

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

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

REPLY TO ATTORNEY GENERAL’S RESPONSE IN OPPOSITION TO  
EMERGENCY MOTION FOR ENFORCEMENT OF INJUNCTION

The Attorney General’s Response in Opposition to Plaintiff’s Emergency Motion for Enforcement of Injunction misses the mark. This Court’s injunction bars the Attorney General from enforcing or seeking to enforce Alabama’s unconstitutional prohibition of marriage by same-sex couples, including by exercising his authority over all litigation brought on behalf of the State to permit an action seeking enforcement of the very laws declared invalid by this Court to proceed in the Alabama Supreme Court. The Attorney General’s decision to acquiesce in the *State v. King* relator petitioners’ attempt to vindicate the State’s interests and obtain an order from the Alabama Supreme Court enforcing the State’s marriage ban for same-sex couples is a violation of this Court’s injunction. Contrary to the Attorney General’s assertions, Plaintiffs are not asking for additional or new injunctive relief against him or others. Rather, Plaintiffs ask this Court to enforce the injunction it has already granted to them. Under an express provision of the Alabama Code, as interpreted by the

Alabama Supreme Court, the Attorney General controls and directs all litigation brought in the name of the State. Although the Attorney General in his opposition brief implausibly seeks to cast doubt upon this unambiguous, explicit grant of authority (without, however, conceding that he does not possess it), his power in this regard is not reasonably in dispute. As a matter of Alabama law, the Attorney General maintains authority over the petition pending before the Alabama Supreme Court because it was filed in the name of the State and seeks to vindicate the State's interest in the enforcement of its laws barring same-sex couples from marriage; his decision to permit its prosecution – regardless of who filed it – constitutes a violation of this Court's preliminary injunction.

Moreover, it bears emphasis that this Court did not enjoin Mr. Strange personally; rather, by enjoining him in his official capacity, the Court enjoined his office, with all its attendant powers. This Court's injunction therefore includes and applies to the full panoply of powers that Alabama law commits to the office of the Attorney General, not to the person who exercises that authority. It is the authority of the Attorney General that is being misused to run afoul of this Court's injunction in the petition before the Alabama Supreme Court.

Plaintiffs reply to each point raised in Defendant's Response in Opposition (Doc. 62) as follows:

1. Plaintiffs seek only to vindicate and effectuate the terms of the preliminary injunctive relief previously awarded them by this Court. Doc. 29. The relief Plaintiffs seek – requiring the Attorney General to comply with the existing

injunction in this case – would create no conflict between this Court’s decisions and any decision of the Alabama Supreme Court.

2. Plaintiffs do not seek “further relief,” as the Attorney General erroneously suggests. Response, Doc. 62 ¶ 2. They come before this Court for the sole purpose of obtaining the benefit of the relief already afforded them. They ask only what this Court has previously ordered – both the right to marry and to have that marriage recognized by the State of Alabama. *See also Searcy v. Strange*, SDAL Civil Action No. 14-0208-CG-N, Memorandum Opinion and Order, Doc. 53. It is incumbent on the Attorney General, in compliance with the preliminary injunction in this case and the determinations in *Searcy*, to ensure that Alabama’s unconstitutional laws barring same-sex couples from marriage and refusing to recognize their marriages are not enforced in the name of the State, regardless of *how* those provisions are enforced. The preliminary injunction binds the Attorney General, to the full extent of his powers, to refrain from prosecuting or permitting others to prosecute litigation in the name of the State that seeks to enforce laws this Court has declared unconstitutional and unenforceable. That prohibition applies no less to litigation filed by private parties purporting to act on behalf of the State, and therefore subject to the Attorney General’s direction and control, than to litigation filed by government attorneys under his direct supervision.

3. The Attorney General’s argument that Plaintiffs lack standing to enforce this Court’s injunction has no merit. As the U.S. Supreme Court has made

clear, Plaintiffs who have obtained injunctive relief maintain standing to effectuate the terms of that relief.

