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

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

PLAINTIFFS' RESPONSE TO DEFENDANT DAVIS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendant Davis's motion to dismiss (Doc. 103) largely repeats arguments previously rejected by the Court. To the extent it raises new arguments, none of them is meritorious. For the reasons set forth below, the motion should be denied in its entirety.

I. This Court Has Previously Rejected Many of Defendant Davis's Arguments, And He Offers No Persuasive Reason for the Court to Reconsider Its Previous Conclusions.

A. The Underlying Merits Determinations.

Defendant Davis urges the Court to reconsider its earlier conclusions that Alabama's marriage ban for same-sex couples and its refusal to recognize the marriages of same-sex couples violate the Fourteenth Amendment. *See* Doc. 103 at 2-8. In granting a preliminary injunction against Defendants, the Court already has decided that Plaintiffs are likely to prevail on the merits of their claims, and those

issues are now before the Eleventh Circuit in an appeal filed by Defendant Strange. *See Searcy v. Attorney Gen., State of Ala.*, No. 15-10295-C, consolidated with *Strawser v. Attorney Gen., State of Ala.*, No. 15-10313-A (11th Cir.). Defendant Davis did not appeal the Court's entry of a preliminary injunction against him, and he offers no persuasive reason for the Court now to reconsider its conclusion that Plaintiffs' claims are meritorious.[1] As noted by the Court in its Order denying Defendant Davis's Motion for Stay:

> This court has found that Alabama's marriage sanctity laws violate the Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This court's conclusion agrees with the overwhelming consensus of courts across the country that have addressed the constitutionality of similar state laws since the Supreme Court's ruling in *United States v. Windsor*, 133 S.Ct. 2675 (2013). Judge Davis has offered no reason why this court should now conclude that judgment in this case is likely to be in favor of Judge Davis.

Doc. 88 at 3.

B. Request for a Stay Revisited.

Defendant Davis renews his request for a stay of these proceedings pending the outcome of the United States Supreme Court's review of *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015), *cert. granted sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), *Tanco v. Haslam*, 135 S. Ct. 1040 (2015), *Bourke v. Beshear*, 135 S. Ct. 1041 (2015). *See* Doc. 103 at 3 ("Judge Davis urges this Court not to attempt to anticipate a future ruling of the U.S. Supreme Court, but

[1] To the extent that the Court wishes to reconsider the merits of Plaintiffs' claims, counsel requests notification and an opportunity to submit a full brief on these issues.

rather either to dismiss the plaintiff's (sic) claims or await that ruling."). Yet, he makes no attempt to address the standards required for such a stay or to explain why this Court should reconsider its denial of his previous motion to stay. *See* Order, Doc. 88. For the same reasons discussed in the Court's Order and in Plaintiffs' previous briefs on this issue (Docs. 83, 87), no stay is warranted.

II. Plaintiffs Have Standing.

Defendant Davis's argument that Plaintiffs lack standing (Doc. 103 at 8–14) is without merit. Plaintiffs (including the putative class) plainly have standing to challenge Alabama's constitutional and statutory prohibitions on marriage by same-sex couples and recognition of their existing marriages. Plaintiffs "have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, ... there [is] a causal connection between the injury and the conduct complained of," and it is "likely, rather than merely speculative," that a favorable decision by the Court will remedy Plaintiffs' injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). *See* Order, Doc. 29 (Plaintiffs have suffered irreparable harm as a result of Alabama's marriage laws prohibiting same-sex marriage and the harm may be remedied by declaratory and injunctive relief), Order, Doc. 55 (same).

