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

To: **Interested Persons**
Date: **April 2020**
From: **A. Eric Johnston**
Re: **The Coronavirus and Religious Freedom**

James Madison said, "The religion then of every man must be left to the conviction and conscious of every man; and it is the right to exercise it as these may dictate." He also said that we should take alarm at the first experiment with our liberties. The question raised today is whether government orders prohibiting meeting in groups applies to church services? It is a simple question but with a complex answer.

Southeast Law Institute entered into the fight for religious freedom in the 1980s to address issues of free exercise and establishment of religion. All of those cases represented experiments with religious freedom, *viz.*, school prayer, church zoning, church and home schools, *etcetera*. The issue of local authorities regulating the size of public meetings because of the coronavirus is not a free exercise or establishment clause issue. It is not an attack on religious freedom. However, some churches have challenged it as that. Churches in Louisiana and California disobeyed the orders of local authorities not to have their meeting. Are they within their rights to do so?

If the government selects a religion or a religious practice to regulate or prohibit, that is unconstitutional. SCOTUS ruled in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1973), that a law prohibiting a religious activity (animal sacrifice) was unconstitutional. In *Employment Division . . . v. Smith,* 494 U.S. 872 (1990), SCOTUS held that a law of neutral and general application meet only a legitimate government interest. In that case, Indians using peyote as a hallucinogen in a religious ceremony violated a generic federal controlled substance law. SCOTUS held the law was constitutional and did not specifically burden the Indian religious activity.

Smith remains law, but as unfriendly to religious freedom, has been modified. The federal Religious Freedom Restoration Act, 42 U.S.C. § 2000 bb, was passed in 1993 to reverse the case, but in the *City of Boerne v. Flores,* 521 U.S. 507 (1997), SCOTUS said Congress could not tell states what to do, but that the statute could apply to federal laws. So, in 1998, SLI authored and helped get passed the Alabama Religious Freedom Amendment, Ala. Const. Art. I § 3.01, which provides the same protective standard for religious freedom at the state level. These two laws apply the "compelling interest test" which requires for a law effecting religion to be constitutional, the government must have a compelling interest in what it seeks to do and achieve it in the least burdensome way.

The real issue is with local orders, such as the one by Governor Ivey of March 19, which forbids gatherings over 25 persons. Some counties reduced it to ten persons. That would make it impossible for most churches to have religious services or meetings. Violation could be a misdemeanor. Ala. Code, § 22-2-14. Does the government have a compelling interest in restricting these meetings? It is almost certain a court would rule that stopping the spread of the coronavirus is a compelling interest. "Social distancing" appears to be the best way to prevent spread of the virus and therefore may be least burdensome.

States retain what is referred to as their "police power." This means the authority to regulate activities within the state, including healthcare. SCOTUS, in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), found no 14th Amendment "liberty" interest was violated by a state statute requiring vaccination against smallpox. Then, in *Prince v. Massachusetts,* 321 U.S. 158 (1944), the court said, " . . . [N]either rights of religion or rights of parenthood are beyond limitation . . . . The right to practice religion freely does not include the liberty to expose the community or the child to communicable diseases or the latter to ill health or death."

These coronavirus restrictions are not directed at religion or religious activity. However, we recognize a variety in the beliefs dictated by one's religion. Obviously, those at the Louisiana and California churches feel strongly God will protect them. Many of the most important cases in protecting our religious freedom have arisen from minority or unpopular religious beliefs. There may be those who wish to test the authority of government in this situation. They may have truly held and sincere religious beliefs, to which they are entitled. Whether it is propitious for them to insist upon those beliefs now is another question.

The best approach may be to recognize the need to cooperate and not to harm or be a stumbling block to others (I Corinthians 8:9). Our witness to show love (compassion) for others is the greatest Christian gift (I Corinthians 13:13). Some may think God will protect them, while others believe God's will is for us to be responsible not to carry the disease so that others, nonbelievers and believers, will not suffer. We are in a difficult time, not experienced in modern history. While the Massachusetts cases cited above offer guidance, there is no case "on all fours" in modern jurisprudence that gives us a clear answer. If the question arises for a church or pastor, we invite you to contact us. We will be glad to work through specific facts.

This situation will pass. And when it does, we must be careful to restore all rights guaranteed to us by our Bill of Rights, which may have been temporarily compromised in the effort to protect public health. We understand the need to cooperate and confront this deadly enemy with the advice of our best healthcare professionals and with the orders carried out by government to effectuate that advice. When it is over, any burdens on religious liberty or other rights must be lifted and if they are not, that will be the time to oppose them.