IN THE COURT OF THE JUDICIARY

IN THE MATTER OF	)
	)
ROY S. MOORE,	)
Chief Justice of the	)
Supreme Court of Alabama	)
	) **Court of the Judiciary**
	) **Case No. 46**

RESPONSE OF CHIEF JUSTICE MOORE TO THE JUDICIAL INQUIRY COMMISSION'S MOTION FOR PRODUCTION OF SUMMARY JUDGMENT DOCUMENTS

On July 29, 2016, the Judicial Inquiry Commission ("JIC") moved the Court for an order requiring Chief Justice Moore to produce redacted portions of two memoranda that were quoted in the *Affidavit of Chief Justice Roy S. Moore* filed with the Court on July 26, 2016. Alternatively, the JIC requested that the Court review the two memoranda *in camera* to determine the appropriateness of the redactions.[1] On August 1, the Chief Judge ordered the Chief Justice to submit for *in camera* review both redacted and unredacted copies of the two memoranda "along with a brief explanation as to why the proposed redactions are necessary."

I. Background

On May 6, 2016, the JIC filed its complaint in this matter. On June 21, Chief Justice Moore filed a Motion to Dismiss that this Court in its order of June 27 treated as a motion for summary judgment. The JIC responded to the motion on July 15 and also made a cross-

[1] "In camera inspection" is "[a] trial judge's private consideration of evidence." *Black's Law Dictionary* 878 (10th ed. 2014).

motion for summary judgment. On July 26, the Chief Justice replied to the response to his motion and also responded to the JIC's cross-motion. In that response, the Chief Justice included an affidavit that quoted from two memoranda he had sent to his fellow Justices dated September 2, 2015, and October 7, 2015. On July 27, at the request of JIC counsel, the Chief Justice provided these two memoranda to the JIC but with certain portions redacted to protect (1) internal court communications, (2) matters not necessary to provide context for the unredacted portions, and (3) confidential information unsuitable to public disclosure. *See* Exhibit A (redacted memorandum of September 2, 2015) and Exhibit B (redacted memorandum of October 7, 2015).

The JIC has now filed a motion to compel disclosure of the entirety of the two memoranda. The Chief Justice opposes this motion for the reasons stated below. In addition to the redacted memoranda provided to the JIC (Exhibits A and B), the Chief Justice is including under seal for this Court's review unredacted copies of the same memoranda (Exhibits A-1 and B-1).

II. Discussion

Large sections of the September 2 memorandum that were not quoted in the Chief Justice's affidavit were provided to the JIC on July 27. The portions redacted are either not necessary to provide context to the unredacted portions, discuss internal court matters, or require confidentiality for the protection of the Court and third parties. The Chief Justice was reluctant to quote from these memoranda in his affidavit because they were intended solely for his colleagues. However, because of the strident and persistent accusations of the JIC that his January 6, 2016 Administrative Order was an act of defiance of the federal

courts, the Chief Justice included a portion of these memoranda in his affidavit as appropriate to his defense against these accusations.[2] That limited disclosure, however, does not diminish the Chief Justice's respect for the privacy of internal Court communications nor his responsibility to protect those communications from unnecessary disclosure in this or any other proceeding.

The JIC's prosecutorial zeal has required the Chief Justice to reveal certain communications that ordinarily would not be open to public scrutiny. He has done this with great reluctance and only as necessary to his defense of this matter. He properly resists, however, any demand for disclosure of portions of those documents not necessary to provide context to the matters disclosed and that would impinge on privacy interests and the internal confidences of the Court.

The JIC claims that Rule 56(e), Ala. R. Civ. P., and Rule 106, Ala. R Evid., require the Chief Justice to disclose the two memoranda "in their un-excerpted and un-redacted entirety." JIC motion, at 3.[3] The JIC is wrong on both counts.

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[2] In his memoranda to the Court, the Chief Justice had noted "[t]he uncertainty facing the probate judges," Sept. memo. at 2, and his "responsibility to respond to the continuing delay of this Court in addressing an issue of serious public concern." Oct. memo. at 3. The Administrative Order similarly noted the anxious concern among members of the public and the "confusion and uncertainty" among probate judges. Order, at 2. *See* Canon 3A(5), Ala. Canons Jud. Ethics ("A judge should dispose promptly of the business of the Court ....").

