No. 17-15208

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WEST ALABAMA WOMEN'S CENTER, et al.,

Plaintiffs-Appellees,

v.

DR. THOMAS M. MILLER, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:15-cv-00497-MHT

BRIEF OF AMICI CURIAE FOUNDATION FOR MORAL LAW, PERSONHOOD ALABAMA, AND PROPOSAL 16 IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amici Curiae* Foundation for Moral Law, Inc., Personhood Alabama Education, Inc., and Proposal 16, represents that these organizations do not have parent entities and do not issue stock. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal:

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Falgout, H. Joseph – Chairman of the Alabama Board of Medical Examiners and defendant in federal district court proceedings

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Marshall, Steve – Alabama Attorney General and Appellant

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Moorer, Terry F. – United States Magistrate Judge for the Middle District of Alabama

Parker, William G., Jr. – Former counsel for Appellants

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West, James E. – Chairman of the Medical Licensure Commission of Alabama and defendant in federal district court proceedings

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Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Foundation for Moral Law ("the Foundation") is a Christian public interest organization in Montgomery, Alabama, that defends the unalienable right to acknowledge God and the sanctity of life and promotes an originalist understanding of the Constitution. 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. Proposal 16 is an unincorporated organization of pro-life advocates in Alabama that focuses on urging Alabama's governor to use her executive power to protect the lives of the unborn. *Amici* have an interest in this case because it involves constitutional challenges to laws in their state that protect an unborn child's God-given and constitutionally protected right to life. *Amici* believe that their brief would be useful to this Court because (1) it presents a Personhood argument, a relatively new theory on how to read *Roe v. Wade* that has been discussed in legal academic circles, and because (2) it explains why the Constitution requires this Court to protect the lives of unborn children in Alabama who will otherwise be murdered if the District Court's order is allowed to stand.

[1] All parties have consented to the filing of this brief. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE 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 numerous statutes explicitly recognizing the unborn as persons, and the Alabama Supreme Court has released five 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 consider whether the Supremacy Clause of the Constitution requires this Court to follow the Constitution itself or clearly unconstitutional Supreme Court precedent when the two cannot be reconciled. The

Supremacy Clause says that the Constitution itself is the Supreme Law of the Land and that every judge in the country is sworn to uphold the Constitution itself, not Supreme Court precedent. At common law, precedent was to be disregarded if it was flatly absurd or unjust, or clearly contrary to reason or divine law. Thus, in the American constitutional system, it follows that the Founders would have wanted the courts to disregard precedent that was clearly contrary to the written Constitution. Because *Roe* and its progeny have no basis in the Constitution and also sanction the destruction of the God-given right to life, this Court should abide by the Constitution itself instead of the Supreme Court's clearly unconstitutional abortion decisions.

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), the United States Supreme Court held that a mother has the constitutional right to destroy her unborn child in most circumstances. However, *Roe* 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." *Roe*, 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 criticized the Texas laws at issue for not treating the unborn as persons:

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

Id. at 157 n.54. It is also important to note that the Texas laws at issue in *Roe* did not *expressly* provide that an unborn child is a person, *Roe*, 410 U.S. at 117 n.1 (quoting the Texas laws at issue).

Ultimately, the Court in *Roe* rejected the personhood of the unborn. *See id.* 157-58 & nn. 54-55.[2] *Roe*'s criticism of the Texas law for failing to treat unborn children as full persons, however, has led to the development of the argument that the states may remedy the problem Texas had in *Roe* by recognizing unborn children as persons, thus causing the right to abortion to collapse. *Roe*, 410 U.S. at 156.[3]

B. Personhood in the states and in academia

The "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 seven years. *See, e.g.*, Rita M. Dunaway, *The 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*

[2] The Court also noted that the Constitution did not explicitly define the term "person," that it did not use the word "person" in other parts of that document to refer to the unborn, and that abortion laws in the 19th Century were not as strict as they were when *Roe* was being decided. *Roe*, 410 U.S. at 157-58. The Court conceded, however, that Wisconsin and Connecticut defined an unborn child as existing *in utero* from the moment of conception and that Connecticut public policy was "to protect and preserve" that life. *Id.* at 158 n.55.

[3] Unacknowledged in *Roe* was the fundamental presumption of personhood that underlies the Fourteenth Amendment. Was not the purpose of the Fourteenth Amendment to extend personhood to those previously considered non-persons?

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 five major pro-life decisions.