A party that obtains a judgment in its favor acquires a “judicially cognizable” interest in ensuring compliance with that judgment. *See Allen v. Wright*, 468 U.S. 737, 763, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984) (plaintiffs’ right to enforce a desegregation decree to which they were parties is “a personal interest, created by law, in having the State refrain from taking specific actions”). Having obtained a final judgment granting relief on his claims, Buono had standing to seek its vindication.

*Salazar v. Buono*, 559 U.S. 700, 712 (2010).

4. There is no requirement that Plaintiffs demonstrate “that allowing the state court action to proceed will harm anyone.” Response, Doc. 62 ¶ 4. Plaintiffs are not required to wait and see whether the Alabama Supreme Court dismisses the mandamus action due to lack of standing or for other reasons before seeking enforcement of this Court’s existing injunction against a party who is bound by it. The Attorney General is enjoined in this case and in *Searcy* from enforcing or seeking to enforce the Alabama laws which prohibit same-sex marriage. As set forth in Plaintiffs Motion, Doc. 60, and as further discussed *infra*, the Attorney General has full authority to control and direct litigation brought in the name of the State. The Attorney General is obligated to comply with the terms of the preliminary injunction and thus cannot permit an action in the name of the State, seeking to enforce the very laws this Court declared to be invalid, to proceed. If a state district attorney had filed the mandamus petition, the Attorney General could not sit idly by and await the outcome. Indeed, under the Attorney General’s erroneous argument, the Attorney General’s office itself could file a mandamus action seeking to enforce the laws this

Court declared to be invalid and no violation of this Court's injunction would occur until and unless the action was successful. Plainly, however, Plaintiffs need not await an outcome in the Alabama Supreme Court before seeking to enforce the terms of this Court's injunction. The Attorney General's action in allowing the state court claim to proceed and to be prosecuted in the name of the State when he has the clear legal authority to direct and control it – thereby facilitating a request for enforcement of laws this Court has declared unconstitutional – is the violation of the preliminary injunction that Plaintiffs seek to remedy.

5. With respect to Plaintiffs' request for enforcement of this Court's injunction, it is irrelevant whether or how the Alabama Supreme Court addresses the merits of the pending mandamus action. What Plaintiffs challenge is the Attorney General's decision to permit a state court proceeding seeking enforcement of unconstitutional laws to go forward in the name of the State, in violation of this Court's injunction. His deliberate decision to allow an action seeking enforcement of those laws, filed in the name of the State of Alabama, to proceed in state court is what violates this Court's preliminary injunction and requires an order directing compliance.

6. The Attorney General's assertion in paragraph 6 of his brief – that further litigation against probate judges is available if they refuse to issue marriage licenses – is irrelevant to Plaintiffs' request for enforcement of this Court's preliminary injunction. The sole basis for Plaintiffs' request for enforcement is that

the actions and deliberate decision of the Attorney General to allow the state court claim to proceed violate this Court's injunction.

7. The Attorney General's argument that he is not required to exercise his authority to prevent litigation seeking enforcement, on behalf of the State, of the Alabama laws that this Court has declared unconstitutional misapprehends his obligations under this Court's orders. Indeed, acceptance of that argument would open the door to the willful evasion of any federal court order by allowing state officials effectively to delegate enforcement of an unconstitutional law to other parties. Here, the parties bringing the state court action are not proceeding as "private citizens" seeking to vindicate their own interests under state law. Response, Doc. 62 ¶ 7. Rather, organizations purporting to act "in the name of the State" of Alabama, in an action styled as a petition by the State of Alabama, have filed an action seeking to enforce the very Alabama laws that this Court held to violate the U.S. Constitution. *See* Doc. 60 ¶ 12, Exhibit 1 at pp. 11, 20, 21. Alabama's statutes and case law, including controlling authority by the Alabama Supreme Court, provide that the Attorney General has the authority to direct and control litigation filed on behalf of the State. Under the plain language of the relevant statute: "*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 (emphasis added).<sup>1</sup> The Attorney General possesses that authority as a matter of state law, and

