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

To: **Interested Persons**
Date: **September 2023**
From: **A. Eric Johnston**
RE: **SCOTUS 2023: Freedom of Speech and Freedom of Religion – Part II**

Last month we reported on the SCOTUS decision in *303 Created LLC v. Elenis.* That case protected a web designer's right to refuse construction of a website celebrating same-sex marriage. The court recognized her rights as a Christian not to do things that would violate her beliefs. In response to this case, President Biden called for Congress to amend federal civil rights laws to cover sexual orientation. In his usual fashion, Joe Biden does not seem to appreciate or understand what is going on around him. As a matter of judicial fact, Justice Gorsuch also wrote the opinion in *Bostock v. Clayton County* which held under the Title VII Civil Rights Law that the word "sex" includes "sexual orientation." *The Wall Street Journal* opined that Justice Gorsuch was inhabited by an alien being when he wrote the opinion. It is good to see Justice Gorsuch exorcised and now on the right side of statutory interpretation and application of constitutional principles.

Title VII was also in SCOTUS news this year. In addition to sex, that law also prohibits discrimination on the basis of religion for larger employers, including governmental agencies. In *Groff v. Dejoy*, Gerald Groff, an evangelical Christian, did not wish to work on Sundays. He worked as a rural carrier for the U.S. Post Office. That position did not require Sunday work. The USPS agreed with Amazon for Sunday deliveries and he was required to work on Sundays. He was accommodated by transferring to a small rural station which did not make Sunday deliveries, but in 2017, Amazon deliveries began there as well. The USPS would not accommodate his religious belief and he resigned his job.

Groff sued the USPS saying it could accommodate his beliefs without undue hardship. The lower court applied the 1977 SCOTUS doctrine that interpreted "undue hardship to mean any effort or cost that is more than *de minimis* permits the employer to discriminate". That standard had haunted employment lawyers for years. It was not properly defined and resulted in virtually no accommodation of religious belief. SLI has had to contend with it in many cases through the years protecting persons who did not wish to work on the Sabbath. Finally, the *Groff* case will provide a pathway to alleviating that burden.

The court pointed out that "religion means all aspects of religious observance and practice, as well as belief." Employers must accommodate that belief and practice, unless it creates undue hardship on the employer's business. Through the years, there was a fear that the easing of the *de minimis* standard would be unconstitutional because it would have the effect of advancing religion. This would possibly violate the Establishment Clause under the *Lemon v. Kurtzman (*1973) case. As a result of a divided court, no relief from the standard was in sight, though SCOTUS had not defined *de minimis*. Here, the court said:

> "We hold that showing more than a *de minimis* cost, as that phrase is used in common parlance does not suffice to establish undue hardship under Title VII… . We therefore… understand [the law] to mean that undue hardship is shown when a burden is substantial in the overall context of an employer's business…. Those costs would have to rise to the level of hardship, and adding the modifier undue means that the requisite burden, privation, or adversity must rise to an excessive or unjustifiable level…. When undue hardship is understood in this way, it means something very different from a burden that is merely more than *de minimis*…. Nothing in this history plausibly suggests that undue hardship in Title VII should be read to mean anything less than its meaning in ordinary use…. We think that it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increase cost in relation to the conduce of a particular business…." *Internal quotations and paragraphs omitted.*

The parameters of Title VII accommodation of religious practices are still not known. The court said "having clarified the Title VII undue hardship standard, we think it appropriate to leave the context and specific application of that clarified standard to the lower courts in the first instance."

This means that trial courts and intermediate level of appellate courts will be searching for how to address the perplexing issue of respecting employees' religious rights, while at the same time meeting the demands of a particular business. These cases will be fact specific and we expect there to be many cases that will matriculate through the eleven judicial circuits from the fifty states, with what that standard will ultimately be. We expect it will take years and, perhaps, will never be conclusively defined due to the many types of businesses that will be required to accommodate this very important constitutional right. Some cases will be more restrictive than others. But it is important to recognize that SCOTUS has once again recognized the importance of the freedom of religion in the constitutional and individual rights hierarchy.

As with the *303 Created LLC* case, the *Groff* case encourages us who fight on a daily basis to protect religious freedom. We see a United States Supreme Court that respects the importance of constitutional rights and freedoms in an ever changing culturally and increasingly complex world.