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. *Id.* 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 overruled two prior decisions holding that a wrongful-death action could be brought only on behalf of a *viable* child, *id.* at 611, noting 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 drew on a special writing of Justice Maddox in which he stated that "'[a] child is an entity, a "person," from the moment of conception[.]'" *Id.* at 607 (quoting *Gentry v. Gilmore*, 613 So. 2d 1241, 1249 (Ala. 1993) (Maddox, J., dissenting)).

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

In *Hamilton*, 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 Art. I, § 1, of the Alabama Constitution of 1901, the court held that "each person has a God-given right to life." *Hamilton*, 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) (quoting *Zaide v. Koch*, 952 So. 2d 1072, 1082 (Ala. 2006) (See, J., concurring specially, joined by four other justices)). Justice Parker's concurrence in *Hamilton* eventually gained a fifth vote, albeit in an indirect way, from Chief Justice Moore two years later. *Ex parte Hicks*, 153 So. 3d 53, 70 n.9 (Ala. 2014) (Moore, C.J., concurring specially).

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 endorsed the reasoning of the Alabama Court of Criminal Appeals, which held that "'the dictionary definition of the term 'child' explicitly includes *an unborn person* or fetus.'" *Ankrom*, 152 So. 3d at 411 (quoting *Ankrom v. State*, 152 So. 3d 373, 382 (Ala. Crim. App. 2011) (emphasis added)). Justice Parker concurred specially, noting that "[t]he decision of this Court today is in keeping with the widespread legal recognition that *unborn children are persons* with rights that should be protected by law." *Ankrom*, 152 So. 3d at 429 (Parker, J., concurring specially) (emphasis added). 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)).

The *Hicks* opinion was accompanied by three notable special concurrences. First, Chief Justice Moore argued 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). Chief Justice Moore also explicitly mentioned the personhood theory. *Id.* at 71 n.10 ("The very opinion in which the 'right' to abortion was judicially created also left open the possibility that if an unborn child's personhood is established, he or she must be equally protected under law. *See* [*Roe*, 410 U.S.] at 157 n.54"). Justice Parker also concurred specially, writing that "courts must have the courage to . . . recognize a child's unalienable right to life at all stages of development." *Hicks*, 153 So. 3d at 84 (Parker, J., concurring specially). Finally, Justice Shaw concurred

in the result, writing that "the word 'child' in Ala. Code 1975, § 26-15-3.2, plainly and unambiguously refers to both born and unborn persons." *Id.* at 84 (Shaw, J., concurring in the result).

5. *Stinnett v. Kennedy*, No. 1150889 (Ala. Dec. 30, 2016).

In *Stinnett*,[4] the court again held that a woman could sue a doctor for "the wrongful death of her unborn previable child." Slip op. at 1. In rejecting the appellant's invitation to overrule *Hamilton*, the court harmonized the use of the word "child" in the Wrongful Death Act with the use of the word "person" in the Homicide Act on the ground that the language in the Homicide Act "was an important pronouncement of public policy concerning who is a 'person' protected from homicide." Slip op. at 29. 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." Slip op. at 51 (Parker, J., concurring specially).

As the above cases demonstrate, the answer to the question of whether unborn children are recognized as "persons" in the State of Alabama is an unequivocal "yes."

[4] *Available at* goo.gl/J2A2dN (last visited Jan. 25 2018).

D. Personhood in Alabama Law 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. Alabama also has two statutes in which the word "person" has been interpreted to include the unborn: the Wrongful Death Act, § 6-5-391, Ala. Code 1975, and the chemical-endangerment statute, § 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 Alabama law treats the unborn as persons in many other areas. After thoroughly reviewing all the areas of law in which the unborn are treated as persons, Justice Parker concluded his special concurrence in *Ankrom* with the following observation about Alabama law:

> "The decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law. Today, 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).

Some portions of Alabama law still do not fully treat the unborn as persons. *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*, any fault for failing to treat the unborn fully as persons in the statutes mentioned above should fall at the feet of the United States Supreme Court. It would be hypocritical of that Court to lead the State of Alabama to believe that it

could not fully treat the unborn as persons and then fault the State of Alabama for following that guidance.

E. Conclusion

The above survey of statutes, cases, and special writings demonstrate that the unborn are recognized as persons under Alabama law. *Amici* thus urge the Court to consider whether the "suggestion of personhood" discussed in *Roe* has been established in Alabama law. 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.[5] If the Court arrives at this conclusion, it should reverse the judgment of the District Court.

