Written by **Warren Mass** on January 7, 2016

Alabama Chief Justice Orders Judges to Adhere to Same-sex Marriage Ban

Roy S. Moore (shown), chief justice of the Alabama Supreme Court, issued an order on January 6 that "Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act."

Alabama's Marriage Protection Act, passed in 1998, states that marriage is a sacred covenant solemnized between a man and a woman. Alabama's Sanctity of Marriage Amendment, officially known as Amendment 774, which was approved by 81 percent of the state's voters, amended the state's constitution, making it unconstitutional for the state to recognize or perform same-sex marriages or civil unions. The amendment stated, in part:

> No marriage license shall be issued in the State of Alabama to parties of the same sex….
>
> A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

Almost one year ago, on February 8, 2015, Moore issued an order mandating compliance with Alabama marriage law in the face of confusion that might have resulted from federal court decisions in two cases. On January 23, 2015, in the case of *Searcy v. Strange,* Judge Callie V.S. Granade of the U.S. District Court for the Southern District of Alabama ruled that Alabama's refusal to license and recognize same-sex marriages is unconstitutional. And on January 27, 2015, in *Strawser v. Strange*, Granade ruled in favor of a male couple seeking the right to marry in Alabama.

On January 27, 2015, Moore released a letter addressed to Governor Robert J. Bentley, in which he said:

> Our State Constitution and our morality are under attack by a federal court decision that has no basis in the Constitution of the United States. Nothing in the United States Constitution grants to the federal government the authority to desecrate the institution of marriage.

However, despite the objections raised by Moore and others, 47 of Alabama's 67 counties began issuing marriage licenses to same-sex couples on February 9, 2015.

On March 3, 2015, the Alabama Supreme Court ordered all probate judges in the state to stop issuing marriage licenses to same-sex couples and by the afternoon of the next day, nearly all counties had

complied with the order.

Then, on June 26, 2015, the Supreme Court delivered a ruling that most Americans would have once thought was unimaginable. In the case of *Obergefell v. Hodges*, in a 5-4 decision, the High Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the 14th Amendment.

During a belated Constitution Day speech at Rhodes College in Memphis on the evening of September 22, Supreme Court Justice Antonin Scalia, one of the dissenting justices, described *Obergefell v. Hodges* as "the furthest imaginable extension of the Supreme Court doing whatever it wants."

"Saying that the Constitution requires [same-sex marriage], which is contrary to the religious beliefs of many of our citizens, I don't know how you can get more extreme than that," continued Scalia. "I worry about a Court that's headed in that direction."

Moore addressed *Obergefell v. Hodges* in his January 6 order, noting that *Obergefell* had held unconstitutional certain marriage laws in the states of Michigan, Kentucky, Ohio, and Tennessee, which fall within the jurisdiction of the Sixth Circuit Court of Appeals. He stated that on June 29, 2015, three days after the issuance of the *Obergefell* opinion, the Alabama Supreme Court invited the parties in the Alabama Policy Institute (API, a nonprofit conservative think tank) to address the "effect of the Supreme Court's decision on this Court's existing orders."

Moore continued, in his order:

> Confusion and uncertainty exist among the probate judges of this State as to the effect of *Obergefell* on the "existing orders" in API. Many probate judges are issuing marriage licenses to same-sex couples in accordance with *Obergefell*; others are issuing marriage licenses only to couples of the opposite gender or have ceased issuing all marriage licenses. This disparity affects the administration of justice in this State.

Moore cited two federal court rulings issued since *Obergefell* indicating that the decision does not apply to states beyond the jurisdiction of the Sixth Circuit Court of Appeals:

• "The United States Court of Appeals for the Eighth Circuit recently ruled that *Obergefell* did not directly invalidate the marriage laws of states under its jurisdiction…. The Eighth Circuit stated: 'The [*Obergefell*] Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee — not Nebraska.'"

• "The United States District Court for the District of Kansas was even more explicit: 'While *Obergefell* is clearly controlling Supreme Court precedent, it did not directly strike down the provisions of the Kansas Constitution and statutes that bar the issuance of same-sex marriage licenses.'"

Commenting on these decisions, Moore noted that they "reflect an elementary principle of federal jurisdiction: a judgment only binds the parties to the case before the court."

The Alabama chief justice stated that whether the court he heads will apply the reasoning of two courts he cited, or "some other legal analysis," is yet to be determined. However, he observed, the administration of justice in Alabama has been negatively impacted by the apparent conflict between the decision of the Alabama Supreme Court and the decision of the U.S. Supreme Court in *Obergefell*.

To remedy this apparent conflict, Moore stated that he was exercising his authority as the head of Alabama's judicial system to take whatever action may be necessary for the "orderly administration of justice within the state."

To that end, he continued, he was issuing an administrative order as follows:

> Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.

In issuing his order, Moore chose the most direct path and one that does not involve the arduous, lengthy, and unpredictable process of attempting to challenge *Obergefell v. Hodges* head-on. His argument rests not on whether or not the Supreme Court was constitutionally correct in its ruling in *Obergefell*, but on the precedent set by the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for the District of Kansas. Since the former decided that *Obergefell* applied to marriage laws in Michigan, Kentucky, Ohio, and Tennessee but not Nebraska, it might be presumed that the ruling does not apply in Alabama, either. And since the latter decided that *Obergefell* did not directly strike down the provisions of the Kansas Constitution, the same might be presumed of the Alabama Constitution, as well.

As useful as these arguments might be in winning a respite from federal overreach for Alabama, they still leave *Obergefell* in place and do not challenge the authority of the Supreme Court to interfere in what should be solely a state matter — marriage law.

As other writers have noted for *The New American*, the most effective tool available to the states in resisting unconstitutional law is nullification. Before employing this tool, the states must ask: Is the Supreme Court's ruling in *Obergefell v. Hodges* constitutional?

As we noted earlier, Justice Antonin Scalia cast severe doubts on the court's authority in this case when he described *Obergefell v. Hodges* as "the furthest imaginable extension of the Supreme Court doing whatever it wants."

In his scathing dissent, he also noted that we justices "allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine" and thus "violate a principle even more fundamental than no taxation without representation: no social transformation without representation."

Scalia also noted: "Saying that the Constitution requires that practice, which is contrary to the religious beliefs of many of our citizens, I don't know how you can get more extreme than that. I worry about a Court that's headed in that direction."

Presuming that the highest judicial officials of a state agree with Scalia and decide that they are not bound by an unconstitutional overreach of federal authority, they might choose to engage the concept of nullification, which was strongly affirmed by several of our Founding Fathers.

As *The New American* noted in a previous article, Moore is well aware of the concept of nullification. Writing to Alabama Governor Robert Bentley a year ago, Moore quoted an 1825 letter by Thomas Jefferson, who was a strong proponent of state nullification. Jefferson had expressed the "deepest affliction" over the "usurpation" by federal courts of "all rights reserved to the states." Moore said that Jefferson's words "precisely express my sentiments on this occasion." Quoting the 10th Amendment to the U.S. Constitution, which reserves all powers to states and the people that were not specifically delegated to the federal government, Moore said that nothing in the U.S. Constitution grants authority to the federal government to "desecrate" the institution of marriage. "Our State Constitution and our morality are under attack by a federal court decision that has no basis in the Constitution of the United

States," he added.

Perhaps Moore is just warming up and his argument based on the rulings of the district courts will be just the first step before Alabama decides, along with other states, that the time is long overdue for proclaiming that the states will not be bound by unconstitutional federal usurpations.

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