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

To: **Interested Persons**

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From: **A. Eric Johnston**

Re: **Abortion and SCOTUS: *Dobbs v Jackson Women's Health Organization* and *Whole Women's Health v Jackson, Judge, et al***

You may recall liberals vociferously fought the Trump nominees to SCOTUS, *viz,* Gorsuch, Kavanaugh and Barrett. Considered conservative and potentially pro-life, these Justices would have augmented the other two conservative Justices on SCOTUS, *viz*, Thomas and Alito. Chief Justice Roberts is considered moderate to conservative and could possibly make up a 6-3 combination. The result of that would potentially be the reversal of *Roe v Wade (1973),* which legalized abortion on demand and which has permitted abortion throughout the entire nine months of pregnancy since then. Since the 1940's, at least, we have had a mostly liberal SCOTUS, which has permitted liberals to accomplish many things that they could not have done legislatively, *viz.*, abortion, restriction of religious freedom, and same sex marriage. Now the court returns to its proper role, that is, interpreting the constitution rather than making law. Liberals are beside themselves and rage the court is now abusive, does not uphold the constitution and needs to be packed with additional liberal justices to return the court to a "policy making body". The abortion issue is the most significant issue instigating court control and one of the most important issues in the history of SCOTUS.

Two cases have been brought to SCOTUS. The main case is *Dobbs v Jackson Women's Health Organization*, contesting a Mississippi law that prohibits abortion fifteen weeks post fertilization. This goes below the "viability" standard initially set by *Roe*, that is, states could not prohibit abortion until the time that the unborn child might be able to live outside the womb, approximately twenty-four weeks. Consequently, *Dobbs* is a challenge to *Roe*. The other case, *Whole Women's Health et al v Jackson, Judge, et al* involves a Texas law that potentially reduces the prohibition time to about six weeks post fertilization. Both laws are based on the "heart beat" concept that when the heart beat of the unborn child can be detected, the abortion can be prohibited. Obviously, that has nothing to do with viability as a legal standard.

The only case to significantly consider the *Roe* decision was *Planned Parent v. Casey (1992),* which upheld *Roe* by only a plurality vote. That is, a majority of the Justices did not agree on the reasoning, but upheld *Roe*. *Casey* introduced us to the "undue burden" concept, meaning if the state enacts any law that would unduly burden a woman's right to abortion, it would be unconstitutional. Taken together, viability and undue burden have provided an almost complete shield to states' efforts to regulate or prohibit abortion.

In 2019, the Alabama Legislature overwhelmingly passed the Alabama Human Life Protection Act, which directly challenges the viability concept. Using the definition we formulated in our criminal code, the law prohibits an abortion of an unborn child at any time from when the fertilized egg implants in the uterine wall forward. The difference between the Mississippi, Texas and Alabama laws is that the Alabama law seeks to provide protection to the unborn from the earliest provable stage. The heartbeat bills leave a gap for when abortions may be performed. This is particularly true for the Mississippi law which only comes into effect at fifteen weeks. Earlier abortions would be permitted.

Chief Justice Roberts asked at the *Dobbs* hearing why fifteen weeks would not be long enough for a woman to decide to have an abortion. We all know Roberts seeks the middle of the road position on many cases, trying to build a consensus. It sounds like he may be interested in changing the viability concept. Courts only consider the issues before them. The Mississippi law is a fifteen-week prohibition law and that is as far down as the court is likely to go in making determination on when abortion can be prohibited. That means that laws like Alabama and possibly Texas must come along later for SCOTUS to further consider the abortion issue.

Alabama's law is based on the idea that now, forty-nine years later, medical science is significantly changed. In the *Dobbs* argument Justice Kagan suggested that not much science has changed since *Roe.* On the contrary, we now have significant advances in ultrasound, fetal photography, heartbeat and pain capable measurements. These are all factors of the personhood of the unborn child. Apparently, the Mississippi Attorney General's office did not originally argue this, but later did in its briefs. Perhaps, the genesis of the Mississippi law was based on heartbeat alone and not the other factors and the idea of proving actual personhood. At this point in time, we still believe the Alabama law can make a larger difference in abortion jurisprudence. Arkansas has passed a similar law and there are possibly others in process.

