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

JAMES N. STRAWSER and JOHN E. HUMPHREY, et al.,	)	
Plaintiffs,	)	
	)	**Case No. 1:14-cv-424-CG-N**
v.	)	
STATE OF ALABAMA, LUTHER STRANGE, and DON DAVIS,	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

COME NOW defendants Alabama Judges of Probate and state as follows in opposition to the Plaintiffs' Motion for Permanent Injunction, respectfully showing that the plaintiffs' motion is due to be denied and that all claims are due to be dismissed.

I. The Court Lacks Jurisdiction Because The Plaintiffs Claims Have Been Rendered Moot By Intervening Events.

"Federal courts do not have jurisdiction under the Article III 'Case or Controversy' provision of the United States Constitution to decide questions rendered moot by reason of intervening events. When effective relief cannot be granted

because of later events, the [case] must be dismissed as moot. See, *e.g., C & C Products, Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). A case is moot when the issues are no longer 'live' or when the parties have no 'legally cognizable interest' in the outcome of the litigation. *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 1183, 71 L. Ed. 2d 353 (1982)." *Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1462-1463 (11th Cir. 1987). "If, after the complaint is filed, the defendant comes into compliance ... , then traditional principles of mootness will prevent maintenance of the suit for injunctive relief as long as there is no reasonable likelihood that the wrongful behavior will recur." *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc*., 897 F.2d 1128, 1135 (11th Cir. 1990) (addressing injunction against violation of the Clean Water Act.) "Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue. As the Supreme Court long ago held in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L. Ed. 264 (1868), 'without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *University of S. Alabama v. American Tobacco Co*., 168 F.3d 405, 410 (11th Cir. 1999).

On June 26, 2015, the U.S. Supreme Court released its decision in *Obergefell et al., v. Hodges*, No. 14-556, 576 U.S. ___ (June 26, 2015), in which it ruled that the Fourteenth Amendment to the U.S. Constitution requires states to license marriages between two people of the same sex and to recognize such marriages lawfully licensed in other states. Thereafter, on Friday June 26, 2015, class representative Judge Don Davis – who due to conflicting orders from this Court and the Alabama Supreme Court had stopped issuing marriage licenses entirely – began issuing marriage licenses properly applied for without regard for the gender of the applicants, i.e. to opposite-sex and same-sex couples alike. The plaintiffs have acknowledged also that "the majority of Alabama's probate court judges are currently issuing marriage licenses to same-sex couples, ...". (Doc. 144, p. 1). The plaintiffs' claims for declaratory and injunctive relief are no longer "live" because, in light of the U.S. Supreme Court's decision and the probate judges' compliance with that ruling, same-sex couples can and have already received marriage licenses in this state. The plaintiffs' claims are therefore moot and must be dismissed for lack of jurisdiction.

The Eleventh Circuit Court explained in *Dow Jones & Co. v. Kaye*, 256 F.3d 1251 (11th Cir. 2001):

> "A claim for injunctive relief may become moot if: '(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and

> irrevocably eradicated the effects of the alleged violations.'" *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir. 1997) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979)). When we consider our jurisdiction for mootness, we look at the events at the present time, not at the time the complaint was filed or when the federal order on review was issued. *See Jews for Jesus, Inc. v. Hillsborough County Aviation Auth*., 162 F.3d 627, 629 (11th Cir. 1998) ("A case is moot when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief.").

256 F.3d at 1254. As the plaintiffs have acknowledged to the Court, following the release of the U.S. Supreme Court's decision in *Obergefell v. Hodges,* the majority of Alabama's probate judges immediately began issuing marriage licenses without regard for the gender of those applying, and there is no reasonable expectation that same-sex applicants (who otherwise meet the requirements for a license) will be denied licenses in the future. "Past exposure to illegal conduct does not in itself show a pending case or controversy regarding injunctive relief if unaccompanied by a continuing, present injury or real and immediate threat of repeated injury." *Cotterall v. Paul*, 755 F.2d 777, 780 (11th Cir. 1985). There is no continuing present injury nor any real and immediate threat of injury to any plaintiff. Any contention by the plaintiffs that probate judges in Alabama might again deny marriage licenses to same-sex couples or refuse to recognize same-sex marriages in the future is purely speculative and cannot justify injunctive relief. See *Dudley v. Stewart*, 724 F.2d

1493, 1494 (11th Cir. 1984) (holding that the mere possibility of a violation recurring in the future *if* certain events take place cannot support claims for injunctive and declaratory relief.) Also, the probate courts' compliance with the Supreme Court's decision in *Obergefell* has eliminated the effects of the prior policy of issuing marriage licenses only to opposite-sex couples as previously mandated by Alabama law. A permanent injunction at this point would give the plaintiffs no meaningful relief because it would merely direct Alabama probate judges to do what they already are doing, obeying the law as announced by the U.S. Supreme Court. The plaintiffs' claims for injunctive relief are therefore moot and must be dismissed.

