Case No. 1160002

IN THE SUPREME COURT OF ALABAMA

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

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANT ON BEHALF OF UNITED STATES JUSTICE FOUNDATION, PUBLIC ADVOCATE OF THE UNITED STATES, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND

Of Counsel:
William J. Olson
Herbert W. Titus
Jeremiah L. Morgan
William J. Olson, P.C.
Vienna, Virginia
Joseph W. Miller
U.S. Justice Foundation
Ramona, California
J. Mark Brewer
Brewer & Pritchard, P.C.
Houston, Texas
James N. Clymer
Clymer Conrad, P.C.
Lancaster, Pennsylvania
Kerry L. Morgan
Pentiuk, Couvreur & Kobiljak
Wyandotte, Michigan
D. Stephen Melchoir
Melchoir Law Office
Cheyenne, Wyoming

Steven Knapp
114 N. 8th Street, Ste. 8A
Opelika, Alabama 36801
tel: 423-677-1708
fax: 334-741-4074
sm.knapp@hotmail.com

Counsel for *Amici Curiae*

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STATEMENT OF THE CASE

The Court of the Judiciary ("COTJ") unanimously found that each one of the six charges[1] that had been brought against Chief Justice Roy S. Moore by the Judicial Inquiry Commission ("JIC") had been proven by clear and convincing evidence. The COTJ found that Chief Justice had not just "violat[ed]," but rather was "guilty" of violating the following Alabama judicial canons:

> "• Canon 1, in that he failed to uphold the integrity and independence of the judiciary;
>
> • Canon 2, in that he failed to avoid impropriety and the appearance of impropriety in all his activities;
>
> • Canon 2A, in that [sic] failed to respect and comply with the law and failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;
>
> • Canon 2B, in that he failed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute;
>
> • Canon 3, in that he failed to perform the duties of his office impartially; and
>
> • Canon 3A(6), in that he failed to abstain from public comment about a pending proceeding in his own court." [Court of the Judiciary Final Judgment ("COTJ Dec.") at 49.]

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[1] *See* COTJ Dec. at 22-23.

Although these six "guilty" findings give the appearance of a long pattern of improper conduct by the Chief Justice, all were based entirely on:

> (i) the Chief Justice's issuance of a January 6, 2016 Administrative Order relating to the duties of Alabama probate judges; and
>
> (ii) the Chief Justice's "refusal to recuse" from a March 4, 2016 unanimous decision of the Alabama Supreme Court dismissing Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 4, 2016] ___ So. 3d ___ (Ala. 2016) ("API II").]

Both actions were taken in the aftermath of the June 26, 2015 decision of the U.S. Supreme Court in Obergefell v. Hodges, 135 S.Ct. 2584 (2015). COTJ Dec. at 2-3.

The specific sanction imposed by the COTJ was that the Chief Justice was "suspended from office without pay for the remainder of his term ... effective immediately [on September 30, 2016]." COTJ Dec. at 50. This "suspension" from office would have the same effect as, and seems to be the legal equivalent of, "removal" from office. The COTJ states that "[r]emoval of a judge from office ... requires 'the concurrence of all members sitting.' Rule 16, R.P. Ala. Ct. Jud." COTJ Dec. at 48. The COTJ then admits that it did not reach its suspension decision unanimously — but only by "a majority" of the COTJ. *Id.* Although not addressed further in this brief, these *amici curiae* are deeply trou-

bled by the COTJ performing an end-run on its own rules by a *de facto* removal of the Chief Justice by mere majority vote — a sanction that it was without authority to impose. If this Court allows that decision to stand, it would improperly sanction the violations of Alabama Judicial Ethics that have been committed not by the Chief Justice, but by the judicial members of the COTJ, including:

- Canon 1, in that they have failed to uphold the integrity and independence of the state judiciary to protect the People of Alabama, the prior decisions of the Alabama Supreme Court, the Constitution of Alabama, and the Laws of Alabama, in the face of a lawless decision of the United States Supreme Court, and particularly when that decision was expressly limited to situations where same-sex marriage would do no harm, a situation very different from that existing in Alabama;

- Canon 2, in that they have failed to avoid impropriety and the appearance of impropriety in all its activities by imposing a sanction that it is powerless to impose;

- Canon 2A, in that they have *de facto* removed the Chief Justice of Alabama, who had been elected by the People of Alabama, now for the second time, in a way that fails to promote public confidence in the integrity and impartiality of the judiciary selected by the People of Alabama; and

- Canon 2B, in that they have committed acts prejudicial to the administration of justice that brings the judicial office into disrepute based on the erroneous premise of the Constitutional Supremacy of United States Supreme Court.

SUMMARY OF ARGUMENT

The COTJ's Final Judgment asserted that it was "concerned only with alleged violations of the Canons of Judicial Ethics," and not the legitimacy of same-sex marriage, or any "review" of the Supreme Court's decision in Obergefell. COTJ Dec. at 1. However, each of the alleged violations of the Canons is based on the COTJ's historically and legally flawed presuppositions as to the role of the United States Supreme Court in American jurisprudence, and the authority and duty of State officials under the United States Constitution when faced with a Supreme Court decision like Obergefell.

The COTJ expressly relied on its own 2003 decision involving the Chief Justice as supporting his suspension. COTJ Dec. at 48-49. That "history with this court" invoked the COTJ's prior removal of "Chief Justice Moore from office based on his 'willful[] refus[al] to obey a lawful and binding order of a federal court.'" *Id.* at 2, n.2. However, the Chief Justice's prior removal is irrelevant to both the charges brought by the JIC, and to the sentence imposed. *See* Section I, *infra*.

The COTJ's decision with respect to the Administrative Order is not based on its text, or what it fairly could be

said could be implied from that text, but rather on a meaning speculatively imputed to that Order by the COTJ, based on its suspicions about the motivations behind it. *See* Section II, *infra*.

The Chief Justice's "refusal to recuse" from API II was supported by a thoughtful and convincing 12-page explanation based on sound Alabama precedent as to why he was under no duty to recuse from participating in the Court's decision. It is by no means clear from the COTJ opinion that the Chief Justice did anything improper by refusing to recuse and concurring in the Court's unanimous order dismissing the case. Therefore, his "refusal to recuse" in no way affected the outcome of the Court's action taken on the case. However, in participating, the Chief Justice did have the opportunity to write an important special concurrence commenting on the Obergefell decision and the degree to which it was binding under our constitutional system. *See* Sections III through IX, *infra*.

ARGUMENT

I. The Removal of the Chief Justice by the COTJ in 2003 Cannot Properly Provide Any Basis for His Removal in 2016.

The COTJ expressly relied on Chief Justice Moore's "history with this court" as one of the grounds upon which

it rested its decision to suspend the Chief Justice "from office without pay." COTJ Dec. at 48-49. That history, the COTJ stated, revealed that the COTJ had "removed Chief Justice Moore from office in 2003 based on his 'willful[] refus[al] to obey a lawful and binding order of a federal court.'" *Id.* at 2, n.2.

According to the JIC, what Chief Justice Moore did in his January 6, 2016 Administrative Order to the state's probate judges was "the same as – indeed, worse than – his actions that led to his removal from the office of Chief Justice in 2003," justifying his removal. *See* COTJ Dec. at 25. For the reasons stated below, neither the January 2016 Administrative Order nor the Chief Justice's "refusal to recuse" is in any way comparable to the actions on which the earlier COTJ grounded its 2003 removal.

Although the COTJ did not formally adopt the JIC's view, the COTJ clearly relied on that 2003 removal to support its ruling. After quoting the Chief Justice's testimony in the 2003 case involving his refusal to remove the Ten Commandments monument, the COTJ ruled:

> 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. [COTJ Dec. at 32 (emphasis added).]

