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 IN OPPOSITION TO EMERGENCY MOTION FOR STAY

In his Emergency Motion for Stay (Doc. 71), Defendant Davis seeks to stay this Court's February 12, 2015 Order granting Plaintiffs declaratory and preliminary injunctive relief. *See* Order, Doc. 55 (hereinafter "February 12 Order"). Defendant Davis seeks to stay enforcement of this Court's order until the United States Supreme Court issues its decision in the Sixth Circuit cases of which it has accepted review.[1] *See* Motion, Doc. 71 at 12.

This Court should deny Defendant Davis's motion for the same reasons this Court, the Eleventh Circuit, and the United States Supreme Court previously denied the Attorney General's requests to stay this Court's rulings in both this case and *Searcy v. Strange*, No. 14-0208-CG-N. The relief sought by Defendant Davis is similar to that sought by the Attorney General in his motion to stay in *Searcy*, Doc. 55

[1] *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015), *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), *Tanco v. Haslam*, 135 S. Ct. 1040 (2015), *Bourke v. Beshear*, 135 S. Ct. 1041 (2015).

(seeking a stay pending outcome of United States Supreme Court's decision in the Sixth Circuit cases). There, this Court determined that a stay was not warranted, but gave the Attorney General 14 days to seek a stay from the Eleventh Circuit. Likewise, when this Court granted a preliminary injunction in this case, it did not enter a stay but gave the Attorney General the same time period to seek a stay from the appellate courts. Order, Doc. 29. Both the Eleventh Circuit and the United States Supreme Court declined to enter stays. *See Searcy v. Attorney Gen., State of Ala.*, No. 15-10295-C, consolidated with *Strawser v. Attorney Gen., State of Ala.*, No. 15-10313-A (11th Cir. Feb. 3, 2015) (order denying stay pending appeal), and *Strange v. Searcy*, 135 S. Ct. 940 (2015) (order denying stay pending disposition of Sixth Circuit cases). The same considerations that led to the denial of a stay in this case a few weeks ago, including by the United States Supreme Court, warrant denial of Defendant Davis's request for the same relief now.

Defendant Davis's request for the extraordinary relief of a stay is not supported by any of the four required factors. *Nken v. Holder*, 556 U.S. 418, 434-435 (2009). He has not made a "strong showing that [the stay applicant] is likely to succeed on the merits," nor has he shown that "the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434-35. The two additional factors – harm to the other party and the public interest – also weigh strongly against granting a stay, as this Court already has determined. *See Searcy* Order, Doc. 59; Order, Doc. 29.

A. Defendant Davis has not shown a likelihood of success on the merits.

Defendant Davis cannot show – and has not even attempted to show – a likelihood of success on the merits. This Court's ruling that the Alabama laws challenged in this case violate the Fourteenth Amendment is consistent with the overwhelming consensus of courts across the country that have addressed the constitutionality of similar state laws since the United States Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Defendant Davis has offered no reason for this Court to reassess its analysis of this factor; indeed, his motion fails even to address it. For that reason alone, the motion should be denied. *See Nken*, 556 U.S. at 434-35 (holding that parties seeking a stay must show a likelihood of success on the merits).

B. Defendant Davis has not shown irreparable harm.

Nor has Davis shown that he would be irreparably harmed by continuing to comply with this Court's February 12 Order. *See Nken*, 556 U.S. at 434. In an attempt to identify such harm, Defendant Davis asserts that he is in the "unenviable position" of being subject to conflicting orders by this Court and by the Alabama Supreme Court. Doc. 71 at ¶ 1. But this Court already addressed any such conflict in its February 12 Order, which stated that Defendant Davis may not deny marriage licenses to Plaintiffs "because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act *or by any other Alabama law or Order pertaining to same-sex marriage*." Order, Doc. 55 at 7-8 (emphasis added). That language – and the settled law that it reflects – continues to bind Judge Davis and

all other parties to this case. Defendant Davis is also bound by this Court's declaratory judgment that Alabama's marriage laws, insofar as they prohibit or refuse to recognize the marriages of same-sex couples, violate the Fourteenth Amendment. *Id.* at 6-7. In sum, Defendant Davis cannot show that he is harmed – much less irreparably so – by the mere existence of an inconsistent state court order, which has no effect on his obligation to comply with this Court's Order in this case.[2]

C. The harm to the Plaintiffs and other same-sex couples, as well as the public interest, counsel against a stay.

In contrast to the absence of irreparable harm to Defendant Davis, this Court already specifically found that granting a stay would irreparably harm not only the *Searcy* Plaintiffs but other same-sex couples as well and that the public interest would be harmed by a stay. *See Searcy* Order, Doc. 59, at 4-5; *see also* Order, Doc. 29. The harms to Plaintiffs and the public are the same here.

