

ALABAMA PRO LIFE COALITION

To: Interested Persons
Date: October 2021
From: A. Eric Johnston
Re: Texas Abortion Law

There is much discussion both locally and nationally about the apparent success of the Texas law that prohibits abortions if a heartbeat can be detected. The unique approach of that law is that it has no provision for state enforcement, therefore no state action, rather depending on private lawsuits by citizens. An emergency request to SCOTUS resulted in a 5-4 opinion refusing to block the law, thereby permitting it to remain in effect. This resulted in the closing of abortion clinics in Texas. The U.S. Justice Department has filed a lawsuit with the federal court asking that the law's operation be enjoined. A hearing is set for early October. The outcome of legal action is uncertain. The constitutionality of the law is questionable as a result of the *Roe v. Wade* and *Casey v. Planned Parenthood* decisions.

The reason the law has remained in effect to this time is procedural and not substantive. The question surrounds the issue of "standing." Standing is legal requirement that a person who brings a lawsuit have an actual injury. The Texas law appears to eliminate the standing requirement. Because there has been no evidentiary procedures in cases involving enforcement of the law, there remain questions about who can enforce it. As a result of these inadequacies, SCOTUS refused to enjoin it. Now, legislators in several states, including Alabama, are proposing Texas type legislation. The question is whether that is efficacious in any state, including Alabama.

The Texas law clearly violates the *Roe* viability standard and the *Casey* undue burden standard. For the former, it prohibits abortion prior to viability, which *Roe* in effect guarantees. For the latter, it places an almost absolute bar on the ability of a woman to obtain an abortion, thereby violating the standard set by *Casey*. The legal fact remains in spite of the procedural issues, the Texas law is state action in violation of controlling SCOTUS precedent. Several states have passed heartbeat laws of various time limitations, all below viability. SCOTUS granted review of a Mississippi law in *Dobbs v. Jackson Women's Health*. It will be heard on December 1, 2021 and we expect a decision by sometime in June 2022. We believe the refusal to enjoin the Texas law is a good sign.

In light of all this, should Alabama entertain passing a Texas type law? At the present time, we do not believe it would be productive. There are several reasons for this. The primary reason is that in 2018, Alabama enacted the Alabama Human Life Protection Act. It protects life from implantation of the fertilized egg in the uterus. This is the absolute most restrictive abortion law in the nation. It too challenges the viability and undue burden provisions of *Roe* and *Casey*. That law is currently being litigated. In passing the Alabama law, our hope was to provide as basic a challenge to *Roe* and *Casey* as we possibly could. There is nothing more restrictive that we could do to protect the unborn in Alabama.

Some may say well if we pass the Texas law right away, then we can stop abortions just like has been done in Texas. We have no doubt at all that if such a law was passed, it would make its way through the courts. It would not be enforceable during that time. In the meantime, the validity of the Texas law may have been determined. If that happens within the next year or so, there would be no reason why Alabama could not enact the law at that time. There is no point in jumping into uncertain litigation on a questionable quest.

APLC has always presented proper and viable proposals to the Alabama legislature. We have never acted for political reasons. We have always been clear in our requests. The regulatory bills we have proposed since 1988 have had a proper constitutional basis, though federal courts have limited some of those. We believe that our efforts have resulted in the improved healthcare of women, while reducing the number of abortions.

Some Alabama legislators will want to sponsor Texas type legislation right away. We do not question their concern for the unborn, but we certainly question the wisdom of pursuing uncertain legislation when we have already accomplished the best we can for the unborn. As noted above, if the Texas law is ultimately upheld and results in *Roe* and *Casey* not being enforced, we can certainly follow suit at that point. That would be the law and there would be no protracted litigation. Also, the APLC does not pursue legislation in order to enhance election possibilities for legislators. Through the years, we have seen legislators sponsor pro-life bills merely for the purpose of getting elected.

We respect the processes of the Alabama legislature, though they are deficient in many ways. However, we do not want to put those processes to the work of considering uncertain pro-life legislation. We know that it takes at least one day in each chamber for the passage of a legislative bill. That is a significant amount of valuable time. We hope leadership recognizes that the APLC always brings proper legislation and does not waste its time. We are grateful for that and we do not want to abuse it.

We know the Alabama legislature and the majority of Alabama people are pro-life. We do not want to abuse the trust in what we do. The battle has lasted for 48 years to this point and a few months time may inform us of our strategy. If the Texas law results in ultimate victory, and it becomes a states' rights issue, then we will be the first to pursue passage of such a law. In the meantime, we will continue to support the Alabama Human Life Protection Act in its process. We support the Mississippi law being reviewed by SCOTUS, as well as the efforts in other states which may bring cases to SCOTUS that would result in the reversal of *Roe* and *Casey*. In the meantime, we will pursue regulatory legislation to improve the healthcare of women, while reducing the number of abortions.