

IN THE ALABAMA SUPREME COURT

Ex parte STATE ex rel.
ALABAMA POLICY INSTITUTE and
ALABAMA CITIZENS ACTION
PROGRAM,

Petitioner,

v.

ALAN L. KING, in his official
capacity as Judge of Probate
for Jefferson County,
Alabama, ROBERT M. MARTIN,
in his official capacity as
Judge of Probate for Chilton
County, Alabama, TOMMY
RAGLAND, in his official
capacity as Judge of Probate
for Madison County, Alabama,
STEVEN L. REED, in his
Official capacity as Judge
of Probate for Montgomery
County, Alabama, and JUDGE
DOES ##1-63, each in his or
her official capacity as an
Alabama Judge of Probate,

Respondents.

Ayesha Khan*
D.C. Bar No. 426836
Americans United for
Separation of Church
and State
1301 K Street, N.W.
Washington, D.C. 20005
202-466-3234
khan@au.org

CASE NO. 1140460

**BRIEF OF AMICUS CURIAE
EQUALITY ALABAMA URGING
DISMISSAL OF EMERGENCY
PETITION FOR WRIT OF
MANDAMUS**

J. Richard Cohen
Ala. Bar No. ASB-1092-N73J
David Dinielli*
Cal. Bar No. 177904
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
334-956-8200
richard.cohen@splcenter.org
david.dinielli@splcenter.org

Shannon P. Minter*
Cal. Bar No. 168907
Christopher F. Stoll*
Cal. Bar No. 179046
National Center for Lesbian
Rights
870 Market St., Ste. 370
San Francisco, CA 94102
415-392-6257
SMinter@nclrights.org
CStoll@nclrights.org

**Pro Hac Vice* applications
forthcoming

Randall C. Marshall
Ala. Bar No. ASB-3023-A56M
ACLU of Alabama Foundation
P.O. Box 6179
Montgomery, AL 36106
rmarshall@aclualabama.org

*Counsel for Amicus Curiae
Equality Alabama*

February 13, 2015

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INTRODUCTION AND SUMMARY OF ARGUMENT

Two advocacy organizations that oppose legal recognition of same-sex couples and their families - but have no formal connection to the State of Alabama or the Probate Courts that issue marriage licenses - purport to act on behalf of the State of Alabama in seeking the issuance of a writ of mandamus requiring certain Probate Judges to comply with Alabama law. The Petition fails on its face and therefore should be dismissed, pursuant to Rule 21(b) of the Alabama Rules of Appellate Procedure, without requiring that any Answer be filed by any Respondent.

This Court repeatedly has described mandamus as an "extraordinary remedy" that may issue only when four factors are present: "(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon [a public officer] to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Ex parte Jim Walter Res., Inc.*, 91 So. 3d 50, 52 (Ala. 2012) (internal quotation omitted). The instant petition fails because

Petitioners have not properly invoked the jurisdiction of the Court (factor (4)) in that they have suffered no injury-in-fact and therefore lack standing; and because they have no "clear legal right" (factor (1)) in that only the Attorney General, not the Petitioners, may enforce the obligation Petitioners seek to enforce here.

No Properly Invoked Jurisdiction: All litigants seeking to invoke the power of any Alabama court must demonstrate that they have standing to do so, including any petitioner who seeks to invoke the power of this Court by means of a mandamus petition. Specifically, a mandamus petitioner must demonstrate an "injury-in-fact." See, e.g., *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1027 (Ala. 1999). Alabama Policy Institute and Alabama Citizens Action Program, the Petitioners here, can make no such showing. The organizations support Alabama's Sanctity of Marriage Laws but cannot show that they have any particularized interest in those laws or that they are injured in any way by Probate Judges' compliance with a federal order deeming those restrictions unconstitutional.