[3] The JIC's statement that the memoranda contain "substantial redactions," JIC Motion, at 1, is an exaggeration. The September memorandum contains 918 words, of which 88 are redacted, or 9.6%. The October memorandum contains 1,232 words, of which 40 are redacted, or 3.2%.

A. Civil Rule 56(e) does not require production of the memoranda in their entirety.

The JIC states: "Rule of Civil Procedure 56(e) requires that the Chief Justice serve and attach these memoranda to his summary judgment affidavit, which he originally failed to do." JIC Motion, at 2. The relevant sentence of Rule 56(e) states: "Sworn or certified copies of all papers *or parts thereof* referred to in an affidavit shall be attached thereto or served therewith." (Emphasis added.) The redacted copies of the two memoranda provided to the JIC on July 27 contained the entirety of the passages quoted in the affidavit (and most of the non-quoted passages), thus satisfying the requirement of providing the "parts thereof" quoted in the affidavit. Because the redacted passages were not quoted in the affidavit, Rule 56(e) does not require their attachment. Since the Chief Justice is the author of the memoranda, his sworn affidavit serves to authenticate them.

B. Evidence Rule 106 does not require disclosure of the redacted passages.

The JIC states:

> Ala R. Evid. 106—known as the Rule of Completeness—entitles the JIC to seek the introduction of the entire memoranda into evidence, and not just the excerpted portions relied upon by the Chief Justice in his affidavit.
>
> ....
>
> Rule of Evidence 106 entitles the JIC to seek introduction of each *entire* document into the record.

JIC Motion, at 1-2. The JIC claims that the redacted memoranda do not satisfy Rule 106. *Id.* at 2. Even though Rule 106 is only one sentence, the JIC tellingly does not quote the text of the rule, which states: "When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of

the writing or statement *that ought in fairness to be considered contemporaneously with it*." (Emphasis added.)

By not quoting the text of Rule 106, the JIC creates the impression that a party who discloses a portion of a document must on demand of the adverse party disclose the entirety of that writing. Rule 106, however, does not require per se disclosure of an entire document upon introduction of part of that document. Instead, the rule provides for the exercise of judicial discretion as to whether the undisclosed portion "ought in fairness" to be provided for the purpose of understanding the introduced part. Rule 106 "vests in the trial judge considerable discretion to determine what 'in fairness' ought to be considered with the part introduced." Advisory Committee's Notes to Rule 106. *See also Sweeney v. Purvis*, 665 So. 2d 926, 930 (Ala.1995) (stating that "the trial court has great discretion in determining whether evidence ... is relevant and whether it should be admitted or excluded").

The Alabama Supreme Court has provided guidelines for the exercise of discretion under Rule 106. "The completeness doctrine 'serves the purpose of allowing a party to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary.'" *Ex parte Ray*, 52 So. 3d 555, 560 (Ala. 2009) (quoting *Ex parte Tucker*, 474 So. 2d 134, 135 (Ala. 1985)). By providing 90% of the September memorandum and 97% of the October memorandum, the Chief Justice has not provided "fragmentary or incomplete" evidence. Furthermore, "'[u]nder the rule of completeness the court has discretion to *admit only those statements which are necessary to provide context and prevent distortion*. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule ....'" *Ray*, 52 So. 3d at 560 n.5

(quoting *State v. Eugenio*, 219 Wis. 2d 391, 412, 579 N.W.2d 642, 651–52 (1998) (emphasis added by the Alabama Supreme Court).

Each memorandum has three redacted passages. The September memorandum has two redacted passages on page 2 of approximately four lines each, and a third passage on page 3 of only a few words. The October memorandum has three redacted passages, all on page 3. The first and the third of these are phrases of a few words; the second is one sentence in length. The redacted passages in the September memorandum relate to internal court procedures and confidential information that is not suitable for public disclosure. Those passages are not necessary to provide context or to prevent distortion. Similarly, the redacted phrases on page 3 of the October memorandum relate to confidential internal court information that is not suitable for public disclosure and is not necessary to provide context or to prevent distortion.

