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.	)

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF SANCTITY OF MARRIAGE ALABAMA

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SUMMARY OF THE ARGUMENT

The attacks upon Chief Justice Moore because of his words and actions concerning same-sex marriage in Alabama and the probate judges, constitute an ideological and constitutional dispute, not an ethical dispute, and are therefore not a proper subject for action by the Judicial Inquiry Commission or the Court of the Judiciary.

ARGUMENT

The facts and the basic issues of law in this case are fully set forth in the briefs of the parties and their various *amici.* Rather than duplicate what they have written, *Amicus* will go directly to the issue we ask the Court to consider: This is fundamentally a constitutional and ideological dispute, not an ethical issue.

I. Throughout American History the Scope of the Supreme Court's Power has been a Matter of Legitimate Debate.

American law is based to a large extent upon English common law. In England, laws that violated the unwritten English constitution were considered null and void, but no court had authority to declare them null and void. That duty fell to Parliament, thus in some instances making Parliament the final reviewer of its own actions.

At the Constitutional Convention of 1787, delegates occasionally mentioned the question of judicial review.[1] Elbridge Gerry noted that state courts had at times set aside laws as unconstitutional.[2] However, John Mercer expressed

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[1] James Madison, *Notes of Debates in the Federal Convention* (Athens, Ohio: Ohio University Press, 1787, 1840, 1966, 1985), pp. 336-37 (James Wilson), 463 (Gouverneur Morris), 539 (James Madison).

[2] *Id.* 61.

his disapproval of the concept of judicial review.[3] In drafting the Constitution the Founders did not directly address the issue of judicial review. They did, however, provide in Article III Section 2 that the judicial power extends "to all Cases, in Law and Equity, arising under this Constitution... ." In *The Federalist* Nos. 16, 78, and 81, Hamilton argues generally in favor of judicial review but does not delineate the extent of this power.[4]

The U.S. Supreme Court's exercise of judicial review did not begin with *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); the Court had previously exercised forms of judicial review in *Hylton v. United States,* 3 U.S. (3 Dall.) 171 (1796), *and Hayburn's Case,* 2 U.S. (2 Dall.) 408 (1792). But even Chief Justice Marshall's ruling in *Marbury* is subject to dispute as to its extent and interpretation. *See* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706 (2003). Indeed, the *Marbury* rationale was strongly disputed at the time. For example, in *Eakin v. Raub,* 12 S. & R. 330 (Pa. 1825), Justice Gibson argued that

[3] *Id.* 462.
[4] *The Federalist,* 1787-88 (Springfield, VA: Global Affairs Publishing Company, 1987).

declaring a law void "is an act of sovereignty; and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms." *Id.* at 358 (Gibson, J., dissenting). Justice Gibson further argued that if courts have the power to invalid acts of the legislature, then the judiciary rather than the legislature is the supreme branch of government. Yet the Framers contemplated the judiciary as the *least* powerful branch of government. *Id.*

The relationship between the federal government and the states was an issue of equal importance to that of the relationship among the branches of the federal government, both at the framing of the Constitution and thereafter. As Madison said in *Federalist* No. 45, "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."[5] This view of states' rights was reinforced by the adoption of the Tenth Amendment.

Spencer Roane, a Virginia judge who probably would have been President Thomas Jefferson's choice for Chief Justice if

[5] *The Federalist* No. 45.

John Adams had not appointed John Marshall earlier, noted that some argued that the Supreme Court was to be the "umpire to decide between the States on the one side, and the United States on the other, in all questions touching the constitutionality of laws, or acts of the Executive." He added: "I do humbly conceive that the States could never have committed an act of such egregious folly as to agree that their umpire should be altogether appointed and paid by the other party," because the Supreme Court "is but a department of the general government."[6]

Jefferson himself was a staunch critic of judicial review:

> You seem ... to consider the judges as the ultimate arbiters of all Constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy ....
>
> ....
>
> "When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them no enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their

[6] Judge Spencer Roane, quoted by Thomas E. Woods, Jr., *Nullification* (Washington, D.C.: Regnery, 2010) p. 6.

> discretion by education. This is the true corrective of abuses of Constitutional power.

Thomas Jefferson, Letter to William Charles Jarvis (1820), in Andrew M. Allison, *The Real Thomas Jefferson* 498-99 (1983).

II. The Court of the Judiciary Relied on *Cooper v. Aaron*, a Case Whose Rationale is Based on *Dred Scott*.

As for the authority of the United States Supreme Court to bind all lower courts and all other parties by its decisions, even extending its reach to those who were not parties to the original action before the Court and whose facts and circumstances might not be in all respects identical to those in the original action, the only authority cited by the Court of the Judiciary for this proposition is *Cooper v. Aaron*, 358 U.S. 1 (1958). And ironically, the case cited in *Cooper v. Aaron* for this proposition is *Ableman v. Booth*, 62 U.S. 506 (1859).

And what is *Ableman v. Booth? Ableman* involved the federal Fugitive Slave Act, which many northern states defied but which was upheld by the U.S. Supreme Court in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In *Ableman*, the Wisconsin Supreme Court had nullified *Dred* Scott, holding that the Fugitive Slave Act was invalid in Wisconsin (several northern legislatures did the same). *In re Booth*, 3 Wis. 157 (1854).

On appeal Chief Justice Roger B. Taney (the author of the *Dred Scott* decision) reversed the Wisconsin Supreme Court, saying that the power to nullify U.S. Supreme Court decisions "has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it." 62 U.S. at 515.[7]

Do the Southern Poverty Law Center, the Judicial Inquiry Commission, and the Court of the Judiciary really want to rest their case entirely (albeit indirectly) upon the Fugitive Slave Act, the *Dred Scott* decision, and *Ableman v. Booth?* Like it or not, that is essentially what they have done.

The issue continues today. On July 8, 2015, the Louisiana Supreme Court reluctantly held over sharp criticism from several justices that *Obergefell* must be applied. *Costanza v. Caldwell*, 167 So. 3d 619 (La. 2015). One Justice wrote that "rather than a triumph of constitutionalism, the opinion of these five lawyers is an utter travesty as is my constrained

[7] Under the Tenth Amendment, the more appropriate question might be whether that power had ever been delegated to the United States by the Constitution or prohibited to the states by the Constitution; if not, the power is reserved to the states.

adherence to their 'law of the land' enacted not by the will of the American people but by five judicial activists." *Id.* at 622 (Knoll, J., concurring). Another Justice dissented, saying he could not and would not apply *Obergefell* to a Louisiana case. That Justice did not prevail, but he was not disciplined or sanctioned for his dissent. *Id.* at 624 (Hughes, J., dissenting).

CONCLUSION

The proper role of the federal and state governments, and the proper relationship between the federal and state courts, was a subject of controversy before the Constitution was adopted, during the drafting and ratification of the Constitution, and in the years thereafter up to and including the present. The way to address this issue and advocate for a position on this issue is through debate and discussion, scholarly writing, litigation, legislation, and (in Alabama) the elective process. Unfortunately, the Southern Poverty law Center and the Judicial Inquiry Commission have chosen to use punitive legal sanctions rather than reason, silencing opposing views by disguising the issues as ethical violations and using this process to disgrace and disable their opponents.

When such strong-arm tactics are used, what ultimately prevails is not the best reason but the mightiest fist. The outcome is not the rule of law; the outcome is the rule of force.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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