No. 17-13561

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPRODUCTIVE HEALTH SERVICES, et al.,

Plaintiffs-Appellees,

v.

DARYL D. BAILEY, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:14-cv-01014-SRW

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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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 *Amicus Curiae* Alabama Center for Law and Liberty, represents that this organizations does not issue stock but has one parent company, the Alabama Policy Institute. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal:

1. ACLU Foundation of Alabama, Inc. - Firm of Appellees' counsel (Randall Marshall);
2. Alabama Center for Law and Liberty – Amicus Curiae
3. American Civil Liberties Union Foundation - Firm of Appellees' counsel, (Andrew D. Beck, Jennifer Dalvin)
4. Alabama Policy Institute – Parent Corporation of Amicus Curiae Alabama Center for Law and Liberty
5. Bailey, Daryl D. – Appellant
6. Beck, Andrew D. – Counsel for Appellees
7. Beckman, Kyle A. – Counsel for Appellants during federal district court proceedings
8. Brasher, Andrew L. – Former counsel for Appellants
9. Campbell, Sarah K. – Counsel for Amici Curiae Tennessee et al.

10. Chynoweth, Brad A. – Counsel for Appellants

11. Clark, Matthew J. – Counsel for Amicus Curiae Alabama Center for Law and Liberty

12. Dalven, Jennifer – Counsel for Appellees

13. Davis, James W. – Counsel for Appellants

14. Estate of Ayers, June, RN – Appellee[1]

15. Howell, Laura E. – Former counsel for Appellants during federal district court proceedings

16. LaCour, Edmund G., Jr. – Solicitor General, State of Alabama Office of the Attorney General

17. Mangan, Mary K. – Former counsel for Appellants during federal district court proceedings

18. Marshall, Randall C. – Counsel for Appellees

19. Marshall, Steve – Appellant

20. Palmer, Eric M. – Former counsel for Appellants

21. Paradis, Renée – Former counsel for Appellees during federal district court proceedings

22. Parker, William G., Jr. – Former counsel for Appellants during federal

[1] Amicus Curiae believes that Ms. Ayers passed away on March 21, 2021. *See* Obituary, June Dianne Ayers, Southern Memorial Funeral Home & Crematorium, https://www.southernmemorialfuneral.com/obituary/june-ayers (last visited July 27, 2021).

district court proceedings

23. Reproductive Health Services – Appellee

24. Strange, Luther – Former Attorney General of Alabama, Defendant in federal district court proceedings

25. Walker, Susan Russ – United States Magistrate Judge

Counsel for Amicus Curiae further certify that to the best of his knowledge no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Respectfully submitted,

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RULE 35 CERTIFICATION

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to at least the following decisions of the United States Supreme Court and this Court and that consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions:

- *Johnson v. Williams*, 568 U.S. 289, 305 (2013);
- *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); and
- *Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

- Whether the States may treat an unborn child as a person to the maximum extent permitted by *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny by appointing a guardian ad litem for an unborn child; and
- Whether the Constitution compels state courts to follow the constitutional interpretation of lower federal courts in the same jurisdiction.

/s/ Matthew J. Clark
Matthew J. Clark
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[2]

The Alabama Center for Law and Liberty is a nonprofit legal organization based in Birmingham, Alabama, that advocates for limited government, free markets, and strong families. ACLL has an interest in this case for two reasons. First, it believes that unborn children are people who are entitled to due process and equal protection of the laws, which Alabama has attempted to secure to the fullest extent possible while complying with *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Second, it believes that our Constitution does not require state courts to follow the constitutional interpretations of lower federal courts, which is a key component of federalism and limited government.

STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC REVIEW

(1) Whether state courts must abide by the constitutional interpretation of lower federal courts within the same jurisdiction;

(2) Whether the panel misapplied the undue burden framework contrary to Chief Justice Roberts's controlling opinion in *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); and

[2] 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 *Amicus Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

(3) Whether the States may appoint a guardian ad litem for a child in a judicial bypass proceeding.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUES

The State's petition for rehearing has accurately described the facts necessary to the argument of these issues. See Pet. for En Banc Rhrg. 2-7.

ARGUMENT

I. The United States Supreme Court and This Court Have Held That State Courts Are Not Bound by Lower Federal Courts' Interpretation of Federal Law.

In its decision, the panel presumed that Alabama courts would follow its decision, appearing to reason that the Supremacy Clause requires state courts to follow the constitutional interpretation of lower federal courts. See slip op. at 19-20 & n.1. This conclusion contradicts both the decisions of the United States Supreme Court and the prior decisions of this Court. En banc review is warranted because failing to correct this error would not only make this Court's precedent unstable, but it would also infringe on the state courts' constitutional duty to interpret the Constitution as they see it.

