NO. 17-15208-FF

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WEST ALABAMA WOMEN'S CENTER, et. al,

PLAINTIFFS-APPELLEES,

v.

THOMAS MILLER, et. al.,

DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Alabama, Northern Division, Honorable Myron H. Thomson, Case No. 9:13-cv-80577-DMM

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS AND AMERICAN COLLEGE OF PEDIATRICIANS IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 27-1(a)(9), Amici Curiae American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") and American College of Pediatricians ("ACPEDS") certify that the following individuals/entities have an interest in this litigation. To the best of Amici's knowledge, none of the following individuals/entities are a corporation that issues shares to the public:

Alabama Women's Center, Plaintiff

American Association of Pro-Life Obstetricians and Gynecologists, Amicus

American Civil Liberties Union, counsel for Plaintiffs

American Civil Liberties Union Foundation, Counsel for Plaintiffs

ACLU of Alabama Inc., counsel for Plaintiffs

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American College of Pediatricians, Amicus Curiae

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West Alabama Women's Center, Plaintiff

West, James E., Defendant

White, Yashica Robinson, Plaintiff

Williamson, Donald E., Defendant

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IDENTITY AND INTEREST OF AMICI

Amicus Curiae American Association of Pro-Life Obstetricians & Gynecologists ("AAPLOG") is an organization whose purpose is to affirm the unique value and dignity of individual human life in all stages of growth and development. AAPLOG members have reviewed and continue to review data from around the world regarding abortion-associated complications to provide a realistic appreciation of abortion-related health risks. AAPLOG respectfully submits some of that research to this Court to provide it with critical information pointing to the necessity for Alabama's statute prohibiting dismemberment abortions.

Amicus Curiae American College of Pediatricians ("ACPeds") is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. The College believes that Alabama's law banning D&E abortions unless the unborn child is killed before the procedure is necessary to protecting the health and well-being of young women and respectfully seeks to provide the Court with information that is critical to the Court's analysis.

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or

entity, other than Amici Curiae or their counsel made a monetary contribution to the preparation and submission of this Brief.

STATEMENT OF THE ISSUES

1. Does an Alabama law that prohibits physicians from dismembering a living unborn child and removing him piecemeal from his mother's womb violate the mother's constitutional right to choose abortion?

SUMMARY OF ARGUMENT

Standards of care in the medical profession[1], as well as compassion and common human decency, require that unborn children who are undergoing life-saving intrauterine surgery be given anesthetics and analgesics to reduce pain from the procedures. In keeping with such standards and its compelling interest in respecting human life, the Alabama Legislature has enacted a law prohibiting the killing of living unborn children by tearing them limb from limb in dismemberment abortion procedures. However, those, like Plaintiffs, who profit from dismemberment abortions performed on living unborn children, are challenging the Alabama Unborn Child Protection from Dismemberment Abortion Act ("Act") as a purported unconstitutional infringement on the mothers' right to abort their children. At issue is not whether a woman will be able to have her

[1] L. Giuntini & G. Amato, *Analgesic Procedures in Newborns*, NEONATAL PAIN 73 (Giuseppe Buonocore & Carlo V. Bellieni ed., 2007).

unborn child killed in an abortion. The ban does not prohibit all D&E abortions, it only prohibits D&E abortions performed on ***living*** unborn children. Thus there is no undue burden to women's right to abort their unborn children posed by this ban.

In fact, the Act protects the health and safety of the mothers as well as furthering the state's compelling interests in respecting the life of the unborn child, preventing cruel and unusual punishment and protecting the ethics and integrity of the medical profession. The Act also complements the state's protection of unborn children who can feel pain through enactment of the Pain-Capable Unborn Child Protection Act. Rather than being an unconstitutional infringement on a purported right to abortion, the Act is an expression of the state's commitment to protecting its most vulnerable and powerless citizens from what even abortion proponents call an excruciating and brutal procedure. *Gonzales v. Carhart,* 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting).

ARGUMENT

I. PROHIBITING THE DISMEMBERMENT OF UNBORN CHILDREN WHO CAN FEEL PAIN FURTHERS ALABAMA'S COMPELLING STATE INTERESTS IN RESPECTING LIFE AND PREVENTING CRUEL AND UNUSUAL PUNISHMENT.

