MEMORANDUM

TO: Alabama Probate Judges

FROM: Chief Justice Roy S. Moore

RE: Sanctity of Marriage ruling

Date: February 3, 2015

The purpose of this memorandum is to provide guidance to the probate judges of Alabama as to their duties under Alabama's Sanctity of Marriage Amendment ("the Amendment"), Art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act ("the Act"), § 30-1-19, Ala. Code 1975, in light of the recent orders of the United States District Court for the Southern District of Alabama. A news story has quoted the Honorable Greg Norris, President of the Alabama Probate Judges Association, as saying: "I don't think I have had a week like this in my life."[1] I hope this memorandum will assist weary, beleaguered, and perplexed probate judges to unravel the meaning of the actions of the federal district court in Mobile, namely that the rulings in the marriage cases do not require you to issue marriage licenses that are illegal under Alabama law.

---

[1]Brian Lawson, With Alabama Same-sex Marriage Decision Looming, Some Probate Judges Stop Doing Weddings, AL.com (Jan. 29, 2015).

I. Background

On Friday, January 23, 2015, the Honorable Callie Granade, a judge of the United States District Court for the Southern District of Alabama, ruled in Searcy v. Strange (No. 1:14-208-CG-N) (S.D. Ala. Jan. 23, 2015), that the Amendment and the Act were unconstitutional. On January 25, in response to a motion by defendant Luther Strange, the Attorney General of Alabama, Judge Granade granted a stay of her ruling until February 9 to permit the United States Court of Appeals for the Eleventh Circuit to consider imposing a stay pending appeal. On February 3, the Eleventh Circuit declined to enter the requested stay.

On Monday, January 26, Judge Granade entered a preliminary injunction in Strawser v. Strange (No. 1:14-CV-424-CG-C) (S.D. Ala. Jan. 26, 2015), another case that challenged the constitutionality of the Amendment and the Act. Two days later, on January 28, Judge Granade issued an "Order Clarifying Judgment" in Searcy to address whether her order of January 23 bound "the Probate Courts in Alabama."

II. Administrative Authority of the Chief Justice

As administrative head of the Unified Judicial System,[2] I have a constitutional and a statutory obligation to provide guidance to the probate judges in this state as to their administrative responsibilities under these recent orders.[3] In that capacity I am authorized and empowered:

> ....
>
> (7) To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.
>
> (8) To take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere.

§ 12-2-30(b), Ala. Code 1975.

In my estimation, Judge Granade's orders in Searcy and Strawser have created a "situation adversely affecting the administration of justice within the state" that requires me "[t]o take ... action for the orderly administration of justice within the state."

---

[2]"The chief justice of the supreme court shall be the administrative head of the judicial system." Art. VI, § 149, Ala. Const. 1901.

[3]The probate judges are part of Alabama's unified judicial system. Art. VI, § 139(a), Ala. Const. 1901.

III. Analysis

A. Alabama probate judges are not bound by the orders in Searcy and Strawser.

In Searcy, an adoption case, Judge Granade enjoined the Attorney General from enforcing the Alabama marriage laws that prohibit recognition of same-sex unions. In Strawser, Judge Granade granted a preliminary injunction against enforcement of these same laws. Her order included standard language describing the scope of an injunction. See Rule 65, Fed. R. Civ. P.

> [T]he court hereby ORDERS that the Alabama Attorney General is prohibited from enforcing the Alabama laws which prohibit same-sex marriage. This injunction binds the defendant and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit same-sex marriage.

Order of Jan. 26, 2015, at 4. The Strawser order is of more significance for Alabama probate judges than the orders in the Searcy case because Strawser is a case about issuing same-sex marriage licenses in Alabama. Therefore, it merits careful scrutiny.

The Strawser order tracks the language of Rule 65(d)(2), Fed. R. Civ. P.:

> Persons Bound. The order binds only the following who receive actual notice of it by personal service

or otherwise:

> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Since no Alabama probate judges are parties to the Strawser case (or to the Searcy case), the only question to resolve in terms of their being bound by the court's order of January 26 is whether they, or any of them, are officers, agents, servants or employees of the Attorney General or "are in active concert or participation" with the Attorney General or his officers, agents, servants, and employees. "[L]ike the Governor, the attorney general is an officer of the executive branch of government." Ex parte State ex rel. James, 711 So. 2d 952, 964 n.5 (Ala. 1998). See also McDowell v. State, 243 Ala. 87, 89, 8 So. 2d 569, 570 (1942) ("The Attorney General is a constitutional officer and a member of the Executive Department of the State government."); Art. V, § 112, Ala. Const. 1901 ("The executive department shall consist of a governor, lieutenant governor, attorney-general, ...").

