No. 18-837

IN THE
Supreme Court of the United States

STEVEN T. MARSHALL, ET AL.,
Petitioners,
v.

WEST ALABAMA WOMEN'S CENTER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE FOUNDATION FOR MORAL LAW, PERSONHOOD ALABAMA, AND THE ADOPTION LAW FIRM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes the Fourteenth Amendment protects the God-given right to life instead of a supposed right to an abortion.

Amicus Curiae Personhood Alabama Education, Inc. ("Personhood Alabama") is an Alabama nonprofit corporation that advocates for the protection of the unborn before the Alabama Legislature and in the courts based on the Personhood theory of *Roe v. Wade*, which will be discussed below. Personhood Alabama has an interest in this case because it believes that the State of Alabama has unequivocally recognized that the unborn are persons, which according to *Roe* itself causes the case for abortion to collapse.

Amicus Curiae The Adoption Law Firm is an Alabama law firm dedicated to helping orphans find

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

loving homes to care for them. The Adoption Law Firm has an interest in this case because it desires to help provide homes for the children of Alabama whose lives would be saved if the law at issue in this case were upheld.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, the Supreme Court conceded that if the "suggestion of personhood" of the unborn is established, then the case for abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Roe v. Wade*, 410 U.S. 113, 156-57 (1973). In rejecting the argument that the unborn were persons within the meaning of the law, *Roe* noted that the Texas laws at issue in that case did not treat the unborn fully as persons. This has led to discussion in legal academic circles in recent years of whether this means *Roe* would allow the States to establish the personhood of the unborn if they were treated fully as persons within the meaning of the law, which would lead to the case for abortion collapsing. This is known as the Personhood theory of *Roe*. The State of Alabama has passed a constitutional amendment and numerous statutes explicitly recognizing the unborn as persons, and the Alabama Supreme Court has released seven opinions since 2011 recognizing the personhood of the unborn. Because the State of Alabama has recognized that the unborn are indeed persons, this Court should consider whether the Fourteenth Amendment accordingly guarantees their right to life.

Alternatively, the Court should take the opportunity to consider whether *Roe* and its progeny should be overruled for several reasons. First, one cannot rationally deduce a right to an abortion from the Fourteenth Amendment's Due Process Clause. Because the judicial branch is bound by the text of the Constitution, it is not at liberty to invent rights under the Constitution that are not actually there. If the Fourteenth Amendment has any application to abortion at all, then the Equal Protection Clause requires the States to protect the right to life with equal application to both the born and the unborn. This is true because unborn children are fully human and fully persons, and God has given them an unalienable right to live. This Court should not ignore the murders of unborn children and the maiming of the Due Process Clause because of a misapplication of the doctrine of *stare decisis*, but should take the opportunity to correct this injustice once and for all.

Finally, if the children of Alabama are allowed to live, Alabama adoption agencies are more than willing to help unwanted children find loving homes to care for them. Children have a right to live, regardless of whether adoption is available or not. Nevertheless, *amici* wish to remind the Court that there are many families in Alabama who would willingly adopt the children whose lives would be saved if the Eleventh Circuit's judgment is reversed.

ARGUMENT

I. *Roe v. Wade* Left Room for the States to Determine Whether Unborn Children Are "Persons," and Alabama Law Has Recognized Them as Persons.

A. *Roe*'s Discussion of Fourteenth Amendment Personhood

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court conceded that if an unborn child is a person, then the child's right to life is protected by the Fourteenth Amendment. "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. . . . *If this suggestion of personhood is established, the appellant's case, of course, collapses*, for the fetus' right to life would then be guaranteed specifically by the Amendment." 410 U.S. at 156-57 (emphasis added).

After acknowledging that establishing the personhood of the unborn child would destroy the "right" to abortion, the Court rejected the proposition that the plain language of the Fourteenth Amendment alone applied to the unborn for two reasons. First, the Texas laws at issue did not treat the unborn fully as persons. *Id.* at 157 n.54.[2] It is also

[2] The fact that the Court raised this point in a footnote should not deprive it of its legal significance. After all, this Court has built important doctrines off of footnotes before. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

important to note that the Texas laws at issue in *Roe* did not *expressly* provide that an unborn child is a person. *Id.* at 117 n.1 (quoting the Texas laws at issue).[3] Second, the Court noted that the Constitution's use of the word "person" did not always appear to apply to the unborn, so it would be difficult to conclude that the use of the word "person" in the Constitution – without more – applied to unborn children. *Id.* at 157-58.

