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

To: **SLI Supporters**
Date: **April 2016**
From: **A. Eric Johnston**
Re: **The Demise of Traditional Marriage in Alabama and the Future of Religious Freedom**

By now, everyone knows that traditional marriage has been declared unconstitutional by the United States Supreme Court ("SCOTUS"). The saga in Alabama began on January 23, 2015, when a federal court trial judge declared Alabama's marriage laws unconstitutional, *viz.*, The Alabama Sanctity of Marriage Amendment, Article I, Section 36.03, 1901 Constitution of Alabama and our statute, The Alabama Marriage Protection Act, Section 30-1-19, 1975 *Code of Alabama.* A number of orders followed from that court which put Alabama's probate judges in legal peril because of the statutory requirement that they issue marriage licenses. Many objected for religious reasons to issuing licenses to same sex couples.

Because of the uncertainty, we participated in the filing of a Petition for Writ of Mandamus on behalf of the Alabama Policy Institute ("API") and the Alabama Citizens Action Program ("ALCAP") with the Supreme Court of Alabama ("SCOAL"). The petition asked the court to determine whether probate judges must issue same sex marriage licenses. On March 3, 2015, SCOAL issued a lengthy scholarly opinion upholding the constitutionality of both of Alabama's marriage laws and protecting the probate judges.

However, on June 30, 2015, SCOTUS, in *Obergefell v. Hodges,* ruled on an appeal from the Sixth Federal Circuit (Tennessee, Kentucky, Ohio and Michigan) that traditional marriage laws were unconstitutional allowing same sex marriage and further holding that all states must give full faith and credit to the laws of other states. It was generally agreed by most judges and lawyers that *Obergefell* would be binding on the marriage laws in all states, though not directly before the court. After *Obergefell,* we filed a motion with SCOAL asking whether its March opinion was still correct in light of *Obergefell.*

The Supremacy Clause of the U.S. Constitution states, "This Constitution, and the laws of the United States . . . shall be the supreme law of the land . . . ." It does not say what the U.S. Supreme Court says is the law of the land, though that has been the legal mindset for a very long time. It is very important to have consistency in the law and for courts not to be randomly making decisions that conflict with each other. It forms the sound continuity and protection of laws for our citizens. We disagree with many court opinions, but most do not ultimately create havoc. Three court opinions come to mind that are beyond this reasoning, *viz., Dred Scott v. Sandford* (declaring a black person not to be a person), *Roe v. Wade* (declaring an unborn child not to be a person), and *Obergefell* (obliterating the definition of marriage and the family). None of these cases were based on good constitutional jurisprudence. The *Dred Scott* opinion was overcome by the Civil War and the Fourteenth Amendment. *Roe* and *Obergefell* remain law.

What was unique about Alabama's case is that it was the only case in the entire country that still may have brought the marriage issue back before SCOTUS. It was a decision by a state's highest court that conflicted with one of SCOTUS. Our hope was that SCOAL would reaffirm its decision, even in light of *Obergefell,* and then permit another review before SCOTUS. Such a decision by SCOAL may have been a pyrrhic victory, which would be later reversed. It would have been the most anyone could have done to challenge the disaster of *Obergefell.*

SCOAL finally decided on March 4, 2016, it would take the case no further. It left standing its March 3, 2015, holding of the constitutionality of Alabama's marriage laws. However, it recognized that, in reality, nothing further could be done. Several of the justices strongly disagreed with *Obergefell* and one recognized that although there was a

> ". . . lack of a legal basis for [the *Obergefell*] opinion" . . . . [defiance of it] " . . . could place [probate judges] in the middle of an end-game stand-off with federal marshals and/or federalized national guardsmen on one side, with a contempt order from the federal court in hand, and state law-enforcement officers on the other, with a competing and conflicting state court order in hand."

The unlawful actions of SCOTUS in *Obergefell* suggest anarchy, which is not a course that other courts would take. We must now turn to the aftermath of *Obergefell*. It is a disgraceful chapter in American history. At the present time, we see no path back into the fight to restoring traditional marriage laws, but we can assure you, if we find one, we will take it.

