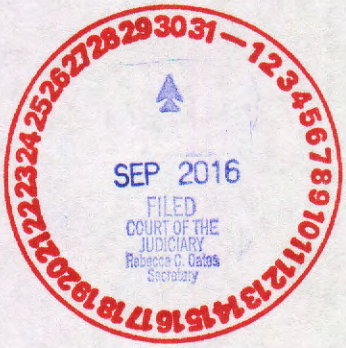


COURT OF THE JUDICIARY CASE NO. 46

IN THE MATTER OF:
ROY S. MOORE
Chief Justice, Supreme Court of Alabama

FINAL JUDGMENT

At the outset, this court emphasizes that this case is concerned only with alleged violations of the Canons of Judicial Ethics. This case is not about whether same-sex marriage should be permitted; indeed, we recognize that a majority of voters in Alabama adopted a constitutional amendment in 2006 banning same-sex marriage, as did a majority of states over the last 15 years. Moreover, this is not a case to review or to editorialize about the United States Supreme Court's June 2015 split decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), a decision that some members of this court did not personally agree with or think was well reasoned. This court simply does not have the authority to reexamine those issues.

This court convenes only "to hear complaints filed by the Judicial Inquiry Commission" as to alleged violations by judges of the Canons of Judicial Ethics adopted by the Alabama

Supreme Court.[1] See § 157, Ala. Const. 1901 (Off. Recomp.). As this court stated in the 2003 action against Chief Justice Roy S. Moore:

> "The Canons are not merely guidelines for proper judicial conduct; they are binding on all judges by the oath taken upon assuming office, and violations of the Canons can serve as the basis for disciplinary action. The charge or charges against a judge must be proved by clear and convincing evidence before any discipline may be imposed."

On May 6, 2016, the Alabama Judicial Inquiry Commission ("the JIC") filed a complaint with this court charging Chief Justice Roy S. Moore with violating the Canons of Judicial Ethics while in his capacity as Chief Justice of the Alabama Supreme Court.[2] The JIC's complaint alleges that Chief Justice Moore violated the Canons of Judicial Ethics in an order he issued on January 6, 2016 ("the January 6, 2016, order"), and

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[1]This court is subject to the appellate jurisdiction of the Alabama Supreme Court as well. See § 157(b), Ala. Const. 1901 (Off. Recomp.).

[2]Chief Justice Moore was elected Chief Justice in November 2012 and assumed office in January 2013. He previously served as Chief Justice of the Alabama Supreme Court from January 15, 2001, until his removal from office by this court on November 13, 2003, a decision affirmed by the Alabama Supreme Court. See Moore v. Judicial Inquiry Comm'n of Alabama, 891 So. 2d 848, 850, 854-55 (Ala. 2004). The Court of the Judiciary removed Chief Justice Moore from office in 2003 based on his "willful[] refus[al] to obey a lawful and binding order of a federal court." 891 So. 2d at 862.

in his subsequent refusal to recuse himself in the March 4, 2016, decision of the Alabama Supreme Court in Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 4, 2016] ___ So. 3d ___ (Ala. 2016) ("API"), a case involving the Alabama Sanctity of Marriage Amendment, § 36.03, Ala. Const. 1901 (Off. Recomp.), and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

This case involves the interplay of four cases that challenged state bans on same-sex marriage. Two of those cases were filed in the United States District Court for the Southern District of Alabama: Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015), and Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015). The third case, API, supra, was filed in the Alabama Supreme Court, and the fourth was filed in the United States Supreme Court, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

In Searcy and Strawser, which were decided in January 2015, the United States District Court for the Southern District of Alabama held that the provisions of Alabama's marriage laws that prohibited same-sex marriages violated the United States Constitution. In response to Searcy and

Strawser, Chief Justice Moore wrote letters to Alabama Governor Robert Bentley and to all probate judges in Alabama.[3] Chief Justice Moore asserted that Searcy and Strawser were not binding on probate judges who were not parties to those cases. In his letter to the probate judges, Chief Justice Moore included a 27-page memorandum of law in support of that position.

On February 8, 2015, Chief Justice Moore issued an "Administrative Order of the Chief Justice of the Supreme Court." The order incorporated by reference his earlier letter and memorandum of law to the probate judges, and it purported to prohibit all probate judges in Alabama from issuing same-sex marriage licenses.

On February 11, 2015, the petition that resulted in the decisions in API, supra, was filed in the Alabama Supreme Court.[4] The petition sought a declaration that Alabama's marriage laws did not violate the United States Constitution

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[3]Chief Justice Moore's letter to Governor Bentley is dated January 27, 2015; his letter to the probate judges is dated February 3, 2015.

[4]The JIC's complaint states that this petition was "docketed in the Alabama Supreme Court" on February 12, 2015. According to the March 3, 2015, opinion in API, the petition was filed in the Supreme Court on February 11, 2015.

and an order directing probate judges to continue to enforce Alabama's marriage laws.

The next day, February 12, 2015, the United States District Court in Strawser enjoined Mobile County Probate Judge Don Davis, who had been added to that case as a party defendant, from refusing to issue licenses to the same-sex couples in Strawser who were seeking to marry. Strawser, 44 F. Supp. 3d at 1209.

