IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 15-12508	Case No. 15-90014
JAMES N. STRAWSER, et al., *Plaintiffs-Appellees*,	TIM RUSSELL, *Defendant-Petitioner*,
v.	v.
TIM RUSSELL, *Defendant-Appellant*.	JAMES N. STRAWSER, et al., *Plaintiffs-Respondents*.

Appeal from the United States District Court for the Southern District of Alabama
Case No. 1:14-cv-00424-CG-C

RESPONSE OF *STRAWSER* PLAINTIFFS TO DEFENDANT RUSSELL'S STATEMENT REGARDING APPEAL

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Pursuant to the Court's Memorandum of August 4, 2015, this Response to Defendant Tim Russell's Statement Regarding Appeal is submitted on behalf of Plaintiffs-Appellees in Appeal No. 15-12508 and Plaintiffs-Respondents in Petition for Permission to Appeal No. 15-90014 (collectively, the "*Strawser* Plaintiffs").

In its August 4 Memorandum, this Court directed Defendant Russell to explain what effective relief, if any, can be granted to him should the pending appeal and Petition for Permissive Appeal proceed to briefing and argument. Defendant Russell has failed to show that the relief he seeks can be granted. Indeed, he does not dispute that: (1) at the time the District Court entered the class certification order and preliminary injunction that are the subject of these appeals, Defendant Russell was not issuing marriage licenses to same-sex couples on the same terms and conditions as he does to opposite-sex couples; and (2) the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), establishes that the Fourteenth Amendment requires States to issue marriage licenses to same-sex couples on the same terms and conditions as they do to opposite-sex couples.

In light of *Obergefell*, the District Court's ruling—granting the *Strawser* plaintiffs' request for a preliminary injunction directing Defendant Russell to issue marriage licenses to same-sex couples on the same terms and conditions as he does to opposite-sex couples—was plainly correct. Therefore, with respect to No. 15-12508, Plaintiffs respectfully request that the Court summarily affirm the District

Court's decision and remand for entry of final judgment in Plaintiffs' favor.

In No. 15-90014, Defendant Russell has filed a Petition for Permissive Appeal pursuant to Fed. R. Civ. P. 23(f) requesting that this Court reverse the District Court's class certification order. His Statement offers no reason why this Court should exercise its discretion to hear such an appeal at this time, and no reason why these issues cannot await an appeal from a final judgment. Defendant Russell has therefore failed to demonstrate that his Petition satisfies the criteria this Court has applied in considering whether to permit an interlocutory appeal of a class certification order. *See, e.g., Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1271-77 (11th Cir. 2000). Accordingly, the *Strawser* Plaintiffs respectfully request that the Petition be denied.

I. This Court Should Summarily Affirm The Decision Of The District Court In Appeal No. 15-12508.

At the outset, Defendant Russell's Statement suggests that this Court lacks jurisdiction over the matters which he wishes to have addressed in this appeal. Although Defendant Russell's Notice of Appeal stated that he was appealing the District Court's entry of a preliminary injunction—an appeal over which this Court would have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1)—his Statement now disclaims any intention to pursue an appeal of the merits of the preliminary injunction. Instead, he states, he "is seeking an order reversing the District Court's denial of his Motion to Dismiss the Second Amended Complaint." (Statement at 1.)

A District Court's denial of a motion to dismiss, however, is neither a final order over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291, nor an interlocutory order subject to this Court's jurisdiction under 28 U.S.C. §1292. *See, e.g.*, *Foy v. Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347, 1350 (11th Cir. 1997). Nor does Defendant cite any authority establishing that that the matters raised in his Statement fall within the collateral order doctrine or any other exception to the final judgment requirement of 28 U.S.C. § 1291.

Even if this Court were to have jurisdiction over this appeal, Defendant Russell has failed to establish that the Court can grant the relief he seeks. In light of *Obergefell*, Defendant Russell concedes that the District Court was correct in concluding that the Fourteenth Amendment requires all Alabama officials, including Defendant Russell, to issue marriage licenses to same-sex couples on the same terms and conditions as they do to opposite-sex couples. He does not dispute that his office stated he would not issue marriage licenses to Plaintiffs Kristie Ogle and Jennifer Ogle, Keith Ingram and Albert Holloway Pigg III, and Gary Wayne Wright II and Brandon Mabrey because they were same-sex couples. Nor does he dispute that he was not issuing marriage license to any same-sex couples at the time the District Court entered its preliminary injunction. He has failed to cite any authority or demonstrate any legal basis on which this Court could reverse the District Court's orders, which correctly applied the law as confirmed by binding Supreme Court

precedent. Instead, he makes various irrelevant assertions, none of which establishes that this Court can or should grant the relief he seeks.

