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

JAMES N. STRAWSER, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.
	)	1:14-cv-00424-CG-C
LUTHER STRANGE, Attorney General, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANT ATTORNEY GENERAL STRANGE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION (DOC. 76)

Defendant Luther Strange, in his official capacity as Attorney General of the State of Alabama, responds as follows in opposition to the Plaintiffs' motion for class certification and for preliminary injunctive relief against 68 Probate Judges.

As a preliminary matter, the Probate Judges themselves should have the opportunity to respond to Plaintiffs' motions. The Attorney General does not issue marriage licenses or supervise Probate Judges. Those judges are the parties who would be placed under contradictory court orders if the motions are granted, they are the parties who should be heard, and they are not likely of one mind. While Judge Don Davis has filed a response in opposition, he correctly points out that other Probate Judges, who have not yet been given the chance to reply, may take different views. (Doc. 90). One of the purported class representatives, Probate Judge Russell of Baldwin County, has only just been served. The Court has granted Plaintiffs' motion to file a second amended complaint, but the motions for class certification and for a preliminary injunction should not be heard until all parties are present and have had a fair opportunity to respond.

That said, as Attorney General Strange has been directed to respond at this time, there are several reasons that the motions for class certification and for a preliminary injunction should be denied.

I. The motion for class certification should be denied

A. The proposed plaintiff class

Plaintiffs seek to certify a class of same-sex couples who "wish to, but cannot, obtain a marriage license" from the State. (Doc. 76 at 6). However, there is no evidence before the Court that the proposed plaintiff class meets the numerosity requirement of Fed.R.Civ.P. 23(a). There is no evidence that any same-sex couple other than the named plaintiffs desires a marriage license and has not yet received one. *See Vega v. T-Mobile USA Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) ("a plaintiff still bears the burden of making some showing, affording the district court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement.").

In *Vega*, the plaintiffs sought to certify a class of T-Mobile retail sales representatives in the State of Florida. The Plaintiff presented evidence that T-Mobile had thousands of employees nationwide, and the District Court concluded that this evidence was sufficient to certify a class of employees within Florida. *Id.* at 1267. The Eleventh Circuit reversed, holding that the absence of any Florida-specific evidence precluded a finding that the class met the numerosity requirement:

> Yes, T-Mobile is a large company, with many retail outlets, and, as such, it might be tempting to assume that the number of retail sales associates the company employed in Florida during the relevant period can overcome the generally low hurdle presented b Rule 23(a)(1). However, a plaintiff still bears the burden of establishing every element of Rule 23, and a district court's factual findings must find support in the evidence before it. In this case, the district court's inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in pure speculation.

Id. at 1267 (internal citation omitted). *See also* 7A Wright, supra, § 1762 (collecting cases providing that a court must make a factual determination on the requirements of Rule 23 and that speculation is insufficient). Here, Plaintiffs have presented evidence of the number of same-sex couples in Alabama, but not how many of those are in a romantic relationship or may desire to be married. The Court must engage in "an exercise in pure speculation" to assume that the numerosity requirement is met.

In addition, Plaintiffs' proposed class definition is too vague to support a class because it depends on a person's subjective desire to obtain a marriage license. It would not be reasonable to assume that *all* same-sex couples desire a marriage license, any more than it would be reasonable to assume that all opposite-sex couples want to get married. The only way to determine who is and who is not in the proposed plaintiff class is to ask them. "Drawing class boundaries around such hopelessly subjective standards yields considerable indeterminacy and imprecision." *Conigliaro v. Norwegian Cruise Line Ltd.*, 2006 WL 7346844 *4 (S.D. Fla. Sept. 1, 2006). *See also, id.* at *2 (noting that courts have declined to certify classes where "membership in the class is made contingent on the state of mind of putative class members"); *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (holding a class definition that related to state-of-mind to be insufficiently definite); *Biediger v. Quinnipiac University*, 2010 WL 2017773 *3 (D.Conn. May 20, 2010) (declining to certify a class where the definition included those who "wanted" a party to cease alleged sex discrimination); *Guillory v. American Tobacco Co.*, 2001 WL 290603 *3 (N.D. Ill. March 20, 2001) (declining to certify a class of those who "'desire to' participate in a medical monitoring and/or smoking cessation program. In this way, the class definition depends on a subjective criteria and improperly relies upon the subjective desires of individual class members."); *Mauldin v. Wal-Mart Stores, Inc.*, 2002 WL 2022334 (N.D.Ga.

Aug. 23, 2002) (declining to certify a class of women who "wish to use" contraceptives not covered by an insurance plan, and instead limiting class to those who in fact used contraceptives). *Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 301 (S.D. Ala. 2006) ("[A] proposed class definition must specify a particular group harmed during a particular time period via a particular manner, such that the district court can utilize objective indicia to determine who is and is not part of the class.); *Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347 (S.D.Tex.2006) ("A class definition must be precise, objective, and presently ascertainable.").

Because there is no evidence to determine the size of the class and because the class definition depends on state of mind, the motion to certify a plaintiff class should be denied.