The plaintiffs also seek a declaration by this Court that Alabama's statutes and constitutional provisions excluding same-sex couples from marriage and prohibiting recognition of same-sex marriages from other states violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution. (Doc. 47, p. 12, ¶ 42). The U.S. Supreme Court's decision in *Obergefell* obviates such a declaration, because the Supreme Court said essentially the same things the plaintiffs are asking this Court to declare. There is no need, and it would serve no purpose, for this Court to reiterate what the U.S. Supreme Court stated in *Obergefell*. The Supreme Court's decision holds that the Fourteenth Amendment to the U.S. Constitution requires all states to license marriages between two people of the same-

sex and to recognize same-sex marriages lawfully licensed and performed in other states. Because the Supreme Court's decision has rendered moot the declaratory and injunctive relief sought by the plaintiffs, this Court no longer has jurisdiction and must dismiss the action.

In addition, as a result of the Supreme Court's *Obergefell* decision, the claim in this case for injunctive relief – to enjoin enforcement of laws or policies that exclude the plaintiffs from marriage or refuse recognition of their marriages – now seeks nothing more than an impermissible "obey the law" injunction. The Eleventh Circuit has held repeatedly that "obey the law" injunctions are unenforceable. *Florida Ass'n of Rehabilitation Facilities, Inc. v. State of Florida Dept. of Health and Rehabilitative Services*, 225 F.3d 1208 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999). Probate Courts in Alabama are now complying with the U.S. Supreme Court's ruling that states must license marriages between two people of the same sex, and there is no need for this Court to order that they continue to do so in the future. In *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) the Eleventh Circuit Court held that the district court properly denied a declaratory judgment that a search of public school students was unconstitutional because, in light of the district court's prior order to that effect, such a declaration was unnecessary. *Id*. at 1176. The Eleventh Circuit also held in *Thomas v. Roberts* that because it was clearly established law in the circuit that searches like those at issue

were unconstitutional, the district court correctly declined to enjoin the defendants from searching students in the future. The Court stated, "[a]n injunction ordering the County and the District to 'obey the law' would serve little purpose." *Id*. The same is now true in this case. In light of the U.S. Supreme Court's pronouncement in *Obergefell*, it is unnecessary for this court to reiterate that same-sex couples are entitled to marry, and a permanent injunction to Alabama's probate judges to obey the law would serve no purpose. The plaintiff's claims should therefore be dismissed.

II. The Plaintiffs Cannot Show The Required Elements For A Permanent Injunction.

"To be entitled to permanent injunctive relief from a constitutional violation, a plaintiff must first establish the fact of the violation. *Rizzo v. Goode*, 423 U.S. 362, 377, 96 S. Ct. 598, 607, 46 L. Ed. 2d 561 (1976). He must then demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506, 79 S. Ct. 948, 954, 3 L. Ed. 2d 988 (1959). If the plaintiff makes such a showing, the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation. See *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S. Ct. 3144, 57 L. Ed. 2d 1160 (1978)." *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982). In this case, the plaintiffs cannot establish the fact of a constitutional

violation. The original plaintiffs received marriage licenses (see Doc. 95, pp. 2-3, ¶ 5) and probate courts throughout the state now are issuing licenses to new applicants, regardless of the genders of the two people wishing to marry. Because probate courts are issuing marriage licenses to both opposite-sex and same-sex couples in compliance with the U.S. Supreme Court's ruling, there will be no continuing injury if the permanent injunction is not issued. Furthermore, even if a same-sex couple were denied a marriage license in a county in the future, no irreparable injury would result because the applicants could obtain a license in any one of the majority of counties where licenses are being issued. Because the plaintiffs cannot establish the required elements for a permanent injunction, their motion is due to be denied and all claims must be dismissed.