A. The Act Furthers the State's Asserted Compelling Interest in Protecting the Lives of Unborn Children Who Can Feel Pain.

As one of 21 states that have enacted a Pain-Capable Unborn Child

Protection Act,[2] Alabama has asserted its "compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain." Ala. Code § 26-23B-2(12). Citing "substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization," the Alabama legislature prohibited abortions on unborn children when:

> [T]he probable postfertilization age of the unborn child of the woman is 20 or more weeks unless, in reasonable medical judgment, the woman has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

Ala. Code §26-23B-5.

The Legislature has again acted in furtherance of that compelling state interest by enacting the Alabama Unborn Child Protection from Dismemberment Abortion Act, which imposes a criminal penalty on physicians who purposely perform "dismemberment abortions," defined as "dismember[ing] a living unborn

[2] Alabama, Arkansas, Arizona, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia and Wisconsin. Rewire News, Legislative Tracker, 20-week Bans, January 22, 2018, https://rewire.news/legislative-tracker/law-topic/20-week-bans/ (last visited January 30, 2018).

child and extract[ing] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments." Ala. Code § 26–23G–2(3). In striking down the Act, the district court refused to consider a fetal pain argument, asserting that "*fetal pain is not a biological possibility until 29 weeks*, well beyond the range of standard D & E procedures and beyond the legal limit of abortion in Alabama." *West Alabama Women's Center (WAWC) v. Miller,* 217 F.Supp.3d 1313, 1337 n.21 (M.D. Ala. 2016) (emphasis added). The court's assertion contradicts Ala. Code §26-23B-5 and is refuted by medical research which demonstrates that unborn children feel pain long before 29 weeks gestation.

In fact, unborn children feel pain even before the 20-week threshold described in Ala. Code § 26-23B-5, demonstrating a compelling interest in enacting even greater protections for the youngest and most vulnerable of Alabama's citizens by banning dismemberment abortions in Ala. Code §26-23B-5.

Researchers have found that unborn children can experience pain in some capacity from as early as **eight weeks** of development. After decades of microscopic tissue studies, researchers have found that sensory receptors, including nerve endings that respond selectively to painful stimuli are present throughout the unborn child between 10 and 14 weeks gestational age, starting as early as seven

weeks.[3] This begins in the tissues around the mouth at seven weeks, followed by the palms and soles of the feet at 11 weeks, and the remainder of the skin surface by 20 weeks.[4]

> Neonatal specialist Dr. Colleen Malloy testified before Congress that:
>
> There is ample biologic, physiologic, hormonal, and behavioral evidence for fetal and neonatal pain. As early as 8 weeks post-fertilization, face skin receptors appear. At 14 weeks, sensory fibers grow into the spinal cord and connect with the thalamus. At 13-16 weeks, monoamine fibers reach the cerebral cortex, so that by 17-20 weeks the thalamo-cortical relays penetrate the cortex.[5]

Dr. Maureen Condic also testified that "it is entirely uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development."[6] She explained that to experience pain, a noxious stimulus must be detected and that "the neural structures necessary to detect noxious stimuli are in place by 8-10

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[3] Stuart W.G. Derbyshire, *Foetal pain?* 24 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY. 647-55 (2010); Kanwaljeet Anand , *et. al. Pain and Its Effects in the Human Neonate and Fetus*. 317 NEW ENGLAND JOURNAL OF MEDICINE, 1321-29 (1987).

[4] Sinno H. Simons, Dick Tibboel, *Pain perception development and maturation,* 11 SEMINARS IN FETAL AND NEONATAL MEDICINE, 227-31 (2006).

[5] *District of Columbia Pain-Capable Unborn Child Protection Act H.R. 3803 Hearing Before the Subcommittee on the Constitution, Committee on the Judiciary,* U.S. House of Representatives, 113th Congress (Testimony of Colleen A. Malloy, M.D.) (May 17, 2012), https://judiciary.house.gov/wp-content/uploads/2016/02/Malloy-05172012.pdf.

