

Case No. 1160002

IN THE SUPREME COURT OF ALABAMA

ROY S. MOORE,)
Chief Justice of the)
Alabama Supreme Court,) ORAL ARGUMENT REQUESTED
)
Appellant,)
)
v.)
)
ALABAMA JUDICIAL INQUIRY)
COMMISSION,)
)
Appellee.)

PRINCIPAL BRIEF OF
APPELLANT CHIEF JUSTICE ROY S. MOORE

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Pursuant to Ala. R. App. P. 28 and the briefing order of this Court dated December 1, 2016, Appellant Roy Moore, Chief Justice of the Alabama Supreme Court ("Chief Justice" or "Chief Justice Moore") hereby files his Principal Brief in the above-captioned appeal.

STATEMENT REGARDING ORAL ARGUMENT

Chief Justice Moore requests oral argument, at least 30- to 45-minutes per side, to assist the Special Supreme Court in reviewing the Final Judgment of the Court of the Judiciary ("COJ") suspending him from office for the remainder of his term. Chief Justice Moore took office in January 2013. His term will expire in January 2019. He was suspended for the remainder of his term on September 30, 2016, thus making his suspension by far the longest in the 43-year history of the COJ.¹ The proper interpretation of Rule 16, Ala. R. Ct. Jud., as amended in 2002, is a key issue in this case and a matter of first impression. The COJ, lacking the unanimity required to remove the Chief Justice from office, decided to accomplish the same result by a lengthy suspension of two years and three

¹ The COJ was created as part of a complete revision of Article VI of the Alabama Constitution in a special election in December 1973.

months. (C.1142-45). In so doing, it imposed a de facto removal while avoiding the unanimity mandate of Rule 16.

The enormity of the COJ's gross excess of authority has profound implications for the judicial independence of every appellate, circuit, district, and probate judge in the state. If the COJ can remove a judge from office through the artful mechanism of a multi-year "suspension," Rule 16's unanimity requirement has no meaning. The COJ's power to punish judges should not be enlarged, as has been done in this case, by any other means than the constitutionally designated rulemaking process. See Art VI, § 157(c), Ala. Const. 1901 ("The Supreme Court shall adopt rules governing the procedures of the Court of the Judiciary.").

Because the parties could not anticipate the COJ's *ultra vires* actions and sinister evasion of the unanimity requirement for removal, that issue was not argued orally before the COJ or in briefs. Therefore, oral argument may be particularly helpful to the Special Court in considering the COJ's egregious violation of law.

In addition to the issue of the legality of the sanction imposed, the Court faces in this case two competing interpretations of the four-page Administrative Order that

the Chief Justice issued on January 6, 2016. (C.690-693). The COJ adopted the Judicial Inquiry Commission's ("JIC") distorted interpretation of the order as a directive to defy the federal courts. Chief Justice Moore demonstrated, by contrast, the express terms of the Administrative Order merely pointed out a legal truism that existing orders of this Court were still in effect until this Court decides otherwise. Because the interpretation of the meaning of the Administrative Order is a central issue in this case, the Court will benefit from the opportunity to refine its understanding through oral argument.

A further issue that will benefit from oral argument is whether the judgment satisfies the clear-and-convincing standard of proof.

WHEREFORE, Chief Justice Roy S. Moore requests the Court to grant his request for oral argument.

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STATEMENT OF JURISDICTION

After trial on September 30, 2016, the COJ granted Final Judgment in favor of the JIC. (C.1096-1145). Chief Justice Moore, timely filed a notice of appeal the same day. (C.1146-1150). The trial court had jurisdiction pursuant to Art. VI, § 157(a), Ala. Const. 1901. This court has jurisdiction to hear the appeal pursuant to Art. VI, § 157(b), Ala. Const. 1901, which provides that “[a] judge aggrieved by a decision of the Court of the Judiciary may appeal to the Supreme Court. The Supreme Court shall review the record of the proceedings on the law and the facts.” Art. VI, § 157(b), Ala. Const. 1901.

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STATEMENT OF THE CASE

On January 23, 2015, United States District Judge Callie Granade issued an opinion declaring unconstitutional the Alabama laws that defined marriage as the union of one man and one woman. *Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015). (C.740-745). On February 8, 2015, Chief Justice Moore issued an Administrative Order (that is not the subject of this appeal) to the Alabama probate judges, who issue marriage licenses, stating that they were not bound by Judge Granade's order because they were not parties or acting in concert with a party. (C.1059-1064) (citing Fed. R. Civ. P. 65). On February 9, 2015, District Judge Callie Grenade agreed with the Chief Justice, ruling that she could not hold Probate Judge Don Davis in contempt because he "is not a party in this case and the Order of January 23, 2015, did not directly order Davis to do anything." (C.669-71).

On March 3, 2015, in an opinion consistent with the Administrative Order of February 8, 2015, this Court upheld the Alabama Sanctity of Marriage Amendment, Art. I, § 36.03(b), Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-19(b), Ala. Code 1975, under the United States Constitution. *Ex parte State of Alabama ex rel. Alabama*

Policy Institute, No. 1140460, 2015 WL 892752, at *43 (Ala. 2015) (“*API*”). (C.855-903). On March 10, 2015, this Court extended the order to apply to all probate judges, except Don Davis. (C.904-14). On March 12, 2015, this Court made the *API* decision applicable to all probate judges, including Don Davis. (C.915-17).

On May 21, 2015, Judge Granade issued a class-action injunction against all Alabama probate judges regarding the same Alabama marriage laws this Court had just declared constitutional in *API*. *Strawser v. Strange*, 307 F.R.D. 604 (S.D. Ala. 2015); *Strawser v. Strange*, 105 F. Supp. 3d 1323 (S.D. Ala. 2015). (C.761-79).

On June 26, 2015, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). (C.780-824). On June 29, 2015, this Court issued an order to the parties in *API* inviting them “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 no later than 5:00 p.m. on Monday, July 6.” (C.382). The parties filed their respective briefs by July 6.

On January 6, 2016, Chief Justice Moore issued a second administrative order to the probate judges, informing them

that this Court was still in deliberation on the effect of *Obergefell* on its existing orders in *API* and that the March 2015 orders remained in effect until further decision of the Court. (C.690-93). Despite the requests of probate judges for this Court to provide guidance, this Court did not rule within the six-month requirement of Canon 3A(5) of the Alabama Canons of Judicial Ethics. Six months to the day from July 6, 2015, the Administrative Order provided a status update, stating the case was still pending and under review. The Administrative Order specifically stated it could not provide guidance and that further direction would come from this Court.

On March 4, 2016, this Court issued an order in *API* dismissing pending motions and petitions, (C.969), which prompted special writings by several Justices. (C.922-968). The Court also issued the Certificate of Judgment, thus bringing *API* to a conclusion and leaving undisturbed its injunctive orders entered in March 2015. (C.970)

On May 6, 2016, the JIC filed a complaint against Chief Justice Moore that triggered his automatic suspension from office. Art. VI, § 159, Ala. Const. 1901. The complaint contained six charges, all of which alleged that the January

2016 Administrative Order, violated Canons 1, 2, 2A, 2B, and 3 of the Alabama Canons of Judicial Ethics. Charge No. 4 additionally alleged a violation of Canon 3A(6). (C.1-305). The parties filed cross-motions for summary judgment, (C.330-402, 414-96, 504-57), both of which were denied after oral argument on August 8, 2016. (R.1-85); (C.610). Two days after the September 28 trial, (R.1-289), the COJ issued its 50-page Final Judgment, (C.1096-1145). Chief Justice Moore's notice of appeal was filed the same day. (C.1146-50).

STATEMENT OF THE ISSUES

1. Whether the COJ exceeded its authority by imposing a suspension without pay for the remainder of Chief Justice Moore's term, which represents a de facto removal, without having the unanimous concurrence of all members of the COJ as required by Rule 16.

2. Whether the COJ exceeded its authority in deciding Charge 6, which was never filed, voted, noticed, or affirmed in the required continuing investigation letters and thus was not properly before the COJ.

3. Whether the COJ erred in finding Chief Justice Moore guilty of Charges 1 - 5 without the support of clear and

convincing evidence and in contradiction to the plain text of the only piece of evidence relied upon in its opinion.

4. Whether the automatic suspension provision in Section 159 of the Alabama Constitution violates Chief Justice Moore's due process rights.

5. Whether the JIC violated the confidentiality mandated by its Rule 5 by disclosing information concerning Chief Justice Moore's case prior to a complaint ever being filed with the COJ.

STATEMENT OF THE FACTS

On January 23, 2015, United States District Judge Callie Granade issued an opinion that declared unconstitutional the Alabama laws that defined marriage as the union of one man and one woman. *Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015). (C.740-45, Ex. 12).² The only defendant in the case was Alabama Attorney General Luther Strange. Judge Granade stayed her order until February 9, 2015. (C.750). On February 8, 2015, Chief Justice Moore issued an Administrative Order to the Alabama probate judges, who issue

² Exhibit numbers are those identified in the *Joint Trial Exhibit List*, (C.684-687). For introduction of those exhibits at trial, see "Exhibit Index." (R.5-10).

marriage licenses, stating that they were not bound by Judge Granade's order because they were not parties or acting in concert with a party. (C.1059-64, Ex. 36). On February 9, 2015, District Judge Callie Grenade agreed with the Chief Justice, ruling that she could not hold Probate Judge Don Davis in contempt because he "is not a party in this case and the Order of January 23, 2015, did not directly order Davis to do anything." (C.753-55, Ex. 15).

On March 3, 2015, in an opinion consistent with the Administrative Order of February 8, 2015, this Court upheld that the Alabama Sanctity of Marriage Amendment, Art. I, § 36.03(b), Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-19(b), Ala. Code 1975, under the United States Constitution. "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [Alabama marriage] law. Nothing in the United States Constitution alters or overrides this duty." *Ex parte State of Alabama ex rel. Alabama Policy Institute*, No. 1140460, 2015 WL 892752, at *43 (Ala. 2015) ("API"). (C.855-903, Ex. 25) This Court cited many cases for the proposition that state and federal courts are equal when interpreting the federal Constitution. *See Johnson v. Williams*, 133 S. Ct. 1088, 1098

(2013) (“[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law.”); *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) (“federal district court decision cannot clearly establish law because, while they bind the parties . . . they are not authoritative as precedent and therefore do not establish the duties of nonparties.”); *Glass v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala. 2004) (“In determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here.”); *Ex Parte Johnson*, 993 So.2d 875, 886 (Ala. 2008) (“This Court is not bound by decisions of the United States Courts of Appeals or United States District Courts.”); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So.2d 367, 373 n.1 (Ala. 1993) (“This court is not bound by

decisions of lower federal courts."). The *per curiam* decision was nearly unanimous (7-1). Chief Justice Moore did not vote on that decision because his Administrative Order of February 8 was argued as a basis for granting the relief requested. (C.971-73).

On March 10, 2015, this Court extended the order to apply to all probate judges, except Don Davis. (C.904-14). On March 12, 2015, this Court made the *API* decision applicable to all probate judges in the state, including Don Davis. (C.915-17, Ex. 27).

On May 21, 2015, Judge Granade issued a class-action injunction against all Alabama probate judges regarding the same Alabama marriage laws this Court had just declared constitutional in *API. Strawser v. Strange*, 307 F.R.D. 604 (S.D. Ala. 2015); *Strawser v. Strange*, 105 F. Supp. 3d 1323 (S.D. Ala. 2015). (C.761-79, Exs. 17-18). Judge Granade stayed her order pending the U.S. Supreme Court opinion.

On June 26, 2015, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). (C.780-824). On June 29, 2015, this Court issued an order to the parties in *API* inviting them "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 no later than 5:00 p.m. on Monday, July 6." (C.918-21, Ex. 28). In September and October, two probate judges filed petitions seeking declaratory relief from the anticipated effects of *Obergefell*.³ In September and October 2016, Chief Justice Moore wrote memos to the Justices of this Court requesting that they reach a decision concerning the pending orders in *API*. (C.697-705). He advocated that any decision was better than silence and that probate judges deserved to know one way or another what this Court's decision would be on the pending matter. (C.697-707, Exs. 3-4).

On January 6, 2016, exactly six months after the July 6, 2015, deadline for filing briefs in *API*,⁴ Chief Justice Moore issued a second administrative order to the probate judges, informing them that this Court was still deliberating on the effect of *Obergefell* on its existing orders in *API* and that those orders remained in effect until further decision of the Court. (C.690-93, Ex. 1). The Administrative Order was issued

³ The COJ took judicial notice of the *API* record. (R.17-18).

⁴ All state judges are required to file a semiannual report listing all cases that "have been under submission or advisement for a period of six months or longer." Canon 3 (A)(5), Ala. Canons Jud. Ethics.

to in order to comply with Canon 3(A)(6), which required the Court to act within six-months of the time the case was ripe for review, and to provide a status report update on the pending motions. (R.53-55, 72). His testimony also demonstrates that he was not instructing anybody to do anything, particularly not violate federal court orders. (R.90) ("It would be against the principles I hold dear to tell somebody to defy a federal court order . . . I don't encourage anybody to defy a federal court."). Newspaper articles from the *Associated Press* and the *Montgomery Advertiser*, written the day after the Administrative Order was issued, also confirm Chief Justice Moore's testimony. (C.1066, Ex. 38) (noting that the Chief Justice "insisted [the Administrative Order] is not in defiance of the U.S. Supreme Court"); (C.708, Ex. 5) ("Moore said in an interview Wednesday afternoon that he did not intend to defy the nation's highest court."); (C.709) (quoting Chief Justice Moore, "The effect of Obergefell on those existing orders has to be determined by the Alabama Supreme Court.").

