

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

JAMES N. STRAWSER and JOHN E.)
HUMPHREY; ROBERT POVILAT and)
MILTON PERSINGER; MEREDITH)
MILLER and ANNA LISA)
CARMICHAEL; and KRISTY SIMMONS)
and MARSHAY SAFFORD,)

Plaintiffs,)

v.)

Civil Action No. 14-0424-CG-C

LUTHER STRANGE, in his official)
capacity as Attorney General for)
the State of Alabama, DON DAVIS,)
in his official capacity as Probate Judge of)
Mobile County, Alabama,)

Defendants.)

**PROPOSED INTERVENOR JEFFERSON COUNTY PROBATE JUDGE ALAN
KING’S MOTION FOR PRELIMINARY INJUNCTION**

PROPOSED INTERVENOR, Jefferson County Probate Judge Alan King, (“Judge King”), by and through counsel respectfully moves this Court pursuant to Federal Rule of Civil Procedure 65(a), to enter a preliminary injunction directing the Alabama Attorney General to immediately enter an appearance in and dismiss the case pending before the Alabama Supreme Court styled *Ex parte State of Alabama v. Alan L. King, et al.*, Supreme Court Case Number 1140460. In further support hereof, Judge King states as follows:

FACTS

1. Judge King is a duly elected Probate Judge of Jefferson County, Alabama, and pursuant to Article XVI, Section 279, of the Constitution of Alabama, is bound by his

oath to “support the Constitution of the United States and the Constitution of the State of Alabama”.

2. This Court entered orders on January 23, 26, and 28, 2015, DECLARING Alabama’s laws excluding same-sex couples from marriage to be unconstitutional and ENJOINING the Alabama Attorney General, “his officers, agents, servants and employees, and others in active concert or participation with any of them who would seek to enforce the marriage laws of Alabama that prohibit same-sex marriage” from enforcing the Alabama laws which prohibit same-sex marriage. (Doc. 29)

3. The Alabama Policy Institute and the Alabama Citizens Action Program, acting on behalf of the State of Alabama, filed an “Emergency Petition for Writ of Mandamus” [the Emergency Petition] in the Alabama Supreme Court on February 11, 2015. Judge King is named as a respondent therein.

4. A majority of the Alabama Supreme Court ordered that Judge King file an answer to the Emergency Petition on or before 5 PM CST February 18, 2015.

5. Judge King submits that the Emergency Petition is an improper attempt by persons acting in concert with and on behalf of the State of Alabama and the Alabama Attorney General to (a) achieve a stay of this Court’s prior orders from the Alabama Supreme Court and (b) to enforce “the marriage laws of Alabama that prohibit same-sex marriage” in violation of the injunctions issued by this Court.

6. The Alabama Attorney General has direction and control over litigation brought on behalf of the State of Alabama: “All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General.” Ala. Code §36-15-21. The Attorney General has the authority to

dismiss an action filed on behalf of the State over the objection of the filing party. *Ex parte King*, 59 So. 3d 21, 25 (Ala. 2010).

7. The Alabama Attorney General has not exercised his authority pursuant to Ala. Code §36-15-21 to dismiss the Emergency Petition. It therefore appears that a preliminary injunction from this Court is necessary.

LEGAL STANDARD

A United States District Court should grant preliminary injunctive relief when the movant establishes four factors: “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest.” *Siebert v. Allen*, 506 F. 3d 1047, 1049 (11th Cir. 2007); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)(“[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.”).

ANALYSIS

I. Plaintiffs Have Already Succeeded on the Merits.

This Court has already declared that Alabama’s laws prohibiting same-sex marriage violate the Equal Protection and Due Process Clauses of the United States Constitution. This Court has already enjoined the Alabama Attorney General, “his officers, agents, servants and employees, and others in active concert or participation with any of them who would seek to enforce the marriage laws of Alabama that prohibit

same-sex marriage” from enforcing the Alabama laws which prohibit same-sex marriage. This Court has issued a similar injunction to Mobile County Probate Judge Don Davis.

The Plaintiffs in this action have already succeeded on the merits of their claims regarding the constitutionality of Alabama laws which prohibit same-sex marriage. It follows that the first factor for preliminary injunctive relief is already established.

II. Judge King Will Suffer Irreparable Harm Absent An Injunction.

Where, as here, success on the merits is extremely likely (or already established) a lesser showing of irreparable harm is required. *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store*, 735 F. 3d 735, 740 (7th Cir. 2013).