Because part of *Roe's* rationale was that state law did not fully treat the unborn as persons, then the states may remedy the problem Texas had in *Roe* by recognizing unborn children as persons fully within the meaning of the law, thus causing the right to abortion to collapse. *Roe*, 410 U.S. at 156.

B. Personhood in the States and Academia

This "personhood" theory has led to the establishment of multiple national and state-wide personhood organizations, including *Amicus* Personhood Alabama, that seek to establish legal recognition of the personhood of the unborn through legislation and litigation. The personhood theory also has been debated in legal academic circles, especially over the last decade. *See, e.g.*, Rita M. Dunaway, *The*

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[3] The Court compared the Texas laws to Wisconsin and Connecticut laws that defined an unborn child as existing *in utero* from the moment of conception. It also noted that Connecticut public policy was "to protect and preserve" that life. *Id.* at 158 n.55. Apparently, the Court was not impressed that Texas did not recognize the personhood of the unborn as clearly as Connecticut and Wisconsin did.

Personhood Strategy: A State's Prerogative to Take Back Abortion Law, 47 Willamette L. Rev. 327 (2011) (discussing the personhood theory and suggesting a strategy for implementing it); T.J. Scott, Note, *Why State Personhood Amendments Should Be Part of the Prolife Agenda*, 6 U. St. Thomas J. L. & Pub. Pol'y 222 (2011) (advocating for the implementation of state personhood laws); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 Am. J. L. & Med. 573 (2013) (discussing implications of personhood laws); Clarke D. Forsythe & Keith Arago, *Roe v. Wade & the Legal Implications of State Constitutional "Personhood" Amendments*, 30 Notre Dame J. L. Ethics & Pub. Pol'y 273, 318 (2016) (concluding that personhood laws would not directly conflict with *Roe v. Wade* and *Planned Parenthood v. Casey*).

C. Personhood in the Alabama Supreme Court

Since 2011, the Alabama Supreme Court, either explicitly or implicitly, has recognized the personhood of unborn children in seven major pro-life decisions.[4]

[4] This Court has held that federal courts are bound by state supreme court decisions when substantive state law is at issue. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Thus, this Court should pay special attention to how the Alabama Supreme Court has treated this question.

1. *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011)

In *Mack*, the court held unanimously that a wrongful-death action can be brought when someone injures a pregnant woman resulting in the miscarriage of her *nonviable* baby. 79 So. 3d at 611. The statute at issue in that case read as follows: "'When the death of a minor child is caused by the wrongful act, omission, or negligence of any person ..., the father, or the mother ... of the minor may commence an action.'" *Id.* at 599 (quoting § 6-5-391, Ala. Code 1975). The court noted that Alabama's homicide law had recently been amended to define a "person" as "'a human being, *including an unborn child in utero at any stage of development, regardless of viability*[.]'" *Id.* at 600 (quoting § 13A-6-1(a)(3), Ala. Code 1975). The court also recognized that "[a] child is an entity, a "person," from the moment of conception[.]" *Id.* at 607 (citations and quotation marks omitted).

2. *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012) [*Hamilton I*]

In *Hamilton I*, the court, applying *Mack*, allowed a woman to pursue a wrongful-death claim against her doctors for the death of her nonviable baby. 97 So. 3d. at 737. Drawing on the Declaration of Independence and Article I, § 1, of the Alabama Constitution, the court held that "each person has a God-given right to life." *Hamilton I*, 97 So. 3d at 734 n.4. Justice Parker wrote a special concurrence that was joined by three other justices, in which he noted

that, in the context of Alabama's homicide law, "when an 'unborn child' is killed, a 'person' is killed." *Id.* at 739 (Parker, J., concurring specially) (citations and quotation marks omitted).

3. *Ex parte Ankrom*, 152 So. 3d 397 (Ala. 2013).