[6] *District of Columbia Pain-Capable Unborn Child Protection Act of 2013: Hearing on H.R. 1797 Before the Subcommittee on the Constitution and Civil Justice, Comm. on the Judiciary, U.S. House of Representatives*, 113th Cong. 8, (May 23, 2013) (Testimony of Maureen L. Condic Ph.D.) https://judiciary.house.gov/_files/hearings/113th/05232013/Condic%2005232013.pdf

weeks of human development."[7] "The neural circuitry responsible for the most primitive response to pain, the spinal reflex, is in place by 8 weeks of development. This is the earliest point at which the fetus experiences pain in any capacity."[8] "Connections between the spinal cord and the thalamus, the region of the brain that is largely responsible for pain perception in both the fetus and the adult, begin to form around 12 weeks and are completed by 18 weeks."[9]

In her February 15, 2017 testimony before the Texas Senate Health and Human Services Committee, Dr. Sheila Page confirmed that unborn children's nervous systems are developed to the point that they can feel pain early in a pregnancy:

> By studying the biokinetics of the human fetus, it becomes very clear that a tiny person with an elegantly developed nervous system is present by eight weeks. Over the next few weeks, these babies will be responding to sounds and pressures around them and developing very coordinated behaviors. All sensory receptors are denser in a baby than in an older child. They are very sensitive to their environment and they are able to feel pain….
>
> The fundamental unit of pain, the peripheral nerves, spinal cord, and reticular activating system, is completed as a unit between seven and eight weeks. By 10 weeks, the motion of breathing begins and continues until birth, shaping and developing the respiratory system. The nervous system and the other organ systems are highly developed and functional.[10]

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7 *Id.* at 4.

8 *Id.* at 3.

9 *Id.* at 4.

10 *The Neuroanatomy and Physiology of Pain Perception in the Developing Human Hearing on S.B. 415 Before the Texas Senate Health and Human Services*

She added, "We may be incapable of relating to the humanity of the little babies developing in their mother's wombs, and incapable of comprehending the potential they have for suffering, but denying the humanity of the pre-born child cripples our understanding of ourselves and our own formation."[11]

Dr. Malloy testified that pain transmitters in the spinal cord are abundant early on in development, but pain inhibitors are sparse until later, supporting the conclusion that premature infants have greater pain sensitivity than do full-term infants.[12] "Thus, the fetus and premature infant appear to be even more susceptible to the pain experience."[13] Standards of care provide that fetal anesthesia be used for surgery or invasive diagnostic procedures in utero.[14] In fact, premature babies require greater concentrations of medication to maintain effective anesthesia.[15] If anesthesia is required for unborn children undergoing life-saving surgery in utero, then it is clear that unborn children can and do respond to painful stimuli in utero. There could be no more painful stimuli than killing someone by tearing them limb from limb in a dismemberment abortion.

Committee (Testimony of Sheila Page, D.O.) (February 15, 2017) https://lozierinstitute.org/written-testimony-of-sheila-page-d-o-in-support-of-texas-bill-to-prohibit-dismemberment-abortions/.

[11] *Id.*

[12] Malloy testimony, *supra* n.2.

[13] *Id.*

[14] L. Giuntini & G. Amato, *Analgesic Procedures in Newborns*, NEONATAL PAIN 73 (Giuseppe Buonocore & Carlo V. Bellieni ed., 2007).

[15] *Id.*

According to fetal pain specialist Dr. Kanwaljeet Anand, "[o]ur current understanding of development provides the anatomical structures, the physiological mechanisms, and the functional evidence for pain perception developing in the second trimester, certainly not in the first trimester, but well before the third trimester of human gestation."[16]

Scientific facts, the observations of medical professionals, "our own experience of pain, and our indirect experience of others' pain," support the conclusion "that there is indeed a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[17] That compelling state interest, specifically referenced in the Pain-Capable Unborn Child Protection Act, is equally applicable to the prohibition against dismemberment abortions in Ala. Code §26–23G–2.

Alabama's law is also narrowly tailored to meet that compelling interest in that it only prohibits dismemberment abortions on living unborn children, implicitly recognizing, as the district court noted, that elective dismemberment abortions can be performed if the physician has induced "fetal demise." *WAWC v. Miller,* 217 F.Supp.3d at 1337. This is a procedure that is well-established:

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[16] Kanwaljeet J. S. Anand, *Fetal Pain?* 14 PAIN: CLINICAL UPDATES, 1, 3 (2006).