On March 4, 2016, this Court issued an order in *API* dismissing pending motions and petitions, (C.969), which prompted special writings by several Justices. *API*, 2016 WL

859009 (Ala. Mar. 4, 2016). (C.922-68, Ex. 29). The Court also issued the Certificate of Judgment for the case, thus bringing it to a conclusion and leaving undisturbed its March 2015 orders. (C.970). The Chief Justice also filed a Statement of Nonrecusal that explained why he was rejoining the case after having previously abstained from voting in the matter, namely because the issue was a new one and not the subject of anything he had previously decided or expressed an opinion. (C.971-81). Judge Granade subsequently stated that in the 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). (C.848-54, Ex. 24). Judge Grenade also stated that

The failure of the Alabama Supreme Court to set aside its earlier mandamus order and its willingness to uphold that order in the face of the United States Supreme Court's ruling in *Obergefell* demonstrate the need for a permanent injunction in this case.

....

Accordingly, the Court finds that as long as the Sanctity of Marriage Amendment and the Alabama Marriage Protection Act remain on the books, there continues to be **a live controversy** with respect to which the Court can give meaningful relief.

(C.853-54) (emphasis added).

On April 28, 2016, prior to charges being filed in this matter, the *Montgomery Advertiser* published a story containing the following "scoop" of private and confidential information:

[A] source familiar with Moore's case said Tuesday that the JIC had completed its review and was in the process of bringing charges against the chief justice. A complaint filed by Southern Poverty Law Center president Richard Cohen against Moore appears to be the primary focus of the JIC charges, according to the source.

(C.1079, Ex. 40). A week later, on May 5, Mat Staver, counsel for the Chief Justice, received an unsolicited telephone call from a *New York Times* reporter stating that a credible source had informed the reporter that the JIC would likely be filing charges that day or the next. (C.1080, Ex. 41). Chief Justice Moore filed a Petition for Relief pursuant to Alabama Judicial Inquiry Commission Rule 19 on May 4, seeking an injunction against the JIC's investigation based on the JIC's breach of confidentiality in violation of JIC Rule 5. See *Moore v. Judicial Inquiry Comm'n*, Case No. 1150818 (Ala. 2016). One day later, this Court denied Chief Justice Moore's petition without an opinion. *Id.*

On May 6, 2016, the JIC filed a complaint against Chief Justice Moore in the COJ that triggered his automatic

suspension from office. Art. VI, § 159, Ala. Const. 1901. The complaint contained six charges, all of which alleged that the Administrative Order of January 6, 2016 ("Administrative Order"), violated Canons 1, 2, 2A, 2B, and 3 of the Alabama Canons of Judicial Ethics. Charge No. 4 additionally alleged a violation of Canon 3A(6). (C.1-305). The parties filed cross-motions for summary judgment, (C.330-402, 414-96, 504-57), both of which were denied after oral argument on August 8, 2016. (R.1-85); (C.610). Two days after the September 28 trial, (R.1-289), the COJ issued its 50-page Final Judgment, (C.1096-1145). The notice of appeal was filed the same day. (C.1146-50).

STATEMENT OF THE STANDARD OF REVIEW

Generally, "[t]he applicable standard of review for an order from the Court of the Judiciary is that the evidence must be clear and convincing." *In re Sheffield*, 465 So.3d 350, 355 (Ala. 1984). However, where, as here, the COJ's ruling rests solely on the interpretation of documents, this Court engages in *de novo* review. *See, e.g., Foster v. Hacienda Nirvana, Inc.*, 32 So.2d 1256, 1259 (Ala. 2009) (if documents at issue can be interpreted solely by looking at the document itself, "the trial court's resolution of the question of law

is accorded no presumption of correctness, and this Court's review is *de novo*); *Kershaw v. Kershaw*, 848 So.2d 942, 951 (Ala. 2002) (same).

The interpretation and application of statutes, such as the judicial ethics canons, are pure questions of law subject to a *de novo* standard of review. See *State Farm Mutual Auto. Ins. Co. v. Bennett*, 974 So.2d 959, 961 (Ala. 2007) ("This Court reviews *de novo* a trial court's interpretation of a statute, because only a question of law is presented." (quoting *Scott Bridge Co. v. Wright*, 858 So.2d 1221, 1223 (Ala. 2003))); *Foster*, 32 So.2d at 1259 (if trial court's ruling rests on the interpretation and application of statutory provisions, "it is reviewed *de novo* by an appellate court, without any presumption of correctness).

Because the COJ admitted that its ruling rested entirely upon the Administrative Order, and involves the applicability and interpretation of statutory provisions, this Court must engage in a *de novo* review of all issues presented.

SUMMARY OF THE ARGUMENT

The JIC and the COJ did not have the jurisdiction or authority to review the Administrative Orders of the Chief Justice, as such authority is placed solely in this Court.

The COJ violated Rule 16 by imposing a de facto removal (*i.e.*, permanent suspension without pay) upon Chief Justice Moore without the unanimous concurrence of all sitting members. Rule 16 mandates the unanimous concurrence of all members, which the COJ admitted it did not have.

All charges against Chief Justice Moore must be dismissed because they have no legal basis and are not supported by clear and convincing evidence. Charge 6 was never filed, voted upon, noticed, or affirmed by letter, and was thus not properly before the COJ. Charges 1-5 are not supported by clear and convincing evidence and are, in fact, contradicted by the sole piece of evidence presented by the JIC and considered by the COJ.

Section 159 of the Alabama Constitution, which imposes an automatic suspension upon the mere filing of a complaint with the COJ, represents a gross violation of due process in violation of the Fourteenth Amendment to the United States Constitution.

The JIC violated the confidentiality mandated by the Alabama Constitution and Rule 5 by disclosing information about Chief Justice Moore's matter prior to filing charges and the penalty should be dismissal of all charges.

ARGUMENT

I. THE COJ AND THE JIC LACK JURISDICTION TO REVIEW LEGAL INTERPRETATIONS IN CHIEF JUSTICE MOORE'S ADMINISTRATIVE ORDER.

A. This Court Has Exclusive Authority To Review The Administrative Orders Of The Chief Justice.

The Alabama Constitution creates the JIC and specifies its limited jurisdiction and powers. The nine-member JIC has "authority to conduct investigations" concerning any Alabama judge and has the ability to file ethical charges against judges. Art. VI, § 156(a), (b), Ala. Const. 1901. The Alabama Constitution confines the scope of its powers as follows:

The commission shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the commission decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties.

Id. Misconduct in office or failure to perform the duties of office is not alleged in the JIC investigation of Chief Justice Moore. *See In re Emmet*, 300 So.2d 435, 438 (Ala. 1974)

(describing "misconduct in office" as "an act of unlawful behavior" and not mere "judicial impropriety"). Nor is it alleged that Chief Justice Moore is physically or mentally unable to perform his duties.

Instead, all six charges arise from the Administrative Order issued pursuant to the constitutional and statutory authority of the chief justice. See Art. VI, § 149, Ala. Const. 1901 ("The chief justice of the supreme court shall be the administrative head of the judicial system."); §§ 12-2-30 (b) (7) and -(8), Ala. Code 1975. The COJ admitted that its entire decision is premised upon the Administrative Order. (C.1119).

The authority to review the administrative orders of the Chief Justice lies with the justices of this Court and there is no provision for any other body to review the validity of those orders.

The justices of the Supreme Court shall have the power and authority to review, countermand, overrule, modify or amend any administrative decision by ... the Chief Justice A majority of all the justices shall constitute a quorum for such purpose. The concurrence of a majority of all the justices shall be sufficient to determine the question of whether and how such decision shall be so reviewed, countermanded, overruled, modified or amended.

§ 12-5-20, Ala. Code 1975 (emphasis added). Only this Court, and not the members of the JIC or the COJ, have the "power and authority" to review, alter, or revoke a chief justice's administrative orders. The oft-cited canon of statutory construction of *expressio unius est exclusio alterius* - "to express or include one thing implies the exclusion of the other, or of the alternative" - supports this conclusion. *Black's Law Dictionary* 661 (9th ed. 2009).

Neither the JIC nor the COJ is authorized to review the administrative orders of Chief Justice Moore. In *API* itself this Court recently stated that the JIC that it lacks the powers of an appellate court:

The JIC is a tribunal commissioned solely for the investigation and prosecution of 'complaints' against judges regarding violation of the Canons of Judicial Ethics and the physical and mental ability of judges to perform their duties. **It is not a court of law, and it has no authority -- and no role to play -- in the performance by this Court of its constitutional duties as a court of law to decide the cases brought before it.**

API, 2015 WL 1036064, at *1 n.3 (Ala. Mar. 10, 2015) (emphasis added) (C.906, Ex. 26). The JIC has no role to play in the performance by this Court of their plenary statutory duty to review the administrative orders of the Chief Justice. That is a matter for this Court alone. In the past, this Court has

exercised its jurisdiction and overruled administrative orders of the Chief Justice. (C.400-01) (overruling Chief Justice Moore's administrative order regarding salary increases). Here, however, this Court did not engage in any review of the Administrative Order, did not overturn it, and ultimately decided the *API* matter consistently with this Court's previous that were the subject of the Administrative Order.

Despite the stern admonition in *API* and in disregard of its limited jurisdiction, the JIC lodged six charges against the Chief Justice, all arising from his Administrative Order. (C.1119). The COJ issued its opinion in this matter based entirely upon that Administrative Order and engaged in substantive review of its provisions. (C.1132-33). The COJ was not authorized to supplant this Court's authority, and its actions to the contrary were *ultra vires* and erroneous. Its judgment should be reversed.

B. Neither The JIC Nor The COJ Have Jurisdiction To Review Mere Legal Error.

The doctrine of "mere legal error" precludes judicial conduct organizations from employing generally worded canons to undermine judicial independence. Even if the Administrative Order misstated the law, which it did not,

legal error is correctable by appellate review, not by judicial-conduct inquisitions. "Mere legal error, without more, ... is insufficient to support a finding that a judge has violated the Code of Judicial Ethics." *Oberholzer v. Comm'n on Judicial Performance*, 84 Cal. Rptr. 2d 466, 975 P.2d 663, 680 (1999); see also *People ex rel. Harrod v. Illinois Courts Comm'n*, 372 N.E.2d 53, 65 (1977) (stating that "to maintain an independent judiciary mere errors of law ... should not be the subject of discipline").

Even if Chief Justice Moore was in error to state that this Court's existing orders continued in effect until modified through orderly procedures (which he was not because he stated a legal truism), such alleged error is not subject to scrutiny in a judicial conduct proceeding. "Mere legal error" is exempt from attack by judicial conduct organizations in order to protect the value of judicial independence. "That value is threatened when a judge ... must ask not 'which is the best choice under the law as I understand it,' but 'which is the choice least likely to result in judicial discipline?'" *In re Curda*, 49 P.3d 255, 261 (Alaska 2002). See also Cynthia Gray, *The Line between Legal Error and Judicial Misconduct: Balancing Judicial*

Independence and Accountability, 32 Hofstra L. Rev. 1245, 1247 (2004) (stating that "if every error of law or abuse of discretion subjected a judge to discipline as well as reversal, the independence of the judiciary would be threatened"). Without this limitation on its jurisdiction, the COJ could operate as the ultimate appellate court, exercising authority over this Court.

The Alabama Constitution does not endow the JIC or the COJ with the authority to review official actions of either the appellate courts of Alabama or of the Chief Justice in his administrative capacity. "So long as the judge makes rulings in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review." James F. Alfini et al., *Judicial Conduct and Ethics* § 2.02 (4th ed. 2007). See *People ex rel. Harrod*, 372 N.E.2d at 66 (holding that the Illinois Courts Commission "exceeded its constitutional authority" by applying "its own independent interpretation and construction" of a statute); Canon 1, *Cal. Code of Jud. Ethics* ("A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this code.").

The orderly processes of appellate review are the exclusive method for addressing legal error except in the rare case of bad faith. "[A]bsent bad faith (i.e., absent proof of malice, ill will, or improper motive), a judge may not be disciplined under Canons 2A and 2B of the Alabama Canons of Judicial Ethics for erroneous legal rulings." *In re Sheffield*, 465 So.2d 350 (Ala. 1984). Chief Justice Moore's Administrative Order explained the interim status of the *API* decision as he understood it pending "further decision" by this Court. (C.693). Absent a showing of bad faith, the JIC and COJ had no authority to review this order. There can be no such showing of bad faith here, even under the JIC's own standard. (C.446) ("noting that legal error amounts to bad faith only when "ill will or improper motive . . . is plainly evident."); (C.446-47) (discussing the factors for determining bad faith as "the frequency of the judge's error, the egregiousness of the error, the judge's motive, and the availability of appeal").

But the plain language of the Administrative Order belies any showing improper motive. (C.691) (explaining why Chief Justice Moore was issuing the order by noting that "confusion and uncertainty exists among the probate judges of this State

as to the effect of Obergefell on the 'existing orders' in API."). The Administrative Order also reflects a proper understanding of the continuing effect of orders of this Court until reversed on appeal. See *infra* Section. III.B.1-3. Also, an appeal was indisputably available given that this Court may review administrative orders of the Chief Justice. See Section I.A. Under the JIC's own standard for bad faith, the Administrative Order does not evince a plainly evident improper motive or ill will.