The redacted sentence on page 3 of the October memorandum discusses a separate document from that memorandum and is for that reason not subject to disclosure under Rule 106. The comparable federal rule allows introduction of related writings: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—*or any other writing or recorded statement*—that in fairness ought to be considered at the same time." Rule 106, Fed. R. Evid. (emphasis added). The Alabama rule, by contrast, does not allow for introduction of related writings.

> Rule 106 constitutes a rejection of that portion of the corresponding federal rule that expands the historic doctrine of completeness to include the admission of any additional writing or recorded statement that ought in fairness to be considered contemporaneously with an already admitted writing or recorded statement. See Fed. R. Evid. 106.

Advisory Committee's Notes to Rule 106. For that reason the redacted sentence on page 3 of the October memorandum is outside the scope of Rule 106. "The completeness doctrine cannot be used as a basis for arguing the admission of an entirely separate conversation or document." 1 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 14.03(2) (6th ed. 2009) (footnotes omitted).

III. Conclusion

Because neither Rule 56(e), Ala. R. Civ. P., nor Rule 106, Ala. R. Evid., requires production of the redacted passages, the motion of the JIC for disclosure of those passages should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 2nd day of August, 2016, served a copy of the *Response of Chief Justice Moore to the Judicial Inquiry Commission's Motion for Production of Summary Judgment Documents* on the Judicial Inquiry Commission through electronic mail to:

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EXHIBIT A

MEMORANDUM

TO: Stuart, Bolin, Parker, Murdock, Shaw, Main, Wise, and Bryan, JJ.

FROM: Chief Justice Roy S. Moore

RE: 1140460 - Ex parte State of Alabama ex rel. Alabama Policy Institute

Date: September 2, 2015

On June 2, 2015, the petitioner in this matter filed a "Motion for Clarification and Reaffirmation of the Court's Orders Upholding and Enforcing Alabama's Marriage Laws." The next day by a vote of 7-1, this Court set a deadline of June 10, 2015, for any respondent probate judge who wished to do so to file a response to the motion. The Court also set a deadline of June 15 for petitioner to reply to any briefs filed. On June 10, Probate Judge Nick Williams filed a response. On June 11, petitioner waived filing a reply brief.

On June 26, 2015, the United States Supreme Court issued its opinion in Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The same day Probate Judge Steven Reed filed a notice with this Court of his intention to cease obeying this Court's orders in this case. The next business day – June 29, 2015 – this Court issued an order giving the parties in this case a week "to submit any motions or briefs addressing the effect of the Supreme Court's decision in Obergefell on this Court's

existing orders in this case." Petitioner and three probate judges – Don Davis, Robert Martin, and Steven Reed -- filed briefs. Probate Judge Nick Williams filed a motion. The matter is now ripe for decision.

[redacted] I believe it is time for us to make a decision in this case, one way or the other: to acquiesce in Obergefell and retreat from our March orders or to reject Obergefell and maintain our orders in place.

[redacted] Likewise, at this juncture any decision is better than no decision at all. The uncertainty facing the probate judges in this state is enormous. As parties in this case, they need guidance from us on this Court's view of the legitimacy and controlling effect of Obergefell.

I have been watching with great interest developments in

Kentucky as County Clerk Kim Davis refuses to issue same-sex marriage licenses as a matter of religious conscience. She stated: "To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience." See Attachment A. Yesterday, West Honeycutt, a spokesperson for Equality Alabama, published an opinion column on AL.com entitled: "Judges Denying Marriage Licenses are in Criminal Contempt." Invoking "precedence [sic] and stare decisis," Honeycutt clearly suggested that the same pressure placed on Kim Davis will soon be directed against Alabama probate judges – and specifically Judge Nick Williams -- who do not bow to Obergefell. See Attachment B.