First, Defendant Russell asserts that he "has never been involved in the litigation regarding the constitutionality of the laws and, indeed, neither he nor any other probate judge has the authority to defend these laws." (Statement at 2.) But as a public official who, under color of state law, denied marriage licenses to some of the named Plaintiffs because they sought to marry as same-sex couples, Defendant Russell is a proper defendant subject to suit in this action. *See, e.g., Ex parte Young*, 209 U.S. 123, 155–56 (1908); *Summit Med. Associates, P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (official may be sued in constitutional challenge to state law if he "has some responsibility to enforce the statute or provision at issue"). Defendant Russell has cited no authority to counter this well-established law.

Second, Defendant Russell asserts that his appeal concerns "the limitations of a federal district court's jurisdiction over defendant state officials who are already subject to a contrary order issued by a state's highest court and, specifically, what types of relief, i.e., injunctive relief, declaratory relief, and attorneys' fees, may be available against such officials." (Statement at 2.) He cites no statute, rule, case, or other authority, however, establishing that such a "jurisdictional limitation" exists.

Contrary to Defendant Russell's contention, the law is clear that the District Court had the authority to issue a preliminary injunction requiring him to comply

with the Fourteenth Amendment, notwithstanding the Alabama Supreme Court's differing conclusions concerning the constitutionality of Alabama's marriage ban for same-sex couples. As the *Strawser* Plaintiffs explained in the District Court, no ruling by the Alabama Supreme Court could prevent the Plaintiffs from seeking or obtaining relief to vindicate their constitutional rights in this separate federal action, which is entirely independent of the state-court mandamus action to which they were not parties. Because the *Strawser* Plaintiffs and the class they represent were not parties to the state-court mandamus proceeding, they were not bound by the decision of the Alabama Supreme Court. They were entitled to seek an injunction barring probate judges from enforcing Alabama's marriage ban, and the District Court was free to issue this injunction based on its independent legal analysis. As the Supreme Court has made clear, "a successful mandamus proceeding in a state court against state officials to enforce a challenged statute" does not bar "injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings." *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 377–78 (1939) (affirming entry of federal injunction directing state officials to cease enforcement of unconstitutional state statute after a state court ordered those officials to enforce the statute in a mandamus proceeding).

To argue otherwise, as Defendant Russell apparently does here, "assumes that the mandamus proceeding bound the independent suitor in the federal court as

though he were a party to the litigation in the state court. This, of course, is not so." *Id*. at 378. *See also Cnty. of Imperial v. Munoz*, 449 U.S. 54, 59–60 (1980) (holding that federal court was not barred from ordering county officials to cease enforcement of unconstitutional condition in land-use permit despite earlier order of California Supreme Court directing compliance with that condition, provided that the plaintiffs in the federal suit were "strangers" to the state-court proceedings); *Munoz v. Cnty. of Imperial*, 667 F.2d 811, 816–17 (9th Cir. 1982) (holding, following remand from Supreme Court, that federal plaintiffs were strangers to state-court proceedings and affirming entry of injunction against county officials); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) ("One who is not a party to state proceedings, nor in privity with a party, may seek a federal injunction against enforcement of a judgment obtained in those proceedings."); *Chezem v. Beverly Enters.-Texas, Inc.*, 66 F.3d 741, 742 & n.3 (5th Cir. 1995) (same); *Pelfresne v. Vill. of Williams Bay*, 917 F.2d 1017, 1020 (7th Cir. 1990) (same). The Alabama Supreme Court's orders created no bar, jurisdictional or otherwise, to the entry of a preliminary injunction against Defendant Russell.

Third, Defendant Russell complains that he "was never actually served with the Motion for Preliminary Injunction or the Motion to Certify, and he was not given the opportunity to file any opposition thereto." (Statement at 3.) In fact, Defendant Russell was served with the class certification motion (Doc. 76), all of its exhibits

(Docs. 76-1, 76-2, 76-3, 76-4, 76-5), the Attorney General's opposition (Doc. 78), Defendant Davis's opposition (Doc. 90), and the District Court's Order granting leave to file a second amended complaint (Doc. 92). *See* Proof of Service, March 20, 2015, Doc. 97 (attached to this Response as Exhibit A).

Even if there were something in the record to support Defendant Russell's contention that he was not served, that omission would not entitle him to the relief he seeks from this Court. Indeed, Defendant Russell seeks review of the denial of a motion to dismiss that he himself filed, and he therefore he cannot complain that he had no opportunity to brief the issues or otherwise defend the lawsuit. To the extent he seeks reversal of the District Court's grant of a preliminary injunction, *Obergefell* establishes that the *Strawser* Plaintiffs were entitled to prevail on the merits of their claims. Defendant Russell has not shown that his claimed denial of an opportunity to brief the preliminary injunction motion creates any legal basis for reversal of the District Court's decision on the merits.

