

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

JAMES N. STRAWSER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
LUTHER STRANGE, in his official)	Civil Action No. 14-0424-CG-C
capacity as Attorney General for the)	
State of Alabama,)	
)	
Defendant.)	
)	

EMERGENCY MOTION FOR ENFORCEMENT OF INJUNCTION

Come now Plaintiffs in this action and move this Court for an order enforcing the injunctive terms of the January 26, 2015, Order (Doc. 29) and the February 12, 2015, Order (Doc. 55) of this Court. Specifically, Plaintiffs move this Court to order the Attorney General to comply with this Court’s injunction by exercising his control over litigation now pending in the Alabama Supreme Court to cause its dismissal rather than to permit litigation in the name of the State seeking to enforce Alabama’s marriage laws which prohibit same-sex marriage to go forward. *See Ex parte State ex rel. Alabama Policy Institute and Alabama Citizens Action Program v. King*, Case No. 1140460 (copy of petition attached as Exhibit 1). In support of this motion, Plaintiffs state as follows:

1. On January 23, 2015, in *Searcy v. Strange*, SDAL Civil Action No. 14-0208-CG-N, this Court granted the *Searcy* plaintiffs’ motion for summary judgment, holding that “ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19

are unconstitutional because they violate they Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.” *Searcy* Memorandum Opinion and Order, Doc. 53 at 10. The Court further held that the Attorney General was enjoined from enforcing those laws. *Id.*

2. On January 26, 2015, in *Strawser v. Strange*, SDAL Civil Action No. 14-0424-CG-C, this Court issued an order granting the *Strawser* plaintiffs a preliminary injunction, relying in part on the *Searcy* legal findings. The preliminary injunction stated:

Accordingly, the 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, Doc. 29 at 4.

3. Both the *Searcy* judgment and the *Strawser* preliminary injunction were stayed for 14 days, until February 9, 2015, to afford the Attorney General time to seek a stay pending appeal from the Eleventh Circuit. *Searcy* Doc. 59; *Strawser* Doc. 29 at 4. Both the Eleventh Circuit and the United States Supreme Court declined to enter a stay. *See Searcy v. Attorney General, State of Alabama*, No. 15-10295-C, consolidated with *Strawser v. Attorney General, State of Alabama*, No. 15-10313-A (11th Cir. Feb. 3, 2015) (order denying stay pending appeal), and *Strange v. Searcy*, --- S. Ct. ----, 2015 WL 505563 (U.S. Feb. 9, 2015) (order denying stay pending disposition of Sixth Circuit cases).

4. On Monday, February 9, 2015, when this Court's stay was lifted, fewer than ten Alabama counties were complying with their constitutional obligation to issue marriage licenses to qualified couples without regard to their gender or sexual orientation. *See*

http://www.al.com/news/index.ssf/2015/02/just_in_time_for_valentines_da.html, last visited February 17, 2015. Plaintiffs then filed an Emergency Motion to File an Amended Complaint and for Injunctive Relief. Doc. 43. The motion to amend was granted the next day and a preliminary injunction hearing set for Thursday, February 12. Order, Doc. 46. The First Amended Complaint added Mobile County Probate Court Judge Don Davis as a defendant and named additional plaintiff couples.

5. Following the preliminary injunction hearing, this Court entered an Order granting the motion for preliminary injunction, holding:

Probate Judge Don Davis is hereby ENJOINED from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage. If Plaintiffs take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, Judge Davis may not deny them a license on the ground that Plaintiffs constitute same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order pertaining to same-sex marriage. This injunction binds Judge Don Davis 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 or fail to recognize same-sex marriage.

Doc. 55 at 7-8.

6. Currently, the great majority of Alabama's counties are complying with the Fourteenth Amendment and issuing marriage licenses to qualified applicant couples without regard to their gender or sexual orientation.¹ See http://www.al.com/news/index.ssf/2015/02/just_in_time_for_valentines_da.html, last visited February 17, 2015.

7. In the *Strawser* Order, this Court enjoined the Attorney General 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.” Doc. 29 at 4.

8. In addition, the U.S. Supreme Court has held that Rule 65 embodies “the common law doctrine that a decree of injunction not only binds the parties defendants but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.” *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). “[D]efendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” *Id.*

¹ As this Court explained in the *Searcy* Order Clarifying Judgment (*Searcy* Doc. 65 at 3):

The preliminary injunction now in effect thus does not require [a probate court judge] to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the [probate court judge] to issue such licenses. As in any other instance involving parties not now before the court, the [probate court judge's] obligation to follow the law arises from sources other than the preliminary injunction.