The refusal by the Chief Justice to remove the monument in 2003 is simply not analogous to the charges being considered in 2016. In 2003, the Chief Justice had been a party to a case within the jurisdiction of a federal district court, and was subject to an injunction specifically directed to "Defendant Roy S. Moore, his officers, agents, servants, and employees" ordering the removal of the monument by a specific date.[2] In the present case, the administrative action taken by the Chief Justice in 2016, while related to the Obergefell decision and Strawser injunction, was not in direct conflict with any order issued in either case — since the Chief Justice was neither a party in either case, nor named in the Strawser injunction. Therefore, unlike the Chief Justice's actions in 2003, whatever the Chief Justice said concerning either Obergefell or Strawser in his January 2016 Administrative Order was not in violation of an injunction, and hence did not constitute "defi-

[2] *See* Glassroth v. Moore, 242 F. Supp. 2d 1067 (D. Ala. 2003).

ance" of the Supreme Court's Obergefell order or the Strawser injunction.

In an attempt to close this unbridgeable gap between 2003 and 2016, the JIC took the position that, although the Chief Justice actually did not defy any court order or injunction, he incited the state's probate judges to disobey the Strawser injunction. *See* COTJ Dec. at 24-26. The COTJ may not have formally adopt the JIC's view, but that view led directly to the COTJ's decision to reject Chief Justice Moore's claim that: "the January 6, 2016, order [was] not ... a direction to anyone to do anything but merely as a sort of 'status update' informing the probate judges that the issues addressed in the June 29, 2015, invitation for 'additional briefing' remained pending before the Court." *Id.* at 27-28. *See also id.* at 29-31. Once again, to support this finding, the COTJ specifically relied on the Chief Justice's testimony before the JIC in 2003 (*id.* at 30), enabling the COTJ to conclude that the Chief Justice's words "clearly express ... not a new strategy," but an old cover to conceal the real purpose of the January 2016 administrative order — "to ... 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." *Id.* at 31-32.

Remarkably, the JIC produced no evidence that any probate judge caught the Chief Justice's supposed covert message calling for defiance. The best "evidence" that the COTJ could offer to justify this purported reading of the January Administrative Order — that it constituted "a 'thinly-veiled order directing probate judges to defy federal law'" — was "Chief Justice Moore's own attorney in this proceeding [having] interpreted the January 6, 2016, order as a call for open defiance of federal court decisions and [having] issued a press release to that effect on the date the order was released." *Id.* at 39. Indeed, it appears from the COTJ's own decision that only the Chief Justice's defense counsel understood the hidden message in his Administrative Order! Based on this "evidence," the COTJ lamely concluded that the Chief Justice's putative call to arms in his "January 6, 2016, order can be reasonably read as requiring defiance of the United States Supreme Court and the district court in Strawser." *Id.* at 32.

In an attempt to shore up its finding that the Chief Justice urged the state's probate judges to defy the Obergefell decision and Strawser injunction, the COTJ concluded

that the January order "**appeared** to require" such defiance. Indeed, the COTJ stated that the "**central claim** of charges nos. 1-5 of the JIC's Complaint is that the January 6, 2016, order required, or **appeared** to require, Alabama's 68 probate judges to defy the United States Supreme Court's decision in Obergefell and the expressed prohibitions of a binding injunction by the federal district court." COTJ Dec. at 25 (emphasis added). Thus, the COTJ was satisfied with its finding that the "order **can** be **reasonably** read as requiring defiance of the United States Supreme Court and the district court in Stawser." *Id.* at 32 (emphasis added). Again to support this claim, the COTJ relied solely on the Chief Justice's counsel, and his press release that "'[i]n Alabama... state judiciaries... are standing up against the federal judiciary or any one [sic] else who wants to come up with some cockeyed view that somehow the Constitution now births some newfound notion of same-sex marriage.'" *Id.* at 32.

The COTJ's decision fails to demonstrate that the JIC met its burden of proof by clear and convincing evidence. His counsel's press release does not even mention the Chief Justice's Administrative Order, much less make any claim that "any State judiciary had been prompted by the order to

'stand up' against the federal judiciary." *Id.* Thus, it does not even begin to support the COTJ claim that the January order "can be reasonably read as requiring defiance." *Id.* Not only did the press release fail to support the JIC allegation that the Chief Justice's order induced defiance, but it does not even support COTJ's claim that it "appear[ed]" to induce such defiance. *Id.* at 39. And, as pointed out above, there was absolutely no evidence presented that any probate judge took any action whatsoever in response to the press release. The COTJ's findings as to "defiance" are unsupportable and should be disregarded.

II. The COTJ's Attempt to Impute Improper Motives to the Chief Justice in an Effort to Find Fault with His January 6, 2016 Administrative Order Was Both Speculative and Improper.

Throughout its final judgment, the COTJ accepted without question the JIC's "premise that the United States Supreme Court is the final arbiter of the United States Constitution" and that its decision in Obergefell nullified and abrogated the decision of the Alabama Supreme Court upholding the Alabama Constitution and marriage laws defining marriage as only a union of one man and one woman. *See* COTJ Dec. at 24-27. Every effort made by Chief Justice Moore to counter this view was met with skepticism and disbelief. *Id.* at 27-29. What Chief Justice Moore found to

be problematic and confusing, the COTJ and JIC found resolved and settled. Thus, the COTJ and JIC found the Chief Justice's testimony — that his Administrative Order was a "status report," not a call for resistance or defiance — to be "selective" at best, if not "intentionally misleading." *See id.* at 38. In short, because the COTJ and JIC concluded that Obergefell was "clear law," there was nothing left for the Alabama Supreme Court and the state probate judges to do but to surrender lock, stock, and barrel, and to obey. *Id.* at 40-41.

The Obergefell decision probably generated more commentary in both the legal and popular press than any other Supreme Court decision in recent memory. In its aftermath, there was much discussion about the impact that decision would have on the various state marriage, divorce, and child custody laws.

Even within the four States that were parties to Obergefell, there was question about whether county employees could be compelled to issue same-sex marriage licenses which were contrary to their religious belief.[3] Elsewhere, there was confusion as well. Texas Attorney General Ken

[3] *See* http://www.rawstory.com/2016/03/kentucky-house-approves-creation-of-marriage-license-accommodating-same-sex-couples/.

Paxton offered to defend free of charge any state clerks who refused to issue same-sex marriage licenses.[4] *See also* Statement of Texas Governor Gregg Abbott. Mississippi Attorney General Jim Hood initially indicated that an order from the Fifth Circuit was required before clerks in that state would be compelled to issue same-sex marriage licenses, and a later statement from Hood was issued to clarify what he meant.[5] Several states claimed that lawsuits against their traditional marriage laws were moot because of the simple existence of the Obergefell decision and the fact that those states did not intend to enforce their own marriage laws. However, the Eighth Circuit held that Obergefell invalidated the laws at issue within the four states in that case, but did not automatically invalidate the laws in other states. *See, e.g.*, Jernigan v. Crane, 796 F.3d 976 (8th Cir. 2015).

In Alabama, there was no broad permanent federal court injunction against the State's marriage law until June 7, 2016 — nearly a year after Obergefell was decided and five months after the Administrative Order. Strawser v. Strange,

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[4] *See* http://www.bbc.com/news/world-us-canada-33314220.

[5] *See* http://www.clarionledger.com/story/news/2015/06/29/ag-oks-same-sex-licenses/29465835/.

2016 U.S. Dist. LEXIS 74389 (S. Dist. Ala. 2016).[6] Failing to understand or appreciate the confusion which reigned at that time, the COTJ stated that it "does not find credible" the reasons advanced by the Chief Justice for issuing the January 2016 Administrative Order. COTJ Dec. at 30.

Similarly, in response to the Chief Justice's explanation of the reason he included a "disclaimer" that he was "'not at liberty to provide any guidance ... on the effect of Obergefell on the **existing orders** of the Alabama Supreme Court,'" the COTJ responded "[w]e likewise do not accept [that] argument." *Id.* at 31. Much of the basis for its refusal to accept the text of the Administrative Order for what it states, or the Chief Justice's purpose in issuing it, is based on an argument offered by the JIC, and apparently accepted by the COTJ, that the Chief Justice "could have simply not issued the January 6, 2016, order." *Id.* at 29. The COTJ appears to accept the assertion by the JIC that the Chief Justice's actions were "'disingenuous and transparent.'" *Id.* at 46.

