

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

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

**DEFENDANT ATTORNEY GENERAL STRANGE’S
RESPONSE IN OPPOSITION TO MOTION TO INTERVENE (DOC. 58)**

Defendant Luther Strange opposes the “Emergency Verified Motion by Jefferson County Probate Judge Alan King for Leave to Intervene” (doc. 58). A probate judge whose jurisdiction rests within the United States District Court for the Northern District of Alabama cannot intervene in this lawsuit for the avowed purpose of pursuing non-adversarial litigation. His motion to intervene should be denied. In opposition to the motion, the Attorney General states as follows:

1. Probate Judge King’s motion to intervene does not meet the bare minimum requirements of Rule 24. *See* Fed. R. Civ. P. 24. His motion to intervene is untimely because it comes *after* the plaintiffs have secured full relief against the defendants. He has no interest in the subject matter of this litigation because this litigation concerns whether the plaintiffs—who reside in the Southern District of Alabama—can secure same-sex marriage licenses and related matters from the Probate Judge of Mobile County, not Probate Judge King. And there is no commonality between any remaining issues in this case (whatever they may be) and the issue

that Probate Judge King apparently wants to address—*i.e.* a pending mandamus action brought against him by third parties in the Alabama Supreme Court.

2. This Court also lacks jurisdiction to address Probate Judge King’s claims. Article III of the U.S. Constitution “limits the jurisdiction of federal courts to cases and controversies.” *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir.2011) (internal quotation marks omitted). Similarly, 28 U.S.C. § 2201 provides that a declaratory judgment may only be issued in the case of “actual controversy,” that is, a “substantial continuing controversy between parties having adverse legal interests.” *Emory v. Peeler*, 756 F.2d 1547, 1551–52 (11th Cir.1985); see 28 U.S.C. § 2201. This “continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury.” *Emory*, 756 F.2d at 1552.

3. These proceedings so far have been cases and controversies between parties taking adverse positions. The Attorney General and the original Plaintiffs took adverse positions on the central issue of the case, the constitutionality of Alabama’s marriage laws. Then, the plaintiffs added as an additional defendant, Mobile County Probate Judge Don Davis. Probate Judge Davis held similarly adverse positions to the Plaintiffs: Plaintiffs desired to receive a marriage license from Probate Judge Davis’ office, and Probate Judge Davis was not at the time issuing such licenses.

4. The motion to intervene seeks to take the litigation in a new direction—one that Article III and other principles of federal jurisdiction do not countenance. The proposed intervenor, Jefferson County Probate Judge Alan King, is already issuing marriage licenses to same-sex couples in Jefferson County. (Doc. 58 at ¶ 3). 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. Judge King avers that the he and plaintiffs hold common interests of law and fact. (*Id.* at ¶ 8). But he does not allege any adversity between his office and the Defendants. There is thus not any case or controversy between Judge King and any party of the Court.

5. Instead, Judge King alleges a purported conflict with a non-party—the Alabama Supreme Court. But the purported controversy is entirely “conjectural, hypothetical, or contingent,” *Emory*, 756 F.2d at 1552, and thus insufficient to grant this Court jurisdiction to issue relief for or against the proposed intervenor. It is only speculative, at the most, that the Alabama Supreme Court will rule on the merits of the mandamus petition to which Judge King is a party. 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, any issue relating to standing or otherwise relating to this Court’s subject-matter jurisdiction, 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 hereto as Exhibit A).

6. Moreover, there is nothing that the Alabama Supreme Court can order Judge King to do that would conflict with any order of this Court. If the Supreme Court holds that Probate Judge King may issue same-sex marriage licenses, there obviously would be no conflict. But even if the Alabama Supreme Court holds that Probate Judge King may *not* issue such licenses, there would be no conflict. As this Court explained in the companion case of *Searcy v. Strange* 14-0208, its injunctions and orders do not even purport to bind officers who were not parties to the case at the time they were issued. *See* Doc. 72. A probate judge who “is not a party in this

case” has not been “directly order[ed] . . . to do anything.” Doc. 72. If a probate judge like Probate Judge King decides not to follow this Court’s understanding of the Constitution, then “actions against [him] or others who fail to follow the Constitution could be initiated by persons who are harmed by their failure to follow the law.” Do. 72. But they are not in violation of any of this Court’s orders. In other words, this Court contemplated that there would be other actions in other courts—such as the Northern District of Alabama or the Alabama state courts—that would adjudicate the actions of probate judges like Judge King. The mandamus petition in the Alabama Supreme Court appears to be one such action.

7. Finally, it should go without saying that this Court cannot enjoin the actions of the Supreme Court of Alabama, which is the only relief that Probate Judge King seeks. “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 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).

8. The *Rooker-Feldman* doctrine also prohibits Probate Judge King's attempted intervention in this lawsuit. *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 Probate Judge King 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.

9. At the very least, interests of comity and federalism counsel against any order from a federal court that would bar a state court from considering a question (the validity of the Alabama Chief Justice's order) which has not been placed before this Court, and which may not even be addressed on the merits by the State court system.

10. Finally, Probate Judge King is incorrect to argue that the Petitioners in the state-court mandamus petition are acting "in concert and on behalf of" the State of Alabama, or the Attorney General, or that the filing of the Petition is a violation of the Court's injunctions. (Doc. 58 at ¶¶ 7-8). The Attorney General is not working in concert with any party to the state-court proceeding, and the Attorney General has taken no action that violates this Court's injunctions. Instead, the Petitioners in that case are citing legal authorities that (allegedly) give members of

the public the freestanding right to compel action by public officials. *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 concerns the sovereign rights of the State, it must be instituted on the relation of the Attorney General, the law officer of the State.”).

11. Probate Judge King’s motion to intervene should be denied. In the end, there is no Article III case or controversy between the proposed intervenor and any party before this Court. Judge King is not under conflicting orders. For all we know, the Alabama Supreme Court intends to dismiss the mandamus petition after full briefing. But, even if the Alabama Supreme Court were to disagree with this Court about the meaning of the Constitution, it would still be no basis for intervention by Probate Judge King. If the Alabama Supreme Court addresses the merits of the petition and orders Judge King to decline to issue same-sex marriage licenses on that basis, then same-sex plaintiffs who want to be married can sue Probate Judge King in a court of competent jurisdiction, such as the Northern District of Alabama. Moreover, Probate Judge King could object to any such order from the Alabama Supreme Court by filing a petition for writ of certiorari in the United States Supreme Court. These issues should not be preemptively litigated in this case where there is no adversity between Judge King and any of the actual parties, and the Alabama Supreme Court and the petitioners in the Alabama Supreme Court are not parties. Instead, the Motion to Intervene should be denied.

12. Although he has not yet been allowed to intervene, Probate Judge King has filed a Motion for Preliminary Injunction (doc. 59). He is not entitled to the relief that he seeks in that

motion. If the Court grants the Motion to Intervene, Attorney General Strange will submit an opposition to that motion for injunctive relief.

WHEREFORE, the Motion to Intervene 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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