9. More broadly, federal courts have inherent jurisdiction and broad authority to protect their ability to enter judgment and to ensure that their orders are effectuated. *See United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1973) (citing *United States v. United Mine Workers of America*, 330 U.S. 258 (1947)). Government officials bound by an injunction may not permit the injunction to be frustrated by the actions of non-parties; they may not “accomplish indirectly what the court has forbidden such officers to accomplish directly.” *See, e.g., Gilmore v. City of Montgomery*, 472 F.2d 832, 836 (5th Cir. 1973); *see also Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 180 (1973) (holding that a court’s authority to apply and enforce an injunction broadly is especially clear in cases enforcing public rights).

10. Section 36-15-21 of the Alabama Statutes provides: “All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General.”

11. In *Ex Parte King*, 59 So. 3d 21, 26-27 (Ala. 2010), the Alabama Supreme Court held that, under Section 36-15-21, the Alabama Attorney General has the authority to direct and control any litigation “that is filed in the State’s name and on its behalf to vindicate its policies and concerns.” 59 So. 3d at 26-27. In *Ex Parte King*, a district attorney filed an action “in the name of the State of Alabama” against pharmaceutical companies for alleged violations of a state law. *Id.* at 23. The Alabama Attorney General’s office sought to dismiss the complaint over the objections of the district attorney, but the trial court refused to allow it. *Id.*

at 24. The Attorney General then filed a mandamus action asserting its authority to control the litigation with the Alabama Supreme Court. *Id.* The Alabama Supreme Court held that the Attorney General's authority to direct and control any litigation involving the interests of the State includes "the prerogative to step in and dismiss the action on behalf of the State." *Id.* at 29. *See also Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007) (citations and internal quotation marks omitted):

The attorney general is . . . the chief law officer of the state, and on him are conferred various authorities and duties in connection with instituting and prosecuting, in the name of the state, suits and other proceedings . . . for the preservation and protection of the rights and interests of the state. Essentially all litigation concerning the interest of the state or any department thereof [lies] under the direction and control of the attorney general.

12. On February 11, 2015, two private advocacy organizations filed an action in the Alabama Supreme Court seeking "mandamus relief *in the name of the State*" against all Alabama probate judges. *Ex parte State ex rel. Alabama Policy Institute and Alabama Citizens Action Program v. King*, Exhibit 1 at p. 20 (emphasis added). Styled as a petition on behalf of the State, the action seeks the following relief: "Petitioner [the State of Alabama], by the Relators, seeks a writ of mandamus directed to each Respondent judge of probate, commanding each judge not to issue marriage licenses to same-sex couples and not to recognize any marriage licenses issued to same-sex couples." *Id.* at p. 11. The petition avers that "Petitioner [the State of Alabama], through the Relators, has a clear legal right to Respondents' performance . . ." *Id.* at 21.

13. On Friday, February 13, the Alabama Supreme Court ordered the respondents in *State v. King* to “file answers and, if they choose to do so, briefs, addressing issues raised by the petition,” by February 18, and gave the petitioner relators until February 20 to respond. *See Order* (copy attached as Exhibit 2).

14. The relief sought in the Alabama Supreme Court, in the name of the State of Alabama, seeks to enforce the marriage laws of Alabama which prohibit same-sex marriage. Exhibit 1. This Court’s orders in this case and in *Searcy v. Strange*, SDAL Civil Action No. 14-0208 (Memorandum Opinion and Order, Doc. 53, and the Order Clarifying Judgment, Doc. 65) expressly prohibit the Attorney General and all those under his control or acting in concert or participation with him from enforcing or seeking to enforce those laws.

15. Under Section 36-15-21 of the Alabama Statutes and the holding of *Ex Parte King*, the Attorney General of the State of Alabama has the authority to direct and control the action filed in *State v. King* because that action was filed “in the name of the State” and seeks to represent the interest of the State in enforcing its laws. That authority includes “the prerogative to . . . dismiss the action on behalf of the State.” 59 So. 3d at 29.

16. The Attorney General has exercised his authority over the claim in *State v. King* to permit the claim to proceed, even though it seeks to enforce the very provisions of Alabama law that were declared unconstitutional by this Court and that this Court’s order enjoins the Attorney General from enforcing or seeking to enforce. By taking that action, which if successful would have the same legal force

and effect as if the Attorney General himself were bringing the mandamus action, the Attorney General is violating this Court's orders enjoining him or any party subject to his control from seeking to enforce Alabama's laws barring same-sex couples from marriage.