Judge King has previously received an Administrative Order from the Chief Justice of the Alabama Supreme Court directing him not to issue or recognize a marriage license that is inconsistent with the same Alabama laws that this Court has declared to be unconstitutional and which this Court enjoined the Alabama Attorney General and Mobile County Probate Judge from enforcing. Said Administrative Order threatens Judge King with punishment for non-compliance. Order attached hereto as Exhibit A.

The Emergency Petition and the Order from a majority of Justices of the Alabama Supreme Court directing Judge King to answer the Emergency Petition further subjects Judge King to the imminent risk of being placed in the position of having to choose either to disregard the United States Constitution, which he is sworn to uphold, thereby subjecting him to liability and perhaps personal liability for damages and attorney fees, or to disregard a state court order subjecting him to contempt proceedings, sanctions and/or possible impeachment under Alabama law.

The Emergency Petition admits on its face that its drafters are acting on behalf of the State of Alabama. The Alabama Attorney General has the authority under Alabama law (Ala. Code §36-15-21) and the legal duty pursuant to this Court's injunction to stop Petitioners from acting on behalf of the State of Alabama to enforce the Alabama laws that this Court has declared to be unconstitutional. The Alabama Attorney General has not exercised that authority nor performed that duty. Judge King is suffering irreparable harm because of the Alabama Attorney General's inaction and will continue to suffer irreparable harm without preliminary injunctive relief directing the Alabama Attorney General to immediately appear in and dismiss the Emergency Petition now pending in the Alabama Supreme Court on behalf of the State of Alabama.

III. The Injury to Judge King Outweighs Any Harm to Any Other Party, and the Public Interest Favors Granting the Injunction.

No one will be injured by a preliminary injunction directing the Alabama Attorney General to appear in and dismiss the Petition now pending before the Alabama Supreme Court on behalf of the State of Alabama. Further, such preliminary injunctive relief will not be adverse to the public interest. It is respectfully submitted that the Alabama Attorney General should not be permitted to indirectly accomplish what this Court has directly forbidden him to do.

IV. Judge King Should Not Be Required to Post a Bond.

This Court has the discretion to issue a preliminary injunction without requiring the party seeking the injunction to post a bond. *See BellSouth Telecommc'ns, Inc. v. MCIMetro Access Transmission Serv., LLC*, 425 F. 3d 964, 971 (11th Cir. 2005)("[T]he court may elect to require no security at all."). Exercise of that discretion is particularly appropriate where, as here, issues of public concern or important federal rights are

involved. *See Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F.Supp. 2d 1326, 1335-36 (M.D. Fla. 2009)(“Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.”); *Broward Coal. of Condos., Homeowners Ass’ns & Cmty. Orgs. Inc. v. Browning*, 2008 WL 4791004, at *15 (N.D. Fla. Oct. 29, 2008)(same). If this Court enters a preliminary injunction, Judge King asks that no bond be required.

RELIEF REQUESTED

Judge King respectfully requests that this Court enter an appropriate order directing the Alabama Attorney General to immediately appear in and dismiss the Emergency Petition for Writ of Mandamus on behalf of the State of Alabama currently pending before the Alabama Supreme Court as Supreme Court Case Number 1140460. The undersigned counsel respectfully request that this Court set this matter for hearing and enter the relief requested herein prior to 5PM CST February 18, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on February 17, 2015 via the Court's CM/ECF system. Service will be effectuated upon all parties and counsel of record via the Court's electronic notification system.

/s/French A. McMillan
FRENCH A. MCMILLAN
One of the Attorneys for Alan King

STATE OF ALABAMA -- JUDICIAL SYSTEM

**ADMINISTRATIVE ORDER OF THE
CHIEF JUSTICE OF THE SUPREME COURT**

WHEREAS, pursuant to Article VI, Section 149, of the Constitution of Alabama, the Chief Justice of the Supreme Court of Alabama is the administrative head of the judicial system; and

WHEREAS, pursuant to § 12-2-30(b)(7), Ala. Code 1975, the Chief Justice is authorized and empowered to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state"; and

WHEREAS, pursuant to § 12-2-30(b)(8), Ala. Code 1975, the Chief Justice is authorized and empowered to "take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere"; and

WHEREAS, pursuant to Article VI, Section 139(a), of the Constitution of Alabama, the Probate Judges of Alabama are part of Alabama's Unified Judicial System; and

WHEREAS, pursuant to Article XVI, Section 279, of the Constitution of Alabama, the Probate Judges of Alabama are bound by oath to "support the Constitution of the United States, and the Constitution of the State of Alabama"; and

