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Honorable Julia Jordan Weller
Clerk Of The Court

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.	)

MOTION OF APPELLANT CHIEF JUSTICE ROY MOORE TO EXPEDITE ULTIMATE DISPOSITION

Appellant Roy S. Moore, Chief Justice of the Alabama Supreme Court, moves the Court to expedite the ultimate disposition of this appeal and decide this case on the briefs. This case is fully briefed and is ready for disposition on the merits. Chief Justice Moore requests waiver of oral argument in order to expedite the disposition on the merits.

BRIEF IN SUPPORT

On February 6, 2017, this Court issued an order setting oral argument in this case for 10:00 a.m. on Wednesday, April 26, 2017. Setting oral argument nearly three months in the

future imposed, as will be explained below, a substantial financial hardship on the Chief Justice because he has had no income or benefits since September 30, 2016. The injustice and the illegality of the penalty imposed cry out for an early resolution of this matter.

I. THE RULES OF APPELLATE PROCEDURE REQUIRE AN EXPEDITIOUS, SPEEDY, AND INEXPENSIVE DISPOSITION OF THIS APPEAL.

"The rules governing appeals from decisions of the Court of the Judiciary shall be construed and applied so as to assure the just, **expeditious** and inexpensive review of the record on the law and the facts." Rule E, Rules Governing Appeals from Ala. Ct. Jud. (emphasis added.) The word "expeditious" means "marked by or acting with prompt efficiency." *Merriam-Webster's Collegiate Dictionary* 440 (11th ed. 2009). The word connotes speed, action that is fast rather than slow, that is swift and not delayed. *See also* Rule 1, Ala. R. App. P. (requiring a "just, **speedy, and inexpensive** determination of every appellate proceeding" (emphasis added)); Rule 7, Ala. R. P. Ct. Jud. (discouraging "[a]ny action which, in the opinion of the Court, would interfere with the **prompt disposition** of the proceedings" (emphasis added)).

II. CONTINUED DELAY SEVERELY AGGRAVATES THE FINANCIAL HARDSHIP IMPOSED ON THE CHIEF JUSTICE BY THE COJ'S JUDGMENT OF SEPTEMBER 30, 2016.

The Court of the Judiciary imposed upon the Chief Justice the sanction of suspension from office for two years and four months -- by far the longest suspension in the history of the Court of the Judiciary. *See* Principal Brief at 25 & App. A. Indeed, the suspension for the remainder of the Chief Justice's term is a de facto removal. Even though his salary and benefits were terminated on September 30, 2016, he has nonetheless prosecuted this appeal for over four months, not only for his own personal vindication but also for the protection of all judges in this state who might otherwise suffer under an unjust and illegal COJ precedent that imposed a de facto removal, artfully described as a "suspension for term," in violation of the unanimity requirement of COJ Rule 16. *See* Affidavit of Chief Justice Roy S. Moore, ¶¶ 3-5.

The Alabama Constitution limits the outside employment of a judge. *See* Art. VI, § 147(a), Ala. Const. 1901. The scheduling of oral argument so far in the future places a great financial hardship on the Chief Justice and his family. *See* Affidavit, ¶¶ 3, 5. Justice delayed is justice denied, particularly in this case where the COJ's clever but illegal

"suspension" for the rest of the Chief Justice's term precludes him from earning a livelihood to support his family.

III. EXTENDING THE TIME TO RESOLVE THIS CASE FURTHER AGGRAVATES THE INJUSTICE THE CHIEF JUSTICE IS SUFFERING FROM THE VERDICT AND SENTENCE IN THIS MATTER.

The allegations in this matter all center around a four-page Administrative Order. In that Administrative Order the Chief Justice showed respect to an injunction of the Alabama Supreme Court which that Court itself left in place two months after the Administrative Order. *See* Appendix A, Certificate of Judgment, *Ex parte State ex rel. Alabama Policy Institute*, [1140460, March 4, 2016] ___ So. 3d ___ (Ala. 2016) ("*API*"). (C.391.) The wording in the final paragraph of the administrative order is **identical** to the language in this Court's *API* injunction of March 3, 2015 that was expressly certified in the Certificate of Judgment. *See* Principal Brief, at 55.