On March 3, 2015, the Alabama Supreme Court issued an opinion in API ("API I"). The opinion in API I, in which Chief Justice Moore did not participate,[5] concluded that the Searcy and Strawser decisions did not prevent the Alabama Supreme Court from independently determining the constitutionality of Alabama's marriage laws. The Court then declared that Alabama's marriage laws were constitutional, and the Court enjoined all probate judges--except Judge Davis as to the named plaintiffs in Strawser--from issuing marriage licenses

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[5]Chief Justice Moore explained, in a note to his fellow Justices, that he did not participate in API I "to avoid the appearance of impropriety in light of the memorandum of February 3, 2015, and the administrative order of February 8, 2015, that I provided to Alabama probate judges in my role as administrative head of the Unified Judicial System." API, ___ So. 3d at ___ (Moore, C.J., statement of nonrecusal).

to same-sex couples.[6]

In May 2015, the district court in Strawser joined as class defendants all probate judges in Alabama. The court also joined as class plaintiffs all persons in Alabama who were unable to obtain same-sex marriage licenses. See Strawser v. Strange, 307 F.R.D. 604, 608 (S.D. Ala. 2015). The district court enjoined the probate judges from enforcing Alabama's laws prohibiting same-sex marriages or the recognition of same-sex marriages. Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015). The Strawser court specifically stated that the probate judges could not follow any state law to the contrary--including any decision of the Alabama Supreme Court.[7] The district court stayed its

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[6]The Court gave Judge Davis a short time to file a brief "advis[ing] 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." API I, ___ So. 3d at ___. A week later, the Court joined Judge Davis as a respondent in API and required Judge Davis to comply, except as to the four marriage licenses at issue in Strawser, with the injunction applicable to all other Alabama probate judges.

[7]The district court refused to abstain from issuing the injunction to all probate judges because, the court reasoned, the class plaintiffs in Strawser were not parties to the Alabama Supreme Court's decision in API I and therefore were not bound by it.

injunction, however, until the United States Supreme Court issued its decision in Obergefell, which was pending before the Supreme Court at that time.

On June 26, 2015, the United States Supreme Court, in a sharply divided 5-4 decision, released its opinion in Obergefell. Obergefell holds that same-sex couples have a fundamental right to marry under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Among other things, the Court stated: "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States."

Stated briefly, under the doctrine of "abstention," a federal court may decline to exercise jurisdiction over a case out of respect for a state-court proceeding addressing the same or a similar proceeding. This doctrine recognizes that the federal government and state governments are separate sovereigns and that there may be instances when it is better to permit a state court to address a case before a federal court does so.

The district court also relied on the decision of the United States Supreme Court in Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939), which held that 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 where the plaintiffs in the federal action are not bound by the state court's writ of mandamus. Additionally, the district court in Strawser noted that its ruling that the Alabama marriage laws were unconstitutional predated the action of the Alabama Supreme Court.

135 S. Ct. at 2607 (emphasis added). The Court further stated: "It follows that the Court also must hold--and it now does hold--that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S. Ct. at 2607-08.

Three days later, on June 29, 2015, the Alabama Supreme Court issued an order inviting the parties in API "to submit any motions or briefs addressing the effect of the Supreme Court's decision in Obergefell on this Court's existing orders in [API I]."

On July 1, 2015, the Strawser court issued an order stating that because Obergefell had been decided, its injunction was "in effect and binding on all [Alabama probate judges]." On July 10, 2015, the probate judges filed a "response to plaintiffs' motion for a permanent injunction" in Strawser. In that response, the probate judges stated:

> "Probate judges take an oath to follow the law upon investiture. The U.S. Supreme Court has now resolved the conflict between this Court's rulings and the ruling of the Alabama Supreme Court. Both courts are entitled to interpret the U.S. Constitution, and the U.S. Supreme Court decided that this Court's interpretation was correct, essentially overruling the Alabama Supreme Court's determination. The bottom line is this: probate judges in this State were following Court orders when they either refused

> to issue marriage licenses or refused to issue same-sex marriage licenses. Now that confusion about the law has been cleared by the U.S. Supreme Court, there is no indication that the probate judges will violate their oath and refuse to follow what the Supreme Court has established ...."

On October 20, 2015, the United States Court of Appeals for the Eleventh Circuit issued an order in an interlocutory appeal in Strawser filed by Probate Judge Tim Russell. Among other things, Judge Russell argued that the Alabama Supreme Court's decision in API I rendered improper the injunction in Strawser. The Eleventh Circuit summarily rejected that argument, reasoning that API I had been "abrogated by the Supreme Court's decision in Obergefell." The Eleventh Circuit summarily affirmed "the district court's May 21, 2015, order granting a preliminary injunction requiring the issuance of marriage licenses to same-sex couples."

The January 6, 2016, order is entitled "Administrative Order of the Chief Justice of the Alabama Supreme Court." The order first recounts the API I decision of March 3, 2015, and states:

> "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 and 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."**

(Capitalization and bold-face type in original.)

On March 4, 2016, the Alabama Supreme Court issued an order in API that stated: "IT IS ORDERED that all pending motions and petitions are DISMISSED." The order provided no basis for its ruling. The order was accompanied, however, by several writings from individual Justices. (That order and the accompanying writings are hereinafter referred to as "API II.")

Chief Justice Moore issued a lengthy statement of nonrecusal in which he stated that, although he did not sit in API I, he did not think he was disqualified from sitting in API II, because, in his view,

> "[t]he effect of Obergefell on this Court's writ of mandamus ordering that the probate judges are bound to issue marriage licenses in conformity with Alabama law is a new issue before this Court. The controlling effect of Obergefell was not at issue when I earlier abstained from voting. The issue then addressed was the effect of the order of a federal district court, which I had addressed in my [February 8, 2015,] administrative order."

Chief Justice Moore also authored a lengthy special concurrence in API II criticizing the Obergefell decision as being, among other things, "immoral," "unconstitutional," and "tyrannical." Chief Justice Moore asserted that the Alabama Supreme Court's order of dismissal in API II did "not disturb the existing March [2015] orders in this case or the Court's holding therein that the Sanctity of Marriage Amendment, art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975, are constitutional." According to Chief Justice Moore, "state judges are bound to obedience to the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, not to the opinions of the United States

Supreme Court." Chief Justice Moore also stated:

> "[S]o as not to be misunderstood, I emphasize that judges are ordinarily obligated to regard the opinions of the [United States Supreme Court] as valid precedent that should be followed.
>
> "....
>
> "Yet this rule admits of exception ....
>
> "... [I]f precedents are 'manifestly absurd or unjust,' 'contrary to reason,' or 'contrary to the divine law,' they are not to be followed."

(Quoting 1 William Blackstone Commentaries on the Laws of England *69-70.)

