

IN THE COURT OF THE JUDICIARY

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

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) Court of the Judiciary
) Case No. 46



**REPLY TO THE RESPONSE OF THE JIC TO CHIEF JUSTICE MOORE’S
MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE JIC’S
CROSS-MOTION FOR SUMMARY JUDGMENT**

The Judicial Inquiry Commission (“JIC”) can only succeed in its attack upon the Chief Justice’s Administrative Order of January 6, 2016, by portraying it as something it is not. In 53 pages of mischaracterization, misrepresentation, and misdirection, the JIC attempts to do exactly that. The Administrative Order correctly stated that the March 2015 orders of the Alabama Supreme Court in *API* were still in effect pending further decision of the Court. The Order neither instructed the probate judges to defy a parallel federal court order nor to ignore the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The JIC, desperate to justify its complaint, creates a false depiction of the Administrative Order because a truthful reading of that order utterly defeats its case.

Certainly, as of January 6, 2016, the Alabama Supreme Court—a greater authority than the JIC—considered its March 2015 *API* orders to still be in effect. If those orders had been “abrogated” by the issuance of the *Obergefell* opinion on June 26, 2015, the Court’s request three days later for briefing on the effect of *Obergefell* on those orders would have been a pointless, meaningless, and futile act. The JIC’s entire case against the Chief Justice

depends on its transparent attempts to change or obfuscate an otherwise very clear chronology of events. (See Relevant Chronological Events, attached hereto as **Exhibit A**). Regardless of what the JIC thinks about the effect of *Obergefell* on the *API* orders, the Alabama Supreme Court was entitled to make its own decision on that point—a decision, as the Chief Justice pointed out, that was still pending on January 6, 2016.

None of this is difficult to understand. This case requires the Court of the Judiciary (“COJ”) to determine the meaning of a four-page document—the Administrative Order. The Order is self-explanatory. Like a contract, one need merely read the document to determine its meaning. Whether the intention of the Chief Justice in issuing the Administrative Order was to defy the federal courts, a meaning the JIC imputes to the Order, is determined by reading the Order. In contract law, for instance, “the intention of the parties is to be derived from the contract itself, where the language is plain and unambiguous.” *Loerch v. National Bank of Commerce of Birmingham*, 624 So. 2d 552, 553 (Ala.1993).

I. The text of the Administrative Order refutes the JIC’s allegations.

The first two pages of the Administrative Order provide a factual chronology of the *API* case. Page 3 begins with a paragraph that completely refutes the JIC’s contention that the Chief Justice was ordering the probate judges to disregard the *Obergefell* decision.

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

What could be clearer? The “plain and unambiguous” language of the Order states that the Chief Justice is not intruding on the authority of the Alabama Supreme Court to interpret, modify, or vacate its own orders. As the Chief Justice concluded on page 4, until the Alabama Supreme Court acts, those orders remain yet in effect. The Chief Justice made it unequivocally clear that he had no authority to affirm or reject those orders, a matter that lay in the hands of the entire Court. The strident pronouncements of the JIC that the Chief Justice ordered the probate judges to defy the Supreme Court are baseless. The Order says just the opposite. The Chief Justice highlighted the phrase “existing orders” because those are the exact words used in the Supreme Court’s order of June 29, 2015 to describe the March orders. In the Court’s June 29 order, as stated on page 2 of the Administrative Order, the Supreme Court invited the parties in *API* to address the “effect of the Supreme Court’s decision [in *Obergefell*] on this Court’s *existing orders* in this case.” (Emphasis added.) The statement that the March 2015 *API* orders continued to exist post-*Obergefell* was a pronouncement, not of the Chief Justice, but of the Alabama Supreme Court. Does the JIC now intend to prosecute the entire Court, or does it limit its misuse of power to targeting the Chief Justice for quoting what the Court itself said?

Having disregarded or dismissed the import of the first paragraph on page 3, the JIC then directs its fire at the next three paragraphs that provide recent post-*Obergefell* federal precedent for the proposition that under the orderly procedures of the judicial process *Obergefell* does not affect existing orders of courts outside the Sixth Circuit until those courts apply it as precedent. Those paragraphs do not deny the precedential effect of *Obergefell* but merely quote federal authority for the proposition that the *judgment* in

Obergefell applied only to the parties before the Court in that case—the state officials from the four states in the Sixth Circuit. The *precedential* effect of *Obergefell*, by contrast, was a matter for other jurisdictions to apply in due course as other cases and controversies came before them for decision. The Chief Justice did not deny that the Eighth Circuit had applied *Obergefell* as a precedent. Indeed, he begins one sentence as follows: “While applying *Obergefell* as precedent, the Eighth Circuit” Administrative Order, at 3. Nonetheless, he points out correctly that the Eighth Circuit’s prior orders remained in effect until that precedent was applied. *Obergefell* did not negate or vacate existing contrary orders until the Courts that issued those orders so applied it. As the Administrative Order stated, as of January 6, 2016, six months after the deadline for filing briefs on the question, the Alabama Supreme Court had not yet determined the effect of *Obergefell* on its existing *API* orders. No matter how much inflamed, derogatory, and repetitious rhetoric the JIC employs¹ to disguise these procedural realities, the fact remains that the *existing* orders of the Alabama Supreme Court continued to exist until modified or vacated by that Court.

Far from ignoring *Obergefell* or ordering defiance of it, the Chief Justice acknowledged at the top of page 4 “the apparent conflict between the decision of the Alabama Supreme Court in *API* and the decision of the United States Supreme Court in

¹ In its Complaint, the JIC used the word “flagrantly” eight times and the terms “abused” or “abusing” seven times. *See* Motion to Dismiss, at 17. In its opposition to the motion, the JIC uses the word “flagrant” 16 times and variants of the word “abuse” another 16 times. The human ear, as Franklin Roosevelt noted, is not attuned to “the constant repetition of the highest note in the scale.” Arthur M. Schlesinger, *The Politics of Upheaval: 1935-36*, at 10 (1960). *See also* Jonathan K. Van Patten, *On Editing*, 60 S.D. L. Rev. 1, 32 (2015) (“Argument by adjectives and adverbs is cheap argument. ... The more an argument depends on adjectives and adverbs, the weaker it is.”).

Obergefell.” The resolution of that conflict was a matter for the entire Court to decide, not for the Chief Justice to resolve in an administrative order. Because the Supreme Court’s June 29 order did not request briefing on the effect of the federal injunction on the *API* orders, the Chief Justice also did not mention this issue. He sought to instruct the probate judges as to the status of the *API* orders in light of the June 29, 2015 briefing order of the Alabama Supreme Court, not to independently resolve legal issues affecting those orders.

The JIC claims repeatedly that the Administrative Order violates the holding of the Eleventh Circuit that *Obergefell* “abrogated” the March 2015 *API* orders. See JIC brief, at 1, 8-9, 11, 14, 17, 27 n.15, and 30-32. The Administrative Order, as demonstrated above, does not provide guidance to the probate judges as to the effect of *Obergefell* on the *API* orders, a question the Order expressly reserves for decision by the Alabama Supreme Court. In any event, Eleventh Circuit cases are not controlling precedent for state courts (especially state supreme courts) but are binding authority only for the federal district courts in Alabama, Florida, and Georgia. See Motion to Dismiss, at 11-12, where this principle of federal jurisdiction is discussed in detail. “This Court is not bound by decisions of the United States Courts of Appeal” *Ex parte Johnson*, 993 So. 2d 875, 886 (Ala. 2008).

The JIC may hope that the members of the COJ will not read the Administrative Order for themselves but will instead rely on the deprecating rhetoric of the JIC as a substitute. But the best antidote for unreality is reality. The answer to this case lies within the four pages of the Administrative Order in which the Chief Justice states that six months after the close of briefing on the effect of *Obergefell* on the March 2015 *API* orders, the

Alabama Supreme Court continues to deliberate. Until that deliberation concludes, he instructed the probate judges, the orders continue in effect—a thoroughly uncontroversial proposition. The Chief Justice did not presume to decide for the Alabama Supreme Court, or to predict how they would decide. He merely stated that the orders remained in effect until that court said otherwise: “Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court ... remain in full force and effect.” Administrative Order, at 4. If the JIC has a quarrel with this proposition or considers it to violate the Alabama Canons of Judicial Ethics, it should direct its dissatisfaction, should it be so bold, at the Alabama Supreme Court who issued those orders. Instead, it has chosen to prosecute the Chief Justice who, as a mere messenger, stated that the orders continued in existence until modified by the Court that issued them. The selective targeting of the Chief Justice for prosecution is, to use a favorite adjective of the JIC, a *flagrant* abuse of power.

II. The Chief Justice did not order the probate judges to defy *Obergefell* or a federal injunction, but only instructed them that the March 2015 API orders were still in effect pending further decision by the Alabama Supreme Court.