Furthermore, as also stated in the opening appeal brief (pp. 57-59, 61-62), Callie Granade, United States District Judge for the Southern District of Alabama, unambiguously stated in an order of June 7, 2016 – five months after issuance of the Administrative Order and three months after the entire Alabama Supreme Court issued the Certificate of

Judgment in *API* – that **the March 2016 Certificate of Judgment continued in effect the March 2015 injunction regarding the Alabama marriage laws**. *See* Appendix B, Order, *Strawser v. Strange*, (S.D. Ala. June 7, 2016) (Ex. 24, C.848-54). Judge Granade's order specifically stated: "[T]he Alabama Supreme Court **did not** vacate or set aside its earlier writ of mandamus directing Alabama's probate judges to comply with the Alabama laws that were held unconstitutional by this Court." She also stated that "Chief Justice Moore specifically stated in his concurrence [in *API*] that the certificate of judgment and the dismissal of the petitions 'does not disturb the existing March orders in this case ....'" Judge Granade concluded:

> **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.**

Order of June 7, 2016, at C.852-53 (emphasis added). Because the March 2015 orders of the Alabama Supreme Court continued in effect **after** the date of the Administrative Order, Judge Granade entered a permanent injunction against them. *Id.* at C.854).

The JIC carefully avoids drawing the necessary conclusion from the fact recognized by Judge Granade that the Alabama

Supreme Court left its March 2015 orders in *API* in place two months after the issuance of the Administrative Order. Attempting to draw an ethical distinction between the January 2016 administrative order and the Court's March 2016 order, the JIC states:

> [I]n March of 2016, when the Alabama Supreme Court issued its opinion in *API II*, it was doing so within the confines of a case and controversy — the *API* case — and the opinions each court member expressed therein were insulated from ethical scrutiny, provided that they were made in good faith.

JIC Brief at 25 n.5 (citing *Matter of Sheffield*, 465 So. 2d 350 (Ala. 1984). The JIC adds: "An administrative order like this one is no place for a legal ruling and is not protected like a ruling in an actual case." *Id.* at 25.

The Administrative Order, however, was not a legal ruling on the issue before the Court (the effect of *Obergefell* on the *API* orders), but a reminder to the probate judges that the *API* injunctions remained in full force and effect until a contrary decision by the Alabama Supreme Court. In its March 4, 2016 order in *API*, the Alabama Supreme Court, as pointed out by Judge Granade, declined to modify its injunctions to the Alabama probate judges that they had a ministerial duty to follow Alabama marriage law as expressed in the Sanctity of Marriage Amendment and the Marriage Protection Act.

If the Chief Justice is to be punished for telling the probate judges that the March 2015 orders of the Alabama Supreme Court in *API* were still in effect (which is affirmed by Judge Granade), are not the other justices of that Court equally culpable who issued a Certificate of Judgment continuing those orders in effect two months after the date of the administrative order?

This case has been fully briefed and the issues before this Court are straightforward. There should be no further delay in rendering a final disposition of this case. The injustice cries out for an expeditious resolution. Chief Justice Moore requests this Court to dispense with oral argument and to decide this case on the briefs to expedite the final disposition.

CONCLUSION

Because the setting of oral argument so far in the future exacerbates the continuing financial hardship the Chief Justice is experiencing and because the injustice of the judgment of the Court of the Judiciary cries out for a speedy reversal, the Chief Justice respectfully requests this Court to promptly decide this matter. The case is fully briefed and the legal issues are straightforward. Chief Justice Moore

requests this Court to render a final disposition now and to dispense with oral argument to expedite the case.

Respectfully Submitted,

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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.	)

AFFIDAVIT OF CHIEF JUSTICE ROY S. MOORE

Roy S. Moore, Chief Justice of the Alabama Supreme Court, does solemnly affirm under oath that the following statement is true and correct to the best of his knowledge and belief:

1. On February 6, 2017, the Special Supreme Court chosen to hear my appeal entered an order scheduling oral argument for April 26, 2017 at 10:00 a.m. This date is nearly three months from the date of the order.