Were the Chief Justice's statements in the Administrative Order in error, the Supreme Court could have corrected it. See § 12-5-20. Because neither the JIC nor the COJ has any role to play in the process of reviewing the administrative orders of the Chief Justice and because no allegation of bad faith has been made, the complaint was fatally deficient and be dismissed.

II. THE COJ VIOLATED RULE 16 BY DE FACTO REMOVING CHIEF JUSTICE MOORE WITHOUT THE UNANIMOUS CONCURRENCE OF ALL SITTING MEMBERS.

A. Rule 16 Mandates The Unanimous Concurrence Of All Members Of The COJ To Remove A Sitting Judge.

The Alabama Constitution and the COJ's rules of procedure limit the sanctions it may impose. The sanctions are set out in the Alabama Constitution: "The court shall have authority,

after notice and public hearing (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may be prescribed by law, for violation of a canon of judicial ethics." Art. VI, § 157(a), Ala. Const. 1901. The procedure for applying these sanctions is in Rule 16, R.P. Ala. Ct. Jud.: "With respect to all matters other than removal from office, the Court shall convict only with the concurrence of no fewer than six of its nine members. With respect to removal from office, the Court shall convict **only with the concurrence of all members sitting.**" (emphasis added). To remove a judge from office requires a unanimous vote of the COJ. The COJ admitted lacked the requisite unanimity, but proceeded to remove the Chief Justice anyway.

B. The COJ's Sanction Of Permanent Suspension Without Pay Constitutes Removal And Requires A Unanimous Vote Of All Members Of The COJ.

- 1. Permanently suspending Chief Justice Moore without pay is a de facto removal that requires a unanimous vote of nine judges, which the COJ openly admitted that it lacked.**

The COJ's attempt to circumvent the unanimity requirement violates Rule 16. The COJ admitted it lacked the 9 votes: "A **majority** of this court ... agrees with the JIC that the only appropriate sanction for Chief Justice Moore is removal from office. Removal of a judge from office, however, requires

'the concurrence of all members sitting.' Rule 16, R.P. Ala. Ct. Jud." (C.1143) (emphasis added). Lacking the required "concurrence of all members sitting" to remove the Chief, the COJ accomplished the same result via a "permanent suspension." On the day of the judgment, Chief Justice Moore had two years, three months, and 14 days remaining in his term.⁵ **No other judge has ever been suspended from office for more than six months since the adoption of the current version of Rule 16's unanimity provision in 2001.** (See Appendix A) (listing all COJ proceedings and the punishments imposed therein). A "suspension" over four times the length of any imposed under the current rule and one tailored exactly to equal the remaining time left on the Chief's term of office is a removal by another name. There is no difference between removal and a permanent suspension.⁶ Removal requires a 9-0 vote, which the COJ admittedly lacked.

⁵ The six-year terms of Alabama judges, Art. VI, § 154(a), Ala. Const. 1901, begin on the first Monday after the second Tuesday in January. § 17-14-6, Ala. Code 1975. That date in 2019 is January 14.

⁶ For Chief Justice Moore, suspension for the remainder of his term makes him ineligible to ever return to the bench. He reaches the age of 70 prior to the expiration of this permanent suspension. Art. VI, § 155, Ala. Const. 1901.

The COJ's permanent suspension violated Rule 16. The COJ rules are not mere guidelines. "The supreme court shall adopt rules governing the procedures of the court of the judiciary." Art. VI, § 157(c), Ala. Const. 1901. The rules that govern the COJ are promulgated by this Court and can only be altered by this Court. The COJ has no authority to amend or ignore the unanimity rule. "It is, of course, well-settled law in this jurisdiction that due process must be observed...by all courts. Procedural due process requires...at a minimum...a fair trial...**in conformity to statutes and rules.**" *Med. Serv. Admin. v. Duke*, 378 So.2d 685, 686 (Ala. 1979) (internal citations omitted) (emphasis added).

The COJ cannot avoid the 9-0 requirement by substituting "removal" with "suspension." First, § 157(a) recognizes "such other sanction as may be prescribed by law." The unanimity requirement for removal is "prescribed by law" by this Court pursuant to § 157(c). Second, well-settled canons of construction forbid interpreting the canon in such a manner.

a. The COJ's decision renders Rule 16's unanimity requirement mere surplusage in violation of well-established canons of construction.

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' **A statute should**

be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

2A Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction*, § 46.6 (7th ed. 2014) (footnotes omitted) (emphasis added).⁷ Known as the surplusage canon, this rule rejects a construction that renders superfluous, unnecessary, or of no effect any portion of an enactment.

The COJ rendered the unanimity requirement "inoperative or superfluous, void or insignificant." By imposing a permanent suspension without the a 9-0 vote to remove, the COJ nullified the unanimity requirement. Having admitted that only a "majority" concurred in removal, the COJ improperly imposed a permanent suspension to accomplish the same result. (C.1143).

Although Rule 16 requires "the concurrence of all members sitting" for removal, the COJ removed a judge with only a "majority" by calling the removal a "suspension for term." Permitting the COJ's judgment to stand would eviscerate the

⁷ Norman J. Singer, who was a professor of law at the University of Alabama for 40 years, died at the age of 78 on October 31, 2016. Obituaries, *Tuscaloosa News* (Nov. 2, 2016).

unanimity requirement for removal. Suspension for term effectually accomplishes removal without having to satisfy the steep hurdle of unanimity.

"The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition." Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). If removal can be achieved through suspension for term, then the plan language of the Rule would be erased.

According to the COJ, a judge may be convicted of an ethical violation after one year in office and removed for the remaining five years by the vote of only a "majority" of members merely by calling the removal a "suspension." The COJ cannot nullify Rule 16 to evade the "concurrence of all members sitting" requirement. The leading treatise further explains:

A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. **Thus, it is not proper to confine interpretation to the one section to be construed.**

Singer and Singer, *Statutory Construction*, § 46.5 (emphasis added).

By equating removal with suspension for term, the COJ has made the removal provision and its unanimity requirement mere surplusage - language that is wholly unnecessary to the operation of the rule. "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." Scalia and Garner, *Reading Law* 176. The COJ has imposed a sanction that Rule 16 does not permit.

Well-settled Supreme Court precedent compels the conclusion that the COJ's opinion was erroneous.

"The cardinal principle of statutory construction is to save and not to destroy." *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 [(1937)]. It is our duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152 [(1883)], rather than to emasculate an entire section, as the Government's interpretation requires.

United States v. Menasche, 348 U.S. 528, 538-39 (1955); see also *Corley v. United States*, 556 U.S. 303, 314 (2009) (rejecting a reading of a statute that renders a portion of it superfluous and quoting Singer that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or

insignificant"); *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995) (stating a "reluctance to treat statutory terms as surplusage"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (noting that "courts should disfavor interpretations of statutes that render language superfluous").

The COJ additionally violated the "cardinal canon" of construction that "a legislature says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 253-54. When statutory language occupies a "pivotal" place in the statutory scheme, as the unanimity requirement in Rule 16, the Court is particularly unwilling to eliminate its operative effect. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

A statute should not be construed so that one part "eclipses" another or makes that other section "a mere appendage without any real purpose." *Ex parte Uniroyal Tire Co.*, 779 So.2d 227, 235-36 (Ala. 2000). "There is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.'" *Id.* at 236

(quoting *Sheffield v. State*, 708 So.2d 899, 909 (Ala. Crim. App. 1997)). One phrase of a statute should not be construed "so broadly" as to render a following provision to be without any effect. *Sheffield*, 708 So.2d at 909. The surplusage canon has been specifically recognized in Alabama: "'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" *Ex parte Welch*, 519 So.2d 517, 519 (Ala. 1987) (quoting Sutherland, *Statutory Construction* § 46.06 (4th ed. 1984)). The COJ's judgment must be reversed.

b. The COJ's imposition of a de facto removal represents a violation of other well-established canons of construction.

i. The COJ's de facto removal violates the whole text canon.

The surplusage or anti-superfluous canon is an application of a larger principle known as the "whole-text canon" that requires "the judicial interpreter to consider the entire text, in view of its structure and the physical and logical relationship of its many parts." Scalia and Garner, *Reading Law* 167. "[L]imitations on a statute's reach are as much a part of the statutory purpose as specifications of what is to be done." *Id.* at 168. The unanimity rule is a

specific exception to the general rule that "the Court shall convict only with the concurrence of no fewer than six of its nine members." Rule 16, R.P. Ala. Ct. Jud. The general rule of six-votes-to-convict is preceded by a qualifying clause that limits its application "to all matters *other than* removal from office." *Id.*

An interpretation that focuses solely on certain words of a statute "in complete isolation from their context" is impermissible. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Id.* (citation omitted). "To take a few words from their context, and, with them thus isolated, to attempt to determine their meaning certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542 (1940).

Language must be "evaluated in light of the language of the Act as a whole." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986). Rule 16 must be evaluated not merely by considering the six-vote rule in isolation but by

assessing its meaning in the larger context of the unanimity exception. The COJ's admission that it lacked the votes for removal and concomitant attempt to squeeze the same result out of a "majority" vote violates the whole-text canon.

The failure of the COJ to respect "the language and design of the [rule] as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), defeats its attempted subversion of the unanimity rule. "When interpreting a statute, this Court must read the statute as a whole because statutory language depends on context." *Bean Dredging v. Alabama Dept. of Revenue*, 855 So. 2d 513, 517 (Ala. 2003). By effecting a removal and calling it a suspension, the COJ violated Rule 16's unanimity requirement. The COJ's judgment must be reversed.

ii. The COJ's de facto removal violates the canon that the specific prevails over the general.

The COJ also violated the canon that a specific provision prevails over a general provision. See Scalia and Garner, *Reading Law* 183-88. The unanimity rule is a specific exception to the general six-vote rule. Remarkably, the COJ interpreted Rule 16 to allow the general rule to prevail over the specific exception. A correct interpretation would permit both to

coexist. "The specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers." *Id.* at 185; see also *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 211 (Ala. 1991) (stating that "a specific statute relating to a specific subject is regarded as an exception to, and will prevail over, a general statute relating to a broad subject").

The principle that the specific prevails over the general is well settled in Alabama.

Our cases, without conflict, give emphasis to the well defined rule that "'special provisions relating to specific subjects control general provisions relating to general subjects'"; and "'when the law descends to particulars, such more special provisions must be understood as exceptions to any general rules laid down to the contrary.'"

Geter v. U.S. Steel Corp., 84 So.2d 770, 773 (Ala. 1956) (internal citations omitted). The specific requirement of unanimity for removal must prevail over the general provision that six votes are sufficient for a conviction. The COJ's determination to the contrary must be reversed.

iii. The COJ's de facto removal violates the plain meaning rule.

"In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature." *DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.*,

729 So.2d 270, 275 (Ala. 1998). The plain meaning of "suspension" entails "[t]he **temporary deprivation** of a person's powers or privileges, esp. of office." *Black's Law Dictionary* 1584 (9th ed. 2009) (emphasis added); *id.* ("The temporary withdrawal from employment, as distinguished from permanent severance."); *see also Paskon v. Salem Memorial Hosp. Dist.*, 806 S.W.2d 417 (Mo. Ct. App. 1991) ("This court's reference to a 'temporary' suspension is an acknowledgment of the inherent meaning of the term 'suspension', as distinguished from 'termination.'"); *Delahoussaye v. Board of Supervisors of Colleges*, 906 So.2d 646, 650-51 (La. 2005) (stating that "[o]ur review of the removal policy leads us to conclude that it relates to permanent removal from employment (termination), as opposed to temporary removal from duties (suspension)"). Because suspension is temporary and removal is permanent, the "permanent suspension" imposed by the COJ is an oxymoron - a usage of the word "suspension" that is incompatible with its ordinary meaning.

For all the above reasons, the COJ's deliberate avoidance of the unanimity requirement by permanently "suspending" the Chief Justice must be rejected as subversive of Rule 16 and violative elementary and well-settled rules of construction,

namely the surplusage canon, the whole-text canon, the general/specific canon, and the plain meaning rule.

2. **Permanent suspension for the remainder of a term that exceeds two years without pay is the most severe punishment meted out by the COJ in the history of Alabama and is not supported by any precedent or COJ Rule.**

Rule 16, as adopted by the Supreme Court in 1974, read as follows:

At the conclusion of the hearing, the court shall enter an appropriate order, exercising the authority vested in it by section 6.18 of the judicial article, or shall dismiss the complaint. **The concurrence of at least three members of the court shall be necessary for a decision.** The decision of the court shall be final, subject to appeal rights contained in section 6.18(b) of the judicial article.

(emphasis added.) At that time the COJ consisted of five members. A majority of three was sufficient to convict and to impose any punishment from censure to removal. Art. VI, § 157, Ala. Const 1901 (1973 adoption).

In 1996, the membership of the COJ was expanded from five to nine members by Amendment 581. Aware that Amendment 581 required a change in the number of votes required for conviction, the Supreme Court in October 2001 did not merely amend Rule 16 to require five or six votes out of nine to convict but **instead mandated unanimity for any conviction.** The new Rule 16, effective October 10, 2001, stated:

At the conclusion of the hearing, the court shall enter an appropriate order, exercising the authority vested in it by section 6.18 of the judicial article, or shall dismiss the complaint. *The concurrence of all participating members of the court shall be necessary for a conviction. A failure to convict shall constitute an acquittal.* The decision of the court shall be final, subject to appeal rights contained in section 6.18(b) of the judicial article.