A thematic deception that infuses the JIC brief is that the Chief Justice ordered the probate judges that they “had a duty, under Alabama law, *not* to issue same-sex marriage licenses.” JIC brief, at 1. The Chief Justice, however, did not on his own initiative direct the probate judges to follow Alabama marriage law. Instead he instructed them that “[u]ntil further decision by the Alabama Supreme Court” they were still under a state-court injunction issued by that Court. He neither endorsed nor criticized that injunction. Because consideration of the effect of *Obergefell* on that injunction had been pending before the

Alabama Supreme Court for six months, the Chief Justice considered it prudent to remind the probate judges that the injunction still remained in effect pending its review. By informing the probate judges that they were beholden to an injunction of the Alabama Supreme Court, the Chief Justice did not himself order them to follow Alabama law in contradistinction to federal law on the subject. Understanding the JIC's attempted rewriting of the Administrative Order is important. The Chief Justice did not order the probate judges to do anything other than to recognize the continuing effect of the Alabama Supreme Court's injunction until that Court chose to modify it. "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected" *Ex parte Metropolitan Life Ins. Co.*, 707 So. 2d 229, 231-32 (Ala. 1997) (quoting *Howat v. Kansas*, 258 U.S. 181, 190 (1922)). The Chief Justice did not substitute his own authority for that of the Court, but instead pointed the probate judges to the "existing orders of the Alabama Supreme Court" on the marriage question.

The JIC's oft-repeated theme that the Chief Justice under his own authority ordered the probate judges to follow Alabama marriage law is evident in its selective highlighting of the last paragraph of the Administrative Order. On page 9 of the JIC's brief, that paragraph appears as follows:

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.

The purpose and effect of this selective emphasis is to make it appear that the Chief Justice himself is issuing an order to the probate judges to follow Alabama marriage law rather than that he is informing them that the orders of the Alabama Supreme Court to that effect had not as yet been altered. The insistence of the JIC on attributing the orders of the Alabama Supreme Court to the Chief Justice is necessary for it to level the accusation that he is defying the federal courts. The JIC wrongly attempts to convert the Chief Justice from the messenger to the principal and thus to attribute to him the responsibility for orders that he did not issue but whose existence he properly acknowledged. Without this misattribution the JIC's case against the Chief Justice collapses or becomes what it refuses to acknowledge: an accusation against the entire Court.

That the JIC seeks to make the orders of the Alabama Supreme Court the orders of the Chief Justice is further evident in the three-page introduction to its brief. Nowhere in those three pages does the JIC even mention that the Administrative Order is based upon the orders of the Alabama Supreme Court. Instead the JIC, very deceptively, states flatly and without qualification that the Administrative Order “constituted flagrant disregard of federal law by directing every subordinate probate judge in Alabama to ignore a federal injunction and clear federal law.” Expanding on this theme, the JIC accuses the Chief Justice of “[l]awless judicial conduct” and becoming “a law unto himself,” thus “threatening [] the concept of government under law.” JIC Brief, at 2 n.3 (quoting *In re Ross*, 428 A.2d 858, 861 (Me. 1981)). But how is instructing the probate judges that the orders of the Alabama Supreme Court remain in place until altered by that Court “lawless judicial conduct” or “flagrant disregard of federal law”?

While purporting to enforce ethical standards, *see* Canon 1 (“high standards of conduct”), the JIC itself has no hesitation in methodically mischaracterizing the Administrative Order. As noted in the Motion to Dismiss, the Administrative Order does not contain any instruction to the probate judges to disregard federal law. Nor does it assert that state law supersedes federal law. The Administrative Order informs the probate judges of the status of the *API* orders in light of the Court’s request for further briefing on June 29, 2015. Six months had passed with no action by the Court. Probate judges and members of the public in the meantime had expressed concern about the silence of the Court on what they considered an important matter. (*See* the attached Affidavit of Chief Justice Roy S. Moore for his efforts prior to the Administrative order to encourage the Court to rule in the *API* case.) The Chief Justice informed the probate judges that the Court was still deliberating on the question raised in its June 29 briefing order: the effect of *Obergefell* on the *API* orders. Until the Court resolved that issue, its orders obviously still remained in effect. Otherwise, what was the point of the deliberation?

The JIC, concerned to rescue its complaint from dismissal, attempts to redefine the Administrative Order as an imperious command to the probate judges to cross swords with every federal court in sight. The Order says no such thing. As the Motion to Dismiss explained, the JIC, lacking any language in the order to support its theory of the case, resorts to “appearances.”

Aware that the Administrative Order is hard to pigeonhole as an act of “defiance,” the JIC reluctantly mutes its theme that the Chief Justice ordered the probate judges to disobey a federal injunction. Instead it states that his Order “directs *or gives the appearance of directing*” the probate judges to disobey the federal injunction. Complaint, at 20, ¶ 39 (emphasis added).

Similarly, the JIC accuses the Chief Justice of “ordering *or appearing to order*” disobedience to the federal court, *id.*, at 21, ¶ 41 (emphasis added), and states that he “attempted to directly interfere *or gave the appearance of attempting to interfere*” with the jurisdiction of the federal court. *Id.*, at 22, ¶ 43 (emphasis added). *See also id.*, at 23, 26, ¶¶ 49, 59 (same). Although the JIC wishes to create the appearance that the Chief Justice ordered the probate judges to defy the federal courts, he, in fact, did not do so. He merely instructed them that the Alabama Supreme Court’s orders in *API* remained in effect until modified by that Court.

Motion to Dismiss, at 12. In its opposition brief the JIC engages in the same evasiveness. While accusing the Chief Justice of massive multidirectional defiance, the JIC is unable to state that he actually ordered the probate judges to defy anyone. Thus, the JIC states that “disregard for the federal injunction” was “*the intended consequence*” of the Administrative Order, JIC brief, at 22 (emphasis added), even though that Order never made such a statement. Does such purported mindreading satisfy the JIC’s clear-and-convincing evidentiary burden?

In a similar vein, the JIC six times in its brief employs the phrase “unavoidable consequence.” *See* JIC brief, at pp. 19, 21, 22, 28, 36, and 53. By using such phraseology, the JIC concedes that only by inference can it make the Administrative Order say what it wants. More of the same is evident in the JIC’s description of the Administrative Order as a “thinly-veiled” attack on the federal courts. *See* JIC brief, at 23, 28 n.16, 29, and 52. Stating that the ethical inadequacy of the Administrative Order is “thinly-veiled” is an admission that the JIC seeks a hidden meaning in the Order that is not stated on its face. A “veiled” meaning is not a clear one and thus fails to support the JIC’s evidentiary burden, particularly for such a drastic punishment as removal from office, a result the JIC demands throughout its brief. *See* JIC brief, at 4, 17, 23, 49-53. Evidence that is veiled and hidden

is not clear and convincing, but rather obscure and problematical. If, to prove the point asserted, statements in a document require an interpretation that is not obvious from its plain text, that evidence fails the clear and convincing test.

Unable to find in the actual language of the Administrative order the assertions it seeks to impute to the Chief Justice, the JIC derides reliance on the plain language of the order as a “neutered reading,” JIC brief, at 18, a “sterilized reading,” *id.* at 20, a “toned-down reading,” *id.* at 21, “sophistry,” *id.* at 20, “semantic gamesmanship,” *id.* at 23, 49, “double-speak,” *id.* at 28, and “persistent gamesmanship,” *id.* at 45. Perhaps these epithets should be directed at the JIC which creatively seeks to have the Administrative Order state what it does not and then employs that “semantic gamesmanship” to argue stridently for the removal of the Chief Justice from office. The straw-man tactic of misattributing an argument and then knocking it down is not new with the JIC. Successful employment of the straw-man fallacy depends on fooling the public into believing that the deceptive portrayal is actually true to reality.² In this case the JIC seeks to present for public consumption an Administrative Order that does not exist. The JIC then successfully attacks its artfully designed caricature as if it represented the position of the Chief Justice. The JIC wrongly accuses the Chief Justice of statements he did not make and then uses its refutation of those statements as evidence he should be removed from office.

² The straw man technique distorts person A’s viewpoint “by presenting it in an exaggerated or one-sided form. This ‘straw man’ is then attacked and refuted while pretending that it is person A’s actual viewpoint.” P.J.J. van Veuren, “Fallacious Arguments,” in *Skillful Thinking: An Introduction to Philosophical Skills* 66 (G.J. Rossouw ed., Craig MacKenzie trans., 1994). See also Stanley G. Robertson, *The Straw Man Fallacy* 12 (2008) (“At the heart of the Straw Man Fallacy is deception.”).

