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

To: **Interested Persons**
Date: **August 2021**
From: **A. Eric Johnston**
Re: **The Courts, The Law and Religious Freedom**

On June 17, 2021, SCOTUS released its opinion in *Fulton v. City of Philadelphia, PA*, 141 S. Ct. 1868 (2021), holding that the City of Philadelphia could not deny a foster care license to the Catholic Social Services Agency ("CSS"). CSS explained it could not make a foster care placement in a same-sex home because it would violate its religious beliefs. The facts of this case typify the view of many today, as the court said: "The City Council called for an investigation saying that the City had 'laws in place to protect its people from discrimination that occurs under the guise of religious freedom.'" Our first freedom is minimized in today's culture as pretext to discriminate against others, regardless of how offensive their conduct may be to our religious beliefs.

Although the decision protected religious freedom, the reasoning of the majority opinion written by Chief Justice John Roberts was weak and disappointing. A majority of the Court, including Justice Amy Coney Barrett, avoided a longstanding contentious issue of how to review religious freedom cases, by simply saying that the City permitted "exemptions" in their licensing contract. The City had no compelling reason to violate the religious rights of CSS, since the exemption provision existed. The City must grant CSS an "exemption," thereby protecting its religious freedom. While this gave immediate relief to CSS, it does not provide a foundation for protecting future religious rights. In the words of Justice Samuel Alito's separate concurring opinion:

> "This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never used exemption power. If it does that, then, voila, today's decision will vanish – and the parties will be back where they started."

This is similar to the *Little Sisters of the Poor* v. *PA* 591 U.S. ____ (2020) and the *Masterpiece Bakeshop* v. CCRC, 584 U.S. ____ (2019) cases. Those cases dealt with general laws infringing on religious beliefs about abortion and same-sex marriage, respectively. The cases perpetuated secular efforts to minimize religious liberty. They did not go to the root of the continuing uncertain jurisprudence of how to deal with religious liberties in this day of issues like LGBTQ+ demands that religious persons accept their proclivities in spite of their religious beliefs.

THE PROBLEM WITH RELIGIOUS LIBERTY JURISPRUDENCE

The problem began with the case of *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). It held generally applicable laws of neutral application may burden religious belief without showing a compelling reason. Fortunately for CSS in *Fulton*, the Court held that because law had the exemption, it was not generally applicable and therefore, since the City could not demonstrate a compelling interest in denying the license, it could not deny it.

Prior to *Smith*, the test for determining whether "any" law could burden religious freedom was formulated in *Sherbert v. Verner*, 374 U.S. 398 (1963). It held essentially "that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest…." Application of the *Sherbert* test would avoid the reoccurrence of problems with cases "written on the dissolving paper sold in magic shops."

In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000 bb, *et seq*., ("RFRA") which codified the *Sherbert* test. SCOTUS later declared it enforceable for federal actions, but unconstitutional as applied to the states, saying Congress could not impose standards on the states. See, *City of Boerne v. Flores*, 521 U.S. 566 (1997). In response to that, SLI authored and shepherded all the way through an overwhelmingly favorable referendum vote, the Alabama Religious Freedom Amendment, Section 3.01, 1901 Constitution of Alabama ("ARFA"). Like RFRA did for federal law, ARFA essentially codifies into state law the *Sherbert* test providing that government shall not burden a person's freedom of religion, even if the burden results from a rule of general applicability, unless the government demonstrates (1) its action is in furtherance of a compelling governmental interest, and (2) is the least restrictive means furthering that compelling interest.

In *Fulton*, Justice Alito wrote a separate concerning opinion, joined by Justices Clarence Thomas and Neil Gorsuch which provided a very detailed, insistent and cogent argument on why *Smith* needs to be reversed. It needs to be reversed in order to restore the correct place of religious freedom in the Constitutional hierarchy of rights. To do so will avoid the temporary decisions written on the "dissolving paper." So, *Smith* remains the law and Little Sisters of the Poor, Masterpiece Bakeshop and others must continue to litigate their religious rights.

ARFA PROVIDES GREATER PROTECTION FOR RELIGIOUS LIBERTY

There are two important footnotes to the *Fulton* case. In 2017, SLI authored and shepherded through the

legislative process the Alabama Child Placing Agency Inclusion Act, §26-10D-1, *et seq*., *1975 Code of Alabama*. The Alabama State Department of Human Relations ("DHR") licenses child placing agencies. Church and religious run agencies make more than 30% of those placements. All major denominations have Church run agencies, along with other religious non-profit agencies. When *Obergefell v. Hodges*, 576 U.S. 644 (2015) legalized same-sex marriage, we realized Alabama religious child placing agencies would face a dilemma and lose their licenses. Proactively, we wrote legislation to exempt them on religious grounds from making same-sex placements and forbidding DHR from discriminating against the religious agencies in licensing and regulation. *Fulton* does little to help that.