In 1989, the Supreme Court held:

> Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law. *See* 28 U.S.C. § 1738; *Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470 (1930). Indeed, inferior federal courts are not required to exist under Article

> III, and the Supremacy Clause explicitly states that "the Judges in every State shall be bound" by federal law. U.S. Const., Art. VI, cl. 2.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989). In this holding, the Supreme Court recognized that the States have the right to interpret federal law for themselves. That right flows from the Supremacy Clause, which requires judges in every state to uphold the Constitution. Since lower federal courts are created by statute instead of the Constitution itself, the Court did not require the state courts to abide by lower federal courts' constitutional interpretations.

If *Kadish* were not clear enough, the Court held again in 2013 that "the views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law." *Johnson v. Williams*, 568 U.S. 289, 305 (2013). The Court's holding in *Johnson* directly contradicts the panel's assertion that disregarding lower federal court opinions is disregarding federal law. See slip op. at 19 n.1 (equating a federal court's opinion with federal law). The panel's error therefore conflicts with controlling precedent from the Supreme Court.

The panel's decision also conflicts with precedent from this Court. In *Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003), this Court held, "The only federal court whose decisions bind state courts is the United States Supreme Court." Shortly thereafter, the Court mentioned again: "State courts … are not bound to agree with or apply the decisions of federal district courts and courts of appeal."

Glassroth v. Moore, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003). And in 2009 and 2019, this Court quoted *Kadish* for the proposition that state courts have the authority to interpret federal law for themselves. *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1302 (11th Cir. 2019) (en banc); *W.R. Huff Asset Mgmt. Co. LLC v. Kohlberg, Kravis, Roberts & Co., LP*, 566 F.3d 979, 986-87 (11th Cir. 2009); *see also Hittson v. GDCP Warden*, 759 F.3d 1210, 1278 (11th Cir. 2014) (Carnes, C.J., concurring). Because the panel's decision to the contrary contradicts the law of this circuit, en banc review is warranted.

II. The Panel Ignored Chief Justice Roberts's Controlling Opinion in *June Medical Servs. v. Russo*, Contradicting the Supreme Court and Putting This Court at Odds with Two of Its Sister Courts

It is no secret that the Supreme Court sometimes issues split decisions that make it difficult for the lower courts to "divine any sort of clear rule[.]" *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1325 (11th Cir. 2020). In such cases, the Supreme Court has held that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (cleaned up). Therefore, in interpreting the Supreme Court's decision in *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020), Chief Justice Roberts' concurrence controls. In his concurrence, Chief Justice Roberts explained that he understood *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) to be only an

application of the standard articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) rather than the creation of a new judicial balancing test. *June Medical*, 140 S. Ct. at 2133-42 (Roberts, C.J., concurring in judgment). Thus, rather than engaging in a cost-benefit analysis, the courts may focus only on "the existence of a substantial obstacle[.]" *Id.* at 2136. Two federal courts of appeal agree. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 530 (6th Cir. 2021); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020).

In this case, the panel failed to analyze the case under the proper standard. Moreover, because this case was decided on a motion for a judgment on the pleadings, it is unlikely that Plaintiffs would have met their burden to obtain the relief they sought at that stage. *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (discussing the standard of review for motions for judgment on the pleadings). Between the substantive problem of applying the wrong standard (contrary to Supreme Court precedent) and the procedural problem of showing enough evidence at this stage, the panel's decision should be reviewed.

III. Alabama May Afford Unborn Children Procedural Due Process Safeguards, Including a Guardian Ad Litem, Without Running Afoul of Controlling Precedent.

At issue in this appeal are three components of Alabama's judicial bypass law: Ala. Code § 26-21-1(i) (allowing the district attorney to participate as a party); § 26-21-4(j) (participation of a guardian ad litem for the unborn child as a

party); and § 26-21-4(*l*) (participation of parents, parent, or legal guardian as party). In *Belloti v. Baird*, 443 U.S. 622, 643-44 (1979), the Supreme Court held that a judicial bypass law must allow a pregnant minor to show that she is either mature and capable of making the decision herself or that an abortion is in her best interest. However, *Belloti* expressly provided that the court might have to include the parents in its decision-making process as long as it does not constitute an undue burden. *See id.* at 648. If the presence of parents under certain circumstances does not necessarily create an undue burden, then the presence of a district attorney or a guardian ad litem does not necessarily create an undue burden either.

Under *Belloti* and *Casey*, the key question is whether the presence of any of these people would place an undue burden, i.e. a substantial obstacle, in the path of the mother. Because § 26-21-4 requires the matter to be decided quickly, it is difficult to argue that allowing a representative for the state and a guardian ad litem to be present at the hearing would place a substantial obstacle in the mother's path. *Cf. Casey*, 505 U.S. at 880 (upholding a narrow definition of "medical emergency" under the undue-burden standard); 883 (upholding a 24-hour informed-consent requirement); 899 (reiterating that certain parental notification and consent requirements for minors are constitutional). It is also difficult to maintain that the discretionary summoning of the parents would be an undue burden when *Belloti* expressly said that a court could do it.

