IN THE SUPREME COURT OF ALABAMA

Ex Parte STATE OF ALABAMA, ex rel. ALABAMA POLICY INSTITUTE, ALABAMA CITIZENS ACTION PROGRAM, and JOHN E. ENSLEN, in his official capacity as Judge of Probate for Elmore County,	)	CASE NO. 1140460
Petitioner,	)	
v.	)	
ALAN L. KING, in his official capacity as Judge of Probate for Jefferson County, Alabama, et al.,	)	
Respondents.	)	

MOTION TO EXCLUDE THE JUDICIAL INQUIRY COMMISSION FILING & REQUEST THAT CHIEF JUSTICE MOORE NOT RECUSE

COMES NOW the Respondent Nick Williams, Judge of the Probate Court in and for Washington County, Alabama, and hereby presents this special request due to an extraordinary circumstance:

Let's not kid ourselves. The Emperor does not have on new clothes.[1] Although the Southern Poverty Law Center

[1] "In the great city where he [the Emperor] lived, life was always gay. Every day many strangers came to town, and among them one day came two swindlers. They let it be known

(SPLC) apparently does not represent a party in this case, it has served as counsel for *amicus* Equity Alabama and has filed a request to submit its own *amicus* brief. The not-so-thinly-veiled purpose of the SPLC Judicial Inquiry Commission (JIC) filings against Chief Justice Roy Moore and the timing of its Second Amended complaint filed July 29, 2015, is to do one thing - - to influence nay, to intimidate, this Court collectively and its Justices individually to yield on the issue of marriage.

Through its counsel and President who signed the various ethics complaints listing his Alabama State Bar number, the SPLC, while alleging various violations by the Chief Justice (who has heretofore recused himself from the March 3, 2015, adjudication in API) commits a Rule 3.6 violation itself. Rule 3.6 of the Alabama Rules of Professional Conduct provides that:

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they were weavers, and they said they could weave the most magnificent fabrics imaginable. Not only were their colors and patterns uncommonly fine, but clothes made of this cloth had a wonderful way of becoming invisible to anyone who was unfit for his office, or who was unusually stupid." Hans Christian Anderson Center, Hans Christian Anderson: The Emperor's New Clothes, available at http://www.andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed

> create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Ala. R. Prof. Cond. 3.6(emphasis added).

The technical determination of whether SPLC's counsel has acted in violation of Rule 3.6 will be for the JIC in the event someone files a complaint. More important for purposes of this filing, the SPLC has timed its amended JIC complaint to conveniently coincide with when this Court is widely expected to issue its ruling that could have nationwide and historic consequences not only on the subject of marriage but on the broader constitutional issues of federalism and the relationship between the federal and state courts of this nation. The timing of that filing obviously is intended to influence the outcome of this case and shake the confidence each Justice has in his or her convictions as to the right application of the law.

Were its JIC filings focused on removing the Chief Justice, why the timing and overt focus on the API case

from which he has recused? Because it is not about the Chief Justice. Nor is it about the SPLC's repeated efforts to circumvent the will of the people of Alabama expressed in the 2012 Chief Justice election by filing, as in 2003/2004, another ethics complaint against him. It is about the "mak[ing of] an extrajudicial statement . . . [and] disseminat[ing it expecting] that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding". See Ala. R. Prof. Cond. 3.6(a). Although the "ordinar[y]" statements of subparagraph (b) are not at issue here, nothing about the API and Obergefell cases is ordinary.

The specter of the Chief Justice violating Canons 3 and 5 is just that. He is sworn to support and defend the United States Constitution and the Alabama Constitution. Pursuant to the Ala. Const., art. VI, § 149, the Chief Justice is the administrative head of the judicial system. Pursuant to Ala. Code 1975 § 12-2-30(b)(7), he is authorized and empowered to "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state."

In January 2015 and for months thereafter, Alabama faced a constitutional crisis in which the probate judges and their employees confronted the dilemma of having to follow either the January 23, 2015, order of an unelected federal judge for the Southern District of Alabama which violated many of the probate judges' religious beliefs, or the Sanctity of Marriage Amendment to the Alabama Constitution which had been ratified in 2006 by 81% of Alabama voters. Some probate judges were issuing homosexual marriage licenses; others were refusing. Still others were refusing to issue any marriage licenses.

