

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

JAMES N. STRAWSER, <i>et al.</i>,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION NO. 14-0424-CG-C
)	
LUTHER STRANGE, in his official capacity as Attorney General for the the State of Alabama and DON DAVIS in his official capacity as Probate Judge of Mobile County, Alabama,)	
)	
Defendants.)	

EMERGENCY MOTION FOR STAY

Defendant, Don Davis, Judge of Probate Court of Mobile County, pursuant to Rules 62(b) and 60(b) of the Federal Rules of Civil Procedure, and other applicable law, respectfully moves for a stay of this Court’s Order on Plaintiffs’ Emergency Motion for Preliminary Injunction and/or Temporary Restraining Order (Doc. 55), on grounds that Judge Davis is currently facing potentially conflicting orders from this Court and the Alabama Supreme Court, and would further show:

INTRODUCTION

1. The purpose of this Emergency Motion is to bring to the attention of this Court the unprecedented, historic and yet difficult position that Mobile County’s Judge of

Probate, Don Davis, is faced with. This Court has issued certain specific Orders regarding same-sex marriages in Alabama. At the same time, the Alabama Supreme Court has issued what appears to be a conflicting Order, placing Judge Davis in the unenviable position of trying to comply with two conflicting Orders at the same time. Judge Davis has never publically stated his personal opinion on the important issues before both this Court and the Alabama Supreme Court, and has remained neutral and fair to all parties. However, the recent opinion and Order from the Alabama Supreme Court has placed Judge Davis in the position of having to ask this Court to stay its *Strawser* Order of February 12, 2015 (Doc. 55), and to move the Alabama Supreme Court for an extension of time to respond to that Court. Therefore, Judge Davis' difficult position is detailed further below in support of his Emergency Motion for a Stay in this Court.

ARGUMENT

2. Federal Rule of Procedure 62(b) provides for issuance of a stay pending the disposition of a motion, and states that “the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions: . . . (4) under Rule 60, for relief from a judgment or order.” Fed. R. Civ. P. 62(b)(4).

3. In addition to seeking an emergency stay under Rule 62, Judge Davis requests that this Court modify the Order (Doc. 55) as allowed under Federal Rule of Procedure 60(b). “Although Rule 65 does not speak of modification or vacation of injunctions, Rule 60(b) provides that: On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . applying it prospectively is no longer equitable.” § 2961

Modification of Injunctions, 11A Fed. Prac. & Proc. Civ. § 2961 (3d ed.), Fed. R. Civ. P. 65, Fed. R. Civ. P. 60(b).

4. It is a universally recognized principle that this Court has continuing power to modify or vacate a final decree, and this includes injunctive relief. “The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law.” § 2961 Modification of Injunctions, 11A Fed. Prac. & Proc. Civ. § 2961 (3d ed.). In addition, although changes in fact or law afford the clearest bases for altering an injunction, “the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.” *Id.*

5. On January 23, 2015, this Court granted summary judgment in the case of *Searcy v. Strange*, (Civil Action No. 14-0208-CG-N, Jan. 23, 2015) __ F. Supp. 3d __ (S.D. Ala. 2015) (hereinafter “*Searcy I*”) in favor of the Plaintiffs, declaring that Alabama laws prohibiting same-sex marriage and prohibiting recognition of same-sex marriages performed legally in other states are unconstitutional (*Searcy I*, Docs. 53-54). As part of the judgment entered in *Searcy I*, this Court enjoined the sole remaining Defendant, Alabama Attorney General Luther Strange, “from enforcing those laws.” (*Searcy I*, Doc. 54). Judge Davis had previously been dismissed with prejudice from *Searcy I*, and the only remaining Defendant at the time of this Court’s Order in *Searcy I* was the Attorney General.

6. The Attorney General moved for a stay of the Court's order pending a ruling by the United States Supreme Court. (Doc. 56). This Court then stayed the *Searcy I* order of injunction and judgment for 14 days, until February 9, 2015. (Doc. 59). In support of its decision, and despite the fact that the Attorney General had not yet filed an appeal in *Searcy I*, this Court stated:

In its discretion, however, the court recognizes the value of allowing the Eleventh Circuit an opportunity to determine whether a stay is appropriate. Accordingly, although no indefinite stay issues today, the court will allow the Attorney General time to present his arguments to the Eleventh Circuit so that the appeals court can decide whether to dissolve or continue the stay pending appeal (assuming there will be an appeal.)