Fourth, Defendant Russell makes various assertions concerning the collateral consequences that may result if this Court does not reverse the District Court's decisions. He cites no authority suggesting that consideration of these matters establishes legal error or otherwise provides a legitimate basis for reversal of the District Court's orders.

For example, Defendant Russell warns that he and other probate judges may

be required to pay some portion of Plaintiffs' attorneys' fees. (Statement at 3-4.) But a state official's potential liability for attorneys' fees under 42 U.S.C. § 1988 does not affect the legal merit of a motion to dismiss or motion for preliminary injunction. In any event, the District Court has not yet awarded attorneys' fees against any party. Should such an award occur, any aggrieved party will be entitled to appeal that determination at the appropriate time.

In sum, Defendant Russell has not shown that this Court can grant him the relief he seeks. Instead, the appropriate disposition is to summarily affirm the District Court's decision, as this Court did in *Searcy v. Attorney General, State of Alabama,* No. 15-10295-CC (Order, Aug. 20, 2015), and as the First, Fifth, and Eighth Circuits have done in appeals in marriage cases that were pending at the time *Obergefell* was decided. *See Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015) (ordering entry of final judgment in favor of plaintiffs); *Campaign for S. Equal. v. Bryant*, 791 F.3d 625 (5th Cir. 2015) (same); *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (same); *Conde-Vidal v. Rius-Armmendariz,* No. 14-2184 (1st Cir. July 8, 2015); *Rosenbrahn v. Daugaard*, No. 15-1186, 2015 WL 4730871 (8th Cir. Aug. 11, 2015); *Waters v. Ricketts*, No. 15-1452, 2015 WL 4730972 (8th Cir. Aug. 11, 2015); *Jernigan v. Crane*, No. 15-1022, 2015 WL 4731342 (8th Cir. Aug. 11, 2015).

II. This Court Should Deny Plaintiff Russell's Petition For Permissive Appeal In No. 15-90014.

Also pending before the Court is Defendant Russell's Petition for Permissive

Appeal of the District Court's order certifying plaintiff and defendant classes in the underlying case. Defendant Russell claims that the class was certified without "affording him due process" and that the District Court failed to consider "all requirements of Rule 23," but he does not address the threshold question: whether the Court should exercise its discretion to hear an interlocutory appeal of this class certification order at all.

This Court has emphasized that interlocutory review of class certification orders should not be granted routinely, and that such review requires "something that creates a compelling need for resolution of the legal issue sooner rather than later." *Prado-Steiman,* 221 F.3d at 1274. To that end, this Court considers at least five "guideposts": (1) "whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant"; (2) "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion"; (3) "whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself"; (4) "the nature and status of the litigation before the district court"; and (5) "the likelihood that future events may make immediate appellate review more or less appropriate." *Id.* at 1274-76.

None of these factors supports interlocutory review here. First and most importantly, the grant or denial of class certification is not a "death knell" for the

underlying claims. Whether or not this case proceeds as a class action, the claims against Defendant Russell as an individual defendant would survive, Plaintiffs would be entitled to judgment on those claims, and Defendant Russell's exposure to attorneys' fees and other collateral consequences would remain.

Nor do any of the other four factors indicate that immediate review of the class certification order is necessary. Because proceedings in the District Court are essentially complete other than entry of judgment, there is no reason appellate review of the class certification order cannot await final judgment. At that time, Defendant Russell may file a notice of appeal addressing any and all claimed errors in the District Court proceedings, rather than having multiple appeals raising different issues proceed on different schedules. Such piecemeal review is "disfavored" and "has a deleterious effect on judicial administration." *Id.* at 1276. Defendant Russell has not shown otherwise here.

CONCLUSION

For the foregoing reasons, the *Strawser* Plaintiffs respectfully request that the Court summarily affirm in No. 15-12508 and deny the Petition in No. 15-90014.

DATED: August 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 31, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christopher F. Stoll

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 14-0424-CG-C

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Tim Russell, Probate Court Judge, Baldwin County, AL was received by me on *(date)* March 20, 2015.

☑ I personally served the summons on the individual at *(place)* BALDWIN COUNTY COURT HOUSE on *(date)* 3/20/15; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____, a person of suitable age and discretion who resides there, on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify):*

My fees are $ 30.00 for travel and $ 75.00 for services, for a total of $ 0.00 105.00

I declare under penalty of perjury that this information is true.

Date: 3-20-15

Joshua S. DeuPree
Server's signature

JOSHUA S. DEUPREE
Printed name and title

210 S. WASHINGTON AVE.
MOBILE, AL. 36602
Server's address

Additional information regarding attempted service, etc:

In addition to the summons (Doc. 96) and Second Amended Complaint (Doc. 95), I served the following documents: 76, 76-1, 76-2, 76-3, 76-4, 76-5, 78, 81, 81-1, 81-2, 90, 90-1, 92, and 93.