In *Ankrom*, the court held that the word "child" in the child chemical-endangerment statute (§ 26-15-3.2, Ala. Code 1975) applies to unborn children as well as to born children. 152 So. 3d at 421. The court thus upheld the criminal convictions of two women who ingested chemical substances while they were pregnant with their unborn children. *See id.* Although the term "child" was not defined in the statute, the court held that "the dictionary definition of the term 'child' explicitly includes *an unborn person* or fetus." *Ankrom*, 152 So. 3d at 411 (citations and quotation marks omitted.)

Justice Parker concurred specially, noting that unborn children are treated as people in property law, criminal law, tort law, guardianship law, and health-care law, and that *Roe* is an aberration to the law's widespread recognition of the personhood of the unborn. *Id.* at 421-30 (Parker, J., concurring specially). Justice Shaw likewise wrote that "[t]his Court's most cited dictionary defines 'child' as 'an unborn or recently born *person*.'" *Id.* at 431 (Shaw, J., concurring in part and concurring in the result) (quoting *Merriam-Webster's Collegiate Dictionary* 214 (11th ed. 2003) (emphasis added)).

4. *Ex parte Hicks*, 153 So. 3d 53 (Ala. 2014).

In *Hicks*, the court again held that the chemical-endangerment statute applied to unborn children because "the word 'child' in that statute includes an unborn child[.]" 153 So. 3d at 66. The court also drew on § 26-22-1(a), Ala. Code 1975, which provides that "[t]he public policy of the State of Alabama is to protect life, born, and unborn." *Id.* The court noted that its decision "is consistent with many statutes and decisions throughout our nation that recognize unborn children as persons with legally enforceable rights in many areas of the law." *Hicks*, 153 So. 3d at 66 (quoting *Ankrom*, 152 So. 3d at 421 (Parker, J., concurring specially)). Chief Justice Moore concurred specially, arguing that the right to life of the unborn is a God-given right that the Fourteenth Amendment's Equal Protection Clause requires courts to secure. *Hicks*, 153 So. 3d at 66-72 (Moore, C.J., concurring specially).[5]

5. *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016).

In *Stinnett*, the court again held that a woman could sue a doctor for "the wrongful death of her unborn previable child." 232 So. 3d at 203. Rejecting the invitation to overrule *Hamilton*, the court harmonized the use of the word "child" in the Wrongful Death Act with the use of the

[5] Chief Justice Moore also explicitly mentioned the personhood theory. *Id.* at 71 n.10.

word "person" in the Homicide Act, reasoning that the language in the Homicide Act "was an important pronouncement of public policy concerning who is a 'person' protected from homicide." *Id.* at 215. Justice Parker concurred specially, arguing, "Protecting the inalienable right to life is a proper subject of state action, and Alabama judges called upon to apply Alabama law should do so consistent with the robust, equal protection with which the Creator God endows and state-law guarantees to unborn children from the moment of conception." *Id.* at 223 (Parker, J., concurring specially).

6. *Hamilton v. Scott*, No. 1150377 (Ala. Mar. 9, 2018) (*Hamilton II*).

After the Alabama Supreme Court remanded *Hamilton I* to the trial court, the jury ultimately ruled in favor of the doctor. The mother appealed, arguing that the trial court erred by refusing to use the child's name, "Tristan," but instead referred to the baby as the "unborn child." The Alabama Supreme Court held that the trial court did not abuse its discretion by using the terms "unborn child" or "stillborn child" because "[b]y using those terms, *the trial court acknowledged that Tristan was a human being*, and those terms were not demeaning." *Hamilton II*, slip op. at 11 (emphasis added).[6] Justice Parker concurred specially, agreeing that the trial court's nomenclature, while maybe not ideal, was still acceptable because it did not demean Tristan's humanity. *Id.* at 29 (Parker, J., concurring specially).

[6] *Available at* goo.gl/fKqKzJ (last visited Jan. 10, 2019).

Apparently concerned about the Court's opinion being misunderstood, Justice Parker concurred specially "to emphasize the well established principle in Alabama law that unborn children are human beings entitled to full and equal protection of the law." *Id.*, slip op. at 24.

7. *Ex parte Phillips*, No. 1160403 (Ala. Oct. 19, 2018).

