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

To: **SLI Supporters**
Date: **October 2016**
From: **A. Eric Johnston**
Re: **The Attack on Religious Freedom is Beginning to Materialize**

The reality of the new threat to religious freedom is beginning to materialize. The gauntlet has been thrown down by federal district court (trial) judge, Carlton W. Reeves (President Obama 2010 appointee) in Mississippi. In the case of *Rims Barber, et al. v. Phil Bryant, Governor, et al.*, the court has ruled that a Mississippi law meant to protect religious persons' beliefs about marriage violates the Establishment Clause of the U.S. Constitution. The court ignored the free exercise rights of Mississippi citizens in favor of an overruling politically correct recognition of same sex marriage and rights flowing therefrom.

Our earlier and continuing warnings have been that mere same sex marriage is not the objective, but the total annihilation of any condemnation of aberrant sexual activities. Of course, our traditional beliefs about marriage come from religion. This was recognized in the *Obergefell* case, which legalized same sex marriage in 2015. *Obergefell,* along with the *Dred Scott v. Sandford* (black people are not citizens) and *Roe v. Wade* (unborn children are not citizens) cases, are the most significant abuses of power by the U.S. Supreme Court. All are cultural tsunamis. *Obergefell* completely undercuts the historic understanding of the American family and culture. Yet, it has become the goal of the federal government to carry its effects into all areas of our lives.

Many opined in the beginning that those who believed homosexuality and related activities are sin would be protected under the Free Exercise of Religion Clause. The early warnings from court opinions leading up to *Obergefell* were, however, that religious belief would be washed away with *Obergefell* and its progeny tidal wave.

The Mississippi legislature passed House Bill 1523 during the 2016 regular session. The bill recognized the effects of *Obergefell* and sought to protect persons of faith in both public and private employment. State clerks and judges would not be required to issue marriage licenses or perform marriages if it offended their religious belief. They could excuse or recuse themselves, but another official would provide the necessary services. Persons in the private sector, such as religious organizations, adoption agencies, counselors, photographers, florists, and others would not be required to provide a product or perform a service that would violate their religious beliefs. Products or services are available from other sources who do not have religious compunctions. This bill was totally in line with legal jurisprudence prior to *Obergefell*. Religion, being our first right, occupied a very important place of protection.

Nevertheless, the Mississippi trial court judge did not visit the Free Exercise Clause of Religion as an important point in his opinion, rather he dwelt on the Establishment Clause and the equal protection rights of homosexuals. He began by comparing the Mississippi law to what happened in the case of *Romer v. Evans,* when the U.S. Supreme Court struck down a Colorado statute that forbad local governments from passing ordinances that created homosexual rights. Judge Reeves apparently did not understand that *Romer* was about a specific discriminatory statute against homosexuals, while HB1523 merely dealt with protecting people's religious rights, but not about diminishing or denying homosexual rights.

Reeves held the law gave "special rights" to Mississippi citizens who have such religious beliefs. Quoting the liberal Harvard law professor, Laurence H. Tribe, he said:

> "As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even though they are agents of government to *voice* their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals . . . ." (Emphasis in the original.)

More importantly, the court quoted Justice Anthony Kennedy from the *Burwell v. Hobby Lobby Stores* case when he said "[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests."

Did you see the dichotomy between "voice" and "acting on?" It is okay to say or believe something, but you may not act on those things. It is acceptable to worship in your church, but you cannot take your

values into the public square. Barack Obama uses this same dichotomy when he speaks of "worship" rather than "activity." This will be the mantra that will be heard over and over as we progress through these attacks on religious freedom.

The court briefly passed over free exercise concerns and said those rights already exist in law. It specifically mentioned the Mississippi Religious Freedom Restoration Act, a law passed in 2014 that is similar to the 1999 Alabama Religious Freedom Amendment. It is those laws on which the court should have focused. It did not. Rather, the court said HB1523 was "endorsing certain religious thought," which violates the Establishment Clause. This is perverse reasoning. HB1523 recognized religious thought, rather than establishing religious thought, much less a religion.

Fault was found because HB1523 was in response to *Obergefell*. Obviously, Judge Reeves did not realize the totally unexceptional history of the marriage tradition. *Obergefell* became the first exception and one that appears to now be immeasurable. Mississippi, along with the rest of the country, was put in the position of trying to protect the religious rights of its citizens.

As we are coming to know, all same sex rights will be based on the Equal Protection Clause. Judge Reeves observed that "sexual orientation is a relatively recent addition to the equal protection canon." This statement demonstrates the prejudice and historical darkness of judges like Reeves. Equal protection is based either on an immutable characteristic or a stated fundamental right in the Constitution. We do not add new rights as time goes on. The only way that could be done is by amending the Constitution. Sexual orientation, i.e., homosexuality, had been a crime and grounds for divorce in most states and had never been accepted by any western culture in the history of time. Yet, this new right materialized and it is a "recent addition" to equal protection. Such shortsightedness by judges will wreak havoc for the rights of religious persons in coming court cases. We can expect polygamy to join the rights under the Equal Protection Clause. A recent news report said a polygamy case from Utah might test those marriage rights, but possibly would not reach the Supreme Court because the state was not prosecuting polygamy. Similarly, in Italy, Muslims are pressing for polygamy rights for men. If sodomy can be the basis for marriage, then why cannot polygamy?

Looking deeper into the legal analysis of this case, Mississippi contended the state had a "legitimate governmental interest in protecting religious beliefs and expression." The court found it was a legitimate governmental interest but had no rational relationship to the law. If there is no rational relationship, then the law cannot stand.

Mississippi argued its Religious Freedom Restoration Act, but the court rejected the argument saying that the state had not identified any actual, concrete problem of free exercise violations. In other words, the court either did not understand or refused to recognize that *Obergefell* was working a cultural change that would be offensive to many persons of faith, requiring them to do things that violate their faith. Around the country we have seen time and again wedding planners, bakers and florists being required to service same sex weddings. Clerks and judges are being required to issue same sex marriage licenses in violation of their religious beliefs. How real is the threat to religious freedom?

In the 1960s and 70s federal jurisprudence raised the power of the Establishment Clause over the Free Exercise Clause. This started with the removal of Bible reading and prayer from public schools, the establishment of the *Lemon* test (which gave federal judges almost unlimited authority to declare any religious exercise in the public square an establishment of religion), and the removal of the Ten Commandments from many government office buildings. These extravagancies removed the rights of public school students to even say grace over their lunchroom meals. No prayer or Bible reading was even allowed informally in public schools. These events gave rise to a number of legal organizations, such as SLI, who worked to combat these abuses. Finally, by the 1990s, the Free Exercise Clause was given back more of its legal credibility. Individuals, including public school students, were able to reassert and have protected their religious rights which were not only beliefs, but action. These included things like the federal Equal Access Act permitting religious activities in public schools. Our efforts in Alabama culminated in milestones like the Eleventh Circuit case of *Chandler v. Siegelman* (2000), which set forth a list of public school student protected rights, and the Alabama Religious Freedom Amendment approved by voters in 1999.

You have heard the cliché that history repeats itself. Again, the Establishment Clause is being used to unconstitutionally diminish the Free Exercise Clause. Free exercise of religion rights must be protected. Otherwise, citizens become instruments of the state without the ability to express or act upon fundamental truths and beliefs that they hold important to who they are as a people and individually as a person. As we have often said since we realized the real significances of *Obergefell*, if it was only about allowing homosexuals to marry, then let them marry. It is about far more than that. It is about the destruction of religious freedom in America.