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 THE ATTORNEY GENERAL'S MOTION TO DISMISS

Plaintiffs respond as follows to the Attorney General's Motion to Dismiss (Doc. 166).

Plaintiffs previously filed a motion to enter final judgment and to make permanent this Court's preliminary injunction, which prohibits Defendants from discriminating against same-sex couples who wish to get married or to have their marriages recognized in the state of Alabama (Doc. 142). The Attorney General now seeks dismissal of the claims against him based on the same arguments he asserted in his opposition to Plaintiffs' motion for entry of final judgment (Doc. 150). As before, he asserts that: (1) he is bound by an injunction in another case to which Plaintiffs are not parties, (2) he is currently complying with the preliminary injunction in this case, and (3) he acknowledges the decision of the U.S. Supreme Court in *Obergefell* as governing law. Plaintiffs' response remains the same as well: none of the Attorney General's assurances provides Plaintiffs or the members of the Plaintiff Class with a

formal, enforceable order should the Attorney General (or a future Attorney General) violate this Court's *Searcy* injunction or fail to fully recognize marriages validly entered into in Alabama or elsewhere.

The past and present efforts by numerous Alabama officials to resist the Supreme Court's decision in *Obergefell* make the need for a permanent injunction clear. Only a permanent injunction and final judgment will guarantee that Plaintiffs obtain the full relief to which they are entitled, and that state and local officials will permanently cease to enforce Alabama's unconstitutional laws barring same-sex couples from marriage and refusing to recognize their valid marriages solemnized in other states.

I. The Supreme Court's Decision in *Obergefell* Does Not Moot this Case

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court struck down marriage bans and non-recognition laws in Michigan, Kentucky, Ohio, and Tennessee. While *Obergefell*'s reasoning is binding Supreme Court precedent, that case neither declared Alabama's marriage bans and anti-recognition laws to be unconstitutional nor ordered Alabama to stop enforcing its unconstitutional marriage laws. The Supreme Court's invalidation of marriage bans in four other states cannot moot this separate challenge to Alabama's marriage ban, even if the reasoning of that decision controls the outcome of this case.

Indeed, in other cases in the same mid-litigation position, courts have rejected similar mootness arguments and have ordered entry of permanent injunctions and/or final judgments. *See Robicheaux v. Caldwell*, 791 F.3d 616, 619 (5th Cir. 2015) (Louisiana); *Campaign for S. Equal. v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015)

(Mississippi); *DeLeon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) (Texas); *Conde-Vidal v. Rius-Armendariz,* No. 14-2184 (1st Cir. July 8, 2015) (Puerto Rico); *Rosenbrahn v. Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015) (South Dakota); *Waters v. Ricketts*, 798 F.3d 682, 686 (8th Cir. 2015) (Nebraska); *Jernigan v. Crane*, 796 F.3d 976, 980 (8th Cir. 2015) (Arkansas); *Inniss v. Aderhold*, No. 1:14-cv-1180-WSD (N.D. Ga. Oct. 7, 2015) (Doc. No. 67) (Georgia). This Court should do the same.

II. The Attorney General's Current Compliance with *Obergefell* Does Not Moot this Case

The Attorney General also argues that this case is moot because he now recognizes that *Obergefell* is the law of the land and has stopped enforcing Alabama's ban on recognition of same-sex couples' marriages. He cannot, however, to demonstrate that his post-litigation recognition of same-sex couples' marriages—which first occurred only as a result of the preliminary injunctions in this case and in *Searcy*—satisfies the stringent requirements of the mootness doctrine.

The Supreme Court has emphasized that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (citations and alterations omitted). As a result, explained the Court, "the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is *stringent*: A case *might* become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur*." *Id.* (emphasis added,

citation omitted). And the "formidable, heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (quoting *Laidlaw*, 528 U.S. at 190).