No Clear Legal Right In The Petitioners: Relatedly, Petitioners improperly seek a writ of mandamus to force the

Probate Judges to comply with an obligation the Judges owe to the State of Alabama - the obligation to comply with State-imposed limitation of authority - as opposed to an obligation owed to Petitioners or the public generally. Alabama law makes clear that, under these circumstances, the only party who may seek a writ of mandamus is the Attorney General, because it is the *State* that is aggrieved when public functionaries fail to comply with obligations they owe to the State. *See, e.g., Kendrick v. State ex rel. Shoemaker*, 54 So. 2d 442, 447 (Ala. 1951) (proceeding to enforce a duty owed to the state can be brought only by Attorney General). Thus, even if Petitioners here had suffered an injury-in-fact sufficient to confer standing as a general matter, they still would be the wrong parties to purport to act on behalf of the State of Alabama through a mandamus petition, and therefore have no "clear legal right" to the relief they seek.

In the end, Petitioners are situated no differently than any other citizen of Alabama who holds strong beliefs about the propriety of Alabama's Sanctity of Marriage Laws. None of them, including Petitioners here, has the standing or authority to purport to act on behalf of the State of

Alabama in requesting that this Court issue a writ to force compliance with those laws.

I. Petitioners Have Not "Properly Invoked" This Court's Jurisdiction Because They Lack Any Injury In Fact And Thus Do Not Have Standing.

A court is precluded from deciding a matter "absent a named plaintiff who has standing at the time the action was filed." *Grand Lodge of Fraternal Order of Police v. Vann*, 344 So. 2d 1212, 1214 (Ala. 1977). In order to establish standing, a claimant must demonstrate, among other things, "an actual, concrete and particularized 'injury in fact' – 'an invasion of a legally protected interest.'" *Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.*, 890 So. 2d 70, 74 (Ala. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); see also *Ex parte King*, 50 So. 3d 1056, 1059 (Ala. 2010) (holding that Alabama courts impose same injury-in-fact requirement that federal courts do). The requisite injury must be "to a legally protected right held by the plaintiff." *Cadence Bank, N.A. v. Goodall-Brown Assocs., L.P.*, No. 1111422, 2014 WL 4723471, at *13 (Ala. Sept. 19, 2014).

This rule has no less application in the context of mandamus: "A writ of mandamus is a drastic and extraordinary remedy, and to justify issuance of such a writ there must be a clear showing of injury to the petitioner." *Id.* at *14 (quoting *Ex parte Thomas*, 628 So.2d 483, 485 (Ala. 1993)) (emphasis in original); see also *King* 50 So. 3d at 1059 ("Traditionally, Alabama courts have focused primarily on the injury claimed by the aggrieved party"); *Ex parte Adams*, 669 So. 2d 128, 132 (Ala. 1995) ("Mandamus is a proper remedy . . . to prevent an irreparable injury"); *Ex parte Prudential Ins. Co. of America*, 721 So. 2d 1135, 1137 (Ala. 1998) (petitioner must be "injured by the wrong alleged in the complaint"); *Ex parte J.E.W.*, 608 So. 2d 728, 729 (Ala. 1992) (mandamus requires a "clear showing of injury"). In particular, standing in a mandamus action hinges on "whether the party has been injured in fact and whether the injury is to a legally protected right." *Property at 2018 Rainbow Drive*, 740 So. 2d at 1027 (emphasis omitted). The party must have both suffered a "tangible" injury and "have a concrete stake in the outcome of the court's decision." *Kid's Care, Inc. v. Alabama Dep't of Human Res.*, 843 So. 2d 164, 167

(Ala. 2002) (internal quotation omitted). Such a stake arises only when the party has a "personal or property right [that is] affected by the performance of a specified official duty." *Pryor Motor Co. v. Hartsfield*, 93 So. 524, 526 (Ala. 1922). "If he shows no such right, he cannot invoke that remedy, or any other, merely for the purpose of compelling the observance of official duty, or of vindicating the public laws." *Id.*