Probate judges are members of the judicial branch of government. "There shall be a probate court in each county

which shall have general jurisdiction of orphans' business, and of adoptions, and with power to grant letters testamentary, and of administration, and of guardianships, and shall have such further jurisdiction as may be provided by law ...." Art. VI, § 144, Ala. Const. 1901. Probate judges are elected to six-year terms by a vote of the people in each county. § 12-13-30, Ala. Code 1975.

Alabama has strict separation of powers between the branches of government. "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Art. III, § 42, Ala. Const. 1901.

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Art. III, § 43, Ala. Const. 1901.

As a matter of constitutional and statutory law, therefore, Alabama probate judges are not officers, agents, or

servants of the Attorney General. The probate judges are members of the judicial branch; the Attorney General is a member of the executive branch. The Attorney General is bound by the constitutional command that "the executive shall never exercise the ... judicial powers." The probate judges are bound by the constitutional command that "the judicial shall never exercise the ... executive powers." A constitutional firewall separates the authority of the Attorney General from that of the probate courts. The probate judges are not in any sense agents or servants of the Attorney General

The only remaining question, therefore, to resolve in determining whether Alabama probate judges are bound by Judge Granade's orders in Searcy and Strawser is whether they are "in active concert or participation" with the Attorney General or any of his officers, agents, servants or employees in enforcing the Amendment or the Act. Again, the answer is "no" for the simple reason that neither the Attorney General nor any of his agents has any authority over the judges of probate. As independent constitutional officers of the judicial branch of government who are directly elected by the people and shielded from executive influence by Sections 42 and 43 of the Alabama Constitution, the judges of probate are

neither beholden to the Attorney General for their offices nor subject to his control in the execution of their duties.

The federal court in Mobile has no authority to ignore the internal structure of state government. How a state government structures its powers is "a decision of the most fundamental sort for a sovereign entity." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). A state has "constitutional responsibility for the establishment and operation of its own government." Id. at 462. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." Id. at 460.

Finally, no probate judge was a defendant in the cases under discussion except for the Honorable Don Davis who was dismissed with prejudice before issuance of the court's orders. Judge Granade's orders apply to the parties to the case, but under a straightforward application of Rule 65(d)(2), Fed. R. Civ. P., those orders have no effect on the probate judges of Alabama. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Martin v. Wilks, 490 U.S. 755, 762 (1989).

Furthermore, as stated in the Appendix, Judge Granade's

orders are improper because the Eleventh Amendment prohibits the Attorney General from being a defendant in these cases.

B. The probate judges in their judicial capacity do not have to defer to decisions of a federal district court.

Having determined based on the above analysis that Alabama probate judges are not bound by Judge Granade's rulings in Searcy and Strawser, I would now like to give you a general perspective on the precedential effect in state courts of lower-federal-court decisions on constitutional questions. Because the United States Constitution provides that "the Judges in every State shall be bound thereby," Art. VI, cl. 2, U.S. Const., state judges are competent to adjudicate federal constitutional issues and indeed must do so when required in the exercise of properly acquired jurisdiction.

Because federal courts also adjudicate federal-law issues, the question has arisen whether state judges are in any sense bound by lower federal court decisions on constitutional questions. Almost universally the answer has been "no" for the simple reason that federal district and circuit courts have no appellate jurisdiction over state courts. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the

same judicial district, or even upon the same judge in a different case." Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p. 134-26 (3d ed. 2011)). Although decisions of state courts on federal questions are ultimately subject to review by the United States Supreme Court, 28 U.S.C. § 1257(a), as are decisions of federal courts, neither "coordinate" system reviews the decisions of the other. As a result, state courts may interpret the United States Constitution independently from and even contrary to the decisions of federal courts.

Numerous Alabama cases confirm this reasoning. "[I]n determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here, although they can serve as persuasive authority." Glass v. Birmingham So. R.R., 905 So.2d 789, 794 (Ala. 2004). See also Dolgencorp, Inc. v. Taylor, 28 So. 3d 737, 748 (Ala. 2009) (noting that "United States district court decisions are not controlling authority in this Court"); Ex parte Hale, 6 So. 3d 452, 462 (Ala. 2008), as modified on denial of reh'g (Oct. 10, 2008)

("[W]e are not bound by the decisions of the Eleventh Circuit."); Ex parte Johnson, 993 So. 2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or the United States District Courts."); Buist v. Time Domain Corp., 926 So. 2d 290, 297 (Ala. 2005) ("United States district court cases ... can serve only as persuasive authority."); Amerada Hess v. Owens-Corning Fiberglass, 627 So. 2d 367, 373 n.1 (Ala. 1993) ("This Court is not bound by decisions of lower federal courts."); Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 n.2 (Ala. 1991) ("Decisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court.").

