

February 10, 2015

Via Federal Express and Email to kinga@jccal.org

Judge Alan King, President
Alabama Probate Judges Association
716 Richard Arrington, Jr. Blvd. N., Room 120
Birmingham, AL 35203

Re: Legal Status of Chief Justice Moore's Administrative Order

Dear Judge King and To Whom It May Concern:

On February 8, 2015, Alabama Supreme Court Chief Justice Roy S. Moore issued an Administrative Order purporting to prohibit probate judges in Alabama from “issu[ing] or recogniz[ing] a marriage license that is inconsistent with Article 1, Section 36.03, of the Alabama Constitution or § 30-1-19, Ala. Code 1975.” We write this to you as president of the Probate Judges Association, as you have shown by your actions that you did not find Judge Moore’s “order” binding. We agree. Chief Justice Moore acted outside the bounds of his authority in issuing this order, and it has no legal effect on probate judges, who instead should issue licenses consistent with the January rulings of the federal district court for the Southern District of Alabama and their duty to comply with the limitations that the Fourteenth Amendment to the U.S. Constitution imposes on state actors regardless of state law, pursuant to the Supremacy Clause of the U.S. Constitution.

On January 23 and 26, 2015, the federal district court for the Southern District of Alabama ruled that the Fourteenth Amendment to the U.S. Constitution requires both the issuance of marriage licenses to same-sex couples and the recognition of lawful, out-of-state marriages by same-sex couples. *See Searcy v. Strange*, No. 14-cv-208, 2015 U.S. Dist. LEXIS 7776 (S.D. Ala. Jan. 23, 2015); *Strawser v. Strange*, No. 14-0424, 2015 U.S. Dist. LEXIS 8439 (S.D. Ala. Jan. 26, 2015). The court then enjoined the enforcement of Alabama’s marriage ban and stayed its injunction until February 9, 2015, with the explicit proviso that the stay “will be lifted” on that date if not extended by a higher court. *See Searcy v. Strange*, No. 14-cv-208, 2015 U.S. Dist. LEXIS 8187 (S.D. Ala. Jan. 25, 2015). On February 9, 2015, the United States Supreme Court decisively denied a further stay of the district court’s injunction and the injunction thereby became effective immediately, requiring the issuance of licenses and the

recognition of marriages lawfully entered in other jurisdictions. *See Strange v. Searcy*, No. 14A840 (U.S. Feb. 9, 2015).

Despite the clear ruling of the federal district court and the unequivocal action of the United States Supreme Court, several probate judges still continue to enforce Alabama's discriminatory marriage ban. These probate judges have relied in part on Alabama Chief Justice Roy Moore's Administrative Order of February 8, 2015, which cited Sections 12-2-30(b)(7) and (8) of the Alabama Code. However, as explained below, Chief Justice Moore's Administrative Order is contrary to the law as set forth by the Alabama Constitution and precedent from the Alabama Supreme Court.

I. Chief Justice Moore's Administrative Order Is Not Authorized Under Alabama Law.

The power "to issue such ... orders as may be necessary to give [the Alabama Supreme Court] general supervision and control of courts of inferior jurisdiction" is vested in the Alabama Supreme Court and not Chief Justice Moore. ALA. CONST. Art. VI, §140. Such is the case with respect to the duty to "make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts," and with respect to the charge of "adopting rules of conduct and canons of ethics ... for the judges of all courts of this State." ALA. CONST. Art. VI, §§ 139, 140.

While Chief Justice Moore may "take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state," ALA. CODE § 12-2-30(7), and "take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere," *id.* § 12-2-30(8), the Chief Justice's authority is merely "administrative." *See Ex parte State ex rel. James v. ACLU of Alabama*, 711 So. 2d 952, 963 (Ala. 1998) (emphasis in original).

The source of a chief justice's authority to issue such administrative orders is the Alabama Supreme Court itself, and the Alabama Supreme Court has made explicitly clear that the actions taken by Chief Justice Moore on February 8th are not within his authority acting alone. *Id.* at 963. *James*, a case involving Chief Justice Moore himself (then a Circuit Judge), dealt in part with the authority of the Chief Justice to control the conduct of a circuit judge. In that case, the Alabama Supreme Court held that the conduct of a circuit judge "cannot be regulated by the Chief Justice, 'standing alone.'" *Id.* at 964 n.5. The Court further held that "action by the Chief Justice is not synonymous with action by the 'Court'" and that, as a basic "principle of practice and procedure, no appellate pronouncement becomes binding on inferior courts unless it has the concurrence of a majority of the Judges or Justices qualified to decide the

cause.” *Id.* at 964. Accordingly, Chief Justice Moore does not have the authority to issue the Administrative Order issued on February 8, 2015.

II. The Constitutionality of the Alabama’s Marriage Ban Is Not Before Alabama State Courts and Probate Judges Should Follow the United States Constitution As Set Forth in the Federal District Court’s Order.