[17] Condic testimony, at 8.

> For decades, the induction of fetal demise has been used before both surgical and medical second trimester abortion. Intra-cardiac potassium chloride and intra-fetal or intra-amniotic digoxin injections are the pharmacological agents used most often to induce fetal demise.

Studies have reported that inducing feticide does not pose major risks to the mother and one study reported that mothers preferred to have feticide performed prior to the abortion.[18] While feticide procedures are painful, they are less so than the barbaric and horribly painful dismemberment of a live unborn child.[19] The Alabama law is justified as advancing the state's interest in preventing cruel and unusual punishment.

B. The Law Fosters an Understanding of the Unborn Child as a Living Human Being Who Should Not Be Subjected to Cruel and Unusual Punishment.

The humanity of the unborn child is well-accepted by scientists who have determined that the unborn child "is not an inert being," akin to the larval stage of insects, but "an active and dynamic creature, responding and even adapting to conditions inside and outside the mother's body as it readies itself for life in the particular world it will soon enter."[20] The unborn child not only perceives flavors

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[18] R.A. Jackson, *et al, Digoxin to facilitate late second-trimester abortion: a randomized, masked, placebo-controlled trial,* 97 OBSTETRICS AND GYNECOLOGY, 471–476 (2001).

[19]. Xenophon Giannakoulopoulos, *et al., Fetal plasma cortisol and beta-endorphin response to intrauterine needling,* 9 Lancet. 77-81 (July 1994).

[20] Annie Murphy Paul, ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES 5 (2010).

from the substances ingested by his mother, but also her other sensory inputs.[21] Scientists have found that the unborn child does more than passively receive these inputs.[22] Instead, the developing child actually uses these inputs as information, "biological postcards from the world outside."[23]

Science's recognition of the inherent humanity of unborn children, and particularly their acute pain sensitivity, illustrates how, as Supreme Court Justice Ruth Bader Ginsburg said, "dismemberment D&E" (dilatation and extraction) abortion is as gruesome as the "intact D&E" or "partial birth abortion" prohibited by the federal law upheld in *Gonzales v. Carhart,* 550 U.S. 124 (2007). "Nonintact D & E could equally be characterized as 'brutal,' … involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs." *Id.* at 182 (Ginsburg, J. dissenting) (citing majority opinion). Indeed, the "nonintact D&E," or, as described in the Act, "dismemberment abortion," involves, as the name implies, the surgical dissection and piecemeal removal of an unborn child, *i.e.,* an active and dynamic human being susceptible to pain, from the mother's womb:

> The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For

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21 *Id.* at 5.

22 *Id.* at 6.

23 *Id.*

> example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Id. at 135-36.

A former abortionist, Dr. Anthony Levatino, who had performed 1,200 abortions including over 100 late-term abortions up to 24 weeks, offered the House Judiciary Committee graphic testimony regarding the procedure that is the subject of Alabama's law:

> With suction [removal of the amniotic fluid] complete, look for your Sopher clamp. This instrument is about thirteen inches long and made of stainless steel. At the business end are located jaws about 2 ½ inches long and about ¾ on an inch wide with rows of sharp ridges or teeth. This instrument is for grasping and crushing tissue. When it gets hold of something, it does not let go. A second trimester D&E abortion is a blind procedure. The baby can be in any orientation or position inside the uterus. Picture yourself reaching in with the Sopher clamp and grasping anything you can. At twenty-four weeks gestation, the uterus is thin and soft so be careful not to perforate or puncture the walls. Once you have grasped something inside, squeeze on the clamp to set the jaws and pull hard – really hard. You feel something let go and out pops a fully formed leg about six inches long. Reach in again and grasp whatever you can. Set the jaw and pull really hard once again and out pops an arm about the same length. Reach in again and again with that clamp and tear out the spine, intestines, heart and lungs. The toughest part of a D&E abortion is extracting the baby's head. The head of a baby that age is about the size of a large plum and is now free floating inside the uterine cavity.