Only by rewriting the Administrative Order to remove its central premise that the Alabama Supreme Court's orders were still in place pending further decision by that Court can the JIC maintain its "defiance" theme. But, of course, that false mantra must be repeated over and over in order to create the grand finale where COJ Case No. 46 becomes nothing but a repeat performance of COJ Case No. 33, and 2016 blends indistinguishably into 2003. The JIC vigorously demands "the harshest sanction available," JIC brief at 52, because "the fact is, the two cases are self-evidently alike." *Id.* at 51. One member of this Court thought differently. John V. Denson II recently stated that "the facts in the previous case and the present case involving Chief Justice Moore are different and the cases are distinguishable." *Notice of Recusal* (July 20, 2016).

III. Unable to prove its case from the text of the Administrative Order, the JIC resorts to inadmissible and irrelevant extrinsic evidence in an attempt to change its plain meaning.

The misdirection of the JIC's barrage against the Chief Justice is evident in its recourse to matters unrelated to the Administrative Order as evidence for what the Order means. Unable convincingly to make its case from the four corners of the Order, the JIC desperately invokes a press release issued by Liberty Counsel in January 2016 as evidence of what the Order means. See JIC brief, at 20-21. Contrary to the JIC's assertion, Liberty Counsel was not counsel for the Chief Justice at that time and thus had no agency relationship with him. To construe a comment by a member of the public about the Administrative Order as an authoritative interpretation of the meaning of the Order and as evidence upon which to predicate removal from office is absurd. Yet, oblivious to the facts, the JIC falsely charges that "his attorney at Liberty Counsel mounted an aggressive public

relations campaign about ‘standing up to the federal judiciary.’” JIC brief, at 49. But, in fact, Liberty Counsel did not become counsel for the Chief Justice in the JIC matter until several months after the Administrative Order was released. The press release is thus irrelevant, Rule 401, Ala. R. Evid., and accordingly inadmissible. Rule 402, Ala. R. Evid. Additionally, the press release is unauthenticated, Rule 901(a), Ala. R. Evid., and is classic hearsay, an out-of-court statement “offered in evidence to prove the truth of the matter asserted,” Rule 801(c), Ala. R. Evid., that does not satisfy any of the hearsay exceptions. See Rule 801(d) Ala. R. Evid. The Administrative order speaks for itself and may not be rewritten by the JIC based on unauthenticated hearsay of persons who had no agency relationship with the Chief Justice.

Equally unconvincing is the JIC’s attempt to read into the Administrative Order a public statement the Chief Justice made in January 2015, a year before the Order was issued. JIC brief, at 21. The *API* orders, which the Administrative Order addresses, were not even in existence in January 2015. Nor was the federal injunction which the JIC alleges the Chief Justice defied. The February 2015 letter to the probate judges correctly informed them that the federal injunction in place at that time did not affect them as they were not parties to the case from which it issued. The JIC’s attempt to utilize extrinsic events to support its interpretation of the Administrative order is further evidence that it is unable to prove its case from the Order itself.

IV. The JIC’s argument that the March 2015 *API* orders were intended to expire automatically upon the issuance of a contrary federal injunction is unpersuasive in light of the June 2015 briefing order.

The JIC next argues that the Alabama Supreme Court did not intend its March 2015 orders in *API* to persist once a contrary federal injunction was issued. Thus, according to the JIC, the Chief Justice’s statement that the orders continued in existence as of January 2016 was incorrect. That assertion, however, is belied by the June 29, 2015 order of the Alabama Supreme Court that requested further briefing on the *API* orders despite the existence of the federal injunction. The JIC argues in particular that the Alabama Supreme Court in its March 10 order in *API* expressly declined to enjoin any party at that time who was subject to a contrary federal injunction. The JIC extrapolates that observation to contend that the Alabama Supreme Court thereby incorporated into any injunctive order it might issue in the future the implicit provision that such order would immediately and automatically be revoked if a federal court at any time issued a conflicting order. JIC brief, at 22, 30. Thus, the JIC concludes, once the federal court issued a class-action injunction on May 21, 2015, addressed to the probate judges, the *API* orders were *per se* annulled and ceased to exist. This argument, however, collapses in light of the undisputed fact that on June 29, 2015, the Alabama Supreme Court asked the parties in *API* to brief the effect of *Obergefell* on its “existing orders” in that case. If those orders robotically expired on the issuance of *Obergefell* and the related activation of the federal injunction, what purpose would be accomplished in asking for briefing on their status? Thus, the June 29 order requesting further briefing contradicts the JIC argument that the Alabama Supreme Court intended the subsequent federal injunction to instantly uproot its March 2015 *API* orders.

A much more reasonable, and the only plausible, interpretation is that the March 2015 *API* orders sought to respect any *preexisting* federal injunction, perhaps as a matter of comity. The argument that the Alabama Supreme Court intended certain reasoning in its March 10 order to render any subsequent state order subservient to a later federal order *instanter* is simply a bridge too far. The June 29 briefing order in *API* completely rebuts this argument. On March 4, 2016, the Alabama Supreme Court issued an order and certificate of judgment that brought the *API* case to a close. If the *API* orders were defunct long before that time, what was the point of that action?

V. The JIC’s allegation that three paragraphs on page 3 of the Administrative Order constitute substantive legal advice to the probate judges violates JIC Rules 6C and 6D, and is refuted by the Order itself.

The JIC brings forth in its brief a new argument about the Administrative Order that was mentioned neither in its investigation letter of January 22, 2016, nor in its complaint filed with this Court. The investigation letter stated four allegations. *See* Motion to Dismiss, Exhibit H. Because the first allegation stated only a legal conclusion and contained no facts, it did not require a response. The other three allegations were that the Chief Justice (1) ordered the probate judges to violate a federal injunction, (2) ignored a statement of the Eleventh Circuit that *Obergefell* had “abrogated” the *API* orders, and (3) ignored the Supreme Court’s decision in *Obergefell*. The complaint restated these allegations. Neither in the investigation letter nor in the complaint did the JIC allege that three paragraphs on page 3 of the Administrative Order that discussed how lower courts had applied *Obergefell* violated any ethical canon. Yet those paragraphs appear front and center in the JIC brief in

support of the proposition that the Chief Justice improperly provided substantive legal guidance in the Administrative Order. *See* JIC brief, at 13-14, 27-29, 34, 37-43, and 48.

By resorting to an argument heretofore unmentioned, the JIC continues to cast about for some way to keep its complaint afloat. Because the Chief Justice has had no notice of this line of attack, the complaint again violates JIC Rules 6C and 6D which mandate that upon making a decision to investigate a complaint the JIC provide a judge notice of the allegations being investigated. By bringing up these paragraphs for the first time, the JIC attempts to cure the problem that Charges 3, 4, and 5 in the complaint do not state a claim. As summarized in the Motion to Dismiss, Charges 3, 4, and 5 allege that the Chief Justice

... (3) addressed or decided substantive legal issues while acting in his administrative capacity; (4) substituted his judgment for the judgment of the entire Alabama Supreme Court on the substantive legal issue of the effect of *Obergefell* on *API*; and (5) interfered with marriage cases pending before the United States District Court and the Alabama Supreme Court to which the probate judges were parties.

But the Administrative Order states: “I am not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.” Order, at 3.

The Order itself actually says that the Chief Justice will *not* provide substantive guidance to the probate judges on the effect of *Obergefell* on the *API* orders, the very question posed in the June 29 briefing order and still pending for decision on the date of the Administrative Order. In the face of this undeniable disclaimer which directly refutes Charges 3, 4, and 5, the JIC changes direction and for the first time alleges that the three

paragraphs on page 3 of the Order that discuss how lower courts have applied *Obergefell* are really what it was referring to in Charges 3, 4, and 5. These paragraphs, however, even if properly brought up at the last minute to support the charges, do not pretend to provide substantive legal guidance to the probate judges. Referring to the just-quoted disclaimer, the first of the three paragraphs begins: “Nevertheless, recent developments of potential relevance since Obergefell *may* impact this issue.” Order, at 3 (emphasis added). To say something “may” happen is to express a possibility, not a certainty. Such a statement is equivocal and thus not a substantive assertion about a legal proposition.

After discussing the post-*Obergefell* cases, the Order expressly defers to the pending judgment of the Alabama Supreme Court on the question. “Whether or not the Alabama Supreme Court will apply the reasoning of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of Kansas, or some other legal analysis is yet to be determined.” Administrative Order, at 3-4. Such a statement, far from providing substantive legal advice to the probate judges, declines to provide such advice, leaving the matter in the hands of the Alabama Supreme Court. That the three paragraphs in question are stated assertively in the special concurrence of the Chief Justice to the *API* order of March 4, 2016, provides the JIC with no license to ignore their contingent and deferential character in the Administrative Order. Notably, despite its lengthy comparative quotations from the Order and the *API* concurrence, *see* JIC brief, at 38-39, the JIC deliberately omits the concluding sentence that declines to provide advice

to the probate judges.³ Thus, once again the JIC, flailing about to save its complaint from dismissal, misses the mark.

