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

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| JAMES N. STRAWSER, *et al.* | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. |
| | ) | 1:14-cv-00424-CG-C |
| LUTHER STRANGE, in his official capacity as Attorney General of the State of Alabama, *et al*., | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANT ATTORNEY GENERAL STRANGE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR ENFORCEMENT OF JUDGMENT (DOC. 60)**

Defendant Luther Strange, for his opposition to the Plaintiffs' Emergency Motion for Enforcement of Judgment (doc. 60), states as follows:

1. Plaintiffs seek an order that they do not need, against a party who has not harmed them, that would require the Attorney General to exercise extraordinary powers not heretofore recognized under state law, in a manner that would only heighten the tension existing between state and federal courts. Specifically, Plaintiffs seek an order requiring the Attorney General to assume control of litigation initiated by private citizens in state court – a mandamus petition filed in the Alabama Supreme Court seeking an order requiring Probate Judges who are not parties before this Court to comply with state law – and to dismiss that action. Their request should be denied.

2. First, Plaintiffs have not demonstrated any need for further relief. The plaintiffs before the Court are all Mobile County residents (Amended Complaint, doc. 47 at ¶¶ 18-21), and this Court has ordered the Mobile County Probate Court to issue marriage licenses to same-sex

couples. They have everything they need. Plaintiffs have not shown that further relief from the Attorney General would help them, or that the absence of further relief would harm them.

3. For these same reasons, Plaintiffs lack standing to seek further relief from the Attorney General. They have alleged no injury that was not addressed by this Court's previous orders, and no ongoing, concrete harm that is fairly traceable to the Attorney General's conduct or that can be redressed by further relief against the Attorney General. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) ("A party establishes standing ... when it demonstrates the existence of (1) an actual, concrete and particularized 'injury in fact' – 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.'"). Some, if not all, of the Plaintiffs are already married or have received marriage licenses; at the very least, Plaintiffs have not demonstrated how they are unable to do so in light of this Court's injunction against the Mobile County Probate Judge. Plaintiffs therefore have not shown an injury, or even if one exists, how it was caused by the Attorney General or how a further injunction against Attorney General Strange would redress that injury.

4. Second, Plaintiffs have not demonstrated that allowing the state court action to proceed will harm anyone. It is not established that the Alabama Supreme Court will rule on the merits of the mandamus petition. When ordering the Respondents to file answers to the Petition, the Court stated that one of the issues will be whether the Petition is properly before it:

> The respondents are ordered to file answers and, if they choose to do so, briefs, addressing issues raised by the petition, including, but not limited to, <u>any issue relating to standing or otherwise relating to this Court's subject-matter jurisdiction</u>, and any issue relating to the showing necessary for temporary relief as requested in the petition.

Order, *In re Alan L. King, et al.*, Case No. 1140460, dated February 13, 2015 (emphasis added) (copy attached to Plaintiffs' Motion as doc. 60-2). The Alabama Supreme Court may determine that the petition, which was filed in the Alabama Supreme Court and not appealed from a lower court, is not even properly before it.

5. Nor is it established that if the Alabama Supreme Court addresses the merits, it will affect the application of this Court's previous orders. This Court has made clear that its previous injunctions applied to the parties before it (and those in concert with parties). *Searcy* doc. 72 (holding that a probate judge who "is not a party in this case" has not been "directly order[ed] . . . to do anything."). The mandamus petition (doc. 60-1) appears to ask whether probate judges who are *not* subject to the previous injunctions remain under an obligation to follow state law: The Petition, doc. 60-1 at pages 13-19, argues that Probate Judges are not bound by the Court's previous injunction because they are not *parties* to the actions before this Court and are not in privity with parties (the Petition was filed before Probate Judge Don Davis was added as a party). The Plaintiffs are incorrect to argue that the Petition seeks to address the obligations of Probate Judges who are party to proceedings before this Court.