In Chief Justice Moore's view, "[t]he Obergefell opinion, being manifestly absurd and unjust and contrary to reason and divine law, is not entitled to precedential value." Chief Justice Moore stated that the holding of Obergefell should be limited to only the parties in that particular case.

In a separate unpublished order issued on the same date as API II, the Alabama Supreme Court issued the certificate of judgment in API.[8] The certificate of judgment states:

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[8]Justice Shaw, in his special concurrence in API II, noted:

> "[T]he issuance of a certificate of judgment, which is also dictated by the order issued today, is a routine administrative task that is normally accomplished automatically by the clerk of the Court and is not voted upon by the Justices. A certificate

"**CERTIFICATE OF JUDGMENT**

"WHEREAS, the ruling on the application for rehearing filed in this cause and indicated below was entered in this cause on March 20, 2015:

"**Application Overruled. No Opinion.** PER CURIAM - Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan, JJ., concur.

"WHEREAS, the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the orders indicated below were entered in this cause:

"**Petition Granted. Writ Issued.** March 3, 2015. PER CURIAM - Stuart, Bolin, Parker, Murdock, Wise, and Bryan, JJ., concur. Main, J., concurs in part and concurs in the result. Shaw, J., dissents.

"**Writ Issued as to Judge Don Davis.** March 11, 2015. PER CURIAM - Stuart, Parker, Murdock, Main, Wise, and Bryan, JJ., concur. Shaw,

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of judgment in a mandamus matter is generally issued after the application for rehearing has been overruled, which occurred on March 20, 2015. However, because this case was not an appeal, the usual procedures for issuing a certificate of judgment under the Alabama Rules of Appellate Procedure, Rule 41, were not utilized. It is not clear to me that this Court has a procedure for issuing a certificate of judgment in this type of case--an original petition for mandamus relief--or that, because this Court was sitting as a trial court, one is even needed. The issuance of a certificate of judgment is a rote entry. Further, as explained below, it does not, and cannot, mean that the parties in this case may defy Obergefell or any federal court injunction against them."

API II, ___ So. 3d at ___ n.48 (Shaw, J., concurring specially).

J., dissents.

"**Writ Issued as to additional respondents.** March 12, 2015. PER CURIAM - Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan, JJ., concur. Shaw, J., dissents.

"NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P."

(Capitalization and bold-face type in original.)

The JIC, pursuant to complaints filed against Chief Justice Moore, conducted an investigation and, on May 6, 2016, filed the underlying complaint in this court. On June 21, 2016, Chief Justice Moore filed a motion to dismiss the JIC's complaint pursuant to Rule 12(b)(6), Ala. R. Civ. P., and Rule 10, R.P. Ala. Ct. Jud. This court subsequently entered an order converting the Chief Justice's motion to dismiss into a motion for a summary judgment pursuant to Rule 56, Ala. R. Civ. P. The JIC, on July 15, 2016, filed a cross-motion for a summary judgment and an opposition to the Chief Justice's summary-judgment motion; the Chief Justice filed a reply on July 26, 2016.

This court heard oral arguments on the cross-motions for a summary judgment on August 8, 2016. Following that hearing,

this court entered an order denying the summary-judgment motions and setting the matter for a final hearing on September 28, 2016.

At the final hearing, the JIC and Chief Justice Moore presented evidence in the form of documentary exhibits. Chief Justice Moore also testified in his defense.

STANDARD OF PROOF

Rule 10, R.P. Ala. Ct. Jud., requires the JIC to establish its allegations by clear and convincing evidence. In the context of punitive damages, § 6-11-20(b)(4), Ala. Code 1975, defines "clear and convincing evidence" as

> "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

This same definition appears in that part of the Code of Alabama addressing workers' compensation, see § 25-5-81(c), Ala. Code 1975, and has been used in cases addressing the termination of parental rights, see, e.g., J.B. v. DeKalb Cnty. Dep't of Human Res., 12 So. 3d 100, 111-12 (Ala. Civ. App. 2008).

DISCUSSION

I.

A.

At the outset, we briefly address Chief Justice Moore's arguments regarding an alleged breach of confidentiality by the JIC. According to an affidavit from Mat Staver, one of Chief Justice Moore's counsel in these proceedings and one of the counsel of record for the petitioners in API, Staver received a telephone call from a reporter at the New York Times on May 5, 2016, indicating that the reporter's "sources" had told him that the JIC would be filing a complaint as early as May 5 or May 6. Citing the requirements that all proceedings before the JIC are to be confidential, see, e.g., § 156, Ala. Const. 1901 (Off. Recomp.), and Rule 5, Ala. R.P. Jud. Inq. Comm'n, Chief Justice Moore maintains that this telephone call from a reporter the day before the charges were filed in this court indicates that the JIC breached its duty of confidentiality. Chief Justice Moore asks this court to find that the JIC breached its duty of confidentiality, and, as a remedy, he seeks dismissal of the charges against him. Although Chief Justice Moore contends that the JIC is the only possible "source" of the information alleged to have

been disclosed, no evidence was offered during the hearing identifying the reporter's "source." Thus, to conclude that the JIC was the "source" would require this court to speculate, and we decline to do so.[9]

At oral argument on the summary-judgment motions, this court asked Chief Justice Moore to identify how the alleged breach of confidentiality had prejudiced him, particularly given that charges were filed the day after the alleged telephone call. Chief Justice Moore maintains that he is not required to prove prejudice. That may be so, but Chief Justice Moore was reasonably apprised of the charges against him and had the opportunity to address those charges with the JIC and in this court. Even if the evidence established--and it does not--that the JIC breached its duty of confidentiality regarding the proceedings, Chief Justice Moore has cited no authority indicating he is entitled to the remedy he seeks: dismissal of the charges. Accordingly, this court denies Chief Justice Moore's request that the charges be dismissed on the basis that the JIC allegedly breached its duty of

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[9]Chief Justice Moore also offered into evidence an article from the Montgomery Advertiser in which unnamed sources indicated that a complaint would be filed. Again, however, no evidence was offered to identify those unnamed sources.

confidentiality.