VI. The Chief Justice did not usurp the authority of the Supreme Court to supervise lower courts.

In a final attempt to salvage Charges 3, 4, and 5, the JIC claims that the Chief Justice “abused his administrative authority” by usurping the authority of the Supreme Court to supervise lower courts. The JIC is correct that “action by the Chief Justice is not synonymous with action by the ‘Court.’” *Ex parte State ex rel. James*, 711 So. 2d 952, 964 (Ala. 1998). *See also* Art. VI, § 140, Ala. Const. 1901 (granting the Supreme Court “general superintendence and control of inferior jurisdictions”). But the JIC, willfully blind to the reality of the Administrative Order and unswervingly dedicated to its mission of portraying the Chief Justice as a rogue resister of federal authority, misses the simple point that the Order fully recognizes, acknowledges, and respects the authority of the Alabama Supreme Court to supervise the probate judges—exactly what it did in its March 2015 orders in *API*. The Chief Justice in the Administrative Order is not displacing the authority of the Alabama Supreme Court: he is *deferring* to that authority as expressed in the Court’s supervisory orders in *API*. The JIC stubbornly refuses to admit that the Administrative Order instructs the probate judges to do nothing other than what the Alabama Supreme

³ The JIC simultaneously berates the Chief Justice for ignoring *Obergefell* and the federal injunction, while at the same time charging him with wrongly addressing “substantive legal issues.” This whipsaw logic makes the Chief Justice an offender no matter what he does. *See* Motion to Dismiss, at 12-13, for a fuller discussion of this dilemma.

Court has enjoined them to do. The Order states clearly that the remission or continuation of the *API* orders depends not on the Chief Justice but on the Court itself, which as of the date of the Administrative Order had been deliberating on the matter for six months.

VII. The Administrative Order expired on March 4, 2016, and was at all times subject to revocation by the Alabama Supreme Court.

The JIC never mentions that the Administrative Order ceased to exist on March 4, 2016, when the Alabama Supreme Court issued its final *API* ruling. The Administrative Order was an interim status report on the March 2015 *API* orders—effective only “[u]ntil further decision by the Alabama Supreme Court.” During the April 7 discussion with the JIC, the following dialogue occurred:

JIC: Do you believe that your administrative order of January 6, 2016, ought to now be rescinded?

CHIEF JUSTICE MOORE: My January order? Yeah, is automatically rescinded. What was my order on January 6th? Until further decision by the Alabama Supreme Court, the existing orders are in effect.

....

Am I going to put out another administrative order? No.

Transcript, at 111:19-23 to 112:1-3, 20-21 (copy attached hereto as **Exhibit B**). Further along in the discussion the Chief Justice made the same statement: “[T]he administrative order was until further decision by the Supreme Court. Well, they made a further decision. So it, too, is really superseded.” *Id.* at 120:6-9. The Administrative Order was temporary, not permanent, and expired two months after it was issued. Does the Chief Justice really need to be removed from office for issuing an Administrative Order that expired two months after it was issued, was designed to address a peculiar one-time situation, and on

its face did not urge defiance of any federal opinion or order? The JIC is engaged in a massively overreaching abuse of its authority to investigate and prosecute judges and has itself arguably become a threat to the integrity and independence of the Alabama judiciary.

Another reason the JIC cites for the necessity of removing Chief Justice Moore from office is that administrative orders are not subject to appeal. JIC brief, at 35. If that statement means they are not subject to review, the JIC is manifestly wrong. Section 12-5-20, Ala. Code 1975, as explained in the Motion to Dismiss, pp. 36-39, authorizes the Supreme Court “to review, countermand, overrule, modify or amend any administrative decision by ... the Chief Justice .” During the two months the Order was in existence, the other justices chose not to exercise that power. If the Order was as “egregious” as the JIC alleges, JIC brief, at 35, would not the Court have acted?

VIII. The JIC’s attempt to rehabilitate Charge No. 6 fails because the JIC is bound by the rule of law to follow its own rules.

The JIC’s defense of Charge No. 6 is another exercise in misdirection. The cited cases are from other jurisdictions that do not have controlling rules like 6C and 6D. *See* JIC brief, at 45-48. The JIC frequently castigates the Chief Justice for not respecting the “Rule of Law.” *See, e.g.*, JIC brief, at 10, 12, 53. Yet the JIC, though not contending that it followed the procedures mandated in Rules 6C and 6D, claims that those requirements may be “flouted” as long as it supposedly achieved the result another way. JIC Rule 19 is a mechanism for seeking relief from the JIC’s violation of its own rules. The existence of Rule 19 is evidence that the Supreme Court is serious about the JIC following the rules set forth for its operation. The purpose of Rule 19 is to protect judges from the JIC’s misuse

of its power to investigate and prosecute.⁴ The JIC also is bound by the rule of law, which it has violated in bringing Charge No. 6 without providing the investigation-letter notice required by Rules 6C and 6D. Charge No. 6, therefore, should be dismissed. The Chief Justice also incorporates herein his Statement of Nonrecusal published with the final *API* order of March 4, 2016. (Attached hereto as **Exhibit C**). The Statement of Nonrecusal explains why it was appropriate for the Chief Justice to vote on the final *API* decision even though he had declined to participate in earlier phases of the case.

CONCLUSION

A plain reading of the Administrative Order discloses that its intent was not to give the probate judges substantive legal advice but instead to remind them that the March 2015 orders of the Supreme Court in *API* were still in effect pending further decision of the Court as stated in its June 29, 2015 briefing order. The federal injunction was not mentioned in the Order because the Order's purpose was to provide a status report on the Court's June 29, 2015 briefing order which had invited the parties to address one issue and one issue alone—the effect of *Obergefell* on the *API* orders. The JIC errs when it construes the Administrative Order as substantive legal advice to the probate judges, as if the Chief Justice had taken it upon himself to usurp the authority of the Court and to answer authoritatively the question raised in the briefing order. The Chief Justice did no such thing. The Administrative Order points the probate judges to the Court's June 29, 2015, order requesting briefing on its “existing orders” in *API*. The Chief Justice expressly eschews

⁴ In the section of the Motion to Dismiss that discussed JIC Rules 6C and 6D, the Chief Justice invoked Rule 19. *See* Motion to Dismiss, at 29 n.7.

more than once any intention to answer the question raised in the briefing order. Issued six months after the June 2015 briefing order, the Administrative Order served the sole purpose of informing the probate judges that the Court’s “existing orders” were still in effect until the Court decided otherwise.

The JIC accuses the Chief Justice of providing incorrect advice to the probate judges as to the legal effect of the *API* orders in the wake of *Obergefell*. But he provided no such advice, instead instructing them that they were to await the Court’s decision on the question. Had the Court not delayed its ruling, the Administrative Order would have been unnecessary. In early March 2016, two months after issuance of the Administrative Order, the Court issued its final order in *API*. At that point the Administrative Order had no further effect.

The task before the Court in this case, except for Charge No. 6, is solely to construe a written instrument—the four-page Administrative Order. The construction of a writing is “a question of law [that is in] the exclusive province and duty of the court to decide.” *Lampkin v. State*, 105 Ala. 1, 4, 16 So. 575, 576 (1894). *See also Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015) (stating that “we treat document construction as a question of law”). Because document construction is a legal and not a factual issue, it is suitable for summary judgment which is available when the moving party shows “that there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law.” Rule 56(c)(3), Ala. R. Civ. P.⁵ A plain reading of the

⁵ The Chief Justice incorporates by reference the statement of facts on pages 3-5 of the Motion to Dismiss. The Chief Justice disagrees with ¶ 15 of the JIC’s Statement of

Administrative Order indicates that it is intended to provide a status report on the Supreme Court's June 29, 2015, briefing order and thus it (1) did not address the federal injunction which is not mentioned in the briefing order (Charge No. 1); (2) did not instruct the probate judges on the effect of *Obergefell* on the *API* orders (Charge No. 2); (3) did not decide substantive legal issues, but left those for resolution by the Alabama Supreme Court (Charge No. 3); (4) did not instruct the probate judges on the effect of *Obergefell* on the *API* orders (Charge No. 4); and (5) did not interfere with proceedings in state or federal courts but merely pointed out the status of the *API* orders pending further decision by the Alabama Supreme Court. Charge No. 6 fails because the JIC failed to comply with its own mandatory rules and also for the reasons stated in the Chief Justice's Statement of Nonrecusal. No genuine issues of material fact exist as to the meaning of the Order, which is a question of law for the Court. The Chief Justice is therefore entitled to summary judgment.