> You can be pretty sure you have hold of it if the Sopher clamp is spread about as far as your fingers will allow. You will know you have it right when you crush down on the clamp and see white gelatinous material coming through the cervix. That was the baby's brains. You can then extract the skull pieces. Many times a little face will come out and stare back at you. Congratulations! You have just successfully performed a second trimester Suction D&E abortion. You just affirmed her right to choose.[24]

The brutality of the procedure on an unborn child that science has shown can feel pain is a textbook definition of cruel and unusual punishment, As Dr. Condic told Congress:

> Imposing pain on any pain-capable living creature is cruelty. And ignoring the pain experienced by another human individual for any reason is barbaric. We don't need to know if a human fetus is self-reflective or even self-aware to afford it the same consideration we currently afford other pain-capable species. We simply have to decide whether we will choose to ignore the pain of the fetus or not….
>
> Given that fetuses are members of the human species—human beings like us—they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law.[25]

The Alabama Legislature has done precisely that, *i.e.*, given unborn children the benefit of the doubt by protecting them from what even Justice Ginsburg characterized as a "brutal" death. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). In so doing, the Legislature is furthering not only its compelling state

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[24] *Planned Parenthood Exposed: Examining Abortion Procedures and Medical Ethics at the Nation's Largest Abortion Provider: Hearing Before the H. Comm. on the Judiciary,* 114th Cong. (October 8, 2015) (testimony of Anthony Levatino, M.D.) https://judiciary.house.gov/wp-content/uploads/2016/02/Levatino-Testimony.pdf.

[25] Condic Testimony, at 8.

interest in protecting the lives of unborn children capable of feeling pain, but also the "deliberate extinguishment of human life" that, if it "has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Furman v. Georgia,* 408 U.S. 238, 303 (1972) (Brennan, J. concurring).

In discussing the intent behind the prohibition against cruel and unusual punishment in the Eighth Amendment of the United States Constitution (which is also contained in Article I, §15 of the Alabama Constitution), Justice Brennan articulated principles that elucidate how the Act's prohibition against dismemberment abortion furthers compelling state interests. "The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment." *Id.* at 271.

> More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like," [citations omitted] are, of course, "attended with acute pain and suffering." [citations omitted] When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

Id. at 272-73. If even the vilest criminal has common human dignity so as to be protected from degrading treatment and cruel punishment, then how much more does an unborn child, whom science has proven is inherently human and experiences pain? If the state's compelling interest in protecting the lives of unborn children "from the stage at which substantial medical evidence indicates that they are capable of feeling pain" means anything, it must mean protecting these children from dismemberment abortions.

II. THE LAW PROTECTS THE HEALTH AND WELFARE OF WOMEN WHO FACE INCREASED RISKS FROM THE DISMEMBERMENT ABORTION PROCEDURE.

From 1973 to today, the Supreme Court has established and consistently re-affirmed that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). That is precisely what the Legislature did when it enacted the ban on dismemberment of live unborn children in abortion. Alabama has acted in furtherance of its interest to protect the health of the woman in barring a procedure that, even those who support abortion have agreed, poses dangers to the pregnant woman.

While invalidating as overbroad Nebraska's law against "partial birth abortion," the Supreme Court explained how the dismemberment abortion procedure at issue in this case poses risks to pregnant women:

> The D & E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. *See* 11 F.Supp.2d, at 1110; Gynecologic, Obstetric, and Related Surgery 1045 (D. Nichols & D. Clarke–Pearson eds.2d ed.2000); F. Cunningham et al., Williams Obstetrics 598 (20th ed.1997).

Stenberg v. Carhart, 530 U.S. 914, 926–27 (2000). The *Stenberg* court referenced the health risks posed by dismemberment abortions, including uterine perforation, cervical lacerations, blood loss, trauma and maternal death from infection caused by retained fetal tissue. *Id.* at 936. Among the "other complications" referenced by the Court is the potential for secondary infertility due to the presence of fetal bone fragments left behind in a dismemberment abortion.[26]

In seeking a similar result in a challenge to the federal partial birth abortion ban, the American College of Obstetricians and Gynecologists ("ACOG") submitted an amicus curiae brief in which it described the risks posed by

[26] William D. Winkelman et al., *Secondary Infertility and Retained Fetal Bone Fragments,* 122 OBSTETRICS & GYNECOLOGY, 458 (2013).

dismemberment abortions to support its argument that "intact D&E" abortions were safer and should not be banned.[27]