2. As of April 26, 2017, I will have been suspended from the office of Chief Justice for nearly a year – one of the longest suspensions any Alabama judge has ever suffered.

3. My salary and benefits were terminated on September 30, 2016, by order of the Court of the Judiciary. For over four months I have prosecuted this appeal, not only for my personal vindication but also for the protection of all judges in this state who will suffer under an unjust and illegal precedent of the Court of the Judiciary that imposed upon me a de facto removal, artfully described as a "suspension for term" in violation of the unanimity requirement of COJ Rule 16.

4. The Court of the Judiciary imposed upon me the sanction of suspension from office for two years and four months - by far the longest suspension in the history of the Court of the Judiciary. And to aggravate the matter, the COJ violated its own rules to do so.

5. Eight trial judges, both active and retired, in an amicus brief to this Court have expressed great concern at the nullification of the unanimity rule for removal. *See* Rule 16, R. P. Ala. Ct. Jud. They stated:

> We trial judges find a detour like this around the rule requiring unanimity for removal troubling to say the least, for the same sanction could be applied to one of our members in the future, and the Chief Justice's case could set unassailable precedent against any argument to the contrary.

Amicus Brief of 8 Trial Judges of Alabama, at 10. The trial

judges' concern is well taken, especially if delay in resolving this case should create a debilitating financial hardship for me and my family.

6. This case is fully briefed and the issues before this Court are straightforward. I hereby request this Court to expedite the final disposition of my case and am willing to dispense with oral argument in order to facilitate an expeditious ruling.

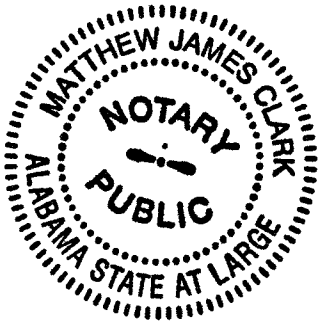
Roy S. Moore

Roy S. Moore

Subscribed and sworn to before me
this 21st day of February, 2017.

NOTARY PUBLIC

My commission expires 2/14/20.



Appendix A

IN THE SUPREME COURT OF ALABAMA

March 4, 2016

1140460 Ex parte State of Alabama ex rel. Alabama Policy Institute, Alabama Citizens Action Program, and John E. Enslen, in his official capacity as Judge of Probate for Elmore County. EMERGENCY PETITION FOR WRIT OF MANDAMUS (In re: Alan L. King, in his official capacity as Judge of Probate for Jefferson County, et al.)

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this cause and indicated below was entered in this cause on March 20, 2015:

Application Overruled. No Opinion. PER CURIAM - Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan, JJ., concur.

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. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

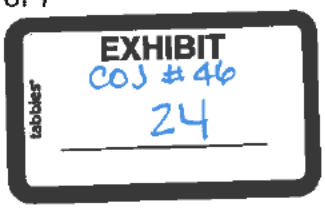
I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 4th day of March, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

Appendix B



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES N. STRAWSER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CIVIL ACTION NO. 14-0424-CG-C**
	)	
LUTHER STRANGE, in his official capacity as Attorney General for the State of Alabama, et al.,	)	
	)	
Defendants	)	

ORDER

This matter is before the court on the motion of Judge Don Davis to withdraw as Class Representative and for his counsel to withdraw as Class Counsel (Doc. 130), Plaintiffs' opposition thereto (Doc. 135), Judge Davis' amended motion (Doc. 147), Plaintiffs' opposition to the amended motion (Doc. 149), Plaintiffs' motion for permanent injunction and final judgment (Doc. 142), opposition to Plaintiffs' motion filed by Attorney General Luther Strange (Doc. 150), Judge Tim Russell (Doc. 151), and Judge Davis (Doc. 152), Plaintiffs' reply (Doc. 159), the motion of Attorney General Strange to dismiss (Doc. 166), Plaintiffs' opposition to dismissal (Doc. 167), Attorney General Strange's reply (Doc. 170), and supplemental authority filed by Plaintiffs (Docs. 162, 171, 173, 174, 175). For the reasons explained below, the Court finds that the motion of Judge Davis to withdraw and the motion of Attorney General Strange to dismiss should be denied and that Plaintiffs' motion for

permanent injunction and final judgment should be granted.