For similar reasons, the Court should deny the JIC's motion for summary judgment. "[T]he allegations of the complaint must be proved by clear and convincing evidence" Rule 10, Ala. R. P. Ct. Jud. Clear and convincing evidence is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the

Undisputed Facts. JIC brief, at 9. Paragraph 15 is not a statement of fact but an argument about the merits of the case that reflects the JIC's distortion of the meaning of the Administrative Order. The Chief Justice would incorporate by reference in ¶ 15 the text of the Administrative Order with no further comment.

correctness of the conclusion.” § 6-11-20(b)(4), Ala. Code 1975.⁶ The evidence for Charges No. 1-5, namely the Administrative Order itself, demonstrates that the allegations of the complaint have not been proven at all, let alone in a clear and convincing fashion. Charge No. 6 similarly fails for the reasons cited above. The JIC’s heightened burden of proof is applicable on a motion for summary judgment. § 12-21-12(c), Ala. Code 1975.

Respectfully Submitted,

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⁶ This definition of clear and convincing evidence in the punitive damages statute, § 6-11-20(b), Ala. Code 1975, is the same as that stated in the workmen’s compensation statute, § 25-5-81(c), Ala. Code 1975. The same definition has also been applied in termination of parental rights cases. *See Ex parte T.V.*, 971 So. 2d 1, 9 (Ala. 2007).

CERTIFICATE OF SERVICE

I certify that I have this 26th day of July, 2016, served a copy of the *Reply to the Response of the JIC to Chief Justice Moore's Motion for Summary Judgment and Opposition to the JIC's Cross-Motion for Summary Judgment* on the Judicial Inquiry Commission through electronic mail to:

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Rosa Hamlett Davis, Co-Counsel
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s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Petitioner

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

AFFIDAVIT OF CHIEF JUSTICE ROY S. MOORE

Chief Justice Roy S. Moore, being duly sworn, deposes and says:

1. Because of the confidential nature of internal communications at the Alabama Supreme Court, the following information has not heretofore been brought before the Court of the Judiciary. However, in my defense I am enclosing certain excerpts from my memoranda to the Court which I feel are necessary for a full understanding of why I issued the Administrative Order of January 6, 2016.

2. In the Administrative Order I described the reasons for its issuance as the anxious concern of the general public and the “confusion and uncertainty” among Alabama probate judges as to the status of the injunctive orders issued in March 2015 in *Ex parte State ex rel. Alabama Policy Institute*, No. 1140460 ___ So. 3d ___ (Ala. 2015).

3. While the JIC contends that my motivation to issue the Administrative Order was to defy the federal courts, the following excerpts from my memoranda to the Court in September and October, 2015 indicate that I strongly encouraged my colleagues to dispel the existing concern and uncertainty by promptly addressing the question posed in the

Court's order of June 29, 2015, namely "the effect of the Supreme Court's decision [in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)] on this Court's existing orders in this case."

4. I issued the Administrative Order on January 6, 2016, exactly six months from the deadline for the filing of briefs stated by the Court in its June 29 order. *My effort to preserve the public reputation of the Court and to urge compliance with Canon 3A(5), Ala. Canons Jud. Ethics*, is evident in the following excerpts from my memoranda to the Court about their delay in addressing this matter:

5. Memorandum of September 2, 2015.

On June 26, 2015, the United States Supreme Court issued its opinion in *Obergefell v. Hodges*. ... 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." ... The matter is now ripe for decision.

... 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.

....

[A]t this juncture any decision is better than no decision at all. The uncertainty facing the probate judges in this state is enormous. As the parties in this case, they need guidance from us on this Court's view of the legitimacy and controlling effect of *Obergefell*.

....

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 ... very unfair."

....

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

6. **Memorandum of 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 Enslin 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. “It 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) “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. ... [A]s 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.

...

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

7. By mid-February, 2016, almost eight months after the release of *Obergefell* and despite my effort to persuade the Court to decide the case, *API* still remained pending on the Court's docket. At that point a number of members of the public complained to the JIC about the Court's delay in disposing of the case. See Josh Moon, "Conservative Groups File Complaints Against the Alabama Supreme Court," *Montgomery Advertiser* (Feb. 18, 2016). A separate complaint was filed against each justice on February 18, 2016. See Exhibit 1. The complaints stated:

Failure of the Alabama Supreme Court to rule expeditiously in *API* – despite their own request for briefs, an Emergency Petition, and a Petition for Declaratory Order in a critical time of legal conflict, suggests nothing less than a dereliction of duty to constituents and other elected officials who are looking to the Court for direction. Canon 3 (Canons of Judicial Ethics) was no doubt established to prevent this this kind of extended silence and the negative effect such silence has had in the State of Alabama.

....

[O]n June 29, 2015, the Alabama Supreme Court invited the parties in *API* to address the "effect of the Supreme Court's decision on this Court's **existing orders** in this case no later than 5:00 p.m. on Monday, July 6." (emphasis added). See Corrected Order, June 29, 2015. The invitation was answered by several parties who filed briefs replete with compelling arguments and a great sense of urgency. There has been no response to these briefs.

....

In December of 2015, the Educational Update from the Southeast Law Institute mail-out addressed the case before the Alabama Supreme Court in *API* and the Court's baffling silence: "This uncertainty leaves us in somewhat of a quandary ... to answer all the questions, we must await the decision of the Alabama Supreme Court."

....

With such extraordinary developments over a period of seven months, the members of the Judicial Inquiry Commission must sympathize with the

frustration of Alabamians concerning the Court's silence in API. Probate judges are left in a sea of confusion - surrounded by conflicting orders and wondering why Petitions remain unanswered. Legislators echo the sentiment of the Southeast Law Institute (see Exhibit III) and feel immobile in a quandary as they consider solutions for the upcoming legislative session. Alabama voters wonder why the justices they elected seem to be ignoring a case before them – especially one of such importance to Alabama's future.

....

Whatever the reason, the seeming unwillingness to rule expeditiously in API and the continued silence on the particulars of the case from [name of Justice] is an injustice to the people of Alabama who await their decision. Is not the very purpose behind Canon 3 in the Canons of Judicial Ethics to prevent the necessity of such a complaint? The provisions of Canon3 include but are not limited to the following:

“A judge should dispose promptly of the business of the court, being ever mindful of matters taken under submission. On the first day of January and the first day of July of each year, each judge shall file a report which shall show the cases and/or matters which have been under submission or advisement for a period of six months or longer, and if there has been no case or matter under submission or advisement for a period of six months or longer the report shall so state. Where a matter or case has been under submission or advisement for six months or longer, the report shall give the date that the matter or case was taken under submission or advisement and the reasons for the failure of the judge to decide such matters or cases. Trial judges shall file their lists with the administrative office of courts, and appellate judges shall file their lists with the clerk of their appellate court.” Canons of Judicial Ethics, Canon 3(A)(5)

Eight days after receiving the complaints, the JIC summarily dismissed them, declining to inquire into the legitimacy of the delay. In an unusual move, the Commission notified the justices that the complaints had been dismissed. Exhibit 2.

8. A week later, on March 4, 2016, the Alabama Supreme Court ruled, issuing a one-sentence order which simply stated that “all pending motions and petitions are

DISMISSED.” The Court also issued a Certificate of Judgment that listed each of the March 2015 orders, thus bringing the case to a close and formally leaving those orders undisturbed. The Court did not, however, provide an opinion on the question that had been pending for eight months since its June 29, 2015, order—the effect of *Obergefell* on the *API* orders.

9. The Administrative Order of January 6, 2016, without criticizing the Court for its delay, informed the probate judges that the Court “continues to deliberate” and that the *API* orders thus remained in effect “[u]ntil further decision by the Alabama Supreme Court.” The June 29, 2015, order of the Alabama Supreme Court that requested briefing on the effect of *Obergefell* on the *API* orders did not mention the federal injunction which had been issued after the Court’s March 2015 orders in *API*. Likewise, my Administrative Order, reporting on the status of the *API* orders in light of the June 29 briefing order, confined itself to the same question and recognized “the apparent conflict between the decision of the Alabama Supreme Court in *API* and the decision of the United States Supreme Court in *Obergefell*.” In my Administrative Order I declined to provide any guidance on this question which was a matter for the entire Court to decide. As the Administrative Order stated: “I am not at liberty to provide any guidance to Alabama probate judges on the effect of *Obergefell* on the existing orders of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.”

10. The actions I took in issuing the Administrative Order were consistent with my duty to provide “for the orderly administration of justice within the state,”

Administrative Order, at 4 (quoting § 12-2-30(b)(8), Ala. Code 1975), and complied with the requirement in Canon 3A(5) to “dispose promptly of the business of the court.” I did not direct the probate judges to disobey a federal order, but instead sought to encourage the Alabama Supreme Court to fulfill its duty to rule on the status of its *API* orders. By issuing the Administrative Order, I sought to address the confusion and uncertainty among the probate judges of Alabama arising from the Court’s delay.



Chief Justice Roy S. Moore

Subscribed and sworn to before me
this 26 day of July, 2016.

Madison Grantham

NOTARY PUBLIC

My commission expires June 7, 2020.