7. The Attorney General then filed a motion for stay of the *Searcy I* order with the United States Court of Appeals for the 11th Circuit, which was denied. Attorney General Luther Strange then filed an Application for Stay with the United States Supreme Court.

8. Subsequently, the day before the *Searcy I* stay was set to expire, on February 8, 2015, the Chief Justice of the Supreme Court of Alabama issued an Administrative Order that ordered:

Effective immediately, no Probate Judge of the State of Alabama nor any agent or employee of any Alabama Probate Judge shall issue or recognize a marriage license that is inconsistent with Article 1, Section 36.03, of the Alabama Constitution or § 30 1 19, Ala. Code 1975.

9. In addition, on the morning of February 9, 2015, the United States Supreme Court refused to stay the order of this Court in *Searcy I*. However, the facts have changed since the above requests for stay described above were denied in *Searcy I*. In fact, the confusion has continued to increase from the time of the issuance of the first *Searcy I*

order to this point in time.

10. After the issuance of the Administrative Order by Judge Moore, Judge Davis was placed in a potential conflict between the Order of this Court and the Order of the Chief Justice of the Alabama Supreme Court, who, by authority of his office, is also the chief administrative officer of the State of Alabama Judicial System. As stated above, Judge Davis had previously been dismissed with prejudice from *Searcy I*, and the only remaining Defendant at the time of this Court's Order in *Searcy I* was the Attorney General.

11. Although Judge Davis was not a party to this Court's Order in *Searcy I*, Judge Davis recognized the potential conflicting authority which confronted his office. Thus, on February 9, 2015, due to the potentially conflicting orders of this Court and the Chief Justice of the Alabama Supreme Court, Judge Davis closed the office which issues marriage licenses in Mobile County until this conflict was resolved.

12. Upon realizing that Judge Davis had closed the marriage license office, the Plaintiffs in *Searcy I* filed a Motion for Contempt on the afternoon of February 9, 2015. On the same day, this Court denied Plaintiffs' Motion for Contempt against Judge Davis (*Searcy I*, Doc. 72), stating in part:

After reviewing the Plaintiffs' motion, the court finds that Plaintiffs have not shown that Davis has failed to comply with this court's order. On January 23, 2015, this court declared that ALA. CONST. ART. I, § 36.03 (2006) and ALA. CODE 1975 § 30-1-19 are unconstitutional and enjoined defendant Luther Strange, in his capacity as Attorney General for the State of Alabama, from enforcing those laws. (Doc. 54). Upon motion by the Plaintiffs, this court further clarified the January 23, 2015 order stating that:

... [A] clerk who chooses not to follow the ruling should take

note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees. ... The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk's obligation to follow the law arises from sources other than the preliminary injunction.

(Doc. 65, p. 3 quoting Brenner v. Scott, 2015 WL 44260 at *1 (N.D. Fla. Jan 1, 2015)). Probate Judge Don Davis is not a party in this case and the Order of January 23, 2015, did not directly order Davis to do anything. Judge Davis's obligation to follow the Constitution does not arise from this court's Order. The Clarification Order noted that actions against Judge Davis or others who fail to follow the Constitution could be initiated by persons who are harmed by their failure to follow the law. However, no such action is before the Court at this time.

13. Judge Davis then filed an In Rem action in the Alabama Supreme Court to address the potential conflict between the Administrative Order entered by Chief Justice Moore and this Court's Orders. This In Rem action focused on whether Chief Justice Moore's Administrative Order was still valid after the U.S. Supreme Court ruling denying the Attorney General's request for a stay of *Searcy I*'s Order. Judge Davis set out in the In Rem action that if the Alabama Supreme Court failed to address the Administrative Order that he would abide by the ruling of the U.S. District Court for the Southern District of Alabama.

14. On February 11, 2015, the Alabama Supreme Court issued an Order dismissing the In Rem action regarding the Administrative Order on the basis that the petition filed by Judge Davis was an impermissible request for an advisory opinion.

15. As a result, Judge Davis' request to the Alabama Supreme Court attempting to resolve the potential conflict between the Administrative Order and the Order of this Court in *Searcy I* did not resolve the issue.