I. Motion to Withdraw as Class Representative and as Class Counsel

Defendant Davis asks to withdraw because he does not want to continue to represent the class or pay expenses associated with litigating this case. However, as this Court has previously stated, "Rule 23(a)(4) does not require a willing representative, [but] merely an adequate one." (Doc. 122, p. 14 (quoting National Broadcasting Co., Inc. v. Cleland, 697 F.Supp. 1204, 1217 (N.D. Ga. 1988)). "In contrast with representatives of plaintiff classes, named defendants almost never choose their role as class champion [as] it is a potentially onerous one thrust upon them by their opponents." Marcera v. Chinlund, 595 F.2d 1231, 1239 (2d Cir.), vacated on other grounds sub nom. Lombard v. Marcera, 442 U.S. 915, 99 S. Ct. 2833, 61 L. Ed. 2d 281 (1979). "But courts must not readily accede to the wishes of named defendants in this area, for to permit them to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread illegality." Id. This Court previously found that Judge Davis is adequate to represent the Defendant Class. After reviewing Judge Davis' motion and amended motion, the Court finds that Judge Davis has not provided any justification to reconsider that decision. The Court also finds no justification for permitting counsel to withdraw as Defendants' Class Counsel.

II. Motion to Dismiss as Moot

Attorney General Strange moves to dismiss this case as moot because a permanent injunction barring the enforcement of Alabama's marriage laws have

already issued and the Attorney General continues to remain in full compliance with it. The Attorney General acknowledges that the Supreme Court's decision in Obergefell v. Hodges 135 S.Ct. 2584(2015) is the law of the land. He contends that nothing more remains to be done in this case and that there is no longer a live case or controversy between the Attorney General and the Plaintiffs. Defendants Russell and Davis also argue that the case is moot in their opposition to Plaintiffs' motion for permanent injunction. Russell contends that he has been issuing marriage licenses to same-sex couples on the same priority and in the same manner as those licenses are issued to couples of the opposite sex. Davis also argues that Alabama probate judges have complied with the reasoning of the Obergefell ruling.

Plaintiffs conversely argue that none of the Defendants' assurances provide Plaintiffs or the members of the Plaintiff Class with a formal, enforceable order should the Attorney General (or a future Attorney General) or other Defendants violate this Court's injunction or fail to fully recognize marriages validly entered into in Alabama or elsewhere. Current or future state and county officials may disagree about Obergefell's applicability to the challenged Alabama laws or otherwise resist the decision. This Court agrees that the need for a permanent injunction is clear. As the Northern District of Florida recently explained "a government ordinarily cannot establish mootness just by promising to sin no more." Brenner v. Scott, Case No. 14-cv-107-RH/CAS, Order granting summary judgment (N.D. Fla. March 30, 2016). "A 'defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.' " Id. (quoting Friends of

the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 174 (2000)). "A case becomes moot only 'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " Id. (quoting Laidlaw supra). "The formidable, heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1184 (11th Cir. 2007) (quoting Laidlaw supra). Here the Attorney General and other Defendants have not satisfied this burden.

To demonstrate that the case is moot, Defendants must show that both of the following conditions are satisfied:

> (1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Los Angeles Cty. v. Davis, 440 U.S. 625, 631 (1979) (citations and internal quotations omitted). Courts consider at least three factors in determining whether a defendant has unambiguously terminated the challenged conduct:

> First, courts consider the timing and content of the decision to terminate the conduct. Rich [v. Fla. Dep't of Corr., 716 F.3d 525, 532 (11th Cir. 2013)]. Second, courts consider whether the change in conduct was the result of substantial deliberation or was instead an attempt to manipulate the court's jurisdiction. Id. And third, courts consider whether the new policy has been consistently applied. Id. If the defendant establishes unambiguous termination, the controversy is moot, "in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1285 (11th Cir. 2004).