COMPLAINT ABOUT AN ALABAMA STATE COURT JUDGE

Today's Date: 2/17/2016 Your Name: Terry B. Patton
Your Telephone Number: 334.695.2414 Your Address: P.O. Box 1627, Eufavia, AL 36027
Your Attorney's Name: N/A Your Attorney's Telephone Number: N/A
Judge's Name: Chief Justice Roy Moore Court: Alabama Supreme Court
Case Number: 1140460 County: -
Name of Case: Ex parte State of Alabama ex rel. Alabama Policy Institute

STATEMENT OF FACTS AND ALLEGATIONS
(See instructions on reverse)

See Attachment 1

The allegations and statements of fact set forth above and in any additional attached pages are true and correct to the best of my knowledge, information and belief, and I understand that a copy of this complaint and all supporting materials will be provided by the Commission to the judge against whom the complaint is made.

Dr. Terry B. Patton
(Complainant's Signature)

SUBSCRIBED AND SWORN to or affirmed before me this 17th day of February, 2016.

My Commission expires: 8-19-19

Angela M. Bowman
Notary Public

ATTACHMENT 1

**Time-Sensitive Complaint to the Judicial Inquiry Commission of Alabama on behalf of
Barbour County Tea Party, Alabama Patriots, Rainy Day Patriots, Conservative
Christians of Alabama, Common Sense Campaign, Christian Development and Renewal
Ministries, Rev. Allen Forte, Jr. (True Love Baptist Church), and Dr. Ken Jackson
(Christian Life Church)
February 17, 2016**

INTRODUCTION

We write to lodge a complaint against the Honorable Roy Moore, as a member of the Supreme Court of Alabama for their failure to “dispose promptly of the business of the court,” and for leaving Ex Parte State ex rel. Alabama Policy Institute ___ So. 3d ___ (Ala. 2015)(No.1140460) (“API”) under submission for “six months or longer” with no apparent procedural or technical reason known to the people of Alabama.

Failure of the Alabama Supreme Court to rule expeditiously in API – despite their own request for briefs, an Emergency Petition, and a Petition for Declaratory Order in a critical time of legal conflict, suggests nothing less than a dereliction of duty to constituents and other elected officials who are looking to the Court for direction. Canon 3 (Canons of Judicial Ethics) was no doubt established to prevent this this kind of extended silence and the negative effect such silence has had in the State of Alabama.

BACKGROUND

On January 23, 2015, Judge Callie V. Granade of the United States District Court for the Southern District of Alabama ruled in Searcy v. Strange that Alabama’s Sanctity of Marriage Amendment (Ala. Const. Amend. 774) was unconstitutional. *See Searcy v. Strange*, [Civil Action No. 14-0208-CG-N, Jan. 23, 2015] ___ F. Supp. 3d ___ (S.D. Ala. 2015)

On February 8, 2015, Chief Justice Roy Moore issued an Administrative Order to probate judges: “Effective immediately, no Probate Judge of the State of Alabama nor any agent or employee of any Alabama Probate Judge shall issue or recognize a marriage license that is inconsistent with Article 1, Section 36.03, of the Alabama Constitution or § 30-1-19, Ala. Code 1975. (*See Administrative Order of the Chief Justice of the Supreme Court, February 8, 2015.*)

On March 3, 2015, the Alabama Supreme Court issued a Writ of Mandamus in a 7-1 opinion clarifying the boundaries of Judge Callie Granade’s jurisdiction and establishing the proper authority of the Alabama Supreme Court in the State *See Ex Parte State ex rel. Alabama Policy Institute ___ So. 3d ___* (Ala. 2015)(No.1140460), writing that: “As it has done for approximately two centuries, Alabama law allows for "marriage" between only one man and one woman. Alabama probate judges have a ministerial duty not to issue any marriage license

contrary to this law. Nothing in the United States Constitution alters or overrides this duty.” This order was reinforced by the same margin on March 10, 2015 *See Ex Parte State ex rel Alabama Policy Institute* [Ms. 1140460, Mar. 10, 2015] ___ So. 3d ___ (Ala.2015) and March 12, 2015 *See Ex Parte State ex rel Alabama Policy Institute* [Ms. 1140460, Mar. 12, 2015] ___ So. 3d ___ (Ala.2015)

On June 26, 2015, the Supreme Court of the United States ruled in *Obergefell v. Hodges*, a case from the United States Court of Appeals for the Sixth Circuit (“Michigan, Kentucky, Ohio, and Tennessee” *Obergefell v. Hodges*, 576 U. S. ___ (2015) at *1), and purported to strike down state bans on same-sex marriage as unconstitutional. *See Obergefell v. Hodges*, 576 U. S. ___ (2015)

Three days later, on June 29, 2015, the Alabama Supreme Court invited the parties in API to address the "effect of the Supreme Court's decision on this Court's **existing orders** in this case no later than 5:00 p.m. on Monday, July 6." (emphasis added). *See Corrected Order*, June 29, 2015. The invitation was answered by several parties who filed briefs replete with compelling arguments and a great sense of urgency. There has been no response to these briefs.

On September 16, 2015, Washington County Probate Judge Nick Williams filed an “Emergency Petition for Declaratory Judgement and/or Protective Order in Light of Jailing of Kentucky Clerk Kim Davis.”

On September 22, 2015, Elmore County Probate Judge John Enslin joined Judge Williams in the Emergency Petition.

On October 5, 2015, Elmore County Probate Judge John Enslin filed his own Petition for Declaratory Judgement. Both the Emergency Petition and the Petition for Declaratory Judgement appear to have been ignored.

On October 1, 2015, Eunie Smith (President of Eagle Forum of Alabama) and Dr. John H. Killian (former president of the Southern Baptist Convention) co-authored an op-ed reflecting a common sentiment of Alabamians titled, “Where is the Supreme Court of Alabama?” (*See Exhibit I.*)

On November 6, 2015, the American College of Pediatricians filed a brief to the Alabama Supreme Court urging them to act on behalf of Alabama’s children. (*See Exhibit II.*)

In December of 2015, the Educational Update from the Southeast Law Institute mail-out addressed the case before the Alabama Supreme Court in API and the Court’s baffling silence: “This uncertainty leaves us in somewhat of a quandary....to answer all the questions, we must await the decision of the Alabama Supreme Court. We are encouraging all of those who have great concern over this issue to be prayerfully patient in hopes for the right outcome.” (*See Exhibit III.*)

On January 6, 2015, Chief Justice Roy Moore issued an Administrative Order stating: “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.” He further noted that after Obergefell both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Kansas wrote that Obergefell was only binding on the Sixth Circuit – not the Eighth Circuit or Kansas. (*See* Administrative Order of the Chief Justice of the Alabama Supreme Court, January 16, 2016.)

COMPLAINT

With such extraordinary developments over a period of seven months, the members of the Judicial Inquiry Commission must sympathize with the frustration of Alabamians concerning the Court’s silence in API. Probate judges are left in a sea of confusion - surrounded by conflicting orders and wondering why Petitions remain unanswered. Legislators echo the sentiment of the Southeast Law Institute (*see* Exhibit III) and feel immobile in a quandary as they consider solutions for the upcoming legislative session. Alabama voters wonder why the justices they elected seem to be ignoring a case before them – especially one of such importance to Alabama’s future.

Because of his remarkable courage to “take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state,” (Ala. Code §12-2-30) and state the technical realities surrounding Obergefell and API, even in the face of criticism, we have no doubt that fear of criticism is not a concern of Chief Justice Roy Moore.

Whatever the reason, the seeming unwillingness to rule expeditiously in API and the continued silence on the particulars of the case from Chief Justice Roy Moore is an injustice to the people of Alabama who await their decision. Is not the very purpose behind Canon 3 in the Canons of Judicial Ethics to prevent the necessity of such a complaint? The provisions of Canon 3 include but are not limited to the following:

“A judge should dispose promptly of the business of the court, being ever mindful of matters taken under submission. On the first day of January and the first day of July of each year, each judge shall file a report which shall show the cases and/or matters which have been under submission or advisement for a period of six months or longer, and if there has been no case or matter under submission or advisement for a period of six months or longer the report shall so state. Where a matter or case has been under submission or advisement for six months or longer, the report shall give the date that the matter or case was taken under submission or advisement and the reasons for the failure

of the judge to decide such matters or cases. Trial judges shall file their lists with the administrative office of courts, and appellate judges shall file their lists with the clerk of their appellate court.” Canons of Judicial Ethics, Canon 3(A)(5)

CONCLUSION

Thus, for any part Chief Justice Moore has played in the Alabama Supreme Court’s deafening seven month silence, their failure to “dispose promptly of the business of the court,” and their leaving API under submission for “six months or longer” with no apparent procedural or technical reason, the undersigned respectfully requests that the Judicial Inquiry Commission investigate our concerns and require that the Honorable Roy Moore give answer and explanation to these charges.