Based on its collective wisdom that no order needed to be issued, the COTJ felt itself at liberty to read into the

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[6] *See* http://www.reuters.com/article/us-alabama-marriage-idUSKCN0YU2SY.

Administrative Order a motivation which somehow violates judicial ethics, even if the text of the Order provides no such basis. The COTJ's conclusion that the Chief Justice "took legal positions in the January 6, 2016, order" (*id.* at 45) was not based on the text of that order, but rather on what it understood to be the Chief Justice's beliefs. How the COTJ felt about the merits of the Chief Justice's criticism of Obergefell provided no justification for a finding against him.

III. The COTJ's Reliance on Cooper v. Aaron Is Sorely Misplaced: Justice Roy Moore's January 6, 2016 Administrative Order Did Not Violate either the Integrity, Independence, Propriety, or Impartiality of the Judiciary.

It is a well-established principle of justice in America that everyone is entitled to his day in court. This sound principle underlay the Chief Justice's Administrative Order in which he reminded the probate judges of his State that it is "'an elementary principle of federal jurisdiction [that] a judgment only binds the parties to the case before the court.'" *See* COTJ Dec. at 12. Rejecting this well-settled rule, the COTJ insisted that the U.S. Supreme Court "in Cooper v. Aaron, 358 U.S. 1 (1958), clearly rejected the **theory** underlying the January 6, 2016, order and Chief Justice Moore's special writing in API II — namely, the

theory that only the parties to a United States Supreme Court decision are bound by the decision." COTJ Dec. at 33 (emphasis added). The COTJ asserted that the Cooper Court carved out an exception to this rule, namely, "that **states** are bound by the decisions of the United States Supreme Court, even when a **state** has not been a party to the case that generated the decision." *Id.* at 33 (emphasis added). The COTJ has mistakenly applied Cooper to this case.

It is presumptuous for the COTJ to invoke Cooper to support its statement that the opinion of five justices in Obergefell is "clear law" worthy of the same consideration accorded Brown v. Board of Education. Unlike the desegregation decision in Brown, an opinion to which all of the justices — laboring cooperatively under the leadership of Chief Justice Earl Warren — agreed, Obergefell was decided by a single vote. Moreover, the division on the Court was so great that each of the four dissenters (including Chief Justice Roberts) wrote separate opinions vigorously contesting not only the result but also the methodology by which the majority had reached its result. Additionally, Brown was the product of argument and reargument on questions such as: "[w]hat evidence is there that the Congress which submitted and the State legislatures and conventions which

ratified the 14th Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?" *See* Brown v. Board of Education, 345 U.S. 972 (1953). In contrast, the five justices in Obergefell made absolutely no effort to ascertain whether either the equal protection or the due process guarantee in the 14th Amendment contemplated a claim of right to same-sex marriage. Rather, they crafted it out of whole cloth.

Furthermore, the COTJ omits the fact that, in Cooper, both the Arkansas governor and the Arkansas legislature were parties in the case before the Court. Both contended that they were not bound by Brown v. Board of Education as a matter of judicial precedent. *See* Cooper, 358 U.S. 1, 9 (1958). Prior to handing down its order in Cooper — rejecting the claim that the Arkansas Governor and legislator was "not bound by our holding in the Brown case" — the Supreme Court acknowledged that the Arkansas officials had challenged the Brown ruling, seeking to "upset and nullify" it. *Id*. at 4. The Court did not rule against the Arkansas officials summarily, but only after careful deliberation, having twice heard oral argument and read "'all the briefs on file.'" *Id*. at 5. Only after full consideration did the

Court conclude that the actions of the Arkansas Governor and Legislature violated the "[t]he controlling legal principles ... that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 16. Thus, the Cooper Court ruled that "[w]hat has been said, in the light of the facts developed, is enough to dispose of the case." *Id.* at 17. So the Supreme Court reaffirmed Brown, reiterating its holding that "the constitutional rights of children [are] not to be discriminated against in school admission on grounds of race or color." *Id.*

The COTJ skipped over this review and reaffirmation of Cooper's legal ruling in Brown, treating it as no more than legal detritus. However, the Cooper Court did not just slam the door on the Arkansas parties, but addressed with care the factual underpinnings of the desegregation decision, attending to the psychological and sociological data upon which it had rested its initial ruling.[7] Only this time, the Court recharacterized its "holding in Brown" to mean that children are "not to be discriminated against in school admission on grounds of race or color," as a matter of law — regardless of the social science data relied on in Brown. *Id.* at 17.

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[7] *See* Brown at 494, n.11.

As was the initial case in Brown,[8] the Obergefell majority expressly acknowledged that its decision was fact-based, and therefore potentially limited in scope. Although the Court ruled that same-sex couples were constitutionally entitled to the same rights as opposite-sex couples to enter into the marriage relationship, the Court tempered that assertion by its observation that "it is appropriate to observe these cases involve **only** the rights of two consenting adults whose marriages would pose **no risk of harm** to themselves or third parties." *Id.* at 2607 (emphasis added).

Rather than demonstrating any understanding of the fact-sensitivity of constitutional litigation, the COTJ insisted that the Obergefell decision is "clear law" without any factual underbrush that might limit its precedential value in any future case addressing the constitutionality of laws governing same-sex couples. (One possible case could be the prohibition of two brothers or two sisters who desire the legal benefits attached to marriage, which would otherwise be illegal under a state law against incest.) In its haste to condemn Chief Justice Moore, the COTJ improperly transformed a difference over the basis for the ruling in Obergefell into a breach of judicial canons.

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[8] *See* Brown at 494-95.

IV. The U.S. Supreme Court's Obergefell Decision Incorporated an Express Limitation on Its Holding Based on the Absence of Demonstrated "Harm" from Same-Sex Marriage, which Was Wholly Disregarded by the COTJ.

Throughout its opinion in Obergefell, Justice Kennedy painted same-sex marriage in glowing and affirming terms. The Court posited that same-sex couples, if admitted to the marital state heretofore denied to them, would find "nobility and dignity," and "sacred ... meaning" of their "most profound hopes and aspirations," just like opposite-sex couples. *See* Obergefell at 2594. The Court proclaimed that opening the door for same-sex couples to marry would bring "'security, safe haven, and connection,'" plus "expression, intimacy, and spirituality" to the same-sex relationship, as has been enjoyed by opposite sex marriage. *Id.* at 2599. Finding nothing in the record but parallels between both same- and opposite-sex marriage, the Court pronounced its holding that "the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605.

However, immediately after stating this holding, the Court addressed whether it ought to "stay its hand" requiring the respondent States to recognize "that same-sex couples may exercise the fundamental right to marry." *Id.* at

2605-06. One by one, the Court stated and then laid aside each request for delay in implementation of its decision, pausing to consider only one: whether "allowing same-sex marriage will cause the **harmful outcomes** [the States] describe." *Id.* at 2607 (emphasis added). Rather than dismissing this concern, as it had the others, the Court faulted the States for "hav[ing] not shown a **foundation** for the conclusion that allowing same-sex marriage will [in fact] **cause**" such **harm**.[9] *Id.* (emphasis added). This alleged failure of the parties to lay a "foundation" of "harmful outcomes" prompted the Court to explain that its holding was a narrow one:

> [W]ith respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe **these cases involve only** the rights of two consenting adults whose marriages would pose **no risk of harm to themselves or third parties**. [*Id.* at 2607 (emphasis added).]

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[9] The question of whether sanctioning same-sex marriage would "harm" others (such as children of the marriage between a man and woman) apparently did not arise until oral argument. *See* Obergefell Oral Arg. Tr. at 46-47. As Justice Kennedy noted in his opinion, Petitioners were able only to "describe" the potential harm, having not laid a previous "foundation." *See* Tr. at 48-49, 51, 66-67, 70, 72-73. In truth, there was no failure of proof by state Respondents, for the issue of harm was never raised by those who challenged the law and most of the evidence put forth by the state was stricken by Judge Friedman. DeBoer v. Snyder, 772 F.3d 388, 397 (6th Cir. 2015).