17. In addition to violating the express terms of this Court's injunction, the Attorney General's action in permitting the claim in *State v. King* to proceed is also improperly thwarting the denial of the State's request for a stay of this Court's orders by the Eleventh Circuit and the United States Supreme Court. One of the counsel for the petitioners in *State v. King*, Eric Johnson, was quoted in an AL.com article: "We want the (Alabama) Supreme Court to say what we are going to do in Alabama until the U.S. Supreme Court issues their opinion in June. . . . We just want the status quo. It's only four months until June. There's no reason to put everyone through this confusion." See http://www.al.com/news/birmingham/index.ssf/2015/02/alabama_supreme_court_agrees_t.html, last visited February 17, 2015. Thus, the petitioner relators, in the name of the State of Alabama, seek precisely what the United States Supreme Court refused to grant in this case and in *Searcy* – a stay pending the Supreme Court's decision in the Sixth Circuit cases before it this term. *Strange v. Searcy*, --- S. Ct. ---, 2015 WL 505563 (U.S. Feb. 9, 2015) (order denying stay pending disposition of Sixth Circuit cases). See also *Searcy v. Attorney General, State of Alabama*, No. 15-10295-C, consolidated with *Strawser v. Attorney General, State of*

Alabama, No. 15-10313-A (11th Cir. Feb. 3, 2015) (order denying stay pending appeal).

18. Jefferson County Probate Court Judge King has now moved to intervene in this action. *See* Emergency Verified Motion, Doc. 58. Proposed intervenor King asserts his legal dilemma:

Judge King faces an imminent risk of being subjected to a state court Order that will put him in the position of having to choose either to disregard the United States Constitution, which he is sworn to uphold, thereby subjecting him to liability and perhaps personal liability for damages and attorney fees, or to disregard a state court Order thereby subjecting him to contempt proceedings, sanctions and/or possible impeachment under Alabama law.

Id. at 3, ¶ 9. Probate Court Judge King is named directly in the petition. *See* Exhibit 1, p. 1.

19. While Defendant Don Davis is under a direct order compelling his compliance (*see* Doc. 55), the petition for a writ of mandamus in *State v. King* seeks relief against all probate court judges in the State of Alabama, including Defendant Davis. *See* Exhibit 1, p. 1. Thus, by its terms, the petition seeks relief that interferes with this Court's Order enjoining Defendant Davis from enforcing the marriage ban, as well as with the injunction against the Attorney General. *See* Doc. 55.

20. Just as the Attorney General, bound by the orders of this Court, could not bring such an action directly, or countenance others on behalf of the State doing so, he cannot permit private parties to stand in his shoes and speak in the name of the State as petitioner relators in seeking such mandamus relief when the Attorney

General has authority to control the prosecution of the mandamus action and can elect either to dismiss it or to permit it to proceed.²

21. The mandamus action in the name of the State of Alabama improperly seeks to accomplish what the State, through the Attorney General, is expressly prohibited from doing directly. Neither Rule 65 nor this Court's broad authority to enforce its injunction permit the Attorney General's acquiescence in the mandamus action to be used as a vehicle to make an end-run around this Court's orders and determinations of federal constitutional law.

22. Under this Court's injunction, the Attorney General may not tacitly permit others, in the name of the State, to violate this Court's injunction while he possesses the power, authority and means to stop it. If that were not the case, then the State could fail to comply with any federal court order invalidating a state law and enjoining its enforcement simply by permitting private parties, as petitioner relators speaking in the name of the State, to file a mandamus action like that filed by the petitioner relators here, seeking the law's enforcement. The Attorney General's action in permitting a mandamus action seeking enforcement of the very

² Because petitioners in *State v. King* seek to stand in the shoes of the State seeking to compel Alabama probate court judges to continue to enforce the State provisions declared unconstitutional by this Court in *Strawser* and *Searcy*, the petitioners there are "in active concert or participation with" the Attorney General and hence themselves are bound by this Court's injunction. However, for the reasons set forth *infra*, the Court need not address that issue and their participation is not necessary because this Court can order effective relief through the Attorney General who has authority to control the prosecution of the writ petition and is expressly bound by the injunction prohibiting enforcement of the marriage provisions found to be unconstitutional.

laws this Court has struck down to go forward, in an action brought on behalf of the State, violates the terms of the injunction.

23. Plaintiffs seek to effectuate the rights declared by this Court through its orders in this case and in *Searcy*.

WHEREFORE, Plaintiffs seek to enforce the terms of the injunction currently in place by asking the Court to direct the Attorney General to cease acquiescing in the action brought in the name of the State in *State v. King, et al.*, Case No. 1140460 (Alabama Supreme Court) and to cause dismissal of the Emergency Petition for Writ of Mandamus forthwith.

Respectfully Submitted,

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* 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 February 17, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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