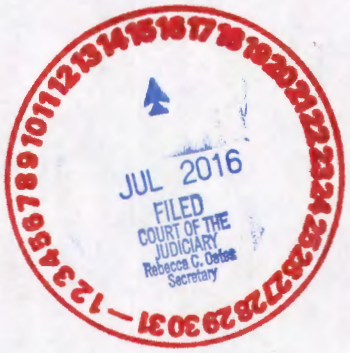

COURT OF THE JUDICIARY NO. 46

IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF ROY S. MOORE,
CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA

ON A COMPLAINT BY THE ALABAMA JUDICIAL INQUIRY COMMISSION

THE JUDICIAL INQUIRY COMMISSION'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CHIEF JUSTICE ROY MOORE'S MOTION FOR SUMMARY JUDGMENT

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THE JUDICIAL INQUIRY COMMISSION'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CHIEF JUSTICE ROY MOORE'S MOTION FOR SUMMARY JUDGMENT

On January 6, 2016—despite the United States Supreme Court's ruling in *Obergefell v. Hodges*, despite a federal injunction enjoining all Alabama probate judges from denying same-sex marriage licenses under Alabama's marriage laws, and despite the Eleventh Circuit's October 20, 2015 Order recognizing the abrogation of Alabama's marriage laws by *Obergefell*[1]—the Hon. Roy S. Moore, Chief Justice of the State of Alabama ("Chief Justice"), under the guise of his administrative authority, issued an Administrative Order ("January 6th Order") to all probate judges in the state ordering and directing them that they still had a duty, under Alabama law, *not* to issue same-sex marriage licenses.[2] Pursuant to complaints filed against the Chief Justice as a result of the January 6th Order, the Judicial Inquiry Commission ("Commission") investigated his conduct and subsequently filed the Complaint ("Complaint") that forms the basis of this judicial ethics prosecution.

Reduced to its essentials, the Complaint contains six charges alleging that the Chief Justice's January 6th Order not only constituted flagrant disregard of federal law by directing every subordinate probate judge in Alabama to ignore a federal injunction and clear federal law,

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[1] *See* Judicial Inquiry Commission's May 6, 2016 Complaint ("Complaint") in *In the Matter of Roy S. Moore,* Case No. 46; Exs. N, M, and P thereto. Unless otherwise noted, all exhibits to the Complaint are incorporated by reference to this motion.

See Compl., Ex. N (*Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015) ("same-sex couples may exercise the fundamental right to marry in *all* States.")); Compl., Ex. M (*Strawser v. Strange*, 105 F. Supp. 3d 1323 (S.D. Ala. 2015) (order issuing an injunction enjoining all Alabama probate judges from denying same-sex marriage licenses in accordance with Alabama's marriage laws)); and Compl., Ex. P (*Strawser v. State*, No. 15-1250B-CC, Oct. 20, 2015) (11th Cir. 2015) (denying appeals of certain probate judges subject to the injunction and noting 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.*")).

[2] *See* Compl., Ex. A at 4 (January 6, 2016 Administrative Order of the Chief Justice of the Alabama Supreme Court).

but also represented an abuse of his administrative authority, and placed his impartiality into question on a matter pending before the Alabama Supreme Court—all of which violate the Alabama Canons of Judicial Ethics.

The actions taken by the Chief Justice bring disrepute to Alabama's judiciary.[3]

From this Court's removal of the Chief Justice in 2003 for his defiance of a federal injunction barring his Ten Commandments monument from state grounds, to the act that forms that basis of today's Complaint—the issuance of an order directing every subordinate Alabama probate judge to ignore a federal injunction and controlling federal law, and instead to follow contrary Alabama law—the Chief Justice has made good on the promise he made to the Court of the Judiciary over ten years ago: "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.*"[4]

This Court has held before and it should hold again that "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *See* Compl., Ex. B at 9 (*In the Matter of Roy S. Moore, Chief Justice of the Supreme Court of Alabama*, Court of the Judiciary No. 33 (Nov. 13, 2003) (citing United States v. Lee, 106 U.S. 196, 220 (1882)); *see also Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("No . . . judicial officer can war against the Constitution without violating his undertaking to support it.").

At stake in the Court's decision today is an affirmation of Alabama's fidelity to the rule of law, as embodied in the Supremacy Clause of the United States Constitution—"This

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[3] Lawless judicial conduct—the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself—is as threatening to the concept of government under law as is the loss of judicial independence. *In re Ross*, 428 A.2d 858, 861 (Me. 1981).

[4] *See* Compl., Ex. B at 9 (*In the Matter of Roy S. Moore, Chief Justice of the Supreme Court of Alabama*, Court of the Judiciary No. 33 (Nov. 13, 2003) (citing the Chief Justice's August 22, 2003 testimony before the Commission)).

Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." *See* U.S. CONST., art. VI, cl. 2. The nation's bedrock Supreme Court decision, *Marbury v. Madison*, long ago "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." *Cooper*, 358 U.S. at 18 (emphasis added); *see also* THE FEDERALIST NO. 44 (James Madison) (concluding that if supremacy were not established "it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.").

Because the Chief Justice's January 6th Order constituted a flagrant disregard of federal law that forms the foundation of this nation's constitutional system, because the January 6th Order was a clear abuse of his administrative authority, and because the January 6th Order included legal positions that pertained to a matter that was currently pending before the Alabama Supreme Court, the Chief Justice violated at least six of the Alabama Canons of Judicial Ethics—which are outlined in depth below and which bind no one more than the chief judicial officer of this State.

Pursuant to Rule 10 of the Rules of Procedure for the Alabama Court of the Judiciary and Rule 56 of the Alabama Rules of Civil Procedure, the Commission respectfully submits this motion for summary judgment and opposition to the motion for summary judgment filed by the Chief Justice. For the reasons outlined below, no genuine issues of material fact exist and this Court should conclude as a matter of law that the Chief Justice is guilty of violating the Alabama

Canons of Judicial Ethics by clear and convincing evidence. Moreover, because he has proven—and promised—that given the opportunity he would ignore our nation's founding principles and flout the rule of law again, the only sanction that will adequately protect the Alabama judicial system, and the citizens who depend upon it for justice, is an order from this Court removing Roy S. Moore from the office of Chief Justice of Alabama.

STATEMENT OF UNDISPUTED FACTS

The background of this judicial ethics proceeding is outlined extensively in the Commission's May 6, 2016 Complaint and in the Chief Justice's June 21, 2016 Motion for Summary Judgment.[5] Thus, the Commission will not duplicate the full history here, except to outline the undisputed facts that render this case capable of summary disposition. Indeed, none of the material facts are in dispute—only their legal and ethical significance, which is a decision of law within the competence of this Court to decide now. The following material facts, most of which are purely procedural in nature, are undisputed:

1. On January 23, 2015, the United States District Court for the Southern District of Alabama held Alabama marriage laws unconstitutional insofar as they denied marital recognition to same-sex couples. *See* Compl., Ex. D (*Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015)).
2. Three days later, on January 26, 2015, the District Court, in a companion case, *Strawser v. Strange*, granted a preliminary injunction against Alabama's Attorney General, Luther Strange, the only party-defendant at that time, enjoining him from enforcing the Alabama marriage laws that prohibit same sex-marriage in Alabama. *See* Compl., Ex. E (*Strawser v. Strange* (Unpublished Order, Jan. 26, 2015)).

[5] Pursuant to Rule 12(b) and Rule 56 of the Alabama Rules of Civil Procedure, this Court converted the Chief Justice's June 21, 2016 Motion to Dismiss into a Motion for Summary Judgment in its June 27, 2016 Order.

3. On February 12, 2015, in *Strawser,* the District Court again held unconstitutional the denial of marriage licenses to same-sex couples under the Alabama marriage laws as violating both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In that February 12, 2015 order in *Strawser*, the Court enjoined Mobile County Probate Judge Don Davis, who had been added as a party-defendant (the only probate-judge defendant at that time), from refusing to issue marriage licenses to the same-sex party-plaintiffs. *See* Compl., Ex. J (*Strawser*, 44 F. Supp. 3d 1206, 1209 (S.D. Ala. 2015)

4. On March 3, 2015, the Alabama Supreme Court took up an extraordinary writ brought by a public interest group and declared those same Alabama marriage laws to be constitutional. In doing so, it ordered all probate judges who were *not* parties to *Strawser* to abide by those laws when issuing marriage licenses. *See* Compl., Ex. K (*Ex parte State ex rel. Alabama Policy Inst.,* No. 1140460, 2015 WL 89275226 (Ala. Mar. 3, 2015) (hereinafter *API I*), abrogated by *Obergefell v. Hodges,* 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)).

5. The *API I* Court showed deference to the existing District Court injunction by specifically limiting its writ to those probate judges *not* then subject to the federal injunction. That is, the Alabama Supreme Court took pains to note that the *API I* decision did not apply to Judge Don Davis: "The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State who, *unlike Judge Davis in his ministerial capacity, are not bound by the order of the federal district court in Strawser v. Strange* . . . ." *See* Compl., Ex. K (*API I*, 2015 WL 892752 at *26).

6. Then, on March 10 and 12, 2015, the Alabama Supreme Court determined that Judge Davis had fully complied with that federal injunction and thus made the *API I* decision applicable him—and subsequently to all probate judges in the state. *See* Ex. R (March 10, 2015 Order); *see also* Chief Justice's Mot. Summ. J., at Ex. B (March 12, 2015 Order). In doing so, the Court noted that the federal injunction *only* ordered Judge Davis not to deny same-sex marriage licenses to "the four couples who sued and obtained a judgment against him for their personal benefit" in *Strawser*, and he had in fact performed as ordered as to them.

7. On May 21, 2015, the District Court certified a plaintiff class, consisting of same-sex couples subject to discrimination under Alabama marriage laws, and a defendant class consisting of *all* Alabama probate judges who, in the performance of their duties, are subject to compliance with those laws. *See* Compl., Ex. L (*Strawser v. Strange*, 307 F.R.D. 604 (S.D. Ala. 2015)).

8. By separate order on the same date, May 21, 2015, the District Court in *Strawser* issued a preliminary injunction enjoining *all* members of the defendant class, i.e., all probate judges in Alabama, from refusing to issue marriage licenses to same-sex couples. *See* Compl., Ex. M (*Strawser v. Strange*, 105 F. Supp. 3d 1323 (S.D. Ala. 2015)). In issuing the injunction, the District Court also enjoined *all* Alabama probate judges from following any law or order, specifically including any order or injunction issued by the Alabama Supreme Court, that would deny a marriage license to same-sex couples on that ground alone:

> If the named Plaintiffs or any member of the Plaintiff Class take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, . . . the members of the Defendant Class may not deny them a license on the ground that they are

> same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act or by any other Alabama law or Order, including any injunction issued by the Alabama Supreme Court [API] pertaining to same-sex marriage. This injunction binds . . . any of the members of the Defendant Class who would seek to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage.
>
> *See* Compl., Ex. M (*Strawser,* 105 F. Supp. 3d at 1330).

9. The District Court stayed its injunction pending a decision of the United States Supreme Court in *Obergefell* and related cases. *See* Compl., Ex. M (*Strawser*, 105 F. Supp. 3d at 1331).

10. On June 26, 2015, the United States Supreme Court issued its decision in *Obergefell.* The Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the United States Constitution and that bans on same-sex marriage violate these constitutional provisions. The Court clearly stated: "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in *all* States." *See* Compl., Ex. N (*Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (emphasis added)). It went on to note: "It follows that the Court also must hold—and it now does hold—that 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." *Obergefell*, 135 S. Ct. at 2607-08 (emphasis added); *see also id.* at 2623-24 (Roberts, J., dissenting) (discussing how challenges that might have otherwise arisen in various states cannot arise after *Obergefell*, "...now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.").

11. When the opinion in *Obergefell* was issued on June 26, 2015, the District Court's stay—by its own terms—was lifted, and its injunction against all Alabama probate judges went into full force and effect.

12. On June 29, 2015, three days after the *Obergefell* decision, the Alabama Supreme Court invited additional briefing on the effect of *Obergefell* on the Court's existing orders in *API I.*

13. On July 1, 2015, the District Court clarified its May 21, 2015 preliminary injunction, in *Strawser*, stating that it "is now in effect and binding on *all* members of the Defendant Class, [all] probate judges in Alabama who are otherwise bound by [the Alabama marriage laws]." *See* Compl., Ex. O (*Strawser v. Strange* (Unpublished Order, July 1, 2015)). When the District Court lifted the stay, all provisions of that Court's order became effective, including that all 68 probate judges in Alabama are enjoined from following any conflicting Alabama law, including Alabama Supreme Court orders. *Obergefell's* holding had become binding precedent for all lower federal courts and state courts, and the federal injunction strictly bound the probate judges.

14. This was also recognized by the United States Court of Appeals for the Eleventh Circuit. On an interlocutory appeal from *Strawser*, one of the probate judges argued the District Court's preliminary injunction was improper because it conflicted with an order from the Alabama Supreme Court. The Eleventh Circuit summarily rejected this argument on October 20, 2015, stating:

> Since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court 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.

See Compl., Ex. P *(Strawser v. State*, No. 15-1250B-CC, Oct. 20, 2015 (11th Cir. 2015)).

15. Then, on January 6, 2016—despite the United States Supreme Court's ruling in *Obergefell*, despite the federal injunction enjoining all Alabama probate judges from denying same-sex marriage licenses under Alabama's marriage laws, and despite the Eleventh Circuit's October 20, 2015 Order recognizing the abrogation of *API I* by *Obergefell*—the Chief Justice, under the guise of his administrative authority, unilaterally issued an Administrative Order to all probate judges ordering and directing that they continue to have a ministerial duty under *API I* to follow the Alabama marriage laws and deny marriage licenses to same-sex couples. His Administrative Order concludes as follows:

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.

See Compl., Ex. A (emphasis added).