B.

In his motion for a summary judgment, Chief Justice Moore reserved the right to raise a constitutional challenge to that part of § 159, Ala. Const. 1901 (Off. Recomp.), that provides: "A judge shall be disqualified from acting as a judge, without loss of salary, while there is pending ... a complaint against him filed by the judicial inquiry commission with the court of the judiciary." He noted in that motion that he had filed a challenge to § 159 in federal court. He ultimately did not prevail in that action.

At the final hearing, counsel for Chief Justice Moore made a brief argument that § 159 is unconstitutional to the extent it applies to allegations of violations of the Canons of Judicial Ethics that do not involve conduct that is criminal in nature. Counsel asserted that no other state has such a provision.

Initially, we question whether this Court has the power to declare this provision of the Alabama Constitution unconstitutional. Regardless, Chief Justice Moore has offered only bare assertions by counsel in support of his constitutional challenge. He therefore has not demonstrated

that he is entitled to relief, and this claim is denied.

II.

We now turn to the charges of the complaint, the evidence presented, and the parties' arguments. The complaint alleges the following six charges against the Chief Justice:

> Charge No. 1: "By willfully issuing [the January 6, 2016, order,] in which he directed or appeared to direct all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."
>
> Charge No. 2: "In demonstrating his unwillingness in [the January 6, 2016, order] to follow clear law, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."
>
> Charge No. 3: "In issuing [the January 6, 2016, order] and in abusing his administrative authority by addressing and/or deciding substantive legal issues while acting in his administrative capacity, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."
>
> Charge No. 4: "In issuing [the January 6, 2016, order] and thereby substituting his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court, i.e., the effect of the decision of the United States Supreme Court in Obergefell, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, 3, 3A(6)]."
>
> Charge No. 5: "By issuing [the January 6, 2016, order] and willfully abusing his administrative

> authority to issue [that order], Chief Justice Roy S. Moore interfered with legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama's probate judges were parties. In so doing, Chief Justice Moore ... violated [Canons 1, 2, 2A, 2B, and 3]."
>
> Charge No. 6: "By taking legal positions in [the January 6, 2016, order] on a matter pending before the Alabama Supreme Court in API, Chief Justice Roy S. Moore placed his impartiality into question on those issues, thus disqualifying himself from further proceedings in that case; yet he participated in further proceedings in API, after having disqualified himself by his actions, in violation of [Canons 1, 2, 2A, 2B, and 3]."

(JIC's complaint, pp. 26-32.)

The JIC alleges that Chief Justice Moore's conduct that resulted in the above charges violated the Canons of Judicial Ethics in that he specifically

a. "[f]ailed to uphold the integrity and independence of the judiciary, Canon 1" (Charges 1-6);

b. "[f]ailed to participate in establishing, maintaining, and enforcing and to himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1" (Charges 1-5; Charge 6 alleges that he "[f]ailed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved");

c. "[f]ailed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2" (Charges 1-6);

d. "[f]ailed to respect and comply with the law, Canon 2A" (Charges 1-6);

e. "[f]ailed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A" (Charges 1-6);

f. "[f]ailed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B" (Charges 1-6);

g. "[f]ailed to perform the duties of his office impartially, Canon 3" (Charges 1-5; Charge 6 alleges that he "[f]ailed to perform the duties of his office impartially and diligently"); and/or

h. "[f]ailed to abstain from public comment about a pending proceeding in his own court, Canon 3A(6)" (Charge 4).

In sum, the first five charges relate to the issuance of the January 6, 2016, order, and the sixth charge relates to the January 6, 2016, order and Chief Justice Moore's subsequent participation in API II.

A. Charges Nos. 1-5

The JIC starts with the premise that binding federal court injunctions--such as the May 2015 injunction in Strawser that bound all Alabama probate judges--are to be obeyed. To that, the JIC adds the premise that the United States Supreme Court is the final arbiter of the United States Constitution and that its decisions on matters of

constitutional law are binding on lower federal and state courts. From these premises, the JIC asserts that the Chief Justice should not issue an order that, if followed, would constitute disobedience to a binding federal injunction supported by a controlling decision of the United States Supreme Court. The central claim of charges nos. 1-5 of the JIC's complaint is that the January 6, 2016, order required, or appeared to require, Alabama's 68 probate judges to defy the United States Supreme Court's decision in Obergefell and the expressed prohibitions of a binding injunction by the federal district court in Strawser.

The JIC argues that Chief Justice Moore's actions in this case are the same as--indeed, worse than--his actions that led to his removal from the office of Chief Justice in 2003. In 2003, the Court of the Judiciary[10] found that Chief Justice Moore had personally violated numerous Canons of Judicial Ethics based on his "willful[] and public[]" refusal to obey the binding orders of a United States district court. As a

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[10]The only current member of this court who served on the court that removed Chief Justice Moore from office in 2003 is John V. Denson II. Judge Denson, however, recused himself from this matter, and a predetermined alternate member was appointed to sit in Judge Denson's place. Thus, no current member of this court served on the court that removed Chief Justice Moore from office in 2003.

sanction, this court removed Chief Justice Moore from the office of Chief Justice because, this court found, Chief Justice Moore had indicated unequivocally that he had no remorse for his defiance of that order and that he would, in fact, "do it again." This court reasoned that "[a]nything short of removal would only serve to set up another confrontation that would ultimately bring us back to where we are today."

According to the Chief Justice, at the time he issued the January 6, 2016, order, there were a number of differences between his conduct and the circumstances in 2003 and his conduct and the circumstances in this case. The primary difference, the Chief Justice asserts, is that the Alabama Supreme Court had issued injunctions in March 2015 in API I that told Alabama's probate judges not to issue same-sex marriage licenses. (The injunctions in API I are at times referred to as "the existing orders" of the Alabama Supreme Court in API.)

