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

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

DEFENDANT PROBATE JUDGE TIM RUSSELL'S MEMORANDUM BRIEF IN SUPPORT OF HIS MOTION TO DISMISS

COMES NOW Tim Russell, in his official capacity as Probate Judge of Baldwin County, and hereby respectfully submits this Memorandum Brief in Support of his Motion to Dismiss.[1] All claims against Judge Russell in his official capacity, both individually and as a putative class representative,[2] are due to be dismissed with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as follows:

[1] If this Motion to Dismiss is not granted, Judge Russell will submit an opposition to class certification.

[2] Judge Russell does not understand the Second Amended Complaint to contain any claims against him in his individual capacity, despite the somewhat confusing phrasing of the caption. (Doc. 95, ¶ 27.)

INTRODUCTION AND STATEMENT OF FACTS

Plaintiffs' failure to mention the involvement of the Alabama Supreme Court in the recount of pertinent events contained in the Second Amended Complaint is frankly disingenuous. This Court's issuance of certain orders in this case and in *Searcy et al. v. Strange*, Civil Action No. 1:14-cv-00208-CG-N, was the beginning of what has been described as a "legal circus" in Alabama. Ex parte Davis, 2015 WL 567479 at *4, No. 1140456 (February 11, 2015) (Bolin, J. concurring). Although no probate judge was a party in either case at the time these orders were issued, probate judges were quickly thrown into the maelstrom surrounding the issue, eventually leading to Judge Russell and the other probate judges in the State of Alabama finding themselves in the middle of a situation that has heretofore only been contemplated in law review articles. See, e.g., Kevin M. Clermont, Reverse-Erie, 82 Notre Dame Law Rev. 1 (2006).

On February 8, 2015, prior to the effective date of the relevant Orders, Chief Justice Roy Moore issued an Administrative Order forbidding Judge Russell (and every Probate Judge in the State of Alabama) from taking the actions requested as relief by Plaintiffs, e.g., issuing marriage licenses to same sex couples.[3] (Exhibit

[3] This Court may take judicial notice of these events under two theories. First, a court may take judicial notice of matters of common knowledge. See, e.g., N. L. R. B. v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300, 304 (5th Cir. 1961) (taking judicial notice of fact of recession in 1957); Second, a court may take judicial notice of the existence of orders entered by other courts. See, e.g., Lobo v. Celebrity Cruises, Inc., 703 F.3d 882, 892 (11th Cir. 2013). Moreover, the

A, Administrative Order). On March 3, 2015, in response to an original petition for writ of mandamus filed by several nonprofit groups, the Alabama Supreme enjoined all probate judges from issuing same-sex marriage licenses, holding that Alabama's marriage sanctity laws were not unconstitutional. Ex parte State ex rel. Alabama Policy Institute, __ So.3d__, 2015 WL 892752 at *43 (Ala. March 3, 2015). On March 10, 2015, the Alabama Supreme Court issued a second order specifying that Co-Defendant Judge Davis was also subject to its March 3, 2015. Ex parte State ex rel. Alabama Policy Institute, __ So.3d__, 2015 WL 1036064 at *3 (Ala. March 10, 2015). On March 12, 2015, the Alabama Supreme Court issued a third order in the case confirming that "all probate judges in this State may issue marriage licenses only in accordance with Alabama law as described in [the March 3, 2015 opinion]." (Exhibit B, March 12, 2015 Order.)

Thus, ***Judge Russell had already been enjoined by the Alabama Supreme Court from issuing any marriage licenses to same-sex couples prior to the calls allegedly made to his office*** by Plaintiffs Kristie Ogle, Keith Ingram, or Gary Wright and Brandon Mabrey on March 5, 2015. Granting the relief requested by Plaintiffs in this case would accordingly require this Court to effectively overturn the judgment of the Alabama Supreme Court. Plaintiffs have failed to identify any

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Court is not bound by the four corners of the Second Amended Complaint in determining whether it has jurisdiction. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

provision in Article III of the United States Constitution or any statutory source that would give this Court the jurisdiction to take such an action; instead, their strategy appears to be to simply ignore the existence of this decision by the Alabama Supreme Court. This strategy is assumedly motivated by the fact that, respectfully, there simply is no jurisdictional provision that would allow this Court to grant the requested relief, as it is well-established that "lower federal courts possess no power whatever to sit in direct review of state court decisions." Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al., 398 U.S. 281, 296 (1970). The fact that the complained-of conduct by Judge Russell was undertaken pursuant to a judicial order also entitles him to quasi-judicial immunity. Moreover, Plaintiffs do not have standing to bring any claims based on the constitutionality of Alabama's marital sanctity laws against Judge Russell or any other probate judge in the State of Alabama because neither the elements of causation or redressibility can be met as to a probate judge. Plaintiffs' claims against Judge Russell and other probate judges are accordingly due to be dismissed with prejudice.

