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

To: **Interested Persons**
Date: **September 2025**
From: **A. Eric Johnston**
RE: **The Continuing Debate Over the Availability of Abortifacients**

Although the Alabama Human Life Protection Act prohibits both surgical and drug induced abortions, we know that abortifacients are regularly coming into the state of Alabama and abortions are taking place. At present, there are two facets to the issue. First, does the Federal Food and Drug Administration ("FDA") preempt state law and allow shipment of the drugs into all states, notwithstanding some states have abortion restrictions? The other issue continues to be how do we keep the drugs from coming into the state at all from any source. We have addressed these issues several times and you may wish to review earlier educational updates. [1] The Biden Administration was unapologetically supportive of abortion on demand at any time and by any method. By encouragement of the administration, U.S. Postal Service legal counsel explained the Comstock Act did not prohibit the FDA from requiring abortifacients to be sent by the mail or courier to all states. The Comstock Act had prohibited that since 1873. Therefore, the FDA began making the drugs available, even though it would violate state law.

The first lawsuit challenging this was *FDA v. Alliance of Hippocratic Medicine*. On June 13, 2024, SCOTUS ruled the plaintiffs in the case did not have standing, that is, the right to bring the case because they could prove no actual injury to themselves. Later, the Trump Administration decided not to pursue the case further. Many complained and some theorized the Trump Administration would not protect the sanctity of life. Actually, it was a valid decision because SCOTUS had settled the standing issue and there was no point in pursuing that case further.

On the other hand, there was a much better case matriculating through the courts. That case has now been decided by the Fourth Circuit Court Appeals on July 15, 2025. *GenBioPro, Inc. v. Raynes* contested the merits of the FDA decision and whether it overrode a West Virginia statute that prohibited most abortions. While the *FDA v. Alliance of Hippocratic Medicine* case dealt with FDA procedures approving the use of abortifacients, the GenBioPro case addressed not arcane medicine approvals, but directly asked can the FDA preempt state abortion laws and make drug inducing abortion legal in all 50 states.

In an extraordinarily well reasoned opinion, the Fourth Circuit Court addressed many issues GenBioPro raised in an effort to legalize nationwide abortion. The court reviewed the "republic's federal design" recognizing that the supremacy clause of the U.S. Constitution does not automatically override the sovereignty of states. The court said that "in areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." Further, "among the areas of traditional state authority to which the presumption against preemption applies is the regulation of matters related to health and safety." The basis for this decision is *Dobbs v. Jackson Women's Health Org.,* which returned the regulation of abortion to the states. The Fourth Circuit recognized that "the West Virginia Law thus fits comfortably within a long history of state regulation of abortion."

GenBioPro is the maker of the abortifacient mifepristone. It stands to profit hugely from the sale of its drugs. Thus, it had standing. However, the court duly recognized the FDA only regulates the safe sale of drugs (which is questionable in this case), and not whether the drugs are always legal. The court spelled out this great difference. Congress did not intend to guarantee nationwide access to mifepristone, only that it would be safe as a drug.

The court clearly recognized the strength of the *Dobbs* decision and the mandate that the issue of abortion remained with the states. It concluded its opinion chastising mainstream (liberal) groups saying they have chosen the wrong "venue" and need to direct their attention to the legislative process. This case provides a much better vehicle for deciding the issue. We expect SCOTUS to grant review of the case. We further expect SCOTUS to affirm this judgment.

In spite of this, however, it will not stop the abortion drugs from coming into states from other states and also other countries. Litigation continues in both Texas and Louisiana on the state availability issue. Recently, the state of Texas sued the state of New York requiring it to give full faith in credit to a judgement based on a Texas law against a New York doctor for violating the Texas law by sending the abortifacients to Texas. Louisiana is making a similar claim based on a criminal statute. These will likely reach SCOTUS at some point and we are hopeful that SCOTUS will require the eighteen "shield states" to give full faith and credit to the laws of the other states. The shield states are those that have passed laws that say they will not recognize laws of other states that prohibit or regulate abortion.

Finally, we will be continuing the effort to regulate the internet sales of abortifacients. That bill will once again be filed in the Alabama Legislature in the 2026 Regular Session. The pro-life community will not abandon the unborn and women and families who are caught up in this continuing web of deceit and destruction.

[1] January 2024 Stopping Abortion Drugs from coming into Alabama
July 2024 The FDA, States Rights and Abortifacients