16. Pursuant to complaints filed against the Chief Justice as a result of this Order, the Commission investigated the Chief Justice's conduct and subsequently filed the Complaint that forms the basis of this judicial ethics prosecution, alleging that the January 6th 2016 Order violated Canons 1, 2, 2A, 2B, and 3 of the Alabama Canons of Judicial Ethics. Charge Four additionally alleged a violation of Canon 3A(6).

ALABAMA CANONS OF JUDICIAL ETHICS VIOLATED BY THE CHIEF JUSTICE

When the Chief Justice issued his January 6th Order, he violated Canons 1, 2, and 3 of the Alabama Canons of Judicial Ethics.[6]

The Chief Justice violated the Canon 1 requirements that a judge "uphold the integrity and independence of the judiciary," and that he observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." As discussed below, there are no genuine issues of material fact that, while acting as the head of Alabama's judicial system, the Chief Justice issued an order that constituted flagrant disregard of a federal injunction and clear federal law by directing every subordinate probate judge in the state to follow contrary Alabama law. The integrity of our nation's judiciary is built upon respect for the rule of law, and the Chief Justice's actions flouted this foundational principle and undermined our judiciary's integrity. The Chief Justice also abused his administrative authority in issuing the January 6th Order. As discussed below, the authority to issue such "remedial writs or orders as may be necessary [for] general supervision and control of courts of inferior jurisdiction," is vested by Amendment 328, § 6.02 of the Alabama Constitution *only* in a majority of the Alabama Supreme Court—not in the Chief Justice alone.

The Chief Justice argues that Canon 1's overly general nature alone "does not establish a bright line for purposes of discipline," and thus his conduct should not be scrutinized under such a broad decree. *See* Mot. Summ. J. at 32 (citing Lisa L. Milord, *The Development of the ABA Judicial Code 12* (1992)). But this assertion is wrong for two reasons. First, Chief Justice Moore is not only charged with a violation of this canon alone, but with numerous canons. Second,

[6] All citations to the canons of the Alabama Canons of Judicial Ethics reference those canons made effective February 1, 1976, and promulgated and adopted by the Alabama Supreme Court pursuant to Art. VI, § 147(c), Ala. Const. 1901 ("The supreme court shall adopt rules of conduct and canons of ethics, not inconsistent with the provisions of this Constitution, for the judges of all courts of this state.").

though the absence of a bright-line rule may be troublesome for cases at the margins, his January 6th Order—and his behavior surrounding it—has fallen so far below the high standard for proper behavior by Alabama judges that it is clear that a violation has occurred..

The Chief Justice also violated the Canon 2, 2A, and 2B requirements that he "avoid impropriety and the appearance of impropriety in all his activities;" "respect and comply with the law;" "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;" and "avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute." As discussed below, it was plainly improper for the head of Alabama's judicial system to issue an order directing every subordinate probate judge in the state to follow contrary Alabama law and to ignore a binding federal injunction and clear United States Supreme Court and Eleventh Circuit precedent. The flagrant and public nature of the Chief Justice's actions served only to magnify this appearance of impropriety.

Moreover, directing and ordering subordinate judges to follow Alabama marriage laws in flagrant disregard of a binding federal injunction and clear federal law is antithetical to respect for and compliance with the law. "Judicial officials at the highest levels must also comply with official directives and court orders." *See* Charles Gardner Geyh, James J. Alfini, Steven Lubet, & Jeffery M. Shaman, Judicial Conduct & Ethics, § 6.07 (5th Edition 2013) (discussing Chief Justice Moore's earlier defiance of a federal court injunction during the Ten Commandments saga); s*ee also In re Hague*, 315 N.W. 2d 524, 536 (Mich. 1982) (addressing a judge's refusal to follow superior court orders and to follow binding precedent, the court stated: "[i]t was in his inability to separate the authority of the judicial office he holds from his personal convictions that Judge Hague lost his way . . . . unable to see that he was the servant of the law and not its embodiment, he set himself above it . . . a mosaic of willful misconduct designed solely to

frustrate enforcement of laws he was oath-bound to uphold."); *see also In re Eastburn*, 121 N.M. 531-532, 538 (1996) (addressing a judge's refusal to obey a writ of mandamus, the court stated that "judges who, as self-perceived defenders of justice, set themselves above the law, to promote a personal belief about what the law should be, do a disservice to justice.").[7]

The Chief Justice's abuse of administrative authority represents a similar failure to respect and comply with the law and to avoid the appearance of impropriety because the authority to issue such "remedial writs or orders as may be necessary [for] general supervision and control of courts of inferior jurisdiction," is vested by Amendment 328, § 6.02 of the Alabama Constitution, only in a majority of the Alabama Supreme Court—not the Chief Justice alone. *See Ex Parte State ex rel. James*, 711 So. 2d 952 (1998) ("The Chief Justice does not have the authority, on his or her own, to interpret the substantive legal effect of a decision of this Court and then to seek to enforce that decision against the parties in that action; in this case, it is this Court that possesses the "authority to interpret, clarify, and enforce its own final judgments.").

The combination of these actions rendered his conduct well below the kind of conduct that "promotes public confidence in the integrity and impartiality of the judiciary." Public flouting of the foundational principles of federal supremacy and the rule of law in America only serves to undermine public confidence in the integrity of the judiciary. Finally he failed to "avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute." At its most fundamental level, the administration of justice requires that the judiciary's chief administrator not direct subordinate judges to follow Alabama marriage laws in

[7] *See also* William H. Pryor Jr., Moral Duty and the Law, 31 HAR. J. OF L. & PUB. POL'Y 154, 160 (2008) ("As a judge, I am not given the authority to use a personal moral perspective to update or alter the text of our Constitution and laws. The business of using moral judgment to change the law is reserved to the political branches, which is why the officers of those branches are regularly elected by the people . . . . the duty of a judge is the application of those laws in controversies within the jurisdiction of the courts.").

flagrant disregard of a binding federal injunction and clear federal law. Yet he did so. That his order conspicuously omits any mention of the federal injunction binding the probate judges at the time makes its issuance even more prejudicial to the administration of justice, in that it blatantly ignores the binding federal injunction *and* serves to confuse or mislead the subordinate judges, most of whom were not law-trained, as to the various legal obligations imposed upon them. Actions such as these bring the judicial office into disrepute.

Finally, the Chief Justice violated the Canon 3 requirement "to perform the duties of his office impartially," and the Canon 3A(6) requirement that he "abstain from public comment about a pending proceeding in his own court." The test for impartiality is an "objective standard"—whether a "disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial." *See* Judicial Conduct & Ethics, § 4.05. At the time the Chief Justice issued the January 6th Order, the Alabama Supreme Court had before it the additional briefing requested in the *API I* case, which would ultimately be addressed in the Court's second *API* opinion. *See* Compl., Ex. Q (*Ex parte State ex rel. Alabama Policy Inst.*, No. 1140460, 2016 WL 859009 (Ala. Mar. 4, 2016) (hereinafter, *API II*)). This Court is well within its competence to impose an objective standard on the Chief Justice's decision to issue the January 6th Order, which, among other things, improperly included as many as three paragraphs of legal authority that supported the very position he would ultimately adopt in his concurrence in *API II*, to determine whether the Chief Justice was motivated by the kind of impartiality that the Alabama Canons of Judicial Ethics demands.

The ethical admonishments and obligations imposed by the Alabama Canons of Judicial Ethics are broad. The Chief Justice assails them as subjective, amorphous, and "mere window dressing for the complaint to create an illusion of jurisdiction." *See* Mot. Summ. J. at 34. But the

fact remains that standards like the appearance of impropriety and the promotion of public confidence, "which apply to all activities, often *are* the backbone of decisions to discipline judges." *Id.* at 34 (citing James R. Noseda, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*, 36 DePaul L. Rev. 519, 532 (1987) (emphasis added). Though the canons' breadth inevitably creates overlap at times, such that a single instance of conduct can form the basis of numerous conduct violations, this Court may weigh the Chief Justice's conduct against each of the violations individually or all of them collectively.

ARGUMENT

The Complaint alleges three categories of ethics charges against the Chief Justice—each of which constitutes numerous violations of the Alabama Canons of Judicial Ethics. Charges One and Two allege that the Chief Justice's January 6th Order constituted flagrant disregard of federal law by directing every subordinate probate judge to continue to follow Alabama's marriage laws, despite the existence of a binding federal injunction prohibiting them from doing so, despite binding United States Supreme Court precedent acknowledging that same-sex couples have a fundamental right to marry in *all* states, and despite an Eleventh Circuit order indicating that Alabama's laws and decisions to the contrary had been abrogated by *Obergefell*. Charges Three, Four, and Five allege that the January 6th Order also represented an abuse of his administrative authority because the authority to issue such "remedial writs or orders as may be necessary [for] general supervision and control of courts of inferior jurisdiction," is vested by Amendment 328, § 6.02 of the Alabama Constitution only in a majority of the Alabama Supreme Court—not in the Chief Justice alone. *See Ex Parte State ex rel. James*, 711 So. 2d 952 (1998). Charge Six alleges that the Chief Justice's January 6th Order included improper legal positions, which placed his impartiality into question on a matter pending before the Alabama Supreme

Court. As outlined below, the Commission and the citizens of the State of Alabama whom it serves, are entitled to judgment as a matter of law that the Chief Justice is guilty of each of these charges by clear and convincing evidence.

A. While the head of Alabama's judicial system, the Chief Justice violated the Alabama Canons of Judicial Ethics when he issued his January 6th Order in flagrant disregard of federal law

The Supremacy Clause of the United States Constitution requires that judges—even the Chief Justice of Alabama—be bound by the federal judiciary's interpretation of the Constitution of the United States and not simply their own moral compasses. U.S. CONST., art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.").

Indeed, both the Alabama Supreme Court and the United States Supreme Court have consistently reaffirmed the foundational principle that "the federal judiciary has the power and authority, among other things, to interpret the provisions of the United States Constitution in determining whether a provision [of the U.S. Constitution] has been violated." *Moore v. Judicial Inquiry Comm'n of State of Ala.*, 891 So. 2d 848 (2004); *Ingram v. American Chambers Life Ins. Co.*, 643 So.2d 575, 577 (Ala.1994) ("Under Article VI of the United States Constitution, we are bound by the decisions of the United States Supreme Court); *Lee v. Yes of Russellville*, 784 So. 2d 1022 (Ala. 2000) (holding that "[d]ecisions of the Supreme Court of the United States, of course, are binding on this Court. Thus, this Court and all the other courts of this State are required faithfully to follow and to apply the decisions of that Court."); *see also, Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (rejecting attempts by Arkansas to nullify *Brown v. Board of Education* and holding that states are bound by the decisions of the U.S. Supreme Court—even

when a state has not been a party to the case that generated the decision).[8] In *Cooper v. Aaron*, the Court plainly held that "the federal judiciary is supreme in the exposition of the law of the Constitution," and that no "*judicial officer can war against the Constitution without violating his undertaking to support it.*" *Cooper*, 358 U.S. at 19 (emphasis added).

This is true of federal decisions interpreting the U.S. Constitution like *Obergefell*, as well as lower federal court injunctions forbidding actions that are violative thereof. *Hale v. Simco Trading*, 306 U.S. 375, 377-78 (1939) (in holding that a successful mandamus proceeding against state officials to enforce a challenged statute *does not* bar injunctive relief in a United States district court, the United States Supreme Court noted that, though "[i]t can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state . . . it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce Clause forbids"); s*ee also Madej v. Briley*, 370 F.3d 665, 666 (7th Cir. 2004) (when a state court refused to honor the order of a lower federal court ordering resentencing in a state criminal case, the court held that no state court can countermand an order issued by a federal court implementing the constitution of the United States); *United States v. Wallace*, 218 F. Supp. 290, 292 (N.D. Ala. 1963) (regarding the issuance of an injunction to ensure that the Governor of Alabama would cease ignoring a federal district court order, the court stated that "the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted

[8] *See also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979) ("State law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.") (citing *Cooper v. Aaron*); *Brinn v. Tidewater Transp. Dist. Comm'n.*, 242 F.3d 227, 233 (4th Cir. 2001) (when State of Virginia argued that Virginia statute forbade a federal court from awarding attorney's fees, the court noted that, although "federal courts are appropriately reluctant to displace state law," the Supremacy Clause mandates that federal law supersedes state law that either directly or by implication conflicts with federal law.").

and has resulted in a final judgement, all persons affected thereby are obliged to obey it.").

In light of the clear supremacy of the federal judiciary in constitutional matters, Charge One of the Complaint alleges that the Chief Justice violated the Alabama Canons of Judicial Ethics "by willfully issuing his [January 6th 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." *See* Compl. at 26.

Charge Two alleges that the Chief Justice violated numerous canons of the Alabama Code of Judicial Conduct "by demonstrating his unwillingness . . . to follow clear law"—namely, the United States Supreme Court's decision in *Obergefell v. Hodges*, which was reinforced by the Eleventh Circuit shortly thereafter. Though they inherently overlap, the Commission will discuss Charge One and Charge Two in turn.

1. The Chief Justice is Guilty of Charge One because the January 6th Order constituted flagrant disregard of the binding federal court injunction

Had *Obergefell* never even issued and had the Eleventh Circuit never spoken, the Chief Justice's flagrant disregard of the binding federal injunction alone is sufficient to find him guilty of this charge and to remove him from the office of Chief Justice. This is because, at the time the Chief Justice issued the January 6th Order, the probate court judges were bound by a federal injunction that was issued pursuant to a federal statute, 42 U.S.C. § 1983. Justice Shaw's concurrence from *API II* highlights the binding nature of the federal injunction quite succinctly:

> So, even if one believes the notion that a Supreme Court decision is not a "law" the Supremacy Clause requires state judges to obey, the federal statute pursuant to which the federal court injunction was issued against Alabama probate court judges *still trumps a contrary order by this State Court*. When our probate court judges are faced with conflicting federal and state court orders—here a federal injunction issued pursuant to § 1983, and directed to parties in that case, versus

> this Court's writ of mandamus—the federal court's order controls. This is why no probate court in this State is currently complying with API or the Chief Justice's January 6 administrative order and issuing government-marriage licenses to opposite-sex couples but not to same-sex couples. Is it seriously to be suggested that a decision by the Supreme Court of Alabama issued on its own volition can override the decision in a federal court action where the parties are under the jurisdiction of the federal court?

