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

To: **Interested Persons**
Date: **December 2018**
From: **A. Eric Johnston**
Re: **The Alabama Unborn Child Protection from Dismemberment Abortion Act**

On August 22, 2018, the Eleventh Circuit Court of Appeals upheld a finding by the Federal District Court in Montgomery that the above Act is unconstitutional. The legislative bill for this Act was introduced to try to stop an inhumane method of abortion. It was predicated on a comment in an earlier U.S. Supreme Court ("SCOTUS") case concerning the gruesome nature of dismembering a live unborn child. The expectation of the supporters of the bill was that the courts would recognize this gruesome procedure and prohibit it.

However, under the current state of abortion law, trial court and intermediate level judges are left with no option but to declare such a law unconstitutional. There is the possibility that SCOTUS will review this decision. Attorney General Steve Marshall has requested review.

The case is *West Alabama Women's Center, et al., v. Donald E. Williamson, State Health Officer, et al.* The review was by a three-judge panel. The opinion was written by Chief Judge Ed Carnes and concurred in by Circuit Court Judge Joel Dubina and a third district court judge sitting by appointment who made no comment other than to concur in the opinion.

Our initial impression of the bill when introduced was that it would not be upheld. The state of abortion law does not permit the upholding of such laws. However, it did have very good educational value and there was a minor chance that it might get better treatment.

The really important thing about this case is not the expected outcome, but the attitude of the two Circuit Court judges. Chief Judge Carnes began his opinion as follows:

> "Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration."

Chief Judge Ed Carnes goes on to note that the state was seeking to make the abortion procedure more humane by enacting the dismemberment law. He said:

> "Under the Act, the one performing the abortion is required to kill the unborn child before ripping apart its body during the extraction . . . . Killing an unborn child and then dismembering it is permitted; killing an unborn child by dismembering it is not."

The sum of this is that Judge Carnes recognizes that the law of abortion is an aberration and is not constitutionally based. He then makes an insightful assessment of the dismemberment law and how ridiculous the abortion related reasoning is. The tone and wording of his opinion is one of incredulity and disgust with abortion.

This assessment was joined in by Circuit Judge Joel Dubina. It is worth quoting at length his concurrence:

> "I fully concur in Chief Judge Carnes opinion because it correctly characterizes the record in this case, and it correctly analyzes the law. I write separately to agree on record with Judge Thomas's concurring opinion in *Gonzales v. Carhart*, 550 U.S. 124, 168-69, 127 S. Ct. 1610, 1639-40 (2007) (Thomas, J., concurring), with whom then Justice Scalia also joined. Specifically, Justice Thomas wrote, '**I write separately to reiterate my view that the Court's abortion jurisprudence**, including *Casey* [*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 112 S. Ct. 2791 (1992)] and *Roe v. Wade*, 410 U.S.113, 93 S. Ct. 705 (1973), **has no basis in the Constitution**.'" *Id.* At 169, 127 S. Ct. at 1639. **The problem I have, as noted in the Chief Judge's opinion, is that I am not on the Supreme Court, and as a federal appellate judge, I am bound by my oath to follow all of the Supreme Court's precedents, whether I agree with them or not**.
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> Therefore, I concur." (Emphasis added.)

It is of significant merit that two Circuit Court judges of their seniority and expertise openly and clearly state their disagreement with *Roe* and *Casey*. They are bound by precedent and do not have the authority to overrule either *Roe* or *Casey*. It is, however, important to note that judges continue to recognize that there is "no basis in the Constitution" for *Roe* and *Casey*. As long as opinions like Judges Carnes and Dubina are expressed, there is always the chance that *Roe* and, therefore, *Casey* will be reversed. With the confirmation of SCOTUS Justice Kavanaugh, we have a court that may review *Roe*. With the approval of Amendment 2 last month protecting the unborn in Alabama, we have a basis for a law prohibiting abortion. The time is right.