ARGUMENT

I. JUDGE RUSSELL AND ALL OTHER PROBATE JUDGES IN THE STATE OF ALABAMA ARE SUBJECT TO A BINDING ORDER ISSUED BY THE ALABAMA SUPREME COURT ENJOINING THEM FROM ISSUSING MARRIAGE LICENSES TO SAME-SEX COUPLES.

All probate judges in the State of Alabama have been enjoined by the Alabama Supreme Court from issuing marriage licenses to same-sex couples. Ex parte State ex rel. Alabama Policy Institute, __ So.3d__, 2015 WL 892752 at *43 (Ala. March 3, 2015). Under this injunction, Judge Russell cannot, as a matter of law, issue marriage licenses to same-sex couples in the State of Alabama. Although Plaintiffs have chosen to simply ignore this injunction's existence, their failure to reckon with it does not make it less significant.

What Plaintiffs are really seeking in this action is not per se relief as to any discretionary actions taken by Judge Russell or any other probate judge. Instead, they are mounting a collateral attack on a final judgment entered by the Alabama Supreme Court against Judge Russell and every other probate judge in the hopes of inducing this Court to impliedly overrule the injunction issued in Ex parte State ex rel. Alabama Policy Institute. In analyzing this issue, it is important to keep in mind the unprecedented nature of the claims alleged against Judge Russell and the other probate judges. While there have certainly been cases in which plaintiffs have sought to enjoin a state court action or order instituted by the defendant

against them on the grounds that these proceedings interfered with a federally protected right, see, e.g., Mitchum v. Foster, 407 U.S. 225 (1972), Defense Counsel has been unable to locate any precedent allowing a plaintiff to enjoin the enforcement of a state court's order entered against the defendant in a wholly collateral proceeding to which the plaintiff was not a party.

"Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Id. (internal citations omitted). Plaintiffs have identified 28 U.S.C. §§ 1331 and 1343 as the source of jurisdiction for this court to hear their claims. These statutes, however, simply do not grant this Court the jurisdiction to take the action requested by Plaintiffs.

A. The Anti-Injunction Act bars any relief.

The jurisdiction conferred upon this Court to enter injunctions is constrained by the Anti-Injunction Act, 28 U.S.C. § 2283, which provides as follows:

> 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.

This Act is an "absolute prohibition" against injunctions that interfere with state court proceedings unless one of the three exceptions is met. Atlantic Coast Line Railroad Company, 398 U.S. at 286. It stems from the "essentially federal nature of our national government," as follows:

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and 'to prevent needless friction between state and federal courts,' Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 537 (1940), it was necessary to work out lines of demarcation between the two systems.

Id. at 286.

In Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers et al., a federal district judge granted an injunction against the enforcement of a state court injunction prohibiting the plaintiff union from picketing, arguing that the injunction violated its federally-protected rights as set out in a previous federal court order. 398 U.S. at 282-284. In vacating this

injunction, the United States Supreme Court ruled that "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear…***Again, lower federal courts possess no power whatever to sit in direct review of state court decisions***." Id. at 295-96 (emphasis added).

Only if one of the three statutory exceptions are met may a plaintiff enjoin a state court proceeding. The three exceptions to this Act must be "construed narrowly." Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 701 F.3d 669, 676 (11th Cir. 2012). The second exception is the easiest to dispense with, as it applies "in only two situations, where: (1) the district court has exclusive jurisdiction over the action because it had been removed from state court; or, (2) the state court entertains an *in rem* action involving a res over which the district court has been exercising jurisdiction in an *in rem* action." Id. at 676 (internal quotations omitted). Neither of these situations are present in this case.