II. In the Alternative, the Supremacy Clause Requires This Court to Abide by the Text of the Constitution When It Cannot be Reconciled with Clearly Contradictory Supreme Court Precedent

This statement undoubtedly sounds shocking. In the practice of law, it is obviously considered a cardinal rule that the decisions of the United States Supreme Court control the interpretation of the United States Constitution. Every lawyer and judge acknowledge that any decision of Congress or the President that is contrary to the Constitution is void, because the Constitution is "the Supreme Law of the Land." U.S. Const., art. VI, cl. 2. But when it comes to the judicial

[5] Subsequent abortion decisions by the Supreme Court have not closed off the possibility of states recognizing the unborn as persons. *See Gonzalez v. Carhart*, 550 U.S. 124, 158 (2007) (noting the State's power to "promote respect for life, *including the life of the unborn*") (emphasis added).

branch of the federal government, we seem hesitant to ask whether a decision of the Supreme Court that is contrary to the Constitution is also void. If this case involved just about anything other than the difference between life and death, *Amici* would not trouble the Court by asking it to consider such a controversial question. But because innocent people will die if the abortions at issue in this case are allowed to continue, *Amici* must urge the Court to consider the question and to refuse to follow the Supreme Court down a path that clearly contradicts the plain meaning of the Constitution and ends with the condonation of murder.

Article VI of the Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.
>
> [A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution[.]

U.S. Const. art. VI, cls. 2-3. According to the Supremacy Clause, the Supreme Law of the Land consists of three components: (1) the Constitution itself, (2) laws of the United States made pursuant to the Constitution (i.e. laws passed by Congress and either signed by the President or ratified by congressional override of the President's veto), and (3) treaties made under the authority of the United States. The Supremacy Clause does not list Supreme Court decisions as a fourth

component of the Supreme Law of the Land. Moreover, the next clause requires judges of lower federal courts to swear or affirm that they will support "this Constitution." Again, that clause does not require state judges to swear to uphold Supreme Court precedents. Therefore, if a lower federal court is presented with a situation where it is impossible to abide by both the Constitution and a decision from the United States Supreme Court, the Supreme Law of the Land requires the judges of that court to abide by the Constitution.

The proposition that Supreme Court decisions are the Supreme Law of the Land was unknown during the founding era and became prevalent only in modern times. At the time of our founding, it was well understood that precedent and law were not necessarily synonymous. In his *Commentaries on 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. Blackstone then explained that 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 explained that an exception to the general rule of following precedent was necessary 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 the common law itself, which was unwritten. Instead 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). If a court's 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 courts must read the Constitution in light of the common law. *Schick v. United States*, 195 U.S. 65, 69 (1904) ("The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.").[6] Article III of the Constitution did not grant the judicial branch the novel power, unknown to the common law, to make laws equal in force to the

[6] "Blackstone's *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick*, 195 U.S. at 69.

Constitution itself. On the contrary, Article III granted to the federal judiciary only judicial power, which is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (citations and quotation marks omitted). And, as stated above, the Constitution made only one change to the common-law system: it added the requirement that judges pledge to uphold the Constitution itself. U.S. Const. art. VI, cl. 3. Thus, it follows that if a court decision conflicts with the written law—the United States Constitution—then state judges are obliged to follow the Constitution itself and not the erroneous precedent.

After 180 years without any amendment to change the terminology of the Supremacy Clause, the Supreme Court boldly attempted to conflate its own precedents with the Constitution itself. In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court reasoned as follows:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is

> the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Id. at 18 (1958).

The above-quoted paragraph contains numerous errors.[7] *Cooper*'s syllogism for judicial supremacy can be reduced to the following:

- Major premise: The Constitution is the supreme law of the land.
- Minor premise: The duty of the judicial branch is to say what the law is.
- Conclusion: Therefore, whatever the judicial branch says about the law is the supreme law of the land.

The obvious error in this reasoning is that just because the Court has the duty to "say what the law is" in a particular case does not mean that the Court's decision becomes the Constitution itself. Consider the logical consequences of *Cooper*'s reasoning as applied to the other two branches of the federal government. *Cooper*'s logic would apply to the legislative branch as follows: (1) the Constitution is the supreme law of the land; (2) the duty of the legislative branch is to make laws; (3) therefore, whatever laws the legislative branch makes are the supreme law of the land. Now consider *Cooper*'s logic as applied to the executive branch: (1) the Constitution is the supreme law of the land; (2) the duty of the

[7] For a detailed analysis of *Cooper*'s misuse of *Marbury v. Madison*, *see* Robert Lowry Clinton, *The Marbury Myth*, National Review (May 6, 2010), http://www.nationalreview.com/article/229672/marbury-myth-robert-lowry-clinton.