"Order Amending Rules of the Alabama Court of the Judiciary," 802 So. 2d LXII-LXIII (Ala. 2001).

The unanimity requirement first appeared in Rule 16 as a blanket provision applicable to any and all convictions. Justice Houston dissented from that revision. Agreeing with his colleagues that the number of votes to convict needed to increase in response to Amendment 581, he recommended that instead of unanimity "the concurrence of six members of the court" should suffice to impose any punishment from censure to removal. *Id.* Four months later, on February 4, 2002, the pendulum swung back again, resulting in the current version of Rule 16 that retains unanimity for removal but adopts Justice Houston's six-judge majority for all other sanctions. "Order Amending Rule 16, Rules of Procedure for the Alabama Court of the Judiciary, 810 So.2d LXX-LXXI (Ala. 2002). Thus, before October 2001, the punishment of removal from office

required only a majority vote of the COJ. After that date, and now, **removal requires unanimity.**

Since adoption of the unanimity rule for removal, the following punishments have been imposed: removal (COJ Nos. 33, 36, 39, 40, 48); suspension without pay: 6 months (COJ Nos. 44, 47), 3 months (COJ Nos. 37, 43), 2 months (COJ Nos. 34, 38); and censure (COJ Nos. 32, 41, 42, 45). Additionally, two judges resigned (COJ Nos. 31, 35) and one case was dismissed (COJ No. 30). For detail, see Appendix A. In the 15 years since the unanimity rule for removal was adopted, the longest suspension without pay imposed on any judge in the 19 cases during that time – except for the sentence at issue here – has been **six months.**

Here, the COJ imposed a “suspension” without pay of **27 months.** That sanction is over four times the longest suspension without pay ever imposed since adoption of the unanimity requirement for removal in 2001. The history of the COJ under amended Rule 16 indicates that suspension without pay, except for the current case, has **never** before been employed to evade the unanimity requirement for removal.

Before the amendment of Rule 16 in 2001, the COJ suspended three judges for the remainder of their terms. See

Appendix B. Because a unanimous vote was not required for removal between 1974 and 2001, the COJ was not subject to the unanimity rule. Of the three cases of suspension for term, one was only 39 days. The judge, who had failed to be re-elected in November 1982, was convicted on December 9, 1982, and suspended for the remainder of his term, which expired on January 17, 1983. App. B (COJ No. 14).

In the other two instances, suspension **without** pay for term was imposed in conjunction with a suspension **with** pay to provide a 6-month severance payment, a benefit that would have been unavailable under a sentence of removal. See COJ No. 13 (judge suspended with pay for 5.5 months and thereafter for remainder of term without pay, a period of 12.5 months); COJ No. 28 (judge suspended with pay for five months and thereafter for remainder of term without pay, a period of 6.5 months). In both of these cases, the judges suffered from disabilities (COJ No. 13: mental health); COJ No. 28 (blindness and other physical conditions). Those suspensions were not imposed to evade the unanimity requirement, which did not exist at that time, but to provide a soft landing with severance pay.

The sentence imposed upon the Chief Justice is not only impermissible under the current version of Rule 16, but is also unprecedented, even under the prior rule that permitted removal by a majority vote. The COJ's obvious flouting of Rule 16 must be rejected. The COJ must be held accountable for violation of the rules that govern its proceedings. Lacking unanimity for removal, the COJ may not deploy a "suspension" to impose de facto removal. **Since adoption of the unanimity requirement, no suspension has ever exceeded six months, nor ever covered the remainder of the term.**

The Supreme Court deliberately amended Rule 16 in 2001 to require unanimity to remove a judge from office. The COJ may not nullify this Court's rulemaking by misusing the suspension provision to remove a judge from office without "the concurrence of all members sitting."

C. The COJ Did Not Have Unanimous Concurrence To Remove Chief Justice Moore And Therefore The Order Must Be Reversed And The Chief Justice Reinstated.

The COJ did not have the required unanimity: "A **majority of this Court** also agrees with the JIC that the only appropriate sanction for Chief Justice Moore is removal from office. Removal from office, however, requires the concurrence of all members sitting." (C.1143) (emphasis

added). This explicit admission demonstrates that there was no concurrence of all sitting members to remove Chief Justice Moore from office, only a majority, and we do not even know if the majority amounted to six members. But, this admission did not stop the COJ from imposing a de facto removal by permanently suspending Chief Justice Moore without pay for the remainder of his term. (C.1144) ("it is the unanimous judgment of this Court that Chief Justice Moore should be suspended from office without pay for the remainder of his term.").

The imposition of suspension without pay represented a 27-month "suspension" from office and de facto removal. This sinister attempt to avoid the clear mandates of the COJ's own rules represents nothing more than judicial lawlessness, and it must be rejected. The de facto removal of Chief Justice Moore without the unanimous concurrence of all members of the COJ must be reversed.

III. ALL CHARGES AGAINST CHIEF JUSTICE MOORE SHOULD BE DISMISSED BECAUSE THEY HAVE NO LEGAL BASIS AND ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

- A. Charge 6 Violates The JIC's Own Rules Because It Was Never Voted Upon, Noticed, Or Affirmed In Any Six Week Continuing Investigation Letter, And Thus Was Not Properly Before The COJ And The COJ Was Without Jurisdiction To Hear The Charge.

The JIC may initiate an investigation of a judge "only upon" receiving a verified complaint, voting to investigate it, and serving a Letter of Investigation upon the judge. JIC Rules 6A, 6B & 6C. Additionally, within 2 to 12 weeks after opening an investigation, the JIC "**shall** advise the judge of those aspects of the complaint that it then considers worthy of some investigation." JIC Rule 6C (emphasis added). Every six weeks thereafter, the JIC "**shall** serve upon the judge a full statement of whether the [JIC] intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation." JIC Rule 6D (emphasis added). The JIC did not follow Rule 6C or 6D in regard to Charge 6,⁸ a fact that neither the JIC nor the COJ disputes. The language of Rule 6 is mandatory. See *Steensland v. Alabama Judicial Inquiry*

⁸ For details, see Motion to Dismiss, pp. 26-29 & Exhs. H-J, (C.356-358, 394-399).

Comm'n, 87 So.3d 535, 541 (Ala. 2012) (noting "[t]he veritable laundry list of *mandatory* investigation-related duties cast upon the JIC by JIC Rule 6") (emphasis added).

The Rules require a (1) verified complaint, (2) vote by the JIC, (3) JIC Letter of Investigation, and (4) a Letter of Investigation every six weeks. Here, there was (1) no verified complaint, (2) no vote by the JIC on Charge 6, (3) no Letter of Investigation, and (4) no Letter of Investigation every six weeks. In the absence of any one of these four requirements, there can be no charge. Charge 6 must be dismissed because not one of the four requirements were met.

The only complaint considered by the JIC was the one filed on January 22, 2016, directed at the Administrative Order of January 6, 2016. The subsequent six-week letters referred only the issues raised in the January 22 complaint. It is impossible for the January 22, 2016 complaint to include a complaint about the subsequent non-recusal regarding the March 6, 2016 order. In the absence of a verified complaint, there can be no charge. And, in the absence of a verified complaint, there was no vote taken by the JIC. Charge 6 must be dismissed.

Words used in statutes or rules "must be given their natural, plain, ordinary, and commonly understood meaning." *IMED Corp. v. Systems Engineering Assoc.*, 602 So. 2d 344, 346 (Ala. 1992). "The word 'shall' is clear and unambiguous and is imperative and mandatory." *Ex parte Prudential Ins. Co. of America*, 721 So.2d 1135, 1138 (Ala. 1998).

In common or ordinary parlance, and in its ordinary signification, **the term "shall" is a word of command**, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' **and is inconsistent with a concept of discretion.**

Id. (quoting *Black's Law Dictionary* 1375 (6th ed.1991)) (emphasis added).

The JIC had no discretion to ignore Rules 6C and 6D, and neither does the COJ. The word "shall" makes the command to which it is attached compulsory. *See, e.g., Ex parte Indiana Mills & Mfg., Inc.*, 10 So.3d 536, 542 (Ala. 2008); *Oliver v. Brock*, 342 So.2d 1, 4 (Ala. 1976) (noting that the requirements in Rule 56(e), Ala. R. Civ. P., that are prefaced with the word "shall" are mandatory); *Jefferson Cnty. Comm'n v. F.O.P.*, 543 So.2d 198, 199-200 (Ala. 1989) (noting that the word "shall" in Rule 65(c), Ala. R. Civ. P., makes the requirement of giving security for a preliminary injunction mandatory); *Ex parte Looney*, 797 So.2d 427, 428-29 (Ala. 2001)

(holding that an information that "does not comply with the mandatory requirements of the statute" that are prefaced by the word "shall" was defective and thus of no effect).

Neither Rule 56 nor Rule 65 states that mandatory provisions may be disregarded if no prejudice results. Nor has this Court ever opened such an escape hatch in either rule. To do so would violate the plain-meaning rule of construction to which this Court steadfastly adheres. Furthermore, "[o]ur supreme court has consistently held that the word 'shall' is mandatory when used in a rule promulgated by that court." *Martin v. Martin*, 637 So. 2d 901, 902 (Ala. Civ. App. 1994). The same logic applies to the JIC rules. By flouting those rules, the JIC impermissibly declared its independence from this Court, its rule maker, and also from the Alabama Constitution that allocates that authority to this Court.

"The Supreme Court shall adopt rules governing the procedures of the [judicial inquiry] commission." Art. VI, § 156(c), Ala. Const. 1901. As this Court has stated: "[t]he fundamental law must necessarily be immune from unauthorized change." *Hunt v. Decatur City Bd. of Educ.*, 628 So.2d 393, 397 (Ala. 1993). As Chief Justice John Marshall stated in

1803: "Why does a judge swear to discharge his duties agreeably to the constitution ... if that constitution forms no rule for his government?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). Ignoring the constitutionally mandated rules that govern the JIC COJ is not a privilege provided to the guardians of judicial ethics in the State of Alabama. Those who seek to be above the law are hardly in a position to accuse a judge of violating the rule of law.⁹

The COJ erroneously adopted the JIC's argument that the failure to provide proper notice of Charge 6 is irrelevant because the Chief Justice suffered "no prejudice" from the failure of the JIC to follow the rules. The COJ concludes that the Chief Justice had adequate notice because the matter was brought up during questioning in a meeting with the JIC on April 7, a month before the charges were filed. (C.1139-40). The JIC's failure to follow its own mandatory process

⁹ JIC Rule 19 is further evidence that this Court is serious about the rules it has promulgated to govern the JIC. That rule states that any judge "who claims to be aggrieved" by the JIC's violation of its rules may petition for relief directly to the Supreme Court (investigation phase) or to the COJ with appeal to the Supreme Court (prosecution phase). What is the purpose of Rule 19 if the JIC may, at will, ignore the rules established by this Court to govern its behavior?

regarding Charge 6 signaled to the Chief Justice that the issue was not a serious one. Furthermore, the JIC rules do not provide the "no prejudice" exception the JIC claims as its excuse for ignoring Rule 6.

The JIC's attempt to exempt itself from obedience to the rule of law is inconsistent with its assertion that Chief Justice Moore "flouted [the] foundational principle" of "respect for the rule of law," (C.422), and acted in a manner "antithetical to respect for and compliance with the law." (C.423); (See also C.424) (again accusing the Chief Justice of "flouting" the rule of law); (C.465) ("This is a case about the rule of law."). The COJ's adoption of the JIC's excuse that other jurisdictions require only minimal notice of potential formal charges ignores the clear Alabama rules. The COJ shamefully permits the JIC to operate outside the law. Because the JIC ignored the mandatory notice requirements of Rule 6C and 6D, Charge 6 must be dismissed.

Even if Charge 6 were properly before this Court, which it is not, the charge is without merit and should be dismissed. The COJ states that Chief Justice Moore took legal positions in his Administrative Order that disqualified him from rejoining the *API* court. (C.1140). The Chief Justice,

however, stated that the orders of this Court remained in effect until this Court altered them. (C.691-92). Far from taking a position on how the Supreme Court should rule on the effect of *Obergefell* on its outstanding orders in *API*, the Chief Justice expressly stated that he could provide no guidance to the probate judges. (C.692) ("I am not a 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.") (emphasis original).

The Chief Justice stated that he cannot provide any "guidance" to the probate judges, that the matter remains pending before the Supreme Court, and that the decision remained one for the Supreme Court. (C.0690-93). "Whether or not the Alabama Supreme Court will apply the reasoning of [certain lower federal courts] or some other legal analysis **is yet to be determined.**" (C.692-93) (emphasis added). Finding a similar discussion in the special concurrence of the Chief Justice in *API II*, the JIC argued that this passage is obviously substantive legal advice. However, as Chief Justice Moore has previously explained: "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." (C.520).

The COJ, again echoing the JIC, claims that the Administrative Order is "a public comment about a pending proceeding," Canon 3A(6), Ala. Canons Jud. Ethics, and thus disqualified the Chief Justice from participation in *API II*. (C.1141). Official acts of judges, however, are not "public comments" about pending proceedings. "Public records are not equivalent to public comment. Otherwise, all opinions would be construed as public comment." *In re A.H. Robins Co.*, 602 F. Supp. 243, 251 (D. Kan. 1985). See Canon 3A(6) (recognizing an "official duties" exception to the public comment canon).

Because it was never before the COJ and it is otherwise devoid of merit, Charge No. 6 must be dismissed.