> Fewer instrument passes and fewer fetal-bone fragments means less risk of uterine perforation - the most serious and feared complication of D&E. "[A] perforation occurring with second-trimester D&E may lead to bowel injury and will likely require laparotomy [open abdominal surgery]." Stubblefield et al., *supra*, at 180. A perforation that reaches the uterine artery, which is engorged during pregnancy, may cause catastrophic hemorrhage. "Uterine perforations that involve injury to major blood vessels or other organs … require in-hospital surgical management." Clinician's Guide, *supra*, at 178. Some uterine perforations can also reach the gastrointestinal tract, risking contamination of the abdominal cavity with bacteria (peritonitis) or entry of bacteria into the blood stream (sepsis). By causing tissue and organ damage, including damage to the brain and other vital organs, both hemorrhage and sepsis can have long term effects on the woman's health. Second, removing the fetus intact also eliminates the possibility that fetal tissue will be retained in the uterus, a cause of hemorrhage or infection in non-intact D&E procedures. See Stubblefield, et al., *supra*, at 180 ("[h]emorrhage during or after D&E can be caused by an incomplete procedure"); Clinician's Guide, supra, at 201 (retained fetal tissue can cause bleeding, infection of the uterus and fallopian tubes, and sepsis). Long-term complications of retained fetal tissue also include infertility. Third, intact removal increases the physician's control over the procedure. Increased control minimizes the likelihood of complications that are present in other forms of D&E. For example, removing the fetus intact reduces the likelihood that the physician will have to locate the last piece of fetal tissue remaining in the uterus by grasping repeatedly with the forceps–a process that risks injuring the woman.

ACOG further noted that:

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[27] Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart,* 550 U.S. 124 (2007) (Nos. 05–380, 05–1382), 2006 WL 2867888.

> Obstetric hemorrhage can be of a volume large enough to precipitate a state of generalized circulatory failure, resulting in … irreversible tissue damage." Am. Acad. of Pediatrics & ACOG, Guidelines for Perinatal Care 180 (5th ed. 2002). Lungs, kidneys, and the pituitary gland are particularly susceptible to damage from hemorrhagic shock during pregnancy. See Critical Care Obstetrics 555 (Gary A. Dildy et al. eds., 4th ed. 2004). Sepsis can result in lung, liver, and kidney failure, damage to the brain and other organs, and even death. See id. at 329-31; Williams Obstetrics 2005, *supra*, at 994-95.[28]

A leading study on risk factors for abortion-related mortality revealed that hemorrhage is the leading cause of abortion-related death associated with "Dilatation and Evacuation," or "D&E" abortions at 13 weeks or more of gestation.[29] The study explained that the risks were due to the "inherently greater technical complexity of later abortions related to the anatomical and physiologic changes that occur as pregnancy advances. The increased amount of fetal and placental tissue requires a greater degree of cervical dilation, the increased blood flow predisposes to hemorrhage, and the relaxed myometrium is more subject to mechanical perforation."[30] Overall, the study found that the risk of maternal death increased at the rate of 38 percent for each additional week of gestation.[31]

A physician experienced in performing abortions, although supporting second trimester abortions, agreed that complications of D&E or dismemberment

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28 *Id.*

29 Linda Bartlett, et. al., *Risk Factors for Legal Induced Abortion–Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 733 (2004).

30 *Id*. at 735.

31 *Id.* at 731.

abortions using "large forceps with destructive teeth to remove the fetus, generally in parts" can be significant.[32] "Of 68 abortion-related deaths in the US in a recent ten-year period, 49 were in the second trimester."[33] These significant risks to pregnant women illustrate that the Legislature acted in furtherance of its interest in protecting maternal health, even in the abortion context, *Gonzales,* 550 U.S. at 145, when it enacted the ban on dismemberment abortions on live unborn children.

III. THE ALABAMA LAW FURTHERS THE HEALTH AND WELL-BEING OF PROVIDERS, ADVANCING THE STATE'S INTEREST IN PROTECTING THE INTEGRITY AND ETHICS OF THE MEDICAL PROFESSION.

