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

To: **Interested Persons**
Date: **July 2025**
From: **A. Eric Johnston**
RE: **SCOTUS Upholds Prohibition of Minor Gender Change Medical Procedures**

In 2022, Alabama enacted the Vulnerable Child Compassion Protection Act. This law prohibits sex change treatments and procedures on children below the age of 19 years. Soon after it was enacted, a lawsuit was filed in federal court which resulted in a preliminary injunction against surgical procedures, but allowed drug-based procedures to continue. That injunction was appealed and the Eleven Circuit Court of Appeals reversed the trial court and allowed the Alabama law to remain in effect. Recently, the United States Department of Justice and the private plaintiffs dismissed their claims. SCOTUS has now upheld a similar Tennessee law. The issue will, however, remain one to be contested in the sister states. We have written several articles on VCAP which you may want to review. [1]

In *United States v. Skrmetti*, decided June 18, 2025, SCOTUS reviewed a Tennessee statute and found it to be constitutional. It was a six-three opinion written by Chief Justice Roberts and concurred in by Justices Thomas, Gorsuch, Kavanaugh and Barrett, with parts of it agreed to by Justice Alito. Justices Sotomayor, Jackson and Kagan, dissented. This was the usual conservative versus liberal split of the court. It was good to see Chief Justice Roberts writing the majority opinion. It was also good to see Justice Barrett join with the majority and provide a well-reasoned concurring opinion. It was also somewhat telling that Justice Gorsuch made no comment, though he voted with the majority.

The issue in the case was whether the Tennessee law banned certain medical care, *i.e.,* sex change procedures for transgender minors, in violation to the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. When laws are passed affecting constitutional protected rights, they are classified on how the court will review them. Generally speaking, specifically "enumerated" rights in the Bill of Rights, such as freedom of religion and freedom of speech, and rights related to characteristics, such as race, sex and national origin ("immutable" rights, meaning you were born that way and cannot be changed) are fundamental protected constitutional rights. There are other "unenumerated" rights reserved by the 9th Amendment, such as some privacy rights, parental rights, travel rights or others.

The Plaintiffs in the lawsuits challenging Tennessee, as well as Alabama, argued that transgender persons should be included in the immutable characteristic of "sex". SCOTUS did not buy that argument. If it had, the court would have applied the strictest judicial standard and probably had declared the law unconstitutional. Rather, the court found the law was based on medical care which requires only a rational basis judicial examination. Applying this standard, a court will uphold the law if there is any reasonable conceivable state of facts that would provide a rational basis for its classification that is related to legitimate government interests. Medical care generally fits that category.

The reason it was curious that Justice Gorsuch said nothing is that he was the author of the *Bostock v. Clayton County* decision that interpreted the federal anti-discrimination statute Title VII to include in the definition of the word "sex" the claim of "gender." When Title VII was passed in 1964, the word "sex" meant male or female. There was no idea that it meant anything else. There were vigorous dissents by Justices Thomas and Alito in that case demonstrating the historical definition of the word "sex". There were efforts by the Plaintiffs in the Tennessee case to apply the *Bostock* reasoning in order to increase a stricter review of the

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[1] Educational Updates of March and April 2022, June 2022, March 2023, October 2023 and April 2025. These can be found at www.SoutheastLawInstitute.org

law that would probably result in its being unconstitutional and the horrific sex change procedures to be legal.

Sometimes we question the judicial philosophy of Chief Justic Roberts. He is often seen to sit on the fence in an effort to find consensus on the court, resulting in weak opinions. As the author of this opinion, he took a strong and correct position.

It was encouraging that Justice Barrett joined in this opinion. Some of her opinions have been less than acceptable to conservative jurists and lawyers. Her concurring opinion in this case was well written. She clearly stated that transgender individuals do not share the "obvious, immutable, or distinguishing characteristics of discreet groups, such as male and female". She also observed that there was no history of invidious racial discrimination against transgender persons, thereby creating an alternative equal protection clause argument.

Roberts began the majority opinion by observing the World Professional Association for Transgender Health ("WPATH") provided guidelines for the medical procedures. In 1979, it recommended them only for adults, but in 1998 and in 2012, it eased those standards to encourage the medical procedures on minors. The court raised the question about the credibility of WPATH and both in the majority opinion and in Thomas' and Barrett's concurring opinions, it is said this group has "allowed ideology to influence the medical guidance." As a party to the Tennessee litigation, and in Alabama, it was the Biden Justice Department, taking the position that there was a medical consensus that these minor medical procedures are proper.

Initially, the Alabama Federal Court bought into that idea when it issued the preliminary injunction on the Alabama law. It also bought into the idea that transgenderism was a suspect class, same as sex, and therefore entitled to heightened judicial scrutiny. In defending the Alabama law, the Attorney General's office was caught off guard initially, but soon educated itself and provided significant evidence to the court of no medical consensus and that the whole issue is politically motivated. There were significant references in the Tennessee SCOTUS opinion to Alabama's important contribution to understanding this issue. We are grateful to Steve Marshall's office and his Solicitor General, Edmund LeCour, for their representation of the state.

As in the *Dobbs* opinion sending the abortion issue back to the states, SCOTUS sends this issue back to the states to be determined by legislative procedures to accomplish goals rationally related to legitimate government interests. Just as the Alabama Legislature overcame the bias of politically motivated transgender groups, SCOTUS was informed and made it clear these issues must be handled as medical issues and not political issues.

The liberal dissenters in this case are politically motivated in their review. They buy totally into the LGBTQ+ political and legal agenda. They do this in spite of the overwhelming medical evidence against the procedures, including new evidence from England, Norway, Sweden and the Netherlands (who engaged in these transgender medical gymnastics way before the United States did) finding the medical evidence they thought to be correct needs to be corrected. The medical procedures that transgenders advocate are, as SCOTUS observed, irreversible, cause significant medical problems, and are not proper medicine. Parents should not be frightened into thinking their child is going to commit suicide and must have attempted gender changing medical and surgical procedures. Rather they should be encouraged to get appropriate psychological and spiritual assistance.

SLI is grateful for having been able to participate in several ways throughout this process. We are grateful to Eagle Forum of Alabama for all of the fine work it did to now result in an Alabama law that will protect minors from Frankensteinian surgeries for political reasons. But we must be mindful, however, that nothing ever remains the same and we must be on our guard.