B. Charges 1-5 Must Be Dismissed Because They Are Not Supported By Clear And Convincing Evidence.

Rule 10 states that "the allegations of the complaint **must be proved by clear and convincing evidence.**" Rule 10, R.P. Ala. Ct. Jud. (emphasis added). The burden placed on the JIC to prove its allegations is a demanding and burdensome

standard. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (clear and convincing evidence standard is “demanding”); *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013) (“Clear and convincing evidence is a demanding . . . standard, requiring proof that a claim is highly probable.”). This Court has stated the standard as follows:

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

Ex Parte Norwood Hodges Motor Co., Inc., 680 So.2d 245, 248-49 (Ala. 1996) (emphasis added).

Noting that clear and convincing evidence is a demanding standard placed upon the party bearing its burden, Alabama courts have outlined that mere possibilities or reasonable arguments are insufficient to establish evidence clearly and convincingly. *See, e.g., T.E.W. v. T.S.*, 97 So.3d 157, 163 (Ala. Civ. App. 2012) (speculative evidence, or mere possible arguments, are insufficient to satisfy the demands of the clear and convincing standard); *Phillips v. Asplundh Tree*

Expert Co., 34 So.3d 1260, 1269 (Ala. Civ. App. 2007) (“mere possibilities” do not amount to clear and convincing evidence and do nothing more than “guess” a party into liability); *Madix, Inc. v. Champion*, 927 So.2d 833, 837 (Ala. Civ. App. 2005) (testimony that an argument was possible, but that ultimate probability would be “difficult to say” was plainly insufficient to satisfy the demands of clear and convincing evidence).

Nothing in the COJ’s Final Judgment could possibly provide a “firm conviction” or a “high probability of correctness.” Indeed, the discussion of Charges 1 to 5 amounts to nothing more than speculation and possibility, certainly well short of the rigors of the clear and convincing evidence standard. Even a cursory reading of the COJ’s Final Judgment plainly demonstrates the insufficiency of the evidence presented. (See, e.g., C.1120) (Administrative Order “appeared to require” certain conduct by probate judges); (C.1127) (stating that the meaning of the Administrative Order **could** “be reasonably read”); (C.1137-38) (discussing possible readings of the Administrative Order, but speculating as to its actual meaning). These **possible** readings of the Administrative Order and the **possible**

appearance that might be inferred from it simply cannot constitute clear and convincing proof of the charges brought against Chief Justice Moore.

"It is in the overall substance and effect of the whole of the evidence, when viewed in the full context of all of the [testimony], and not in the [mere] use of any magical words or phrases" that clear and convincing evidence is to be derived. *Ex Parte S. Energy Homes, Inc.*, 873 So.2d 1116, 1121 (Ala. 2003). Chief Justice Moore presented a compelling evidentiary record in the COJ, supported by sworn testimony and documentation. The best the JIC could muster and the COJ could point to in its decision was that the JIC's understanding was a reasonable reading of the Administrative Order. (C.1129). The JIC put on no testimony and presented nothing more than its conclusions regarding the Administrative Order. (C.1119). The JIC presented **no evidence** to supports its conclusions, just speculation, possibilities, and argument. This is plainly insufficient to meet the demanding burden of clear and convincing evidence, and the COJ's acceptance of this fatal deficiency was in error. Chief Justice Moore's sworn testimony is unrebutted. He unequivocally testified that the Administrative Order was a

status report and did not direct probate judges to violate any federal court order. He went on to testify that he did not and would never order anyone to violate a court order. (R.91). The JIC put on no contrary evidence.

1. Charge 1 Should Be Dismissed Because Chief Justice Moore Merely Provided A Status Update On The Existing Orders Of This Court.

Charge 1 should be dismissed because Chief Justice Moore's status update on the existing orders of this Court did not direct probate judges to do anything or disregard federal law. Charge 1 states:

By willfully issuing his Administrative Order of January 6, 2016, in which he directed or **appeared to direct** all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples.

(C.0038)(emphasis added).

Notably, even the plain language of the charge itself is framed in a matter incapable of satisfying the demands of clear and convincing evidence. Mere appearances (*i.e.*, possibilities, guesses) do not and cannot constitute firm convictions and high probabilities of the correctness of the conclusion reached by the COJ. See *T.E.W.*, 97 So.3d at 163.

That fact alone should have cautioned the court below that any conviction would be in error.

Moreover, the charge itself is belied by the overwhelming weight of the evidence and the plain language of the Administrative Order itself. The COJ's conclusion that Chief Justice Moore's Administrative Order represented more than a mere status update (C.1125) is unsupported by the text of the order. (See C.0048) (discussing that this Court had requested briefing after the decision in *Obergefell* to determine what, if any, effect that decision had on the "existing orders" of this Court); (C.0048) (discussing the uncertainty and confusion existing among Alabama probate judges concerning the various orders of this Court and certain federal courts); (C.0049-50) (discussing "recent developments of potential relevance" to the orders of this Court). Nothing in the Administrative Order disregarded any federal orders or compelled probate judges to do anything they weren't already obligated to do.

The Administrative Order did not change the status quo. With or without the Administrative Order, the probate judges were operating under the same circumstances and obligations. The status of the probate judge remained the same the day

before and the day after the January 6 Administrative Order. The Administrative Order changed nothing. *Compare* (C.691) ("In its March 3 order in API, **the Alabama Supreme Court** stated that 'Alabama probate judges have a ministerial duty not to issue any marriage license contrary to [the Sanctity of Marriage Amendment or the Marriage Protection Act]. Nothing in the United States Constitution alters or overrides that duty.'" (emphasis added)), *with* (C.693) ("**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.**" (bold emphasis original, italic emphasis added)). Chief Justice Moore merely restated what this Court had commanded in its March 2015 Orders. The Administrative Order did not create or modify any duty of the probate judges.

The Chief Justice did not attempt to resolve the conflict between federal and state courts on the constitutionality of Alabama's marriage laws. He merely pointed out that the state court orders were under review and remained in effect pending further decision by this Court. (C.691-92). As the Chief

Justice pointed out in his Administrative Order, other federal courts had reached the same conclusion concerning their own orders. (C.692) (discussing the post-*Obergefell* orders of the Eighth Circuit and District of Kansas which noted that additional briefing and orders were necessary to give effect to the *Obergefell* decision). Chief Justice Moore merely pointed out that until this Court addressed those orders, as the Eighth Circuit had done with its existing orders in the wake of *Obergefell*, they were still in effect.

On June 29, this Court requested briefing on one question only: "the effect of the Supreme Court's decision [in *Obergefell*] on this Court's existing orders in this case." (C.918). Chief Justice Moore noted that order in his Administrative Order, and the only relevant issue was how the United States Supreme Court's decision effected the existing orders of this Court. (C.693). Chief Justice Moore did not attempt to resolve that question, but merely advised probate judges that the question presented was under review and the Court's existing orders remained in effect until further order from this Court ruled. (C.692-93).

Far from ordering probate judges to violate a federal injunction to which they were parties, the Chief Justice never

mentioned that injunction because that issue was not before this Court. This was not incomplete or misleading as the COJ stated (C.1137), but simply was not the question pending before this Court. The Administrative Order merely provided a status update on the **only** question pending before this Court - namely the effect of *Obergefell* on the existing orders of this Court. The federal court order was not the question this Court asked the parties to address and thus the Administrative Order did not address this matter. To do so would have gone way beyond the question presented. The status of this Court's March 2015 orders, as the Chief Justice explained, awaited "further decision by the Alabama Supreme Court." (C.0693).

Two months after the Administrative Order, this Court released its "further order" in *API* and brought the case to a conclusion. Simultaneous with release of the March 4 order, this Court also issued the certificate of judgment in *API*, which certified the three March 2015 orders that had been entered in the case:

CERTIFICATE OF JUDGMENT

...

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

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

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

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

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date.

(C.391)

By certifying its March 2015 orders in the March 2016 certificate of judgment, this Court did not alter, vacate, or disturb those orders, but instead left them in place and made them permanent. Federal judge Callie Granade agreed with this understanding. *See Strawser v. Strange*, Civ. No. 14-0424-CG-C 2016 WL 3199523 *3 (S.D. Ala. June 7, 2016) (noting “[t]he failure of the Alabama Supreme Court to set aside its earlier mandamus order and its willingness to uphold that order in the face of the United States Supreme Court’s ruling in *Obergefell*” and the resulting continuation of a “live controversy”) (C.853, Ex. 24). In a filing with the United States Court of Appeals for the Eleventh Circuit, the ACLU of

Alabama Foundation, representing parties in one of the Alabama marriage cases, also acknowledged this reality: "[T]he 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*." Appellant's Reply Brief, *Aaron-Brush v. State of Alabama*, No. 16-10028, 2016 WL 1376047, at *2-*3 (11th Cir. March 25, 2016) (C.722-23, Ex. 9). The ACLU noted precisely what Chief Justice Moore's Administrative Order recognized, that *Obergefell* "did not rule directly on Alabama's constitutional or statutory provisions because those provisions were not before the Supreme Court." (C.723).

The Administrative Order, Judge Grenade's June 2016 order, and the ACLU's brief all recognized that the decisions of federal district and appellate court decisions have no impact on the decisions of this Court. Abundant Supreme Court precedent supports this truth. See, e.g., *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013) ("[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as

ignoring federal law."); *Camreta v. Greene*, 563 U.S. 692, ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."). The decisions of this Court, too, recognize the fact that a federal district court order do not have any effect on state supreme courts. *See, e.g., Gloss v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala. 2004) ("In determining federal common law, we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law. Legal principles and holdings from inferior federal courts have no controlling effect here."); *Ex Parte Johnson*, 993 So.2d 875, 886 (Ala. 2008) ("This Court is not bound by decisions of the United States Courts of Appeals or United States District Courts.")).

This truth is a simple reflection of the federal system, where this Court may decide questions arising under the federal constitution. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) ("state courts enjoy concurrent jurisdiction" over federal questions); *Singer v. City of Alabaster*, 821 So.2d 954, 956 (Ala. 2001) ("Under our federal system, state courts and federal courts are presumed

to have concurrent jurisdiction over cases arising under federal law.”). As such, this Court was free to interpret the United States Constitution independently from and even contrary to federal courts. See *Surrick v. Killion*, 449 F.3d 520, 535 (3d Cir. 2006) (“Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from forum-shopping, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other.”); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) (“In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court.” (internal quotations omitted)). This is precisely what this Court did in *API*. (C.0969-70).

Undoubtedly, if the March 2016 certificate of judgment left the March 2015 *API* orders in place, then surely those same orders were in place on January 6, 2016, when Chief

Justice Moore issued his Administrative Order. Chief Justice Moore merely noted the status of the "existing orders" of this Court. (C.0692-93). The Administrative Order merely described a legal truism: a decision as to the status of the orders of the Alabama Supreme Court was still pending and in effect. This Court itself made the decision to leave the orders in place, as recognized by the Administrative Order, Judge Granade's June 2016 order, and the ACLU's Eleventh Circuit brief. In its 50-page opinion, the COJ made no mention of Judge Granade's June 2016 order acknowledging that the March 2015 orders of the Alabama Supreme Court were still in effect. Yet the COJ found that the Administrative Order's update on the indisputable status of this Court's orders somehow completely disregarded federal law.

The allegation in Charge 1 that Chief Justice Moore ordered the Alabama probate judges to obey state law when a federal injunction required them to ignore state law overlooks the reality that the purpose of the Administrative Order was to explain the status of the *state-court* orders and not to address or resolve the question of their status in light of *Obergefell*. Since the issue of these existing orders in relation to the lower federal court order was not before

this Court, the Administrative Order did not address that question. Complaining in Charges 3 and 4 that the Chief Justice wrongly decided "substantive legal issues," the JIC then inconsistently accuses the Chief Justice in Charge No. 1 of not addressing the legal issue of the resolution of a conflict between state and federal court orders. Regarding Charge 1, the Chief Justice did not address that legal issue because it was not before this Court. Regarding Charges 3 and 4, as will be discussed below, the Chief Justice did not decide any legal issue. He left the question presented in this Court's briefing order (C.918-21) for this Court to decide. There is no evidence, let alone clear and convincing evidence, that the Administrative Order directed the probate judges to disobey a lower federal court injunction. The Administrative Order did not (1) alter the status quo or (2) change the obligations or duties of the probate judges. It did not address the status of the lower court injunction because that was not before this Court. And it left the resolution of the pending question to the future decision of this Court. Charge 1 must be dismissed.

2. Charge 2 Should Be Dismissed Because Chief Justice Moore Properly Left Final Resolution Of Pending Matters To This Court.

Charge 2 should be dismissed because Chief Justice Moore did not determine the final resolution of matters before this Court. Charge 2 states that Chief Justice Moore failed "to follow clear law" in his Administrative Order. (C.0039). The COJ erroneously concluded "the evidence was clear and convincing that the [Administrative Order] demonstrated an unwillingness to follow clear law." (C.1136). Once again, however, the **only evidence** put forward by the JIC was the order itself, nothing more. The COJ's conclusion is belied by the plain text of the order itself and the sworn testimony of Chief Justice Moore.

First, the Administrative Order refutes the COJ's conclusion. That order explicitly states that Chief Justice Moore did not decide matters currently pending before this Court. (C.692) ("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 the matter.**") (emphasis added); (C.692-93) ("**Whether or 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.**") (emphasis added); (C.693) ("**Until further decision by the Alabama Supreme Court . . .**") (emphasis original).