See Compl., Ex. Q (*API II*, 2016 WL 859009 at *58 (Shaw, J. concurring)); *see also Hale*, 306 U.S. at 377-78 (even a successful mandamus proceeding in a state court against state officials does not bar injunctive relief in a United States district court).

Despite the Chief Justice's assertions to the contrary, the law is abundantly clear that federal injunctions, even when weighed against a state mandamus proceeding, are to be obeyed, not ignored—and the Chief Justice should know this rule of law better than anyone. *See* Compl., Ex. C (*Moore v. Judicial Inquiry Comm'n of State of Ala.*, 891 So .2d 848 (2004) (upholding the Court of the Judiciary's decision to remove Chief Justice Moore for defiance of a federal injunction)). But the Chief Justice attempts to evade a plain reading of his January 6th Order, suggesting, among other things, that it never *mentions* the standing federal injunction at all, and that the Chief Justice never *actually* ordered the probate judges to defy any federal law. Rather, according to the Chief Justice, the January 6th Order "merely pointed out" that prior "existing orders of the Alabama Supreme Court" ordering probate judges "not to issue any marriage license contrary" to Alabama's marriage laws were still in full force and effect.

Urging this neutered reading of his January 6th Order, the Chief Justice accuses the Commission of perpetrating a "myth of defiance" against him. But this is simply wrong—the unavoidable fact is, ordering and directing all Alabama probate judges to heed laws that require them "not to issue any marriage license contrary" to Alabama's marriage laws is directly contrary to the standing federal injunction, which forbade all of them from enforcing those laws.

Even his colleagues on the Alabama Supreme Court have pointed out the obvious consequence of his January 6th Order:

> 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 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.

See Compl., at Ex. Q *(API II*, 2016 WL 859009 at *n.49 (Shaw, J. concurring)); *see also id.* at *46 (Bolin, J., concurring specially) ("I join that portion of Part II of Justice Shaw's well-reasoned special writing concerning defiance).

That his January 6th Order fails even to mention the preexisting federal injunction binding all of Alabama's probate judges makes the issuance of the order doubly violative. That is, far from "alleviating a condition affecting the administration of justice," as he purports was the basis of his authority to issue it, the Chief Justice's January 6th Order did exactly the opposite—it contributed to additional confusion about the various legal obligations imposed upon the probate judges, subjected them to "punitive fines, fees and sanctions by the federal government, the price of which would have to be paid—at least in part—by the [Alabama] taxpayers," and constituted conduct prejudicial to the administration of justice. *See* Compl., at Ex. Q *(API II*, 2016 WL 859009 at *55 (Shaw, J. concurring) ("We have now been invited to order Alabama's probate court judges to violate a federal court injunction . . . . Such a course of action would damage the institution of the Alabama Supreme Court and the rule of law . . . .")).

Despite the unavoidable consequence of his January 6th Order, the Chief Justice nonetheless accuses the Commission of drawing inappropriate parallels between this case and his 2003 removal for defying the Ten Commandments federal injunction—that is, seeking to

bootstrap his guilt then to establish his guilt now. But the Commission submits that the same sophistry he employed in 2003 is being employed by him now:

In 2003, he testified—"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 that as you will."[9]

Now he argues that he did not *order* the judges to defy the federal court injunction; rather "[h]e merely pointed out that the state court orders were still in effect pending further decision by the Alabama Supreme Court . . . . Far from ordering the probate judges to violate a federal injunction to which they were parties, the Chief Justice never mentioned that injunction." *See* Mot. Summ. J. at 21-22.

If this sterilized reading of his January 6th Order is indeed the correct interpretation, it must be a new one. This is because on the very day the Chief Justice issued his January 6th Order, the Liberty Counsel—which served as counsel for the petitioning public interest group in the *API* cases and which now serves as the Chief Justice's counsel in this matter—issued a press release with the headline: "Alabama Chief Justice Says Judges **Must Uphold** Sanctity of Marriage Amendment,"[10] followed by "Alabama Chief Justice Roy Moore issued an administrative order today saying, 'Alabama probate judges have a ministerial duty *not* to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment.'" It goes on to quote the Chief Justice's counsel, Mat Staver, as saying, "[i]n Alabama . . . state judiciaries . . . **are standing up against the federal judiciary** or any one [sic] else who wants to come up with

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[9] *See* Compl., Ex. B at 9 (*In the Matter of Roy S. Moore, Chief Justice of the Supreme Court of Alabama*, Court of the Judiciary No. 33 (Nov. 13, 2003) (citing the Chief Justice's August 22, 2003 testimony before the Commission)).

[10] *See* Ex. S, attached hereto: Mat Staver, Alabama Chief Justice Says Judges Must Uphold Sanctity of Marriage Amendment (Liberty Counsel), LIBERTY COUNS. (Jan. 6, 2016) (https://www.lc.org/newsroom/details/alabama-chief-justice-says-judges-must-uphold-sanctity-of-marriage-amendment) (emphasis added).

some cockeyed view that somehow the Constitution now births some newfound notion of same-sex marriage."[11] But now they offer a far more toned-down reading, urging instead that the "sole purpose" of the order was only to inform the probate judges "that the March 2015 orders in API were still in effect," and that "[a]lthough the Administrative Order may have increased the probate judges' awareness of the conflicting orders to which they were subject, it did not instruct them how to resolve that dilemma." *See* Mot. Summ. J. at 22.

The Chief Justice's suggestion that disregard for the federal injunction was not the intended and unavoidable consequence of his January 6th Order is further belied by the widely-publicized actions he took immediately following United States District Judge Callie Granade's very first order in early 2015. In addition to making numerous television appearances on CNN and other nationwide outlets, on January 27, 2015, he issued a letter to Governor Bentley, which includes the following:

> Today the destruction of that institution is upon us by federal courts using specious pretexts based on the Equal Protection, Due Process, and Full Faith and Credit Clauses of the United States Constitution. As of this date, 44 federal courts have imposed by judicial fiat same-sex marriages in 21 states of the Union, overturning the express will of the people in those states. If we are to preserve that "reverent morality which is our source of all beneficent progress in social and political improvement," **then we must act to oppose such tyranny**!

See Compl., Ex. F at 2 (emphasis added). Then, on February 3, 2015, the Chief Justice sent an "advisory letter" to all probate judges, titled "Federal Intrusion into State Sovereignty," in which he "warn[ed] against any unlawful intrusion into the jurisdiction and sovereignty of this state and its courts." *See* Compl., Ex. H. With his "advisory letter," the Chief Justice sent the probate judges his 27-page memorandum of law, addressing his legal conclusion that probate judges do not have to defer to lower federal court decisions on constitutional questions.

[11] *Id.* (emphasis added).

In the clear light of common sense, the Chief Justice's suggestion that disregard for the federal injunction was not the intended consequence of his January 6th Order is transparent and frankly strains credulity.

But just as important as the January 6th's Order's flagrant disregard of the *federal* injunction, the Order was actually issued in similar disregard of the Alabama Supreme Court's essential holding in *API I* itself. That is, *API I*—by its own terms—only purported to apply to probate judges that were *not* currently covered by the existing federal injunction. *See* Compl., Ex. K (*API I*, 2015 WL 892752, at *26 ("The final procedural issue we consider is whether the federal court's order prevents this Court from acting with respect to probate judges of this State who, u*nlike Judge Davis in his ministerial capacity, are not bound by the order of the federal district court in Strawser v. Strange* . . . .")). The importance of the majority of the Alabama Supreme Court in *API I* specifically carving out Judge Davis from the decision's coverage—and only later bringing Davis back in *after* it had determined that he had complied with Judge Granade's order—cannot be overstated, for it belies any suggestion that the Chief Justice's order to disregard the federal injunction bore the imprimatur of the whole Alabama Supreme Court. The fact is, when he directed the probate judges only to follow Alabama marriage laws, he did so in direct contravention of the federal injunction *and* of the essential holding of *API I*.[12]

In conclusion, the Court's entire decision today can be reduced to one question—did he or did he not direct subordinate probate judges to follow contrary Alabama law in flagrant disregard of a federal injunction? If the unavoidable consequence of the January 6th Order mandates a common sense "yes," then the Chief Justice is guilty of Charge One, he has

[12] One of the API motions that the *API II* Court dismissed in its order was the Alabama Policy Institute's Motion for Clarification and Reaffirmation of Orders Upholding Alabama's Marriage Laws filed on June 2, 2015, which asks for an order directing the probate judges to ignore Judge Granade's injunction. Thus, the Chief Justice's assertion that his position on the controlling nature of federal injunctions was somehow endorsed by the Alabama Supreme Court is further undermined.

consequently violated numerous canons of the Alabama Code of Judicial Ethics, and he should be removed from his office. Indeed, when the Alabama Supreme Court upheld the Chief Justice's removal from office twelve years ago, it opined as follows:

> "The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. *See generally, e.g., Meredith v. Fair*, 328 F.2d 586, 589-90 (5th Cir.1962)(en banc) ...; *Williams v. Wallace*, 240 F. Supp. 100 (M.D.Ala.1965) ... (Johnson, J.,) ...; cf. *United States v. Barnett*, 376 U.S. 681 ... (1964).
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> "Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case. *See* U.S. Const. Art. III, § 1; id., Art. VI, cl. 2."

See Compl., Ex. C (*Moore v. Judicial Inquiry Comm'n of State of Ala.*, 891 So. 2d 848 (2004) (quoting *Glassroth v. Moore*, 335 F.3d at 1302-03)). Far from perpetrating a myth of defiance, when it comes to the requirement to honor lower federal court injunctions, that opinion is as germane today as it was then.

The rule of law requires that federal injunctions not be ignored—and it requires that our state's highest judicial officer not issue thinly-veiled directions to all judges all across this state to do just that. It cannot seriously be questioned that the Chief Justice's January 6th Order constituted flagrant disregard of the binding federal court injunction. His attempts to evade a common sense reading of his Order through semantic gamesmanship are just as transparent today as they were in 2003. Ordering probate judges that they "must uphold" Alabama Marriage laws in the face of the federal injunction was also in direct contravention of the Alabama Supreme Court's holding in *API I*, which recognized the binding nature of the federal injunction

on Judge Davis. And the Chief Justice's failure to mention the federal injunction in the January 6th Order renders the order even more ethically suspect. For these reasons alone, there are no genuine issues of material fact that he is guilty of Charge One—by clear and convincing evidence—and this Court can find as a matter of law that his conduct violated the Alabama Canons of Judicial Ethics. *See* Alabama Canons of Judicial Ethics, Canons 1, 2, 2A, 2B, and 3.

2. The Chief Justice is Guilty of Charge Two because the January 6th Order constituted flagrant disregard of clear law

That the natural consequence of the Chief Justice's January 6th Order was to direct the probate judges to ignore the federal injunction is actually enough to establish his guilt for Charges One and Two—because the federal injunction represents clear law as well. But the fact that *Obergefell* so clearly abrogated *API I*, and the fact that the Eleventh Circuit spoke so clearly about *Obergefell's* effect prior to the January 6th Order, renders the Chief Justice guilty of Charge Two for this independent reason as well. That is, he violated the canons "[b]y demonstrating his unwillingness . . . to follow clear law" in the form of the United States Supreme Court's decision in *Obergefell.*

The dissenters in *Obergefell*, like the Chief Justice here, passionately disagreed with the decision's reasoning and its result. But unlike Chief Justice Moore, none of them—including the late Justice Scalia, who scathingly referred to the decision's reasoning as "profoundly incoherent"—ever suggested that it should not be followed.[13] *Obergefell*, 135 S. Ct. at 2630

[13] In his 2002 article on the morality of capital punishment, Justice Scalia argued that judges are duty bound to follow the law and should resign before defying it. There, he stated: "I pause here to emphasize the point that in my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty—and if that fails, lead a revolution. But rewrite the laws he cannot do." *See* Antonin Scalia, *God's Justice And Ours* (2002) (available at, www.firstthings.com/article/2002/05/gods-justice-and-ours).

(Scalia, J., dissenting); *see also, id.* at 2623-24 (Roberts, J., dissenting) (challenges that might have otherwise arisen in various states cannot arise after *Obergefell*, ". . . now that the Court has taken the drastic step of requiring *every* State to license and recognize marriages between same-sex couples."); *see also* Compl., Ex. Q *(API II,* 2016 WL 859009 at *40-46 (Bolin, J. concurring) ("I do not agree with the majority opinion in *Obergefell*; however, I do concede that its holding is binding authority on this Court . . . . I cannot and will not go that far in defiance . . . ."); *see also id.* at *54-56 (Shaw, J., concurring) ("[t]he idea that a decision of the Supreme Court does not have application outside the parties to that particular case . . . is, to be blunt, just silly. . . . [c]onjuring up specious arguments to contend that the courts of this State suddenly do not have to follow the Supreme Court—despite doing so for nearly 200 years—is embarrassing. It does nothing but injure public confidence in the integrity and impartiality of the judiciary.").