executive branch is to enforce the laws; (3) therefore, whatever the executive branch enforces is the supreme law of the land. The first proposition would reduce our constitutional republic to a tyranny of the majority, and the second proposition would reduce it to a dictatorship. The Supreme Court has correctly rejected both of those propositions, recognizing that the Constitution is superior to the power of the legislative and executive branches. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (holding that "a law repugnant to the constitution is void"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

Chief Justice Marshall said in *Marbury*: "It is emphatically the province of the judiciary to say what the law is." 5 U.S. at 177. He did not say it is *exclusively* the province of the judiciary to say what the law is. At the beginning of our republic, it was well-recognized that the other branches of the federal government had a right and duty to interpret the Constitution for themselves. *See, e.g.*, Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819) ("my position [is] that each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question"); Veto Message from President Andrew Jackson to the United States Senate (July 10, 1832) (arguing that "[e]ach

public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others"); Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861) ("[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court … the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.").

Although the Supreme Court has been willing to recognize the Constitution's limitations on the other two branches of the federal government, it has failed to recognize its own constitutional limitations. Nonetheless, the Constitution requires the judges of the lower federal courts to abide by the Constitution, even if the Supreme Court refuses to do so. U.S. Const., art. VI, cls. 2-3. Allowing five unelected lawyers on the Supreme Court to reign "as the ultimate arbiters of all constitutional questions" would be "a very dangerous doctrine indeed and one which would place us under the despotism of an Oligarchy …." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), National Archives, *available at* https://goo.gl/w8J86o.[8]

[8] After the Supreme Court released its decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Alabama Supreme Court refused to vacate a previous decision holding that marriage in Alabama was limited to one man and one woman. *Ex parte State ex rel. Alabama Policy Institute*, 200 So. 3d 495, 561 (Ala. 2016). The Chief Justice concurred specially, basing his decision on the same logic discussed

The question then becomes whether *Roe* and its progeny are clearly unconstitutional. The Fourteenth Amendment's Due Process Clause, which is supposedly the constitutional basis for *Roe*, reads, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. No rational person could deduce a right to abortion or *Roe's* trimester framework from those words. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution[.]"); s*ee also Hicks*, 153 So. 3d at 66-72 (Moore, C.J., concurring specially) (arguing that an unborn child has a God-given right to life that is protected by the Equal Protection Clause).[9]

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above. *See id.* at 586-90 (Moore, C.J., concurring specially). Justice Parker likewise stated that the Supreme Court's decision in *Obergefell* was "without legitimacy." *Id.* at 608 (Parker, J., concurring specially). Two Justices of the Mississippi Supreme Court have also questioned the legitimacy of *Obergefell*. *Czekala-Chatham v. State*, 195 So. 3d 187, 189 (Miss. 2015) (Dickson, P.J., dissenting); *id.* at 199 (Coleman, J., dissenting).

[9] *Amici* presume that the Court is well aware of the arguments that *Roe* was wrongly decided, as well as the theological, philosophical, and scientific arguments for why the unborn are persons. For the sake of being concise, *Amici* shall not repeat what the Court already knows. The objective of *Amici*'s second argument is to demonstrate that lower courts have a legal obligation to stand for the Constitution and for life in spite of the Supreme Court's abortion decisions to the contrary.

Finally, the Court should note that an unborn child's right to life is not only protected by the Constitution but also by the God whom our system of government presupposes. "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) (emphasis added). Every human being has value because God made man in His image. *Genesis* 1:27. In addition, He made it abundantly clear that every person has the right to life when He said, "You shall not murder." *Exodus* 20:13. The Supreme Court's abortion jurisprudence therefore violates not only the Supreme Law of the Land but also the fundamental law of the Creator, which cannot be violated without provoking His wrath. *See Romans* 1:18, 29 (stating that the wrath of God is being revealed against man because of murder). Therefore, *Amici* respectfully and strongly urges this Court to stand with the Constitution of the United States and protect the God-given right to life of innocent unborn children rather than following the abjectly unconstitutional abortion precedents of the Supreme Court.

CONCLUSION

Roe left room for the States to determine whether the unborn are persons or not within the meaning of the law. Alabama statutory law and Alabama Supreme Court decisions recognize the unborn as persons. This Court should consider

whether the State of Alabama has by these actions brought the unborn within the protection of the Fourteenth Amendment's right to life. If the Court concludes that the State has not done so, the Supremacy Clause would require the Constitution to take precedence over clearly contradictory Supreme Court precedent. In this case, that principle requires recognition that the Constitution protects the right to life instead of the "right" to abortion.

For these reason, *Amici* respectfully request that the judgment of the District Court be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rule 32-4, this brief contains 5,880 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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I certify that on January 30, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on the following:

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