Not so long ago, in his unsuccessful attempt to fight his removal from judicial office following his disregard of a federal court order, Chief Justice Moore argued that “the order of the federal district court [at issue in that case] was not lawful,” and that “he was ethically bound by his solemn oath to comply with the Constitutions of the United States and of Alabama, and not [with] the unlawful court order.” *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848, 857 (Ala. 2004). The arguments made by Chief Justice Moore then are the same arguments he makes today. But, as with his actions in *Moore*, the constitutionality of the Alabama’s marriage ban has been fully and fairly adjudicated by a federal court of competent jurisdiction. The Alabama Supreme Court has previously made clear that it is not the province of state court judges to review the merits of that decision; “[o]nly a superior federal court can review the merits of a ruling by a federal court.” *Id.* at 857.

III. If Marriage Licenses Are Unavailable to Everybody, an Obvious Constitutional Violation Occurs.

It is our understanding that some probate judges think they can avoid legal problems simply by not issuing marriage licenses to any couples. This tactic is embarrassing politically and very risky legally. It harkens back to the days when Jackson, Mississippi shut down its public pools in the 1960’s after a court desegregation order, and Alabama today does not need comparisons to that era. These probate judges are being paid to do a job and are refusing to do it. The neglect of this duty could lead to significant personal consequences, because while there may be no constitutional right to swim in a public pool, it is bedrock constitutional law -- that not even Chief Justice Moore questions -- that there is a fundamental constitutional right to marry. *See Loving v. Virginia*, 388 U.S. 1 (1967); *see also Turner v. Safley*, 482 U.S. 78 (1987).

Because the United States Supreme Court, our Country’s highest court, has refused to delay the effect of the injunctions in *Searcy* and *Strawser*, probate judges throughout Alabama should follow the pronouncement of the federal district court and recognize the *federal* constitutional right of same-sex couples to marry. To do otherwise may subject probate judges

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to a series of consequences, which may include further lawsuits and attorney's fees awards against them pursuant to 42 U.S.C. §§ 1983 and 1988 for violating individuals' federal constitutional rights.

Sincerely,

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AND EDUCATION FUND, INC.



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176 W Fifth Street • Prattville, Alabama 36067-3041

Baldwin County
322 Courthouse Square • Bay Minette, Alabama 36507

Barbour County
201 Ct Sq • Clayton, Alabama 36072-0758

Bibb County
8 Court Sq W, Suite A • Centreville, Alabama 35042-2232

Butler County
700 Court Square • Greenville, AL

Calhoun County
1702 Noble Street, Suite 102 • Anniston, Alabama 36202

Cherokee County
260 Cedar Bluff Road, Suite 10 • Centre, Alabama 35960

Choctaw County
117 S Mulberry • Butler, Alabama 36904-2557

Clarke County
114 Court Street • Grove Hill, Alabama 36451

Clay County
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Cleburne County
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Coosa County
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Covington County
PO Box 789 • Andalusia, Alabama 36420

Cullman County
PO Box 970 • Cullman, Alabama 35056-0970

Dale County
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Dallas County
105 Lauderdale • Selma, Alabama 36702-0987

Dekalb County
300 Grand Avenue SW Ste 100 • Fort Payne, Alabama 35967

Elmore County
PO Box 280 • Wetumpka, Alabama 36092

Escambia County
PO Box 557 • Brewton, Alabama 36427

Geneva County
PO Box 430 • Geneva, Alabama 36340

Greene County
PO Box 656 • Eutaw, Alabama 35462

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101 Courthouse, Suite A • Abbeville, Alabama 36310-2135

Houston County
462 N Oates Street • Dothan, AL

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Jackson County
PO Box 128 • Scottsboro, Alabama 35768

Lamar County
PO Box 338 • Vernon, Alabama 35592

Lauderdale County
1st Floor of Courthouse • 200 S Court Street • Florence, AL

Lawrence County
14330 Court Street, Suite 102 • Moulton, Alabama 35650-1139

Lee County
Lee County Courthouse • 215 South 9th Street • Opelika, AL 36801

Limestone County
100 South Clinton Street • Athens, Alabama 35611

Marengo County
PO Box 480668 • Linden, Alabama 36748-0668

Marion County
PO Box 1687 • Hamilton, Alabama 35570

Marshall County
425 Gunter Ave, Suite 110 • Guntersville, Alabama 35976-1199

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PO Box 7 • Mobile, Alabama 36601-0007

Morgan County
Morgan County Probate Office • 302 Lee Street • Decatur, AL 35601 (2nd Floor)

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PO Box 478 • Marion, Alabama 36756-0478

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Sumter County
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Talladega County
PO Box 737 • Talladega, Alabama 35161-0737

Tallapoosa County
125 N Broadnax Street, Room 12 • Dadeville, Alabama 36853

Tuscaloosa County
Tuscaloosa County Courthouse • 714 Greenboro Ave • Tuscaloosa, AL 35401

Walker County
PO Box 502 • Jasper, Alabama 35502-0502

Washington County
PO Box 549 • Chatom, Alabama 36518-0549

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PO Box 668 • Camden, Alabama 36726

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PO Box 27 • Double Springs, Alabama 35553-0027