In addition to complying with *Belloti* and *Casey*, § 26-21-4 attempts to comply with something else: the Constitution of the United States itself. The Due Process Clause of the Fourteenth Amendment states, "No State shall … deprive any person of *life*, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added). In *Roe*, the Supreme Court punted on the critical question of when life begins. *See Roe*, 410 U.S. at 159. It also used "intratextual" reasoning to conclude that the word "person" in the Fourteenth Amendment did not refer to the unborn instead of exploring what it meant in 1868. Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. L. & Pub. Pol. 539, 550 (2017).

Blackstone, reflecting the common law rule, wrote in his *Commentaries on the Laws of England*: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of the law as soon as an infant is able to stir in the mother's womb." 1 William Blackstone, *Commentaries* *129. On the related concept of personhood, "The principle of Blackstone's rule was that where life can be shown to exist, legal personhood exists." Craddock, *supra*, at 550 (cleaned up). Protecting life at the moment of quickening was meant not to exclude life before quickening but only to protect it from the moment it was discernable. *Id.* But in the 19th Century, advances in medical technology led the American Medical Association to launch an aggressive campaign to protect life from the

moment of conception. Esther Slater McDonald, *Patenting Human Life and the Rebirth of the Thirteenth Amendment*, 78 Notre Dame L. Rev. 1359, 1376-79 (2003). That campaign was so successful that 36 out of 37 states adopted such laws by 1868. *Roe*, 410 U.S. at 175 (Rehnquist, J., dissenting). Thus, *Roe* erred gravely by failing to hold that the Fourteenth Amendment protected the lives of the unborn.

But it does not follow that Alabama must perpetuate the Supreme Court's error. Alabama is not attempting to defy the rules that the Court established in *Casey* and other abortion cases, but it is attempting to treat the unborn as people within the full meaning of the Fourteenth Amendment as much as the Supreme Court will let it. As Chief Justice Parker of the Alabama Supreme Court has noted: criminal law, tort law, family law, property law, and healthcare law often treat unborn children as people in various ways, leaving abortion jurisprudence as the only area in which the law does not treat unborn children as people. *Ex parte Phillips*, 287 So. 3d 1179, 1247-52 (Ala. 2018) (Parker, J., concurring specially). And just like every state in the union, Alabama also allows guardians ad litem to be appointed for unborn children (outside of abortion cases) to protect the interests of the unborn. *Id.* at 1249-50. Since every state allows the unborn to be treated as people by appointing guardians ad litem for them in other contexts, it should be no surprise that a state would do the same in a judicial bypass procedure. Since doing so under these circumstances does not violate *Belloti* or *Casey*, this Court should

not punish Alabama for complying with what the Constitution actually requires: affording due process to people who are at risk of being deprived of life.

In addition to upholding the laws at issue here, Amicus Curiae encourages this Court also to call on the United States Supreme Court to overrule *Roe* and its progeny. *See W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1330 (11th Cir. 2018) (Dubina, J., concurring specially) (calling on Supreme Court to overrule *Roe* and *Casey*). Such a call would be well-received, since there appear to be six justices on the Court willing to overrule that line of decisions. *See* Matthew J. Clark, *Go Big or Go Home: The Case for Boldness in Pro-Life Advocacy After* June Medical Services v. Russo, 33 Regent U. L. Rev. 239, 253-72 (2021) (analyzing the views of six justices and concluding that they would be willing to overrule *Roe* if a party would present the challenge). Even if the Court overrules *Roe* in *Dobbs v. Jackson Women's Health Org.* before this Court releases its opinion in this case, there is still the question of whether the unborn are "persons" within the meaning of the Fourteenth Amendment. *See generally* Craddock, *supra*; *see also* Clark, *supra*, at 275 n.272. This Court could acknowledge that Alabama has done its utmost to answer that question in the affirmative.

All of these matters are worth of en banc consideration because they involve questions of exceptional importance. Rule 35(a)(2), Fed. R. App. P. The Supreme Court held recently that saving people from something that was killing thousands

very quickly was "unquestionably a compelling interest[.]" *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020). Just as saving thousands of lives from COVID is a compelling interest, so is saving millions from something that has killed far more Americans than COVID ever has. *Compare COVID-19 Forecasts: Deaths*, Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/forecasting-us.html (last visited July 27, 2021) (predicting that 625,000 Americans will have died from COVID by August 14, 2021) *with Abortion Statistics*, National Right to Life Committee, http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf (last visited July 27, 2021) (noting that over 62.5 million babies have been aborted in America since 1973).

CONCLUSION

This Court should grant the petition for an en banc rehearing.

Respectfully submitted,

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July 28, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rules 29-3 and 35-5, this brief contains 2,475 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 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on July 28, 2021, 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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