Some have been attracted to the Texas law. HB23 is a bill that has been prefiled for the regular session of the Alabama Legislature. It is based on the Texas law. We wrote on the Texas law in our October 2021 Educational Update. Since then, there was oral argument and an opinion released, which gives us better guidance. Unlike the *Dobbs* case, we will not have to wait until June 2022 for an opinion.

The basis of the Texas law is that the state cannot enforce it, but it can be done so by private individuals. This represents procedural challenges which are taking place in the court at this time. The first problem is that of "standing." Standing is a legal concept that says you may not file a lawsuit unless you have an actual injury. The Texas law permits anyone to file a private action to enjoin an abortion clinic's activities and for damages. The lack of standing does not normally permit a lawsuit. This would be a billboard lawyer's dream if this becomes law. In other words, anyone can sue anybody for anything. As a result of this, California is now considering a similar approach to abridge Second Amendment gun rights.

More importantly, we have better insight into the thinking of SCOTUS since they have issued an 8-1 opinion on the Texas law. Justice Gorsuch wrote the opinion and pointed out the issue of reviewing the finding in *Roe,* was not before the court. He also said the wisdom of the law as a matter of public policy, its unique manner of enforcement, was not before the court.

All of the issues discussed in the opinion were procedurally related and not the legality of abortion. Basically, the court was saying it could not address the merits of the case on appeal "pre-enforcement" of the law and based only on a motion to dismiss the case, that is, the earliest stage of pleading. Gorsuch pointed out that there are avenues of redress, and it is too early in the litigation to determine whether those were effective. Justice Sotomayor argued the court should disregard all of this and hold the law unconstitutional. She is the one in the *Dobbs* case who asked "[W]ill this institution [SCOTUS] survive the stench that this creates in the public perception that the constitution and its reading are just political acts." She was referring to a reversal of *Roe*. It seems to us more likely the stench would be the deaths of millions of unborn children who have died as a result of *Roe*. What she intends is for the court to disregard laws and rules. Perhaps she did not realize that this is exactly what Justice Blackmun did when he wrote the opinion in *Roe.* Either way, there is still no constitutional basis for *Roe*.

As we began this article, we talked about the policy making nature of SCOTUS under liberal leadership. This goes exactly to the issue of Sotomayor and her apparent willingness to disregard the rules of the court in order to accomplish a political end. The majority of the court is saying let's follow our procedure and stay true to our proper judicial role.

As noted, Chief Justice Roberts likes to find middle ground. We do not read the opinion in *Whole Women's* to say he supports *Roe.* He said the law attempts to kill a constitutional right, but says it must be litigated on the merits. The implication is the law attempts to sidestep the substance of *Roe* by creating a procedural mechanism to stop abortion. In the end, that will not work. With this opinion, the procedural issues are resolved. SCOTUS clearly states Texas abortion doctors, women, or whoever have standing, may sue Texas licensing authorities to test the constitutionality of the Texas law. Thus, it will begin the same judicial process as with the Mississippi and Alabama laws. The procedural slight of hand does not provide ultimate protection to the unborn. To be clear, the Texas law or an Alabama clone are not the best vehicles for ending abortion. HB23 is certainly not the choice at this time.

For these reasons we think the *Dobbs* case will be an important case to ending *Roe*. The Texas case may, but has a much further distance to travel by just beginning its meritorious consideration. Also, one other factor that must be considered is that the Texas law and the Alabama pre-filed HB23 provide that a defendant may have an affirmative defense to being sued if he or she "demonstrates that the relief sought by the claimant will impose an undue burden on that woman or on that group of women seeking an abortion." The undue burden concept from *Casey* has been used time and again to stymie actions to even reasonably regulate abortion. The meaning in the Texas law and HB23 is unclear and that in and of itself will likely result in significant, expensive and protracted litigation.

There is still a great amount of uncertainty of where all this litigation will lead. Justice Kavanaugh said the constitution is silent on abortion. However, the constitution is not silent on protecting a person's equal rights under the law. The abortion supporters argue this is about the constitution. *Roe* is not the constitution. It is an erroneous unbased constitutional anomaly. It is one that for forty-nine years it has not been accepted.

We hope the Alabama legislature will not insist on HB23. We trust Attorney General Steve Marshall to continue his stalwart efforts to protect the Alabama Human Life Protection Act. We believe the SCOTUS opinion in *Whole Woman* is a good sign. We believe comments during the arguments of *Dobbs* are a good sign. However, there is still much work to be done.