Alabama's ban on dismemberment abortions also furthers the state's asserted interest in protecting the integrity and ethics of the medical profession. *WAWC v. Miller,* 217 F.Supp.3d at 1337. The Supreme Court noted with approval Congress' statement that "intact D&E" or "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." *Gonzales,* 550 U.S. at 157. "There can be no doubt that the government has an interest in protecting the integrity and ethics of the medical profession." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). *See also Barsky v. Board of*

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[32] Lisa H Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, 16 REPRODUCTIVE HEALTH MATTERS 74, 75 (2008).

[33] *Id.*

Regents of Univ. of N.Y., 347 U.S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). In the abortion context as well as other medical contexts, "it is clear the State has a significant role to play in regulating the medical profession." *Gonzales,* 550 U.S. at 157. That is the role that the Alabama Legislature is furthering by banning a procedure that has shown to have detrimental effects on practitioners.

Studies and anecdotal reports from those who have performed dismemberment abortions show that, despite support for the availability of the procedure, those who participate in it suffer significant psychological and emotional consequences.

> Abortion is different from other surgical procedures. Even when the fetus has no legal status, its moral status is reasonably the subject of much disagreement. It is disingenuous to argue that removing a fetus from a uterus is no different from removing a fibroid. Pregnancy itself is different from other bodily states. It is an ambiguous, liminal border-state that is neither one nor two people. Doing second trimester abortions is clinical care at the boundary between life and death and in the context of political and social controversy and, likewise, commitment.[34]

One practitioner described the life-altering psychological trauma of participating in a dismemberment abortion:

> Seeing an arm being pulled through the vaginal canal was shocking. One of the nurses in the room escorted me out when the colour left my face. . .Not

[34] Harris, *Second Trimester Abortion Provision,* at 75.

> only was it a visceral shock; this was something I had to think deeply about. . . Confronting a 21-week fetus is very different….this cannot be called 'tissue'. It was not something I could be comfortable with. From that moment, I chose to limit my abortion practice to the first trimester: 14 weeks or less.[35]

Another physician who continued to do dismemberment abortions recounted the "visceral" reaction she experienced when she was pregnant and the long-term psychological effects that reaction created:

> With my first pass of the forceps, I grasped an extremity and began to pull it down. I could see a small foot hanging from the teeth of my forceps. With a quick tug, I separated the leg. Precisely at that moment, I felt a kick – a fluttery ''thump, thump'' in my own uterus. It was one of the first times I felt fetal movement. There was a leg and foot in my forceps, and a ''thump, thump'' in my abdomen. Instantly, tears were streaming from my eyes – without me – meaning my conscious brain - even being aware of what was going on. I felt as if my response had come entirely from my body, bypassing my usual cognitive processing completely. A message seemed to travel from my hand and my uterus to my tear ducts. It was an overwhelming feeling – a brutally visceral response – heartfelt and unmediated by my training or my feminist pro-choice politics. It was one of the more raw moments in my life. Doing second trimester abortions did not get easier after my pregnancy; in fact, dealing with little infant parts of my born baby only made dealing with dismembered fetal parts sadder.[36]

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[35] Susan Wicklund, THIS COMMON SECRET: MY JOURNEY AS AN ABORTION DOCTOR, 28 (2007).

[36] Harris, *Second Trimester Abortion Provision,* at 76.

A study of the effects of "mid-trimester abortion procedures" on professional staff revealed similar reactions. "The D and E procedure was described as distasteful and many nurses preferred noninvolvement."[37]

> A physician who did amnios but not D and Es said, "Killing a baby is not a way I want to think about myself." The two physicians who have done all the D and E procedures in our study support each other and rely on a strong sense of social conscience focused on the health and desires of the women. They feel technically competent but note strong emotional reactions during or following the procedures and occasional disquieting dreams.[38]

The authors said that despite perceived advantages of the procedure, "physicians seem to be slow in changing to the D and E method. Their hesitation may be related to difficulty with the psychological problems raised by the fetal dismemberment in the procedure."[39] "Moreover, the technique requires the invasion of the pregnant uterus at a time when conventional wisdom has suggested that serious complications would ensue."[40] As discussed above, these complications include perforation of the uterus, infection, hemorrhage and even death.