6. Parties, of course, can be added to a lawsuit, or new actions can be filed that would subject Probate Judges to injunctions, if the Plaintiffs demonstrate the elements for injunctive relief. For example, when the Amended Complaint added a Probate Judge as a defendant, this Court effectively extended its injunction to cover him too. Regardless of how the Alabama Supreme Court rules on the merits, if it addresses the merits at all, that ruling should not be an impediment to a person who is denied a marriage license from bringing a lawsuit against the Probate Judge who denied the license.

7. Third, Plaintiffs have not shown that the Attorney General has violated this Court's injunctions. Those injunctions prohibit him from enforcing Alabama's marriage laws to the extent those laws prohibit "same-sex marriage," and the Attorney General has taken no action to enforce Alabama's marriage laws. The injunctions do not require the Attorney General to take affirmative steps to stop private citizens from inquiring into the state-law matters at issue in the pending mandamus action in the Alabama Supreme Court: the obligations of local officials, who are outside the Attorney General's control, and who are not parties to the proceedings before this Court. Plaintiffs take an overbroad reading of the injunctions to argue that they require the Attorney General to take affirmative, discretionary action against private citizens (assuming, as discussed below, that the Attorney General possesses such powers). This Court's injunctions forbid the Attorney General to take action; they do not compel action.

8. Fourth, the Plaintiffs are incorrect to argue that the Petitioners in the state-court mandamus petition are acting "in concert" with the Attorney General. The Attorney General did not authorize or encourage the Petitioners. But even if the private Petitioners are somehow bound by this Court's previous orders because they are in privity with the Attorney General, or somehow under his control, then Plaintiffs should seek to add the Petitioners as parties and seek enforcement of the injunctions directly against Petitioners. If a third party is violating this Court's injunctions, then further relief should address those parties, not the Attorney General.

9. Fifth, it is not clear that the Attorney General possesses the authority under state law to assume control of the state-court litigation and dismiss it over the Petitioners' objections. And whether the Attorney General possesses such authority is indeed a question of Alabama state law, a matter on which the federal courts write with "disappearing ink."See *LeFrere v. Quezada*, 582 F.3d 1260, 1262 (11th Cir.2009) ("Because state supreme courts are the final

arbiters of state law, when we write to a state law issue, we write in faint and disappearing ink, and once the state supreme court speaks the effect of anything we have written vanishes ...." (quotation marks omitted)). The Alabama Supreme Court knows that the Attorney General is under a federal injunction that forbids him from enforcing Alabama's traditional marriage laws. And the Alabama Supreme Court can consider and decide whether that fact precludes the petitioners in the mandamus action—as a matter of state law—from receiving the writ of mandamus that they have requested. .

10. For his part, the Attorney General cannot control the Alabama Supreme Court's decision on that point. The Attorney General *may* assume control of litigation brought by District Attorneys, as in *Ex parte King*, 59 So. 3d 21 (Ala. 2010), or certain Executive officers like the Secretary of State, as in *Chapman v. Gooden*, 974 So. 2d 972 (Ala. 2007). But it is not clear that the Attorney General possesses such authority in actions brought by *private citizens*. Such authority has never been recognized by an Alabama court. And, if this Court recognized such authority and ordered the Attorney General to move to dismiss the state-court suit, the Alabama Supreme Court would be free to determine otherwise and to deny the Attorney General's motion to dismiss.

11. Moreover, assuming the Alabama Supreme Court believes the mandamus petition is procedurally proper (an open question on which we take no position), it seems likely that the Alabama Supreme Court would simply deny the Attorney General's motion to dismiss that petition. The petitioners argue in their mandamus petition that state law allows private citizens to bring a mandamus petitions to require a public official to comply with state law.[1] If they are

[1] *See, e.g.*, *Kendrick v. State ex rel. Shoemaker*, 54 So. 2d 442, 447 (1951) ("It is now the settled rule in Alabama that a mandamus proceeding to compel a public officer to perform a legal duty in which the public has an interest, as distinguished from an official duty affecting a private interest merely, is properly brought in the name of the State on the relation of one or more persons interested in the performance of such duty to the public; but if the matter

correct, it would seem that the purpose for such a rule would be to address those occasions when a state official – a District Attorney or Attorney General – who otherwise might bring the action is unable or unwilling to do so. If the Attorney General could simply dismiss such an action, it is not clear what purpose there would be for allowing private citizens to bring such an action in the first place.

