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MEMORANDUM

TO: Interested Persons
FROM: A. Eric Johnston
DATE: November 2021

RE: **Alabama Parental Consent to Abortion Law**
Reproductive Health Services v. Luther Strange, et al

In 1988 the Alabama Legislature passed a statute we drafted to conform to recent SCOTUS rulings permitting a minor girl to obtain an abortion without the consent of a parent or parents, by seeking permission from a court. See Section 26-21-1 *et seq*., *1975 Code of Alabama*. The purpose of the law was to provide guidance to judges in Alabama on how to handle these cases.

Through the years, cases that followed the SCOTUS standards demonstrated the fallacy of the standards which almost required a rubber stamp by a judge of a minor girl's decision to abort her child. Seeing the weaknesses of these procedures, we proposed to the legislature amendments to the 1988 law. These would protect the immature decisions of a young girl, as well as, advance the state's interest in protecting unborn life. In 2014, amendments to the law were passed. Shortly thereafter, a lawsuit was filed. A decision has handed down by the 11th Circuit Court of Appeals in *Reproductive Health Services v. Luther Strange, et al, 2021WL2678574* on June 30, 2021.

Unfortunately, a three-panel judge of the 11th Circuit upheld the District Court's decision striking down three of the most important provisions of the amendment:

1. The requirement that the District Attorney participate in the case to assure adequate presentation of evidence was made, to protect the interests of the minor girl and to respect the state's policy to protect unborn life.

2. Appointment of a guardian *ad litem* to represent the interest of the unborn child. Though he could not stop the abortion, he could ensure that all procedural and substantive matters were properly addressed for making a decision on whether to permit the abortion.

3. Involvement of parents or guardians would be permitted, if they had actual knowledge of the judicial bypass procedure. They could not be given notice of the procedure, but would be allowed to participate if they knew from other sources.

Both in the amended law and in the court opinion are very detailed provisions. If you want more information, contact us. The unfortunate conclusion is that the legacy of *Roe v. Wade*, *Planned Parenthood v. Casey* and their progeny has laid a firm foundation for abortion rights. Our hope in doing the amendment was that experience demonstrated the need for more protection of the minor and her unborn child. However, the court finds that the original basis for protecting the minor's right to abortion could not be changed. That law is basically (1) the judge will examine the minor and determine if she is mature and well enough informed to make a decision to have the abortion and (2) regardless of that, whether it would be in her best interest. Usually, only the girl herself testifies.

The effort to include the three requirements above was to provide a more thorough and fact-based body of evidence upon which the judge could decide whether to permit the abortion. The 11th Circuit judges cared little for those protections. As with the original SCOTUS opinions allowing judicial bypass, they ignore the reality of the need for participation and guidance of a number of persons in a child's life.

The AG's office is asking for further review. This might be an en banc hearing, which would be all active judges on the 11th Circuit or a SCOTUS review. As an aside, the three judges were Clinton, Obama and Reagan appointees. Though not always, it shows the importance of the appointment process. These judges could have as easily upheld the amendments, as easily as they struck them down.

This opinion did not change several things in the law. It does not impact the original Alabama law, which still requires, at a minimum, a court order to allow a minor to get an abortion. Importantly, the case did not strike down other important provisions in the 2014 amendment:

1. The requirement that the court follow all judicial procedural and evidentiary rules to assure sufficient probative evidence supported its finding and protection of the judicial process.

2. A detailed requirement that the minor provide probative and admissible evidence, though it might include hearsay, that she has been informed and understands the medical procedure and its consequences. The minor must present additional probative evidence of her maturity that enables her to make mature and informed decisions. Importantly, a court error commonly expressed that the maturity of the girl is shown by her simply choosing the judicial bypass procedure. It is now required that the totality of the evidence must be probative and of such weight to prove the minor is mature and well enough informed to make the decision on her own and that it is in her best interest. Uncorroborated legal conclusions by the minor are not sufficient.

3. Evidence of the legal identity of the parents and the minor is required. Previously, there had been no requirement to ascertain with any degree of certainty that a person posing as a parent might not be the parent. We had many cases of other relatives or friends posing as parents in order to give permission for an abortion. The 2014 amendment requires official identification for a parent and child, such as a certified birth certificate, a court order appointing the person as guardian, and official photographic identification. Some limited exceptions were permitted with penalties of perjury, if official documents could not be readily obtained.

We are disappointed that the judges in Alabama who must make these decisions are not allowed to conduct their judicial inquiry as they do in all other cases. In 1988 after the law was passed we participated in a seminar for those judges who would be applying the law. After a lengthy lecture and discussion, one of the judges said: “That we are to make these decisions, with so little information, makes no sense.” It still does not. It places a very heavy burden on the judge to make a life decision with, usually not more than, the words of the minor herself. It becomes important that judges assume that responsibility and meet the requirements that admissible probative evidence be used to make the decision. It is not something that can be done lightly.

Much is said about seeking to reverse the *Roe/Casey* basis for abortion. This case demonstrates the need for the foundations of those cases to be reexamined and for SCOTUS to make an informed, educated and enlightened decision of whether abortion is such a simple and fundamental right that it cannot be regulated with reason.

Throughout this *Reproductive Health Services* case, the 11th Circuit relied on that faulty foundation, for the most part blindly following the *Casey* opinion that abortion regulations are invalid if they create an undue burden to the woman’s choice. That has been said over and over again. Until *Roe/Casey* are reversed, the rationale remains an undue burden on the life of the unborn child.

Forty-eight years of profile jurisprudence has protected women’s health to an extent, but the right to abortion continues. It is all the more important that a case, like the recent Mississippi case SCOTUS has decided to review, or the Alabama Human Life Protection Act now in court, make it before SCOTUS so they can reexamine the reality of the humanity of the unborn child on the basis of empirical medical science and not on some fictitious right unsupported by the U.S. Constitution.

When we drafted the 2014 amendment to the Alabama Parental Consent law, we took into consideration the need to protect the confidentiality of the minor and to expedite the process. The 11th Circuit could have just as easily have upheld these provisions, as it struck them down. They blindly followed *Roe/Casey* at the expense of minor mothers, unborn children and Alabama judges who must make these heart-wrenching decisions.

Every parent has experienced the immaturity and problems of their minor children. It is wrong for the law to assume minor girls have enough wisdom and experience to make such a physical, psychological and life-changing decision, on a basis of faulty judicial logic where judges abandon their own experience and insight into human nature.