Chief Justice Moore did not direct or order probate judges to violate any federal court order or precedent. He properly left resolution of the pending matters to this Court, and explicitly stated that the issue remained before, and needed further decision by, this Court. Chief Justice Moore was not issuing any law, compelling any action, and directing anything: he informed probate judges that this Court had requested briefing on the effect of *Obergefell*, was still deliberating the issue, and that the conclusion of this Court was yet to be determined. (C.691-93). Without issuing any mandates or establishing any law, the Chief Justice simply could not be ignoring any law, much less clear law.

Notable, too, is the fact that the decisions of other federal courts compel a finding that the status of existing orders of many courts were anything but clear post-*Obergefell*. As the Administrative Order references, several federal courts also indicated that the status of existing

marriage-related orders required further action post-*Obergefell*. (C.692) The Administrative Order specifically notes decisions from the Eighth Circuit Court of Appeals and the District of Kansas, and explicitly states that those courts were applying *Obergefell* when they requested additional briefing. (C.0692) ("While **applying Obergefell**, the Eighth Circuit rejected the . . . suggestion that Obergefell mooted the case."). Those courts, too, requested further briefing and indicated that additional decisions would be forthcoming. (C.0049). There was no such "clear law" to violate at the time of the Administrative Order. Like the Eighth Circuit Court of Appeals and several other reported federal District Courts, *Obergefell* had to be applied to each case.

Finally, the sworn testimony of Chief Justice Moore compels the opposite conclusion. (R.73-74) ("I followed clear law. The effect of the *Obergefell* case with the Alabama Supreme Court was before the Alabama Supreme Court, and I would tell them to wait until that law was - or that issue was decided before the Alabama Supreme Court."); (R.74) ("When I say I can't make any comment on it, I can't decide that issue. **It is for the Court to decide, and it was and**

they did.") (emphasis added). As his testimony demonstrates, the Administrative Order was not intended to and did not decide the effect of *Obergefell* on this Court's orders. The plain language and Chief Justice Moore's sworn testimony demonstrate that no such decision was or even could be made by Chief Justice Moore. The COJ's decision is not supported by clear and convincing evidence and Charge 2 must be dismissed.

3. Charge 3 Should Be Dismissed Because Chief Justice Moore's Administrative Order Did Not Address Any Substantive Legal Issues.

As the above discussion demonstrates, Chief Justice Moore could not and did not determine any substantive legal issues in the Administrative Order. Charge 3 states that Chief Justice Moore violated his ethical duties by "addressing and/or deciding substantive legal issues while acting in his administrative capacity." (C.40). The COJ held that clear and convincing evidence supports the conclusion that Chief Justice Moore "decid[ed] legal issues." (C.1137). This unbelievable conclusion ignores the plain language of the Administrative Order.

In the Administrative Order, Chief Justice Moore simply recognized a truism: that orders of this Court remain in

effect until reversed by this Court or a court of competent jurisdiction. (C.693). This Court explicitly relied upon this fundamental principle in its March 3 opinion in *API* (877-78), and the Chief Justice quoted it in his Administrative Order:

"'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties **until it is reversed by orderly and proper proceedings.**'" *United States v. Mine Workers*, 330 U.S. 258, 293 (1947) (quoted in *Fields v. City of Fairfield*, 143 So. 2d 177, 180 (Ala. 1962))."

(C.693) (emphasis added).

There can be no dispute that this principle, which has been recognized since time immemorial, is correct. See *Stein v. McGrath*, 30 So. 792, 793 (1900) ("This decision, which still stands, and has not been appealed from, and **until reversed** by a higher court of appeal is a judicial determination of that question, **is conclusive as to the parties.**") (emphasis added); *Landford v. Dunklin*, 71 Ala. 594, 604 (1882) (a decision reached by this Court is binding "until reversed by a court of appellate jurisdiction, upon a direct proceeding for its reversal"). The order is also consistent with the plain text of Rule 65. Fed. R. Civ. P. 65(d)(2) ("The order binds only the following . . . the parties.").

Chief Justice Moore's Administrative Order did not determine any substantive legal issues. He properly left those matters to this Court. His language makes that abundantly clear: "**Until further decision by the Alabama Supreme Court**, the existing orders of the Alabama Supreme Court . . . remain in full force and effect." (C.0050) (emphasis added). This was not determining any legal issues; it was stating a matter of indisputable fact and cannot serve as the basis for the COJ's erroneous conclusion. Charge 3 should be dismissed.

4. Charge 4 Should Be Dismissed Because Chief Justice Moore Unequivocally Stated That He Could Not Provide Guidance On The Effect Of *Obergefell* On Existing Orders Of This Court.

Charge 4 states that by issuing the Administrative Order, Chief Justice Moore "substitute[ed] his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court, i.e., the effect of the decision of the United States Supreme Court in *Obergefell*." (C.0041). The COJ held that Chief Justice Moore violated his ethical duties by imposing his judgment upon and substituting it for the entire Court. (C.1137). This decision fails as a matter of common sense and is belied by the

Administrative Order's plain text and the factual circumstances surrounding this Court's decisions in *API*.

First, in the Administrative Order, Chief Justice Moore stated that he could not provide any guidance to probate judges concerning the existing orders of this Court. (C.0692) ("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."); (C.693) (noting that the determination of this Court is "**yet to be determined.**") (emphasis added).

Once again, the text of the Administrative Order was the only evidence put forward by the JIC and relied upon by the COJ in making its determination. (C.1119). Yet, that evidence cannot be read to reach a decision, supported by the demanding standard of clear and convincing evidence, that Chief Justice Moore imposed his will and substituted his judgment on the members of this Court. His express language makes such a determination impossible: "**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.**" (C.0692); (see also C.0693)

(noting that the decision and analysis of this Court was "yet to be determined"). This plain and unequivocal language cannot possibly provide the basis for holding, as the COJ did below, that Chief Justice Moore substituted his judgment for this Court. (C.1137).

The plain language, bolstered by the only sworn testimony presented in the court below, demonstrates that the final resolution of the matter was left to this Court. (R.52) ("I can't tell anybody on the Court how to rule. That's - you know, on the appellate court, we are all equal when it comes to ruling on cases. I have no authority over them on how to rule, just like they have no authority over me."); (R.62) ("That issue remains before the entire Court...I wouldn't comment on it, and I said I couldn't tell them what to do. I couldn't give them any guidance. That's as plain as I can put it.").

In two separate memos to the Justices of this Court, Chief Justice Moore urged action in the *API* cases and encouraged the Court to let its decisions be known. He stated, "The matter is now ripe for decision. I believe it is time for **us** to make a decision in this case, one way or another." (C.698) (emphasis added); (C.1082) ("I urge **you** to act as

soon as possible in this matter.") (emphasis added). As Chief Justice Moore's sworn testimony revealed, he was "urging" this Court to vote on the case and to reach a decision - any decision. (R.47). Even in his memos his recognition that final decision was for this entire Court is abundantly evident, as he noted that a decision "one way or another" was necessary and that "any decision is better than no decision at all." (C.1082).

In his second memo, Chief Justice Moore once again urged this Court to exercise its own judgment. (C.1083-84). His testimony concerning that memo also eviscerates the contention that he substituted his own judgment for that of this Court. (R.52) ("I can't tell anybody on the Court how to rule. That's - you know, on the Appellate Court, we are all equal when it comes to ruling on cases. I have no authority over them on how they rule."). Given his testimony, and clear demonstration that he could not and did not tell any Justice how to rule, the notion that Chief Justice Moore substituted his own judgment for that of this Court is demonstrably false.

Finally, the factual circumstances surrounding this Court's decisions in *API* reveal that Chief Justice Moore's Administrative Order did not remove or replace the judgment

of this Court with the Chief Justice's judgment. As Chief Justice Moore encouraged the Court to do, and as it had an obligation to do, this Court reached a determination as to the final impact of *Obergefell* on the existing orders of this Court. Two months after the Administrative Order, this Court issued its order in *API* and the Certificate of Judgment concerning the pending matters. (C.0391). Chief Justice Moore's Administrative Order could not and did not deprive this Court of the opportunity to address the impact of *Obergefell* on this Court's existing orders. The COJ's conclusion that Chief Justice Moore substituted his judgment for this Court's is absurd and should be reversed.

5. Charge 5 Should Be Dismissed Because Chief Justice Moore Merely Noted That Final Resolution Of Existing This Court's Existing Orders Is A Matter For This Court To Decide.

Charge 5 states that Chief Justice Moore's Administrative Order "interfered with legal process and remedies" in other courts. (C.42). How can the Administrative Order interfere with proceedings in another Court when the order says that the issue is under review before the Alabama Supreme Court and thus Chief Justice cannot give any guidance? The Administrative Order merely stated that the impact of *Obergefell* on the orders of this Court was for the full Court

to determine. (C.693). The Administrative Order said nothing of other proceedings before the lower federal District Court because that issue was not before this Court. Because Chief Justice Moore left that determination to this Court and merely noted the truism that existing orders remain until further decision of this Court (C.693), his order had no bearing upon other proceedings and could not have interfered with them by providing a status update on the existing state-court orders. Charge 5 has no basis in law or fact and must be dismissed.

C. All Charges Should Be Dismissed Because The COJ Committed Reversible Error By Using Its 2003 Case Against Chief Justice Moore As Evidence Of Guilt In The Matter Below.

Chief Justice Moore objected to the admission as evidence of the COJ judgment removing him from office in 2003 (c.997-1009, Ex. 31) and the Supreme Court opinion upholding that removal (c.1011-23, Ex. 32). Those documents first appeared in this case as attachments to the JIC's Motion for Summary Judgment filed on July 15 (C.414-467). The Chief Justice explained:

Exhibits B and C relate to COJ Case #33 that was tried in 2003. Those exhibits shed no light on the meaning of the Administrative Order. Furthermore, they are prejudicial because they are being offered to persuade the Court to convict on the basis of a prior proceeding remote in time to the current case and arising from different facts. Such evidence

serves only to confuse the Court and unfairly prejudice the Chief Justice. See, e.g., Ala. R. Evid. 404(a) (setting out a general exclusionary rule regarding character evidence offered as a basis from which to infer how a person acted on the occasion at issue); Advisory Committee's Notes to Rule 401. See also Rule 403, Ala. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading [the court]").^[10]

Objections of Chief Justice Moore to Certain Exhibits of the Judicial Inquiry Commission (Aug. 5, 2016). (C. 589-90). On August 8, the JIC, citing Rule 404(a), Ala. R. Evid., agreed that Exhibits B and C should not be used as evidence of guilt. (C.596). The JIC did argue, however, that Exhibits B and C were relevant to determine "the appropriate *sanctions* in this case." (C.596).

In his pretrial ruling on evidentiary issues, the Chief Judge of the COJ stated that Exhibits B and C were "admissible for limited purposes as identified in the JIC's August 8, 2016, response to Chief Justice Moore's objections." (C.682-83)).¹¹ On the *Joint Trial Exhibit List*, (C.684-89), Exhibits

¹⁰ The Alabama Rules of Evidence apply in COJ proceedings. COJ Rule 10.

¹¹ The Chief Judge has the authority to make evidentiary rulings. COJ Rule 9.

B and C were numbered as Exhibits 31 and 32 and followed by asterisks. A footnote explained: "Pursuant to the Court's September [14], 2016 Order, exhibits marked with a "*" represent those the Court has indicated it will admit for a limited purpose only." (C.686). At the trial on September 28, Judge Joiner, over the objection of counsel for the Chief Justice, reiterated that Exhibits 31 and 32 were "admitted for the limited purposes identified in JIC's August 8, 2016, response." (R.14).

However, the COJ's decision below uses the 2003 proceedings as evidence that the Chief Justice is guilty of the current charges. The COJ stated:

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

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

Just as Chief Justice Moore's decision that he "wouldn't move the monument" was, in fact, defiance of the federal court order binding him, a disinterested reasonable observer, fully informed of all the relevant facts, would conclude that the undeniable consequence of the January 6, 2016, order

was to order and direct the probate judges to deny marriage licenses in direct defiance of the decision of the United States Supreme Court in *Obergefell* and the *Strawser* injunction.

(C.1126-27).

The COJ's quotation and discussion of its 2003 decision (Exhibit 31) is not for the purpose of deciding the appropriate sanction, but instead is presented as evidence that the Chief Justice has violated the Canons of Judicial Ethics in the current proceeding. By arguing that the Chief Justice is repeating the same strategy he used in 2003, the COJ marshals testimony from the former case to prove that the Chief Justice's assertions in the current case are not to be trusted. This comparison, the COJ declares, bolsters its conclusion that the purpose of the Administrative Order was to defy the federal courts. Thus, ignoring both the Rules of Evidence and its own pretrial ruling, the COJ has used the 2003 conviction as evidence to support a finding of guilt in the current proceeding. Yet this finding is flatly contradicted by the sworn testimony of Chief Justice Moore below, where he indicated that the issue presented here is different from that at issue in 2003. (R.90) (It would be against the principles that I hold dear to tell somebody to defy a federal court or a state court order."); (R.91) ("I

would be amiss in my responsibility as Chief Justice to tell somebody to defy another court order. I don't believe in that. I don't agree with that. That is a personal decision as one I made - and never denied I'd make that decision - in 2003.").

The COJ quotes at length from *Cooper v. Aaron*, 358 U.S. 1 (1958), for rejection of the theory, which it attributes to the Chief Justice, that "only the parties to a United States Supreme Court decision are bound by the decision." (C.1128-30). The COJ then again has recourse to the 2003 case to prove that the Chief Justice's explanation of the meaning of the 2016 order is dishonest.