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<sup>1</sup> To be clear, Plaintiffs do not claim that Section 36-14-21 obliges the Attorney General to step in and direct any litigation concerning the interest of the State, but rather that it gives him the authority to do so in any such case. Here, the

he has exercised that authority by permitting the relator petitioners to bring an action seeking to enforce Alabama's ban on marriage by same-sex couples violates the preliminary injunction in this case and the injunction in *Searcy*. It is the Attorney General's action in permitting that litigation to proceed, rather than causing its dismissal, as he is legally empowered to do, that runs afoul of the injunctions. The Attorney General's claim that this "Court's injunctions forbid the Attorney General to take action; they do not compel action" (Doc. 62 ¶ 7) is a distinction without a difference in this context. By allowing a proceeding seeking enforcement of Alabama's marriage bans to go forward, the Attorney General *already has taken action* that the injunction prohibits. Indeed, under the Attorney General's reasoning, any of his employees or agents, or anyone under his chain of authority, could file such a mandamus action and he would then have no obligation to do anything because this Court's injunction does not require any action on his part. Plainly, however, the injunctions require him to refrain from undertaking any such litigation or from permitting any such litigation to be undertaken in the name of the State.

8. Whether the petitioners in *State v. King* are "in active concert or participation with" the Attorney General is a matter that is also irrelevant to Plaintiffs' request for enforcement of the injunction. The only party whose conduct is at issue here, and the only party who needs to be before this Court, is the Attorney General. Plaintiffs can obtain the only relief they seek here through an order of this

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Attorney General has exercised his statutory authority by permitting the petitioner relators' claim on behalf of the State to proceed.

Court directing the Attorney General to comply with the injunctions by dismissing the mandamus action that has been filed on the State's behalf. The Attorney General has authority to control the prosecution of the state court action and is expressly bound by the existing injunctions to prevent enforcement of the marriage provisions found to be unconstitutional.

9. The Attorney General also attempts to cast doubt on whether he possesses the authority to dismiss the state court mandamus action. His authority in this regard, however, is clear. Under Alabama law, the Attorney General has the power and authority to direct all litigation in the name of the State. Construing Section 36-15-21, the Alabama Supreme Court has held that the statute confers upon the Attorney General the authority to direct and control any "action . . . that is filed in the State's name and on its behalf to vindicate its policies and concerns." *Ex parte King*, 59 So. 3d 21, 26-27 (Ala. 2010). Moreover, under the holding in *Ex parte King*, that power includes the right and authority to step in, take over the litigation, and dismiss it. *Id.* at 29. That precedent is controlling here, where the petitioner relators have filed an action, in the name of the State, seeking to vindicate the State's interest in the enforcement of its laws barring same-sex couples from marriage. That the mandamus petition here has been brought by relator petitioners in the name of the State rather than by a district attorney in the name of the State as in *Ex parte King*, makes no difference; the rule established in that case is based on the statute itself, which applies equally to mandamus actions initiated by private parties.



The Attorney General claims it is unclear whether he possesses the authority to dismiss the mandamus action and, remarkably, declines even to state his own position on that question; however, this Court is bound by the Alabama Supreme Court's authoritative construction of Section 36-15-21 in *Ex parte King*, which held that it confers authority upon the Attorney General in any "action . . . that is filed in the State's name and on its behalf to vindicate its policies and concerns." *See also Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007) ("Essentially all litigation concerning the interest of the state . . . [lies] under the direction and control of the attorney general.") (citations and internal quotation omitted). That power is not cabined by whether the instigator of the litigation was a district attorney or a private party claiming the mantle of the State, and the Attorney General has not argued or shown any reason why he does not possess that authority. Given that clear authority, this Court's injunctions do not permit the Attorney General to allow the mandamus action to go forward where that action seeks relief that runs directly counter to this Court's holdings and injunctions. Moreover, contrary to the Attorney General's assertion, the Attorney General's obligations under this Court's injunctions are not before the Alabama Supreme Court. Nor is there any question before the Alabama Supreme Court regarding how to construe Section 36-15-21 or whether the Attorney General can exercise control in the mandamus action.

