AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **April 2015**
From: **A. Eric Johnston**
Re: **Alabama Becomes a Leader in the Battle to Protect Traditional Marriage and the Family**

Since June 2013, when the U.S. Supreme Court ruled the Federal Defense of Marriage Act (defining marriage as between a man and a woman for federal law applications) was unconstitutional, there has been an avalanche of federal court opinions around the country striking down many state traditional marriage laws. Finally, when the Sixth Circuit Court of Appeals (Tennessee, Kentucky, Ohio and Michigan) upheld a traditional marriage law, the U.S. Supreme Court agreed to review the issue. There was and is no doubt that court will rule on the marriage issue by the end of June 2015.

Nevertheless, in two poorly written opinions a federal trial court judge in Mobile struck down Alabama's Sanctity of Marriage Amendment (a state constitutional provision) and the Alabama Marriage Protection Act (a statute). These rulings came on January 23 and 27, 2015. Federal appellant courts refused to stay the judge's order. What followed was a maelstrom of confusion among the probate judges in Alabama's 67 counties. Ultimately, only one probate judge was enjoined by the federal trial court judge, Mobile County Probate Judge Davis, and then only as to the four parties in the two referenced cases. With either a misunderstanding of the relationship of federal and state courts' authority, or with improper motives, probate judges and their lawyers issued either same sex and heterosexual licenses, issued only heterosexual licenses, or issued no licenses at all. In other words, probate judges were in a quandary about what to do. It was particularly troublesome because the federal judge gave a veiled warning that Alabama probate judges could find themselves embroiled in lawsuits and responsible for attorney's fees. Because of this, on February 11, 2015, SLI, along with Liberty Counsel and local Montgomery Attorney Sam McClure, filed on behalf of the Alabama Policy Institute (API) and the Alabama Citizens Action Program (ALCAP) an Emergency Petition for Writ of Mandamus with the Alabama Supreme Court.

A petition for writ of mandamus is an extraordinary writ, utilized only in the most exigent circumstances. The basis for our petition was that there was no other legal remedy available to instruct Alabama probate judges on the proper course of action. The threshold question was whether the Alabama Supreme Court had authority to instruct the probate judges and with great wailing and gnashing of sharpened teeth, proponents of same sex marriage opposed the petition. But, to their surprise, the Alabama Supreme Court granted the petition, recognizing **"the 'magnitude and importance' of the issue before us is unparalleled. And the 'special reasons' that compel us to act are unlike any other in the history of our jurisprudence."**

Before the court could determine what to instruct Alabama probate judges, it had first to determine if mandamus was proper. The opponents argued the petitioners did not have "standing," that is, a specific injury for which they could seek relief. We argued and the court ruled that this was a case of great public interest, common to the whole community, not requiring a specific injury, but the need to enforce a public duty. Neither the Governor nor the Attorney General had done so. The court noted the latter had been enjoined in by the federal court. Consequently, "on relation" of the state, API and ALCAP had the authority to represent the interests of the state.

Having determined the petitioners had the authority to file the petition, it was necessary for the court to determine whether the errant probate judges had a right to shirk their duties and otherwise advise the unsure probate judges on what to do. That would require a decision on the merits of marriage in Alabama.

The court observed, "The family is the fundamental unit of society. Marriage is the foundation of the family. There is no institution in a civilized society in which the public has any greater interest." Marriage is the "indispensible foundation of the family." The court pointed out that "same sex marriages [are] unknown to history and tradition" and "the limitation of lawful marriage to heterosexual couples . . . had been deemed both necessary and fundamental." Marriage between men and women had been "measured in millennia, not centuries or decades."

After making these forceful statements, the court pointed out the uncertainty that followed the federal trial court's decision by simply saying, "Confusion reigns." In addition to confusion for probate judges, the court explained in detail that not only is the question of "marriage at stake," but many other issues with which every probate judge and every circuit court judge "will soon enough be faced, in his or her judicial capacity, with a universe of novel derivative questions unprecedented in their multiplicity, scope and urgency."

On this basis, the court determined that the petition should be granted and would consider whether to issue the writ of mandamus to the probate judges, that is giving them direct instruction about what to do. The court then proceeded to find the petition was proper because, "It could not be clearer that the public - - the people of Alabama – have an interest in the respondents' [probate judges] faithful compliance with Alabama's marriage laws." Recognizing that the Alabama Supreme Court was not bound by decisions of federal courts of appeals or federal trial courts, and that the judgment of the Mobile trial court did not apply, "We find that the provisions of Alabama law contemplating the issuance of marriage licenses only to opposite-sex couples do not violate the United States Constitution and that the Constitution does not alter or override the ministerial duties of the respondents [probate judges] under Alabama law."