Here, the Attorney General cannot satisfy his burden of showing that "(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." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added, citations omitted). For "[a] defendant's assertion that it has no intention of reinstating the challenged practice does not suffice to make a case moot and is but one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Sheely*, 505 F.3d at 1184 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Given the conduct of Alabama state and local officials at all levels during this litigation—both before and after *Obergefell*—it cannot be said "with assurance" that enforcement of Alabama's unconstitutional marriage ban has been "completely and irrevocably eradicated." *Davis*, 440 U.S. at 631.

Even if the Attorney General follows through on his intention not to enforce the marriage ban, he cannot guarantee that state enforcement of the marriage ban will not recur. The challenged laws have not been repealed. Alabama's marriage prohibitions remain part of the state Constitution and the Alabama Code. Moreover, there are multiple ways in which same-sex couples continue to be subjected to different

treatment under Alabama law, and it appears that these matters will linger for some time.

First, more than three months after *Obergefell*, the Alabama Supreme Court has taken no action to set aside its ruling in *Ex parte State ex rel. Ala. Policy Inst.*, --- So. 3d ---, 2015 WL 892752 (Ala. Mar. 3, 2015). In response to the Alabama Supreme Court's request to address the effect of *Obergefell* on June 29, 2015, the petitioners called upon the Alabama Supreme Court to ignore the holding in *Obergefell* and maintain state law that bars same-sex couples from getting married. *See* Relators Alabama Policy Institute and Alabama Citizens Action Program's Brief Addressing the Effect of Obergefell on this Court's Existing Orders, Case No. 1140460 (Alabama Supreme Court) (filed July 6, 2015). Washington County Probate Court Judge Nick Williams has twice called upon the Alabama Supreme Court to do the same. *See* Motion to Exclude the Judicial Inquiry Commission Filing & Request that Chief Justice Moore Not Recuse, Case No. 1140460 (Alabama Supreme Court) (filed August 3, 2015); Respondent Probate Judge Nick Williams' Emergency Petition for Declaratory Judgment and/or Protective Order in Light of Jailing of Kentucky Clerk Kim Davis, and Memorandum in Support of Emergency Motion, Case No. 1140460 (Alabama Supreme Court) (filed September 16, 2015). And earlier this month, Alabama Supreme Court Justice Tom Parker appeared on a radio talk show and asserted that the Alabama Supreme Court should defy *Obergefell*, citing, as justification, Wisconsin's defiance of the *Dred Scott* decision and the Fugitive Slave Act. *See* Complaint Against Justice Tom Parker (Ala. Jud. Inquiry Comm'n Oct. 12, 2015), http://tinyurl.com/ALParker.

Second, it remains far from "absolutely clear" that state officials in Alabama will refrain from enforcing the marriage ban. For example, in October, Elmore County Probate Judge John Enslen filed a petition in the Alabama Supreme Court arguing that he should not have to issue marriage licenses to same-sex couples and that the federal government should take over the job. *See* Petition for Declaratory Judgment, Order, and Decree That Alabama Will Honor Same-Sex Marriage Licenses Only if Issued Under the Exclusive Licensing Authority of the United States Government or Sister States Whose State Laws Recognize Same-Sex Marriages, Case No. 1140460 (Alabama Supreme Court) (filed October 5, 2015). If the Alabama Supreme Court were to adopt Judge Enslen's proposal, Alabama would no longer recognize the marriages of same-sex couples whose marriages were licensed and solemnized in any state that is following the ruling in *Obergefell* but whose legislature has not amended its laws to permit marriage for same-sex couples. *Id.* at 2.

In addition, earlier this month a group of over sixty law professors—who claim that the *Obergefell* opinion "cannot … be taken to have settled the law of the United States"—released a statement "call[ing] on all federal and state officeholders … [t]o refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case." American Principles Project, *Statement Calling for Constitutional Resistance to Obergefell v. Hodges* (Oct. 8, 2015), http://tinyurl.com/ObergefellResistance. This highlights that opponents of *Obergefell* will actively look for gaps in enforcement, and will take the position that only a court order protecting the specific plaintiffs seeking relief will compel them to license or recognize their marriages.