The "affirmative and appropriate action" of § 12-2-30 is a duty of the office, not the plaything of politics; nor is it to be exercised by measuring the temperature of those who may complain of the action. That action includes the constitutional duty to advise the Governor and other officials of the State of Alabama, including her citizenry, about the administration of justice under the dominion of the Alabama Constitution. The Chief Justice's January 27, 2015, letter to the Governor and his February 8, 2015, Administrative Order to Alabama probate judges, were necessary and proper to advise Alabama probate judges and

other officials concerning their duty to obey the Alabama Constitution with its Sanctity of Marriage Amendment rather than the order of the Southern District Court. Although court precedent cited by this Court in API (March 3, 2015) clearly establishes that state judges are not required to follow the decisions of lower federal courts, there was considerable confusion about that issue among probate judges, the general population, and even the legal community. The letter and order of the Chief Justice, followed by the order of this Court in API, brought clarity to a confusing situation.

The modern notion of federal judicial supremacy was not the view of many of America's founders. Even Marbury v. Madison, 5 U.S. 137 (1803), often regarded as the cornerstone of judicial review, articulated a much more moderate doctrine than is commonly supposed today. See Michael Stokes Paulson, The Irrepressible Myth of Marbury, Northwestern University School of Law Constitutional Theory Colloquium Series, February 18, 2004. As Chief Justice John Marshall stated in Marbury: "It is emphatically the province and duty of the judicial department to say what the law is." Id. at 177. He did not say it is *exclusively*

the province and duty of the judicial department to say what the law is. Many believed that each branch of government had the independent responsibility of judging a measure's constitutionality. In his veto message to the Senate on July 10, 1832, President Andrew Jackson declared that a national bank was unconstitutional despite the Court's 1819 McCulloch v. Maryland ruling to the contrary. He stated:

> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

The Avalon Project, President Jackson's Veto Message Regarding the Bank of the United States, July 10, 1832, available at http://avalon.law.yale.edu/19th_century/ajveto01.asp.

The SPLC claims that the Chief Justice undermined public confidence in the judiciary by promoting the "Lesser Magistrate" doctrine that lower-ranking officials such as state and county judges have the duty to resist higher magistrates when those higher magistrates become tyrannical or rule contrary to the Constitution or Higher Law. In so doing, it is complained that the Chief Justice violated Canon 2(A) by failing to "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Rather than refute the doctrine, the SPLC brands it as "subversive," (p.2), "fringe,"(p. 12), "anathema,"(p. 12), and an "outlandish doctrine" that "has no legitimate basis or place in our country's jurisprudence."(p. 13).

This doctrine is more commonly called interposition, and it has a substantial and legitimate place in American constitutional federalism and Western jurisprudence. It has been a part of this Chief Justice's constitutional

scholarship since before the people of Alabama elected him to the office for the second time. It is accepted and advocated by many, past and present, as a proper response and remedy for tyranny and abuse of power for which the SPLC offers no solution other than absolute submission to the federal courts. It constructs a stable middle-ground position between absolute submission (which leads to tyranny) and rebellion (which often leads to anarchy which is remedied by tyranny). We may legitimately disagree as to the meaning, application, and appropriateness of interposition. But SPLC's demand that a Chief Justice be removed merely for his philosophical approach to legal reasoning is simply the SPLC's attempt to achieve by judicial coup d'etat what they have consistently failed to achieve at the ballot box.

The SPLC claims the Chief Justice "promotes the erroneous legal proposition that opinions of the Supreme Court are not the supreme law of the land." (p. 12). That claim against the Chief Justice is erroneous because there is merit to that proposition. U.S. Const., art. VI, § 2 declares that the Constitution, federal laws made under the authority [of the Constitution], and treaties are the

supreme law of the land. It does not mention court decisions. In Swift v. Tyson, 41 U.S. 1, 18 (1842), Justice Story held:

> In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.[2]

The only constitutional provision cited by the SPLC is its invocation of the Supremacy Clause and the repeated chanting of the phrase "supreme law of the land." But what portion of the Constitution, according to Art. VI Sec. 2, is the supreme law of the land? The obvious answer is, all of it. Would the SPLC hold that the Thirteenth Amendment is more "supreme" than say the Second? The Fifth? The Tenth? Article V provides that amendments, when ratified,

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[2] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that in diversity of citizenship cases federal courts were not free to disregard the common law of the states, but the Court did not overrule Tyson's holding that court decisions do not constitute law) overruling, in part, Tyson, 41 U.S. 1 in part.