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

(C.1130).

Thus, for a second time, and again at length, the COJ impermissibly marshals the 2003 case as evidence for a finding of guilt in the current case. Indeed, the COJ in this passage of its opinion uses the 2003 case to prove to its satisfaction

that the Chief Justice is lying to the Court in 2016 and that his explanation for his actions is not credible. Thus, the 2003 case, in both of the detailed passages in the COJ's opinion, played a critical role in its chain of reasoning that the Administrative Order represented knowing and willful defiance of the federal courts – the basis of its finding of guilt.

This Court in a previous judicial discipline case implicitly rejected the use of prior proceedings to establish guilt. One of the issues raised in that appeal was: "Are the judgment and sanction due to be reversed because counsel for the Judicial Inquiry Commission argued that a prior case against Judge Hayes was relevant on the issue of the proper sanction to be applied in this case?" *Hayes v. Alabama Court of Judiciary*, 437 So.2d 1276, 1278 (Ala. 1983). The Court answered the question as follows:

Our search of the record does not reveal, by brief, testimony, or oral argument, that Judge Hayes's previous case before the Court of the Judiciary, where he was given a censure, was ever used to influence the court to find the judge guilty. It was used, and properly so, to influence the court as to the proper sanction to be given in this case.

Id. at 1279. This passage necessarily implies that using a previous case "to find the judge guilty" would be

improper. Yet in this case, the COJ not only made extensive use of the 2003 case to conclude that the Chief Justice was guilty, but also violated its own pretrial order that prohibited such action.

Rule 404(a), Ala. R. Evid., states: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." But that is exactly what the COJ has done. Its statement that "Chief Justice Moore's arguments that his actions and words mean something other than what they clearly express is not a new strategy," (C.1126), identifies a supposed trait of character from 2003 that is being repeated in the current case. Yet, according to Rule 404(a), former character evidence is not admissible to prove that the Chief Justice "acted in conformity therewith" in the current case. Similarly, the COJ uses statements the Chief Justice made about *Cooper v. Aaron* in the 2003 case to support the proposition that he is being "disingenuous" in this case, again assaying to prove a fact in the current case by character evidence gleaned from a former proceeding. (C.1130). The COJ's

reliance on evidence that the Chief Justice acted in 2016 in conformity with character traits demonstrated in 2003 is prohibited by Rule 404.

This is not harmless error. Error "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103(a), Ala. R. Evid. This Court has stated:

The purpose of the doctrine [of harmless error] is to cast upon the party complaining of technical or procedural errors the burden of showing that they have substantially affected his legal rights. In such cases, there is always the possibility, often the probability, that the prejudicial statement entered into the judgment, and the harmless error rule is not intended to save such a verdict from appellate condemnation.

Stain v. State, 138 So.2d 703, 706 (Ala. 1961). As the United States Supreme Court has stated: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); see also *Stain*, 138 So.2d at 706 (same).

From the beginning of this case, the JIC has portrayed the actions of the Chief Justice in 2016 as a rerun of 2003. (C.336-37). The JIC charge begins and ends by looking back to

2003. (C.1, 20). The COJ unfortunately embraced this approach in defiance of its own rulings, Evidence Rule 404, and the *Hayes* precedent. (C.1126-30). That the prejudicial statements entered into the judgments is not a mere possibility or probability that the prejudicial statements entered into the judgment, *see Stain supra*, but a certainty, as evidenced by the COJ's heavy reliance on the 2003 in constructing its rationale for guilt. (C.1126-30). Because the COJ's opinion demonstrates that the 2003 case had a "substantial influence," *Kotteakos*, 328 U.S. at 765, on its finding of guilt, the decision must be reversed.

IV. THE AUTOMATIC SUSPENSION PROVISION OF SECTION 159 OF THE ALABAMA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Section 159 of the Alabama Constitution states that "[a] judge shall be disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging him in the United States with a crime punishable as a felony under a state or federal law, or (2) a complaint against him filed by the [JIC] with the [COJ]." Art. VI, § 159, Ala. Const. 1901. This harsh sanction on judges in Alabama is unparalleled, as no other state in the

union has a provision requiring automatic suspension without any prior due process proceeding.

"The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law." *Goss v. Lopez*, 419 U.S. 565, 572 (1975). "The Due Process Clause requires 'that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)). "The government must provide the required notice and opportunity for a hearing 'at a meaningful time and in a meaningful manner,'" *Catron*, 658 F.3d at 1266 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)), unless certain "'extraordinary circumstances'" are present that permit the "provision of notice and a hearing [to] be postponed until after the deprivation has occurred." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).¹² A procedural due process violation

¹² No such "extraordinary" or "exigent" circumstances existed here to justify departure from the pre-deprivation notice and hearing. Such circumstances are marked by three characteristics not present here: "(1) the seizure of

involves: "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Grayden*, 345 F.3d at 1232.

The COJ asserted that it did not believe it had the authority to address this issue, but denied Chief Justice Moore's claims for relief anyway. (C.1116-17).

A. Section 159 Deprived Chief Justice Moore Of A Constitutionally Protected Property And Liberty Interest.

Chief Justice Moore possesses a sufficient liberty and property interest in his position to entitle him to the protection of the Fourteenth Amendment. "The requirements of procedural due process apply only to deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). "Protected interests in property are normally 'not created by the Constitution.

property is necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; and (3) the person initiating the seizure is a government official responsible for determining, under the standards of a narrowly drawn statute, that the seizure was necessary and justified in the particular instance." *Grayden*, 345 F.3d at 1236 (citing *Fuentes*, 407 U.S. at 91).

Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss*, 419 U.S. at 572-73 (citation omitted). Thus, "[t]o have a property interest in a benefit [or job], a person clearly must have more than abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577 (1972); see also *Goss*, 419 U.S. at 573 ("[A] state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.").¹³

"The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." *Id.* at 574 (quoting *Wisconsin*

¹³ This Court has recognized that the concept of property protected under the Fourteenth Amendment includes government employees who have a legitimate claim to continued employment. See *Stallworth v. City of Evergreen*, 680 So.2d 229, 233 (Ala. 1996).

v. Constantineau, 400 U.S. 433, 437 (1971)); see also *Roth*, 408 U.S. at 573. Reputational injury alone is not a cognizable interest protected under the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 701 (1976). But "when reputational damage is sustained in connection with a termination of [government] employment, it may give rise to a procedural due process claim for deprivation of liberty which is actionable under section 1983." *Cotton v. Jackson*, 216 F.3d 1328, 1330 (11th Cir. 2000). "To establish a liberty interest sufficient to implicate the Fourteenth Amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law." *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1296 (11th Cir. 2003) (citation omitted); see also *Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1436-37 (11th Cir. 1998) ("This rule, labeled the 'stigma-plus' standard, requires a plaintiff to show the [government's] conduct deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation.").

An elected official "who is entitled to hold office under state law has a property interest in his office which can be

taken from him only by procedures meeting the requirements of due process." *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979); *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971) (concluding it is "correct" that "plaintiff, as an elected official, has a property right in his office which cannot be taken away except by due process of law") (internal quotation omitted). The Eleventh Circuit held that a state legislator "certainly had a constitutional right to run for office and **to hold office once elected.**" *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985) (emphasis added).

A Wisconsin Supreme Court Justice possessed a property interest in her position that was cognizable under the Fourteenth Amendment:

The chief justice is a position of constitutional dignity in Wisconsin. There is no one with unfettered discretion to remove a justice from the position of chief. The entitlement to serve as chief justice is defined in the state constitution, which also articulates the powers attendant on the position. The chief justice also draws a higher salary than the other justices. These characteristics carry the position of chief justice well above the *de minimis* threshold required for a benefit to rise to the level of a cognizable interest. The position of chief justice confers secure, state-created powers and benefits to the one who holds that position. Under *Roth*, the position of chief justice entails a property interest to which due process protections apply.

Abrahamson v. Neitzel, 120 F. Supp. 3d 905, 922-23 (W.D. Wis. 2015) (internal citation omitted). The federal district court held that the justice had a protectable interest that the Due Process Clause shielded from arbitrary deprivation.

Many other courts have recognized that judges hold a property or liberty interest in their judicial office that warrant due process protections. *See, e.g., In re: Hanson*, 532 P.2d 303, 305 (Alaska 1975) ("The Commission's procedures are required to meet constitutional due process standards since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation."); *In re: Nowell*, 237 S.E.2d 246, 251 (N.C. 1977) (subjecting judicial conduct proceeding to due process scrutiny because a judge has a protectable interest in continuing in public office); *In re: Gillard*, 271 N.W.2d 785, 812 (Minn. 1978) (stating "[i]t is clear" that due process rights attach to judicial conduct proceedings); *Town of Upton v. Whisler*, 824 P.2d 545, 548 (Wyo. 1992) (concluding that federal constitutional due process rights attached because judge appointed for a specific term had a property right in the office); *Mosley v. Nev. Comm'n on Judicial Discipline*, 22 P.3d 655, 659 (Nev.

2001) (holding that state court judges "have a protected interest in their judicial offices under the Fourteenth Amendment"); see also James J. Alfani et al., *Judicial Conduct & Ethics*, § 13.10, at 13-25 (4th ed. 2010) ("The majority of courts have taken the position that judges do possess a property or liberty interest in the judicial office."). The property and liberty interests in a judge's office extend beyond remuneration to encompass the exercise of the functions of the office itself. Section 159 deprived Chief Justice Moore of this protected interest the moment the JIC filed its complaint with the court below.

B. Section 159 Fails To Provide Chief Justice Moore Constitutionally Adequate Process.

"[D]ue process assures notice and a meaningful opportunity to be heard **before a right or an interest is forfeited.**" *Johnson v. U.S.D.A.*, 734 F.2d 774, 782 (11th Cir. 1984) (emphasis added); see also *McCarley v. Sanders*, 309 F. Supp. 8, 11 (M.D. Ala. 1970) ("[I]t is now well established that...a person may not be discharged or expelled from a public office upon a ground involving criminal guilt, infamy, disgrace, or other grave injury to the individual until after such notice and hearing as is requisite to due process of law."). "Procedure...marks much of the difference between

rule of law and rule by fiat." *Constantineau*, 400 U.S. at 436. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

Chief Justice Moore's automatic suspension demonstrates that the process is insufficient to provide due process. The mere filing of a complaint with the COJ triggered automatic and immediate removal of Chief Justice Moore from office. In its entirety, Section 159 requires that "[a] judge shall be disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging him in the United States with a crime punishable as a felony under a state or federal law, or (2) a complaint against him filed by the [JIC] with the [COJ]." Art. VI, § 159, Ala. Const. 1901. Section 2 is what is challenged here.

This mandatory provision disrupts the orderly functioning of the Alabama judiciary, deprives an individual judge of property and liberty interests in judicial office, and irreversibly stains and stigmatizes the name and

reputation of any judge against whom the JIC files. The automatic disqualification provision also cripples the judge's staff, wreaks havoc on cases pending on the judge's docket, and undermines overall judicial administration throughout the state. The Administrative Director of the Administrative Office of the Courts presented sworn testimony in Chief Justice Moore's federal suit that detailed just how destructive Section 159 can be. *See Moore v. JIC*, Case No. 2:16-cv-00388-WHA-GMB, Dkt. 3-3 at 3-4 (M.D. Ala. 2016) (noting that Section 159 imposes a "serious setback" to Alabama courts and can "seriously impair the functioning of the system"). Even though the JIC takes a judge's office away from him or her indefinitely on the mere act of filing a complaint in the COJ, the JIC is not required to provide the judge notice or opportunity to be heard before the judge is suspended as a result of the filing of a JIC complaint.

Because the suspension is automatic, the JIC can wield significant power over Alabama's elected judges based upon trivialities, viewpoint-based objections, differences in legal interpretation, or political motivations. Rule 19, Ala. R. P. Jud. Inq. Comm'n. No procedures, let alone appropriate ones, exist to curb this potential for, and actual, abuse of

power by the JIC and thus to protect the due process rights of Alabama judges subject to investigation by the JIC, from trial judges to justices of the highest state court. This automatic suspension provision is a Sword of Damocles hanging over every Alabama judge's head who is under investigation by the JIC. The procedure provided in Section 159 is unconstitutional, and this Court should strike it down.

V. THE JIC VIOLATED THE CONFIDENTIALITY MANDATED BY RULE 5 AND THE ALABAMA CONSTITUTION AND THE CONSEQUENCE OF SUCH A SERIOUS VIOLATION SHOULD BE DISMISSAL OF THE COMPLAINT.

The Alabama Constitution requires that all JIC proceedings "shall be confidential." Art. VI, § 156, Ala. Const. 1901. See also Rule 5, Ala. R. Proc. Jud. Inq. Comm'n ("All proceedings of the commission shall be confidential."). Contrary to the confidentiality mandate, news of the investigation of Chief Justice Moore was published in a local newspaper and leaked to a national reporter.

Chief Justice Moore presented sworn testimony that the JIC breached the confidentiality mandate. (C.1080, Ex. 41). On April 28, 2016, prior to charges being filed in this matter, the *Montgomery Advertiser* published a story containing the following "scoop" of private and confidential information:

[A] source familiar with Moore's case said Tuesday that the JIC had completed its review and was in the process of bringing charges against the chief justice. A complaint filed by Southern Poverty Law Center president Richard Cohen against Moore appears to be the primary focus of the JIC charges, according to the source.