The JIC's position is that at the time of the January 6, 2016, order, the March 2015 API orders had been nullified by Obergefell, as well as by the injunction entered against all probate judges in Strawser in May 2015 that by its terms took

effect once the United States Supreme Court decided Obergefell. The JIC further cites the Eleventh Circuit's statement in October 2015 that Obergefell had "abrogated" the orders in API.

The Chief Justice, however, finds significance in the Alabama Supreme Court's June 29, 2015, order--issued three days after the Obergefell decision--in which the Alabama Supreme Court invited the parties in API I "to submit any motions or briefs addressing the effect of the Supreme Court's decision in Obergefell on this court's existing orders in [API I]." The Chief Justice argues that the Alabama Supreme Court, by inviting additional briefing, did not view its orders as having been automatically abrogated or nullified by Obergefell.[11] The Chief Justice asserts that the Eleventh Circuit's October 2015 statement was therefore incorrect, and he cites decisions standing for the proposition that the Eleventh Circuit does not have the authority to review decisions of the Alabama Supreme Court.

The crux of the Chief Justice's argument is that he issued the January 6, 2016, order not as a direction to anyone

[11]The Alabama Supreme Court's June 29, 2015, invitation for additional briefing, as well as the Court's possible reasons for it, are discussed in more detail below.

to do anything[12] but merely as a sort of "status update" informing the probate judges that the issues addressed in the June 29, 2015, invitation for "additional briefing" remained pending before the Court. Chief Justice Moore argues that he "merely recited the status of the API orders" and that he "did not offer an opinion, pro or con, as to their validity."[13] He asserts that he respected the prerogative of the Alabama Supreme Court and did not anticipate how the Court would rule.

He claims further that he "did not counsel the probate judges to disobey the federal injunction. In fact, he did not mention it." Finally, he claims that the JIC's complaint is "double minded":

> "On the one hand, the JIC accuses the Chief Justice of failing to declare that Obergefell, the federal injunction [in Strawser], and the Eleventh Circuit had rendered the API orders meaningless. On the other hand, the JIC criticizes the Chief Justice for allegedly usurping the authority of the Alabama Supreme Court to decide the fate of its own orders. In the eyes of the JIC, the Chief Justice is guilty of an ethical violation no matter what he does."

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[12]According to Chief Justice Moore's counsel in closing argument, the January 6, 2016, order did not have the authority to require anyone to do anything.

[13]Chief Justice Moore acknowledges that he ignored the federal injunction in Strawser--including its statement that the probate judges could not obey any contrary injunction issued by the Alabama Supreme Court.

As the JIC points out, however, this is a false dilemma. There is a third option Chief Justice Moore fails to mention: He could have simply not issued the January 6, 2016, order.

Chief Justice Moore testified that the purpose of the January 6, 2016, order was to preserve the public reputation of the Court and to urge compliance with Canon 3A(5), Canons of Judicial Ethics, which states that "[a] judge should dispose promptly of the business of the court." He offered into evidence two partially redacted, internal memoranda he wrote to other members of the Alabama Supreme Court--one dated September 9, 2015, and one dated October 7, 2015--in support of this claim.[14] He further offered evidence that complaints were filed by third parties with the JIC against each of the Justices on the Alabama Supreme Court on February 18, 2016, alleging ethical violations because of the delay in ruling on the API motions.[15] Chief Justice Moore asserted that he issued the January 6, 2016, order "to address the confusion and uncertainty among the probate judges of Alabama arising from

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[14]On August 3, 2016, this Court, after an in camera review, denied the JIC's motion to produce the unredacted copies.

[15]Those complaints were summarily dismissed.

the Court's delay."

This court does not find credible Chief Justice Moore's claim that the purpose of the January 6, 2016, order was merely to provide a "status update" to the State's probate judges. Chief Justice Moore repeatedly has asserted to this Court that he wanted to draw attention to the "conflicting orders" of API I and the injunction in Strawser. Thus, Chief Justice Moore clearly knew about the contrary, binding injunction in Strawser. Chief Justice Moore's failure in the January 6, 2016, order to acknowledge the recipients' obligations under the binding federal injunction in Strawser --and the potential dire implications of open defiance of that injunction--did not negate the existence of the injunction in Strawser (or Obergefell's clear holdings quoted above). Moreover, the failure to mention the Strawser injunction did not prevent the January 6, 2016, order--with its clear statement that probate judges could not issue same-sex marriage licenses--from being in direct conflict with Strawser.[16]

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[16]See API II, ___ So. 3d at ___ n.49 (Shaw, J., concurring specially) ("Ordering and directing that Alabama probate court judges had a 'duty not to issue any marriage license contrary to the Sanctity of Marriage Amendment or the Marriage Protection Act' is contrary to the federal district court

We likewise do not accept Chief Justice Moore's repeated argument that the disclaimer in paragraph 10 of the January 6, 2016, order--in which Chief Justice Moore asserted he was "not at liberty to provide any guidance ... on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court"--negated the reality that Chief Justice Moore was in fact "order[ing] and direct[ing]" the probate judges to comply with the API orders regardless of Obergefell or the injunction in Strawser.

Chief Justice Moore's arguments that his actions and words mean something other than what they clearly express is not a new strategy. In 2003, this court's order removing Chief Justice Moore quoted the following testimony from him before the JIC:

> "I did what I did because I upheld my oath. And that's what I did, so I have no apologies for it. I would do it again. I didn't say I would defy the court order. I said I wouldn't move the monument. And I didn't move the monument, which you can take as you will."

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injunction, which said that the probate court judges could not enforce those provisions. The order did more than address the hypothetical impact of Obergefell on API; it ordered and directed that the probate court judges continue to follow API, a course of action that would be contrary to the federal court injunction. The failure of the order to mention the federal court injunction did not negate that reality.").

Just as Chief Justice Moore's decision that he "wouldn't move the monument" was, in fact, defiance of the federal court order binding him, a disinterested reasonable observer, fully informed of all the relevant facts, would conclude that the undeniable consequence of the January 6, 2016, order was to order and direct the probate judges to deny marriage licenses in direct defiance of the decision of the United States Supreme Court in Obergefell and the Strawser injunction.