Finally, in *Phillips*, a man was convicted of capital murder for killing his wife while she was pregnant with their child. The death of the unborn child was the sole factor needed to make the crime a double-homicide and the sole aggravating factor needed to impose the death penalty. Before the Alabama Supreme Court, Phillips essentially argued that the word "person" in the aggravating-circumstance statute did not apply to his child. The court disagreed, reasoning that "the definition of a person as including an unborn child in utero" was applicable to the capital-murder statute and the aggravating-circumstance statute. *Phillips*, slip op. at 41.

Phillips also argued that the trial court should not have assigned the death of his child so much weight as an aggravating circumstance because the child was not born. The Alabama Supreme Court disagreed, reasoning as follows:

> "The [trial] court correctly stated that Alabama recognizes an unborn baby as a life worthy of respect and protection .... In other words, under the criminal laws of the State of

> Alabama, *the value of the life of an unborn child is no less than the value of the lives of other persons*."
>
> *Id.* at 70 (emphasis added).

Apparently giving a nod to the personhood argument, the court also reasoned, "The trial court's additional commentary that this country is founded upon equal protection and due process for all of its persons is also based upon constitutional law." *Id.* at 70-71. Justice Parker noted the Fourteenth Amendment language in the main opinion and concluded that "the Court's rationale" for its decision was "that unborn children are persons entitled to the full and equal protection of the law." *Id.* at 149 (Parker, J., concurring specially). "A person is a person, regardless of age, physical development, or location," he wrote, arguing that the mother and the child "were equally persons." *Id.* at 158.[7]

D. Personhood in Alabama Statutes

As mentioned above, the Texas laws at issue in *Roe* did not explicitly recognize unborn child as "persons." *Roe*, 410 U.S. at 117 n.1. In contrast, Alabama's homicide statute *explicitly* defines a "person" as "a human being, *including an unborn child in utero at any stage in development*, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975 (emphasis added). Alabama also has four statutes in

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[7] Justice Parker also updated the information from his *Ankrom* concurrence and pleaded with this Court to overrule *Roe*. The latter point will be discussed *infra*.

which the word "person" has been interpreted to include the unborn: §§ 6-5-391, 13A-5-40(10), 13A-5-49(9), and 26-15-3.2, Ala. Code 1975.

The Alabama Legislature has repeatedly affirmed that the public policy of the State of Alabama is to protect unborn life. *See* § 26-22-1(a), Ala. Code 1975 ("The public policy of the State of Alabama is to protect life, born and unborn."); § 26-21-1(d), Ala. Code 1975 (finding the public policy of this state is to protect life, including "the life of the unborn *child*") (emphasis added); § 26-21-1(e), Ala. Code 1975 (stating that "it is always the Legislature's intent to provide guidance to the Alabama courts on how life may be best protected"); *see also* § 26-23B-2, Ala. Code 1975 (referring repeatedly to the unborn as a "child").

The Alabama Supreme Court has correctly interpreted those laws in the cases discussed above to mean that an unborn child is a person. Thus, the biggest omission that *Roe* identified in the Texas laws at issue in that case is not present here.

In addition, the Supreme Court criticized the Texas law in *Roe* for not being consistent in treating the unborn as persons outside the context of abortion. *Roe*, 410 U.S. at 157 n.54. However, as demonstrated above, recent decisions of the Alabama Supreme Court have highlighted that this State treats the unborn as persons consistently throughout its law.

It is true that some portions of Alabama statutory law still fall short of the personhood ideal.[8] *See, e.g.*, § 13A-6-1(d)&(e) (prohibiting the prosecution of abortion under the homicide statute); § 26-22-3, Ala. Code 1975 (prohibiting prosecution of abortion of viable unborn children under certain circumstances); § 26-23G-3, Ala. Code 1975 (providing some exceptions to the prohibition of dismemberment abortions). But each of those laws was passed after *Roe* was decided. Thus, unlike the Texas laws in *Roe*, the only reason for these aberrations in the Alabama Code is this Court's precedents. As Justice Parker said, "The only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe*." *Ankrom*, 152 So. 3d at 429 (Parker, J., concurring specially). Thus, short of outright defying this Court's precedents, the Alabama Legislature has done nearly everything it can to recognize and emphasize the personhood of the unborn.

E. Personhood in the Alabama Constitution

Finally, if any doubt remains about whether Alabama recognizes the unborn as persons, the People voted to approve the following state constitutional amendment on November 6, 2018:

> (a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity

[8] To the extent that these statutes count against personhood, they may be preempted by the state constitutional amendment that Alabama voters just approved, discussed *infra*.

