	28%
4	599	Calhoun	190	4.02	77	113	30%
5	656	Chilton	63	3.83	31	32	44%
6	667	Escambia	54	3.79	26	27	43%
7	730	St. Clair	115	3.65	13	102	12%
8	748	Houston	148	3.61	78	70	22%
9	806	Shelby	256	3.46	81	176	5%
10	828	Baldwin	249	3.40	83	166	17%
11	838	Elmore	96	3.38	0	96	29%
12	855	Etowah	140	3.34	47	94	20%
13	879	Limestone	102	3.26	33	69	22%
14	882	Tuscaloosa	248	3.25	80	168	23%
15	884	Autauga	66	3.25	33	33	11%
16	914	Madison	426	3.16	150	276	10%
17	957	Russell	65	3.04	49	16	20%
18	967	Dale	61	3.02	14	46	42%
19	970	DeKalb	81	3.01	40	41	26%
20	975	Marshall	107	2.99	37	70	24%
21	987	Blount	63	2.93	0	63	22%
22	993	Walker	77	2.90	4	73	10%
23	995	Talladega	92	2.88	48	44	24%
24	998	Lee	160	2.88	22	138	25%
25	1031	Morgan	129	2.75	30	100	7%
26	1036	Coffee	54	2.72	12	42	8%
27	1075	Colbert	57	2.48	22	35	33%
28	1125	Cullman	64	2.01	0	64	0%
29	1129	Lauderdale	75	1.94	0	75	12%

Counties with <50 same-sex couples

	Barbour	34	3.42	8	26	54%
	Bibb	4	0.56	0	4	100%
	Bullock	19	5.19	16	3	17%
	Butler	21	2.49	10	12	7%
	Chambers	42	3.03	22	20	25%
	Cherokee	39	3.70	11	28	11%
	Choctaw	10	1.68	0	10	0%
	Clarke	29	2.77	0	29	18%
	Clay	18	3.21	11	7	0%
	Cleburne	5	0.87	0	5	24%
	Conecuh	11	1.97	3	8	11%
	Coosa	2	0.33	0	2	80%

	Covington	32	2.04	0	32	12%
	Crenshaw	14	2.52	7	7	11%
	Dallas	46	2.67	25	21	32%
	Fayette	25	3.48	10	15	27%
	Franklin	14	1.18	0	14	0%
	Geneva	31	2.82	1	30	18%
	Greene	13	3.32	0	13	9%
	Hale	19	3.04	0	19	4%
	Henry	19	2.66	10	9	10%
	Jackson	37	1.73	0	37	9%
	Lamar	19	3.03	1	18	7%
	Lawrence	24	1.73	0	24	39%
	Lowndes	3	0.76	0	3	0%
	Macon	37	4.34	27	10	20%
	Marengo	16	1.85	0	16	33%
	Marion	30	2.36	0	30	39%
	Monroe	22	2.37	0	22	14%
	Perry	19	4.85	8	12	31%
	Pickens	25	3.09	0	25	52%
	Pike	35	2.64	19	16	22%
	Randolph	34	3.72	15	19	38%
	Sumter	24	4.35	4	20	38%
	Tallapoosa	47	2.77	0	47	23%
	Washington	11	1.56	0	11	29%
	Wilcox	5	1.10	0	5	17%
	Winston	31	3.07	5	26	0%

**Cities with 50+ same-sex couples
ranked by same-sex couples per 1,000 households**

State rank	US rank among 1,415 cities with 50+ same-sex couples	City	Same-sex couples (adjusted)	Same-sex couples per 1,000 households (adjusted)
1	286	Birmingham	758	8.48
2	926	Mobile	385	4.87
3	1060	Hoover	143	4.40
4	1126	Montgomery	342	4.20
5	1151	Huntsville	315	4.09
6	1168	Prattville	51	4.02
7	1263	Gadsden	54	3.58
8	1281	Dothan	94	3.50
9	1359	Tuscaloosa	110	3.04
10	1382	Decatur	64	2.84

About the authors

Gary J. Gates, PhD is the Williams Distinguished Scholar at the Williams Institute, UCLA School of Law.

Abigail M. Cooke is a PhD candidate in the Department of Geography at UCLA and is affiliated with the California Center for Population Research.

Acknowledgments

The authors thank Williams Institute Fellows Angeliki Kastanis, Laura Durso, and Christy Mallory for assistance with the Snapshots.

For more information

The Williams Institute, UCLA School of Law, (310) 267-4382

<http://williamsinstitute.law.ucla.edu/>

PLAINTIFFS'
EXHIBIT C

4. On March 4, 2015, Jennifer and I went to the Mobile County Probate Court office to obtain a marriage license. The office was not issuing licenses and so we were unable to obtain one. On March 5, 2015, I called the Baldwin County Probate Judge's office and was told that while they are issuing marriage licenses to opposite-sex couples, they are not issuing licenses to same-sex couples.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 2015.