16. The confusion caused by the conflicting authorities, which had resulted in Judge Davis closing the Mobile County Probate Court's marriage license office, was further intensified when a Mandamus Petition was filed by the Alabama Policy Institute and Alabama Citizens Action Program against all Alabama Probate Judges, some of which had issued marriage licenses to same sex couples after this Court's Order (Doc. 55) in this case. Judge Davis previously submitted this material for the consideration of this Court, as the documents showed the unique issues faced by Judge Davis at that point in time and related to the conflicts of authority which he and the other probate judges in this state potentially faced.

17. Also on February 9, 2015, as a result of the marriage license office being closed, the Plaintiffs in this case ("*Strawser*" or "*Strawser* Plaintiffs") filed an Emergency Motion for Leave to File an Amended Complaint and for Preliminary Injunction and/or Temporary Restraining Order. (Doc. 43). This Court granted the Plaintiffs' request to amend their Complaint and add Judge Davis as a defendant. (Doc. 46). On February 10, 2015, the Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief, adding Judge Davis as a defendant in his official capacity and seeking declaratory and injunctive relief against Judge Davis. (Doc. 47).

18. Two days later, a hearing was then held on February 12, 2015, on the *Strawser* Plaintiffs' Motion for Preliminary Injunction. This Court granted Plaintiffs'

request for relief.

19. Judge Davis then complied with this Court's order in *Strawser*, and all of the *Strawser* Plaintiffs have since received marriage licenses pursuant to this Court's injunction.

20. Since the time of this Court's first order with respect to same-sex marriage in *Searcy I*, and this Court's Order granting the Plaintiffs' Motion for a Preliminary Injunction against Judge Davis in *Strawser* (Doc. 55), Judge Davis has been at the center of statewide confusion. Judge Davis continues to be subject to conflicting authority. The issue continues to be litigated and new lawsuits are brought in this Court and the Alabama Supreme Court. Moreover, the facts and circumstances surrounding the issues have changed greatly with the addition of other orders, in front of this Court, and other federal and state courts, from the time of this Court's first order in *Searcy I* and the more recent Order (Doc. 55) involving Judge Davis in this case.

21. For example, on February 24, 2015, Plaintiff Searcy filed another lawsuit against Judge Davis with respect to her pending adoption petition, claiming violation of constitutional rights and seeking money damages, against the judge in his official and individual capacity under 42 U.S.C. § 1983 and § 1988. *See Searcy v. Davis* (Civil Action No. 15-0104-CG-N, Jan. 23, 2015) __ F. Supp. 3d __ (S.D. Ala. 2015) ("*Searcy II*"). Judge Davis has filed a Motion to Dismiss all claims in *Searcy II*, and this Court stayed the hearing on the preliminary injunctive relief requested in *Searcy II* until after the Court hears Judge Davis' Motion to Dismiss.

22. Moreover, on March 3, 2015, the Alabama Supreme Court granted the aforementioned Mandamus Petition and issued an order upholding the constitutionality of the Alabama marriage laws previously held unconstitutional by this Court's orders in *Searcy I* and *Strawser*, and ordering almost all Alabama Probate Court Judges not to issue same-sex marriage licenses. A copy of the entire text of the Alabama Supreme Court Opinion is attached for reference. The Alabama Supreme Court ordered, in pertinent part, that:

The named respondents are ordered to discontinue the issuance of marriage licenses to same-sex couples. Further, and pursuant to relator Judge Enslin's request that this Court, "by any and all lawful means available to it," ensure compliance with Alabama law with respect to the issuance of marriage licenses, each of the probate judges in this State other than the named respondents and Judge Davis are joined as respondents in the place of the "Judge Does" identified in the petition. Within five business days following the issuance of this order, each such probate judge may file an answer responding to the relator's petition for the writ of mandamus and showing cause, if any, why said probate judge should not be bound hereby. Subject to further order of this Court upon receipt and consideration of any such answer, each such probate judge is temporarily enjoined from issuing any marriage license contrary to Alabama law as explained in this opinion. As to Judge Davis's request to be dismissed on the ground that he is subject to a potentially conflicting federal court order, he is directed to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, as to whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four marriage licenses he was ordered to issue in *Strawser*.