Indeed, to see that the January 6, 2016, order can be reasonably read as requiring defiance of the United States Supreme Court and the district court in Strawser, we need look no further than a press release issued by Mat Staver--Chief Justice Moore's own counsel in these proceedings and one of the counsel of record in API--that was issued the same day as the January 6, 2016, order. In that press release, which solely addressed the January 6, 2016, order, Staver asserted:

> "In Alabama ... state judiciaries ... are standing up against the federal judiciary or any one [sic] else who wants to come up with some cockeyed view that somehow the Constitution now births some newfound notion of same-sex marriage."[17]

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[17]Chief Justice Moore challenged the admissibility of these statements. Specifically, Chief Justice Moore pointed out that Staver was not his counsel of record at the time, and he asserted that the statements are not properly

Chief Justice Moore's contention that the only purpose and plausible reading of the January 6, 2016, order is that of a "status update" is entirely unconvincing.

Furthermore, as the JIC correctly argues, the United States Supreme Court in Cooper v. Aaron, 358 U.S. 1 (1958), clearly rejected the theory underlying the January 6, 2016, order and Chief Justice Moore's special writing in API II--namely, the theory that only the parties to a United States Supreme Court decision are bound by the decision. Cooper held that states are bound by the decisions of the United States Supreme Court, even when a state has not been a party to the case that generated the decision. In addressing attempts by the State of Arkansas to resist the school-desegregation decision of the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954), the Cooper Court stated:

> "[W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

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authenticated and are irrelevant. This court overruled Chief Justice Moore's objections, however, and admitted Staver's statements for the limited purpose of showing that the JIC's reading of the January 6, 2016, order as calling for open defiance of federal court orders was the same reading Staver --a licensed attorney--gave the January 6, 2016, order at the time it was issued.

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v. Madison, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. ...' Ableman v. Booth, 21 How. 506, 524.

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery ....' United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is

> manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases ...' Sterling v. Constantin, 287 U.S. 378, 397-398."

358 U.S. at 17-19 (emphasis added).

Chief Justice Moore recognized the holding and validity of Cooper in 2003, when he argued then that his case was distinguishable from Cooper. Chief Justice Moore's understanding of Cooper--as evidenced by his arguments in 2003--means that he could not have actually thought that Obergefell bound only the parties to that case. Thus, we agree with the JIC's contention that Chief Justice Moore is disingenuous in his suggestion in the January 6, 2016, order that "recent developments of potential relevance since Obergefell may impact" whether Obergefell abrogated API.

We likewise are not persuaded by Chief Justice Moore's attempt to, in effect, blame the Alabama Supreme Court for creating a situation that necessitated his issuance of the January 6, 2016, order. Because the Alabama Supreme Court chose to take no action on its June 29, 2015, invitation for additional briefing other than eventually to dismiss all pending motions and to certify its judgment in API I, this

court does not know what field of operation, if any, the Alabama Supreme Court thought its "existing orders" in API I had after the decision in Obergefell was released.[18] What is clear to this court, however, is that the Alabama Supreme Court's decision to take no action after Obergefell other than to give a deadline to submit additional briefing in its June 29, 2015, order is qualitatively different from the language Chief Justice Moore used in the January 6, 2016, order. That order, with its clear statement --"IT IS ORDERED AND DIRECTED THAT ... the existing orders of the Alabama

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[18]Counsel for Chief Justice Moore informed this court that one of the issues briefed in response to the June 29, 2015, invitation for briefing is whether the Alabama Supreme Court should attempt in API to protect the right of individual probate judges to object, on the basis of religious liberty, to the issuance of same-sex marriage licenses.

The fact remains, however, that the Alabama Supreme Court simply did not explain the basis for its June 29, 2015, briefing order or for its ruling in API II. Justices Wise and Bryan concurred in the Court's order in API II without writing. As noted above, Chief Justice Moore authored a lengthy special concurrence. In addition to Chief Justice Moore's writing, Justice Stuart authored a special concurrence, joined by Justices Bolin and Main; those three Justices stated that when the Alabama Supreme Court dismisses a matter without explanation from the Court, it would be "erroneous and unjust" to "[a]ttribut[e] the reasoning and explanation in a special concurrence or a dissent to a Justice who did not issue or join the writing." Justices Bolin, Parker, Murdock, and Shaw each issued separate special concurrences. Justice Bolin joined Justice Shaw's special concurrence in part.

Supreme Court ... remain in full force and effect"--was not, as the JIC pointed out in its closing argument, merely a status update. A judge does not issue a "status update" that "orders and directs" that a law remain in effect. Rather, a judge "orders and directs" individuals to do something: in this instance, to comply with law that is in "full force and effect." The January 6, 2016, order called for action--and that action would have been in defiance of Obergefell and of the injunction in Strawser.

An additional difference in the Alabama Supreme Court's June 29, 2015, invitation for briefing and the January 6, 2016, order is that the Alabama Supreme Court cited no legal authority in its order other than the rule of the United States Supreme Court giving the parties in Obergefell "a period of 25 days to file a petition for rehearing in that case." The January 6, 2016, order, on the other hand, includes three paragraphs of legal authority, which the order describes as standing for the "elementary" proposition that "a judgment only binds the parties to the case before the court." As noted above, the United States Supreme Court has rejected the notion that only the parties to a United States Supreme Court judgment are bound by it. Regardless of the

merits of the statement in the January 6, 2016, order, however, it is clear to this court that Chief Justice Moore in fact took a legal position in the January 6, 2016, order, despite his claim that he was not taking any such position.[19]

Further, Chief Justice Moore's use of legal authority in support of that position was incomplete to the point that this court finds it was intended to be misleading. First, his brief description of Obergefell in the January 6, 2016, order as holding "unconstitutional certain marriage laws in the states of Michigan, Kentucky, Ohio, and Tennessee" is, as the JIC explains, at best incomplete and at worst intentionally misleading. That brief description of Obergefell did not address the clear holding of Obergefell--that same-sex couples may exercise the right to marry in all states, not just Michigan, Kentucky, Ohio, and Tennessee.