There can be no doubt, then, that the Supreme Court recognized that the absence of any "risk of harm" to the persons in the marriage, or to third parties, from same-sex marriage was an important predicate for its decision — a factor that not only could limit the application of the Court's new fundamental right, but also could negate the desire by some to overstate the Court's new definition of the right itself. After all, the Court's definition of the right of same-sex couples to marry is already tied directly to the "terms and conditions" enjoyed by "opposite-sex couples." *See id.* at 2605. If certain opposite-sex couples can be and, in fact have been and are, denied access to the marital relationship, so should same-sex couples. But, as Justice Kennedy admitted, the record before the Court was inadequately developed to enable it to assess any such risks.

In addition to the serious health risks to partners in same-sex marriages, there are serious health risks to opposite-sex marriages as well as the public in general that have been reported, including the following:

- Disproportionately, same-sex coupling invites the Human Immunodeficiency Virus ("HIV") weakening the immune system of men engaged in same-sex activity

which is already at epidemic proportions and increasing.[10]

- All-cause morbidity and mortality of gay men shows that homosexual men lose up to 20 years of life expectancy.[11]

- Same-sex couples are more sexually promiscuous, even when not barred from marriage, "open marriages" being normative in the homosexual community.[12]

Since the decision in Obergefell was issued, two eminent scholars[13] issued a lengthy report debunking the

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[10] *See* CDC, "HIV in the United States: At a Glance," (last updated July 1, 2015) http://www.cdc.gov/hiv/statistics/ basics/ataglance.html.

[11] A study in the 1997 *Oxford International Journal of Epidemiology* concluded: "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 years will not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are now experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871." *See* http://ije.oxfordjournals.org/content/26/3/657.abstract?ijkey=268ecd7a27aaf1f73d592cdb11317ec7cc5924a6&keytype2=tf_ipsecsha.

[12] *See* "Many Successful Gay Marriages Share an Open Secret," *New York Times*, 28 Jan 2010, http://www.nytimes.com/2010/01/29/us/29sfmetro.html?_r=0.

[13] The study was undertaken by Lawrence S. Mayer, M.B., M.S., Ph.D., scholar in residence in the Department of Psychiatry at Johns Hopkins University and a professor of statistics and biostatistics at Arizona State University, and Paul R. McHugh, M.D., a professor of psychiatry and behavioral sciences at the Johns Hopkins University School of Medicine who was for 25 years the psychiatrist-in-chief at the Johns Hopkins Hospital.

commonly held assumption that homosexuals were "born that way." This report finds: "There is virtually no evidence that anyone, gay or straight, is 'born that way' if that means their sexual orientation was genetically determined." L. Mayer, Ph.D. & P. McHugh, M.D., "Sexuality and Gender," *The New Atlantis*, No. 50 (Fall 2016) at 31. For many years the argument has been that homosexuality is "just like race" — you are born homosexual. And if you are "born that way," then you should not be held responsible for the behavior that flows from that sexual trait.[14] The study also demonstrated that social stress may contribute to the poor mental health suffered by homosexuals, but is certainly not the only cause. The fact that homosexual behavior is an act against the created order carries with it serious consequences for homosexuals which cannot be blamed on a supposedly homophobic society. Importantly, this study pointed to the fact that homosexuals have often been the childhood victims of adult sexual offenders — including by homosexuals[15]: "One environmental factor that appears to be

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[14] If homosexuality is a choice, then it is not "just like race," and the Obergefell majority's reliance on the 14th Amendment's due process and equal protection clauses is badly misplaced.

[15] The *Journal of Sex and Marital Therapy*, in 1992, found that half of sexually-molested children are molested

correlated with non-heterosexuality is childhood sexual abuse victimization...." *Id.* at 13. In no way were these findings, or similar findings from prior studies, litigated in the district courts for Kentucky, Michigan, Ohio, or Tennessee, the U.S. Court of Appeals for the Sixth Circuit, or the U.S. Supreme Court prior to the Supreme Court's ruling in Obergefell.

Justice Felix Frankfurter once observed that when "[f]undamental issues which have neither been argued by counsel nor considered by the Court are ... involved," a petition for rehearing should be granted. *See* Burns v. Wilson, 346 U.S. 844 (1953) (Frankfurter, J., dissenting). Otherwise, Justice Frankfurter continued, "such important questions [would] be left with[out] []conclusive determination." *Id.* at 844. With such an important issue unresolved, the Obergefell Court's decision cannot be viewed as a final resolution of the issue presented.

Indeed, as Justice Frankfurter elsewhere observed the "demands of sound adjudication call for reargument" when constitutional issues — even less fundamental that they are here — are at stake. *See* City of Detroit v. Murray Corp.,

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by homosexuals. *See* "Homosexuality and Child Sexual Abuse," Family Research Council, 2 Jul 2002, http://www.frc.org/get.cfm?i=is02e3.

357 U.S. 913 (1958). Such another opportunity for argument should be afforded another state, such as Alabama, to support its state constitutional provision and state law mandating opposite-sex marriage to be based on proof of disproportionate harm that extends to the People of Alabama. The problems with the Obergefell decision is not cured by repeating it constitutes "clear law" — as the COTJ erroneously claimed.

V. The U.S. Supreme Court's Obergefell Decision Constituted a Lawless Act of Political Will Wholly without Basis in the United States Constitution, as Documented by All Dissenting Justices.

No one can deny the revolutionary nature of the Obergefell decision, which appears to be dramatically changing the way in which the American people view the United States Supreme Court and federal courts generally.[16] It would be wrong for those whom Justice Scalia described as belonging to an elite class of lawyers (Obergefell at 2629 (Scalia, J., dissenting)) to attribute that deterioration of respect

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[16] A Rasmussen poll taken after the Obergefell decision was released found that 33 percent of likely U.S. voters now believe that states should have the right to ignore federal court rulings if their elected officials disagree with them — up nine points from 24 percent when the question was asked in February 2015. Rasmussen Reports, "Support Grows for States to Ignore the Federal Courts" (July 3, 2015). http://www.rasmussenreports.com/public_content/politics/general_politics/june_2015/support_grows_for_states_to_ignore_the_federal_courts.

to uninformed and uneducated Americans, as it faithfully reflected the unprecedented individual dissenting opinions of four justices of the Supreme Court.

It has not gone without notice that neither the justice writing for the Court, nor any of his four concurring colleagues, even bothered to respond to a single point expressed by any one of the four dissenters.

- There was no majority response to Chief Justice Roberts' charge that the "Constitution ... had nothing to do with [the majority decision]." Obergefell at 2626 (Roberts, C. J., dissenting).

- Nor was there any rebuttal to Justice Scalia's accusation that the majority's "decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." Obergefell at 2627 (Scalia, J., dissenting).

- Nor was there even as much as a footnote in the majority decision, much less a discussion in a concurring opinion, challenging Justice Thomas's erudition on the historic meaning of "liberty" in America's founding documents. Obergefell at 2631-37 (Thomas, J., dissenting).

- And, finally, there was nothing in the majority decision allaying Justice Alito's fear that it "will be used to vilify Americans who are unwilling to assent to the new orthodoxy." Obergefell at 2642 (Alito, J., dissenting).

As the majority opinion now stands, it appears to be the product of a naked vote of the political will of a bare majority, not of the "reasoned judgment" that the Supreme Court claimed it to be. *See* Obergefell at 2598.

From the beginning of the Republic, the law of domestic relations has been viewed as exclusively within the jurisdictions of the states. Indeed, in Barber v. Barber, 62 U.S. (21 How.) 582 (1858), the U.S. Supreme Court denied the existence of federal court jurisdiction over "the subject of divorce, or ... alimony." *Id.* at 584. *See also* Ankenbrandt v. Richards, 504 U.S. 689 (1992).