We should not leave Nick Williams and the other probate judges of this state to bear the stress of this battle alone with no guidance from us. To be silent at this moment, providing no guidance at all, would be in my view – [redacted] – very unfair. As I have said before, Obergefell is particularly egregious because it mandates submission in violation of religious conscience (ask Kim Davis). Either go along or be disqualified from holding public office. In the near future Christians like Clerk Kim Davis

will be driven out of public life, forced to forsake their faith or their livelihood.

Ominous developments are already occurring in other states. The California Code of Professional Conduct now prohibits "unlawful discrimination" on the basis of sexual orientation by any "law practice" in regard to selection of clients or employment policy. Rule 2-400, Cal. Code Prof. Conduct. The Board of Professional Conduct of the Ohio Supreme Court in the wake of Obergefell has advised that judges who perform marriages while declining to conduct same-sex weddings will be in violation of the Code of Judicial Conduct. The Board also advised that ethical problems would arise if a judge declined to perform all weddings to avoid this mandate. Op. 2051-1, Aug. 7, 2015. As Justice Alito stated, Obergefell "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" and "to stamp out every vestige of dissent." 135 S. Ct. at 2642. The suppression of all dissent is now underway.

To paraphrase Martin Niemoller:

> They came for the florists,
> but I didn't deal in flowers;
>
> They came for the bakers,
> but I didn't bake cakes;

They came for a county clerk in Kentucky,
but that seemed far away;

Then they came for me,
and there was no one left to speak out.

Shakespeare's poignant words apply to our current situation:

There is a tide in the affairs of men.
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries.
On such a full sea are we now afloat,
And we must take the current when it serves,
Or lose our ventures.

Julius Caesar, Act 4, Scene 3.

I urge you to act as soon as possible in this matter.

EXHIBIT B

MEMORANDUM

TO: Stuart, Bolin, Parker, Murdock, Shaw, Main, Wise, and Bryan, JJ.

FROM: Moore, C.J.

RE: 1140460 - Ex parte State of Alabama ex rel. Alabama Policy Institute

Date: October 7, 2015

A week ago AL.com published a guest opinion entitled "Where is the Supreme Court of Alabama on gay marriage?" The article, which I have reformatted for ease of readability, is attached for your reference. The authors are Eunie Smith, President of the Alabama Eagle Forum, and Dr. John H. Killian, Sr., former President of the Alabama State Baptist Convention. After reviewing Obergefell and noting that four members of the United States Supreme Court found it to be "completely unconstitutional," the authors acknowledged this Court's March orders in the API case and that a request to affirm those orders has been pending "for nearly three months."

In fact, over three months ago we asked the parties in API for briefs on the effect of Obergefell "on this Court's existing orders in this case." Subsequently, concerned about the gathering momentum to disregard the religious liberty of public officials, Probate Judges Nick Williams and John Enslen asked us for emergency relief. "So far," write Killian and

Smith, "those petitions also remain unanswered." Dismayed at the failure of this Court to act, they state: "We anxiously await ... a prompt and resolute decision in this case." They conclude: "The Alabama Supreme Court ... should not leave the citizens of Alabama to wonder, "'Where is the Supreme Court of Alabama?'"

Unquestionably we have a duty to decide the cases before us. Our oath of office states "that I will faithfully and honestly discharge the duties of the office upon which I am about to enter." Ala. Const. 1901, § 279. "'[I]t is the duty of the judge to adjudicate the decisive issues involved in the controversy ... and to make binding declarations concerning such issues, thus putting the controversy to rest ....'" Federated Guaranty Life Ins. Co. v. Bragg, 393 So. 2d 1386, 1389 (Ala. 1981) (quoting 26 C.J.S. Declaratory Judgments § 161 (1956), at 374-375). "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." McGough v. McGough, 252 So. 2d 646, 648-49 (Ala. Civ. App. 1970). "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in

the litigants." Pierson v. Ray, 386 U.S. 547, 554 (1967).

As the AL.com article indicates, we are coming under increasing scrutiny for our failure to act.[1] [redacted] as Chief Justice I feel a responsibility to respond to the continuing delay of this Court in addressing an issue of serious public concern, as well as an obligation to answer the probate judges of this State who have asked for our assistance in protecting their religious liberty. [redacted]

We should be prepared to resolve this issue [redacted] on October 21.