The reason that none of the Supreme Court justices listed above ever suggested that states should not follow *Obergefell* is because the law is abundantly clear that Supreme Court decisions are to be followed. Nearly seventy years ago, the United States Supreme Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), 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 *Cooper*, the Court categorically rebuked the state of Arkansas for its defiance of *Brown v. Board of Education* in a decision that, uniquely, was personally signed by each Justice and delivered in the name of the Court rather than by an individual Justice. The Court in *Cooper* re-affirmed *Marbury v. Madison* and "declared the basic principle that *the federal judiciary is supreme in the exposition of the law of the Constitution* . . . . It follows that the interpretation of the 14th Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and [the Supremacy Clause] makes it of binding effect on the States . . . ." *Cooper*, 358 U.S. at 18

(quoting U.S. Const., art. VI, cl. 2).

Frankly, resort to *Cooper v. Aaron* should be unnecessary in this analysis, considering that *Obergefell* plainly mandated that "same-sex couples may exercise the fundamental right to marry in *all* States," and 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." *Obergefell*, 135 S. Ct. at 2607-08 (emphasis added). But viewing *Obergefell* in light of *Cooper v. Aaron*—which plainly held that states are bound by the decisions of the U.S. Supreme Court—really does settle it.

Even Chief Justice Moore himself has acknowledged the binding nature of United States Supreme Court decisions—going so far as to invoke *Cooper v. Aaron* itself during his fight over the Ten Commandments monument. Arguing that the U.S. Supreme Court had not yet articulated a rule governing Establishment Clause cases like his and thus, the Eleventh Circuit was free to examine his Ten Commandments argument on its own "unique circumstances," he argued that "[t]his case is not like *Cooper v. Aaron*, 358 U.S. 1 (1958), which involved the enforcement of the rule of *Brown v. Board of Education*, 347 U.S. 483 (1954), **a uniform and binding Supreme Court Equal Protection order to constitute public school districts without regard to race**." *See Glassroth v. Moore*, 2003 WL 22208837 at *52 (C.A.11) (emphasis added). But now his January 6th Order conspicuously whistles past the fact that at the time he issued his January 6th Order, the *Obergefell* Court had already similarly created **"a uniform and binding Supreme Court Equal Protection order to constitute [marriages] without regard to [sexual orientation]."**

This glaring omission should be viewed by this Court with heightened ethical scrutiny—and this Court can weigh it against any assertion by the Chief Justice that the January 6th Order,

even if it was somehow legally erroneous, was still issued in "good faith." Rather, the Order omits any mention of *Cooper v. Aaron* or the Chief Justice's former acknowledgment that, once the United States Supreme Court has spoken on an issue involving constitutional protections, that rule becomes binding and uniform on all states. This kind of omission would perhaps be understandable if the "sole purpose" of the order was only to inform the probate judges "that the March 2015 orders in API were still in effect," but if this were in fact his sole purpose, then there would be no need whatsoever to spend the next three paragraphs of that very Order highlighting certain "recent legal developments that may impact" the issue regarding *Obergefell's* abrogation of *API.*

That the January 6th Order goes on to discuss numerous cases purporting to support the notion that *Obergefell* is not controlling—while omitting any mention of *Cooper v. Aaron*, a case that actually controls the question—is important for two reasons. First, it cannot go unnoticed that the cases the Chief Justice *does* cite to support the notion that *Obergefell* is not controlling are selectively quoted and contain contrary holdings which he fails to discuss. In the cases he cites,[14] the courts specifically held that *Obergefell* rendered unconstitutional the same-sex marriage prohibitions they were addressing—and the states actually admitted that their prohibitions against same-sex marriages were unconstitutional. Rather, it appears the courts remained unconvinced that the states would actually abide by *Obergefell*'s mandate, and thus did not moot the pre-existing injunctions in those underlying cases. To say that these cases somehow indicate that *Obergefell* does not impact Alabama has no basis.[15] There really is no controversy

[14] *Waters v. Ricketts*, 798 F.3d 682, 685 (8th Cir.2015), *Rosenbrahn v. Daugaard*, 799 F.3d 918 (8th Cir.2015), *Jernigan v. Crane*, 796 F.3d 976 (8th Cir.2015), and *Marie v. Mosier*, [No. 14–cv–02518–DDC–TJJ, Aug. 10, 2015] —— F.Supp.3d —— (D.Kan.2015).

[15] Even if the Eighth Circuit cases stood for the proposition for which the Chief Justice asserts they do, the Eleventh Circuit has plainly held otherwise. *Strawser v. State*, (No. 15-1250B-CC, Oct. 20, 2015)

about the question of the binding nature of *Obergefell*, and the cases the Chief Justice cites to generate controversy fail to do so.

Second, and more importantly, it represents another example of the Chief Justice's double-speak when it comes to the unavoidable consequence of his January 6th Order. The Chief Justice suggests that "*all* he stated in that order was that the March 2015 orders in API were still in effect," and that the order explicitly included a disclaimer—"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 . . . ." *See* Mot. Summ. J. at 25; *see also* Mot. Summ. J., Ex. A. Thus, he argues, if he were to have waded into the holdings of *Cooper v. Aaron* and other Supreme Court case law, he would actually have been providing guidance on a matter before the Alabama Supreme Court—and such would have been improper.[16] But if *all* the Chief Justice really stated in his January 6th Order was that the API orders were still in effect and if he was *truly* not at liberty to provide guidance on *Obergefell's* effect, then his subsequent inclusion of three, robustly-cited paragraphs immediately thereafter, which carefully track the very position he ultimately adopted in *API II* and which conspicuously omit any discussion of *Cooper v. Aaron*, is equally improper.

The selective inclusion of authority that supports the Chief Justice's own legal position—and the selective omission of controlling authority like *Cooper v. Aaron* that totally undermines

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(11th Cir. 2015) ("since the filing of this appeal, the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in *Obergefell v. Hodges*").

[16] The Chief Justice argues that the Commission is presenting him with a Hobson's choice: (a) either address the "correct" substantive law on the issue (as the Commission views it) and be charged for speaking out on an issue pending before the Supreme Court (Charge Six), or do not address substantive issues at all, and be charged with disregarding clear law (Charge Two). But this characterization ignores the plainest option of all: just do not issue the order —or at the very least, do not issue an order that includes a series of thinly-veiled paragraphs designed to broadcast a legal position on the matter.

it—exposes the January 6th Order for what it is—a thinly-veiled order directing probate judges to defy federal law. Thus, even if the Chief Justice were somehow justified in not deferring to *Obergefell's* clear precedent at the time he issued his January 6th Order—which he was not—he was nonetheless unjustified in including what is, at best, one-sided and at worst, fully misleading legal argument in the January 6th Order itself. And the Chief Justice's suggestion that the January 6th Order's disclaimer somehow erases the obvious fact that it goes directly on to address substantive legal authority offends common sense.

Accordingly, these undisputed facts render him guilty not only of Charge Two, but also of Charges Three through Six, which allege that he violated the canons by abusing his administrative authority and by taking legal positions in his January 6th Order on a matter pending before the Alabama Supreme Court in *API*. His inclusion of these so-called "recent developments" plainly placed his impartiality into question as prohibited by the Alabama Canons of Judicial Ethics. Thus, the Order not only represents a failure to follow clear law, but also a failure to avoid conduct prejudicial to the administration of justice, a failure to promote public confidence in the integrity and the impartiality of the judiciary and a failure to respect and to comply with the law. *See e.g., Matter of Hague*, 315 N.W.2d 524, 532 (Mich. 1982) ("Where, as here, a judge's decision . . . is directly contrary to appellate precedent of which he is aware and obviously based upon his widely publicized personal belief about what the law should be rather than what it is, the public perception of impartiality of the justice system is seriously harmed.") (citing Code of Judicial Conduct, Canon 2(B)). The Court can find now as a matter of law that he violated the Alabama Canons of Judicial Ethics for this reason alone.

3. The Chief Justice cannot rely on prior or subsequent orders of the Alabama Supreme Court to absolve him from his guilt with respect to Charges One and Two

The Chief Justice argues that, at the time he issued his January 6th Order, the Alabama

Supreme Court itself had asked for additional briefing on the effect of *Obergefell* and, in its March 2016 certificate of judgment, it ultimately left the *API* orders in place. Thus, the Chief Justice suggests, he did nothing in his Order that was not simultaneously being done by the Alabama Supreme Court, which, he also implies, subsequently endorsed his actions when it issued its certificate of judgment in *API II*. Put another way, if he is wrong, then so is the whole Court. This argument is a non-starter for three independent reasons.

First, his argument that the January 6th Order somehow benefits from the imprimatur of the whole Court is belied by a plain reading of *API I*—which by its own terms only purported to apply to probate judges that were *not* currently covered by the federal injunction. Again, the importance of the majority of the Alabama Supreme Court in *API I* specifically carving out Judge Davis from the decision's coverage—and only later bringing Davis back in after it had determined that he had complied with Judge Granade's order—cannot be overstated. In derogation of *API I's* essential holding, the January 6th Order clearly instructed the probate judges to ignore the federal injunction binding them at the time by ordering them to follow Alabama laws that the federal injunction directly contravened.

Second, it is belied by his fellow justice's concurrences in *API II* itself. Whatever *API II's* certificate of judgment actually means, the notion that *API II* stands for the proposition that Alabama's Marriage laws remain wholly unaffected by *Obergefell* is simply wrong. *See* Compl., Ex. Q (*API II*, 2016 WL 859009 at *40-46 (Bolin, J. concurring) ("I do not agree with the majority opinion in *Obergefell*; however, I do concede that its holding is binding authority on this Court . . . . I cannot and will not go that far in defiance . . . ."); *see also id.* at 54-56 (Shaw, J., concurring) (""[t]he idea that a decision of the Supreme Court does not have application outside the parties to that particular case . . . is, to be blunt, just silly . . . ."); *see id.* at 39 (Stuart,

J., concurring specially) ("When a Justice issues a writing concurring in . . . an order summarily dismissing a pending motion or petition the writing expresses the explanation for the vote of *only* the Justice who issues the writing and of any Justice who joins the writing. Attributing the reasoning and explanation in a special concurrence or a dissent to a Justice who did not issue or join the writing is erroneous and unjust.").

Third, this argument also whistles past the Eleventh Circuit's clear pronouncement that *Obergefell* had abrogated *API I*. The Chief Justice's only meaningful response to this is that the Eleventh Circuit was simply wrong, citing a handful of critical blog posts from constitutional law professors[17] and one case out of the Ninth Circuit which he claims stands for the proposition that federal courts of appeals do not wield constitutional authority over state supreme courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law") (citing *Lockhart v. Fretwell*, 506 U. S. 364, 375-376 (1993) (Thomas, J., concurring)). But the *Arizonans* case is inapposite here because it deals with a federal court of appeals interpreting unsettled constitutional questions *prior* to the U.S. Supreme Court having ruled on the issue—at that stage, the Chief Justice is at least partially correct that state supreme courts are not necessarily bound to follow constitutional interpretations of courts of appeals. But *Obergefell* had already issued prior to the January 6th Order—and the Eleventh Circuit's order then had to do with settled United States Supreme Court precedent. This is another example of the Chief Justice citing law that simply does not stand for the proposition he asserts it does. Even assuming the Eleventh Circuit was legally wrong in its decision about *Obergefell's* effect, this is no

[17] *See* Martin Lederman, Professor of Law at the Georgetown University Law Center writing at Balkinization.com (Jan. 6, 2016); *see also* Howard Wasserman, Professor of Law at the Florida International University School of Law writing at Prawfsblawg.blogs.com (Jan. 8, 2016).

justification to ignore its holding, for the canons are equally clear that judges must follow the law—even law they feel is wrongly decided. *See* Judicial Conduct & Ethics, § 2.02 ("Intentional refusals to follow the law are another manifestation of unfitness for judicial office.").

4. The Chief Justice's assertion that his January 6th Order constitutes "mere legal error" does not insulate the Order from ethical scrutiny and does not absolve him from his guilt with respect to Charges One and Two

Finally, the Chief Justice asserts that the "heart of the JIC's case, therefore, is that the Chief Justice made an error of law," and that his January 6th Order represents—at worst— a "mere legal error" which was taken in "good faith." Thus, he submits, the January 6th Order should be insulated from ethical scrutiny because "the doctrine of judicial independence shields the official acts of judges from review for legal error." *See* Mot. Summ. J. at 35.

This argument is wrong for two reasons.

First, the Chief Justice's argument that his January 6th Order represents a "mere legal error" that should be insulated from ethical scrutiny is a simultaneous concession that he abused his administrative authority. This is because legal rulings have *no* place in administrative orders; rather, they are reserved for courts, like the Alabama Supreme Court, ruling upon a case or controversy, not for the Chief Justice acting unilaterally, presenting what amounts to an advisory opinion in his administrative capacity. On June 29, 2015, when the Alabama Supreme Court requested additional briefing on *Obergefell's* effect on *API*, and in March of 2016, when it issued its opinion in *API II*, it was doing so within the confines of a case and controversy, and the opinions expressed therein were insulated from ethical scrutiny, provided that they were made in good faith. *See Matter of Sheffield,* 465 So.2d 350 (Ala.1984) ("[A]bsent bad faith . . . a judge may not be disciplined under Canons 2A and 2B of the Alabama Canons of Judicial Ethics for erroneous legal rulings."). It is in *this* province that guidance may be given on how trial courts should follow the law. The Chief Justice is simply not permitted to give legal instruction in an

administrative order, and certainly not permitted to give legal instruction contrary to a federal injunction.