The case of Loving v. Virginia, 388 U.S. 1 (1967) was a notable exception to this rule, but that case involved a state law grounded in the then-popular "science" of eugenics, prohibiting certain types of inter-racial marriages. Although Justice Kennedy purported to rely on Loving in his Obergefell decision, Loving involved not a same-sex marriage, but rather a marriage of one man and one woman, where the Court found a violation of both the 14th Amendment's due process clause and equal protection clause based on racial distinctions of the sort addressed by that Amendment. In Obergefell, Justice Kennedy made no attempt whatsoever to tie his decision to the views of the Framers of the 14th Amendment. It did not deter him in the slightest that there was no indication whatsoever that the Framers of the 14th Amendment would have viewed same-sex marriage as anything but a crime against nature. Indeed, in his concurring

opinion in dismissing API II, Chief Justice Moore carefully extracted from Obergefell the statements made by Justice Kennedy which demonstrate that he knew that his decision was not originally fixed by the Constitution, but changeable based on the evolutionary will of five unelected lawyers then serving on the U.S. Supreme Court:.

> "• 'When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.' 576 U.S. at ___, 135 S.Ct. at 2598 (emphasis original).
>
> • 'The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.' 576 U.S. at ___, 135 S.Ct. at 2590 (emphasis original).
>
> • '[Rights] rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.' 576 U.S. at ___, 135 S.Ct. at 2602 (emphasis original).
>
> • '[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.' 576 U.S. at ___, 135 S.Ct. at 2603 (emphasis added).
>
> • 'The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment ... entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.' 576 U.S. at ___, 135 S.Ct. at 2598 (emphasis original)." [API II at 19-20.]

Indeed, in these statements, Justice Kennedy revealed that he knew that there was no original or textual basis for his decision in the U.S. Constitution; that he was not interpreting, but rather imposing his will on the U.S. Constitution; that in doing so he was elevating the power of the majority of U.S. Supreme Court justices above the text of the Constitution; that he was usurping the People's right to govern themselves by setting out permanent rules in a written constitution; that he was usurping the People's right to amend their Constitution pursuant to the provisions of Article V; and that he was instituting an era of the rule of man over the rule of law. And, if that were not enough, Justice Kennedy must have understood that he was usurping the role of states — as well as the legislative function — to impose on them a new law of domestic relations. Such actions are wholly inconsistent with the duty of the justices in the majority to demonstrate "good behavior" during their term of office, as required by Article III, Section I. By issuing his concurring opinion in APII, Chief Justice Moore resisted the lawless Obergefell majority and thereby upheld the integrity and independence of the Alabama judiciary in compliance with Canon 2A, not in violation thereof.

VI. The Opinion of the COTJ Is Based on the Distinctly Unconstitutional Doctrine of the Constitutional Supremacy of the U.S. Supreme Court.

According to the JIC, as affirmed by the COTJ, the canons of judicial ethics require slavish, blind obeisance of all of the nation's judges and justices to all decisions of the United States Supreme Court regardless of their merit. COTJ Dec. at 24-25, 33. Never invoking his Oath which was to the United States Constitution, the COTJ concluded that Chief Justice Roy Moore owed fealty rather to the decision of the United States Supreme Court in Obergefell v. Hodges, 135 S.Ct. 2584 (2015). It is the COTJ's opinion that the Obergefell decision is the supreme law of the land, and thus commands unquestioning acceptance in every state of the union. Why? Because, the COTJ avers, the Supreme Court emphatically said so: "The Court, in this decision, holds same-sex couples may exercise this fundamental right to marry in all States." *See* COTJ Dec. at 7, 38.

According to the COTJ's understanding of the power of judicial review, it did not matter that only four — Michigan, Kentucky, Ohio, and Tennessee — of the 50 States were parties to the case. Nor was the COTJ bothered by the fact that four of the nine justices on the Supreme Court dissented from the Court's decision on the strongest of grou-

nds: that the decision that two people of the same sex have a constitutional right to marry was outlandish, wholly illegitimate, outside the jurisdiction of the Court, contrary to the natural order upon which the nation was founded, and having nothing to do whatsoever with the Constitution. *See* Obergefell at 2611-26 (Roberts, C.J., dissenting); 2626-31 (Scalia, J., dissenting); 2631-40 (Thomas, J., dissenting); and 2640-43 (Alito, J., dissenting).

However, none of this deterred the COTJ from pronouncing that the Obergefell Court five-to-four majority opinion is "clear law." COTJ Dec. at 40-41. And on the basis of this naked assertion, the COTJ voted to suspend from office the Chief Justice of one of the 46 States that was not a party to the Obergefell opinion, on the ground that he had "fail[ed] to uphold the integrity and independence of the judiciary," having "defied" the rule of law by an Administrative Order in which he reminded the state's probate judges that the Obergefell decision had not overruled, erased, or in any way, abrogated the state supreme court's prior decision upholding the State's constitutional amendment and statutes limiting marriage to a union of one man and one woman. COTJ Dec. at 32, 40.

Additionally, in its haste to condemn Chief Justice Moore's administrative action and opinion in API II as a violation judicial ethics, as contemptuous of the Supreme Court's decision in Obergefell and the Alabama federal district court's injunctions against the state's probate judges, the COTJ bought the Commission's erroneous argument that "at the time of the January 6, 2016, order, the March 2015 API orders had been nullified." COTJ Dec. at 26. Or, as the Eleventh Circuit had stated, that, on October 2015, Obergefell had 'abrogated' the orders in [API I]." *Id.* at 27.

However, it is beyond question that the Eleventh Circuit has no appellate jurisdiction over a decision of the Alabama Supreme Court, or for that matter, over the January 6 Administrative Order issued by the chief justice in response to the Obergefell holding. COTJ Dec. at 27. But the COTJ dismissed the Chief Justice's contention on the ground that the Obergefell decision itself had displaced the exclusively opposite sex marriage laws of all 50 states, with a new law of extending the law of marriage to same sex couples. *See* COTJ Dec. at 7-8, 38-40.

To be sure, the Obergefell Court stated that it "holds same sex couples may exercise the fundamental right to marry

in **all** States," not just the four states that were parties to the case. Obergefell at 2607 (emphasis added). But that holding does not mean that the court's ruling in Obergefell is, *de jure*, the "law" of all 50 states. For that to be the case, the Court would need to have been vested with legislative power by the U.S. Constitution — indeed, it would need to have been vested with the legislative power of each of the 50 States. Article III of the Constitution, however, vests in the Supreme Court only judicial power. And, having only judicial power, the Supreme Court did not — indeed, could not — repeal and rewrite the laws governing marriage in the 50 states.

As the author of one of the leading casebooks on constitutional law, Stanford Professor Gerald Gunther has observed: "a law held unconstitutional by an American court is by no means ... wholly a nullity...." G. Gunther, Constitutional Law 28 (12th ed., Foundation Press: 1991). Indeed, Professor Gunther has elaborated, "to say that an invalidity ruling affects more than the parties is not to say it is the same as wiping the statute off the books." *Id.* This proposition is well-supported. "[A]s the [U.S.] Attorney General quite persuasively advised President Roosevelt in 1937[,] the Supreme Court had held the District of

Columbia minimum wage law as unconstitutional in 1923, in the Adkins case; but in 1937, in sustaining a similar Washington law in the West Coast Hotel, Inc. case, the Court formally overruled Adkins." *Id.* In the meantime, the D.C. minimum wage statute remained on the "statute books," so that when the Court overruled Adkins, "the act was valid and enforceable," the 1923 court ruling having "simply 'suspended' enforcement." *Id.*

Chief Justice Moore's views accord with these principles. As the COTJ acknowledged, the Chief Justice wrote in his concurring opinion in API II that, although he was oath-bound to the Constitution, he was not bound to the opinions of the United States Supreme Court. In the exercise of judicial power, the Chief Justice, as the COTJ recognized, averred that he would "ordinarily [be] obligated to regard the opinions of the United States Supreme Court as valid precedent that should be followed." COTJ at 14-15. Applying the rule of *stare decisis*, as stated in Blackstone's Commentaries, the Chief Justice found "[t]he Obergefell opinion ... manifestly absurd and unjust and contrary to reason and divine law ... not entitled to precedential value.'" COTJ at 15. Although the COTJ may disagree with both the content and tenor of the Chief Justice's concurring

opinion, but such disagreement cannot support the charges that he failed to uphold the integrity and independence of the judiciary.