When we wrote the Alabama Child Placing Agency Inclusion Act, since it is a state law, we could rely on ARFA. In Section 26-10D-7, *id*., we included:

> "…an aggrieved agency shall be entitled to all rights, remedies, and defenses available to it under the First Amendment Free Exercise of Religion Clause of the United States Constitution and The *Alabama Religious Freedom Amendment*, Amendment 622 to the Constitution of Alabama of 1901, now appearing as Section 3.01 of the Official Recompilation of the Constitution of Alabama of 1901, as amended. (Act 2017-213, §7.)" *Emphasis added*.

Therefore, Alabama has given greater religious freedom protection than is available on the federal level. ARFA is a Constitutional Amendment and not a statute. It cannot be easily repealed by a subsequent Alabama legislature. By being a constitutional provision, it controls the interpretation of other Alabama statutes when it comes to recognizing religious rights and freedoms.

ARFA IS STRONGER THAN RFRA

More importantly, a second footnote to all of this is that ARFA provides another basis for more protection for religious agencies and persons in Alabama. As noted above, when RFRA was held by SCOTUS not to apply to the states, and Alabama passed ARFA, we brought to Alabama protection of religious freedom that is to this date not available under the U.S. Constitution.

Now for the best development of all, Alabama's foresight in passing ARFA was recently recognized by a Federal Court. ARFA is stronger than RFRA. When we drafted ARFA, we left out the word 'substantial.' RFRA says if a government places a "substantial burden" on someone then the compelling interest test applies. In ARFA, "any burden" on religious freedom will prohibit the government from discrimination.

In *Mediation Association of Alabama, Inc. v. City of Mobile, Alabama*, 980 F. 3d 821 (11 C.A. 2020) the 11th Circuit Court of Appeals reviewed ARFA in an Alabama case involving a religious right. The plaintiffs requested a zoning change to permit construction of a mediation center. It involved the Religious Land Use and Institutionalized Persons Act, ("RLUIPA"), 42 U.S.C. §2000 cc, *et seq*., another federal law similar to RFRA using the same judicial test. It applies to land use and institutionalized persons rights. The court pointed out as follows:

> "The Plaintiffs emphasized that ARFA's text – unlike RLUIPA's [and RFRA's] – doesn't require proof that the government 'substantially' burdened religious exercise, only that it 'burden[ed]' it. Thus, they insist, the Alabama Constitution requires strict scrutiny of *any* burden of religious exercise, even if that burden is *in*substanital." *Emphasis in the original.*

The 11th Circuit did not find a case where the Alabama Supreme Court had interpreted ARFA. Using the usual rules of legal construction, the court said:

> "ARFA is perfectly clear both in what it says and what it doesn't….So what *doesn't* ARFA say? It never once uses the phrase 'substantial burden.' And given the historical backdrop against which ARFA was adopted, the absence of the term 'substantial' is so conspicuous that we can only conclude that its omission was intentional...Not surprisingly, therefore, ARFA reads like a carbon copy of the stricken RFRA – with one very notable exception: In every place that RFRA employed the term 'substantial burden,' ARFA uses 'burden.'" *Emphasis in the original*.

At some point in the future, the Alabama Supreme Court will have the opportunity to apply ARFA. When it does, it will read this opinion with interest and we believe it will follow its reasoning. After all, it was "intentional" to leave out the word "substantial." With all of the litigation and legislation flowing from *Smith*, we wanted to be sure that we had an Alabama Constitutional Amendment that would give the absolute best protection to religious freedom for the citizens of Alabama. We believe we accomplished that.

CONCLUSION

Smith has been disputed since 1990. Not all states have an ARFA. Application of the First Amendment's Free Exercise of Religion Clause must be uniform across the nation to protect the rights of all citizens. We are disappointed that recent appointees to SCOTUS have not seen the wisdom in reversing *Smith* and restoring the *Sherbert* test. We know that Justices' Thomas, Alito and Gorsuch will continue to insist on that. We believe that at some point Justices' Kavanaugh and Barrett will join them. The right set of facts will come along and, regardless of Chief Justice Roberts' consensus building, the Justices will do the right thing.