The court did a detailed and thorough analysis of marriage and its history, finding no discrimination based on gender and that it was the province of the state to determine and regulate marriage. The court did not simply make this up or give the personal opinions of the justices, but fully documented each and every statement and finding made in the 134 page majority opinion, joined by six of the court's nine justices (Justices Stuart, Bolin, Parker, Murdock, Wise and Bryan). Chief Justice Roy Moore had recused himself and Justice James Main thought the court should not procedurally hear the case, but agreed with the outcome, while only Justice Greg Shaw dissented and did not agree to the decision. In other words, there was almost uniform agreement in the profound decision of the court.

Based on this, the Alabama Supreme Court ordered probate judges "to discontinue the issuance of marriage licenses to same sex couples." It gave probate judges five business days to respond, if they felt the court was in error. After five days, the court found that there were no responses or no adequate responses to the contrary and issued an order enjoining all probate judges from issuing same sex marriage licenses.

This holding by the Alabama Supreme Court is unique in the nation. It is the highest court of the state determining the law of the state. It is only under the Supremacy Clause of the U.S. Constitution that the U.S. Supreme Court could overrule that finding. While the U.S. Supreme Court plans to review the Sixth Circuit case, with oral argument on April 28th and a decision expected in late June 2015, it is unlikely the Alabama Supreme Court decision will be before the U.S. Supreme Court. Whether the U.S. Supreme Court will recognize the Alabama opinion, address it in any way, make an exception for it, or take other actions is unknown at this time. We believe it changes the dynamic from what everyone believed to be a foregone conclusion, for the possibility of the U.S. Supreme Court having second thoughts about how it would address this issue.

In the meantime, no same sex licenses are being issued in Alabama and there are no same sex marriages. Those same sex marriages that took place before the Alabama Supreme Court's order are in doubt. If, in the end, traditional marriage laws, including Alabama's, are struck down, then it is likely those marriages would be legal. If the finding is not that complete and final, then those marriages will be suspect and, likely as not, nonexistent. Because the Mobile federal trial court judge hastily entered improvident judgments, she has put many people in doubt. Though we do not agree with their positions, we sympathize with the quandary in which they may find themselves. Law should be informing and helpful, not arbitrary and confusing. We believe the Alabama Supreme Court took the right action in maintaining Alabama's long history of marriage between one man and one woman, the definition of family, and the importance it has to our culture. The Alabama Supreme Court did an admirable job.

The battle is far from over. We are thankful for this victory. We will continue our effort through the courts, as well as our efforts to draft and support legislation for the Alabama Legislature which will protect sincerely held religious beliefs of Alabama citizens who may ultimately be put into the position of having to provide a product or service related to same sex marriage, as well as other forms of marriage which may be pressed upon us in the future.

The coalescence of dates for a U.S. Supreme Court order and actions by the Legislature present a problem. Customarily, the U.S. Supreme Court will not issue opinions in cases of this magnitude until the last day of the term, i.e., June 30, 2015. The Alabama Legislature's last day for the regular session will be no later than June 15, 2015. If the Legislature goes out of session without providing safety valve laws, then the confusion will continue to reign. While the Governor could call a special session to address this, we believe that is unlikely.

We hope the Legislature will respond. Regrettably to this point, many members have failed to appreciate the "magnitude and importance of this issue," as observed by the Alabama Supreme Court. Nevertheless, we are persevering in our efforts to put in place statutes which will provide protection to Alabama citizens, in the event traditional marriage laws are struck down.

One bill has made significant progress, HB56, which amends Alabama's marriage law to say that a minister, rabbi, priest, *etcetera*, or judge who are authorized to perform marriages, shall not be required to do so if they have religious objections. Another bill, SB261 and HB296, provides that ministry operated child placing services, *viz.*, Alabama Baptist Children Home, Catholic Family Services, Lifeline Children Services, *etcetera*, would not be required to make adoptive, foster care or child placements into families which might violate the sincerely held religious belief of the ministry. On the contrary, it accommodates the sincerely held religious belief of the ministry. To do otherwise is the discrimination.

As the Alabama Supreme Court noted, there will be "a universe of novel derivative questions" that must be addressed in the courts. Therefore, we have proposed legislation that would recognize the ability of any employee, public or private, to opt out of providing a product or service, if it would violate a religious belief. The employer would be required to "accommodate" that religious belief, by permitting another employee, who has no objection, to provide the product or service. These bills, and other possible "conscience" bills that may be introduced, are necessary to give guidance in times of great social turmoil. Without that guidance and the practical ability to accommodate religious beliefs, it is likely many lawsuits will be filed to protect beliefs, resulting in significant costs to employers and state agencies. These can be avoided with proper planning. We think it is incumbent the Legislature act.

These are extremely serious matters. We believe that at no time in the history of America has she been faced with so daunting and destructive a foe. As our Alabama Supreme Court clearly stated, "The magnitude and importance of this issue is unparalleled."