Specifically, Plaintiffs (including the newly added named Plaintiffs in the Second Amended Complaint and members of the proposed Plaintiff Class) wish to marry a person of the same sex and to have that marriage recognized under Alabama

law, but they are unable to do so because of the enforcement of Alabama's laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages. *See* Second Amended Complaint, Doc. 95 at 14, ¶ 38. While it may be true that Alabama's probate court judges alone cannot offer complete relief for statewide *recognition* of Plaintiffs' marriages (for those who have already married), the probate court judges plainly can offer relief to Plaintiffs and Plaintiff Class members who have not yet married. An injunction against Defendant Davis and the Defendant Class would therefore "redress (at least in part) the plaintiffs' injury, and that is enough for standing purposes." *I.L. v. Alabama*, 739 F.3d 1273, 1282 (11th Cir. 2014) (citing *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310–11 (11th Cir. 2001) for proposition that "relief which remedies at least some of the alleged injuries is sufficient to establish redressability").

Moreover, the fact that some of the named Plaintiffs have now obtained marriage licenses from Defendant Davis as a result of the Court's preliminary injunction does not deprive those Plaintiffs of standing to obtain a final judgment declaring the marriage ban unconstitutional and permanently enjoining Judge Davis from enforcing the ban. *See*, *e.g.*, *Salazar v. Buono*, 559 U.S. 700 (2010) (a plaintiff has continued standing to enforce an injunction entered in his favor).

That Defendant Davis has currently chosen not to issue any licenses at all (Doc. 103 at 10) is irrelevant. Plaintiffs do not seek an order compelling Davis or any other probate court judge to issue marriage licenses if they have elected to cease issuing them entirely. Rather, they seek an order preventing any Alabama probate

court judge from denying licenses to same-sex couples "because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order, including any injunction issued by the Alabama Supreme Court pertaining to same-sex marriage." Proposed Order, Doc. 100-2 at 4. That is, Plaintiff couples seek to be treated on the same terms and conditions as an opposite-sex couple seeking a marriage license. Were Defendant Davis not bound by this Court's injunction barring him from enforcing those unconstitutional laws, he would be free to resume issuing marriage licenses only to opposite-sex couples.

III. No Immunity Doctrine Bars Plaintiffs' Claims.

A. Judicial Immunity Does Not Apply.

Defendant Davis's claim that injunctive relief and attorneys' fees are barred by judicial immunity and 42 U.S.C. §§ 1983, 1988 is without merit. This argument was squarely rejected in a case challenging Kansas's ban on marriage by same-sex couples, and that court's analysis is equally applicable here:

> Defendants correctly point out that the Clerks are "judicial officers" for purposes of the judicial immunity provision of § 1983. *Lundahl v. Zimmer,* 296 F.3d 936, 939 (10th Cir. 2002). However, § 1983 contains a significant caveat—the "acts or omissions" at issue must be ones taken in the "officer's judicial capacity." *Id.; Mireles v. Waco,* 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); 42 U.S.C. § 1983. Thus, to determine whether judicial immunity applies to the Clerks, the Court must determine whether issuing marriage licenses constitutes a judicial act.
>
> "In determining whether an act by a judge [or here, a clerk of the judicial system] is 'judicial,' thereby warranting absolute immunity, [courts] are to take a functional approach, for such 'immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'" *Bliven v. Hunt,* 579 F.3d 204, 209–10 (2d Cir.2009) (quoting

> *Forrester v. White,* 484 U.S. 219, 227, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)) (emphasis in original). "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Kansas law distinguishes between a clerk's "judicial" and "ministerial" functions by asking whether "a statute imposes a duty upon the clerk to act in a certain way leaving the clerk no discretion." *Cook v. City of Topeka,* 232 Kan. 334, 654 P.2d 953, 957 (1982).

Marie v. Moser, — F. Supp. 3d —, 2014 WL 5598128, at *8 (D. Kan. Nov. 4, 2014), *stay denied*, 135 S. Ct. 511 (2014).