Defendant Davis's argument that Plaintiffs would not be harmed by a stay because they have already obtained marriage licenses ignores that Plaintiffs seek not only marriage licenses, but the same full panoply of protections that marriage provides to opposite-sex couples under state law. This Court's February 12 Order expressly reflects the scope of that requested relief by finding unconstitutional "Alabama's marriage sanctity laws prohibiting and refusing to recognize same-sex

[2] It bears emphasis that the decision in *Ex parte State ex rel. Alabama Policy Institute*, --- So.3d ----, 2015 WL 892752 (Ala. March 3, 2015), recognized that Defendant Davis is a party to this litigation and remains bound by this Court's orders. *See also* Order, *Ex parte State*, No. 1140460 (Ala. Mar. 10, 2015) at 4 ("March 10 Order") (recognizing that Defendant Davis is bound by this Court's order).

marriage" and by enjoining Defendant Davis and others in active concert or participation with him from "seek[ing] to enforce the marriage laws of Alabama which prohibit *or fail to recognize same-sex marriage*." Order, Doc. 55 at 6, 8 (emphases added). Indeed, were this Court to stay its Order and thereby permit Defendant Davis and others in concert with him to resume enforcing those laws, Plaintiffs would be stripped of the very protections they sought to gain by bringing this litigation; once again, they would be subjected to serious and irreparable dignitary and legal harms by being treated as legal strangers to one another under Alabama law. The mere possession of a marriage license, without any requirement that state and local officials recognize the marriage, would deprive Plaintiffs of the relief they sought in bringing this suit and effectively nullify the relief provided to them by this Court's February 12 Order.

Defendant Davis's argument is also erroneous because imposing a stay would additionally cause serious and irreparable harms to other same-sex couples in Alabama who wish to obtain marriage licenses and to have their marriages recognized, and who are also protected by this Court's February 12 Order. Under the February 12 Order, Defendant Davis is bound by this Court's declaratory judgment and injunction barring Defendant Davis and others in active concert or participation with him from seeking to enforce "the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage." Order, Doc. 55 at 8. As Defendant Davis acknowledges in his March 9, 2015, submission to the Alabama Supreme Court, this Court's February 12 Order enjoins him from enforcing the marriage ban with respect

not just to Plaintiffs but to anyone: "Judge Davis is the only probate judge in this state who, together with 'all his officers, agents, servants and employees, and others in active concert or participation with any of them,' is enjoined by a direct order from a federal court not 'to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage.'" Davis Response to Show Cause Order, *Ex parte State v. King*, No. 1140460 (Ala.) at 5 (copy attached as Exhibit 1).

While the Alabama Supreme Court recently reached a different conclusion, finding that this Court's February 12 Order required nothing more than the issuance of marriage licenses to the named Plaintiffs, see Order, *Ex parte State*, No. 1140460 (Ala. Mar. 10, 2015) at 6-9 ("March 10 Order"), that conclusion is, of course, not binding on this Court, which has the authority to determine the scope of its own injunction. *See, e.g.*, *Madej v. Briley*, 371 F.3d 898, 899-900 (7th Cir.2004) ("It is for the federal judiciary, not the [state], to determine the force of [the federal court's] orders.") (Easterbrook, J.). Plaintiffs, along with Defendant Davis and other probate judges across the state, have understood this Court's February 12 Order to enjoin Defendant Davis from enforcing the challenged laws with respect to any same-sex couples in Alabama. In light of the potential confusion regarding the scope of this Court's injunction that may be caused by the Alabama Supreme Court's March 10 Order, Plaintiffs respectfully request that this Court confirm that its February 12 Order enjoins Defendant Davis from enforcing the challenged laws with respect to all same-sex couples in Alabama, notwithstanding any Alabama law or Order, including the Alabama Supreme Court's March 10 Order in *Ex parte State*.

