

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

To: Interested Persons
Date: December 2019
From: A. Eric Johnston
Re: Update on the Alabama Human Life Protection Act

*“Now, this is not the end. It is not even the beginning of the end.
But it is, perhaps, the end of the beginning.”* Winston Churchill

In the 2019 regular session of the Alabama Legislature, the Alabama Human Life Protection Act (“AHLPA”) was passed which made commission of an abortion a Class A felony. With minor exceptions, anyone performing an abortion would go to prison for a minimum of ten years. The unborn child’s life is recognized from the time it could be determined he or she is in utero. This law would prohibit all known abortions. See the June 2019 Educational Update. It is the strongest abortion law in the nation. The purpose of the law is to test the constitutionality of the *Roe v. Wade* (1973) court decision which legalized abortion on demand. *Roe* was upheld by *Planned Parenthood v. Casey* (1992), which was only a plurality opinion. It was not a strong cohesive judgment by SCOTUS that abortion should remain the law of the land, but did uphold *Roe*. There has never been a meaningful review of *Roe*.

In *Roe*, its author, Justice Harry Blackmun said, “If this suggestion of personhood is established, the . . . case . . . collapses for the fetus’ right to life would then be guaranteed especially by the amendment [Fourteenth Amendment].” The AHLPA seeks to do exactly that. In the 46 years since *Roe* was decided, advances in medicine and science establish the humanity of the unborn child and therefore his “personhood” under the Fourteenth Amendment. In the passage of the AHLPA, we were often asked, “Don’t you know it’s unconstitutional?” Of course, it is. The purpose is to test *Roe* and that is what is happening.

Soon after the law passed, a lawsuit was filed in the Middle District of Alabama. *Yashica Robinson, MD et al. v. Steven Marshall, Alabama Attorney General, et al.* was assigned to Judge Myron Thompson, the federal judge who virtually always gets Alabama’s abortion statutes for review. Regardless of Judge Thompson’s predilection toward abortion, he is bound by *stare decisis* to follow the supreme law of the land, *Roe v. Wade*. Judge Thompson issued a preliminary injunction before the effective date of the law, thereby precluding its enforcement while being tested in the courts. That was expected.

The preliminary injunction is based on certain legal criteria, the most important of which is that the trial court judge does not believe the case will be successful on the merits, that is, on the law and facts. The preliminary injunction is only the first stage in the trial court. Now the case will proceed to development of evidence and its presentation to the court. There is a question, however, about what evidence will be permitted.

The plaintiffs contend that the AHLPA is simply unconstitutional on the basis of *Roe* and therefore no evidence is necessary. The Attorney General’s Office, who by law represents the state on cases like this, argues that evidence must be presented to demonstrate that *Roe* was unconstitutional. This goes to the heart of the issue of the humanity of the unborn child with proof through fetal photography, ultrasounds, heartbeat, pain capability, *etcetera*. This evidence must be fully developed. There is a chance the judge will rule on the law alone, writing an opinion favorable to the plaintiffs, excluding the evidence, resulting in an appeal to the Eleventh Circuit Court of Appeals in Atlanta. The case would then be reviewed by a three-judge panel who hopefully would remand the case to the trial court for the development of the evidence.

It is likely that the trial judge will allow the evidence to be presented, then writing a favorable abortion opinion, resulting in an appeal to the Eleventh Circuit. The three-judge panel then would review the law as applied to the facts and determine whether the trial court judge is correct. Again, bound by the doctrine of *stare decisis*, the appellate court would be bound to find AHLPA unconstitutional. That is expected. There is a chance of a second Eleventh Circuit review by all its judge, but who would still be bound by *stare decisis*.

The next step will be to ask SCOTUS to review the case. A petition for writ of certiorari is filed with the court and review is discretionary. Less than one percent of cases are reviewed by SCOTUS. We are hopeful this case represents such a significant issue at a propitious time that the court will grant review. It only takes four judges voting for a review. Normally, on issues like this, the court will review the laws of several states. These may include some of the heartbeat laws that were passed, as well as other laws testing the thesis of *Roe* that abortion is permitted at anytime prior to viability, that is, when the child can live outside the womb. Viability should not determine the rights of the unborn. When the child is conceived, it becomes a viable human and living outside the womb should not be a legal milestone. If SCOTUS does not review the case, the process ends and the law is unenforceable.

We are hopeful that it will be the first meaningful review of *Roe* and the court will find the unborn child to be a person entitled to protection within the meaning of the United States Constitution and therefore all of the laws protecting human rights. If this happens, we must reach out to women and provide for them. Compassion must replace brutality. If *Roe* is not reversed, we will continue the fight to protect the unborn child.