It has long been recognized under Alabama law that the issuance of a marriage license is a ministerial act, not a judicial act. *See Cotten v. Rutledge*, 33 Ala. 110, 1858 WL 339 at *3 (Ala. 1858) ("In issuing a license to marry, the judge of probate does not exercise *judicial power.* He acts *ministerially* . . . .") (emphasis in original). Indeed, the Alabama Supreme Court made that crystal clear in its recent order:

> Advising a probate judge how to issue government marriage licenses is not "superintendence and control" of an inferior court's performance of a judicial function. Instead, it is instructing a State official acting in a nonjudicial capacity on how to perform a ministerial act. Specifically, probate courts are courts of limited jurisdiction. The jurisdiction of those courts is specified in Ala. Code 1975, § 12–13–1, which lists the types of cases and controversies the courts may hear. Issuing marriage licenses is not a function of the court or of its judicial power—the court has no judicial power to issue a marriage license. Instead, it is something the legislature has instructed that probate judges "may" do. Ala. Code 1975, § 30–1–9; *Ashley v. State*, 109 Ala. 48, 49, 19 So. 917, 918 (1896) ("The issuance of a marriage license by a judge of probate is a ministerial and not a judicial act."). There is no exercise of a probate court's jurisdiction when a probate judge issues a marriage license because the source of the probate judge's authority to issue such a license does not stem from the jurisdiction of the court.

Ex parte State ex rel. Alabama Policy Institute, — So. 3d —, 2015 WL 892752 at *45 (Ala. Mar. 3, 2015) (footnotes omitted).

Because Defendant Davis is not performing a judicial function when he issues marriage licenses, the judicial immunity provisions in 42 U.S.C. § 1983 and § 1988 have no application here.

B. Qualified Immunity Does Not Apply.

The doctrine of qualified immunity[2] similarly has no application here, as Plaintiffs have not sued Defendant Davis in his personal capacity and are not seeking money damages. *See Fortner v. Thomas*, 983 F.2d 1024, 1029 & n.1 (11th Cir. 1993) (*quoting Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975)). Plaintiffs' Second Amended Complaint states that Defendant Davis "is sued in his official capacity." Doc. 95, ¶ 26. *See also id.* ¶ 14 ("Plaintiffs state the below causes of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief."). If that were not clear enough, prior to filing the motion to dismiss, counsel for Defendant Davis contacted counsel for Plaintiffs inquiring about whether Plaintiffs were suing him in his "individual capacity." Plaintiffs' counsel confirmed in writing that they were not, stating in an e-mail: "This is to confirm that plaintiffs are not suing Probate Court Judge Davis in his individual capacity. We name him only in his official capacity as Probate Court Judge for Mobile County and as a class representative for the class of Alabama probate court judges." *See* Ex. 1, April 6, 2015 e-mail from R. Marshall to H. Satterwhite.

[2] Claimed by Defendant Davis, Doc. 103 at 17–21 & n.10.

In addition, Plaintiffs have fully responded to Defendant Davis's prior argument that he is entitled to qualified immunity. *See* Plaintiffs' Reply, Doc. 100 at 23–24. That response applies equally here.

C. The Eleventh Amendment Does Not Shield Defendant Davis.

Defendant Davis's claim to Eleventh Amendment Immunity likewise has no merit, as Plaintiffs previously have explained. *See* Doc. 103 at 22–24. It is well settled that the Eleventh Amendment does not immunize state officials from federal constitutional claims that seek injunctive relief. *Ex parte Young*, 209 U.S. 123, 155–56 (1908).[3] Indeed, this Court has already enjoined both Defendants Davis and Strange from enforcing Alabama's marriage ban. The Eleventh Amendment is no bar to the entry of a similar injunction extending to the proposed Plaintiff and Defendant Classes.

IV. Plaintiffs' Requested Relief is Proper.

A. Plaintiffs' Claim for Declaratory Relief is Not Moot.

"'[A] case is moot [only] when it no longer presents a live controversy with respect to which the court can give meaningful relief.'" *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216–17 (11th Cir. 2000) (quoting *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993)). Here, it is clear that the entry of the declaratory judgment and injunction requested in

[3] Counties and county officials have no Eleventh Amendment immunity whatsoever. *Ins. Co. of New York v. Chatham Cnty.*, 547 U.S. 189, 193 (2006).