From a constitutional perspective, it makes no sense that Defendant Davis must adhere to the Fourteenth Amendment only for specifically named plaintiffs while being free to continue to violate the same Fourteenth Amendment rights of other same-sex couples who come before his office to obtain marriage licenses. Such a severely limited construction of this Court's February 12 Order would run counter to the principle that when a federal court rules that a law unconstitutionally discriminates against a particular class of persons and enjoins its enforcement with respect to the named plaintiffs, "the decree run[s] to the benefit not only of [those plaintiffs] but also for all persons similarly situated." *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (holding that an injunction entered on behalf of plaintiffs challenging racial segregation on common carriers protected all similarly situated persons). As the Fifth Circuit explained in *Potts v. Flax*, 313 F.2d 284, 289-90 (5th Cir. 1963), a school segregation case: "By the very nature of the controversy, the attack is on the unconstitutional practice of racial [or other prohibited] discrimination. Once that is found to exist, the Court must order that it be discontinued" with respect to all those harmed by the unconstitutional practice, not just "the successful plaintiff." *Id* at 289. As the Court further explained, limiting such relief only to the named plaintiffs would be tantamount to authorizing the application of an unconstitutional law to others who are similarly situated, which "would be for the court to contribute actively to the class discrimination." *Id*. *See also Davy v. Sullivan*, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973) (holding in a challenge to Alabama's sexual psychopath law that "where plaintiffs seek not to collect monetary

damages but to strike down a constitutionally offensive statute, the requested relief (if granted) will necessarily affect all persons subject to the statute – whether formally combined as a class or not."). *Cf. Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984) (holding that Title VII violation may be remedied with injunctive relief benefitting non-plaintiffs, even outside the context of a class action, provided that remedy also benefits plaintiff). Just as a federal court's ruling that segregated schools are unconstitutional necessarily encompasses all students, so too this Court's conclusion that Alabama's marriage ban is unconstitutional runs to the benefit of all same-sex couples in Alabama, not just to the benefit of the particular Plaintiffs in this case.

The relief that Defendant Davis seeks would permit him to resume enforcing Alabama's unconstitutional laws excluding same-sex couples from marriage and refusing to recognize their marriages despite this Court's declaration that such enforcement violates the Fourteenth Amendment and entry of an order enjoining such enforcement. Given the Court's continued, and consistent, findings in this case and in *Searcy* that the challenged laws are unconstitutional and inflict serious and irreparable harms on same-sex couples and their families, such a result would be unconscionable.

CONCLUSION

Defendant Davis has not made the required showing to obtain a stay of this Court's February 12 Order, nor has he offered any reason for the Court to reverse course and deprive Plaintiffs and other same-sex couples in Alabama of the full

measure of liberty and equality to which they are entitled as equal citizens of this state. Accordingly, Plaintiffs respectfully urge this Court to deny Defendant Davis's motion to stay and to confirm that its February 12 Order enjoins Defendant Davis from enforcing the state laws challenged in this case with respect to any same-sex couples in Alabama, notwithstanding any Alabama law or Order, including the Alabama Supreme Court's March 10 Order in *Ex parte State*.

Respectfully Submitted,

By: /s/ Shannon P. Minter__

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system on March 13, 2015. I certify that service will be accomplished by the CM/ECF system to the following parties:

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EXHIBIT 1

SUPREME COURT OF ALABAMA

1140460

Ex parte STATE ex rel. ALABAMA POLICY INSTITUTE and ALABAMA CITIZENS ACTION PROGRAM,

Petitioner,

vs.

ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, ROBERT M. MARTIN, in his official capacity as Judge of Probate for Chilton County, Alabama, TOMMY RAGLAND, in his official capacity as Judge of Probate for Madison County, Alabama, STEVEN L. REED, in his official capacity as Judge of Probate for Montgomery County, Alabama, and JUDGE DOES ##1-63, each in his or her official capacity as an Alabama Judge of Probate,

Respondents.

