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

To: **Interested Persons**
Date: **February 2019**
From: **A. Eric Johnston**
Re: **The Failure of SCOTUS to Review the Planned Parenthood Issue**

On November 10, 2018, the United States Supreme Court ("SCOTUS") refused to review the case of *Gee v. Planned Parenthood of Gulf Coast.* Because Planned Parenthood is the nation's leading abortion provider, pro-lifers began wringing their hands about this, and particularly because the new Justice Brett Kavanaugh joined the liberals in voting against review. While we do not know Justice Kavanaugh's real position on the abortion issue, we believe it is too early to condemn him for his failure to vote to review the *Gee* case.

There have been efforts in many states to defund Planned Parenthood. For decades, Planned Parenthood has been receiving subsidies in many forms from the federal and state governments. One of those methods was through Medicaid programs which allowed persons who qualify for Medicaid to have health services provided by Planned Parenthood. While government funds could not be directly used to pay for abortions, the substantial income received for the other healthcare services, i.e., pregnancy testing, examinations, *etcetera*, freed up substantial funds for Planned Parenthood to carry on its abortion activities. We recently saw the ability of Planned Parenthood to use those funds in improper ways when $1.4 million was spent in Alabama to oppose Amendment 2, which stated Alabama's public policy to protect the unborn. We believe it is proper to continue pursuing the defunding of Planned Parenthood.

However, the failure of SCOTUS to review *Gee* was not a litmus test on how SCOTUS may review a proper challenge to *Roe v. Wade* and the right to abortion. For us lawyers we see the distinction. *Gee* involved a civil procedure issue of whether individuals could sue state governments through a private right of action in federal courts. Five federal appellant courts have recognized that right of action and one has not. A division among federal appellant courts is one of the grounds for SCOTUS review. Many opined after failure to review *Gee* that the Court had failed its duty by not addressing this procedural question.

Actually, not about abortion as such, the issue is whether federal courts can require state Medicaid providers to apply Medicaid regulations. States provide their own administrative and judicial review procedures. There are important federal/state principles involved which have been addressed in many cases by SCOTUS in order to protect the integrity of states and their rights under the Tenth Amendment. It is a difficult question, but difficult questions are often the very important ones. At some point these private rights of action must be clarified.

A review by SCOTUS is called "*certiorari*." A vote of four Justices is required to review a case. In this case, Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, Elena Kagan and Brett Kavanaugh simply voted not to review the case. Three Justices, Clarence Thomas, Samuel Alito and Neil Gorsuch, dissented and joined in a written dissent by Justice Thomas that the Court had shirked its duty:

> "So, what explains the Court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named 'Planned Parenthood.' That makes the Court's decision particularly troubling, as the question presented has nothing to do with abortion . . . . Some tenuous connection to a politically fraught issue does not justify abdicating our judicial duty."

Perhaps Justice Thomas is correct. We agree the case should have been reviewed, regardless of personal issues some of the Justices may have had. However, there is no reason to believe that Chief Justice Roberts or Justice Kavanaugh harbor secret support of *Roe* and the right to abortion. It is true Roberts is the Chief Justice and must seek to keep peace on the Court. We have heard he is very fond of the cocktail circuit in Washington and may not want to offend people. In our mind he may be the most questionable vote for reversing *Roe.* Justice Kavanaugh has indicated opposition to abortion in several indirect ways, but has never spoken or ruled directly on the issue. He has said *Roe* is settled law, but no case is ever settled law before SCOTUS. SCOTUS routinely reverses a number of prior decisions every year. Most are not as high profile as *Roe*.

It is certain that denial of *Cert* in this case will result in more litigation, whether it involves Planned Parenthood or other parties, which face these procedural issues. We agree these should have been cleared up.

Roe has been the law for 46 years. *Planned Parenthood v. Casey* (1992) challenged *Roe* but resulted in only a plurality opinion (a mere three votes) to uphold *Roe.* Otherwise, SCOTUS has not reconsidered the right to abortion. To do so would be perhaps the greatest decision on an issue of such magnitude since *Dred Scott v. Sandford* (1857), when black persons were declared not to be citizens under the Constitution, resulting in the Civil War and the Thirteenth and Fourteenth Amendments to the U.S. Constitution. Obviously, we have not had a civil war, but the mistake of *Roe* must be corrected. Because of that significance, we believe the Chief Justice and Justices of SCOTUS will be very careful in choosing what law to review. It is our belief that that choice will someday be made. We hope it is sooner than later. For the time being, we should give Justice Kavanaugh the benefit of the doubt and work towards the opportunity for a proper case to come before the Court. We believe four Justices will agree on that.