III. The Claim For Attorneys' Fees Is Barred By Judicial And Quasi-Judicial Immunity And Does Not Preclude Dismissal.

Probate Judges in Alabama are officers of the state's unified judicial system. Alabama Const., Art. VI, Sec. 139. As judicial officers, they have an obligation to follow the laws and constitution of the state and to follow the precedents and direct orders of the Alabama Supreme Court. Probate judges also were issued a direct order by the Alabama Supreme Court to follow the state's statutes and constitutional provisions prohibiting same-sex marriage. While the actual sale and issuance of marriage licenses may be but a ministerial duty, deciding whether applications were

in compliance with Alabama law or whether or not to issue marriage licenses at all were decisions involving the exercise of discretion in the defendants' capacity as judicial officers. Each defendant is therefore entitled to absolute judicial immunity. Title 42 U.S.C. §1988 (b) provides explicitly that judicial officers may not be held liable for costs or attorneys' fees for actions in their judicial capacity. The plaintiffs' claim for costs and attorneys' fees therefore does not preclude dismissal of this litigation.

Even as to the actual issuance of marriage licenses, quasi-judicial immunity bars the plaintiff's claim for attorneys' fees. "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." *Roland v. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994). (Quotation marks and citation omitted.) In *Roland v. Phillips*, the Eleventh Circuit Court held that officials "were protected by absolute quasi-judicial immunity because they acted pursuant to valid written and oral judicial orders." *Id*. at 557. At all times, the probate judges of this state acted in compliance with either then-valid Alabama statutes and constitutional provisions or, in the case of Judge Don Davis of Mobile County, in compliance with written orders from both this Court and the Alabama Supreme Court. The plaintiff's claim for costs and attorneys' fees therefore is barred by quasi-judicial immunity and must be dismissed.

Judge Don Davis of Mobile County is the only probate judge in Alabama who was subject to an injunction between February 12, 2015 and the announcement of the U.S. Supreme Court's decision in *Obergefell v. Hodges* on June 26, 2015, because the preliminary injunction issued on May 21, 2015 (Doc. 123) to all Alabama probate judges was stayed by its own provisions. In light of the conflicting orders from this Court and the Alabama Supreme Court, Judge Davis stopped issuing any marriage licenses at all, until the Supreme Court ruled in *Obergefell*, which this Court acknowledged not to violate either court's order. (See Doc. 123, p. 10, fn 3). All other probate judges were subject only to the Alabama Supreme Court's order not to issue same-sex marriage licenses, and they complied with that order. Because all probate judges in the state acted in compliance with a lawful court order, they are protected by quasi-judicial immunity and the plaintiffs' claims must be dismissed.

IV. Probate Judges Who Did Not Violate This Court's Orders Should Not Be Subject To A Permanent Injunction.

The plaintiffs have not established that all of Alabama's 68 judges refused to grant same-sex marriage licenses while granting opposite sex marriage licenses. Those probate courts which either granted same-sex marriage licenses or who exercised their judicial authority and refused to issue any marriage licenses did not violate this Court's orders. Accordingly, they should not be subjected to a permanent injunction. This Court has already allowed claims before it for compensatory and

punitive damages, as well as attorney's fees, for failure of a judge to recognize the right to same-sex marriage.

V. The Plaintiffs' Motion Is Premature.

Finally, U.S. Supreme Court Rule 44 provides a 25-day period during which a rehearing may be requested, which some have interpreted as staying the effect of the Court's ruling in *Obergefell v. Hodges* until that period expires. Under Supreme Court Rule 45, no formal mandate will be issued by the Supreme Court because mandates are not issued in appeals from federal courts and *Obergefell v. Hodges* was before the Supreme Court on a *petition for writ of certiorari* to the Sixth Circuit Court of Appeals. Nevertheless, it is prudent for the determination of any motion for final injunction to await the expiration of and results of the rehearing period.

Probate judges take an oath to follow the law upon investiture. The U.S. Supreme Court has now resolved the conflict between this Court's rulings and the ruling of the Alabama Supreme Court. Both Courts are entitled to interpret the U.S. Constitution, and the U.S. Supreme Court decided that this Court's interpretation was correct, essentially overruling the Alabama Supreme Court's determination. The bottom line is this: probate judges in this State were following Court orders when they either refused to issue marriage licenses or refused to issue same-sex marriage licenses. Now that the confusion about the law has been cleared up by the U.S. Supreme Court, there is no indication that the probate judges will violate their oath

and refuse to follow what the Supreme Court has established, and what the Alabama Attorney General and the Governor of the State have said is now the law of the land.

WHEREFORE, the defendants respectfully show that the plaintiffs' motion for permanent injunction should be denied and all claims dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on **July 7, 2015** electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of record, and I have mailed the same to non-CM/ECF participants via United States Mail properly addressed and first class postage prepaid, to wit:

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