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[37] Nancy B. Kaltreider, M.D., Sadja Goldsmith, M.D., M.P.H., Alan J. Margolis, M.D., *The impact of midtrimester abortion techniques on patients and staff*,135 AMERICAN JOURNAL OF OBSTETRICS AND GYNECOLOGY, 235, 237 (1979).

[38] *Id.*

[39] *Id.*

[40] *Id.*

A study by the director of a Planned Parenthood clinic revealed psychological and emotional trauma resulting from participating in dismemberment abortions even among those who support the right of abortion.[41]

> The stress experienced by the staff is different from that experienced by the patient and is at its highest during the D & E itself. Failing to recognize the symptoms and signs of this stress may have important consequences for continuation of the service. We discerned that the following psychological defenses were used by staff members at various times to handle the traumatic impact of the destructive part of the operation: denial, sometimes shown by the distance a person keeps from viewing D & E; projection, as evidenced by excessive concern or anguish for other staff members assisting with or performing D & E; and rationalization. The last popularly took the form of discussing the pros and cons of performing D & E and its value.[42]

The authors referred to an "unusual dilemma" created by the dismemberment abortion procedure: "A procedure is rapidly becoming recognized as the procedure of choice in late abortion, but those capable of performing or assisting with it are having strong personal reservations about participating in an operation that they view as destructive and violent."[43]

> We have reached a point in this particular technology where there is no possibility of denying an act of destruction. It is before one's eyes. The sensations of dismemberment flow through the forceps like an electric current. It is the crucible of a raging controversy, the confrontation of a modern existential dilemma. The more we seem to solve the problem, the more intractable it becomes.[44]

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41 Warren M. Hern, M.D., M.P.H. & Billie Corrigan, R.N., M.S., *What about us? Staff reactions to D & E,* 15 ADVANCES IN PLANNED PARENTHOOD, 3 (1980).

42 *Id.* at 6-7.

43 *Id.* at 7.

44 *Id.*

That existential dilemma was described by a former abortion doctor who espoused the incongruity between the physician's commitment to preserving life and the destruction of life inherent in a dismemberment abortion:

> As for elective second trimester abortions, I believe that they should be illegal. I understand that for some women this would be a terrible burden….But I believe that tearing a developed fetus apart, limb by limb, simply at the mother's request is an act of depravity that society should not permit. We cannot afford such a devaluation of human life, nor the desensitization of medical personnel that it requires. This is not based on what the fetus might feel, but on what we should feel in watching an exquisite, partly formed human being dismembered, whether one believes that man is created in God's image or not. I wish everybody could witness a second trimester abortion before developing an opinion about it.[45]

These first person accounts of the psychological and emotional trauma experienced by doctors and nurses who participate in dismemberment abortions, even those who advocate for the procedure, evidence the adverse effects the procedure has on the integrity of the medical profession. Indeed, as was true of the "partial birth abortion" procedure in *Gonzales*, the dismemberment abortion procedure here "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" to rip it apart and remove it piecemeal from the mother's womb. *Gonzales,* 550 U.S. at 157. As the Supreme Court affirmed in *Gonzales*, the state, in this case,

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[45] George Flesh, *Perspective On Human Life: Why I No Longer Do Abortions: Tearing A Second Trimester Fetus Apart Simply At A Mother's Request Is Depravity That Should Not Be Permitted,* LOS ANGELES TIMES, September 12, 1991.

Alabama, has a significant role to play in regulating the medical profession, including prohibiting of procedures that diminish the integrity of the profession and detrimentally affect the practitioners. That is what the Legislature has done in enacting Ala. Code §26–23G–2.

CONCLUSION

Alabama's law prohibiting the dismemberment and removal of live unborn children from their mothers' womb reflects the state's profound respect for human life at all stages from conception to natural death. It also furthers the state's compelling interests in protecting unborn children from cruel and unusual punishment, protecting the health and safety of pregnant women and preserving the ethics and integrity of the medical profession.

Based upon the foregoing, Amici respectfully request that this Court reverse the lower court and uphold the validity of Ala. Code §26–23G–2 to protect the state's most vulnerable citizens, their mothers and their physicians.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, the Brief contains 6,434 words, according to the word count feature of the software (Microsoft Word 2010) used to prepare the Brief.

2. The Brief has been prepared in proportionately spaced typeface using Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 30th day of January 2018. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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