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

To: **Interested Persons**
Date: **August 2020**
From: **A. Eric Johnston**
Re: **Title VII – Sex Now Includes Sexual Orientation and Gender Identity**

On June 15, 2020, SCOTUS handed down a landmark opinion which will have a continuing effect on our individual and corporate liberties of religion and speech. In the last couple of decades, the LGBTQ+ community has made significant strides in normalizing aberrant and perverse sexual activities. This has been accomplished essentially through SCOTUS opinions, rather than duly enacted legislative laws deemed proper by a majority of the people. *Lawrence v. Texas* (2003) decriminalized sodomy, *Obergefell v. Hodges* (2015) legalized same-sex marriage, and now the court has redefined the definition of the word "sex" to include sexual orientation and gender identity ("SOGI"). This means virtually anything you prefer, not just the biological sex with which you were born.

What LGBTQ+ advocates could not do through legislative processes they have now done through SCOTUS opinions in three employment cases, *viz.*, *Bostock v. Clayton County, Georgia* (gay man fired), *Altitude Express v. Zarda* (gay man fired), and *Harris v. EEOC* (transgender man fired). In each of these cases SCOTUS determined that "sex" was the reason for the discrimination. The purpose of this memo is to give a basic understanding of the applicable law and then some guidance toward the uncertain and difficult future ahead.

Title VII, the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-1, *et seq.*, provides that it is an unlawful employment practice to fail to hire, to fire, or to discriminate in any of the terms of employment against a person because of such person's race, color, religion, sex, or national origin. This applies to employers who have 15 or more employees during 20 or more weeks of a calendar year. Employers with less than this are not affected by this statute. The qualities listed are all immutable characteristics, that is biological or natural conditions with which you are born. Until now, it was easy to identify under this law a protected person. Now, with the definition of the word "sex" to mean something more than your biological condition, it opens the door for significant expansion and abuse.

Justice Neal Gorsuch was the author of the 6-3 opinion, joined by Chief Justice John Roberts and the four liberal Justices. Gorsuch was believed to be a conservative jurist who would help eliminate the legislative proclivities of SCOTUS. Dissenting were Justices Thomas, Alito and Kavanaugh. Justice Gorsuch claimed to be basing his opinion on a textural analysis method championed by former Justice Antonin Scalia. Gorsuch went to inordinate extremes to demonstrate that he was applying the intent of Congress in defining the word sex. He opines you cannot fire someone for being a homosexual or transgender unless it relates to sex. In reality, his analysis was of a 56-year-old law based on contemporary standards. He did not use the definition intended by Congress in 1964.

In a well written dissent Justice Alito challenged Gorsuch's opinion beginning by saying, "There is only one word for what the court has done today: legislation." He said Gorsuch did not apply the Scalia analysis. Alito pointed out that sex was added at the last minute before passage of the law, for the purpose of protecting women. He also pointed out there had been many attempts since then to amend the law to expand the definition of sex, all of which failed. He gave the history of homosexuality explaining that ". . . [The] plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment . . . ." Also, "Sodomy was a crime in every state but Illinois . . . ."

Justice Kavanaugh also filed a dissent and pointed out, as did Alito, that until 2017, every federal circuit court of appeal that considered the issue, totaling 30 appellate judges, agreed Title VII applied only to biological sex. There had been many cases litigated by LGBTQ+ plaintiffs in an effort to expand the definition. However, all of the circuits agreed that the meaning of the word in 1964 and the history surrounding it limited it only to biological sex.

The opinion in these three cases forebodes significant problems for the future of religious freedom and free speech. Justice Alito listed a number of areas in which we expect litigation and the expansion of the definition. These include over 100 federal statutes that prohibit discrimination because of sex. After these court decisions, the obvious question is what can be done? What will happen? First, we will address two ways the finding of the court can be changed. Then, we will explain the difficulties that churches and religious organizations will have in protecting their employment practices.

When we have a "legislative" decision as Justice Alito pointed out, this expansive definition will be applied in other contexts. SCOTUS could reverse itself in a later case, but notice how difficult that is by considering the still extant *Roe v. Wade* decision on abortion 47 years later. SCOTUS is unlikely to reverse itself. Both Justices Alito and Kavanaugh found sympathy for LGBTQ+ persons. They seemingly condone those beliefs. Frankly, their expressions of sympathy were gratuitous and unnecessary, but important for us to know. The other method of reversing this is for Congress to amend Title VII. As noted above, the LGBTQ+ effort tried for 56 years to expand the definition. It would be a herculean task for conservatives now to amend it back to what the proper and original meaning is. In other words, that is unlikely as well.