RESPONSE TO SHOW CAUSE ORDER

COMES NOW Don Davis, Probate Judge of Mobile County, Alabama, pursuant to the directive of this Honorable Court in its Order dated March 3, 2015 granting the Relators' Emergency Petition for Writ of Mandamus (herein "Mandamus Order"), and

to the extent the Mandamus Order is directed to Judge Davis, shows cause as follows why he should not be bound thereby.

I. Judge Davis Is Responding Although He Understands The Mandamus Order Does Not Apply To Him.

Initially, Judge Davis reasonably interprets the Mandamus Order **not** to be directed to him, because it does not expressly name him as a respondent and because Judge Davis' position vis-a-vis the relators and this Court is unique among all probate judges in Alabama. Judge Davis alone received a direct order from the United States District Court for the Southern District of Alabama enjoining "Judge Don Davis and all 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 which prohibit or fail to recognize same-sex marriage." Strawser v. Strange, Civil Action No. 14-0424-CG-C, Doc. 55, p. 8. Judge Davis is responding to this Court's Mandamus Order out of an abundance of caution, in the event the Court's intention was to include Judge Davis among those to whom the Mandamus Order is directed. In filing this response, Judge Davis does not agree[1] or concede that he is subject to the Mandamus Order,

[1] One of the attorneys for Petitioners also agrees that Judge Davis is not a party to the mandamus opinion. See Exhibit 1.

and he reserves the right to, and does, oppose his inclusion. Judge Davis has requested an extension of time to respond to this Court as to "whether he is bound by any existing federal court order regarding the issuance of any marriage license other than the four marriage licenses he was ordered to issue in Strawser" (Mandamus Order, p. 134), as he alone was directed to do in the Mandamus Order. Whether he is, in fact, bound beyond the four marriage licenses issued in Strawser, may be a relevant factor in determining whether he should or should not be subject to the Mandamus Order, and Judge Davis reserves the right to assert all grounds applicable to such determination.

II. The Express Terms Of The Mandamus Order Do Not Include Judge Davis.

The named respondents in the relators' Emergency Petition For Writ Of Mandamus "are Alabama Probate Judges Alan L. King (Jefferson County), Robert M. Martin (Chilton County), Tommy Ragland (Madison County), Steven L. Reed (Montgomery County), and 'Judge Does ## 1-63' each in his or her official capacity as an Alabama Judge of Probate. " (Mandamus Order, p. 2). This Court noted that:

> On February 18, 2015, the named respondent probate judges and Probate Judges Don Davis and John E. Enslen filed their respective responses to the petition.

> In his response, Judge Davis 'moved this . . . Court to enter an Order that the Emergency Petition for Writ of Mandamus filed on February 11, 2015, with this Court does not apply to [him] due to changing circumstances that are not reflected in the Mandamus Petition.' He states that the petition does not apply to him because he is a defendant, in his official capacity as probate judge, in Strawser, and he has been enjoined from refusing to issue marriage licenses to the plaintiffs [in that case] due to the Alabama laws which prohibit same-sex marriage.'

(*Id.* p. 9). (Alterations in original). The Court stated further:

> The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State who, **unlike Judge Davis** in his ministerial capacity, are not bound by the order of the federal district court in Strawser.

(*Id.*, p. 73). Finally, the Mandamus Order states,

> [E]ach of the probate judges in this State **other than the named respondents and Judge Davis** are joined as respondents in the place of the 'Judge Does' identified in the petition. Within five business days following the issuance of this order, **each such probate judge** may file an answer responding to the relator's petition for the writ of mandamus and showing cause, if any, why said probate judge should not be bound hereby.

(Mandamus Order, p. 133, footnote added)[2]. As Judge Davis and

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[2] Alternatively, if the first language shown above in bold type is meant to say "each of the probate judges in this State (other than the named respondents) and Judge Davis are joined . . .", then Judge Davis is to file his response within five business days. The difference is significant: The language does not say "each . . . is joined as respondents . . . ". The Order uses the plural "are" rather than the singular "is" with the subject "each."

his counsel understand the Mandamus Order, this Court has never considered Judge Davis to be among the respondents, and nothing in the Mandamus Order joins Judge Davis as a respondent, either by name or in substitution for one of the fictitiously-named "Judge Does." Judge Davis therefore should not be bound by the Mandamus Order.