Even the Chief Justice himself has previously acknowledged that an administrative order is no place to give legal instruction. *See* Ex. T, attached hereto (January 25, 2013 Administrative Order of Roy Moore) (rescinding an administrative order directing how lower courts should collect funds pursuant to an Alabama statute, Chief Justice Moore acknowledged that "it is not the role of the Chief Justice of the Alabama Supreme Court to dictate the manner in which the trial courts should comply with" certain laws). This January 25, 2013 Administrative Order not only provides clear evidence that the administrative authority of the Chief Justice is far more limited than he now suggests, but also proves he acted "willfully" in issuing his January 6th Order, i.e., he knew the proper limits of his authority and he plainly exceeded them anyway. If an order directing how lower courts should collect funds is excessive, an order directing that all probate judges follow Alabama's marriage laws in direct contravention of a federal injunction must be as well. *See Ex parte State ex rel. James*, 711 So. 2d 952, 963-64 (Ala. 1998) (in holding that Chief Justice Hooper lacked the authority to issue an administrative order to then-Circuit Judge Roy Moore to remove the Ten Commandments from his courtroom in Etowah County, the Alabama Supreme Court held that the power of the Chief Justice is purely administrative, and any so-called "appellate pronouncement," must come from the whole Supreme Court).[18]

Second, his argument that the January 6th Order's so-called "legal error" should be insulated from ethical scrutiny assumes that the legal error was *actually* committed in good faith. But the January 6th Order actually bears all the hallmarks of bad faith, the presence of which can

[18] The further reasons why the Chief Justice abused his administrative authority in the issuance of the January 6th Order are addressed in section B., below, in the Commission's analysis of Charges Three, Four, and Five.

transform legal error into grounds for judicial discipline. *See Matter of Sheffield*, 465 So.2d 350, 357 (Ala.1984) ("*[A]bsent bad faith* . . . a judge may not be disciplined under Canons 2A and 2B of the Alabama Canons of Judicial Ethics for erroneous legal rulings.") (emphasis added). In *Sheffield*, the Court noted that "[i]n certain circumstances erroneous legal rulings may indeed amount to a failure to respect and comply with the law" which undermines "the public confidence in the integrity and impartiality of the judiciary" (Canon 2A), or to "conduct prejudicial to the administration of justice which brings the judicial office into disrepute" (Canon 2 B)." *Id.* at 357. According to the Court, these "certain circumstances" are present when bad faith—which it defined as ill-will or improper motive—is plainly evident. As discussed above, one need not even inquire into the Chief Justice's subjective state of mind here to determine that his January 6th Order was improperly motivated—one need only to look at the undisputed content of the January 6th Order itself, which contains selective authority that forecasts his own legal ruling in *API II* and which orders and directs subordinate judges to ignore a federal injunction and clear federal law. Moreover, *Sheffield* stands for the proposition only that bad faith is a necessary inquiry when a judge is investigated for erroneous legal rulings *within* the confines of a case or controversy—not when the judge is investigated for an improper legal error that has no place in administrative order.

Though Alabama has not formally adopted a balancing test for determining all of the specific factual circumstances for when "legal error" may serve as grounds for judicial discipline, the following four factors, adopted by many other jurisdictions, are certainly instructive here: the frequency of the judge's error, the egregiousness of the error, the judge's motive, and the availability of appeal. *See* Judicial Conduct & Ethics, § 2.02. As to the first factor, the Chief Justice's conduct is plainly part of a pattern of error, as evidenced by his

removal from office for defying a federal injunction in 2003—and a pattern of repeated "legal error" is "obviously is more serious than an isolated instance." *Id.* Second, courts generally agree that if a judge's legal error results in the denial of an individual's fundamental rights, egregiousness can be established. *See id.* Here, the intended effect of the January 6th Order was for the probate judges to defy a federal injunction and to ignore clear federal law establishing the fundamental right of same-sex couples to marry in all states. If this was legal error, then it was egregious. Third, if a judge's error was founded in "malice, ill will, or any improper motive" this too weighs in favor of finding grounds for judicial discipline. And the law is clear that the ill-will or bad faith requirement can be satisfied by an intentional refusal to follow the law. Fourth, the availability of appeal is a factor to be considered when distinguishing legal error with grounds for judicial discipline. Here, appeal of an administrative order of the highest judicial officer in the state is self-evidently severely curtailed, especially as to those whose fundamental rights are most directly affected by it.

Weighing these four factors against the Chief Justice's conduct here leads to the conclusion that, even if his failure to follow and acknowledge clear federal law in his January 6th Order could be characterized as legal error—which the Commission does not concede—this Court would still be well within its purview to find grounds for discipline. The conduct was repetitive, egregious, intentional, and, from a practical perspective, un-appealable. As a final note, the Chief Justice also argues that the Commission and the Court of the Judiciary actually lack the jurisdiction to review his Administrative Order for legal error. But as the above authority plainly shows, this is simply not the case. If the so-called legal error is so egregious as to constitute interference with a lawful, contrary injunction issued by a federal court, grounds for

judicial discipline clearly exist. *See Matter of Sheffield*, 465 So. 2d 350 (Ala.1984).[19] In the end, it cannot be overstated that the Chief Justice's characterization of his January 6th Order as constituting "mere" legal error is wrong, for it was *not* issued within the confines of a case or controversy (where judicial independence must be weighed against the need for discipline) but rather in a purely administrative capacity. And if it can somehow be characterized as such, then this characterization renders him simultaneously guilty of abusing his authority.

* * *

With respect to Charges One and Two, the plain fact is that judges must follow the law—even when their moral and political beliefs conflict therewith. *See* Judicial Conduct & Ethics, § 1.01 ("Unlike legislators, judges do not represent constituencies that call upon them to make policies consistent with the public's political preferences; rather . . . judges are duty bound to follow laws made and executed by others."). While acting as the head of Alabama's judicial system, the Chief Justice violated the Alabama Canons of Judicial Ethics when he issued his January 6th Order in flagrant disregard of federal law. The unavoidable consequence of his January 6th Order was to direct the probate judges of Alabama to disregard the federal injunction. Moreover, his direction to the probate judges that the Alabama marriage laws were still in place ignored the plain language of the Supremacy Clause, *Obergefell v. Hodges*, *Cooper*

[19] The Chief Justice also asserts that the Commission—and consequently this Court—lacks jurisdiction to "review or reverse" his January 6th Order, because such authority is specifically reserved to a majority of the Alabama Supreme Court justices. *See* Mot. Summ. J. at 36 (citing § 12-5-20, Ala. Code 1975). But the Commission is seeking neither review nor reversal of his January 6th Order; rather, it seeks to scrutinize the Chief Justice's conduct in issuing it, as well as his conduct in including certain plainly violative statements and admonitions therein. This is within the province of the Commission and within the competence of this Court. *See* Art. VI, 156(a),(b), Ala. Const. 1901 (defining the scope of the Commission's jurisdiction to review a judge's *conduct* to determine if it violates any Canon of Judicial Ethics). A judge is bound to abide by the canons of judicial ethics in *every* facet of his life—personal and professional—and the notion that his administrative conduct is somehow immune or carved out from ethical scrutiny is belied by common sense and the Model Code of Judicial Conduct itself. *See* Model Rule Judicial Conduct 1.2 at Comment [1] ("Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both *the professional and personal conduct* of a judge.").

v. Aaron, and other longstanding federal law and practice mandating that United States Supreme Court decisions are binding. His attempts to manufacture a controversy around this well-settled law and practice should be wholly rejected. Accordingly, there are no genuine issues of material fact and this Court can conclude as a matter of law that he is guilty of Charges One and Two by clear and convincing evidence. The Chief Justice has violated the Alabama Canons of Judicial Ethics.

B. While the head of Alabama's judicial system, the Chief Justice violated the Alabama Canons of Judicial Ethics when he issued the January 6th Order in direct abuse of his administrative authority

Charges Three, Four, and Five all allege that the Chief Justice abused his administrative authority when he issued the January 6th Order. A number of these abuses are actually detailed above in Section A and need no further discussion. But briefly, a few additional issues deserve this Court's attention.

Charge Three alleges that the Chief Justice violated the Alabama Canons of Judicial Ethics in issuing his January 6th Order "by addressing and/or deciding substantive legal issues while acting in his administrative capacity." *See* Compl. at 28-29. Charge Four alleges that the January 6th Order "substitut[ed] 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*." *See* Compl. at 29-30. Charge Five alleges that the Chief Justice's January 6th Order "interfer[ed] 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." *See* Compl. at 30-31. Taken together, these charges jointly question the January 6th Order's inclusion of three robustly-cited paragraphs, which immediately follow a disclaimer indicating

that he was not "at liberty to provide guidance" on *Obergefell's* effect, but which then conspicuously go on to track the very position the Chief Justice ultimately adopted in *API II* regarding *Obergefell's* effect. By addressing these substantive legal issues in his January 6th Order, the Chief Justice acted outside of his administrative authority (Charge Three), intruded upon the province of the Alabama Supreme Court on a substantive legal issue (Charge Four), and interfered with the proper legal processes reserved for courts like the Alabama Supreme Court and the United States District Courts when they are presiding over an actual case or controversy (Charge Five).

The 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.* This alone represents clear and convincing evidence of his guilt for Charges Three, Four, and Five. For one glaring example of this, consider the following two passages from his January 6th Order—and pay close attention to the italicized language:

> 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).

See Mot. Summ. J., Ex. D at 3-4 (emphasis added).

Now here is the Chief Justice's subsequent *API II* concurrence, which is clearly just copied and pasted from his January 6th Order, as italicized below:

> For example, *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. 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 the laws of only 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, [No. 14–cv–02518–DDC–TJJ, August 10, 2015] —— F.Supp.3d —— (D.Kan.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.*

See Compl., Ex. Q (*API II*, 2016 WL 859009 * 35 (Moore, J., concurring specially) (emphasis added)). The only word that is not verbatim in the two italicized portions above is the word "while," which self-evidently changes nothing. 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.

And to make it worse, his January 6th Order goes on to discuss his legal *interpretation* of those Eighth Circuit cases—"The above cases reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court." *See* Mot. Summ. J., Ex: D at 3. That he would not only cite the cases and discuss them, but then offer an exposition thereof, even more clearly constitutes the "addressing" of substantive legal issues in his administrative capacity (Charges Three and Four), and intruding upon the legal process reserved for the Alabama Supreme Court (Charges Four and Five). *See Ex Parte State ex rel. James*, 711 So. 2d 952 (1998) ("The Chief Justice does not have the authority, on his or her own, to interpret the substantive legal effect of a decision of this Court and then to seek to enforce that decision against the parties in that action . . . .").

Addressing substantive legal issues in an administrative order is grounds for judicial discipline for two independent reasons. First, the inclusion of these paragraphs clearly forecasted the Chief Justice's predisposition towards his future rulings in *API II*—which, at a minimum, violates the Canon 2 requirement that he "avoid impropriety and the appearance of impropriety in all his activities," Canon 3's requirement "to perform the duties of his office impartially," and the Canon 3A(6) requirement that he "abstain from public comment about a pending proceeding in his own court"—namely the *API* matter.[20] In this sense, Charges Three and Four, on the one hand, and Charge Six on the other, plainly overlap. *See* Compl. at 31-32 (listing Charge Six, which alleges that the Chief Justice violated the canons by taking legal positions in his January

[20] The Chief Justice argues that the ethical mandate of Canon 3A(6) excludes public statements that a judge makes "in the course of ... official duties." Thus, he argues, because "an administrative order is an official act," it has no application to his conduct here. *See* Mot. Summ. J. at 31. But this assumes that he acted within his official capacity in issuing the administrative order at all—which he did not. This is the very essence of the charge. It was his abuse of his official and administrative authority that transformed his inclusion of three paragraphs of legal authority in his January 6th Order from an official act into an improper public comment.

6th Order "on a matter pending before the Alabama Supreme Court in API"). Examining the Chief Justice's conduct in light of what the canons require here, the Court is bound to test his claimed impartiality under "whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial." *See* Judicial Conduct & Ethics, § 4.05. At the time the Chief Justice issued the January 6th Order, the Alabama Supreme Court had before it the additional briefing requested in the *API I* case, which would ultimately be addressed in the Court's *API II* opinion. This Court should impose an objective standard on the Chief Justice's decision to include these paragraphs of legal authority, which were subsequently copied and pasted verbatim into his concurrence in *API II*, in order to determine whether he was motivated by impartiality.

Second, the law is clear that administrative orders are simply no place to address substantive legal issues—even if the substantive legal issues had nothing to do with a pending case. Citing only to the expressed concerns of a few special interest groups with which he is closely affiliated,[21] the Chief Justice claims justification for issuing the January 6th Order because there existed "confusion and uncertainty among the probate judges" as to their legal obligations—thus, he intended to use his administrative authority to "alleviate any condition or situation adversely affecting the administration of justice within the state." *See* Mot. Summ. J.; Ex. D at 2; *see also* Ala. Code § 12-2-30(b)(7). He further argues that, to the extent this authority is unjustified, his broad authority "[t]o 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

[21] The Chief Justice cites the following as the basis for the confusion: "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. *See* Mot. Summ. J., Ex. D at 2.

the law]," serves as further justification. *See* Ala. Code § 12-2-30(b)(8). Though these code provisions speak broadly to the Chief Justice's authority to act unilaterally in issuing orders, his expansive interpretation envisions an exception that would swallow the very well-settled rule that the Chief Justice's authority be confined purely to administrative issues—and not substantive legal issues—as is made clear in in §§ 6.02, 6.10 of Amendment 328 to the Alabama Constitution. *See Ex Parte State ex rel. James*, 711 So. 2d 952 (1998) (the power of the Chief Justice is purely administrative, and any so-called "appellate pronouncement," must come from the whole Supreme Court).