B. The proposed defendant class

The proposed defendant class also fails to meet the numerosity requirement. To satisfy Rule 23(a)(1), the class must be not only numerous, but "*so* numerous that joinder of all members is impracticable." (Emphasis added). There are only 68 Probate Judges in the State, a definite, limited group of easily-identified men and women. They could each be joined and given the opportunity to respond to Plaintiffs' motion. Suing the 68 Probate Judges separately would be practicable, and those State officials deserve the chance to be heard.

Plaintiffs also fail to satisfy the typicality, commonality, and adequacy of representation requirements with the proposed Defendant class because there is no evidence of how Probate Judges, other than Judge Davis, have responded to the Alabama Supreme Court's orders addressed in Plaintiffs' motion. Moreover, as Judge Davis points out, the Judges may take different positions on Plaintiffs' motion. Some judges may believe that "same-sex marriage" is both a good policy and is constitutionally required. Some may believe that "same-sex marriage" would be a good policy but is *not* constitutionally required. Other Probate Judges may believe it

is neither. Therefore, some might welcome an injunction against them and some might oppose it. Presently there is no evidence one way or the other. Depending on the positions ultimately taken by Judge Davis and Judge Russell (which this Court cannot know until Judge Russell responds), their interests may be adverse to some members of the proposed class. *See Howard v. McLucas*, 87 F.R.D. 704, 705 (M.D.Ga.1980) ("The test of adequate representation in class action litigation brought under Rule 23, Fed.R.Civ.P. is whether the plaintiff's counsel is competent, and whether the interests of the named plaintiffs are not adverse to those of the class.").

There are reasons to deny the motion to certify a defendant class now. The motion should not be considered, though, at least until Judge Russell is heard as a proposed class representative, and until the other Probate Judges as purported class members are given notice and an opportunity to be heard.

II. The motion for preliminary injunction should be denied

Like the motion for class certification, the Probate Judges should be provided an opportunity to respond to the motion for preliminary injunction before this Court rules. The rules demand at least that the new named defendant Judge Russell be heard. Fed.R.Civ.P. 65(a)(1). The other Probate Judges who would be subject to the requested injunction ought in fairness to be given notice and an opportunity to respond as well. While Attorney General Strange believes it is premature to litigate the issue, he has been directed to respond at this time, and identifies the following reasons that the motion for preliminary injunction should be denied.

First, Attorney General Strange maintains that Plaintiffs are not likely to prevail ultimately on the merits, although he recognizes that this Court has ruled otherwise in its previous orders.

Second, Plaintiffs have not shown that any purported class member will suffer irreparable harm without an injunction. The issue of "same-sex marriage" will be resolved in a few months when the United States Supreme Court rules. There is no evidence of any immediate health issue, for example, that would require a more prompt determination. And it is hard to see how plaintiffs have met their burden to show that waiting for the Supreme Court to rule would irreparably harm each and every one of the named and unnamed plaintiffs on a class-wide basis.

Third, the injunction would harm the Probate Judges by placing them in the difficult situation of being placed under inconsistent directives, one from this Court and one from the Alabama Supreme Court. The Alabama Supreme Court has ordered the Probate Judges not to issue marriage licenses to same-sex couples. That order came in a case that did not involve the Attorney General and was issued when the Probate Judges were not parties before this Court. It is not clear how the Probate Judges could comply with both courts' orders if the Plaintiffs' motion is granted, unless they stopped issuing marriage licenses altogether (which some judges believe state law permits them to do). That result would benefit no one.

Fourth, an injunction would be against the public interest. It would, as discussed above, place Probate Judges under inconsistent directives, and may lead to *no* marriage licenses being issued as Judges seek to avoid violating either court's orders. It would increase the tension between State and federal courts. And the conflict could be avoided entirely simply by waiting about three months for the U.S. Supreme Court to weigh in.

And finally, there are many doctrines of federal law that counsel not entering injunctive relief at the moment, but instead waiting until the Supreme Court rules. And here, the Attorney General is not asking for a *stay* of litigation, recognizing that this Court has denied all such requests, but instead urging the Court in its discretion to take a course of denying *preliminary*

relief in order to avoid unnecessary conflict, or delaying the resolution of that motion. The *Rooker-Feldman* doctrine, for example, counsels against permitting parties to ask federal courts to undo state court decisions. The plaintiffs clearly seek this injunction in an attempt to override the Alabama Supreme Court's ruling. This case may not fit squarely within the *Rooker-Feldman* doctrine when the plaintiffs were not parties to the proceedings in state court. But the Supreme Court has recognized that "[c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action" even when the *Rooker-Feldman* doctrine may not directly apply. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 292 (2005). Doctrines like *Rooker-Feldman*, *Colorado River* abstention, the anti-injunction act, and *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330-1331 (11th Cir. 2005), all counsel caution in circumstances like the extraordinary ones presented in this case.

For these reasons, Attorney General Strange submits that the motion for preliminary injunction should not be considered until Judge Russell and other Probate Judges are given the opportunity respond. In the alternative, the motion should be denied or held until the Supreme Court issues its ruling on the issues presented in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 23, 2015, I electronically filed the foregoing document using the Court's CM/ECF system which will send notification of such filing to the following persons:

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