Brenner v. Scott, Case No. 14-cv-107-RH/CAS, Order granting summary judgment (N.D. Fla. March 30, 2016). Given the actions by Alabama state and local officials

during this litigation, both before and after the Supreme Court decided Obergefell, it cannot be said with assurance that there is no reasonable expectation that Alabama's unconstitutional marriage laws will not again be enforced. Although the Attorney General professes that he will continue to abide by the decision in Obergefell, like the defendant in Brenner v. Scott, "[t]here has been nothing voluntary about the defendants' change of tack." The Defendants defended this case with vigor from the outset and the challenged statutes remain on the books.

Although Attorney General Strange is already subject to a permanent injunction from another case in this Court, Searcy v. Strange, No. 14-cv-208-CG-N, the other Defendants in this case are not subject to that injunction and the Plaintiffs in this case lack standing to enforce the Searcy injunction. It is also apparent that certain Alabama state courts do not view this Court's ruling in Searcy as binding precedent, as demonstrated by the writ of mandamus issued by the Alabama Supreme Court on March 3, 2015, requiring probate judges to discontinue the issuance of marriage licenses to same-sex couples. Ex parte State ex rel. Alabama Policy Inst., 2015 WL 892752, at *43 (Ala. Mar. 3, 2015).

The Court notes that the Supreme Court of Alabama denied the pending mandamus petitions and entered judgment in Ex parte State of Alabama ex rel. Alabama Policy Institute on March 4, 2016. However, 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 laws that were held unconstitutional by this Court. Chief Justice Moore specifically stated in his concurrence that the certificate

of judgment and the dismissal of the petitions "does not disturb the existing March orders in this case or the Court's holding therein that the Sanctity of Marriage Amendment, art. I, § 36.03, Ala. Const. 1901, and the Alabama Marriage Protection Act, § 30-1-9, Ala. Code 1975, are constitutional." Ex parte State ex rel. Alabama Policy Inst., 2016 WL 859009, at *5, *39 (Ala. Mar. 4, 2016). Chief Justice Moore went further to state that "[t]he Obergefell opinion, being manifestly absurd and unjust and contrary to reason and divine law, is not entitled to precedential value." Id. at *28. Chief Justice Moore also stated that the Eleventh Circuit's finding that the Alabama Supreme Court's order was abrogated by the Supreme Court's decision in Obergefell "is plainly wrong." Id. at *34.

This Court is aware that Chief Justice Moore is currently suspended from his position and is facing charges before the Alabama Court of the Judiciary. However, even if Chief Justice Moore is not reinstated to his position as Chief Justice, the concurring opinions of several other Alabama Supreme Court Justices also expressed disagreement with Obergefell. Justice Bolin and Justice Parker also stated that the Order dismissing the mandamus petitions was not a "decision on the merits," indicating that the mandamus order finding Alabama's marriage statutes constitutional was still in effect. Id. at *40, *47. 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. It is clear that the decision by the United States Supreme Court in Obergefell does not

provide certainty that the alleged violations will not recur. 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.

III. Motion for Permanent Injunction and Final Judgment

Plaintiffs move for entry of a permanent injunction based on the Supreme Court's decision in Obergefell, upholding this Court's findings in its preliminary injunction order. The parties have had ample opportunity to respond to the merits of Plaintiffs' claims. The Court is not persuaded that the grant of class certification or its other prior rulings should be reconsidered. Having found that this action is not moot, the Court also finds that the reasoning in Obergefell is determinative of the case. Accordingly, entry of a permanent injunction is appropriate.

CONCLUSION

For the reasons stated above, the motion of Judge Don Davis to withdraw as Class Representative and for his counsel to withdraw as Class Counsel (Doc. 130), is **DENIED**, the motion of Attorney General Strange to dismiss (Doc. 166), is **DENIED** and Plaintiffs' motion for permanent injunction and final judgment (Doc. 142), is **GRANTED**. Final Judgment will be entered by separate order.

DONE and ORDERED this 7th day of June, 2016.

/s/ Callie V. S. Granade
SENIOR UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I have this 22nd day of February, 2017, served a copy of this *Motion Of Appellant Chief Justice Roy Moore To Expedite Ultimate Disposition* on the Judicial Inquiry Commission and counsel below through electronic mail:

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