The third exception also plainly does not apply in this case. This exception is known as the "relitigation exception." Burr & Forman v. Blair, 470 F.3d 1019, 1029 (11th Cir. 2006). It is "appropriate where the state law claims would be precluded by the doctrine of res judicata." Id. at 1030. In determining whether this exception applies, this Court must apply Alabama's law in regards to res

judicata. Id. In order for res judicata to apply in Alabama, a final judgment must have been entered against either a party or one in privity with the party. Id. The Alabama Supreme Court has specifically held that a preliminary injunction cannot be res judicata because it is not a final judgment. EB Investments, L.L.C. v. Atlantis Development, Inc., 930 So.2d 502, 510 (Ala. 2005). Moreover, Judge Russell was not a party to this case at any time before the judgment was entered by the Alabama Supreme Court. Thus, the preliminary injunctions previously entered by this Court do not provide a basis for the application of the relitigation exception.

Finally, the first exception also does not apply in this case. In so arguing, Defendant recognizes that the United States Supreme Court held in Mitchum v. Foster that 42 U.S.C. § 1983 could qualify as express authorization for a federal court to enter an injunction forbidding an ongoing state judicial proceeding that violated the plaintiff's rights. 407 U.S. 225, 242 (1972). The distinguishing factor between this case and Mitchum, however, is that the subject of the injunction at issue in that case was current, ongoing litigation actually being undertaken by the defendants in that case. Mitchum thus recognized that § 1983 authorized suits to stop defendants from pursuing state judicial action that violated a federal right.

In this case, however, Plaintiffs are not actually seeking to enjoin some kind of positive action taken by Judge Russell or the other probate judges vis-à-vis an ongoing state court lawsuit. Instead, they are asking this Court to essentially

overrule a judgment of the Alabama Supreme Court - to rule, in fact, that the Alabama Supreme Court's interpretation of the law was wrong and to enjoin Judge Russell and every other probate judge from obeying the injunction entered against by that court. The nature of this request removes this case from the rubric of Mitchum and its progeny. "Again, lower federal courts possess no power whatever to sit in direct review of state court decisions." Atlantic Coast Line Railroad Company, 398 U.S. at 296. The Anti-Injunction Act accordingly bars the relief sought by Plaintiff.

B. This Court does not have the jurisdiction to overrule the Alabama Supreme Court's interpretation of the Fourteenth Amendment.

Respectfully, this Court does not possess the jurisdictional authority to impose its holding on the Alabama Supreme Court by ordering Judge Russell and the other probate judges to defy that court's order. "In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996) (quoting Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring)). If Plaintiffs wish to attack the ruling of the Alabama Supreme Court on this issue, their remedy would be to file a petition for writ of prohibition in the United States Supreme Court, which is the only Court with jurisdiction to overrule the judgment entered in Ex parte State ex rel. Alabama

Policy Institute. See Atlantic Coast Line R. Co., 398 U.S. at 296 (stating that the plaintiff union could have sought relief from the United States Supreme Court). Because Plaintiffs have failed to sufficiently invoke this Court's jurisdiction, all claims against Judge Russell are due to be dismissed with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

II. JUDGE RUSSELL IS ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY.

The other consequence flowing from the fact that Judge Russell has acted at all relevant times pursuant to an order issued by the Alabama Supreme Court is that he is entitled to absolute quasi-judicial immunity. "Absolute quasi-judicial immunity derives from absolute judicial immunity." Roland v. Phillips, 19 F.3d 552, 555 (11th Cir. 1994). Judges are "absolutely immune from civil liability under section 1983 for acts performed in their judicial capacity, provided such acts are not done in the clear absence of all jurisdiction." Id. (internal quotations and citations omitted). This immunity flows down to cover nonjudicial officials who "have an integral relationship with the judicial process." Id. This immunity specifically includes those officials who enforce or implement judicial orders. Id. This rationale for this immunity is as follows:

> Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.

> ....
> Tension between trial judges and those officials responsible for enforcing their orders inevitably would result were there not absolute immunity for both.... The public interest demands strict adherence to judicial decrees.... Absolute immunity will ensure the public's trust and confidence in courts' ability to completely, effectively and finally adjudicate the controversies before them.

Id. at 556 (quoting Valdez v. Denver, 878 F.2d 1285 (10th Cir.1989)).

Importantly, pursuant to the 1996 amendment to 42 U.S.C. § 1983, judicial immunity extends to bar injunctive relief entered against judges. 42 U.S.C. § 1983; Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000). Further, 42 U.S.C. § 1988 now provides that judicial immunity bars liability for any costs, including attorney's fees.