(C.1079). A week later, on May 5, Mat Staver, counsel for the Chief Justice, received an unsolicited telephone call from a *New York Times* reporter who stated that a credible source had informed the reporter that the JIC would likely be filing charges that day or the next. (C.1080). Chief Justice Moore filed a Petition for Relief pursuant to Alabama Judicial Inquiry Commission Rule 19 on May 4, seeking an injunction against the JIC's investigation and potential complaint based on the JIC's breach of confidentiality in violation of Rule 19. *See Moore v. Judicial Inquiry Comm'n*, Case No. 1150818 (Ala. 2016). One day later, this Court denied Chief Justice Moore's petition without opinion. *Id.* On May 6, 2016, the JIC filed the complaint against Chief Justice Moore with the COJ.

Common sense dictates that the only individuals capable of knowing and sharing such information are necessarily associated with the JIC. No one else could know that the JIC already determined that it would file a complaint with the COJ against Chief Justice Moore. The COJ, nevertheless, found

that Chief Justice Moore had not presented proof of such a breach. (C.1115). That decision was erroneous. Such a breach of confidentiality and infringement of Chief Justice Moore's privacy represents a disturbing infraction of the JIC's own rules. This serious violation necessitates dismissal of the charges against Chief Justice Moore.

CONCLUSION

All six charges exceeded the authority of the JIC and COG because only the Alabama Supreme Court has authority of the Administrative Orders of a Chief Justice.

The COJ violated its own rules by permanently removing Chief Justice Moore from office without the unanimous concurrence of all members. Removal was the only sanction requested by the JIC. In the absence of a 9-0 vote to remove, this case should be dismissed.

Charge 6 should be dismissed because there was no (1) verified complaint, (2) JIC vote to charge, (3) Letter of Investigation, or (4) Letter of Investigation sent every six weeks. Like Charges 1-5, Charge 6 is not supported by clear and convincing evidence.

Charges 1-5 should be dismissed because they are not supported by clear and convincing evidence.

The automatic removal provision of Section 159 of the Alabama Constitution violates the Fourteenth Amendment of the U.S. Constitution and should be stricken.

The JIC violated the confidential requirement regarding its proceedings prior to a formal charge by leaking the impending charge to the media, and the sanction for such violation should result in dismissal of all charges.

Respectfully Submitted,

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I certify that I have this 13th day of December, 2016, served a copy of this *Principal Brief* on the Judicial Inquiry Commission and counsel below through electronic mail:

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Case No. 1160002

IN THE SUPREME COURT OF ALABAMA

ROY S. MOORE,)
Chief Justice of the)
Alabama Supreme Court,)
)
Appellant,)
)
v.)
)
ALABAMA JUDICIAL INQUIRY)
COMMISSION,)
)
Appellee.)

APPENDIX A TO PRINCIPAL BRIEF OF
APPELLANT CHIEF JUSTICE ROY S. MOORE

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Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #48: In the Matter of Isaac	2016	Failed to recuse herself from a case involving the probate of her father's estate of which she was an heir	Removed, must immediately retire, and never seek judicial office in Alabama; costs of litigation
COJ #47: In the Matter of Archer	2016	Exchange of sexually explicit dialogue & pictures with a woman he met in his capacity as a judge	Suspended for 180 days without pay; costs of litigation; continued counseling
COJ #45: In the Matter of Wiggins	2016	Provided that defendants who didn't have any money and didn't want to go to jail could donate blood as an option to pay for court assessments	Public censure and costs of litigation
COJ #44: In the Matter of Pettway	2015	Pattern & practice of inattention to small claims docket & irregular application of the law	Suspended for 180 days without pay; judicial training; costs of litigation
COJ #43: In the Matter of Batiste	2013	"Cavalier disregard" for the due-process rights of litigants & witnesses	Attend judicial training, suspended for 90 days without pay, costs of the proceeding, and public reprimand
COJ #42: In the Matter of Allred	2013	Made public comments on Facebook & via email (to all state judges) regarding pending contempt proceedings against attorney	Public censure, email apology to each district judge to whom he sent original email, and costs of litigation
COJ #41: In the Matter of Durward	2012	Failure to recuse from case involving his son's speeding ticket	Public censure and costs incurred in litigation (\$1,117.12)
COJ #40: In the Matter of Warner	2011	Failed to respect & comply with the law; engaged in ex parte communications & sealed case file in bad faith after she recused herself	Removed from office
COJ #39: In the Matter of Steensland	2010	Sentencing the accused in bad faith in an effort to discourage other defendants from seeking a trial	Public censure; he retired early, but was barred from ever serving as a judge. Aff'd, 87 So. 3d 535 (Ala. 2012).

Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #38: In the Matter of King	2010	Set aside rape conviction of former client without legal justification & without a petition being filed. Count 2: Entering order of recusal in another case in which he made "gratuitous comments" regarding a fellow judge's actions in a case pending before that judge	Public reprimand & suspended without pay for 60 days
COJ #37: In the Matter of Wiggins	2009	Failure to recuse from case involving his close family members	Public reprimand and suspended without pay for 90 days
COJ #36: In the Matter of Dubose	2008	Failed to implement settlement agreement of his client; engaged in ex parte communications; threatened his court reporter; ordered court reporter to violate Professional Conduct of the Alabama Board of Court Reporters; uttered profanity & threatening remarks against specific members of the bar and judiciary; prior to the general election, he contacted all attorneys who supported his opposition & attempted to coerce pledges for supporting him	Removed from office
COJ #35: In the Matter of Thomas	2007		Resigned, matter dismissed
COJ #34: In the Matter of Dobson	2006		Suspended w/o pay for 2 months and public censure
COJ #33: In the Matter of Moore	2003	"Willfully & publicly" failed to comply with a binding and existing court order	Removed as Chief Justice. Aff'd, 891 So. 2d 848 (Ala. 2004).
COJ #32: In the Matter of Barnes	2003		Public censure
COJ #31: In the Matter of Woodard	2002		Resigned, matter dismissed

Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #30: In the Matter of See, Jr.	2002		Dismissed
RULE 16 AMENDED ON OCTOBER 10, 2001			
COJ #29: In the Matter of Boggan	1999	Presented a false deposit slip (\$23,000) in an attempt to show that judge had paid examiner's charges; gave false information to investigators	Removed from office; Kendall and Vinson, JJ., dissenting, and stating that sentence of removal was excessive. Aff'd, 759 So. 2d 550 (Ala. 1999), Cook and Johnstone, JJ., dissenting on the ground that mitigation evidence should be considered in sentencing.
COJ #28: In the Matter of Cothren	1998	Engaged in ex parte communications; fell asleep on the bench multiple times; failed to dispose of uncontested matters w/in a reasonable time after matters were submitted for disposition	Public censure; suspended from office as a circuit judge with pay for 5 months; suspended thereafter w/o pay for the remainder of his term of office (6.5 months); Scruggs and North, JJ., dissenting, would remove from office for ex parte communications
COJ #27: In the Matter of Robertson	1997	Failed to avoid the appearance of impropriety; failed to conduct himself in a manner that promotes public confidence in integrity of judiciary; failed to perform diligently; failed to diligently discharge administrative responsibilities	Public censure; Suspended 1 month w/o pay
COJ #26: In the Matter of Woodard	1994	Violated Canons 2, 2A, and 3A(3)	Suspended, w/o pay for 6 months
COJ #25: In the Matter of Hann	1992		Resigned, matter dismissed
COJ #24: In the Matter of Quattlebaum	1990		Resigned, matter dismissed

Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #23: In the Matter of Langley	1988		Resigned, matter dismissed
COJ #22: In the Matter of Rabren	1988		Removed from office
COJ #21: In the Matter of Nice	1988		Suspended w/o pay for 6 months
COJ #20: In the Matter of Sloan	1987		Resigned, matter dismissed
COJ #19: In the Matter of Epperson	1987		Suspended w/o pay for 6 months
COJ #18: In the Matter of Rabren	1986		Public censure
COJ #17: In the Matter of Enfinger	1985		Resigned, matter dismissed
COJ #16: In the Matter of Teel	1984		Suspended w/o pay for 6 months
COJ #15: In the Matter of Sheffield	1984	Improperly initiated contempt proceedings; made public comment about pending proceedings	Suspended w/o pay for 2 months. Reversed as to use of contempt power; sentence affirmed. 465 So. 2d 350 (Ala. 1984).
COJ #14: In the Matter of Hayes	1982	Violated Canons 2A and 2B	Suspended, w/o pay until expiration of term (39 days). Aff'd, 437 So. 2d 1276 (Ala. 1983).
COJ #13: In the Matter of Powers	1981	Failed to promptly dispose of cases submitted to him, failed to report cases pending decision before him for more than 6 months; found "mentally unable to perform his duties as a circuit judge at the present time"	Public censure; suspended, with pay for 5 months; suspended thereafter without pay for the remainder of his term of office (12 1/2 months). Aff'd 434 So. 2d 745 (Ala. 1983).

Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #12: In the Matter of Coggin	1981		Resigned, matter dismissed
COJ #11: In the Matter of Hogan	1980	Accumulated debt to the point creditors interfered with his judicial duties; used funds deposited in his bank knowing that such funds were not his	Public censure
COJ #10: In the Matter of Strickland	1979	Knowingly claimed and was paid for travel expenses which he was not entitled to	Suspended, w/o pay for 6 months. Aff'd, 388 So. 2d 1202 (Ala. 1980).
COJ #9: In the Matter of Hayes	1978		No disciplinary action taken
COJ #8: In the Matter of Caldwell	1978	Repeatedly associated with a well known felon in public places and accepted favors from him	Retired, public censure
COJ #7: In the Matter of Burns	1977	Violated Canon 2	Public censure
COJ #6: In the Matter of King	1977	Violated Canon 2	Censure; King, J., dissenting, "King is a young single judge whose private sexual conduct is not the proper concern for this Court."
COJ #5: In the Matter of Samford II	1977	Failure to remit fiduciary funds, comingled previous client funds to pay for personal debts	Removed from office. Aff'd, 352 So. 2d 1126 (Ala. 1977).
COJ #4: In the Matter of Garren	1977	Failed to recuse	Public censure
COJ #3: In the Matter of Conley	1977		Resigned, matter dismissed
COJ #2: In the Matter of Halsey, Jr.	1976	Failure to perform the duties of his office which required a report of convictions in his court for driving while intoxicated	Resigned, matter dismissed

Alabama Court of the Judiciary			
Convictions and Sanctions (1976-2016)			
Case	Year	Conviction	Sanction
COJ #1: In the Matter of Emmet	1974	Ex parte communications to a judge in order to influence his decision in a pending proceeding	Censure. Reversed and remanded, 300 So. 2d 435 (1974).
NOTE: The case filings for COJ #37 and forward are on the Court of the Judiciary website: http://judicial.alabama.gov/judiciary/judiciary.cfm			

Case No. 1160002

IN THE SUPREME COURT OF ALABAMA

ROY S. MOORE,)
Chief Justice of the)
Alabama Supreme Court,)
)
Appellant,)
)
v.)
)
ALABAMA JUDICIAL INQUIRY)
COMMISSION,)
)
Appellee.)

APPENDIX B TO PRINCIPAL BRIEF OF
APPELLANT CHIEF JUSTICE ROY S. MOORE

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APPENDIX B

Judges Suspended by the Court of the Judiciary for the Balance of Their Terms

COJ #13: William P. Powers

According to the Final Judgment in Case No. 13, on July 11, 1981, William P. Powers was "suspended from his office as circuit judge with pay until December 31, 1981 and suspended thereafter without pay for the remainder of his term of office." Powers had serious mental-health issues that several doctors testified disabled him from continuing in office.

"Powers served as a circuit judge in the 29th Judicial Circuit [Talladega] from January 18, 1971, to March 27, 1981." *Powers v. Bd. of Control of Jud. Ret. Fund*, 434 So. 2d 745, 746 (Ala. 1983). Assuming that Powers was elected to office in the general election of November, 1970, and was re-elected for another 6-year term in 1976, his second term was slated to expire in mid-January 1983.

If these assumptions are correct, Judge Powers' period of suspension without pay for the remainder of his term lasted a year and two weeks—from January 1, 1982 until mid-January 1983.

COJ #14: Wilson A. Hayes

According to the Final Judgment in Case No. 14, on December 9, 1982, Wilson A. Hayes was "suspended from the office of circuit judge, without pay, ... until the expiration of his term of office."

"Judge Hayes's term expired on January 17, 1983. His bid to be re-elected to office had failed in the November election of 1982." *Hayes v. Alabama Court of Judiciary*, 437 So. 2d 1276 (Ala. 1983).

Thus, Judge Hayes' period of suspension without pay for the remainder of his term lasted from December 9, 1982 to January 17, 1983, a period of 39 days.

COJ #28: Robert A. Cothren

According to the Final Judgment in Case No. 28, on January 23, 1998, Robert A. Cothren was "suspended from his office as a circuit judge with pay through June 30, 1998, and suspended thereafter without pay for the remainder of his term of office."

"Cothren, 48, appointed by Gov. Fob James in April 1996 to a new judgeship in the Bessemer area, was suspended with pay until June 30 and without pay for the remainder of his appointed term, which ends in January 1999." "State Court

Panel Suspends Blind Judge," *Tuscaloosa News* (Jan. 24, 1998).

Thus, Judge Cothren's period of suspension without pay for the remainder of his term lasted from July 1, 1998 to mid-January, 1999, a period of 6 ½ months.