BEFORE THE JUDICIAL INQUIRY COMMISSION OF ALABAMA

Inquiry Concerning a Judge, No. ___.

THIRD SUPPLEMENT IN SUPPORT OF COMPLAINT OF THE SOUTHERN POVERTY LAW CENTER AGAINST CHIEF JUSTICE ROY S. MOORE

On January 28, 2015, we lodged a complaint against Chief Justice Roy S. Moore, regarding the January 27, 2015, letter he sent to Governor Robert Bentley and his related public statements. On February 3, 2015, we filed a supplement in support of that complaint based on the Chief Justice's subsequent public comments. On July 29, 2015 we filed a second supplement in support of the complaint based on additional comments by Chief Justice Moore on pending case, his continued efforts to undermine public confidence in and respect for the integrity of the judiciary, his lack of respect and faithfulness to the law, and his improper association with the Foundation for Moral Law. We now write to supplement the complaint again. The Chief Justice continues to flout and violate the Alabama Canons of Judicial Ethics.

In particular, Chief Justice Moore has today issued an administrative order to all Alabama probate judges advising them that they have a "duty" to continue to enforce Alabama's laws prohibiting same-sex marriage in direct contravention of a

federal injunction instructing them to do the opposite. Simply put, Chief Justice Moore has advised Alabama probate judges to violate a federal court order.

On July 1, 2015, just days after the United States Supreme Court decided *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), Judge Granade issued a supplemental Order making clear that her preliminary injunction against the defendant class of all Alabama probate judges (dated May 21, 2015) was now in effect and binding. *See* Exhibit A. That preliminary injunction remains in effect and binding today, the day that Chief Justice Moore issued his administrative.

On October 20, 2015, the Eleventh Circuit Court of Appeals, in denying appeals of certain of Judge Granade's orders, noted that "since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause, and that bans on same-sex marriage are unconstitutional." *Strawser v. Russell*, No. 15-12508-CC (11th Cir. Oct. 20, 2015), attached hereto as Exhibit B. The Alabama Supreme Court orders referred to by the Eleventh Circuit are the very ones the Chief Justice addresses in his administrative order today.

Despite the existence of the preliminary injunction and the ruling from the Eleventh Circuit, Chief Justice Moore issued an administrative order on January 6,

2016, advising Alabama probate judges that they "have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act" and that the "existing orders of the Alabama Supreme Court . . . remain in in full force and effect." *See* Exhibit C at 4.

The Chief Justice's actions plainly and willfully violate the Alabama Canons of Judicial Ethics. Canon 2(A) provides that "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Advising probate judges to violate Judge Granade's preliminary injunction order, to ignore the decision of the Eleventh Circuit with respect to the very orders of the Alabama Supreme Court he asserts are still in effect, and to ignore the United States Supreme Court's decision in *Obergefell* is the opposite of respecting and complying with the law as required Canon 2(A).

Just as Chief Justice Moore's previous refusal to comply with a federal court order disqualified him for judicial office and necessitated his removal from the bench, his advising other judges to violate a federal court order also requires his removal as Chief Justice of this state's highest court.

Dated: January 6, 2016

SOUTHERN POVERTY LAW CENTER

By: J. Richard Cohen, President
Ala. Bar No. ASB-1092-N73J

Subscribed and Sworn to or affirmed before me this 6th day of January, 2016.

My commission expires: 9.19.18

Notary Public

EXHIBIT A

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

JAMES N. STRAWSER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CIVIL ACTION NO. 14-0424-CG-C**
	)	
LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiffs' motion for clarification. (Doc. 144) in which they seek a clarification as to whether the preliminary injunction entered on May 21, 2015, (Doc. 123) is currently in effect and binding upon all probate court judges. In that preliminary injunction order the Court stated "that because the issues raised by this case are subject to an imminent decision by the United States Supreme Court in Obergefell v. Hodges and related cases, the above preliminary injunction is **STAYED** until the Supreme Court issues its ruling." (Doc. 123, p. 14 (footnote omitted)). The United States Supreme Court issued its ruling on June 26, 2015. Obergefell v. Hodges, 576 U.S. ____ (2015). Accordingly, by the language set forth in the order, the preliminary injunction is now in effect and binding on all members of the Defendant Class.

Plaintiffs' motion for clarification is therefore **GRANTED** as set forth above.