In *Grand Lodge of Fraternal Order of Police v. Vann*, 344 So. 2d 1212, 1213 (Ala. 1977), this Court considered a Birmingham executive order that required city employees hired in the future to reside within the city. When an association of existing city employees, who were exempt from the order, and thus had no concrete injury or stake in the outcome, petitioned for a writ of mandamus "directing the mayor to withdraw his [executive] order," the Court had little difficulty dismissing the writ for lack of standing. In addition to framing its claim as "on behalf of individuals who may choose to become members of [the association]," the association forcefully argued that the order was simply illegal as "an unauthorized restriction into an area where the Alabama Legislature has delegated

all authority to the County Personnel Board." *Id.* at 1214. The Court was wholly unmoved, however, holding that "even assuming the executive order is inconsistent with the [Board's] regulations," the association still "ha[d] no standing to litigate on behalf of the [] Board." *Id.*

Likewise, in this case, none of Petitioners, or their members, are at risk of having any of their own rights infringed by the probate judges Petitioners seek to restrain. Even if every probate judge were to act inconsistently with Alabama's Sanctity of Marriage Amendment and the Alabama Marriage Protection Act, the Petitioners would suffer no concrete, tangible, personal injury.

Petitioners' copious reliance on adverbs notwithstanding (see *Pet.* at 20 (referring to "a clear legal right to mandamus relief," without citation; arguing, again without citation, that "mandamus relief is clearly appropriate")), Petitioners entirely gloss over the injury-in-fact requirement. Their only discussion of injury in the Argument section of their Petition relates to an alleged injury to the interests of the "public" and to "citizens in general." *Pet.* at 21. But it is well settled that the

assertion of such a generalized injury is insufficient to satisfy the injury-in-fact requirement. See *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1258-59 (Ala. 2004) (“even if this Court was inclined to take judicial notice of the Legislature’s finding . . . and presume that the public welfare, health, peace and morals of Cedar Bluff would be injured . . . such an approach does not establish an actual, concrete and particularized injury in fact to [these litigants]”) (internal quotation omitted)).

The only *personalized* claim to injury that Petitioners put forth is that they were “leading proponent[s]” of the laws in question. Pet. at 10 & 11. But that, too, is an insufficient basis on which to establish an injury-in-fact. In *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-63 (2013), the United States Supreme Court squarely held that even the official proponents of an initiative measure lack the kind of personal and tangible interests that would give them standing to defend the measure in court. In that case, the organization in question was not simply a proponent of the law; it had proposed the initiative to the attorney general, collected the signatures required to qualify the

measure for the ballot, had the exclusive right to file the measure with election officials to put it on the ballot, and possessed control over the arguments in favor of the initiative that would appear in ballot pamphlets. *Id.* at 2662. Even then, the Court held, once the measure was approved by the voters, because the organization lacked any authority to directly enforce the measure in question, they lacked the kind of personal stake in defending its enforcement that was distinguishable from the general interest of every citizen of the state. *Id.* at 2663. The organization there, like the Petitioners here, had nothing more than a "keen interest in the issue." *Id.* at 2659. As such, "to allow [Petitioners] to proceed would be tantamount to rewriting the law of standing." *Grand Lodge*, 344 So. 2d at 1214.

II. Petitioners Have No "Clear Legal Right" To Relief Because They Improperly Seek To Enforce The State's Own Interest As Sovereign In The Enforcement Of Its Laws, Which Can Only Be Asserted By State Officials, Not By Private Parties.

As noted above, "[a] writ of mandamus is an extraordinary remedy." *Jim Walter Res., Inc.*, 91 So. 3d at 52 (quotation omitted). Again, such a writ may issue only when the following four factors are present: "(1) a clear

legal right *in the petitioner* to the order sought; (2) an imperative duty upon [a public officer] to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Id.* (emphasis added).