A recent detailed study of the courts of all 50 states and the District of Columbia determined that 46 states and the District of Columbia adopt the position that the precedents of lower federal courts are not binding in their jurisdictions. Wayne A. Logan, A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights, 90 Notre Dame L. Rev. 235, 280-81 (2014). The position of three other states is uncertain. Only one state (Delaware) defers to the constitutional decisions of lower federal courts. Id. at 281.

Federal courts have recognized that state-court review of constitutional questions is independent of the same authority lodged in the lower federal courts. "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court." United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970).

> Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other.

Surrick v. Killion, 449 F. 3d 520, 535 (3rd Cir. 2006).

The United States Supreme Court has acknowledged that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989). Two justices of the United States Supreme Court in special writings have elaborated on this principle.

The Supremacy Clause demands that state law yield to

> federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring). See also Steffel v. Thompson, 415 U.S. 452, 482, n. 3 (1974) (Rehnquist, J., concurring) (noting that a lower-federal-court decision "would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.").

For the above reasons, I am of the opinion that an Alabama probate judge may deliver his own considered opinion, subject to review, on the issues raised in Searcy and Strawser and is not required to defer to federal district and circuit court rulings on the same questions.

IV. Conclusion

In fulfillment of my obligations as Administrative Head of the Unified Judicial System, I have herein offered you my considered guidance on how the recent orders from the United

States District Court in Mobile affect your duties as an Alabama probate judge. Because, as demonstrated above, Alabama probate judges are not bound by Judge Granade's orders in the Searcy and Strawser cases, they would in my view be acting in violation of their oaths to uphold the Alabama Constitution if they issued marriage licenses prohibited under Alabama law.

APPENDIX

The reasoning employed by Judge Granade in dismissing Governor Bentley with prejudice on August 28, 2014, namely that his general authority to enforce the laws was insufficient to make him a defendant, also applies to Attorney General Strange, who is the sole remaining defendant in both Searcy and Strawser.

I.
How the Alabama Attorney General came to be the sole defendant in each case

A. Searcy

The complaint in Searcy named five defendants in both their individual and official capacities: Robert Bentley, Governor; Luther Strange III, Attorney General; Don Davis, Mobile County Judge of Probate; Catherine Donald, State Registrar of Vital Statistics; and Nancy Buckner, Commissioner of the Department of Human Resources.

On May 30, 2014, Judge Davis filed a motion to dismiss. He explained that in December 2011 Cari Searcy had filed in his court a petition for a step-parent adoption of the son of Kimberly McKeand. See § 26-10A-27, Ala. Code 1975. In April 2012, Judge Davis denied the petition on the ground that Alabama law did not recognize Searcy as McKeand's spouse.

Searcy appealed, and the Court of Civil Appeals affirmed. In re Adoption of K.R.S., 109 So. 3d 176 (2012). Once his decision was appealed, Judge Davis argued, he lost jurisdiction of the case and was thus unable to provide relief to the plaintiffs.

On June 3, 2014, Commissioner Buckner filed a motion to dismiss, alleging lack of standing, namely that Searcy had suffered no injury traceable to Buckner's actions that a court order could redress. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In her complaint Searcy alleged that Buckner "has the authority and power to ... amend birth certificates to reflect the adoption of a child." However, in her motion to dismiss, Buckner explained that such authority resides solely with the Department of Vital Statistics.

On June 6, 2014, Governor Bentley and Attorney General Strange filed a joint motion to dismiss. The motion argued that Governor Bentley's general authority over the executive branch was insufficient to name him as a defendant when he had no direct enforcement responsibility for the Amendment, the Act, or the adoption statute. Merely suing Governor Bentley as a representative of the State was no different than suing the State itself, an action forbidden by the Eleventh Amendment.

While seeking a dismissal of all claims against Governor Bentley, the Attorney General agreed to remain in the suit in his official capacity "to defend the validity of Alabama's marriage laws."