A highly relevant passage from the Alabama Supreme Court's opinion in *Ex Parte State ex rel. James* is so particularly instructive here as to warrant its wholesale inclusion today:

> The powers and duties of the Chief Justice are described in various provisions of the Constitution and the Code of Alabama. The primary source of his authority is Ala. Const.1901, amend. 328, § 6.10, which provides in pertinent part: "The chief justice of the supreme court shall be the administrative head of the judicial system. He shall appoint an administrative director of courts and other needed personnel to assist him with his administrative tasks." (Emphasis added.) Pursuant to his administrative authority, he may "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state," Ala. Code 1975, § 12–2–30(b)(7), and he may "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," § 12–2–30(b)(8).
>
> *These and other provisions make it clear, however, that the Chief Justice's authority is administrative. A common definition of "administration" is "a furnishing or tendering according to a prescribed rite or formula."* Webster's Third New International Dictionary of the English Language 28 (Unabridged) (1986) (emphasis added). The source of his specific authority is the Court, itself, as expressed elsewhere in the Constitution and the Code of Alabama.
>
> Authority to issue such "orders as may be necessary [for] general supervision and control of courts of inferior jurisdiction," is vested by Amendment 328, § 6.02, in the Supreme Court. Similarly, it is the Supreme Court that is charged by Amendment 328, § 6.08, with "adopt[ing] rules of conduct and canons of ethics ... for the judges of all courts of this State." Again, it is the Supreme Court that is charged by Amendment 328, § 6.11, with the duty to

> "make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts.
>
> . . . .
>
> Indeed, as a "hornbook" principle of practice and procedure, no appellate pronouncement becomes binding on inferior courts unless it has the concurrence of a majority of the Judges or Justices qualified to decide the cause. Simply stated, action by the Chief Justice is not synonymous with action by the "Court."

Ex parte State ex rel. James, 711 So. 2d 952, 963-64 (Ala. 1998). There is not a clearer or more convincing statement of law that the Chief Justice's January 6th Order represents an abuse of his authority than this one. His inclusion of three paragraphs of selective legal authority in an administrative order that discusses and actually interprets the substantive legal effect of certain legal decisions—legal decisions that happen to support his own legal position on a matter pending before the Alabama Supreme Court— is an abuse of his authority. That the Order goes on to direct the probate judges to continue to abide by certain Alabama laws in disregard of a federal injunction represents another intrusion on the power reserved to the whole Supreme Court , which alone possesses the "authority to interpret, clarify, and enforce its own final judgments." *Id.* (the power of the Chief Justice is purely administrative, and any so-called "appellate pronouncement," must come from the whole Supreme Court); *see also* Ex. T, attached hereto (January 25, 2013 Administrative Order of Roy Moore) (Chief Justice Moore acknowledging that "it is not the role of the Chief Justice of the Alabama Supreme Court to dictate the manner in which the trial courts should comply" with certain laws).

There are no genuine issues of material fact and this Court can conclude as a matter of law that the Chief Justice is guilty of Charges Three, Four, and Five by clear and convincing evidence. And his guilt renders him in violation of numerous canon requirements, among others, to "avoid impropriety and the appearance of impropriety in all his activities;" to "respect and comply with the law;" to "conduct himself at all times in a manner that promotes public

confidence in the integrity and impartiality of the judiciary;" to "avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute;" to "promote public confidence in the integrity and impartiality of the judiciary;" "to perform the duties of his office impartially;" and to "abstain from public comment about a pending proceeding in his own court." *See* Alabama Canons of Judicial Ethics 2, 2A, 2B, 3, and 3A(6).

C. While the head of Alabama's judicial system, the Chief Justice violated the Alabama Canons of Judicial Ethics when, in his January 6th Order, he took legal positions that placed his impartiality into question, thus disqualifying him from participation in *API II*

Charge Six alleges that the Chief Justice violated the Alabama Canons of Judicial Ethics as follows: "[b]y taking legal positions in his Administrative Order of January 6, 2016, on a matter pending before the Alabama Supreme Court in API," and by "plac[ing] his impartiality into question on those issues, thus disqualifying himself from further proceedings in that case . . . ." *See* Compl. at 31-32. An examination of Charge Six reveals it is a two-pronged allegation. First, it charges him with taking legal positions on a pending matter—namely *API I*—and thus placing his impartiality into question, in violation of numerous canons discussed above. Second, it charges him with failing to disqualify himself in *API II* after having placed his impartiality into question on those issues, in similar violation of numerous canons. There are no genuine issues of material fact that the Chief Justice plainly took legal positions in the January 6th Order, which positions unquestionably placed his impartiality into question as to the *API II* matter. He is guilty of Charge Six.

The Chief Justice argues once again that he never "took a legal position in [the January 6th Order] on the effect of *Obergefell* on the API case" and that the "sole purpose of the Administrative Order in question was to inform the probate judges that six months after that briefing order, the Court still remained in deliberation on the matter and that, therefore, the API

orders continued in effect pending 'further decision.'" *See* Mot. Summ. J. at 26 and 41. The Commission will not belabor its argument exposing the Chief Justice's persistent gamesmanship here, except to point out that his assertion about the "sole purpose" of his order is belied by the fact that his January 6th Order apparently needed four pages to assert what it took him two lines to assert in his Motion for Summary Judgment. This is plainly transparent.

The Chief Justice also argues that he was not on notice of the substance of Charge Six at all, and thus the Commission violated JIC Rules 6C and 6D when it included Charge Six in the Complaint. Specifically, the Chief Justice claims that, on January 22, 2016, the Commission served upon the Chief Justice a Rule 6C investigation letter that advised him of only four allegations arising from the January 6th Order that it considered "worthy of some investigation"—but none of those allegations stated that the Administrative Order raised a question about his impartiality in the API case such as to disqualify "him[] from further proceedings in that case." *See* Mot. Summ. J. at 26-28. Thus, he argues, he should not have to defend himself before this Court from the allegations in Charge Six.[22]

His notice challenge is wrong for three reasons.

First, the suggestion that he lacked formal notice that the legal positions he took in his January 6th Order were being investigated for violations of the duty of impartiality and his failure to disqualify himself in *API II* elevates form over substance. This is because the

[22] Actually, he only meaningfully challenges the second prong of Charge Six, i.e., the portion of the charge regarding his failure to disqualify himself in API II. *See* Mot. Summ. J. at 27 ("None of those allegations stated that the Administrative Order raised a question about his impartiality in the API case, "thus disqualifying him[] from further proceedings in that case."). The Chief Justice does not challenge the first prong of Charge Six regarding his taking of legal positions on a pending matter and thus placing his impartiality into question, because this prong was indisputably noticed. And it alone is plainly violative of the canons.

Commission fully complied with Rule 6C and 6D,[23] and also provided him with hundreds of pages of supporting documents, as required by those rules. The Commission will not burden the record with attaching this voluminous supporting documentation as additional exhibits to this motion for summary judgment, but it is happy to provide it to this Court upon request, because even a cursory examination of the documentation proves that the Chief Justice was fully apprised of the nature of *all* charges against him. But even more importantly than this, the Chief Justice was actually afforded the opportunity to address *these very issues* at the Commission's April 17, 2016 investigatory hearing. On page 81 of the transcript, the Chief Justice was specifically asked to address why his many statements against *Obergefell* and the fact that he "had already issued an order which said courts in this state remain under the order of the Alabama Supreme Court" did not disqualify him from *API II*:

> Q: "Talk to us, if you can, a little bit about why those two things did not disqualify you from sitting in that final case."
>
> A: "I will do that gladly . . ."

See Ex. U at 81, lines 15-21, attached hereto; *see also* Ex. U at 131, lines 22-23, through Ex. U at 132, lines 1-19 (acknowledging the various allegations against him and noting that impartiality and disqualification have clearly been raised). After this testimony, the Chief Justice then proceeded to hand out copies of his statement of non-recusal from the *API II* opinion, and at that time, he made *no* objection based on any notice failure of any kind. On the weight of this evidence alone, the Chief Justice's notice challenge is due to

[23] Rule 6C requires that the Commission provide copies of the complaints and all related documentation provided by the complainant or accumulated by the Commission in the course of the investigation to the investigated judge, including an investigation letter advising the judge of those aspects of the complaint that it then considers worthy of some investigation. *See* Rule 6C. Rule 6D requires that, "[e]very six weeks after serving the judge pursuant to Rule 6.C., the commission ... shall serve upon the judge a full statement of whether the commission intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation." *See* Rule 6D. The Commission fully complied with these rules.

be ignored—he had *actual* notice of this Charge *and* he was afforded an opportunity to address its substance before the Commission.

Second, his notice challenge fundamentally mischaracterizes the notice to which is he entitled at the investigatory phase—which actually is very little. 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." *See* Judicial Conduct & Ethics, § 12.10. This is because the purpose of the disciplinary proceeding is "to protect the public interest"—not to punish the judge; thus, the "standards of due process in a disciplinary proceeding are determined by a balancing test, which takes into account both the public interest and the interest of the individual charged with the misconduct." *Id.* For example, expedited procedures that would normally run afoul of due process protections in a criminal matter are routinely upheld—and minor deviations from notice procedures are rarely if ever fatal to the charges. *Id.* ("When considering questions of notice during the investigative stage, courts seldom hold disciplinary bodies to strict compliance with the procedural guidelines provided for their operation."); *see also In re Storie*, 574 S.W.2d 369, 372 (Mo. 1978) (notice of investigation need not be given as a matter of due process). 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*." *Id.* (emphasis added). 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 third, and finally, even if the second prong of 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. *See* JIC Rule 19 (requiring that a judge show that he is "aggrieved" by the violation of the JIC Rules in a Rule 19 petition); *see also In re Storie*, 574 S.W.2d 369, 372 (Mo. 1978) (the judge's complaint about the informal notice he received could only be justified by a showing of actual prejudice); *McCartney v. Commission on Judicial Qualifications*, 526 P.2d 268 (Cal. 1974) (the Commission's failure to fully inform the judge of the preliminary investigation did not threaten the fundamental fairness of the proceedings because the judge failed to prove the existence of actual prejudice). Here, the Chief Justice has not made—and cannot reasonably make—any showing of actual prejudice. He was informed of the general nature of the charges against him, if not the specifics, and all of this notice was afforded to him during the investigatory phase, which the majority of jurisdictions hold actually requires no notice whatsoever. The Chief Justice knew the Commission had been investigating his conduct for breaches of the duty of impartiality for almost a year, and he was afforded the opportunity, during the Commission's investigatory hearing, to address issues about disqualification and impartiality.

The Chief Justice actually copied and pasted portions of his January 6th Order directly into his *API II* opinion (or the other way around) and now boldly suggests that he took no legal positions in the January 6th Order. The idea that it is a surprise to him that the Commission might take issue with such an improper practice is simply remarkable and is plainly undermined

by the consistent manner in which the Commission has apprised him of the status of the investigation at every possible juncture. There are no genuine issues of material fact that he was afforded ample notice of Charge Six, and there are no genuine issues of material fact that he is guilty of Charge Six by clear and convincing evidence.

SANCTIONS & CONCLUSION

The Chief Justice's January 6th Order and his conduct surrounding it has once again created an atmosphere in which Alabama's subordinate probate judges—and by extension, the public itself—have been encouraged to show disregard for a binding federal injunction and clear federal law. It also represents a blatant abuse of his administrative authority, one which placed his impartiality into question on a matter pending before the entire Alabama Supreme Court. These actions alone and taken in concert violate the Alabama Canons of Judicial Ethics.

Moreover, Chief Justice has never expressed remorse for the impact of his actions on our judicial system. Rather, he continues to engage in semantic gamesmanship to convince this Court that he never counseled defiance of the federal injunction, while simultaneously, his attorney at the Liberty Counsel mounts an aggressive public relations campaign about "standing up to the federal judiciary."[24]

"I would do it again."[25]

The Chief Justice has made good on his promise of many years ago, and his continued flouting of our system of constitutional justice regrettably leaves this Court only one suitable

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[24] *See* Ex. S, attached hereto: Mat Staver, Alabama Chief Justice Says Judges Must Uphold Sanctity of Marriage Amendment (Liberty Counsel), LIBERTY COUNS. (Jan. 6, 2016) (https://www.lc.org/newsroom/details/alabama-chief-justice-says-judges-must-uphold-sanctity-of-marriage-amendment) (emphasis added).

[25] *See* Compl., Ex. B at 9 (In the Matter of Roy S. Moore, Chief Justice of the Supreme Court of Alabama, Court of the Judiciary No. 33 (Nov. 13, 2003) (citing the Chief Justice's August 22, 2003 testimony before the Commission)).

response. This Court must remove Chief Justice Moore from office. *See In re Bauer*, 3 N.Y.3d 158, 165, 818 N.E.2d 1113, 1118 (2004) ("Petitioner's apparent lack of contrition is telling . . . . his utter failure to recognize and admit wrongdoing strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same.").[26]

For conduct far less egregious than that of the Chief Justice here, other states either have removed judges from office or permitted them to resign on the condition that they not seek judicial office without approval from their state's judicial ethics body. For example, in *Kloepfer v. Commission on Judicial Performance*, the disciplinary court found that a judge's willful denial of the procedural rights of a defendant represented a pattern of defiance and ordered him removed from the bench. *See Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 850 (1989); see also *In re Duckman*, 699 N.E.2d 872 (N.Y. 1998) (holding that the judge willfully disregarded the law when he dismissed charges in 16 criminal cases based on his own personal opinion). In *In the Matter of Samay*, the disciplinary court removed a judge after it was established beyond a reasonable doubt that he had, among other things, failed to uphold the integrity and independence of the judiciary by electing not to recuse himself in matter where he was not impartial. *See In the Matter of Samay*, 166 N.J. 25 (2001); *see also In re Inquiry Concerning Holien*, 612 N.W.2d 789 (Iowa 2000) (judge removed after her refusal to abide by statute and rules regarding public access to courtroom and accepted procedures).

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[26] *See also In the Matter of Carpenter*, 17 P.3d 91, 95 (Ariz. 2001) ("[T]he record established several factors that this court has previously recognized as aggravating: the repeated nature of the misconduct; failure to acknowledge wrongdoing and the offering of excuses; and providing inaccurate responses to the Commission's investigation" (citations omitted)); *Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.3d 212, 226 (Ark. 2000) ("Even at this stage, Judge Thompson fails to accept responsibility for those acts that conflicted with any of the canons or laws in issue"); *In the Matter of Vaughn*, 462 S.E.2d 728, 736 (Ga. 1995) (noting "from her own testimony, we find it unlikely that, were she to stay on the bench, Judge Vaughn would alter her previous conduct"); *Commission on Judicial Performance v. Hopkins*, 590 So. 2d 857, 866 (Miss. 1991) ("Judge Hopkins denies that he committed any wrongdoing. He instead offers explanations and excuses for every act.").