Even though the Attorney General's motion is directed only to the claims against him, if this case were totally dismissed as moot there would be no Alabama probate judge who would be subject to any court order except for the Alabama Supreme Court's mandamus order purporting to compel probate judges *not* to issue marriage licenses to same-sex couples. It is this court's permanent orders, in conjunction with *Obergefell,* that ensure adherence to the Fourteenth Amendment.

Thus, although there is a rebuttable presumption that governmental defendants will not resume challenged conduct, *see Sheely*, 505 F.3d at 1184, the continued resistance of multiple state and local officials to implementation of the freedom to marry for same-sex couples in Alabama is more than sufficient to rebut that presumption here. And as detailed above, federal courts have consistently rejected state officials' assurances that they will comply with *Obergefell* as a basis to deny entry of final judgment in cases seeking the freedom to marry.

Plaintiffs cannot risk the loss of recognition of their marriages. Recognition of their marriages affects their income taxes, their employee health benefits, and their financial security if a spouse dies. Because Plaintiffs need the certainty that their marriages will be recognized by the State throughout their lives and at the time of their deaths, they still "need … the judicial protection that [they] sought" by bringing this action. *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Only a permanent injunction will allow them to seek prompt judicial relief should state officials resume enforcing the marriage ban, as some have indicated they wish to do.

III. This Court's Permanent Injunction in *Searcy* Does Not Moot this Case

The Attorney General does not contest the entry of a permanent injunction against members of the Defendant Class of county probate judges. Doc. 150 at 1 (citing *Obergefell*). He argues, however, that because he is already covered by an injunction in *Searcy v. Strange*, No. 14-0208-CG-N (S.D. Ala. Jan. 23, 2015) (Doc. 53), no injunction is needed against him in this case. But a permanent injunction and final declaratory judgment is necessary to give these Plaintiffs—as opposed to the plaintiffs in a different case—the full relief to which they are entitled under the U.S. Constitution.

In *Taylor v. Brasuell*, No. 1:14-cv-00273-REB, 2015 WL 4139470 (D. Idaho July 9, 2015), the court rejected the precise argument made here by the Attorney General and ruled that an earlier permanent injunction striking down a state's ban on marriage for same-sex couples did not moot a second action challenging the ban which had been filed before the judgment in the first action became final. In that case, a military veteran filed suit challenging the state's denial of her application to be buried together with her late wife at the Idaho Veterans Cemetery. The defendant state official argued that the case was moot in light of an earlier successful challenge, which resulted in the state halting enforcement of the marriage ban a few months after the veteran filed her suit.

The court first rejected the state's argument that its current non-enforcement of the marriage ban mooted the veteran's claims, because her suit sought not only current recognition of her marriage, but *ongoing* recognition to ensure that her remains would be interred with her wife's remains when she died. *See id.* at *5.

Second, the court recognized the risk that "Veterans Services may in fact perform an about-face" and resume enforcing the marriage ban, because "at nearly every turn, Idaho state officials sought to overturn [the earlier decision] and restore Idaho's same-sex marriage ban." *Id.* at 7. As a result, the state had not "borne its formidable burden of establishing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). As here, "notwithstanding the rulings in [the Ninth Circuit's marriage case] and *Obergefell*, a future [head of the defendant agencies] may come to view his or her role as being responsible for deciding what is/is not constitutional under the law on matters that may impact [the plaintiff's] claimed right to be interred there with her same-sex spouse." *Id.*

The same is true of the claims of the Plaintiffs and Plaintiff Class members in this case. The judgment and permanent injunction in *Searcy* protect only the plaintiffs in *Searcy*. They do not protect the *Strawser* Plaintiffs against non-recognition of their marriages by state or local officials. Plaintiffs have no legal authority to invoke the Court's jurisdiction to enforce the *Searcy* injunction. *See*, *e.g.*, *In re Emp't Discrimination Litig. Against the State*, 213 F.R.D. 592, 601 (M.D. Ala. 2003) (Fed. R. Civ. P. 71 does not allow non-party plaintiffs to enforce court orders); *see also Salter v. Douglas MacArthur State Tech. Coll.*, 929 F. Supp. 1470, 1481 (M.D. Ala. 1966) (non-party has no standing to enforce terms of consent decree); *Sims v. Montgomery Cnty. Comm'n*, 873 F. Supp. 585, 599 (M.D. Ala. 1994) (same). If the Attorney General resumes enforcing the Alabama marriage ban, the *Searcy*

injunction will not provide Plaintiffs with any way to obtain relief against him or his successors. *See* Doc. 159 (Plaintiffs' Consolidated Reply in support of motion for permanent injunction and final judgment) at 2-3.