WHEREAS, as explained in my Letter and Memorandum to the Alabama Probate Judges, dated February 3, 2015, and incorporated fully herein by reference, the Probate Judges of Alabama are not bound by the orders of January 23, 2015 and January 28, 2015 in the case of Searcy v. Strange (No. 1:14-208-CG-N) (S.D. Ala.) or by the order of January 26, 2015 in Strawser v. Strange (No. 1:14-CV-424-CG-C) (S.D. Ala.); and

WHEREAS, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the aforementioned orders bind only the

Alabama Attorney General and do not bind the Probate Judges of Alabama who, as members of the judicial branch, neither act as agents or employees of the Attorney General nor in concert or participation with him; and

WHEREAS, the Attorney General possesses no authority under Alabama law to issue marriage licenses, and therefore, under the doctrine of Ex parte Young, 209 U.S. 123 (2008), lacks a sufficient connection to the administration of those laws; and

WHEREAS, the Eleventh Amendment of the United States Constitution prohibits the Attorney General, as a defendant in a legal action, from standing as a surrogate for all state officials; and

WHEREAS, the separation of powers provisions of the Alabama Constitution, Art. III, §§ 42 and 43, Ala. Const. 1901, do not permit the Attorney General, a member of the executive branch, to control the duties and responsibilities of Alabama Probate Judges; and

WHEREAS, the Probate Judges of Alabama fall under the direct supervision and authority of the Chief Justice of the Supreme Court as the Administrative Head of the Judicial Branch; and

WHEREAS, the United States District Court for the Southern District of Alabama has not issued an order directed to the Probate Judges of Alabama to issue marriage licenses that violate Alabama law; and

WHEREAS, the opinions of the United States District Court for the Southern District of Alabama do not bind the state courts of Alabama but only serve as persuasive authority; and

WHEREAS, some Probate Judges have expressed an intention to cease issuing all marriage licenses, others an intention to issue only marriage licenses that conform to Alabama law, and yet others an intention to issue marriage licenses that violate Alabama law, thus creating confusion and disarray in the administration of the law; and

WHEREAS, the Alabama Department of Public Health has redrafted marriage license forms in contradiction to the public statements of Governor Bentley to uphold the Alabama Constitution, and has sent such forms to all Alabama Probate Judges, creating further inconsistency in the administration of justice; and

WHEREAS, cases are currently pending before The United States District Court for the Middle District of Alabama and the United States District Court for the Northern District of Alabama that could result in orders that conflict with those in Searcy and Strawser, thus creating confusion and uncertainty that would adversely affect the administration of justice within Alabama; and

WHEREAS, if Probate Judges in Alabama either issue marriage licenses that are prohibited by Alabama law or recognize marriages performed in other jurisdictions that are not legal under Alabama law, the pending cases in the federal district courts in Alabama outside of the Southern District could be mooted, thus undermining the capacity of those courts to act independently of the Southern District and creating further confusion and uncertainty as to the administration of justice within this State; and

WHEREAS Article I, Section 36.03, of the Constitution of Alabama, entitled "Sanctity of marriage," states:

(a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

(f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.

(g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

and

WHEREAS § 30-1-9, Ala. Code 1975, entitled "Marriage, recognition thereof, between persons of the same sex prohibited," states:

(a) This section shall be known and may be cited as the "Alabama Marriage Protection Act."

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability

and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

and

WHEREAS, neither the Supreme Court of the United States nor the Supreme Court of Alabama has ruled on the constitutionality of either the Sanctity of Marriage Amendment or the Marriage Protection Act:

NOW THEREFORE, IT IS ORDERED AND DIRECTED THAT:

To ensure the orderly administration of justice within the State of Alabama, to alleviate a situation adversely affecting the administration of justice within the State, and to harmonize the administration of justice between the Alabama judicial branch and the federal courts in Alabama:

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.

Should any Probate Judge of this state fail to

follow the Constitution and statutes of Alabama as stated, it would be the responsibility of the Chief Executive Officer of the State of Alabama, Governor Robert Bentley, in whom the Constitution vests "the supreme executive power of this state," Art. V, § 113, Ala. Const. 1901, to ensure the execution of the law. "The Governor shall take care that the laws be faithfully executed." Art. V, § 120, Ala. Const. 1901. "'If the governor's "supreme executive power" means anything, it means that when the governor makes a determination that the laws are not being faithfully executed, he can act using the legal means that are at his disposal.'" Tyson v. Jones, 60 So. 3d 831, 850 (Ala. 2010) (quoting Riley v. Cornerstone, 57 So. 3d 704, 733 (Ala. 2010)).

DONE on this 8th day of February, 2015.

A handwritten signature in black ink, appearing to read "Roy S. Moore". The signature is written in a cursive, flowing style.

Roy S. Moore
Chief Justice