> of unborn life and the rights of unborn children, including the right to life.
>
> (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.
>
> (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.

Ala. Act 2017-188 (to be codified in Ala. Const. 1901).[9] This amendment is an unequivocal statement by the People – not just their representatives or their judges – that they view unborn children as living persons entitled to the law's fullest measure of protection.[10]

F. Conclusion

This survey of Alabama cases, statutes, and constitutional amendments demonstrates that the unborn are recognized as persons under Alabama law. *Amici* thus urge the Court to consider whether

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[9] *Available at* goo.gl/cnTWHb.

[10] Arguing that the amendment failed to state the unborn are "persons" because it did not use that specific word would fail to comprehend what the word "child" means. *See Child*, Merriam-Webster Online, goo.gl/YCxQRx (last visited Jan. 10, 2019) (defining "child" as "an unborn or recently born person").

the "suggestion of personhood" discussed in *Roe* has been established. If so, then the case for abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Roe*, 410 U.S. at 156-57.

II. In the Alternative, This Court Should Take the Opportunity to Consider Whether *Roe* Should Be Overruled

In his concurring opinion in *Phillips*, Justice Parker implored this Court to overrule *Roe*, describing it as "a legal anomaly and logical fallacy" that is "an increasingly isolated exception to the rights of unborn children." *Phillips*, slip op. at 149 (Parker, J., concurring specially). Likewise, two of the three judges of the Eleventh Circuit criticized *Roe* in the proceedings below. Chief Judge Ed Carnes, who wrote the majority opinion, strongly suggested that this Court's abortion jurisprudence is "an aberration in constitutional law." *West Alabama Women's Center v. Williamson*, 900 F.3d 1310, 1314 (11th Cir. 2018). Concurring, Judge Dubina wrote that this Court's abortion decisions have "'no basis in the Constitution.'" *Id.* at 1330 (Dubina, J., concurring) (quoting *Gonzalez v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring)). This Court should take this opportunity to listen to the cries of the lower-court judges as they beg this Court to reconsider *Roe* and its progeny.[11]

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[11] The Court may consider this issue even though the parties did not raise it because it is "antecedent to … and ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).

A. The Fourteenth Amendment's Due Process Clause Does Not Protect Abortion in Any Way

The Due Process Clause of the Fourteenth Amendment says, "No State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV, § 1. Grammatically, this Clause does not prohibit the government from abridging *substantive* rights, such as free exercise of religion, the right to keep and bear arms, or the like. Instead, it guarantees the people of the states the right to due *process* of law before the states deprive them of life, liberty, or property. It is procedural, not substantive; therefore it cannot be construed to recognize rights that are not in the Constitution.

As Justice Thomas has explained, "substantive due process" is a "dangerous fiction" that "distorts the constitutional text" and invites judges to "roam at large in the constitutional field guided only by their personal views...." *Obergefell v. Hodges*, 135 U.S. 2584, 2631 (2015) (Thomas, J., dissenting) (quotations, citations, and alterations omitted). This Court recognized these dangers in *Bowers v. Hardwick*, which held:

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it

> deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

Bowers v. Hardwick, 478 U.S. 186, 194 (1986).[12]

With this analysis in mind, Justice Scalia was correct when he said that a right to an abortion cannot "be logically deduced from the text of the Constitution." *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring). If this Court continues to maintain that the Due Process Clause protects the right to an abortion, then "[w]ords no longer have meaning." *King v. Burwell*, 135 S.Ct. 2480, 2497 (2015) (Scalia, J., dissenting). [13]

Let us not forget that the central point of the Fourteenth Amendment was to recognize a group of people as persons who were not recognized as persons before. To use the Fourteenth Amendment to deprive a group of people their personhood violates not only the letter but also the spirit of the Amendment.

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[12] *Overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). *Amicus* Foundation for Moral Law maintains that *Bowers* was right and *Lawrence* was wrong.

[13] Even if substantive due process comported with the Fourteenth Amendment, it would not support the right to an abortion because it is not "found in the longstanding traditions of our society[.]" *Akron*, 497 U.S. at 520 (Scalia, J., concurring); *see also Washington v. Glucksberg*, 521 U.S. 720-21 (1997).