Kristie Ogle

PLAINTIFFS' EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E.)
HUMPHREY; ROBERT POVILAT and)
MILTON PERSINGER; MEREDITH)
MILLER and ANNA LISA)
CARMICHAEL; and KRISTY SIMMONS)
and MARSHAY SAFFORD,)

Plaintiffs,)

v.)

Civil Action No. 14-0424-CG-C

LUTHER STRANGE, in his official)
capacity as Attorney General for)
the State of Alabama, DON DAVIS,)
in his official capacity as Probate Judge of)
Mobile County, Alabama,)

Defendants.)

DECLARATION OF KEITH INGRAM

I, Keith Ingram, state the following:

1. I am over the age of 19, and I live with my partner, Albert Holloway

Pigg III, in Dothan, Alabama.

2. Albert and I have been in a committed, loving relationship for approximately one year. We have lived in Alabama for most of our relationship. We moved together to my hometown, Dothan, so that we could be with my family.

3. We are not married but want to get married in order to make our family legal and to declare our commitment to each other before our loved ones and our community. Each day that we are not permitted to be married, we experience uncertainty about whether we will be treated as family members in the event of an emergency. This concern has made us particularly anxious because I have seen many doctors over the past several months for an undiagnosed illness. We also experience humiliation each day that we are not permitted to be married; it is demeaning to us that our family is treated unequally under Alabama law. We want nothing more than to receive the legal protections and responsibilities that marriage provides.

4. Albert and I drove to the probate office in the county in which we live, Houston County, on February 9, 2015, to obtain a marriage license when the office opened at 7:00 AM. However, a clerk told us that the Houston County Probate Judge, Patrick Davenport, would not issue us a marriage license. We returned home feeling crushed and disappointed.

5. Albert and I drove to the Houston County Probate Office again on the morning of February 17, 2015, and again we were informed that Probate Judge Davenport refused to issue us a marriage license.

6. I called the office of Baldwin County Probate Judge Tim Russell on March 5, 2015, and asked if Albert and I could obtain a marriage license, but I was informed that Probate Judge Russell's office was only issuing marriage licenses to "traditional" different-sex couples.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 6, 2015.


Keith Ingram

PLAINTIFFS'
EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER and JOHN E.)
HUMPHREY; ROBERT POVILAT and)
MILTON PERSINGER; MEREDITH)
MILLER and ANNA LISA)
CARMICHAEL; and KRISTY SIMMONS)
and MARSHAY SAFFORD,)

Plaintiffs,)

v.)

Civil Action No. 14-0424-CG-C

LUTHER STRANGE, in his official)
capacity as Attorney General for)
the State of Alabama, DON DAVIS,)
in his official capacity as Probate Judge of)
Mobile County, Alabama,)

Defendants.)

DECLARATION OF GARY WAYNE WRIGHT II

I, Gary Wayne Wright II, state the following:

1. I am over the age of 19, and live with my partner, Brandon Mabrey, in Arab, Alabama. We have lived together in Alabama, my home state, for six years.
2. Brandon and I have been in a committed, loving relationship for eighteen years.

3. I served in the U.S. Navy beginning in 1991. After four years of service, I was honorably discharged under the government's Don't Ask, Don't Tell policy, when I was asked to reveal my sexual orientation and I admitted that I am gay.

4. In the seventeen years since the Navy discharged me for being gay, I have fought to receive my veteran's benefits and coverage, including coverage for treatment of a muscular disorder that leaves me dependent on a wheelchair. I finally receive my benefits, but in a lesser amount than I would if I were married. Brandon and I have loved and supported one another throughout these difficulties.

5. We are not married but want to get married in order to make our family legal and to declare our commitment to each other before our loved ones and our community. Each day that we are not permitted to be married, we experience uncertainty about whether we will be treated as family members in the event of an emergency. We also experience humiliation each day that we are not permitted to be married; it is demeaning to us that our family is treated unequally under Alabama law. We want nothing more than to receive the legal protections and responsibilities that marriage provides.

6. On February 12, 2015, after this Court declared Alabama's exclusion of same-sex couples from civil marriage unconstitutional, Brandon called the office of the Marshall County Probate Judge, Tim Mitchell, to ask to obtain a

marriage license, but he was informed that the office was not issuing marriage licenses to anyone.

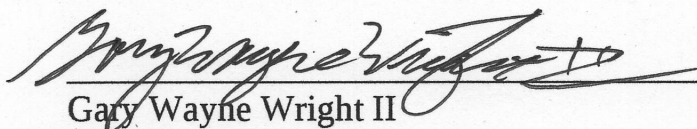
7. I sent a letter by mail and email to Marshall County Probate Judge Tim Mitchell on February 18, 2015, requesting that his office issue marriage licenses to same-sex couples. I did not receive a response.

8. I visited the Marshall County Probate Judge's Office in person on March 2, 2015, to obtain a marriage license, and a clerk told me that the probate judge would not issue marriage licenses to anyone.

9. On March 5, 2015, Brandon and I called the office of Baldwin County Probate Judge Tim Russell to ask if we could obtain a marriage license, but the office informed us that it was issuing licenses only to "traditional" different-sex couples.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5th, 2015.


Gary Wayne Wright II