[1]The AL.com article has been picked up by other news sites. "Alabama Supreme Court should act immediately to protect religious liberty," Yellowhammer News (Oct. 2, 2015); "Where is Alabama's Supreme Court?" Andalusia Star News (Oct. 3, 2015); "Supremes snubbed: 1 marriage case steams on," WND.com (Oct. 4, 2015).

Where is the Supreme Court of Alabama on gay marriage?

AL.COM
Guest opinion
October 01, 2015

by
Eunie Smith
President, Eagle Forum of Alabama
and
Dr. John H. Killian, Sr.
former President of the Alabama Baptist State Convention

It has been three months since the Supreme Court of the United States rocked the nation with their landmark opinion in *Obergefell v. Hodges*, which purported to redefine marriage to include two adults of the same-sex and force that redefinition on "320 million Americans" as Justice Antonin Scalia disparaged in his dissent.

Five "unelected judges" - as Chief Justice Roberts called them in his criticism of Obergefell - dealt an arrogant blow to God, the family, nature, the rule of law, the Constitution of the United States and the democratic process. Simply because their opinion has been accepted as the "law of the land" by the media and the left, doesn't mean that the rest of us have to close our eyes to the truth or pretend that the Constitution allows the judicial branch to legislate a new right to same-sex marriage.

Confusion has reigned in the wake of *Obergefell*. A Christian clerk was jailed for refusing to issue same-sex marriage licenses. A physician was found guilty of warning patients about the dangers of homosexuality. Leading LGBT activist groups rallied for the legalization of prostitution. The Browns, of "Sister Wives," cited *Obergefell* in their fight to legalize polygamy.

Protests are erupting over transgender boys being allowed in the girls' bathroom. The Southern Poverty Law Center is pumping funds into their "Teaching Tolerance" curriculum - aimed at brainwashing children to accept perversion in our public schools. Alabama probate judges who uphold what Alabama's law demands when it comes to marriage, receive frequent hate mail and threats designed to intimidate them into violating their religious beliefs about marriage.

This is only the beginning. *Obergefell* will be a catalyst for the further deterioration of the family, religious liberty, and the values and principles that have made America great. Massive litigation fees will be incurred as Christians in Alabama stand firm on their convictions in businesses, churches, and in the public square. Judicial activism following *Obergefell* will only intensify as the sentiments of men and women – no matter how "supreme" – are allowed to trump the rule of law found in the plain text of the Constitution and the "law of Nature and of Nature's God."

In March, the Alabama Supreme Court exhibited a remarkable understanding of these issues when they issued a permanent injunction that halted same-sex marriage in this state. Liberty Counsel – with a brief filed on behalf of Alabama Policy Institute and Alabama Citizens Action Program - has asked the Alabama Supreme Court to affirm its injunction and disregard the Obergefell opinion which four members of the United States Supreme Court said was completely unconstitutional.

That request has been pending in the Alabama Supreme Court for nearly three months.

Washington County Probate Judge Nick Williams and Probate Judge John Enslen of Elmore County, have asked for an "Emergency" Petition and a "Protective Order" to protect

their sincerely held beliefs in light of the prosecution of Kentucky Clerk Kim Davis.

So far those petitions also remain unanswered.

Alabamians elected justices to the Alabama Supreme Court with confidence that they would judge rightly in the fear of God, in step with the Constitution of the United States and the Alabama Constitution, and representative of the traditional values that Alabamians cherish. We anxiously await their decision.

Duty to God, the preservation of our constitutional republic, and the future of families and children require no less than a prompt and resolute decision in this case. The Alabama Supreme Court should act immediately to protect the sincerely held religious beliefs of our citizens and the sanctity of the institution of marriage – as adopted by 81% of Alabama voters. They should not leave the citizens of Alabama to wonder, "Where is the Supreme Court of Alabama?"

http://www.al.com/opinion/index.ssf/2015/10/where_is_the_supreme_court_of.html#incart_story_package