DONE and **ORDERED** this 1st day of July, 2015.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-12508-CC

JAMES N. STRAWSER,
JOHN E. HUMPHREY,
ROBERT POVILAT,
ANNA LISA CARMICHAEL,
KRISTY SIMMONS, et al.,

Plaintiffs-Appellees,

versus

STATE OF ALABAMA, et al.,

Defendants,

TIM RUSSELL,
in his official capacity as Probate Judge
of Baldwin County, Alabama,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

Before: TJOFLAT, HULL, and WILSON, Circuit Judges

BY THE COURT:

Alabama Probate Judge Tim Russell appeals from the following three district court orders: (1) the court's April 23, 2015 order denying Judge Russell's motion to dismiss; (2) the court's May 21, 2015 order denying Judge Russell's motion to alter or amend the order denying his motion to dismiss; and (3) the court's May 21, 2015 order granting a preliminary injunction

that requires Alabama probate judges to issue marriage licenses to same-sex couples. Judge Russell argues that he was entitled to quasi-judicial immunity due to an order of the Alabama Supreme Court enjoining all Alabama probate judges from issuing marriage licenses to same-sex couples. He also argues that the district court's preliminary injunction was improper because of the conflicting order from the Alabama Supreme Court. He also contends that he was never served with the motion for a preliminary injunction, and was not allowed an opportunity to respond to that motion.

Since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause, and that bans on same-sex marriage are unconstitutional. Therefore, the arguments supporting Judge Russell's motion to dismiss are now moot. See Soliman v. United States, 296 F.3d 1237, 1242 (11th Cir. 2002). Moreover, the other arguments Judge Russell seeks to raise with respect to his motion to dismiss are not properly before this Court. See Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980)[1] (holding that the issue of attorneys' fees does not "salvage[ ] an otherwise moot case"); S & Davis Int'l, Inc. v. Yemen, 218 F.3d 1292, 1297 (11th Cir. 2000) (holding that this Court can consider other arguments presented in a motion to dismiss only where they are "'inextricably intertwined' with an issue that is properly before this Court on interlocutory appeal"). Accordingly, to the extent that Judge Russell seeks review of the district court's April 23, 2015 order denying his motion to

[1] See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

dismiss and the May 21, 2015 order denying his motion to alter or amend the order denying his motion to dismiss, this appeal is DISMISSED AS MOOT. See Soliman, 296 F.3d at 1242.

Additionally, Judge Russell's assertions about not being served with the motion for a preliminary injunction are contradicted by the record. An affidavit filed with the district court certified that he was served with a summons, a copy of the amended complaint, a copy of the plaintiffs' motion for a preliminary injunction, and various other documents relating to the motion two months prior to the district court's order granting the motion. In the intervening two months, Judge Russell filed his motion to dismiss the complaint, which requested a preliminary injunction among other forms of relief. Accordingly, in light of the record and Obergefell, the district court's May 21, 2015 order granting a preliminary injunction requiring the issuance of marriage licenses to same-sex couples is SUMMARILY AFFIRMED.

EXHIBIT C

ADMINISTRATIVE ORDER OF THE
CHIEF JUSTICE OF THE ALABAMA SUPREME COURT

WHEREAS, IN CONSIDERATION OF THE FOLLOWING:

On March 3, 2015 the Alabama Supreme Court issued a lengthy opinion upholding the constitutionality of Article I, Section 36.03(b), Ala. Const. 1901 ("the Sanctity of Marriage Amendment"), and Section 30-1-19(b), Ala. Code 1975 ("the Marriage Protection Act"), which both state: "Marriage is inherently a unique relationship between a man and a woman." Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___ (Ala 2015) (hereinafter "API").

The API opinion relied on earlier opinions of the United States Supreme Court and the Alabama Supreme Court for authority. In 1885 the Supreme Court of the United States described marriage as "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Murphy v. Ramsey, 114 U.S. 15, 45. The Alabama Supreme Court similarly stated that "'[T]he relation of marriage is founded on the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness.'" Goodrich v. Goodrich, 44 Ala. 670, 675 (1870).

In its March 3 order in API, the Alabama Supreme Court stated that "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act]. Nothing in the United States Constitution alters or overrides this duty."

A week later the Court reaffirmed that its March 3 order bound every Alabama probate judge "to the end of achieving order and uniformity in the application of Alabama's marriage laws." API (Order of March 10, 2015). The Court also stated that "all probate judges in this State may issue marriage licenses only in accordance with Alabama law as described in our opinion of March 3, 2015." API (Order of March 12, 2015).