12. Sixth, interests of comity and federalism counsel against any order from a federal court recognizing new authority of a state official, as a matter of state law, when that state-law authority has not been recognized by a state court, and when it could be taken away by a state court. The same comity and federalism interests counsel against a federal order that would in effect bar a state court from considering a question (the obligations of non-parties) which has not been placed before this Court, and which may not even be addressed on the merits by the State court system.

13. It should go without saying that this Court cannot enjoin the actions of the Supreme Court of Alabama, which is actually the "Emergency" relief that Plaintiffs seek. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Anti–Injunction Act's "core message is one of respect for state courts," and it "broadly commands that those tribunals 'shall remain free from interference by federal courts.' " *Smith v. Bayer Corp.*, —— U.S. ——, 131 S.Ct. 2368, 2375, (2011) (quoting *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 282, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970)). The statute allows three exceptions to this general prohibition, but "those exceptions, though designed for important purposes, 'are narrow

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concerns the sovereign rights of the State, it must be instituted on the re lation of the Attorney General, the law officer of the State."). The Petitioners in the Alabama Supreme Court cite *Shoemaker* and like cases for their authority to bring the Petition.

and are not [to] be enlarged by loose statutory construction.' " *Id.* (quoting *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 146, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)) (internal quotation marks omitted) (alteration in original). The Supreme Court has long emphasized that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Id.* (quoting *Atlantic Coast Line*, 398 U.S. at 297, 90 S.Ct. 1739). *See generally SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 764 F.3d 1327, 1335-36 (11th Cir. 2014) (explaining the very narrow exceptions to the anti-injunction act).

14. The *Rooker-Feldman* doctrine also bars the relief Plaintiffs seek. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). "Under that doctrine federal district courts generally lack jurisdiction to review a final state court decision." *Doe v. Florida Bar*, 630 F.3d 1336, 1340 (11th Cir. 2011). Instead, "the authority to review final decisions from the highest court of the state is reserved to the Supreme Court of the United States." *Id.* If a Probate Judge who opposes the Petition were to lose his case on the merits in the Alabama Supreme Court on the grounds that the Constitution does not require same-sex marriage, then he can challenge that ruling by filing a petition for writ of certiorari to the United States Supreme Court. He cannot challenge the Alabama Supreme Court's decision by preemptively appealing it to this federal district court.

15. Finally, Attorney General Strange is entitled to a hearing before this Court enters such extraordinary further relief. This Court's injunctions prohibit only enforcement of marriage laws; they do not require the Attorney General to exercise affirmative, unrecognized authority against private citizens who have filed a state-court lawsuit to which the Attorney General is not a party. What Plaintiffs really seek is not enforcement of a prior order, but new preliminary

injunctive relief. Rule 65(a) of the Federal Rules of Civil Procedure entitles the Attorney General to a hearing in such circumstances. If the Court is inclined to consider Plaintiffs' request for extraordinary relief, the Attorney General therefore requests a hearing at which these bedrock issues of standing and federalism can be explored in a deliberate and thoughtful way.

Because Plaintiffs have not demonstrated that the requested relief would help them or that they have standing to seek it, that the Attorney General possesses the authority they seek to have him exercise, that the Attorney General is in violation of this Court's orders, or that they are unable to join any official they contend to be in violation of an injunction, the Plaintiffs' Emergency Motion to Enforce Judgment should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on February 17, 2015, I electronically filed the foregoing document using the Court's CM/ECF system which will send notification of such filing to the following persons:

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