In light of the repeated, intense, and ongoing opposition by Alabama officials to same-sex couples' freedom to marry, it is not "absolutely clear" that a future Attorney General or some other state officer will act consistently with *Obergefell* and uphold Plaintiffs' right to marry. Especially since the Plaintiff Class includes all same-sex couples in Alabama whose marriages have been or will be denied recognition due to the marriage ban—a much broader group of plaintiffs than in *Searcy,* which is not a class action—permanent injunctive relief remains essential to fully vindicate Plaintiffs' and class members' constitutional rights.

The cases on which the Attorney General relies do not undermine this conclusion. *See Thayer v. Chiczewski*, 705 F.3d 237, 256-57 (7th Cir. 2012); *Longley v. Holahan*, 34 F.3d 1366, 1367 (8th Cir. 1994); *Eagle Books, Inc. v. Difanis*, 873 F.2d 1040, 1042 (7th Cir. 1989). *Thayer* and *Longley* each contain a few short sentences dismissing an appeal as moot after holding the challenged statute unconstitutional in a companion case; neither of them includes any analysis of the legal standard for mootness or any discussion of relevant Supreme Court precedent. *Eagle Books* did not involve the mootness doctrine at all; it held that the plaintiff did not have *standing* to challenge a state obscenity statute because a state supreme court decision

eliminated any threat of prosecution. 873 F.2d at 1042.[1] Unlike this case and *Taylor*, none of those cases involved specific facts calling into question whether state officials would resume enforcement of the challenged provision. And unlike this case, none of those cases involved a class action challenging the constitutionality of a state statute and seeking entry of a permanent injunction enforceable on behalf of an entire Plaintiff Class of state residents.

The Northern District of Alabama's recent dismissal of a marriage equality case does not alter this conclusion, and in fact supports Plaintiffs' position that a permanent injunction is necessary. In *Aaron-Brush v. Bentley*, No. 2:14-cv-01091-RDP (N.D. Ala. Oct. 13, 2015) (Doc. No. 44), the court dismissed the case in deference to this Court's injunctions in both *Searcy* and this class action. The court reasoned that "if in the future, unconstitutional conduct is perpetrated by state actors who are not parties in this case, it appears Judge Granade will have jurisdiction and the desire to address those matters *in her cases*." *Id.* at 4 (emphasis added). Particularly since this case is a statewide class action on behalf of all same-sex couples in the state, entry of a permanent injunction is necessary and appropriate to ensure

[1] The Supreme Court has emphasized that standing and mootness are distinct doctrines, and that the allocation of burdens is also distinct. When it comes to mootness, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. But with respect to standing, when a lawsuit is initially filed "it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue." *Id.*

continued and uniform compliance by state officials with the requirements of the Fourteenth Amendment.

Finally, the Attorney General's opposition to entry of a final judgment against him appears to be directed primarily at avoiding liability for payment of Plaintiffs' reasonable attorneys' fees in this action. Even if his motion were granted, however, all Defendants, including the Attorney General, would remain liable for Plaintiffs' reasonable attorneys' fees under 42 U.S.C. § 1988, and Plaintiffs intend to file a motion seeking such fees at the appropriate time. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (awarding attorneys' fees under Section 1988 to Plaintiffs who obtained a preliminary injunction); *see also Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1232 (10th Cir. 2011) (awarding attorneys' fees to plaintiffs who secured a preliminary injunction that was later mooted through the actions of third parties), *cert. denied*, 132 S. Ct. 1715 (2012).

For these reasons, the Attorney General's Motion to Dismiss should be denied in full.

Respectfully Submitted,

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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 October 19, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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