ADMINISTRATIVE ORDER OF THE
CHIEF JUSTICE OF THE ALABAMA SUPREME COURT

WHEREAS, IN CONSIDERATION OF THE FOLLOWING:

On March 3, 2015 the Alabama Supreme Court issued a lengthy opinion upholding the constitutionality of Article I, Section 36.03(b), Ala. Const. 1901 ("the Sanctity of Marriage Amendment"), and Section 30-1-19(b), Ala. Code 1975 ("the Marriage Protection Act"), which both state: "Marriage is inherently a unique relationship between a man and a woman." Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___ (Ala 2015) (hereinafter "API").

The API opinion relied on earlier opinions of the United States Supreme Court and the Alabama Supreme Court for authority. In 1885 the Supreme Court of the United States described marriage as "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Murphy v. Ramsey, 114 U.S. 15, 45. The Alabama Supreme Court similarly stated that "'[T]he relation of marriage is founded on the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness.'" Goodrich v. Goodrich, 44 Ala. 670, 675 (1870).

In its March 3 order in API, the Alabama Supreme Court stated that "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act]. Nothing in the United States Constitution alters or overrides this duty."

A week later the Court reaffirmed that its March 3 order bound every Alabama probate judge "to the end of achieving order and uniformity in the application of Alabama's marriage laws." API (Order of March 10, 2015). The Court also stated that "all probate judges in this State may issue marriage licenses only in accordance with Alabama law as described in our opinion of March 3, 2015." API (Order of March 12, 2015).

On June 26, 2015, approximately three months after the Alabama Supreme Court issued its orders in API, the United States Supreme Court in Obergefell v Hodges, 135 S. Ct. 2584 (2015), held unconstitutional certain marriage laws in the

states of Michigan, Kentucky, Ohio, and Tennessee, which fall within the jurisdiction of the Sixth Circuit Court of Appeals. In its 5-4 opinion the high court noted that "[t]hese cases come from Michigan, Kentucky, Ohio, and Tennessee." Obergefell, 135 S. Ct. at 2593.

On June 29, 2015, three days after the issuance of the Obergefell opinion, the Alabama Supreme Court invited the parties in API to address **the "effect of the Supreme Court's decision on this Court's existing orders in this case** no later than 5:00 p.m. on Monday, July 6." API (Order of June 29, 2015) (emphasis added).

Several parties filed briefs in response to that request. Additionally, on Sept 16, 2015, Washington County Probate Judge Nick Williams filed an "Emergency Petition for Declaratory Judgement and/or Protective Order in Light of Jailing of Kentucky Clerk Kim Davis," which requested the Court "to prevent the imprisonment and ruin of their State's probate judges who maintain fidelity to their oath of office and their faith." On September 22, Elmore County Probate Judge John Enslen joined Judge Williams's Emergency Petition. On October 5, Judge Enslen filed a separate petition for a declaratory judgment arguing additional grounds for relief.

In October, Eunie Smith, President of the Eagle Forum of Alabama and Dr. John Killian, Sr., former President of the Alabama Baptist State Convention, published a guest opinion on AL.com stating that they "anxiously await" the pending decision on the effect of Obergefell on the orders in API. In December, the Southeast Law Institute of Birmingham, whose President is local counsel for some of the parties in API, stated in an online commentary that he was "encouraging all of those who have great concern over this issue to be prayerfully patient" as the Court deliberates.

Confusion and uncertainty exist among the probate judges of this State as to the effect of Obergefell on the "existing orders" in API. Many probate judges are issuing marriage licenses to same-sex couples in accordance with Obergefell; others are issuing marriage licenses only to couples of the opposite gender or have ceased issuing all marriage licenses. This disparity affects the administration of justice in this State.

I am not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.

Nevertheless, recent developments of potential relevance since Obergefell may impact this issue. The United States Court of Appeals for the Eighth Circuit recently ruled that Obergefell did not directly invalidate the marriage laws of states under its jurisdiction. While applying Obergefell as precedent, the Eighth Circuit rejected the Nebraska defendants' suggestion that Obergefell mooted the case. The Eighth Circuit stated: "The [Obergefell] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee -- not Nebraska." Waters v Ricketts, 798 F.3d 682, 685 (8th Cir. 2015) (emphasis added). In two other cases the Eighth Circuit repeated its statement that Obergefell directly invalidated only the laws of the four states in the Sixth Circuit. See Jernigan v Crane,796 F.3d 976, 979 (8th Cir. 2015) ("not Arkansas"); Rosenbrahn v Daugaard, 799 F.3d 918, 922 (8th Cir 2015) ("not South Dakota").

The United States District Court for the District of Kansas was even more explicit: "While Obergefell is clearly controlling Supreme Court precedent, it did not directly strike down the provisions of the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses ...." Marie v Mosier, 2015 WL 4724389 (D. Kan. August 10, 2015). Rejecting the Kansas defendants' claim that Obergefell mooted the case, the District Court stated that "Obergefell did not rule on the Kansas plaintiffs' claims." Id.

The above cases reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court. "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). "[N]o court can make a decree which will bind anyone but a party ... no matter how broadly it words its decree." Alemite Mfg. Corp. v Staff, 42 F.3d 832, 832 (2d Cir. 1930). See also Rule 65, Fed R. Civ. P., on the scope of an injunction.

Whether or not the Alabama Supreme Court will apply the

reasoning of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of Kansas, or some other legal analysis is yet to be determined. Yet the fact remains that the administration of justice in the State of Alabama has been adversely affected by the apparent conflict between the decision of the Alabama Supreme Court in API and the decision of the United States Supreme Court in Obergefell.

NOW THEREFORE,

As Administrative Head of the Unified Judicial System of Alabama, authorized and empowered pursuant to Section 12-2-30(b)(7), Ala. Code 1975, to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state," and under Section 12-2-30(b)(8), Ala. Code 1975, 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";

And in that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." United States v. Mine Workers, 330 U.S. 258, 293 (1947) (quoted in Fields v. City of Fairfield, 143 So. 2d 177, 180 (Ala. 1962));

IT IS ORDERED AND DIRECTED THAT:

Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.

DONE January 6, 2016.

Roy S. Moore
Chief Justice