On June 24, 2014, the plaintiffs responded to the motions to dismiss. They volunteered to dismiss all claims against Davis, Donald, and Buckner and to dismiss the individual capacity claims against Bentley and Strange. However, they argued that the official-capacity claims against both Bentley and Strange should remain in the case. On July 14, 2014, Davis and the plaintiffs filed a joint stipulation for Davis's dismissal. On July 18, the court entered an order to dismiss Davis with prejudice if no other party objected by July 25.

On July 30, 2014, Magistrate Judge Katherine Nelson acknowledged the stipulation of dismissal of all claims against Davis, Donald, and Buckner. She also recommended granting Governor Bentley's motion to dismiss on the ground that his relationship to the acts complained of was "'too attenuated to establish that he was responsible for' implementation of the challenged laws." Report and Recommendation of July 30, 2014 (quoting Women's Emergency Network v. Bush, 323 F.3d 937, 949 (11th Cir. 2003)). Judge

Granade adopted the Magistrate's recommendation and, on August 28, dismissed with prejudice the claims against Bentley, Buckner, and Donald. The only remaining defendant in the case was the Attorney General in his official capacity.

B. Strawser

Because the complaint in Strawser named "the State of Alabama" as the sole defendant, the Attorney General filed a motion to dismiss on the ground of sovereign immunity. In an order dated October 21, 2014, Magistrate Judge William E. Cassady, providing free legal advice, advised the Strawser plaintiffs

> that rather than filing a substantive response in opposition to the defendant's motion to dismiss, they may well desire to respond by filing a motion to dismiss the State of Alabama and substitute as the proper defendant ... Luther Strange, in his official capacity as the Attorney General of the State of Alabama.

The order contained a detailed footnote advising these pro-se plaintiffs that "[t]he Eleventh Amendment bars suits against an unconsenting State by one of its citizens." The footnote included as supporting authority three citations and parenthetical supporting quotations from United States Supreme Court cases. Order of Oct. 21, 2014, at 1 n.1. In a second footnote, Magistrate Cassady continued the plaintiffs' legal

education by explaining that "'official-capacity actions for prospective relief are not treated as actions against the State.'" Order of Oct. 21, 2014, at 2 n.2 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). Dutifully following this advice from the court, the plaintiffs on November 13, 2014 filed a "Motion to Amend Complaint and Change Defendant." The Attorney General did not object to the motion.

Thus, by dismissal of all defendants except the Attorney General in Searcy, and the substitution, with court assistance, of the Attorney General for the State of Alabama in Strawser, Luther Strange in his official capacity became the sole defendant in each case.

II.
The Attorney General is not a proper defendant in these cases

The issuance of marriage licenses in Alabama is controlled by Chapter 1 ("Marriage") of Title 30 ("Marital and Domestic Relations"). Section 30-1-9, Ala. Code 1975, states: "No marriage shall be solemnized without a license. Marriage licenses may be issued by the judges of probate of the several counties." The duty is discretionary because certain prerequisites must be satisfied before a license may be issued, such as, where applicable, the age and parental

consent requirements of § 30-1-4 & -5, Ala. Code 1975. The probate judge must maintain a register of all licenses issued, § 30-1-12, Ala. Code 1975, which is to include certificates of solemnization received from those who perform weddings. § 30-1-13, Ala. Code 1975. "It is the duty of the judge of probate to give notice to the district attorney of all offenses under this chapter." § 30-1-18, Ala. Code 1975. "No marriage license shall be issued in the State of Alabama to parties of the same sex." § 30-1-19(d), Ala. Code 1975.

By contrast to the exclusive statutory duty of probate judges to issue and record marriage licenses, and to monitor this process, including solemnizations, for offenses, the Attorney General has no duties in this area.

As an officer of the State, the Attorney General shares the immunity of the State from private law suits in federal court. "[T]he Eleventh Amendment prohibits suits against state officials where the state is, in fact, the real party in interest." Summit Medical Associates, P.C. v. Pryor, 180 F. 3d 1326, 1336 (11th Cir. 1999). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963). An exception exists

to this rule for actions taken by state officials that violate the Constitution. "The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984). This principle, first articulated in Ex parte Young, 209 U.S. 123 (1908), "has not been provided an expansive interpretation." Pennhurst, 465 U.S. at 102. Actions for damages are precluded, but generally prospective actions for declaratory and injunctive relief are permitted.