B. This Court Should Not Continue to Affirm *Roe* Based on *Casey*'s Incorrect View of Precedent

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a plurality of this Court affirmed *Roe*'s central holding, reasoning that overruling *Roe* "would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." 505 U.S. at 865. *Casey*'s erroneous application of *stare decisis* should not prevent this Court from correcting its error in *Roe*.

The Founding generation did not believe that erroneous precedent became more correct over time, and there is no reason to think the Framers of the Fourteenth Amendment thought any differently. In his *Commentaries of the Laws of England*, Sir William Blackstone acknowledged the general rule "to abide by former precedents, where the same points come again in litigation[.]" 1 William Blackstone, *Commentaries* *69. But Blackstone then explained why this rule was not absolute:

> Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust,

> it is declared not that such a sentence was *bad law*, but that it was *not law*, that is that it is not the established custom of the realm, as has been erroneously determined….
>
> The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd or unjust* ….

Id. at *69-*70 (last emphasis added). Blackstone went on to explain that such an exception is needed because "*the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may *mistake* the law." *Id.* at *71. Opinions of the court were not law itself, but the "general rule" was that "the decisions of the courts of justice are the *evidence* of what is common law." *Id.* at *71 (emphasis added, quotation marks omitted). But if such a decision was contrary to reason or divine law, or flatly absurd or unjust, then such a precedent would not be followed. *Id.* at *69-*71.

The only difference between the common-law system and the American system is the presence of a written Constitution. Because the American Constitution is written, there is even less of a need for *stare decisis* than in Blackstone's day. If the presumption during the Founding era was that precedent should be disregarded under the circumstances described above, then in the American system, precedent should be disregarded if it is plainly contrary to the Constitution—which *Roe* is.

C. Every Person Has a God-Given Right to Life

The right to life ultimately comes not from the courts or from a legislature, but from God. As our Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence*, para. 2 (U.S. 1776). The right to life ultimately derives from the fact that "God created man in his own image." *Genesis* 1:27. Because of this, He gave the command, "You shall not murder." *Exodus* 20:13 (NASB). As Blackstone said, "Life is the immediate gift of God, a right inherent by nature in every individual." 1 Blackstone, *Commentaries* *129.

If God gave the right to every person, then the question becomes, "Who is a person?" Blackstone said, "Natural persons are such as the God of nature formed us." 1 Blackstone, *Commentaries* *123. "The principle of Blackstone's rule was that 'where life can be shown to exist, legal personhood exists.'" Joshua Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. L. & Pub. Pol. 539, 554-55 (2017) (quoting Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L. J. 14, 28 (2012)).[14]

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[14] Due to lack of scientific evidence, the common law held that one could be convicted of homicide for killing a preborn child only after "quickening," because only then could the court ascertain that the child was alive, and it is legally impossible to

Unborn children are persons, made in the image of God and vested with the right to life from the moment of fertilization.[15] The male and female gametes that combine to form a zygote are scientifically alive even before they come together to form a zygote, and a zygote is as much alive as any other living cell. The difference is that the zygote – which is completely genetically human – has the DNA of a unique human being that did not exist the moment before fertilization.[16]

This fact is so obvious that even abortionists admit it. Oregon abortion clinic owner Aileen Klass admitted, "*Of course* human life begins at conception." Calvin Freiburger, *Bill Nye: Embryology Science Denier*, Live Action, goo.gl/r9uv4j (Jan. 18, 2015) (emphasis added). Ron Fitzsimmons, who was the Executive Director of the National Coalition of Abortion Providers, said, "Well, when the woman

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kill a person who is already dead and not alive. *Id.* But when the Fourteenth Amendment was ratified, many courts had repudiated the quickening standard because of the discovery that life begins at fertilization. Craddock, *supra*, at 554-55.

[15] "Fertilization" means "the process of union of two gametes whereby the somatic chromosome number is restored and the development of a new individual is initiated." *Fertilization*, Merriam-Webster Online, goo.gl/Be6Jd7 (last visited Jan. 14, 2019). *Amici* prefers the term "fertilization" to "conception" because the latter can mean either fertilization or implantation. *See Conception*, Merriam-Webster Online, goo.gl/46Yok6 (last visited Jan. 14, 2019).