As recently as this year, the Supreme Court of Louisiana removed a judge for her failure to comply with an order requiring her to pay a civil penalty for violating financial reporting requirements. There, the Court held that "a judicial officer who refuses to abide by the law and refuses to comply with a court order is *not worthy of holding the title of judge and sitting in judgment of others*." *See In re: Justice of the Peace Stacie Myers*, Pointe Coupee Parish, District 4, No. 2016-O-0078 at *8, May 3, 2016 (La. Sup. Ct) (emphasis added). It went on to note that,

> [a] judgment issued by a judicial officer who refuses to respect the law or an order of a court will not be respected. Allowing a judicial officer, who refuses to follow the law . . . to remain in office would be a disservice to the public, to the litigants that appear before that judicial officer, and to our system of justice . . . . Respondent's misconduct is so prejudicial to the administration of justice that she cannot be allowed to remain on the bench. Any discipline less than removal would undermine the judicial discipline process and diminish the integrity of the judiciary.

Id. at *8. And this removal was for willfully failing to pay a financial reporting fine. The Chief Justice here is willfully ordering 68 subordinate judges to defy a federal injunction and to ignore federal law.

Ironically, the preeminent example of judicial removal in cases like this, highlighted now in judicial ethics treatises nationwide, is from the state of Alabama and involved Chief Justice Moore's own removal from office for his defiance of the Ten Commandments federal injunction. *See* Judicial Conduct and Ethics § 6.07 ("[j]udicial officials at the highest levels must also comply with official directives and court orders."). Though the Chief Justice bristles at the Commission's so-called "myth of defiance" and its drawing of inappropriate parallels between his former case and this one, the fact is, the two cases are self-evidently alike.

Though Alabama has not formally adopted factors the Court of the Judiciary should consider in determining a sanction, other jurisdictions have, and they are instructive here. In *In re Deming*, 736 P.2d 639, 659 (Wash.1987), the Washington Supreme Court stated that, to

determine the appropriate sanction, it would consider: (a) whether the misconduct evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged that the acts occurred; (f) whether the judge has evidenced an effort to change his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires. *In re Deming*, 736 P.2d at 659; *see also In re Brown*, 626 N.W.2d 403 (Mich. 2001) (listing similar factors). The Commission will not now itemize these factors as they pertain to the Chief Justice's conduct, except to argue that a common sense view of his professional and personal conduct counsels plainly for the harshest sanction available.

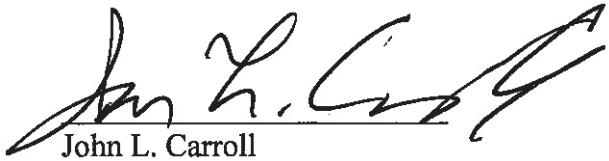
When he issued his January 6th Order, he acted in flagrant disregard of a federal injunction binding the very probate judges to whom the order was directed. He failed to follow clear federal law that forms the foundation of our constitutional system, and plainly placed his impartiality into question on matters pending before the Court by including a series of thinly-veiled paragraphs. The Chief Justice acted even more egregiously than many of the judges outlined above because (a) he committed his violations while acting as the state's chief judicial officer, who should be a model of proper judicial conduct, and (b) rather than simply defying a federal injunction, as he did alone in 2003, here he counseled 68 other subordinate judges to the same. The Chief Justice has undermined the integrity, independence, and impartiality of Alabama's judiciary. Because the Chief Justice has proven—and promised—that he will not change his behavior, he has left this Court with no choice but to remove him from office to

preserve the integrity, independence, and impartiality of Alabama's judiciary and to protect the citizens who depend upon it for justice.

* * *

This case is not about the Court of the Judiciary's approval of the United States Supreme Court's decision in *Obergefell*. It is not a case about taking sides in a public debate about a controversial issue. This is a case about the rule of law and Chief Justice Moore's continued flouting of our nation's foundational principles. In issuing an order whose unavoidable consequence was to order probate judges not to follow federal law, the Chief Justice violated the Canons of Judicial Ethics as adopted by the Supreme Court of Alabama. There are no genuine issues of material fact that he is guilty of the charges against him by clear and convincing evidence, and as a result, that he violated the Alabama Canons of Judicial Ethics. This Court can conclude this matter now, deny the Chief Justice's Motion for Summary Judgment, enter judgment as a matter of law in favor of the Commission, remove the Chief Justice from judicial office, and reaffirm Alabama's fidelity to the rule of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this 15 day of July, 2016, served a copy of this notice on attorneys for the Respondent, through electronic mail to:

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NOTICE

Pursuant to Rule 1.12 of Alabama Rules of Professional Conduct, notice is hereby provided to this Court that, since the Hon. Gorman Houston (Ret.), who is a partner in the undersigned's law firm, participated as a Special Justice in the Rule 19 petition filed by Justice Parker, he is disqualified from participation in this matter. Pursuant to Rule 1.12(c)(2), the undersigned—and the law firm of Lightfoot, Franklin & White—has taken all necessary steps to screen him off any participation in this matter, and no portion of any fee will be apportioned to him.

/s/ R. Ashby Pate
R. Ashby Pate
One of the Counsel for the
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COURT OF THE JUDICIARY NO. 46

IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF ROY S. MOORE,
CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA

ON A COMPLAINT BY THE ALABAMA JUDICIAL INQUIRY COMMISSION

EXHIBITS

The Judicial Inquiry Commission hereby incorporates by reference Exhibits A – Q, which are listed below and which were previously attached to the Commission's May 6, 2016 Complaint, as exhibits in support of its Cross Motion for Summary Judgment And Opposition To Chief Justice Roy Moore's Motion For Summary Judgment. Exhibits R – U, which are also listed below but which were not previously attached to the Commission's May 6, 2016 Complaint, are attached hereto in support of its Cross Motion For Summary Judgment And Opposition To Chief Justice Roy Moore's Motion For Summary Judgment.

(Exhibits Attached to May 6, 2016 Complaint: incorporated by reference hereto)

A. Administrative Order of January 6, 2016

B. In the Matter of Roy S. Moore, Chief Justice of Alabama, COJ #33 (Nov. 13, 2003)

C. Moore v. Judicial Inquiry Commission, 891 So. 2d 848 (Ala. 2004)

D. Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015)

E. Strawser v. Strange, (Unpublished Order, Jan. 26, 2015)

F. January 27, 2015 Letter from Chief Justice Moore to Governor Robert Bentley

G. Searcy v. Strange (Unpublished Order, Jan. 28, 2015)

H. February 3, 2015 Letter from Chief Justice Moore to All Probate Judges of Alabama, with a Memorandum from Chief Justice Moore on "Sanctity of Marriage ruling"

I. Administrative Order of February 8, 2015

J. Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015)

K. Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___So. 3d ___ (Ala.2015)

L. Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015)

M. Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015)

N. Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

O. Strawser v. Strange, (Unpublished Order, July 1, 2015)

P. Strawser v. Strange (No. 15-12508-CC, Oct. 20, 2015 (11th Cir. 2015)

Q. Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 4, 2016] __So. 3d ___ (Ala. 2016)

(Exhibits Attached Hereto)

R. Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 10, 2015] ___So. 3d ___ (Ala.2015) (March 10, 2015 Order)

S. Mat Staver, Alabama Chief Justice Says Judges Must Uphold Sanctity of Marriage Amendment (Liberty Counsel), LIBERTY COUNS. (Jan. 6, 2016)

T. January 25, 2013 Administrative Order of Chief Justice Roy S. Moore

U. Excerpts from April 7, 2016 Testimony of Chief Justice Roy S. Moore before the Judicial Inquiry Commission

Exhibit R

IN THE SUPREME COURT OF ALABAMA
March 10, 2015

1140460

Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County.

ORDER

In an opinion issued on March 3, 2015, this Court ordered Judge Don Davis, the Probate Judge for Mobile County,

> "to advise this Court, by letter brief, no later than 5:00 p.m. on Thursday, March 5, 2015, 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 [v. Strange (Civil Action No. 14-0424-CG-C, Jan. 26, 2015)].[1]"

On March 5, Judge Davis filed a motion seeking an 11-day extension of time, until March 16, 2015, to comply with this Court's order. On March 9, Judge Davis filed a "Response to Show Cause Order" in which he asserts that he should not be included in this Court's March 3 order out of concern that doing so would require him to violate the federal district

---

[1]The decision of the federal district court in Strawser was premised on its earlier decision in Searcy v. Strange, [Civil Action No. 14-0208-CG-N, Jan. 23, 2015] ___ F. Supp. 3d ___ (S.D. Ala. 2015).

court order previously entered in Strawser.[2] Because we find Judge Davis's concern to be without merit, and for the additional reasons discussed below, Judge Davis's motion for extension is denied, and he is added as a respondent to this mandamus proceeding and is enjoined from issuing any further marriage licenses contrary to Alabama law.

Judge Davis asks for the 11-day extension to respond to this Court's question because he has asked for a "ruling" as to that question from the Alabama Judicial Inquiry Commission ("the JIC"):

> "As grounds for this Motion, Judge Davis sets out as follows:
>
> ". . . .
>
> "2. Judge Davis has sought instruction today from the Alabama Judicial Inquiry Commission.
>
> "3. Proper response to this Court is best made after [United States District Court] Judge Granade rules and/or after the Alabama Judicial Inquiry Commission rules."

(Emphasis added.) Our inquiry to Judge Davis was intended as a factual one. We fail to see what knowledge the JIC might have as to the facts regarding whether Judge Davis is bound by

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[2]A "corrected" copy of Judge Davis's response has since been filed with this Court.

an order in any case other than Strawser v. Strange (Civil Action No. 14-0424-CG-C, Jan. 26, 2015), or the fact of what the Strawser order says. As to the latter, the task of reading the order in Strawser and understanding what it says is the task of this Court, not the JIC.[3]

Judge Davis also notes that he has asked the federal district court "for a stay" of its order in Strawser. The fact of this request offers no basis for delay here; indeed, the prospect of such a stay by the federal court is compatible with the action of this Court. Further, Judge Davis has made no showing that the federal court order for which he seeks a stay is one that has not already been executed, i.e., one that concerns any license other than those already issued to the plaintiffs in that case.

---

[3]The latter task is to read the Strawser order and to consider the import, if any, of that order as a decision by a court in a coordinate judicial system. The JIC is a tribunal commissioned solely for the investigation and prosecution of "complaints" against judges regarding violation of the Canons of Judicial Ethics and the physical and mental ability of judges to perform their duties. Ala. Const. 1901, § 156. It is not a court of law, and it has no authority -- and no role to play -- in the performance by this Court of its constitutional duties as a court of law to decide the cases brought before it.

Our opinion of March 3 serves as binding statewide precedent. To ensure compliance with that precedent, we also entered on that date and as part of our opinion an order specifically directing Alabama probate judges not to issue marriage licenses contrary to that precedent. Davis has made no showing that he was, or is, the subject of any previously entered federal court order other than the one issued in Strawser, and he makes no showing that that order has any continuing, binding effect on him as to any marriage-license applicants beyond the four couples who were the plaintiffs in that case and who already have received the relief they requested. The inapplicability of the federal court order to any other couple is evident from the terms of the order itself:

> "Probate Judge Don Davis is hereby ENJOINED from refusing to issue marriage licenses to plaintiffs due to the Alabama laws which prohibit same-sex marriage. If Plaintiffs take all steps that are required in the normal course of business as a prerequisite to issuing a marriage license to opposite-sex couples, Judge Davis may not deny them a license on the ground that Plaintiffs constitute same-sex couples or because it is prohibited by the Sanctity of Marriage Amendment[, Ala. Const. 1901, § 36.03,] and the Alabama Marriage Protection Act[, Ala. Code 1975, § 30-1-19,] or by any other Alabama law or Order pertaining to same-sex marriage."

(Capitalization in original; emphasis added.)

In his motion, Judge Davis himself places emphasis on the same passages we have emphasized above. In the absence of a showing otherwise, we are left to read this language in accordance with its plain meaning: It grants injunctive relief against Judge Davis only as "to [the] plaintiffs" in Strawser. Our reading of this plain language is confirmed by the fact that the plaintiffs in Strawser sought relief only on their own behalf, not on behalf of any others, and by the fact that federal jurisprudence contemplates that a federal court decides only the case before it, see Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ (Part II.C.) (Ala. 2015),[4] in turn binding the

[4]As we noted in Part II.C., "'"[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case,"'" ___ So. 3d at ___ (quoting Camreta v. Greene, ___ U.S. ___, ___ n.7, 131 S. Ct. 2020, 2033 n.7 (2011), quoting in turn 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], pp. 134-26 (3d ed. 2011)), much less upon a defendant sued by new plaintiffs in a different case. The principle quoted above from the United States Supreme Court decision in Camreta was manifestly reflected in orders entered on this date by the United States District Court for the Middle District of Alabama, in which that court chose to stay its consideration of a case similar to Strawser and stated that "[t]his court is not bound by Searcy." Hard v. Bentley (Case No. 2:13-cv-00922-WKW;

parties before them only with respect to the other parties in the case.[5]

Notwithstanding the plain description of the activity enjoined by the quoted language in the federal court order requiring Judge Davis to issue licenses "to [the] plaintiffs" in the Strawser case, Judge Davis questions whether the following language somehow was intended to enjoin him in relation to persons other than the four couples who sued and obtained a judgment against him for their personal benefit:

March 10, 2015) (M.D. Ala.).