Under the first prong of that test, private parties may bring a mandamus proceeding in the name of the state – like the one Petitioners have brought here, see Pet. at 20-21 – only when the order they seek is one that provides a concrete benefit to some or all members of the public, not merely the vindication of the State's own interest in the enforcement of its laws. *Rodgers v. Meredith*, 146 So. 2d 308, 314 (Ala. 1962). For example, in *Kendrick*, mandamus was sought to "require[] the County to install voting machines," a concrete duty owed to the public. 54 So. 2d at 446. Likewise, in *Homan v. State ex rel. Smith*, 89 So. 2d 184 (Ala. 1956), mandamus was sought to require an election before a town could be annexed by a neighboring city. *Id.* at 186. Because the ability to vote "is one in which the public, all the people of [the community], have an interest," *id.* (citing *Kendrick*, 54 So. 2d at 447), these mandamus actions were allowed. In other instances, this

Court has allowed mandamus actions to compel public officials to provide funds to a local library, to pay moneys owed, and to assess the petitioner's property taxes. See *Gray v. State ex rel. Garrison*, 164 So. 293 (Ala. 1935); *State ex rel. Holcombe v. Stone*, 166 So. 602 (Ala. 1936); *State ex rel. Turner v. Henderson*, 74 So. 344 (Ala. 1917); *State ex rel. Matson v. Laurendine*, 74 So. 370 (Ala. 1917).

In contrast, Petitioners do not seek relief that would ensure the provision of any concrete benefit (such as the provision of voting machines or funds for a library) to the public; rather, they seek to vindicate the State of Alabama's interest — as sovereign — in ensuring that its laws are enforced. Under settled law, that is not the type of relief that a private party may seek in a mandamus action. Any such mandamus action must be brought by state officials. Only "the state may . . . enforce rights which affect it in its sovereign capacity," *State ex rel. Chilton Cnty. v. Butler*, 142 So. 531, 532 (Ala. 1932); see also *Kendrick*, 54 So. 2d at 447 (holding that a proceeding to enforce a duty owed to the state can be brought only by the Attorney General).

This Court has repeatedly enforced this important restriction, which protects the State's exclusive ability to protect its own interests as sovereign, by dismissing mandamus actions, like the action here, in which private parties seek to compel compliance with a law not to obtain a particular benefit for themselves or the public, but merely to vindicate the State's interest in enforcing its laws.¹ For example, in *Morrison v. Morris*, 141 So. 2d 169 (Ala. 1962), a member of a county board of equalization sought a writ of mandamus to void notifications that had

¹ The restriction on *who* gets to decide if the State will seek to force compliance with its own laws assumes heightened importance where, as here, the State could reasonably decide that Respondents are not bound by the obligation that Petitioners seek to enforce. The Supreme Court and the Eleventh Circuit repeatedly have stated that government officials may abide by a federal district court's ruling that a law is invalid even if those officials are not parties in the case. For example, in *Made in the USA Found. v. United States*, 242 F.3d 1300, 1309-11 (11th Cir. 2001), the Eleventh Circuit cited with approval language from a U.S. Supreme Court decision observing that the Court could "assume" that federal officials "would abide by an authoritative interpretation of [a federal statute] and constitutional provision by the District Court, even though they would not be directly bound by such a determination." *Id.* at 1309 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). Given this rule of law, it might be wholly rational for the State of Alabama to choose not to attempt to force compliance with marriage restrictions that have been deemed unconstitutional, and Petitioners should not be permitted to usurp that decision and proceed as if bearing the mantle of the State.

been sent to certain taxpayers. The plaintiff alleged that the notifications were unlawful because the "procedure prescribed by statute [] for the conduct of the Board's activities had not been followed." *Id.* at 170. This Court held that the "authority of these Boards, having emanated from the State, it necessarily follows that the functioning of the Boards is a matter affecting the State, which has a peculiar interest in the uniformity of their activities." *Id.* at 169-70. Accordingly, the plaintiff was not authorized to institute proceedings to enforce this sovereign duty. *Id.* Similarly here, Petitioners allege that the actions of Probate Judges in issuing marriage licenses to same-sex couples violate the requirements of state law. But as *Morrison* held, only the State – not private parties – can vindicate the State's peculiar interest in compliance with its own laws.