On June 26, 2015, approximately three months after the Alabama Supreme Court issued its orders in API, the United States Supreme Court in Obergefell v Hodges, 135 S. Ct. 2584 (2015), held unconstitutional certain marriage laws in the

states of Michigan, Kentucky, Ohio, and Tennessee, which fall within the jurisdiction of the Sixth Circuit Court of Appeals. In its 5-4 opinion the high court noted that "[t]hese cases come from Michigan, Kentucky, Ohio, and Tennessee." Obergefell, 135 S. Ct. at 2593.

On June 29, 2015, three days after the issuance of the Obergefell opinion, the Alabama Supreme Court invited the parties in API to address **the "effect of the Supreme Court's decision on this Court's existing orders in this case** no later than 5:00 p.m. on Monday, July 6." API (Order of June 29, 2015) (emphasis added).

Several parties filed briefs in response to that request. Additionally, on Sept 16, 2015, Washington County Probate Judge Nick Williams filed an "Emergency Petition for Declaratory Judgement and/or Protective Order in Light of Jailing of Kentucky Clerk Kim Davis," which requested the Court "to prevent the imprisonment and ruin of their State's probate judges who maintain fidelity to their oath of office and their faith." On September 22, Elmore County Probate Judge John Enslen joined Judge Williams's Emergency Petition. On October 5, Judge Enslen filed a separate petition for a declaratory judgment arguing additional grounds for relief.

In October, Eunie Smith, President of the Eagle Forum of Alabama and Dr. John Killian, Sr., former President of the Alabama Baptist State Convention, published a guest opinion on AL.com stating that they "anxiously await" the pending decision on the effect of Obergefell on the orders in API. In December, the Southeast Law Institute of Birmingham, whose President is local counsel for some of the parties in API, stated in an online commentary that he was "encouraging all of those who have great concern over this issue to be prayerfully patient" as the Court deliberates.

Confusion and uncertainty exist among the probate judges of this State as to the effect of Obergefell on the "existing orders" in API. Many probate judges are issuing marriage licenses to same-sex couples in accordance with Obergefell; others are issuing marriage licenses only to couples of the opposite gender or have ceased issuing all marriage licenses. This disparity affects the administration of justice in this State.

I am not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.

Nevertheless, recent developments of potential relevance since Obergefell may impact this issue. The United States Court of Appeals for the Eighth Circuit recently ruled that Obergefell did not directly invalidate the marriage laws of states under its jurisdiction. While applying Obergefell as precedent, the Eighth Circuit rejected the Nebraska defendants' suggestion that Obergefell mooted the case. The Eighth Circuit stated: "The [Obergefell] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee -- not Nebraska." Waters v Ricketts, 798 F.3d 682, 685 (8th Cir. 2015) (emphasis added). In two other cases the Eighth Circuit repeated its statement that Obergefell directly invalidated only the laws of the four states in the Sixth Circuit. See Jernigan v Crane, 796 F.3d 976, 979 (8th Cir. 2015) ("not Arkansas"); Rosenbrahn v Daugaard, 799 F.3d 918, 922 (8th Cir 2015) ("not South Dakota").

The United States District Court for the District of Kansas was even more explicit: "While Obergefell is clearly controlling Supreme Court precedent, it did not directly strike down the provisions of the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses ...." Marie v Mosier, 2015 WL 4724389 (D. Kan. August 10, 2015). Rejecting the Kansas defendants' claim that Obergefell mooted the case, the District Court stated that "Obergefell did not rule on the Kansas plaintiffs' claims." Id.

The above cases reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Martin v. Wilks, 490 U.S. 755, 762 (1989). "[N]o court can make a decree which will bind anyone but a party ... no matter how broadly it words its decree." Alemite Mfg. Corp. v Staff, 42 F.3d 832, 832 (2d Cir. 1930). See also Rule 65, Fed R. Civ. P., on the scope of an injunction.

Whether or not the Alabama Supreme Court will apply the

reasoning of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of Kansas, or some other legal analysis is yet to be determined. Yet the fact remains that the administration of justice in the State of Alabama has been adversely affected by the apparent conflict between the decision of the Alabama Supreme Court in API and the decision of the United States Supreme Court in Obergefell.

NOW THEREFORE,

As Administrative Head of the Unified Judicial System of Alabama, authorized and empowered pursuant to Section 12-2-30(b)(7), Ala. Code 1975, to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state," and under Section 12-2-30(b)(8), Ala. Code 1975, to "take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere";

And in that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." United States v. Mine Workers, 330 U.S. 258, 293 (1947) (quoted in Fields v. City of Fairfield, 143 So. 2d 177, 180 (Ala. 1962));

IT IS ORDERED AND DIRECTED THAT:

Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.

DONE January 6, 2016.

Roy S. Moore
Chief Justice