[16] For a more detailed discussion of this point, see Randy Alcorn, *Why Pro-Life?* 26-31 (2004).

comes in, *the fetus is alive*. But the doctors that we represent will affect fetal demise in utero. So that means the baby is effectively, you know, dead in the uterus and then the procedure starts." *Id.* (emphasis added). So the question for the abortionists is not whether unborn children are *alive*, but whether they are *persons*. Fortunately, when the Fourteenth Amendment was ratified, the People considered the answer to be an unequivocal "yes." *See* Craddock, *supra*, at 552-62.

Scripture confirms what science teaches and the Framers of the Fourteenth Amendment believed. The Law of Moses proscribed the death penalty for anyone who induced the miscarriage of a pregnant woman and caused the baby's death. *Exodus* 21:22-25. This was the same penalty for intentionally causing the death of a born person. *Exodus* 21:12. Thus, the Scripture gives the same value to the life of a born person as to an unborn person.

Because God gave the right to life to unborn children, no human institution—including this Court—may abridge that right.

D. The Fourteenth Amendment Guarantees Equal Protection for the Unborn Because They Are Persons

The Equal Protection Clause of the United States Constitution says, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. Unborn children are persons. Thus, the Equal Protection

Clause applies to them as well. *See Hicks*, 153 So. 3d at 71-72 (Moore, C.J., concurring specially); Craddock, *supra*, at 559-71.

Therefore, the State's willful refusal to protect the unborn from murder is an equal protection violation. *Id.* at 569-70. Under the Fourteenth Amendment, the State must either protect everyone from homicide or protect nobody from homicide. But it cannot willfully turn its back on one class of people while protecting the right to life for everyone else.

III. The People of Alabama Are Interested Not Only in Saving the Lives of the Unborn, but also in Taking Care of Them After They Are Born.

The people of Alabama have shown a consistent and zealous interest in caring for at-risk children after they are born. In 2013, the Legislature passed and the Governor signed into law the Best Interest of the Child Act with the stated purpose of make adoption out of foster care more streamlined.[17] In addition, Alabama pays for the legal expenses when a child is adopted out of foster care. When a child is over the age of sixteen (16) when adopted out of foster care, the state offers a $5,000 scholarship per year for four years of college. To promote the adoption of children in foster care who are waiting for forever homes, the State of Alabama has partnered with Heart Gallery Alabama, which produces promotional videos and bios to raise awareness about

[17] Ala. Act 2013-157.

the need for adoptive families. The State has also partnered with Alabama Pre/Post Adoption Connections to provide support and counseling for families who have gone through the adoption process. Furthermore, for any unrelated adoption within the state of Alabama, the State will make a $1,000 tax credit to the adoptive family's tax liability.

In addition, there are numerous non-profit and NGO child services organizations in Alabama. Just to name a few, Alabama citizens support and maintain Camp Hope, Adullum House, Big Oak Ranch, North Alabama Children's Homes, AGAPE of Central Alabama, Lifeline Children's Services, and the Alabama Foster and Adoptive Parents Association.

To further highlight Alabama's ownership of caring for abused and at-risk children, we need look no further than Alabama's premier land-grant university, Auburn. In 2013, Molly Anne Dutton was named as Auburn's homecoming queen. Dutton gained national attention with her story of "Light Up LIFE" which highlighted the Dutton's early near death encounter. Dutton's mother was considering abortion, but changed her mind instead and placed her for adoption in Alabama.[18] Dutton's story exemplifies the citizens' of Alabama and their attitude towards caring at-risk and vulnerable children.

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[18] Cliff Sims, *Auburn's New Homecoming Queen Has a Ridiculously Inspirational Life Story*, Yellowhammer News, goo.gl/bbE6LN (last visited Jan. 22, 2019).

CONCLUSION

Roe left room for the states to protect the right to life by recognizing the personhood of the unborn, and the State of Alabama has unequivocally done so. But if the Court disagrees with *amici*'s interpretation of *Roe*, then it should take this opportunity to address the ultimate issue: whether *Roe* and its progeny should be overruled.

The lives of the most innocent and helpless human beings in the State of Alabama are at stake. Many Alabamians are willing to do their part in taking care of these people. This Court must do its part also by recognizing their right to live.

Amici therefore respectfully urge this Court to grant the writ of certiorari and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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