Plaintiffs have correctly alleged that the issuance of marriage licenses is a ministerial duty in the State of Alabama and is not, in and of itself, a judicial function. (Doc. 95, ¶ 27.) In carrying out this ministerial duty, Judge Russell, and all other probate judges in the State of Alabama, are bound to follow Alabama law and the orders of the Alabama Supreme Court directed at them. In so doing, there is little difference between Judge Russell and a federal marshal who has been ordered to take a person into custody by this Court. Although Judge Russell does exercise judicial authority in his own right as to some matters, in the issuance of marriage licenses, he is bound to follow the dictates of the Alabama Supreme

Court. The claims against him are accordingly due to be dismissed with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

III. PLAINTIFFS DO NOT HAVE STANDING TO BRING THESE CLAIMS AGAINST JUDGE RUSSELL.

Under Article III of the United States Constitution, federal courts' jurisdiction "depends on the existence of a case or controversy," which "places a dual limitation upon federal courts which is termed justiciability." U.S. v. Florida Azalea Specialists, 19 F.3d 620, 621 (11th Cir. 1994) (citations omitted). "Justiciability seeks to ensure that federal courts address only questions which are presented in an adversarial context." Id. at 622. One component of justiciability is standing, which has three requirements: actual injury; causation; and redressibility. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998). Causation requires "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." Id. at 103. Redressibility is the "likelihood that the requested relief will redress the alleged injury." Id.

As an initial matter, it is highly questionable whether the act of merely calling Judge Russell's office is sufficient to convey standing on Plaintiffs to bring this action against him. Moreover, any injury that Plaintiffs might have suffered was neither caused by Judge Russell, nor is it redressable by Judge Russell.

The Middle District of Alabama very recently dismissed Governor Bentley from a case brought challenging these same laws, holding, *inter alia*, that the plaintiff in that suit lacked standing to sue Governor Bentley because he failed to meet either the causation or redressibility requirements. Hard v. Bentley, No. 2:13-CV-922-WKW, 2015 WL 1043159 at *6 (M.D. Ala. March 10, 2015). Like Governor Bentley, Judge Russell cannot take any action to redress Plaintiffs' alleged injury. This alleged injury was caused, if at all, by Alabama law and specific orders issued by the Alabama Supreme Court.[4] Ordering Judge Russell to perform the ministerial duty of issuing a marriage license to Plaintiffs simply would not address the myriad of alleged harms identified in their Second Amended Complaint. The claims against Judge Russell are accordingly due to be dismissed with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. THE PRINCIPLES OF COMITY AND FEDERALISM MILITATE IN FAVOR OF THE DISMISSAL OF THE CLAIMS AGAINST JUDGE RUSSELL OR, IN THE ALTERNATIVE, FOR A STAY OF FURTHER PROCEEDINGS.

"The seriousness of federal judicial interference with state civil functions has long been recognized." Huffman v. Pursue, Ltd., 420 U.S. 592, 603, (1975). Thus, "when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity

[4] In so arguing, Judge Russell in no way concedes that Plaintiffs actually have suffered any injury to their constitutional rights.

jurisprudence." Id. This comity doctrine "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." Levin v. Commerce Energy, Inc., 560 U.S. 413, 421 (2010). The doctrine arises out of the principles of federalism and "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." Id.

Again, although Plaintiffs do not actually mention the orders issued by the Alabama Supreme Court in Ex parte State ex rel. Alabama Policy Institute in their Second Amended Complaint, there can be little doubt that there claims are directed squarely at the injunction entered in that case. Even if this Court were to find that it has jurisdiction over this action, Judge Russell respectfully requests that it refrain from exercising that jurisdiction for considerations of comity and federalism in order to avoid forcing him to decide which court's order to defy. In the alternative, Judge Russell respectfully requests that this Court stay all further action in this case until such time as the United States Supreme Court issues its opinion in the consolidated cases of *Obergefell v. Hodges*, No. 14-556, *Tanco v. Haslam*, No. 14-562, *DeBoer v. Snyder*, No. 14-571, and *Bourke v. Beshear*, No. 14-574 in June.

CONCLUSION

WHEREFORE, THESE PREMISES CONSIDERED, Judge Russell, in his official capacity as Probate Judge for Baldwin County, Alabama, both individually

and as a class representative, hereby respectfully requests that this Court dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, that this Court stay any further proceedings in this action.

Respectfully submitted this the 10th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of April, 2015, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide notice to the following CM/ECF participants:

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