

No. 1140460

IN THE SUPREME COURT OF ALABAMA

Ex parte State of Alabama ex rel. Alabama Policy Institute
And Alabama Citizens Action Program
(In re: Alan L. King, in his official capacity as Judge Of
Probate for Jefferson County, Alabama, et al.)

**APPLICATION FOR REHEARING AND BRIEF BY RESPONDENT,
MONTGOMERY COUNTY PROBATE JUDGE STEVEN L. REED**

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**APPLICATION FOR REHEARING BY RESPONDENT,
MONTGOMERY COUNTY PROBATE JUDGE STEVEN L. REED**

Montgomery County Probate Judge Steven L. Reed applies for rehearing from this Court's decision of March 3, 2015.

While respectfully disagreeing with this Court's decision, Judge Reed requests that the Court add a further provision to its order. The Court has ordered that he "discontinue the issuance of marriage licenses to same-sex couples." (Slip Opinion p. 133). The Court should further provide: "This order shall be in force and effect, until and unless the Supreme Court of the United States issues an opinion which holds that a state law denying marriage to same-sex couples is unconstitutional."

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BRIEF IN SUPPORT OF APPLICATION

1. The relevant proceedings, in federal courts and in this Court, leading to the present posture of this case.

Earlier this year, the United States District Court for the Southern District of Alabama held that Alabama's marriage laws violate the Constitution of the United States, insofar as Alabama refuses to permit and recognize same-sex marriages. Both the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States, denied motions to stay that ruling. (Slip Opinion, pp. 4-7).

Judge Reed, and various other Probate Judges in the State, began issuing marriage licenses to same-sex couples out of respect for the federal court's ruling and in light of the higher courts' refusal to stay that ruling. (Slip Opinion, pp. 7-8).

In this case, this Court issued a writ of mandamus to Judge Reed and other Probate Judges. The Court ordered Judge Reed and other named respondents, who had been issuing marriage licenses to same-sex couples, to "discontinue the issuance of marriage licenses to same-sex

couples." (Slip Opinion p. 133). The Court issued a similar order to other Probate Judges as well.¹

2. The Supreme Court of the United States will almost certainly decide, in late June, whether same-sex couples have the right to marry under the United States Constitution. It is quite possible, even likely, that the Court will hold that couples do have that right.

¹ Judge Reed opposed the Petition for Writ of Mandamus, and respectfully disagrees with this Court's opinion and order. See Slip Opinion pp. 137-45 (Shaw, J., dissenting) (reasons why Court's exercise of jurisdiction, including its findings of standing, improper); *State ex rel. Chilton County v. Butler*, 142 So. 531, 532, 533 (Ala. 1932)(sovereign rights of state enforceable by Attorney General or Governor **only**); cf. *Ex parte State of Alabama (In re Riley v. Cornerstone Community Outreach, Inc.)*, 57 So.2d 704, 719-26 (Ala. 2010)("[t]he core power of the executive branch is the enforcement of [the] laws"; under the "supreme executive authority" of Governor to "take care that the laws be faithfully executed," Governor is empowered constitutionally and statutorily to sue in the name of the State)(quotations omitted).

Judge Reed also respectfully suggests that it was unfortunate that this Court decided issues of federal constitutional law, when the Petitioners had not presented any such issue for decision, when Petitioners made no argument on any such issue, and when Judge Reed relied on these facts in his response to the petition. See Slip Opinion pp. 147-48 (Shaw, J., dissenting). But given this Court's instructions in *Nationwide Retirement Solutions v. PEBCO*, ___ So.3d ___, 2014 Ala. LEXIS 124 (Ala. 2014), on the range of issues that can be raised on rehearing, and notwithstanding that Judge Reed could not reasonably have anticipated and raised this objection in his opposition to the Petition, Judge Reed does not seek to re-argue his disagreements with the Court's decision in this rehearing application.