23. Upon review of the extensive and complicated history of the same sex marriage issues that are, even now, still pending in front of this Court, it is clear that Judge Davis has been put in an extremely difficult position that is now forcing him to choose between potentially contradictory orders issued by this Court and the Alabama Supreme Court. The Alabama Supreme Court highlighted the dilemma facing Judge

Davis when, despite the fact he is directly subject to this Court's order in *Strawser*, the Alabama Supreme Court stated the Judge Davis "is directed to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, as to whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four marriage licenses he was ordered to issue in *Strawser*."¹

24. Therefore, Judge Davis is now subject to an unprecedented and historic Order from the Alabama Supreme Court, and potentially subject to conflicting unprecedented and historic Orders from this Court.

25. Simultaneously with the filing of this Motion, in his continuing effort to follow the law, Judge Davis is sending an emergency request for an Advisory Opinion to the Alabama Judicial Inquiry Commission. Judge Davis asserts that this Court's Orders, when read in conjunction with the Alabama Supreme Court's Order, as well as anticipated future Orders of both Courts, have raised issues concerning the proper ethical and legal course of action for a judge faced with Judge Davis' current unprecedented dilemma. Therefore, Judge Davis requests that this Court stay its *Strawser* Order (Doc. 55) until such time as the Judicial Inquiry Commission has either stated an opinion, or refused to so state its opinion.

26. In addition to the confusion in Alabama, the law across the United States on the issue of same-sex marriage remains unestablished and continues to change rapidly. The approach of our judicial systems across the United States has been inconsistent when

¹ Judge Davis is filing simultaneously with this Motion, through undersigned counsel, a separate Motion with the Alabama Supreme Court, asking for an extension of time to respond to that Court's Order of March 3, 2015, to file a letter brief with that Court explaining whether Judge Davis is currently subject to a federal order from this Court. A copy of the Motion is attached.

it comes to same-sex marriage, and many of the various courts that have ruled on the validity of same-sex marriages have taken polar opposite views. There are cases involving the validity of same-sex marriages currently pending in most state and federal appellate courts serving the State of Alabama, i.e., the United States Court of Appeals for the 11th Circuit, the United States Supreme Court and the Alabama Supreme Court, as well as in this Honorable Court.

27. However, the above-described confusion and potential conflicting authorities that Judge Davis currently faces could be avoided if this Court chooses to stay its previous order in *Strawser* until after a ruling by the United States Supreme Court. The issue of same-sex marriage will be heard this term by the United States Supreme Court, which will resolve the issues on a nation-wide basis. *See James v. Hodges*, Supreme Court No. 14-556, Order dated January 16, 2015; see also cases 14-562, 14-571, and 14-574. This Court noted, in footnote one of its order in *Searcy I*, that “[t]he questions raised in this lawsuit will thus be definitively decided by the end of the current Supreme Court term, regardless of today’s holding by this court.” (*Searcy I*, Doc. 53). The Alabama Supreme Court Order stated that the United States Supreme Court is expected to rule on this issue by June of this year – which is less than three months (3) from the date of this filing - meaning a stay of this Court’s order in *Strawser* would only be necessary for a short period of time.

28. Moreover, as noted by this Court in previous orders, Judge Davis has complied with this Court’s injunction and relief sought by the Plaintiffs in *Strawser*. The Plaintiffs in *Strawser* have all been provided marriage licenses. As the Plaintiffs have

already received the specific relief they requested against Judge Davis, they would not be harmed by this Court's decision to stay its order against Judge Davis until the United States Supreme Court rules and finally clears up this issue. No other aggrieved parties are currently before this Court.

29. For the foregoing reasons, and because of the continually changing nature of the Orders issued to Judge Davis, Judge Davis respectfully requests that this Honorable Court enter an order staying its previous order in *Strawser* (Doc. 55) on Plaintiffs' Motion for Preliminary Injunction. A stay will serve the public interest by putting an end to the current confusion and inconsistency that has resulted in an on-again, off-again enforcement of marriage laws. As they have received the requested relief, the *Strawser* Plaintiffs would not be harmed by issuance of this stay.

WHEREFORE, the Defendant, Don Davis, Judge of Probate of Mobile County, by and through undersigned counsel, respectfully moves this Honorable Court to issue an Order staying its order on Plaintiffs' Emergency Motion for Preliminary Injunction and/or Temporary Restraining Order (Doc. 55) until after the U.S. Supreme Court issues its ruling, and for such further and other relief this Court deems appropriate.

Respectfully submitted,

/s/ Harry V. Satterwhite

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CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of March 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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