"shall be valid to all Intents and Purposes, as Part of this Constitution."

As Judge Williams argued in earlier filings, the powers not delegated to the federal government by the Constitution, or prohibited by it to the states, are reserved to the states respectively, or to the people. Is that constitutional doctrine subversive? Anathema, etc.? Nonetheless, it is constitutional. The provision reserving powers to the states is as fully the "supreme law of the land" as the provisions that delegate powers to the federal government or preserve free speech. Like many other Americans, the Chief Justice believes the powers delegated to the federal government have been interpreted too broadly and the powers reserved to the states have been interpreted too narrowly. One may agree or disagree, but surely holding, promoting and following this position is not an impeachable offense.

"Public confidence" in the judiciary is not defined by thoughts emanating from 400 Washington Avenue in Montgomery. It is promoted not by those who would elevate five unelected lawyers to the status of semi-absolute rulers. Public confidence in the judiciary is promoted by

those who would restore the checks and balances among the three branches of the federal government and who would restore the state judiciaries to their proper place in our constitutional system of government.

SPLC's assertion that the Chief Justice "has been forced to recuse himself from proceedings before the Alabama Supreme Court," (p. 6), is incorrect. He was not "forced" to recuse; he voluntarily recused to avoid any appearance of impartiality, a decision herein argued that the Chief Justice should reconsider. By contrast, U.S. Supreme Court Justices Ginsburg and Kagan refused to recuse in the Obergefell case, even though they had far greater reason to do so -- the fact that they had performed same-sex weddings and had made statements implying their belief that same-sex marriage is a constitutional right. Since they did not, Judge Williams moves that the Chief Justice resume his voting posture in this case.

Judge Williams will not tarry long on the SPLC's allegations concerning the relationship between the Chief Justice and the Foundation for Moral Law. He has no access to the details of that connection. However, Respondent will not refrain from noting the crudeness of the SPLC's

reference to Kayla Moore, wife of the Chief Justice and President of the Foundation for Moral Law, saying that "he allowed his wife to act as a surrogate to convey his sentiments...." (p. 16). The SPLC's clear implication is that Kayla Moore has no thoughts of her own, is unable to speak and act on her own, and does only what the Chief Justice allows her to do. This is an insult to Kayla Moore and to all women.

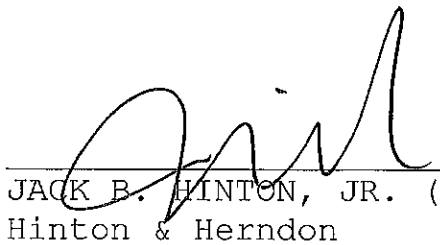
Judge Williams recognizes that this is not the proper forum in which to litigate the ethics complaint to which he is not a party. He has filed this special pleading out of concern that the complaint, timed as it was just before the expected release of this Court's opinion, could have the chilling effect of intimidating the Justices from doing what they believe is right in this case. The supreme relief Judge Williams seeks through this filing is that the Justices will stand by their convictions as they decide this case.

On March 3, 2015, this Court took a courageous stand and made a historic ruling. During 2014, federal judges across the nation (Judge Feldman of Louisiana excepted) were striking down state marriage laws and imposing on the

people and officials of those states the so-called right of homosexual marriage. Many complained. Some appealed with mixed results. But the Alabama Supreme Court stood its ground and defended the right of the people of Alabama to decide the marriage laws of their state. Throughout the nation, defenders of traditional marriage and defenders of constitutional federalism looked - - and continue to look - - to Alabama as their last best hope.

In the wake of Obergefell, the eyes of the nation are again turned upon Alabama. This Court has the lifetime opportunity to issue a landmark ruling that could inspire other courts, officials, and legislatures to stand with us. For such a time as this, the Justices of the Alabama Supreme Court have an opportunity to safety traditional marriage and spark a rebirth of constitutional federalism. Who knows when, or if, that opportunity will come again?

Respectfully submitted this 3rd day of August, 2015.



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