Plaintiffs' Second Amended Complaint would provide meaningful relief to Plaintiffs against Defendant Davis.

Plaintiffs' Second Amended Complaint adds additional named Plaintiffs and Defendants and pleads a Plaintiff Class and a Defendant Class in order to obtain statewide relief for the named Plaintiffs and members of the putative class. The newly added named Plaintiffs and Plaintiff Class members are unmarried couples who have been prevented from obtaining marriage licenses due to the enforcement of Alabama's marriage ban by county probate judges. Though Defendant Davis is already subject to a declaratory judgment and preliminary injunction, Plaintiffs and the Plaintiff Class now seek that same declaratory relief and a permanent injunction against him and the Defendant Class of Alabama probate court judges. The entry of such a judgment and class-wide injunction prohibiting enforcement of the marriage ban would constitute "meaningful relief" to the Plaintiffs and Plaintiff Class members by enabling them to obtain marriage licenses, and recognition of their marriages, on equal terms with opposite-sex couples. Therefore the claim is not moot.

B. Plaintiffs' Request for Injunctive Relief is Proper.

Plaintiffs seek essentially the same injunctive relief that was previously entered against Defendant Davis, Doc. 55 at 7–8, broadened to afford class relief statewide. *See* Doc. 100-2 at 3–4. Defendant Davis has never argued that the Court's preliminary injunction against him was unduly vague or overbroad, nor has he sought clarification of his obligations under that injunction; indeed, he apparently has had no difficulty to date complying with that injunction. Just as the Court's previous

injunction was proper and not unduly vague, so too the injunction requested in the Second Amended Complaint is entirely proper.[4] Moreover, the requested injunction does not purport to require Defendant Davis "to stop something he is powerless to prevent" or to control the "actions of persons who are beyond Judge Davis' authority to control." Doc. 103 at 27. Like the preliminary injunction previously entered by the Court against Defendant Davis, the requested injunction merely requires him to refrain from enforcing the marriage ban to the extent his duties and responsibilities otherwise would require him to do so.

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[4] The requested injunction closely parallels the injunctions entered in numerous cases around the country prohibiting enforcement of various states' laws barring marriage for same-sex couples. *See, e.g.*, *Latta v. Otter*, 19 F. Supp. 3d 1054, 1087 (D. Idaho 2014), *aff'd,* 771 F.3d 456 (9th Cir. 2014), *stay denied*, 135 S.Ct. 345 (2014) (enjoining "the State of Idaho and its officers, employees, agents, and political subdivisions from enforcing Article III, § 28 of the Idaho Constitution; Idaho Code Sections 32–201 and 32–209; and any other laws or regulations to the extent they do not recognize same-sex marriages validly contracted outside Idaho or prohibit otherwise qualified same-sex couples from marrying in Idaho"); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1165 (S.D. Ind. 2014) *aff'd,* 766 F.3d 648 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 316 (2014) ("Defendants and their officers, agents, servants, employees and attorneys, and those acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Code Section 31-11-1-1 and other Indiana laws preventing the celebration or recognition of same-sex marriages."); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va.) *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014) ("The Court ENJOINS the Commonwealth from enforcing Sections 20–45.2 and 20–45.3 of the Virginia Code and Article I, § 15–A of the Virginia Constitution to the extent these laws prohibit a person from marrying another person of the same gender.").

V. The Alabama Supreme Court's Mandamus Order Has No Effect On This Court's Jurisdiction.

Under well-settled precedent, the Alabama Supreme Court's decision in *Ex parte State ex rel. Alabama Policy Institute*, *supra*, provides no impediment to the issuance of the class-wide injunction that Plaintiffs seek and has no effect upon this Court's jurisdiction.