10. The Attorney General's argument in Doc. 62 ¶ 10 is essentially the same as his argument in ¶ 9. For the same reasons set forth *supra*, there is no ambiguity under Alabama law about the authority of the Attorney General, and the mandamus

action pending before the Alabama Supreme Court does not present that question. In any event, moreover, whether the Alabama Supreme Court could decide the mandamus action on the merits even if the Attorney General seeks dismissal is irrelevant to the issue before this Court. The Attorney General's decision to allow an action seeking enforcement of Alabama's ban on marriage by same-sex couples, in the name of the State, to proceed in state court violates this Court's order enjoining the Attorney General from enforcing or seeking to enforce that ban.

11. The Attorney General's assertion in the last sentence of Doc. 62 ¶ 11 – that there would be no purpose for allowing private parties to file actions in the name of the State if the Attorney General can simply dismiss such actions – has no merit. The same argument could be made with regard to litigation filed by district attorneys, which the Attorney General concedes he has the power to control. There is an obvious reason why both types of litigation are permitted, and an equally obvious reason why the Attorney General may assume control of such litigation: Alabama law permits litigation that is in the State's interest to proceed where appropriate, while preserving the power for the Attorney General to prevent litigation in the name of the State that runs counter to the State's interest. That purpose, and that authority, apply equally to private parties who litigate in the name of the State as it does to district attorneys who file such litigation. It vests in the Attorney General the power to determine what course of action is in the State's interest and the means to effectuate that determination either by allowing the litigation to proceed or by stepping in to direct it, including where appropriate causing its dismissal.

12. With respect to the Attorney General's argument that considerations of comity or federalism counsel against the enforcement of this Court's injunction, this is simply a plea for this Court to abdicate its role in ensuring that state officers comply with valid federal court orders. There is no need for this Court to recognize previously unknown powers of the Attorney General in order to direct compliance. The Attorney General's authority to control litigation filed in the name of the State is plain and clear by statute, common law, and settled Alabama Supreme Court authority. Nor does the Alabama Supreme Court have before it any question concerning the Attorney General's power to comply with this Court's injunctions by dismissing litigation that seeks enforcement of unconstitutional laws. It is entirely appropriate for this Court to consider the Attorney General's authority under state law in enforcing the terms of the injunctive relief that it has issued. The Attorney General's attempts to create uncertainty where there is none should be rejected.

13. The Attorney General also erroneously contends that the requested enforcement order would constitute an impermissible injunction against the Alabama Supreme Court. Plaintiffs seek no such relief. The only relief they seek to obtain is to require the Attorney General – a party to this litigation, subject to this Court's jurisdiction, and under this Court's injunction – to comply with his obligation under the Court's existing injunctions not to allow or to seek enforcement of Alabama's laws prohibiting marriage for same-sex couples.

14. Similarly, the Attorney General raises the straw man of a federal district court's "lack of jurisdiction to review a final state court decision." Doc. 62 ¶

14. There is no state court decision for this Court to consider and Plaintiffs seek no such relief. They seek only vindication of the injunctive relief already afforded them by this Court.

15. The Attorney General has raised no meritorious argument as to why his deliberate decision to allow an action filed in the name of the State of Alabama, and seeking enforcement of Alabama's unconstitutional marriage laws, to go forward in state court does not violate his duty under this Court's existing injunctions to prevent enforcement of those laws. Plaintiffs seek no new preliminary injunctive relief that might entitle the Attorney General to a hearing on this motion, and Plaintiffs see no need for such a hearing. Simply put, the law is clear, the Attorney General's powers are clear, and Plaintiffs are entitled to the full benefit of the preliminary injunctive relief previously afforded them.

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 February 18, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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