Second, Chief Justice Moore's use of authority from the Eighth and Tenth Circuits was selective and misleading. In

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[19]As the JIC explained at the final hearing, a disclaimer that one is not doing something is only true if one, in fact, does not do that something. Here, despite Chief Justice Moore's repeated protests that he said he could not give guidance as to the effect of Obergefell, he proceeded to give guidance as to the effect of Obergefell and ultimately concluded that it had done nothing to affect the "existing orders" in API I, which he said remained "in full force and effect."

each of the cases Chief Justice Moore cited in the January 6, 2016, order, the lower federal courts had issued injunctions before Obergefell was decided--and each of those injunctions was consistent with what Obergefell later held. Thus, the question was whether Obergefell had rendered moot the need for the lower federal courts to continue to exercise jurisdiction to enforce the injunctions they had already entered before Obergefell was decided. In each case, as the JIC explains, "it appears the courts remained unconvinced that the states would actually abide by Obergefell's mandate. To say that these cases somehow indicate that Obergefell does not impact Alabama law has no basis." At best, as the JIC asserts, the "selective inclusion" and "selective omission" of authority was "one-sided"; at worst, it was "fully misleading" and was a "thinly-veiled order directing probate judges to defy federal law." Indeed, as we have already noted, Chief Justice Moore's own attorney in this proceeding interpreted the January 6, 2016, order as a call for open defiance of federal court decisions and issued a press release to that effect on the date the order was released.

In sum, this court rejects Chief Justice Moore's argument that the January 6, 2016, order "merely recited the status of

the API orders" and "did not offer an opinion, pro or con, as to their validity." The order clearly asserts that 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."** (Bold-face type in original.)

Beyond question, at the time he issued the January 6, 2016, order Chief Justice Moore knew about Obergefell and its clear holding that the United States Constitution protects the right of same-sex couples to marry. Similarly, at the time he issued the January 6, 2016, order he knew the binding application of the federal injunction in Strawser. Accordingly, we conclude that the omission from the January 6, 2016, order of any mention of the federal injunction in Strawser was intentional. Further, this intentional omission was a failure to follow clear law and a failure to uphold the integrity and independence of the judiciary.

As noted, Chief Justice Moore's use of caselaw in the order was incomplete, misleading, and manipulative. We find that, when coupled with the intentional omission of binding federal authority, the clear purpose of the January 6, 2016,

order was to order and direct the probate judges--most of whom have never been admitted to practice law in Alabama[20]--to stop complying with binding federal law until the Alabama Supreme Court decided what effect that federal law would have.

Based on the foregoing, this court finds that the JIC has proved by clear and convincing evidence that Chief Justice Moore is guilty of charges nos. 1-5. As to charge no. 1, by willfully issuing the January 6, 2016, order, in which he directed or appeared to direct all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples, the evidence that Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3 is clear and convincing.

As to charge no. 2, the evidence is clear and convincing that the January 6, 2016, order demonstrated an unwillingness to follow clear law, and Chief Justice Moore thereby violated Canons 1, 2, 2A, 2B, and 3.

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[20]According to records from the Alabama State Bar introduced at the hearing of this matter, 20 of Alabama's 68 probate judges are admitted to practice law in Alabama.

As to charge no. 3, the evidence is clear and convincing that in issuing the January 6, 2016, order, and deciding substantive legal issues while purporting to act in his administrative capacity, Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3.

As to charge no. 4, the evidence is clear and convincing that in issuing the January 6, 2016, order, Chief Justice Moore substituted his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court--the effect of the decision of the United States Supreme Court in Obergefell--and thereby violated Canons 1, 2, 2A, 2B, 3, 3A(6).

As to charge no. 5, the evidence is clear and convincing that, by issuing the January 6, 2016, order Chief Justice Moore interfered with the legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama's probate judges were parties. In so doing, Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3.

B. Charge No. 6

The remaining charge in the JIC's complaint is that (1)

Chief Justice Moore took legal positions in the January 6, 2016, order on a matter pending before the Alabama Supreme Court in API, which (2) placed his impartiality into question on those issues, and therefore (3) disqualified Chief Justice Moore from further proceedings in that case. The JIC alleges that Chief Justice Moore's continued participation in the case--by participating in the decision in API II--violated Canons 1, 2, 2A, 2B, and 3.

Chief Justice Moore asserts this charge is "demonstrably untrue"--that he "did not take a legal position on the effect of Obergefell on the API case." He says he merely "instruct[ed] the probate judges that the Alabama Supreme Court's orders remained in effect pending 'further decision' of that Court." Additionally, Chief Justice Moore argues that charge no. 6 was brought in violation of the Rules of Procedure of the Judicial Inquiry Commission, specifically Rule 6C and 6D. Rule 6C requires the JIC to "advise the judge of those aspects of the complaint that it then considers worthy of some investigation"; Rule 6D requires the JIC to provide a status-update letter every six weeks. According to Chief Justice Moore, the JIC provided status-update letters on March 4 and April 15, but neither letter included the

substance of charge no. 6. Chief Justice Moore asserts that charge no. 6 is therefore procedurally noncompliant and should be dismissed. Chief Justice Moore also cites Rule 19, Ala. R.P. Jud. Inq. Comm'n, which authorizes a judge to petition this court to remedy a violation of rules by the JIC.