So, that leaves us with how is this going to affect us and how do we respond? Claims of discrimination under Title VII begin with a filing with the Equal Employment Opportunity Commission. Most states have several EEOC offices. A claim is made, the EEOC investigates, and based on the investigation, determines whether to represent the complaining employee against the employer or to give the employee a right to sue letter, which will permit a complaint to be filed in federal court. The interpretation and application of Title VII varies from jurisdiction to jurisdiction. There is a vast body of law related to racial issues, which is the primary objective of the law. Now that sex has been redefined, we can expect litigation in every state, resulting in a new vast body of law related to sex.

While all employers with 15 or more employees are included, we are concerned religious entities will be the main targets. The faith belief of Christians in the sanctity of one man one woman marriage and that homosexual activities are sin is the main obstacle to the LBGTQ+ agenda being legally and culturally accepted.

Title VII provides an exemption for religious entities. It does not apply to an employer with respect to employment if it is a religious organization, i.e., church, ministry, *etcetera*. However, by court decisions, that exemption is limited to ministerial, executive and policy-making level employees. The question is, to what degree are secretarial, clerical, custodial and other employees covered?

The federal Eleventh Circuit Court covers Alabama, Georgia and Florida. Decisions by that court are binding on those three states. Other circuits may apply the law differently. It is only when there is a substantial disagreement that SCOTUS reviews cases, or there is an important federal question, such as in the three above. For now, the Eleventh Circuit has applied the exemption to clergy and teachers in Title VII cases.[1] There is scant authority anywhere for protecting the lower classes of employees.

Churches and religious organizations, including ministries, whether a part of a church or a separate 501(c)(3) organization, must now strengthen their policies on this issue. Previously, as noted above, Title VII defined sex as biological sex, and this was not an issue. It is now an issue.

There are a couple of initial lines of defense. First, Title VII is a federal law. Its application may be limited by the Religious Freedom Restoration Act, which says a federal law burdening religious activity must have a compelling interest in what it seeks to achieve, but then done in the least restrictive way. By SCOTUS declaring SOGI grounds for discrimination under federal law, erasing SOGI animus becomes important. That will serve as a compelling interest. At this time, we do not know the extent to which the courts will determine whether it burdens religious freedom. Secondly, taking federal funds may open the door for regulation of the recipient. Most religious organizations do not take federal funds, but as we recently pointed out, churches taking PPP or EDIL money during the pandemic could open the door for regulation. See, May 2020 Educational Update. Significant caution is necessary if you participate in any federal program that involves funds. The better wisdom is not to.

We recommend that churches and religious organizations strengthen and more clearly define their policies related to SOGI and employment. After *Obergefell*, most developed strong statements on scriptural marriage. However, most of those statements were not all encompassing of the SOGI issues. Because religious bodies could rely on the biological definition of sex by all the circuits until 2017, there was no need for a policy related to Title VII. Now, the policy must specifically state as a result of these court decisions and the new definition of sex, why it does not accept SOGI or sexual activities other than those in a scriptural one-man one-woman marriage.

The policy should also say that while ministers, teachers and policymakers must conform to the scriptural mandates observed by the entity, the entity does not overlook the need to have a cohesive staff to fulfill the goals and objectives of the entity, all in agreement on the attributes of a Christian life, increasingly including sexual matters. We believe reasonable arguments can be made to cover clerical and administrative staff. It is important to the integrity of a religious mission to have all those involved in the effort to conform to its principles. A distinction is made with secular employers and it may be difficult to argue the exemption for custodial and similar workers.

Your organization should review its procedures and policies manual for human resources, hiring practices, and everything related. Clearly articulated policies and the reasons for them need to be developed. Every hire must conform to the statement of faith and be viewed as an important and integral part of the institution. To the extent possible, you should require employees to be professing Christians who are active members of a Bible believing church. A carefully worded policy statement should be signed by all new hires. Also, a specially worded policy should be signed by present employees, in order to comply with this "new law."

If you presently have on staff, at any level, a person you hired that you knew or found out is engaged in some type of homosexual activity, transgender, or even "Side B" (claiming to be a celibate homosexual), it is likely you will not be able to terminate that person's position of employment for any reason without having an EEOC claim. Further, if you knowingly hired a person with known SOGI beliefs or activities, you have likely lost your scriptural defense for new hires at every level and in all of your ministries. The EEOC and courts will not have compassion for your religious position on any of your employees, if you have already, even once, accepted that lifestyle.

Remember, this Title VII problem is just the beginning. Religious organizations can expect to be engaged in litigation under this law. It will begin with Title VII and move to other laws. These recently decided cases are far more damaging to religion and the church than *Obergefell* or anything that has happened in the past.

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[1] SCOTUS affirmed the ministerial and teacher exception for religious entities in disability and age cases in *Our Lady of Guadalupe School v. Morrissey – Berru*, which we will review in next month's educational update.