Reduced to its essence, the COTJ's final judgment rests not on a matter of ethics, but upon a jurisprudential disagreement with the Chief Justice's position that a court opinion is not law just because the court that issues that opinion says it is. On pages 33-35 of its Final Judgment, the COTJ quotes extensively from that part of the Supreme Court's opinion in Cooper that a Supreme Court constitutional opinion is the supreme law of the land. But that proposition is itself only the Cooper Court's opinion. Article VI, however, states the Constitution — not judicial statements about the Constitution — is the Supreme Law of the land. According to Cooper, Marbury v. Madison, 5 U.S. 137 (1803), stands for the proposition that a Supreme Court decision is "law" because it is the "province and duty" of the Court "to say what the law is," and therefore, whatever the Court says, is law. If true, then Cooper has elevated the judicial power of interpretation of the constitutional text above the text, itself, as if the supremacy clause established the principle that what the Supreme Court says is law. To the contrary, American law, including American

constitutional law as interpreted and applied by the Supreme Court, is governed by the Constitution, not by five Supreme Court justices. *See* Marbury at 179-80 ("[T]he framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.").

The Supreme Court has not always taken the view it expressed in Cooper. In a 1939 concurring opinion, Justice Frankfurter stated "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). Indeed, as constitutional historian Charles Warren stated in his treatise on the Supreme Court, "It is still the Constitution which is the law, not the decisions of the Court." C. Warren, The Supreme Court in United States History, vol. 3, pp. 470-71 (Little, Brown and Co.: 1922).

According to the COTJ, any resistance to Obergefell offered by the Chief Justice in his Administrative Order could only be characterized as "defiance" of "clear law," bringing the judiciary into disrepute. To the contrary, Chief Justice Moore's forthright challenge to the Obergefell decision is in line with many who have gone before him, not the least of whom was President Abraham Lincoln who, in

response to the now infamous Dred Scott decision, proclaimed in his first inaugural address:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, which the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that **if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court,** the instant they are made, in ordinary litigation between parties, in personal actions, **the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.** [Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings (Stanford Univ. Press: 1964) at 157 (emphasis added).]

The doctrine of Supreme Court constitutional supremacy does not go so far as to assert judicial infallibility. Indeed, the U.S. Supreme Court has admitted that it has made many mistakes over the years, expressly or impliedly overruling 236 of its own decisions.[17] The COTJ, on the other

[17] *See* U.S. Government Printing Office, "Supreme Court Decisions Overruled by Subsequent Decision," (2016) https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2016-13.pdf.

hand, appears to believe that only the Supreme Court itself is qualified to identify its own mistakes.

VII. The U.S. Supreme Court's Obergefell Decision Constituted a Violation of Natural Law, and Was Therefore Not Law at All.

Certainly the most vocal critic of Chief Justice Moore in Alabama has been the Southern Poverty Law Center ("SPLC"). Posted on its website is an article by its President Richard Cohen entitled "Roy Moore Suspension about the Rule of Law"[18] which asserts: "The facts are beyond dispute: Moore attempted to put his personal religious beliefs above the rule of law." Endorsing the Obergefell decision as the law of the land, and attacking the Chief Justice for not falling into line, the SPLC insisted that the Chief Justice had no other choice – either conform to Obergefell, and be governed by the rule of law, or resist Obergefell and be "govern[ed] by personal whim." Overlooked entirely was a third alternative, one whose pedigree stretched back to the creation of the universe — to be governed by the "natural law."

In Robert Bolt's play *A Man for All Seasons*, Sir Thomas More asked, "if [the Earth] is round, will the King's com-

[18] https://www.splcenter.org/news/2016/10/12/roy-moore-suspension-about-rule-law.

mand flatten it?"[19] Likewise, here, God who created us male and female also created marriage as a covenant union between a husband and a wife and a court is powerless to change that created order. This simple proposition is in concert with a long line of English and American authorities.

Without question, the U.S. Constitution constitutes the highest law of the land. The Constitutional text is the law that governs the actions of our federal government, and some actions of state governments. But the U.S. Constitution, the highest of man's law in the nation, is still subservient to the law of God, as revealed in the Holy Writ. The Constitution may not be interpreted or applied by the Supreme Court to violate God's law. Although this may seem shocking to the ears of those trained in law school by a professoriate which has little familiarity with or respect for the Creator God, it would be shocking to America's Founders to think that one could understand the rights of the people apart from the laws of God. Apart from God's law, U.S. Supreme Court decisions like the never-overruled Buck v. Bell, 274 U.S. 200 (1927)sanctioning compulsory sterilization based on secular eugenics must be accepted *prima facie* as "clear law" and implemented by the judiciary.

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[19] R. Bolt, *A Man for All Seasons*, Act Two.

Indeed, the great and high calling of this nation was set out in the Declaration of Independence, and the Constitution must be read in that context. The Declaration recognizes the supremacy of our Creator. It begins with laying the purpose of the Revolution as a quest to achieve "the separate and equal station to which the Laws of Nature and of Nature's God entitle them." It sources rights in God: "all men ... are endowed by their Creator with certain unalienable Rights." After detailing the abuses of their British governors, the Founders "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions...." And the Declaration concludes that it is made "with a firm reliance on the protection of Divine Providence..." Sadly, however, it was not long after that even Benjamin Franklin had to remind the Constitutional Convention:

> that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in **the sacred writings** that "except the Lord build they labor in vain that build it." I firmly believe this; and I also believe that **without his concurring aid we shall succeed in this political building no better than the Builders of Babel**: We shall be divided by our little partial local interests; our projects will be confounded, and **we ourselves shall be become a reproach and a bye word down to future age**. And what is worse, mankind may hereafter this unfortunate instance, despair of establishing Governments by Human Wisdom, and leave it to chance, war, and conquest. [B. Franklin, Ad-

dress on Prayer to the Constitutional Convention (June 28, 1787) (emphasis added).][20]

The supremacy of God's law antedates the founding of our Republic. The view that not just religion, and not just the Bible, but Christianity was the foundation of the common law was rarely challenged. Indeed, Justice Joseph Story was so thoroughly convinced of the indissoluble bond between Christianity and the common law, that, when hearing that Thomas Jefferson had written a letter in 1824 challenging that view, he wrote "It appears to me inconceivable how any man can doubt ... that Christianity is part of the common law. J. McClellan, Joseph Story and the American Constitution, (U. Okla. Press: 1971) at 119. In a long section entitled "Christianity and the Common Law" Professor McClellan details this historic connection, including innumerable authorities, such as Justice Hale who declared "The Christian religion is part of the law itself." Taylor's Case, 1 Ventris 203; 3 Keble 607 (King's Bench, 2676) (cited in Joseph Story, at 121.)

Sir Edward Coke wrote that the superseding law of nature is:

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[20] http://www.americanrhetoric.com/speeches/benfranklin.htm.

> that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction and this is *lex aeterna*, **the moral law**, called also **the law of nature**. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world. [*Calvin's Case*, 8 Coke's Rep. 113b, 118(a); 77 Eng. Rep. 377, 392 (1610) (emphasis added).]

William Blackstone explained the effect of a law that violated the law of nature:

> As man depends absolutely upon his Maker for everything, **it is necessary that he should, in all points conform to his Maker's will**. This will of his Maker is called the law of nature.... This law of nature being coeval with mankind, and dictated by God himself, is, of course, **superior in obligation to any other**. It is binding over all the globe, in all countries, and at all times: **no human laws are of any validity, if contrary to this**; and such of them as are valid derive all of their force and all of their authority mediately or immediately from this original. [William Blackstone, "Introduction," I *Commentaries on the Laws of England*, sec. 2 (emphasis added).]