Judicial Inquiry Commission

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MONTGOMERY, AL 36104

February 26, 2016

Hon. Roy Moore
Chief Justice
Alabama Supreme Court
300 Dexter Avenue
Montgomery, AL 36104

Dear Chief Justice Moore:

Pursuant to Rule 17, Ala. R. P. Jud. Inq. Comm'n, a majority of the members of the Commission present at a duly called meeting of the Commission may authorize non-Bar members of the Commission to communicate informally with a judge if the contents of that communication are also so authorized. Although the Commission has rarely if ever made such communication, it was the unanimous decision of all members present at a duly called meeting this date, February 26, 2016, to authorize the Commission's three lay members to inform you that a complaint was filed against you by Mr. Terry B. Barton, on February 18, 2016. The Commission voted today to summarily dismiss that complaint as having presented no reasonable basis to initiate an investigation. Mr. Barton will be notified of the Commission's decision in a letter mailed this date.

Sincerely,

A handwritten signature in black ink, appearing to read "D Scott".

Mr. David Scott
Lay Member

A handwritten signature in black ink, appearing to read "D Thrasher".

Dr. David Thrasher
Lay Member

A handwritten signature in black ink, appearing to read "R Malone".

Mr. Ralph Malone
Lay Member

Relevant Chronological Events

- March 3, 2015: Alabama Supreme Court orders four probate judges, named parties in *Ex parte State ex rel. Alabama Policy Institute*, No. 1140460 (“API”), to comply with Alabama marriage law. Moore had recused.
- March 10, 2015: Alabama Supreme Court orders a fifth probate judge to comply with Alabama marriage law. Moore had recused.
- March 12, 2015: Alabama Supreme Court enjoins all Alabama probate judges to comply with Alabama marriage law. Moore had recused.
- June 26, 2015: The United States Supreme Court issues its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
- June 29, 2015: The Alabama Supreme Court invites the parties in API to address by July 6 the “effect of the Supreme Court’s decision [in *Obergefell*] on this Court’s existing orders in this case.”
- August 11, 2015: The United States Court of Appeals for the Eighth Circuit rules that *Obergefell* directly “invalidated laws in Michigan, Kentucky, Ohio, and Tennessee,” but, though valid as precedent, did not moot marriage cases in its jurisdiction. *Waters v Ricketts*, 798 F.3d 682, 685 (8th Cir. 2015) (Nebraska); *Jernigan v Crane*, 796 F.3d 976, 979 (8th Cir. 2015) (Arkansas); *Rosenbrahn v Daugaard*, 799 F.3d 918, 922 (8th Cir. 2015) (South Dakota).
- January 6, 2016: Chief Justice Moore issues an Administrative Order stating that the March 2015 orders of the Alabama Supreme Court in API remain in effect until modified by the Court, but states: “*I am not at liberty to provide any guidance to Alabama probate judges on the effect of Obergefell on the existing orders of the Alabama Supreme Court. That issue remains before the entire Court which continues to deliberate on the matter.*”
- March 4, 2016: The Alabama Supreme Court dismisses the pending motions and petitions in API and issues the Certificate of Judgment, leaving its March 2015 orders undisturbed.
- March 25, 2016: In an appellate brief before the Eleventh Circuit Federal Court of Appeals, *the ACLU of Alabama states that Obergefell “did not directly rule on Alabama’s constitutional and statutory provisions ... because those provisions were not before the Supreme Court.”*

Appellant's Reply Brief, *Aaron-Brush v. State of Alabama*, No. 16-10028, 2016 WL 1376047, at *3 (11th Cir. March 25, 2016).

March 25, 2016: In the same brief, the ACLU states that "the Alabama Supreme Court has acted in a manner that leaves in place its earlier order to Alabama's probate court judges to follow Alabama law with regard to its prohibition of same-sex marriage, notwithstanding *Obergefell*." *Id.* at *2-*3.

June 7, 2016: United States District Judge Callie Granade states that in its March 4, 2016 order in *API* "the Alabama Supreme Court did not vacate or set aside its earlier writ of mandamus directing Alabama's probate judges to comply with the Alabama [marriage] laws." Order, *Strawser v. Strange*, No. 14-0424-CG-C, 2016 WL 3199523, at *2 (S.D. Ala. June 7, 2016).

1 what you're saying.

2 CHIEF JUSTICE MOORE: I'm saying it
3 was issued before *Obergefell*. In other
4 words, *Obergefell* didn't exist on March
5 3rd, 2015. It was in June 26 when
6 *Obergefell* was issued. And thereafter, the
7 Alabama Supreme Court, on June 29th,
8 requested briefing on the effect of
9 *Obergefell* on the existing orders in *API*.
10 It continued about a year, from originally
11 March 3 to March 4th, when they finally
12 issued a certificate of judgment in that
13 case. They did not retract the orders.
14 The certificate of judgment lists the
15 orders.

16 MS. DAVIS: Didn't --

17 JIC: Let me ask one more question.

18 MS. DAVIS: I'm sorry.

19 JIC: Do you believe that your
20 administrative order of January 6, 2016,
21 ought to now be rescinded?

22 CHIEF JUSTICE MOORE: My January
23 order? Yeah, is automatically rescinded.

1 What was my order on January 6th? Until
2 further decision by the Alabama Supreme
3 Court, the existing orders are in effect.

4 JIC: All right. Should that be --

5 CHIEF JUSTICE MOORE: There was a
6 final -- there was another decision of the
7 Alabama Supreme Court in March.

8 JIC: Should that be made more
9 publicly known that that administrative
10 order is no longer in force and effect?
11 Should that be made obvious to people?

12 CHIEF JUSTICE MOORE: I said until
13 further decision by the Alabama Supreme
14 Court -- decision by the Alabama -- the
15 orders remain in effect. The orders that
16 went in by the Supreme Court saying motions
17 and petitions dismissed, certificate of
18 judgment issued, which included the
19 preexisting orders, in effect left those
20 orders in existence. Am I going to put out
21 another administrative order? No.

22 JIC: I'm sorry. Go ahead.

23 MS. DAVIS: That's okay.

1 They didn't even mention my order, but it
2 is superseded because it's a higher order.

3 JIC: I understand.

4 CHIEF JUSTICE MOORE: That's why I
5 say it's superseded. Then the next order
6 that I issued, the administrative order,
7 was until further decision by the Supreme
8 Court. Well, they made a further decision.
9 So it, too, is really superseded.

10 JIC: So when it was superseded by
11 this -- the latest decision, right? Your
12 administrative order was superseded, right,
13 by this latest decision, March 3rd?

14 CHIEF JUSTICE MOORE: You're
15 talking about the January 6 administrative
16 order?

17 JIC: Right.

18 CHIEF JUSTICE MOORE: It, too,
19 would be superseded.

20 JIC: Okay. That's the one I'm
21 talking about. January the 6th was
22 superseded.

23 CHIEF JUSTICE MOORE: Well, the

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MOORE, Chief Justice (statement of nonrecusal).

On February 11, 2015, the State of Alabama on relation of the Alabama Policy Institute and the Alabama Citizens Action Program initiated this case by filing in this Court an "Emergency Petition for Writ of Mandamus." The petition sought a writ of mandamus "directed to each Respondent judge of probate, commanding each judge not to issue marriage licenses to same-sex couples and not to recognize any marriage licenses issued to same-sex couples."

In its statement-of-facts section the petition described the federal injunctions in Searcy v. Strange, 81 F. Supp. 3d 1285 (S.D. Ala. 2015), and Strawser v. Strange (Civil No. 14-0424-CG-C) (S.D. Ala. Jan. 26, 2015), which enjoined the Alabama Attorney General from enforcing Alabama's Sanctity of Marriage Amendment, Art. I, § 36.03, Ala. Const. 1901 ("the marriage amendment"), and the Alabama Marriage Protection Act, § 30-1-19, Ala. Code 1975 ("the marriage act"). The petition further stated:

"On February 8, 2015, Chief Justice Roy S. Moore of the Supreme Court of Alabama entered an administrative order ruling that neither the Searcy nor the Strawser Injunction is binding on any Alabama probate judge, and prohibiting any probate judge from issuing or recognizing a marriage license

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which violates the Marriage Amendment or the Marriage Act."

Attached to the petition as Exhibit C was a copy of the referenced administrative order. In subsequent paragraphs the petition identified by name four respondent Alabama probate judges who allegedly were issuing marriage licenses to same-sex couples "in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order." (Emphasis added.) The petition also named as respondents 63 Judge Does "who may issue, or may have issued, marriage licenses to same-sex couples in Alabama as a result of the Searcy or Strawser Injunction, in violation of the Marriage Amendment, the Marriage Act, and the Administrative Order."

