

**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 REPLY TO THE ALABAMA ATTORNEY GENERAL’S OPPOSITION

PROPOSED INTERVENOR, Jefferson County Probate Judge Alan King, (“Judge King”), by and through counsel, submits this Reply to the Alabama Attorney General’s Opposition to Probate Judge King’s Intervention in this case. In further support hereof, Judge King states as follows:

1. Neither the Plaintiffs nor Judge King have secured full relief from the Alabama Attorney General who continues to refuse to comply with this Court’s injunction directing him to refrain from enforcing Alabama laws which prohibit same sex marriage. The Attorney General has exercised his authority under §36-15-21 by permitting the Emergency Petition to proceed even though it seeks to enforce the very provisions of Alabama law that were declared unconstitutional by this Court. Simply

stated, the Alabama Attorney General is attempting to indirectly accomplish what this Court has directly forbidden him to do. His refusal to comply with this Court's injunction creates the interest Judge King has in this case and establishes the common questions of law and fact that exist at this stage of the litigation. That is all that is required by Federal Rule of Civil Procedure 24.

2. The Attorney General's reliance on Article III standing is without merit. It is well settled in the Eleventh Circuit that an intervenor does not need to satisfy the standing requirements of Article III:

Intervening parties, however, need not in every instance demonstrate that they independently fulfill the familiar requisites of injury-in-fact, causation, and redressability. Because of lessened justiciability concerns in the context of an ongoing Article III case or controversy, intervenors in this circuit may in some cases be permitted to "piggyback" upon the standing of original parties to satisfy the standing requirement.

...

So long as an original party on the intervenor's side remains party to the action and maintains an adversarial litigating position vis-a-vis the opposing parties, at least in this circuit an intervenor need not make an independent showing that he or she meets the standing condition of Article III.

Dillard v. Chilton County Com'n, 495 F. 3d at 1330, 1337 (11th Cir. 2007).

There is no serious question that the Alabama Attorney General is maintaining his adversarial litigating position as evidenced by his refusal to comply with this Court's injunction. That continuing controversy is real and immediate and is subjecting Judge King to irreparable injury. That is all that is required for Judge King to have standing to intervene in this case.

3. The Plaintiff's pending Emergency Motion For Enforcement of Injunction and the Alabama Attorney General's opposition thereto belie the Attorney General's statement that there is no present adversarial case or controversy in this case.

4. The Alabama Attorney General has taken the case in a new direction by permitting the Emergency Petition to enforce Alabama's unconstitutional marriage laws to proceed in the Alabama Supreme Court. The Alabama Attorney General is acting in concert with the Petitioners who are seeking an order directing Judge King to stop issuing marriage licenses to same sex couples. The Alabama Attorney General is attempting to indirectly accomplish what this Court has directly forbidden him from doing. It is the Attorney General, not Judge King, who is taking the case in a new direction.

5. Judge King has not alleged any conflict with the Alabama Supreme Court.

6. The Chief Justice of the Alabama Supreme Court has already ordered Judge King to enforce Alabama laws that this Court has declared to be unconstitutional. Were Judge King to obey such an order, he would be exposed to liability and perhaps personal liability under 42 USC §1983 for violating the United States Constitution. With the permission of the Alabama Attorney General, the Petitioners are seeking to have a majority of the Alabama Supreme Court order Judge King to enforce the very laws that this Court has enjoined the Attorney General from enforcing. That presents a concrete, real, direct and unmistakable conflict between the Attorney General and this Court.

7. Judge King has not requested this Court to enjoin the Alabama Supreme Court, although this Court likely has the power to do so in this instance to protect and effectuate its judgment and to prevent the Attorney General from re-litigating the issues this Court has already decided.

8. The *Rooker-Feldman* doctrine has no application here because this case involves questions of federal law, not state law.

9. The consideration of “federalism” has already been addressed by this Court on January 28, 2015 (Doc. 65) when it “clarified” its January 23, 2015 Order in *Searcy v. Strange*, and quoted from Judge Hinkle of the Northern District of Florida:

History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law. Happily, there are many more instances when responsible officials followed the law, like it or not. Reasonable people can debate whether the ruling in this case was correct and who it binds. Here should be no debate, however, on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney’s fees.

The preliminary injunction now in effect thus does not require the Clerk to issue licenses to other applicants. But as set out in the order that announced issuance of the preliminary injunction, the Constitution requires the Clerk to issue such licenses. As in any other instance involving parties not now before the court, the Clerk’s obligation to follow the law arises from sources other than the preliminary injunction.

Searcy v. Strange, Order January 28, 2015. (Doc. 65)

The foregoing succinctly states the concept of federalism and recognizes the potential harm to Judge King if the Alabama Attorney General is not directed to dismiss the Emergency Petition pending before the Alabama Supreme Court.

10. The Alabama Attorney General is exercising his authority under Alabama law to permit the petitioners to enforce Alabama marriage laws that are unconstitutional. There is no material difference between that and bringing the action himself. It is simply an attempt to indirectly accomplish what this Court has directly forbidden him from doing. The Court should not tolerate that circumvention of its injunction.

/s/Jeffrey M. Sewell

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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