The SPLC's crusade against Chief Justice Moore employed the worst type of revisionist history when it claimed support for the removal of the Chief Justice based on the views of Alexander Hamilton and John Adams:

> More than 200 years ago, Alexander Hamilton wrote that a "sacred respect for the constitutional law is the vital principle, the sustaining energy of a free government." John Adams believed in the importance of a "government of laws, not of men," incorporating the phrase into the Massachusetts

> Constitution, which served as a prototype for the U.S. Constitution.[21]

However, Alexander Hamilton believed that the Constitution was subservient to the law of God as he "maintained a life-long belief in a **divinely ordained** eternal law.... [concluding] **that no tribunal**, no codes, no systems **can repeal or impair this law of God**, for by his eternal laws it is inherent in the nature of things." Alfons Beitzinger, "The Philosophy of Law of Four American Founding Fathers, 21 *Am. J. of Jur.* 1, 5 (1976). As to John Adams, Professor McClellan explains how, in 1775, Adams "proclaimed the common law of England to be the law of nature and the birthright of every American." Joseph Story at 160. "When John Adams defined a constitutional republic as 'a government of laws, and not of men,' he was invoking an understanding of law and social life that is now almost wholly alien to our own. For Adams and most other pre-nineteenth-century adherents of the rule of law, law was inextricably linked with timeless moral norms." Sanford Levinson, "Constitutional Faith" at 60 (Princeton Univ. Press, 1988).

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[21] https://www.splcenter.org/news/2016/10/12/roy-moore-suspension-about-rule-law.

George Mason likewise adhered to the view that laws which violated the laws of nature were void and must be disobeyed:

> **All acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void.** The laws of nature are the laws of God; Whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. **All human constitutions which contradict his laws, we are in conscience bound to disobey.** Such have been the adjudications of our courts of Justice. [Robin v. Hardaway, 2 Va. (2 Jefferson) 109, 114 (1772) (emphasis added).]

Professor Charles Rice, who taught for 30 years at Notre Dame Law School, has been one of the nation's leading scholars on natural law. He reports on two revivals of natural law in the Twentieth Century — one in reaction to the legal positivism of Nazi Germany and the other in response to racial segregation:

> During the Nazi period in Germany, "all attempts at passive and actual resistance to the regime were necessarily grounded on natural law ideas or on divine law, for legal positivism as such could offer no foundation." After the war, the courts of the Federal Republic of Germany repudiated legal positivism. They recognized "the necessity of universal higher standards of objectively valid suprapositive principles for the lawmaker" and relied on the natural law in punishing actions that were legal under the Nazi regime. [Charles Rice, 50 Questions on the Natural Law (Ignatius Press: 1999) at 26.]

Professor Rice addressed how history might have been different if the German legal profession had refused to cooperate with the early Nuremberg laws. However, lawyers and judges wanted to be good Germans, which they understood to mean demonstrating obedience to the higher powers. They embraced legal positivism, to their shame:

> "Positivism", wrote Heinrich Rommen, "with its thesis that 'law is law' has made German jurists and lawyers defenseless against laws of arbitrary or criminal content. Positivism simply holds that a law is valid because it is successfully enforced. 'Any legislative act is unconditionally binding upon the judge.'" [Rice at 28.]

Of course, the temptation to just follow orders is worldwide, as "no federal judge has ever refused to enforce the fugitive-slave law on the ground that it was unjust." Rice at 28-29.

The second revival of natural law was in the modern civil rights movement. Martin Luther King, Jr. believed that laws which violated the moral law were unjust laws:

> A just law is a man-made code that squares with the moral law or the law of God.... **An unjust law is a code that is out of harmony with the moral law**. To put it in the terms of Saint Thomas Aquinas: "An unjust law is a human law that is not rooted in eternal law and natural law." [Martin Luther King, Jr., "Letter from Birmingham Jail," *Why We Can't Wait* (1963) at 76, 82.]

Although the Biblical principles of natural law are no longer taught in secular law schools, whenever those princi-

ples are raised and discussed, their pedigree is disregarded, as modern judges would prefer not to be constrained by any external standard even, or perhaps especially, the law of God, causing such constraints to be ignored.

> One of the more curious displays of **cultural illiteracy** has been the consternation and bafflement created by **Judge Clarence Thomas's** expressions of esteem for "**natural law.**"... These are strange reactions to a philosophical theory stretching back to Socrates, Plato and Aristotle, propounded by the Stoics, developed anew by medieval churchmen like Aquinas, elaborated in secular terms by Protestant jurists like Grotius and Pufendorf, reshaped to justify "natural rights" by Locke, Montesquieu, Jefferson and Adams, and invoked in the cause of racial equality by Abraham Lincoln, the Rev. Martin Luther King Jr. and, yes, even the man Judge Thomas has been nominated to replace, Thurgood Marshall. [Peter Steinfels, "Natural Law Collides with the Laws and Politics in the Squabble over a Supreme Court Nomination," *New York Times*, Aug. 17, 1991, p. A8 (emphasis added).]

There is no question that Chief Justice Moore has been removed, not for a violation of judicial ethics, but for his Christian jurisprudential views on same-sex marriage, judicial review, the rule of law, and natural law which man is powerless to change.

The institutions of our government are threatened not by justices who understand and take seriously their responsibilities under the Constitution and under God. Rather they are threatened by judicial decisions which violate the

authorial intent of the Framers and those principles of natural law which underlay the fabric of society:

> After biblical faith wanes, a people can maintain habits of thought and of self-restraint. The ethic remains after the faith that bore it departs. But eventually a generation arises that no longer has the habit, and that is when the behavior changes radically.... There is no protection against this in statutes or constitutions, which become scraps of paper when people come to despise the law that stands behind them. [O]ur institutions ... can survive the domination of wicked people in high places, and they often have; but they cannot long survive the people's insistence that wickedness be dominant, the continual boast that evil is good. [H. Schlossberg, Idols for Destruction (Crossway Books: 1990) at 296.]

VIII. Judicial Ethics Were Not Designed to Be Used to Delegitimize Well-Established Schools of Constitutional Scholarship.

Legal ethics were never designed to force judges to adhere to one school of constitutional interpretation or another. Had that been the intent, during the period that the Supreme Court was always understood to be "under" the Constitution, lawyers who argued for the High Court to creatively interpret the Constitution to make it suit the felt needs of the day were not disbarred nor judges removed from office. Now we have a Supreme Court with five justices who adhere to the view of Justice Ginsburg that "[w]hen political avenues become dead-end streets, judicial intervention in the politics of the people may be essential in

order to have effective politics" so long as it is in sync with "the direction of change" in society. Quoted in M. Franck, Against the Imperial Judiciary, Univ. Press of Kansas: 1996) at 12.

Schools of Constitutional thought have varied over the years. Professor Matthew J. Franck explains that, beginning in the 1950's, constitutional law came to focus on the theory and practice of judicial review by the U.S. Supreme Court. There were "two models for the exercise of judicial power in constitutional law: judicial restraint and judicial activism." However, in the 1980's the debate turned to whether judges would be guided "by an 'original intent' or an 'original understanding' ... [t]hus the debate ... came to be suplanted between 'interpretivists' and 'noninterpretivists' or between 'originalists' and 'nonoriginalists.'" *Id*. at 2. The debate over the appropriate principles to apply will continue, but what is clear is that, until recently, there was no effort to politicize legal ethics to declare certain schools of thought to be so far out of the mainstream that they constitute violations of legal ethics. This is a dangerous game that can be played both ways, depending on which school of thought has dominance at any one time. It certainly should not be used to

remove a chief justice twice elected by the People of Alabama. It certainly cannot be based on a state judge who views with respect a Constitutional amendment adopted by the People of Alabama, and statutes enacted by the Alabama state legislature with the broad support of the People of Alabama.