Initially, we address Chief Justice Moore's claim that the JIC did not properly notify him of charge no. 6. The JIC introduced evidence indicating that Chief Justice Moore actually was given an opportunity to address the charge at an April 17 hearing before the JIC. At that April 17 hearing, in response to questioning about his participation in API II, Chief Justice Moore distributed copies of his statement of nonrecusal in API II. The JIC also asserts:

> "The requirements of due process--which are at the heart of the Chief Justice's claim here--'are not necessarily the same as those in a criminal matter.' ... This is because the purpose of the disciplinary proceeding is 'to protect the public interest'--not to punish the judge .... In fact, 'the majority view holds that virtually no notice is required by the due process clause in investigatory proceedings. This view does not extend to adjudicative proceedings. Even there, though, due process demands only the amount of notice necessary to give a judge a general idea of the charges against him.' ... With this in mind, there is simply no question that the Chief Justice has been provided robust notice under the JIC Rules, above and beyond what the majority of jurisdictions require at the investigatory stage

--and his own testimony at the April 17, 2016, hearing proves he had, at the very least, a general idea of the charges against him, if not specific knowledge of the Commission's investigation into these matters.

"But ... even if ... Charge Six was not adequately noticed by the Commission--which the Commission does not concede--and even if formal notice and strict adherence to the JIC procedures is required--which it is not--the Chief Justice has not shown any prejudice by this lack of notice, as required by Rule 19 and the majority of jurisdictions."

We agree with the JIC. Chief Justice Moore had adequate notice of charge no. 6, and, even if he did not, he has not demonstrated prejudice--despite having multiple opportunities to do so--by any alleged lack of notice.

Turning to the merits of charge no. 6, as noted above, Chief Justice Moore in fact took legal positions in the January 6, 2016, order on a matter pending before the Alabama Supreme Court--namely, he stated that the "existing orders" of the Alabama Supreme Court remained in effect until vacated by the Alabama Supreme Court, and he argued that Obergefell bound (or might only bind) the parties to it but no one else.

As the JIC points out:

"[T]he Chief Justice's guilt here is self-evident upon a simple comparison that reveals that significant portions of his January 6th Order are actually just copied and pasted verbatim into his subsequent--and substantive--legal opinion in API

II.

"....

"... Considering that the substantive legal content of his API II concurrence is identical to the language in his January 6th Order, the Chief Justice's assertion that his January 6th Order somehow does not also address substantive legal issues is plainly disingenuous and transparent."

Further, we agree with the JIC's argument that, under an objective standard, Chief Justice Moore's decision to issue the January 6, 2016, order was a decision to make a public comment about a pending proceeding in his own Court, thereby placing his impartiality into question. See Canon 3A(6), Canons of Jud. Ethics ("A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control."). Thus, under an objective standard, by virtue of the issuance of the January 6, 2016, order, Chief Justice Moore was disqualified from additional participation in API II.

In his statement of nonrecusal in API II, Chief Justice Moore asserted:

"The effect of Obergefell on this Court's writ of mandamus ordering that the probate judges are bound to issue marriage licenses in conformity with Alabama law is a new issue before this Court. ...

"....

> "In joining this case to consider the effect of Obergefell, I am not sitting in review of [the January 6, 2016,] order, nor have I made any public statement on the effect of Obergefell on this Court's opinion and order of March 3, 2015."

As noted above, in the January 6, 2016, order, Chief Justice Moore, in fact, took legal positions on the effect of Obergefell, and that order was, in fact, a public comment on the issue. And, as noted above, he copied and pasted substantial portions of those legal positions and public comment into his special concurrence in API II. Accordingly, this court finds that the evidence is clear and convincing that Chief Justice Moore is guilty of charge no. 6.

III.

We turn now to the issue of the appropriate sanction. The JIC argues that Chief Justice Moore should be removed from office. In the JIC's view, Chief Justice Moore's conduct in this case is even worse than the conduct that led to Chief Justice Moore's removal in 2003 because the order in this case, if complied with, would have put 68 probate judges in direct defiance of federal law.

As noted above in Part II, this court agrees with the JIC as to Chief Justice Moore's violation of the Canons of

Judicial Ethics. A majority of this court also agrees with the JIC that the only appropriate sanction for Chief Justice Moore is removal from office. Removal of a judge from office, however, requires "the concurrence of all members sitting." Rule 16, R.P. Ala. Ct. Jud.

As this court stated in its 2003 order removing Chief Justice Moore from office: "While this court respects Chief Justice Moore's right to his personal opinion on the underlying issues ..., the fact remains that Chief Justice Moore is the chief judicial officer of this State and is held to a higher standard than a member of the general public." The fact also remains that this is the second time Chief Justice Moore has caused himself to be brought before this court for taking actions grossly inconsistent with his duties as Chief Justice and in violation of the Canons of Judicial Ethics. The result in both instances has been a lengthy, costly proceeding for this court, the JIC, and, most unfortunately, the taxpayers of this State.

Based upon the clear and convincing evidence of Chief Justice Moore's violations of the Canons of Judicial Ethics, his disregard for binding federal law exhibited in the January 6, 2016, order, and his history with this court, it is the

unanimous judgment of this Court that Chief Justice Moore should be suspended from office without pay for the remainder of his term.

CONCLUSION

On the basis of the evidence presented, this Court unanimously finds that the JIC proved by clear and convincing evidence that Chief Justice Moore is guilty of charges nos. 1-6. Specifically, Chief Justice Moore is guilty of violating:

- Canon 1, in that he failed to uphold the integrity and independence of the judiciary;
- Canon 2, in that he failed to avoid impropriety and the appearance of impropriety in all his activities;
- Canon 2A, in that failed to respect and comply with the law and failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;
- Canon 2B, in that he failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute;
- Canon 3, in that he failed to perform the duties of his office impartially; and
- Canon 3A(6), in that he failed to abstain from public comment about a pending proceeding in his own court.

For these violations Chief Justice Moore is hereby suspended from office without pay for the remainder of his term. This suspension is effective immediately.

Chief Justice Moore is also taxed with the costs of this proceeding.

ORDERED this 30th day of September, 2016.

J. MICHAEL JOINER
CHIEF JUDGE

W.N. WATSON

JEFFREY T. BROCK

L. GWALTNEY MCCOLLUM, JR.

JAMES W. WOODROOF, JR.

LAURA PETRO

S. DAGNAL ROWE, SR.

LUCINDA SAMFORD CANNON

DARYL O. PERKINS