In *State ex rel. Foshee v. Butler*, 142 So. 533 (Ala. 1932), a local taxpayer sought a writ of mandamus to require the county tax assessor to increase the assessment recorded for the local power company. *Id.* at 533-34. The Court held that an increase in the power company's assessment would have no effect on any personal right of

the relator, and that the duty imposed by the assessment requirement instead ran to the state, so the taxpayer lacked a cognizable mandamus claim. *Id.* The Court reached a similar conclusion in *Chilton County*, 142 So. at 533, rejecting a mandamus action brought by a county that would likewise be unaffected by the writ that it sought. The Court in *Chilton County* contrasted an earlier case – *Mooring v. State*, 91 So. 869 (Ala. 1921) – in which “the relief sought affected the private right of relator,” a real estate owner and taxpayer who sought a revaluation of his and other owners’ property. *Chilton County*, 142 So. at 533.

Like the relief improperly sought by private parties in *Foshee* and *Chilton County*, the relief sought by the Petitioners here is the enforcement of an asserted duty that runs to the State. The provisions Petitioners seek to enforce here do not establish “official dut[ies] to the public at large,” rather – at most – they establish “only duties to the state in its sovereign capacity.” *Foshee*, 142 So. at 534. The provisions do not bestow “a specific legal right in the petitioner to have [an] act performed.” *Kendrick*, 54 So. 2d at 447. They do not call for Probate

Judges to extend payments, to lodge documents, to revalue property, or to provide services; indeed, the provisions don't require them to do anything. Rather, the provisions set legal parameters for the execution of Probate Judges' duties, much like a host of other rules that govern their duties in the marriage-license context and elsewhere. The Judges' compliance with these provisions is a manifestation of the general duty of governmental bodies to obey their own rules and procedures. As in *Morrison*, that is not the kind of obligation that a writ of mandamus is designed to enforce. Petitioners are "merely seeking to force the state, by the unauthorized use of its name, to control an administrative function of . . . its officers, in respect to a matter which is the prerogative of the state." *Foshee*, 142 So. at 534.

In sum, Petitioners seek to represent the State based on their assertion that "[t]he Alabama public has an interest in probate judges' faithful performance of their duties under the Marriage Amendment and the Marriage Act." Pet. at 21. But that claim falls squarely under the type of mandamus action that must be brought by state officials. The interest that Petitioners' describe – in ensuring that

public officials faithfully perform their duties under state law – belongs to the State of Alabama as sovereign and may be asserted only by the Attorney General. Under this Court's precedents, and to preserve the State of Alabama's authority over its own exclusive interests, the Petition should be dismissed.

CONCLUSION

The Emergency Petition for Writ of Mandamus is defective on its face because Petitioners do not have standing to bring it and cannot, as private parties, properly invoke this Court's jurisdiction to assert the interests of the State. For this and for all the foregoing reasons, *Amicus Curiae* Equality Alabama respectfully requests that it be dismissed, pursuant to Rule 21(b) of the Alabama Rules of Appellate Procedure, without requiring any Answer from any Respondent.

Respectfully Submitted,

Ayesha Khan*
D.C. Bar No. 426836
Americans United for
Separation of Church
and State
1301 K Street, N.W.
Washington, D.C. 20005
202-466-3234
khan@au.org

Shannon P. Minter*
Cal. Bar No. 168907
Christopher F. Stoll*
Cal. Bar No. 179046
National Center for Lesbian
Rights
870 Market St., Ste. 370
San Francisco, CA 94102
415-392-6257
SMinter@nclrights.org
CStoll@nclrights.org

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/s/ J. Richard Cohen
J. Richard Cohen
Ala. Bar No. ASB-1092-N73J
David Dinielli*
Cal. Bar No. 177904
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
334-956-8200
richard.cohen@splcenter.org
david.dinielli@splcenter.org

Randall C. Marshall
Ala. Bar No. ASB-3023-A56M
ACLU of Alabama Foundation
P.O. Box 6179
Montgomery, AL 36106
rmarshall@aclualabama.org

*Counsel for Amicus Curiae
Equality Alabama*