III. Judge Davis' Position Is Unique Among All Probate Judges In Alabama.

As noted, the Mandamus Order considers Judge Davis separately from all other Alabama probate judges. And with good reason: Judge Davis is the only probate judge in this state who, together with "all his officers, agents, servants and employees, and others in active concert or participation with any of them," is enjoined by a direct order from a federal court **not** "to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage." (Strawser, Doc. 55, p. 8). Justice Bolin recognized in earlier proceedings, "amongst everyone heretofore connected with the constitutional issues and the litigation, nowhere has there been a probate judge with a seat as a party at any of these proceedings, except for Mobile County Probate Judge Don Davis . . . ." Ex parte Davis, 2015 Ala. LEXIS 16, 2-3 (Ala. Feb. 11, 2015). (Bolin, J., concurring specially). If Judge

Davis were considered to be a respondent subject to the Mandamus Order, which temporarily enjoins the respondents "from issuing any marriage license contrary to Alabama law," he would be ordered by this Court to do, along with all other probate judges, exactly that which the federal court ordered only Judge Davis not to do. Judge Davis would be in a position of having to violate either the order of this Court or that of the federal court. Either choice could potentially subject him to disciplinary sanctions by the offended court, and/or to monetary damages and further litigation. This Court has stated:

> Alabama courts have long recognized "that an order issued by a court with jurisdiction over the subject matter [and the person] must be obeyed by the parties subject to the order until it is reversed by orderly and proper proceedings." Ex parte Purvis, 382 So. 2d 512, 514 (Ala. 1980); see Walker v. City of Birmingham, 279 Ala. 53, 181 So. 2d 493 (1966), affirmed, 388 U.S. 307, 18 L. Ed. 2d 1210, 87 S. Ct. 1824 (1967); and United States v. United Mine Workers of America, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947). . . . [P]arties subject to a court order "are expected to obey [it] until it is modified or reversed, even if they have proper grounds to object to [it]." Celotex Corp. v. Edwards, 514 U.S. 300, 306, 131 L. Ed. 2d 403, 115 S. Ct. 1493 (1995).

Ex parte Metropolitan Life Ins. Co., 707 So. 2d 229, 231-232 (Ala. 1997). Assuming appropriate parties are before him, Judge Davis therefore is expected to obey the federal court's

injunction unless it is reversed by either the U.S. Court of Appeals for the 11th Circuit, or the U.S. Supreme Court. Judge Davis also is expected to obey any order of this Court directed to him, but he cannot do both where those orders directly conflict and obeying one requires him to disobey the other. For that reason alone, and to preserve the public respect for and dignity of Judge Davis and the Mobile County Probate Court, this Court should not include Judge Davis as a respondent in this proceeding. As Justice Bolin also remarked about the result of conflicting orders from this Court and the federal court:

> If the term "circus" is hyperbole, the current predicament at least qualifies as a "darned if I do, darned if I don't" dilemma for the probate judges, and this is no way to wisely, fairly, and deliberately administer justice.

Ex parte Davis, 2015 Ala. LEXIS 16, 9 (Ala. Feb. 11, 2015). (Bolin, J., concurring specially). For probate judges other than Judge Davis, that dilemma may never materialize, because only Judge Davis currently faces an injunction order by the federal court. Justice Bolin also pointed out in his concurring opinion:

> The highly emotional issue involved in the federal proceeding, on both sides of the argument, it appears will be decided only by the United States Supreme Court. . . . The federal district judge in

> her order acknowledged both that the United States Supreme Court has granted certiorari in a case to be decided in this Term of Court and that that case will "definitively" decide the important constitutional issues involved.

Id. at 7-8. Excluding Judge Davis as a respondent in this matter therefore will not result in any long-term uncertainty in Mobile County, nor any lasting difference between the Mobile County Probate Court and the probate courts of the other counties, as the underlying issues will be definitively decided by the U.S. Supreme Court during its current term.

WHEREFORE, Don Davis, Probate Judge of Mobile County, respectfully shows that he should not be bound by this Court's Mandamus Order.

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I hereby certify that on **March 9, 2015**, I electronically filed the foregoing with the Alabama Supreme Court E-file electronic filing system and that I have on this day served a copy of the foregoing on counsel by mailing a copy of the same by United States Mail, properly addressed and first class postage prepaid, to wit:

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