IX. Chief Justice Moore's Decision Not to Recuse Did Not Violate Judicial Ethics Canons.

The JIC separately charged Chief Justice Moore for breach of Canon 2A by his "refusal to recuse himself from [from participating] in the [March 4, 2016] decision of the Alabama Supreme Court in Ex Parte State *ex rel.* Alabama Policy Institute, [Ms. 1140460, March 4, 2016] ___ So. 3d ___ (Ala. 2016)." The gist of the JIC charge is that the Chief Justice should have recused himself from participation in the matter pending before the Supreme Court because he had already taken a position on the "effect" of Obergefell in his January Administrative Order. *See* COTJ Dec. at 42-43. In response, the Chief Justice contended that he had not taken a legal position on that point. *Id.* at 43.

To be sure, the issue before the Alabama Supreme Court in March 2016 was the same as the issue addressed by the Chief Justice in his January 2016 Administrative Order. The COTJ ruled erroneously that the Chief Justice expressly

addressed and resolved that very question in January, requiring him to have recused himself.

First, the COTJ found that the Chief Justice "stated that the 'existing orders' of the Alabama Supreme Court remained in effect until vacated by the Alabama Supreme Court." COTJ Dec. at 45. To the contrary, the Chief Justice stated that "**until further decision**" of the full Court, the "existing orders ... remain in full force and effect." *Id.* at 13. Indeed, the Chief Justice averred in his January order that he was "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." *Id.* at 11.

Second, the COTJ found the Chief Justice duty-bound to have recused himself because in his January 2016 Administrative Order he "argued that Obergefell bound (or might only bind) the parties to it but no one else." *Id.* at 45. In truth, the Chief Justice did not "argue" anything. Rather, he drew the probate judges attention to "recent developments since Obergefell [which] may impact" the resolution of the issue whether Obergefell bound only the four states that were parties to the case. *Id.* at 11-12. The Chief Justice

did not "argue" that Obergefell was so limited; rather, he simply noted that the cases cited "reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court." *Id.* at 12.

Third, the COTJ found the "'Chief Justice's guilt [to be] self-evident upon a simple comparison that reveals that significant portions of his January 6 order are actually just copied and pasted verbatim into his subsequent — and substantive — legal opinion.'" *Id.* at 45. This characterization should be rejected out-of-hand. Chief Justice Moore's opinion is 113 pages long; his Administrative Order only four pages long. Even if the entire Administrative Order were quoted in the opinion, it could hardly be "significant," either in quantity or quality. And for the charge that "portions" having been "copied and pasted verbatim," surely this does not support an ethical violation.

Fourth, and finally, the COTJ agreed with the JIC that the Chief Justice's Administrative Order "under any objective standard," was the product of a decision "to make a public comment about a pending proceeding in his own Court, thereby placing his impartiality into question." *Id.* at 47. Neither the COTJ nor the JIC name the "objective" standard by which they are measuring the Chief Justice's decision.

Surely, it is the COTJ's burden to evaluate whether the evidence of violation is "clear and convincing," proving conclusively that something unprofessionally sinister was going on. By that incredibly high civil standard, one would rightfully expect transparency from a body commissioned to uphold judicial ethical standards — not hiding the ball.

It is deeply troubling that the COTJ findings concerning Chief Justice Moore relate to state versions of the same federal ethics rules that should have prevented Justices Ruth Bader Ginsburg and Elena Kagan from participating in the Obergefell decision because of their clearly demonstrated partiality with respect to the constitutionality of traditional marriage. Canon 3A(6) of Code of Conduct for United States Judges[22] requires that a judge "not make public comment on the merits of a matter pending or impending in any court." Canon 2A of the same Code provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Not only did these two justices appear to violate federal Judicial Ethics, but also federal law. A federal

[22] Justice Kennedy stated on March 14, 2013 that he and the other justices of the Supreme Court consider the Code of Conduct to be "absolutely binding" on them.

statute, 28 U.S.C. § 455(a), mandates that a federal judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Both Justices Ginsburg and Kagan officiated at same-sex weddings prior to the Obergefell decision despite their knowledge of pending federal homosexual marriage cases. Justice Ginsburg had been especially vocal, stating in August 2013 regarding an impending homosexual marriage she was presiding over in Washington, D.C., that "I think it will be one more statement that people who love each other and want to live together should be able to enjoy the blessings and the strife in a marriage relationship."[23]

Justice Ginsburg later compounded her error, marrying two men in New York City in May 2015, during the pendency of the Obergefell case. During that ceremony, the Justice emphasized her support for same-sex marriage: "[T]he most glittering moment for the crowd came during the ceremony. With a sly look and special emphasis on the word 'Constitution,' Justice Ginsburg said that she was pronouncing two men married by the powers vested in her by the Constitution

[23] R. Barnes, "Ginsburg to officiate same-sex wedding," *The Washington Post* (Aug. 30, 2013).

of the United States."[24] There is nothing in the Constitution vesting in a U.S. Supreme Court justice the power to preside over a marriage ceremony. Rather, it is state law, not federal law, that governs whether one has authority to officiate a wedding ceremony. By invoking the U.S. Constitution as her authority, Justice Ginsburg was, in effect, deciding that, a Supreme Court justice has jurisdiction to officiate at a same-sex wedding under the 14th Amendment's due process guarantee. In doing so, she prejudged Obergefell, despite the judicial canon of impartiality.

Similarly, Justice Kagan's voluntary officiation over a homosexual marriage (involving her former law clerk)[25] — arguably less public than Justice Ginsburg's actions — also causes her "impartiality [to] reasonably be questioned." 28 U.S.C. § 455(a).

In 1988, the U.S. Supreme Court in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 869-870 (1988), quoted Justice Frankfurter, explaining that the "'guiding consideration is that the administration of justice should

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[24] M. Dowd, "Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word 'Constitution,'" *New York Times* (May 18, 2015).

[25] Associated Press, "Supreme Court Justice Elena Kagan Performs Her First Same-Sex Wedding," (Sept. 22, 2014), http://www.huffingtonpost.com/2014/09/22/elena-kagan-gay-wedding_n_5861620.html.

reasonably appear to be disinterested as well as be so in fact.'" Here, appearance and fact are consonant: Justices Ginsburg and Kagan are vested in their same-sex marriage positions. Even if only one of these two justices who improperly joined the majority decision had recused, the vote in the Supreme Court would have been four to four, and the decision of the U.S. Court of Appeals for the Sixth Circuit upholding amendments and laws on traditional marriage would have been left standing.

Although the COTJ does not sit in direct judgment of Supreme Court Justices Ginsburg and Kagan, it cannot now avert its eyes from the acts of these two justices, severely compromising the legitimacy of the Obergefell decision in the minds of the American people, and rendering it suspect. The Supreme Court's Obergefell decision invaliding traditional marriage in Michigan, Ohio, Kentucky, and Tennessee, is itself the product of judicial conduct far more egregious than proven here, it cannot provide the basis for the COTJ's various findings against the Chief Justice.

CONCLUSION

For the reasons set forth above, the decision of the Court of the Judiciary should be vacated and Chief Justice

Moore reinstated as Chief Justice of the Supreme Court of Alabama.

Respectfully submitted,

/s/ Steven Knapp

Steven Knapp
114 N. 8th Street
Opelika, Alabama 36801
tel: 423-677-1708
fax: 334-741-4074
sm.knapp@hotmail.com

Counsel for *Amici Curiae*

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Of Counsel:
William J. Olson
Herbert W. Titus
Jeremiah L. Morgan
William J. Olson, P.C.
370 Maple Avenue W., Ste. 4
Vienna, Virginia 22180
tel: 703-356-5070
fax: 703-356-5085
wjo@mindspring.com

Joseph W. Miller
United States Justice Foundation
832 D Street, Ste. 2
Ramona, California 92065

J. Mark Brewer
Brewer & Pritchard, P.C.
3 Riverway, Ste. 1800
Houston, Texas 77056

James N. Clymer
Clymer Conrad, P.C.
408 W. Chestnut Street
Lancaster, Pennsylvania 17603

Kerry L. Morgan
Pentiuk, Couvreur & Kobiljak
2915 Biddle Ave., Ste. 200
Wyandotte, Michigan 48192

D. Stephen Melchoir
Melchoir Law Office
2010 Warren Avenue
Cheyenne, Wyoming 82001