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

To: **Interested Persons**
Date: **October 2023**
From: **A. Eric Johnston**
RE: **New Developments in the VCAP Litigation**

On April 8, 2022, Governor Kay Ivey signed into law the Alabama Vulnerable Child Compassion and Protection Act ("VCAP"). That law, which was shepherded through the legislative process by Eagle Forum of Alabama and the Southeast Law Institute prohibited hormone treatments and surgical procedures on minors for supposed gender changes. On April 19, 2022, Plaintiffs consisting of transgender minor parents and a minister filed a lawsuit saying the law is unconstitutional. Ten days later, the United States Department of Justice joined them in the lawsuit. You may recall, this is the lawsuit in which the DOJ attacked Eagle Forum and SLI attempting to subpoena all of our records, which subpoena was quashed by the federal court.

The trial court had issued a preliminary injunction at the request of the Plaintiffs, relying on the skewed positions of national medical groups such as the American Academy of Pediatrics, The American Psychological Association and others. Those groups are known to be controlled by liberal interests. Unfortunately, the trial judge's understanding and background of these issues was not informed.

The State of Alabama appealed the preliminary injunction. On August 21, 2023, a three-judge panel of the Eleventh Circuit Court of Appeals reversed the trial court judge dissolving the injunction. Subsequently, the Plaintiffs have requested a full *en banc* hearing for all of the judges. A trial on the merits will take place next year back in the trial court. The intermediate appeal is important to determine the legal standards on which the trial court will be guided and the ultimate appeal when there is a complete record for review.

The trial judge issued a preliminary injunction on the basis that the parents had a due process fundamental right to "treat their children with transitioning medications subject to medical accepted standards." He also ruled the law violated the Equal Protection Clause by creating a sex-based classification. The appellate court found he was incorrect on both of these rulings.

The Due Process Clause is based on two types of substantive rights possessed by all Americans. There are those that are enumerated in the Constitution *i.e.,* the Bill of Rights, and then there are those that are the unenumerated rights. Enumerated means they are specific rights stated in the Constitution. Unenumerated rights are rights that can be found when they are "deeply rooted in [our] history and tradition and essential to our nation's 'scheme of ordered liberty.'" The Constitution does not state that parents have a fundamental right to treat their children with gender transitioning medications. The issue of transgender changes on minors is a new phenomenon. It was virtually unknown until recent years. It is not the basis for an unenumerated substantive constitutional right.

However, it is a very sensitive issue because the law observes in many instances that parents have a fundamental right in the upbringing of their children. The appellate court pointed out the history of parent's rights did not deal with these questionable medical issues. If that fundamental right existed, the law would be subject to the highest degree of judicial scrutiny *i.e.,* strict scrutiny. That right does not exist. Yet, this creates the difficult judicial chore of balancing parental decisions and the need of the state to provide reasonable regulation of medical care. Parents are being misled by activists with a perverted medical agenda. The unfortunate bias of medical professionals was the deciding factor in the preliminary injunction. Had the trial judge realized that bias, we believe even under strict scrutiny, he would have upheld the law. The court bought into the idea of a right "to treat ones children with transitioning medication subject to medically accepted standards." It may be that the phrase "subject to medically accepted standards" was the turning point for him. These Frankenstienian procedures are not "medically accepted standards." While liberal medical associations support this, good medicine does not. Also, there is significant evidence from Europe, who earlier experimented with these procedures, that they are not medically or psychologically advisable.

The other basis for the trial court's preliminary injunction was that VCAP violated the Equal Protection Clause on the basis of sex discrimination. The level of judicial scrutiny for that is intermediate. This scrutiny requires that the state prove important objectives that are accomplished by efforts substantially related to the achievement to those objectives. The appellate court found there is no discrimination on the basis of sex. Both male and female are treated similarly by VCAP. Gender dysphoria is not sex discrimination. Consequently, there is no violation of the Equal Protection Clause.

At trial, the state must only prove that VCAP is rationally related to a legitimate government interest. Protecting minors from medically suspect and permanently damaging procedures is certainly a legitimate interest within the state's "police power.". The appellate court pointed out that these types of issues are quintessentially the sort that our system of government reserves for legislative, not judicial action. That is what the Alabama Legislature did based on non-biased medical evidence. The case is far from over. We will expect another opinion from the Eleventh Circuit. The case will then return to the district court for trial on the merits. We will hope and pray the Eleventh Circuit judges will apply correct judicial standards and the trial court will sift carefully through the evidence to determine what is really medically acceptable.