The Supreme Court of the United States will hear arguments on April 28 in *Obergefell v. Hodges* and three other cases. The issues in those cases include whether state laws refusing to permit and recognize same-sex marriages are unconstitutional. Pursuant to the Supreme Court's nearly unbroken practice of issuing all decisions before taking its summer recess, a decision in those cases is expected by the end of June. See *Strange v. Searcy*, 135 S.Ct. 940, 2015 U.S. LEXIS 912, *3 (2015) (Thomas, J., dissenting from denial of stay) ("The Court has now granted a writ of certiorari to review these important issues and will do so by the end of the Term.").

There is a substantial chance that the Supreme Court of the United States will hold that same-sex couples do have the right to marry, under the United States Constitution. Many sophisticated legal observers expect this outcome; all recognize that it is a distinct possibility. And indeed, the Supreme Court's refusal to stay the order from the Alabama federal court is seen by many as a strong clue suggesting such an outcome. See *Strange v. Searcy*, 135 S.Ct. 940, 2015 U.S. LEXIS 912, *3-4 (Thomas, J., dissenting from denial of stay) (noting that the denial of

stay in the Alabama case “may well be seen as a signal of the Court’s intended resolution of” the questions presented in *Obergefell* and related cases).

3. It is important that Judge Reed (and other Probate Judges) be permitted to immediately obey the decisions of the Supreme Court of the United States about constitutional rights.

If the Supreme Court of the United States issues an opinion holding that same-sex couples have the constitutional right to marry, then it is a practical certainty that one or more such couples will apply to Judge Reed for marriage licenses quickly – probably that very day. The modification of this Court’s order, which Judge Reed seeks here, would allow him to issue such licenses.

If this Court declined to modify its order in this way, and if the Supreme Court of the United States ruled in favor of same-sex marriage, then Judge Reed would be in an untenable position. He would be under order from this Court to keep doing something (i.e., denying licenses) that violates the United States Constitution as interpreted by the United States Supreme Court. He would be torn between this Court’s order and his oath of office. Judge Reed could move this Court to lift its order, after the Supreme

Court of the United States rules. But this would entail expense, delay, further complication, and the denial of constitutional rights to citizens of Montgomery County, for no good reason.

Judge Reed does not wish to flout a decision of the United States Supreme Court, especially on a matter involving constitutional rights, for any time. He believes in the rule of law, which under our Constitution includes adherence to decisions of the Supreme Court of the United States on matters of federal law. *See, e.g., Johnson v. Jefferson County Racing Ass'n*, 1 So. 3d 960, 964 n.5 (Ala. 2008) ("This Court is bound by decisions of the Supreme Court of the United States.").²

Judge Reed also respectfully suggests that it is important for this Court to demonstrate that Alabama is committed to the rule of law: that Alabama would not engage

² Moreover, if this Court required Judge Reed to flout such a decision even for a temporary period, it would place him at risk of civil liability. Couples who were denied licenses following a decision of the Supreme Court of the United States could sue Judge Reed in federal court, and could argue that he was personally liable for damages for violating clearly established constitutional law. Denial of licenses after a Supreme Court decision could also lead to monetary liability on the county, for damages, attorneys' fees, and costs.

in foot-dragging or other forms of resistance to decisions of the Supreme Court of the United States about matters of constitutional rights. Alabama's judicial branch should be a leader in this respect; the judiciary should make clear that it will not seek to delay the ability of Alabama citizens to exercise their constitutional rights as they are declared by the Supreme Court of the United States. In light of Alabama's history, and for the sake of Alabama's future, it is important that Alabama be willing to honor constitutional rights under holdings of the Supreme Court of the United States. Judge Reed is committed to doing so, and trusts that this Court is committed to that as well.

Conclusion

For the reasons stated herein, Judge Reed respectfully requests that this Court modify its order as stated above, by adding this provision: "This order shall be in force and effect, until and unless the Supreme Court of the United States issues an opinion which holds that a state law denying marriage to same-sex couples is unconstitutional."

Respectfully submitted this 17th day of March, 2015.

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