Religious Freedom

Writing for the majority in *Obergefell*, Justice Anthony Kennedy not only awarded homosexuals with the right to marry, but also said they would be entitled to the "constellation of benefits" that followed, *viz.*, adoption, spousal rights, inheritance, *etcetera.* Already, on March 7, 2016, SCOTUS summarily reversed a SCOAL opinion that did not give full faith and credit to a Georgia court decision to allow a lesbian mother's adoption of her partner's children. What was unique about the case is that SCOTUS ruled on it without briefs, oral argument, or input from any source whatever.

It is obvious that the proponents of gay rights will not be stopping at marriage, or even adoption. The gay rights agenda does not only want those rights, but it wants us to accept those rights. By "us," we are referring to religious people who believe homosexual activities are a sin. The majority of Alabamians would share that belief.

Alabama has the Alabama Religious Freedom Amendment, which protects religious rights of individuals. SLI drafted that law and it was approved by a majority of the voters in 1998. That amendment was proposed in anticipation of things such as are happening in the state today. Similarly, the State of Georgia is now proposing such a law. However, there is a great deal of difference in the political climate between 1998 and 2016. Gay rights advocates have marshaled significant forces against Georgia, including the NFL who may not have a Super Bowl there, the NBA which may not have tournaments there, movie producers who will not produce movies there, and even Coca Cola. Significant pressure was brought on the governor of Georgia who vetoed the bill. The purpose of the bill is to do nothing more than protect the religious rights of individuals who do not want to provide products or services that would violate their religious beliefs.

In Alabama this year, we drafted The Child Placement Inclusion Act (HB158 and SB204) for the purpose of protecting Christian child placing agencies who could be required to make placements in same sex marriages. The ACLU and the Human Rights Campaign (a homosexual lobbying group) both testified against the bill saying it was discriminatory. Quite the contrary, the bill was to avoid discrimination against Christians who might not want to make those placements. This covered only organizations like The Alabama Baptist Children's Home, Lifeline Children Services, Catholic Social Services, and others. Adoption services for homosexuals are readily available from other agencies. There is no discrimination.

This militancy will increase. Religious rights will be under attack. It has been difficult to understand why religious freedom must be diminished because of the gay rights agenda. One reason is that the "church" is the only impediment to total recognition of homosexual rights. If the church is removed, then homosexual activities have no critics. What they do will be right in their own eyes, as well as they believe, in the eyes of others.

Additionally, we believe the problem is theological, as well as, constitutional. On the one hand, we all have personal beliefs, some of which are very different. We have a right to live our lives as we choose. Our rights go only so far as the rights of others. No one should be required to violate his or her beliefs and this is particularly true for religious beliefs. In the ordinary course of daily life and work, we do not selectively discriminate against others, we do not question their beliefs and, in most situations, when there is a conflict, we respect the other's right to choose.

Those who would subrogate religion do not understand religion. They do not take it seriously. To them, it is an inferior right that should not be used to deny others universal acceptance of other rights, regardless of how offensive their activities are. On the other hand, sincerely religious people, *viz.*, Christians (Protestants, Catholics and Orthodox), devout Jews and Muslims, understand, live by and apply their beliefs in all that they do. Without understanding this distinction, secular minded persons, or persons who subscribe to religion in name or identity only, will not accept the sincerity, depth and well meaning of truly religious persons. As a result, we see the opposition noted above.

Our forefathers were truly religious persons. They understood the meaning of true religion. We have a great legacy of religious legal jurisprudence upon which to draw to protect religious rights. Our problem is protecting those rights in the legislative arena and then in court systems, particularly the federal system, where there will be attempts to diminish religious rights.

We have done the best we can to protect traditional marriage. While some remedies such as a reversal by SCOTUS at some point in the future, or an amendment to the U.S. Constitution could change the *Obergefell* decision, those are not foreseeable at the present time and we must turn our attention to the tsunami effect of *Obergefell* to our religious faith, rights and actions by an opponent who does not understand or respect our beliefs.