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

To: **SLI Supporters**
Date: **December 2015**
From: **A. Eric Johnston**
Re: **Ex Parte State of Alabama ex rel Alabama Policy Institute and ALCAP**

We have had many inquiries in recent weeks about the status of the case we filed last February on behalf of the Alabama Policy Institute and the Alabama Citizens Action Program ("ALCAP"), dealing with the marriage issue in Alabama. Please recall that we filed a Petition for Writ of Mandamus asking the Alabama Supreme Court to determine whether Alabama probate judges were required to issue marriage licenses to same sex couples. Our petition was precipitated by a February 2015 federal trial court order holding unconstitutional Alabama's marriage laws, both the statute and constitutional amendment permitting marriage between only one man and one woman.

On March 3, 2015, the Alabama Supreme Court released a scholarly detailed opinion upholding Alabama's one man one woman marriage laws. On June 26, 2015, the U.S. Supreme Court ruled in the *Obergefell* case that one man one woman marriage laws were unconstitutional and that same sex persons could be married. *Obergefell* and some related cases arose in the Sixth Federal Judicial Circuit, *viz.*, Tennessee, Kentucky, Ohio and Michigan. Our Alabama case was not part of those cases. As a result of the *Obergefell* decision, we filed a motion with the Alabama Supreme Court asking it what it now intended to do. The short answer to the question that many are asking is that we have not had a response from the Alabama Supreme Court.

Many lawyers and judges would opine that the Supremacy Clause of the U.S. Constitution, Article VI, Section 2, requires all courts, legislatures and others to follow *Obergefell*; also, any laws in conflict, such as Alabama's in this case, are repealed by implication. Others argue the opinion only applies to laws in the states in the Sixth Circuit. Finally, there are those who argue, as do we, that the Alabama Supreme Court opinion is binding on Alabama and the U.S. Supreme Court opinion, which is in conflict with it, is not. If the U.S. Supreme Court is incorrect in its ruling, the Supremacy Clause does not require lesser courts to follow the dictates of that court, only the requirements of the Constitution and laws of the United States. That is exactly what we are requesting the Alabama Supreme Court to do. The Alabama Supreme Court is as qualified (and in this case more qualified) as the U.S. Supreme Court to make this decision.

It is obvious to any lawyer or judge, and most lay persons, that when comparing the Alabama Supreme Court's opinion with the U.S. Supreme Court's opinion, the latter is a mere illusion of what a court opinion should be. It was poorly written based on popular opinion and sociological conclusions. We say that to clarify that the Alabama Supreme's Court opinion is entitled to as much authority as that of the U.S. Supreme Court and when you compare the scholarship of the two, there is no comparison. Further, four of the Justices on the U.S. Supreme Court dissented with lengthy scholarly opinions. In all respects, the five member majority in the *Obergefell* opinion lacks credibility and, therefore, supremacy.

In the meantime, many are wringing their hands about what to do. The gay rights agenda moves forward with efforts to establish their "constellation of benefits" as referenced by Justice Kennedy in his majority *Obergefell* opinion. The worst fallout from *Obergefell* is the attack on religious freedom.

There are proposed state legislative bills, including Tennessee and perhaps Alabama, that would keep a state from submitting to *Obergefell.* In Tennessee, that law may be dead on arrival, since it is in the federal circuit from which *Obergefell* arose. Though Alabama is not in that circuit, it is still not good strategy to attack *Obergefell* in that manner. What would happen is that the Alabama law would be struck down in an Alabama federal trial court and then appealed to the federal Eleventh Circuit Court of Appeals. It would almost certainly follow *Obergefell.* There is no direct appeal to the U.S. Supreme Court but only a review by permission, *viz.*, *certiorari*. It is highly unlikely the U.S. Supreme Court would grant *certiorari* in such a case. This ruling would create a further complication for any subsequent ruling by the Alabama Supreme Court and might even prematurely settle the issue. On the other hand, if the Alabama Supreme Court upholds its March opinion, any appeal is directly to the U.S. Supreme Court. While many would say the U.S. Supreme Court would overrule the Alabama Supreme Court, it would be faced with a compelling opinion which might change the outcome. At least, we would have the chance for a proper review.

This uncertainty leaves us in somewhat of a quandary. We must take whatever action is appropriate in the meantime, such as, pass laws to protect religious persons from discrimination. To answer all the questions, we must await the decision of the Alabama Supreme Court. We are encouraging all of those who have great concern over this issue to be prayerfully patient in hopes for the right outcome.