The petition argued that the writ should issue because (1) the marriage amendment and the marriage act were consistent with the United States Constitution and (2) this Court was not bound by a federal district court's interpretation of the United States Constitution. Alternatively, the petition stated:

"Chief Justice Moore's Administrative Order provides a separate basis for mandamus relief because it directly prohibits all Alabama probate judges from issuing marriage licenses to same-sex couples in violation of the Marriage Amendment and the Marriage

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Act. (Admin. Ord. (Ex. C) at 5.) The Administrative Order is binding on all probate judges for the reasons stated in the order. Just as mandamus is appropriate for this Court to command a lower court's compliance [with] this Court's mandate, see, e.g., Ex parte Ins. Co. of N. Am., 523 So. 2d 1064, 1068-69 (Ala. 1988), it is appropriate for this Court to command probate judges' compliance with the Administrative Order."

Because the petition requested, as an alternative to the determination of the constitutional issues, that this Court order the enforcement of the administrative order, I abstained from voting on this Court's order of February 13, 2015, that ordered the respondents to file answers and permitted them to file briefs. I also abstained from voting on the opinion and order of March 3, 2015, that granted the petition and ordered the named probate judges "to discontinue the issuance of marriage licenses to same-sex couples." On March 3, 2015, I explained in a note to my fellow Justices:

"I have decided to abstain from voting in this case to avoid the appearance of impropriety in light of the memorandum of February 3, 2015, and the administrative order of February 8, 2015 that I provided to Alabama probate judges in my role as administrative head of the Unified Judicial System."

I likewise have abstained from voting on subsequent orders in this case.

In Ex parte Hinton, 172 So. 3d 348 (Ala. 2012), Justice

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Shaw addressed the question whether he could sit on a case "given that it was previously before me when I was a judge on the Court of Criminal Appeals." 172 So. 3d at 353. Canon 3.C.(1), Ala. Canons of Jud. Ethics, states: "A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned" Justice Shaw noted that "'a reasonable person has a reasonable basis to question the impartiality of a judge who sits in [an appellate court] to review his own decision as a trial judge.'" 172 So. 3d at 354-55 (quoting Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978)). See § 12-1-13, Ala. Code 1975. For an analogous reason I declined to vote in this case when my administrative order was potentially under review. Compare Rexford v. Brunswick-Balke-Collender Co., 228 U.S. 339 (1913) (construing federal law and noting that an appellate judge should not pass upon "the propriety, scope, or effect of any ruling of his own made in the progress of the cause in the court of first instance").

Justice Shaw identified, however, an exception to the principle that a judge should not review a case in which the

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judge had participated below: "The principle that a judge must recuse himself or herself in an appeal where the judge ruled in the case while a member of a lower court has been held not to apply if the issue on appeal is different from the issue ruled upon below." 172 So. 3d at 355. In my administrative order, I addressed the issue whether probate judges in Alabama were bound by the orders in Searcy and Strange when they were not parties to those cases. This Court's order of March 3, 2015, which held that the United States Constitution did not require a state to recognize same-sex marriage, mooted that issue.

The issuance of the opinion in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), on June 26, 2015, has sufficiently altered the posture of this case to cause me to reconsider my participation. The effect of Obergefell on this Court's writ of mandamus ordering that the probate judges are bound to issue marriage licenses in conformity with Alabama law is a new issue before this Court. The controlling effect of Obergefell was not at issue when I earlier abstained from voting. The issue then addressed was the effect of the order of a federal district court, which I had addressed in my

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administrative order. In his analysis of the recusal issue in Hinton, Justice Shaw said:

"Participation in the instant case does not involve a determination of the correctness, propriety, or appropriateness of what I did as a member of the Court of Criminal Appeals in Hinton v. State, because we are now faced with an issue that had not been decided by the trial court in the case that was before the Court of Criminal Appeals while I was serving on that court. My impartiality cannot be questioned because I am not called upon to review my prior decision"

172 So. 3d at 355. Likewise in this case, the issue now before the Court "does not involve a determination of the correctness, propriety, or appropriateness" of my administrative order.

In joining this case to consider the effect of Obergefell, I am not sitting in review of my administrative order, nor have I made any public statement on the effect of Obergefell on this Court's opinion and order of March 3, 2015. My expressed views on the issue of same-sex marriage are also not disqualifying.

"'A judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, even if such views are strongly held. After all, judges commonly come to a case with personal views on the underlying subject matter. ... Far from necessarily warranting recusal, typically such views merely mark an active mind.'"

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Barber v. Jefferson Cty. Racing Ass'n, Inc., 960 So. 2d 599, 618 (Ala. 2006) (Stuart, J., statement of nonrecusal) (quoting United States v. Snyder, 235 F.3d 42, 48 (1st Cir. 2000) (citations omitted)).

In Barber, the defendants were charged with "operating illegal gambling devices at the Birmingham Race Course." 960 So. 2d at 601. They sought Justice Bolin's recusal because a voter guide for the 2004 election listed him as opposing gambling. Justice Bolin responded as follows:

"My position on that 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, but my personal opposition to the above acts does not prevent me from fairly and unbiasedly participating in cases involving such acts."

Barber, 960 So. 2d at 620 (Bolin, J., statement of nonrecusal) (emphasis added). See also Barber, 960 So. 2d at 618 (Stuart, J., statement of nonrecusal) (stating that her "decision in a case [is] based on the application of the law to the facts in that particular case, regardless of my personal opinion").

Although I have made public comments critical of Obergefell in which I quoted extensively from the four dissenting Justices in that case, "'a judge's expressing a

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viewpoint on a legal issue is generally not deemed to be disqualifying in and of itself; this is usually true without regard to where such judicial views are expressed, and even if they are expressed somewhat prematurely or harshly.'" Ex parte Ted's Game Enters., 893 So. 2d 376, 392 (Ala. 2004) (See, J., statement of nonrecusal) (quoting Richard E. Flamm, Judicial Disqualification § 10.7 (1996)). Most noteworthy, I have not publicly commented on the question whether this Court is bound to follow Obergefell or on the effect of Obergefell on this Court's March 3, 2015, order.¹

Furthermore, my job as Chief Justice requires me to participate in every case in which I am qualified to sit.

"By establishing a Supreme Court consisting of nine Justices, Alabama law presumes that those Justices have something of value to contribute to the resolution of a case. Consequently, when a Justice recuses himself or herself unnecessarily, the recusal deprives the parties and the public of the benefit of the Justice's participation and the Justice fails to do the job he or she was elected to do."

Jones v. Kassouf & Co., 949 So. 2d 136, 145 (Ala. 2006)

¹By contrast, Supreme Court Justice Ruth Bader Ginsburg presided at a same-sex wedding while Obergefell was pending before the Supreme Court, thus demonstrating her view of the merits of that very case. Maureen Dowd, Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word "Constitution," New York Times, May 18, 2015.

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(Parker, J., statement of nonrecusal). Even when issues are difficult and controversial, a judge must decide. "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). See also Federated Guar. Life Ins. Co. v. Bragg, 393 So. 2d 1386, 1389 (Ala. 1981) (stating that "'it 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'" (quoting 26 C.J.S. Declaratory Judgments § 161 (1956))); McGough v. McGough, 47 Ala. App. 223, 226, 252 So. 2d 646, 648-49 (Ala. Civ. App. 1970) ("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.").

Because it is a judge's duty 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 procedure. The petition for a writ of certiorari in American Broadcasting

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Cos. v. Aereo, Inc., 573 U.S. ____, 134 S. Ct. 2498 (2014), according to the Supreme Court docket sheet, was filed October 11, 2013. The Court granted the petition on January 10, 2014. The docket sheet contains a notation that Justice Alito did not participate in the decision to grant certiorari. On March 3, 2014, 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, 2014, however, the docket sheet states: "Justice Alito is no longer recused in this case." Justice Alito participated in the oral argument on April 22 and dissented when the opinion was released on June 25. Thus, in Aereo, Justice Alito recused himself and then unrecused himself. The same scenario played out in Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008). Chief Justice Roberts, who did not vote on the decision to grant certiorari on March 26, 2007, "unrecused" himself on September 20 in time to participate in the oral argument on October 9 and in the final decision.²

²The docket sheets for Aereo (No. 13-461) and Scientific-Atlanta (No. 06-43) can be found on the Supreme Court Web site. See <http://www.supremecourt.gov>. Copies of those docket sheets printed from the Web site are available in the case file of the clerk of the Alabama Supreme Court.

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As explained above, I abstained from voting in this case to avoid sitting in review of my own administrative order. Because that order is no longer at issue in this case, I may appropriately sit on the case to review a different issue. A federal court noted that in certain instances a trial judge who had disqualified himself "could resume direction or even decide the issues. ... But the reason for resuming control should be more than a second reflection on the same facts which the trial judge considered originally disqualified him." Stringer v. United States, 233 F.2d 947, 948 n.2 (9th Cir. 1956). The relevant facts in this case are not the same because my administrative order is no longer at issue, having been superseded by orders of the entire Court.