[5]In Brenner v. Scott (No. 4:14cv107, Jan. 1, 2015) (N.D. Fla.), a case similar in many respects to the present one, the court explained that "[t]he Clerk has acknowledged that the preliminary injunction requires her to issue a marriage license to the two unmarried plaintiffs," but that, in "the absence of any request by any other plaintiff for a license," "[t]he preliminary injunction now in effect does not require the Clerk to issue licenses to other applicants." See also Vikram David Amar, Justia-Verdict, February 13, 2015; https://verdict.justia.com/2015/02/13/ just-lawless-alabama-state-court-judges-refusing-issue-sex-marriage-licenses (explaining that generally a federal district court can enjoin a defendant only with respect to the defendant's treatment of plaintiffs actually before the court and that the remedial limitation on federal district courts is defined by the identity of the plaintiffs, not just the identity of the defendants) (last visited March 10, 2015; a copy of the Web page containing this information is available in the case file of the clerk of the Alabama Supreme Court).

> "This injunction binds Judge Don Davis and all his officers, agents, servants and employees, and others in active concert or participation with any of them, who would seek to enforce the marriage laws of Alabama which prohibit or fail to recognize same-sex marriage."

The apparent purpose of this latter passage was to clarify who is bound by the federal court's order, not what action that order requires of those persons. The question of "what" is the subject of the clear statement in the previous paragraph quoted above, i.e., that the enjoined parties are directed to issue marriage licenses specifically "to [the] plaintiffs." The subsequent reference to persons who "would seek to enforce the marriage laws of Alabama" is in reference to Judge Davis and his agents, employees, etc., to the extent that they would seek to enforce the marriage laws of Alabama as "to [the] plaintiffs." We are further confirmed in our reading of the federal court's order by our understanding, as discussed in notes 4 and 5, supra, that federal court jurisprudence contemplates that a federal district court adjudicates the obligations, if any, of a defendant or defendants only with respect to the plaintiff or plaintiffs in the case before the court. See also Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994) ("An

injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.' Califano v. Yamasaki, 442 U.S. 682, 702, 99 S. Ct. 2545, 2558, 61 L. Ed. 2d 176 (1979). ... This is not a class action, and Meinhold sought only to have his discharge voided and to be reinstated. ... Beyond reinstatement ..., DOD should not be constrained from applying its regulations to Meinhold and all other military personnel." (emphasis added)); Zepeda v. United States Immig. & Naturalization Serv., 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court ... may not attempt to determine the rights of persons not before the court."); Hollon v. Mathis Indep. Sch. Dist., 491 F.2d 92, 93 (5th Cir. 1974) (holding that "the injunction against the School District from enforcing its regulation against anyone other than [the plaintiff] reaches further than is necessary" (emphasis added)).

As we explained in our March 3 opinion, this Court has acted to ensure statewide compliance with Alabama law in an orderly and uniform manner. We have before us in this case a petitioner in the form of the State that has an interest in and standing as to the actions of every probate judge in the

State. Moreover, as we noted in the opinion, Alabama's probate judges took a variety of different positions in the wake of the federal district court's decisions, and no single circuit court has jurisdiction over all probate judges to enable it to address that disarray. The inclusion of Judge Davis, along with all the other probate judges in this State, as a respondent subject to this Court's March 3 order as to future marriage-license applicants is necessary and appropriate to the end of achieving order and uniformity in the application of Alabama's marriage laws.

Based on the foregoing, Judge Davis is added to this mandamus proceeding as a respondent and is subject to this Court's order of March 3, 2015. Section 30-1-9, Ala. Code 1975, provides that Judge Davis "may" issue "marriage licenses." To the extent he exercises this authority, he must issue those licenses in accordance with the meaning of the term "marriage" in that Code section and in accordance with other provisions of Alabama law, as discussed in our March 3 opinion.

Stuart, Parker, Murdock, Main, Wise, and Bryan, JJ., concur.

Shaw, J., dissents.

1140460

SHAW, Justice (dissenting).

As explained in my dissent in Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ (Ala. 2015), I do not believe that this Court has jurisdiction in this case; therefore, I dissent.

Exhibit S

Alabama Chief Justice Says Judges Must Uphold Sanctity of Marriage Amendment

Jan 6, 2016

Montgomery, AL – Alabama Chief Justice Roy Moore issued an administrative order today saying, "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment."

"Confusion and uncertainty exist among the probate judges of this State as to the effect of *Obergefell* on the 'existing orders' in API," Moore wrote. "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."

Therefore, pursuant to his responsibility to "take any such other, further or additional action as may be necessary for the orderly administration of justice within the state," Chief Justice Roy Moore has ordered Alabama probate judges to uphold the Alabama Sanctity of Marriage Amendment.

"I applaud Chief Justice Roy Moore for this order reaffirming the marriage law in Alabama," said Mat Staver, Founder and Chairman of Liberty Counsel. "The Alabama Supreme Court issued an order in March 2015 barring probate judges from issuing same-sex marriage licenses after a federal court in January of last year overturned Alabama's voter-approved constitutional amendment defining marriage as one man and one woman," Staver explained. "In Alabama and across America, state judiciaries and legislatures are standing up against the federal judiciary or anyone else who wants to come up with some cockeyed view that somehow the Constitution now births some newfound notion of same-sex marriage."

"The opinion of five lawyers on the U.S. Supreme Court regarding same-sex marriage is lawless and without legal or historical support," Staver concluded.

Liberty Counsel is an international nonprofit, litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of life, and the family since 1989, by providing pro bono assistance and representation on these and related topics.

###

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Exhibit T

IN THE SUPREME COURT OF ALABAMA
ADMINISTRATIVE ORDER

WHEREAS, pursuant to Article VI, Section 149, of the Constitution of Alabama, the Chief Justice of the Supreme Court of Alabama is the administrative head of the judicial system;

WHEREAS, under Section 12-11-30, Code of Alabama 1975, the circuit courts have "exclusive original jurisdiction of all civil actions" in their circuits and "exercise a general superintendence over all district courts, municipal courts, and probate courts;"

WHEREAS, the district courts, municipal courts, and probate courts exercise a limited jurisdiction governed by the Constitution of Alabama of 1901 and the Alabama Code of 1975;

WHEREAS, Section 12-17-225.2, Code of Alabama 1975, is a duly enacted law of the Alabama Legislature advancing the critical and legislatively-directed goal of collecting funds owed to the State of Alabama and to crime victims, and should be followed by those entities within its purview; and

WHEREAS, this Chief Justice agrees whole-heartedly with and highly encourages the goal of courts and clerks of court collecting unpaid bond forfeitures, court costs, fines, penalty payments, crime victims' restitution, and assessments.

HOWEVER, as it is not the role of the Chief Justice of the Alabama Supreme Court to dictate the manner in which the trial courts should comply with Section 12-17-225.2, Code of Alabama 1975;

Effective immediately, the Order issued by the Chief Justice of the Alabama Supreme Court regarding Section 12-17-225.2, Code of Alabama 1975, dated January 8th, 2013 is hereby rescinded.

DONE on this 25th day of January, 2013.

ROY S. MOORE
CHIEF JUSTICE

Exhibit U

APPEARANCE OF CHIEF JUSTICE ROY MOORE
BEFORE THE JUDICIAL INQUIRY COMMISSION
THURSDAY, APRIL 7, 2016
*** * * * * * * * * * * * ***

JIC: Let the record reflect that we have the pleasure of having Chief Justice Roy Moore here with us today accompanied by his -- I guess his legal advisor, legal counselor, Martin Wishnatsky?

MR. WISHNATSKY: Wishnatsky.

JIC: Okay. And you're his legal counsel or --

MR. WISHNATSKY: A staff attorney.

JIC: Staff attorney. All right.

Chief, we appreciate you coming today. I know you have a busy schedule, and we appreciate your working us in today. I'm (redacted). I'm the Chairman of the Commission. And I'll go around the table, starting to my right, and have each member of the Commission and the other individuals introduce themselves.

And you wrote a statement of recusal explaining -- a statement of nonrecusal explaining why you didn't have to recuse at that point. That statement did not address the many, many statements that you had made about *Obergefell* and following -- whether or not courts had to follow that law, I don't believe, nor did it address -- it attempted to address, but I'm not sure addressed fully, the fact that you had already issued an order which said courts in this state remain under the order of the Alabama Supreme Court.

Talk to us, if you can, a little bit about why those two things did not disqualify you from sitting in that final case.

A. Well --

Q. Or final decision.

A. I will do that gladly, but I also want to point out that I've handed this statement of nonrecusal out.

Q. Yeah. Right.

A. Because this was -- this was issued long before this stuff came up. But I've pointed out the reason that I explained on March 3rd, 2015, which is back when the Supreme Court issued their original opinion -- I explained why I stayed out of the case, abstained from voting, I called it: I've decided -- and this is a quote of my statement to them -- to abstain from voting in this case to avoid the appearance of impropriety in light of the memorandum of February 3rd, 2015, and the administrative order of February 8th that I provided to Alabama probate judges in my role as administrative head of the Unified Judicial System.

That's why I abstained from voting. This -- a new issue arose when the Supreme Court itself said give us your briefing on this issue, the effect of *Obergefell* on the preexisting orders -- or existing orders -- I'm sorry -- in

this case, in *API*. That was a new issue. I had never commented on that issue, the effect of *Obergefell* on the existing orders of the Alabama Supreme Court.

In *Ex parte Hinton*, I pointed out that a justice of the Court addressed whether he (sic) could sit on a case, given it was previously before me when I was a judge on the Court of Criminal Appeals. He said, A judge should disqualify himself in a proceeding in which his disqualification is required by law if his impartiality might reasonably be questioned, but there was a -- and it went on. And he said there was an exception to that principle. The principle that a judge must recuse himself or herself where the judge ruled in the case while a member of the lower court has been held not to apply if the issue on appeal is different from the issue ruled on below.

Other justices on our court have

pointed out in *Barber*, the case of *Barber*, that a person with my position on the issue is consistent with the law of Alabama. Gambling is illegal in this state. I also oppose other acts that violate the laws of the state of Alabama, such as murder, rape, and robbery. And my personal opposition to the above acts does not prevent me from fairly and unbiasedly participating in cases involving such acts. That's on page 7.

Another justice said the same thing. And there are also -- I would point out that there is a duty, McGo -- *McGough vs. McGough*, that if a judge is not disqualified or incompetent under statute, constitution, or common law, it is his duty to sit, a duty which he cannot delegate or repudiate.

And I pointed out a thing that -- about once recused, all recused. I did this in my thing. This was way before I went to a conference. Because of the

duty of a judge to decide cases, a judge may participate in a case after initially not sitting if the issues that prompted that abstention have changed.

A recent case illustrates the application of this principle, *American Broadcasting vs. Aereo*. According to the Supreme Court docket, Justice Alito did not participate in the decision to grant certiorari. On March 3rd, the Court denied a motion to intervene. The docket sheet shows that Justice Alito did not participate in that decision either. Under the date of April 16, however, the docket sheet states Justice Alito is not recused in this case because it's a different issue.

That was in the case of *American Broadcasting vs. Aereo*, 134 Sup.Ct. 2498. In *Stonebridge Partners, LLC, vs. Scientific Atlanta -- Scientific Atlanta, Incorporated*, Chief Justice Roberts, who did not vote on the decision to grant

certiorari, unrecused -- and I put that in quotes -- on September 20th in time to participate in oral argument on October 9th.

As I explained in my -- I abstained from voting in this case to avoid sitting in view of my own administrative order. Because that situation no longer exists at issue in this case, I may appropriately sit on the case to review a different issue.

MS. DAVIS: Any questions?

JIC: You want to start around, Judge --

You want to start on this side?

JIC: Well, I just had a real quick one.

JIC: All right.

JIC: We really appreciate you coming here, Your Honor. As a layperson, there's a lot of back and forth going on. And understanding you're trying to give clarification for the judges, but I guess,

you know, it's enlightening to hear that I guess there -- because as a layperson, there's certain things that you just kind of assume, I guess -- that, like you were saying, federal is here and then states are here. And so this is the first I've ever heard of that.

And I guess is there any way from -- I'm not sure if it's from your position or from the court. As a -- as a citizen of the state -- you know, and I travel a good bit on business. And, you know, sometimes things like this come up. And I'm just curious, you know, because this -- how -- I guess some of the stuff Rosa is trying to peel back, how -- because -- how this could be seen as not being political.

And I know everything you've said is -- you know, you're documenting as legal, not political, whereas, do you feel the political? Does that come from -- from your position, or is that just coming from

It did not moot the case.

In fact, that was the words used in the Eighth Circuit specifically. It did not moot the case. The federal district court of appeals had to decide that issue. Whereas, by the same reasoning, it did not moot the existing orders of the Alabama Supreme Court.

JIC: Okay. Thank you.

CHIEF JUSTICE MOORE: That's all I'm saying. It's --

JIC: Any other questions from any member of the Commission?

Ms. Davis, you through?

Chief Justice, would you like to conclude with a statement?

CHIEF JUSTICE MOORE: I'd like to conclude with it's far different from what I've been doing now because we haven't addressed really what I wanted to state.

MS. DAVIS: Well, feel free.

JIC: Feel free to state whatever you want to before us.

CHIEF JUSTICE MOORE: Okay. There were three allegations basically. And I've got them underlined.

The first, March 20th, about public comments about pending or impending proceedings under 3A(b) -- or 3A(6) -- I'm sorry -- comments undermining public confidence in the court under 2A, recusing or dissenting from Supreme Court precedent in administrative order of February 8th, 2015.

The second allegation was August 21st, which included public comments about pending, impending proceedings, 3A(6), comments undermining public confidence in the court, 2A. Comments mandating disqualification, cast doubt on impartiality, and recusing or dissenting from Supreme Court precedent.

And on January 22nd, the last round, in response to my administrative order of January 6 -- and they all related to undermining public confidence in the