Nonetheless, a key requirement of an Ex parte Young action against a state official is that "such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." 209 U.S. at 157. The Court elaborated:

> "In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the

> State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

209 U.S. at 157 (quoting Fitts v. McGhee, 172 U.S. 516, 530 (1899)).

The situation described in Ex parte Young is exactly what has occurred in this case. The Alabama Attorney General does not hold a "special relation to the particular statute alleged to be unconstitutional," nor is he "expressly directed to see to its enforcement." Those duties and responsibilities lie with the judges of probate in the judicial branch. In the passage that immediately precedes the one quoted in Ex parte Young, the Court in Fitts underscored this point:

> It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1895.
>
> ....
>
> There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an

> unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State.

Fitts v. McGhee, 172 U.S. at 529-30. Recapping its discussion of Fitts, the court in Ex parte Young stated: "As no state officer who was made a party bore any close official connection with the [act at issue], the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done." 209 U.S. at 156 (emphasis added).

Making the Attorney General, who is not the official chiefly responsible for enforcing the marriage laws, the sole defendant in this case was a convenient means of making the State of Alabama the defendant, a methodology condemned by Ex parte Young as unconstitutional under the Eleventh Amendment. Because both Searcy and Strawser were in substance actions against the State rather than against one of its officers, the United States district court lacked jurisdiction and its judgment is void. The tenor of Judge Granade's orders indicates that she intends the orders to be applicable to all

state officials merely because the Attorney General is the defendant. Such an assumption violates the Eleventh Amendment. "Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend Young beyond what the Supreme Court has intended and held." Children's Healthcare Is A Legal Duty v. Deters, 92 F. 3d 1412, 1416 (6th Cir. 1996).

The Tenth Circuit in a very similar case came to the same conclusion. Two women who desired to be married to each other filed an action against the Governor and the Attorney General of Oklahoma seeking to have that state's marriage amendment declared unconstitutional. The Tenth Circuit held that they lacked standing to sue these officials. "[T]he Oklahoma officials' generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce." Bishop v. Oklahoma, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished). Noting that marriage licenses in Oklahoma were issued by district-court clerks who were part of the judicial branch, the court stated: "Because recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to

issue a marriage license or record a marriage." 333 F. App'x at 365. Stating that "[t]hese claims are simply not connected to the duties of the Attorney General" and citing the specificity requirement of Ex parte Young, the court ordered dismissal of the claims against the Attorney General for lack of subject-matter jurisdiction under the Eleventh Amendment. Id.

In a later published case the Tenth Circuit noted that the holding in Bishop that the Attorney General was not a proper defendant in a challenge to Oklahoma's prohibition on same-sex marriage "turned on the conclusion that marriage licensing and recognition in Oklahoma were 'within the administration of the judiciary.'" Kitchen v. Herbert, 755 F.3d 1193, 1202 (10th Cir. 2014). The parallels with Searcy and Strawser are too obvious to require elaboration.

The Attorney General's agreement to litigate this case with himself as the sole defendant cannot confer subject-matter jurisdiction that is otherwise not present. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951) (emphasis added). "'It

needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.'" Id. at 18 n.17 (quoting People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880)). See also Boumatic, L.L.C. v. Idento Operations, BV, 759 F. 3d 790, 793 (7th Cir. 2014) ("Litigants cannot confer subject-matter jurisdiction by agreement or omission ...."); SmallBizPros, Inc. v. MacDonald, 618 F. 3d 458, 464 n.4 (5th Cir. 2010). ("[P]arties cannot confer jurisdiction by agreement where it otherwise would not lie ....").

Further, because the Attorney General neither caused the plaintiffs' alleged injuries nor is able to redress them, the parties also lack standing to sue him as a defendant. "To have standing the plaintiffs must demonstrate injury in fact, causation, and redressability." I.L. v. Alabama, 739 F.3d 1273, 1278 (11th Cir. 2014). Accordingly, the federal court in Mobile lacked jurisdiction on this basis also. Alabama law agrees with these propositions:

> "Actions or opinions are denominated 'advisory,'" and, therefore, not justiciable, ... "where, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive." E. Borchard, Declaratory Judgments 31 (1934) (emphasis added). "'Actions for declaratory judgments brought by individuals to test or challenge the propriety of public action often fail

> on this ground, ... because the ... public officer or other person selected as a defendant has ... no special duties in relation to the matters which would be affected by any eventual judgment.'" Rogers v. Alabama Bd. of Educ., 392 So.2d 235, 237 (Ala. Civ. App. 1980) (emphasis added) (quoting E. Borchard, Declaratory Judgments 76 (2d ed. 1941)). "'The absence of adversary or the correct adversary parties is in principle fatal. A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power.'" Id. (emphasis added).

Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994) (emphasis in original).

End of Appendix