As an initial matter, no ruling by the Alabama Supreme Court can prevent the Plaintiffs from seeking to vindicate their federal constitutional rights in an unrelated federal case or from being granted the relief they seek from this Court. Because the Plaintiffs and members of the Plaintiff Class were not party to the state-court mandamus proceeding, *see id.*, 2015 WL 892752 at *1, the couples in the Plaintiff Class are not bound by the conclusions of the Alabama Supreme Court. They may seek, and this Court may issue, an injunction barring probate judges from enforcing Alabama's same-sex marriage ban.

As the U.S. Supreme Court has made clear, "a successful mandamus proceeding in a state court against state officials to enforce a challenged statute" does not bar "injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings." *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 377–78 (1939) (affirming entry of federal injunction directing state officials to cease enforcement of unconstitutional state statute after a state court ordered those state officials to enforce that statute in a mandamus proceeding). To argue otherwise, as Defendant Davis does here, "assumes that the mandamus proceeding bound the independent suitor in the federal court as

though he were a party to the litigation in the state court. This, of course, is not so." *Id*. at 378. *See also Cnty. of Imperial v. Munoz*, 449 U.S. 54, 59–60 (1980) (holding that federal court was not barred from ordering county officials to cease enforcement of unconstitutional condition in land-use permit despite earlier order of California Supreme Court directing compliance with that condition, provided that the plaintiffs in the federal suit were "strangers" to the state-court proceedings); *Munoz v. Cnty. of Imperial*, 667 F.2d 811, 816–17 (9th Cir. 1982) (holding, following remand from Supreme Court, that federal plaintiffs were strangers to state-court proceedings and affirming entry of injunction against county officials); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) ("One who is not a party to state proceedings, nor in privity with a party, may seek a federal injunction against enforcement of a judgment obtained in those proceedings."); *Chezem v. Beverly Enters.-Texas, Inc.*, 66 F.3d 741, 742 & n.3 (5th Cir. 1995) (same); *Pelfresne v. Vill. of Williams Bay*, 917 F.2d 1017, 1020 (7th Cir. 1990) (same).

Additionally, Defendant Davis' reliance on the *Rooker-Feldman* doctrine, which bars federal-court review of state-court judgments, is unfounded. The doctrine has no application here because Plaintiffs were not parties to the state court proceeding, are not bound by the judgment in that proceeding, and therefore are not precluded from independently seeking relief in federal district court. *See Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994); *Lance v. Denis*, 546 U.S. 459, 465–66 (2006).

VI. None of Defendant Davis's Remaining Arguments Has Merit.

Finally, Defendant Davis states that he "incorporates the motions and grounds of the Alabama Attorney General and Judge Russell, to the extent their motions and grounds are not inconsistent with the above." Doc. 103 at 29.[5] Plaintiffs have fully responded to the Attorney General's arguments for dismissal, none of which has merit. *See* Doc. 100, Doc. 105. Plaintiffs will respond to Defendant Russell's arguments, if any, once he has responded to the Second Amended Complaint.

VII. Conclusion.

For the reasons set forth above, Defendant Davis's Motion to Dismiss should be denied in its entirety.

[5] Defendant Davis "also incorporates by reference his objection to the class action (Doc. 90)." Doc. 103 at 29. Plaintiffs have already responded to his objections. *See* Reply, Doc. 100.

Respectfully Submitted,

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** Motion 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 April 10, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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I hereby certify that the following parties were served via electronic mail and U.S. mail on April 10, 2015:

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PLAINTIFFS'
EXHIBIT 1

From: Randall Marshall
To: harry@satterwhitelaw.com
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Date: Monday, April 6, 2015 10:27:43 AM

Harry –

This is to confirm that plaintiffs are not suing Probate Court Judge Davis in his individual capacity. We name him only in his official capacity as Probate Court Judge for Mobile County and as a class representative for the class of Alabama probate court judges.

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