No. 12-145

IN THE
Supreme Court of the United States

PERSONHOOD OKLAHOMA,
Petitioner,
v.
BRITTANY MAYS BARBER, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF *AMICI CURIAE* FOUNDATION FOR MORAL LAW AND THE ADOPTION LAW FIRM IN SUPPORT OF PETITIONER

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August 31, 2012

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oklahoma Supreme Court erred in ruling that a state constitutional amendment defining an unborn child as a "person" was "clearly unconstitutional" under the original understanding of the Constitution and the judicial review power of this Honorable Court.

2. Whether the Oklahoma Supreme Court's wholesale rejection of Oklahoma's personhood amendment conflicts with laws and cases in Alabama and other states that protect preborn children as persons under the law.

3. Whether the Holy Bible's recognition of the personhood of the unborn conflicts with *Roe v. Wade*'s theological discussions of abortion and preborn life.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the right to acknowledge God and other inalienable rights. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution. The Foundation believes, as our Founders did, that all people, born and unborn, are "endowed by [our] Creator with certain unalienable Rights," among them "Life, Liberty, and the Pursuit of Happiness." *Declaration of Independence* (1776). The Foundation has assisted in various pro-life cases and causes and in cases involving the Tenth Amendment powers reserved to the states and the people. The Foundation has an interest in this case because, through its statewide project Personhood Alabama, it is leading the effort to pass an Alabama constitutional amendment or statute that, like the Oklahoma Personhood Amendment, Initiative Petition No. 395, would protect unborn children as "persons" under the law.

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[1] *Amici curiae* Foundation for Moral Law and The Adoption Law Firm file this brief with blanket consent from all parties, copies of which are on file in the Clerk's Office. Counsel of record for all parties received *amici's* notice of their intention to file this brief no fewer than 10 days before the due date for this brief, although the parties agreed to waive the notice requirement. Counsel for *amici* authored this brief in its entirety. No person or entity—other than *amici*, supporters, or counsel—made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae The Adoption Law Firm is a non-profit law center based in Montgomery, Alabama, promoting a culture of orphan-care and providing excellent legal services to effectuate ethical adoptions. The Adoption Law Firm has an interest in this case because it believes all pre-birth human beings are persons "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"; and that all pre-birth persons, from the moment of fertilization, should enjoy the same rights as post-birth persons. The Oklahoma Supreme Court, by blocking Initiative Petition No. 395, has unjustly limited the ability of the people of Oklahoma, through their government, "to secure these" cherished and fundamental "rights" for pre-birth persons.

SUMMARY OF ARGUMENT

The constitutionality of state initiatives is ultimately determined by state and federal constitutional texts, not by hypothetical judicial prognostications. Neither the Oklahoma Supreme Court nor even this Honorable Court is above the "supreme law of the land," but is bound by solemn oath to it. The Oklahoma Supreme Court's first faulty premise was its disregard for that law.

Personhood laws recognize a class of human beings—the preborn—as legal persons entitled to rights and equal protection. Even now, Alabama and many states, by criminal and civil laws, are protecting

the right to life of the preborn. While Personhood laws may challenge the legitimacy of the so-called "right" to abort that person under *Roe v. Wade* and *Casey v. Planned Parenthood*, the Oklahoma Supreme Court, by blocking personhood protection for every preborn child, "threw the baby out with the bathwater" and rejected the many other ways a state may protect the life and dignity of the preborn child.

Finally, the Holy Scriptures provide additional support for the personhood of the preborn child. Though some interpretations of scriptural passages try to devalue the preborn, the Bible, rightly divided, consistently protects the life of preborn persons from murder and assault as equally as it does those already born.

ARGUMENT

In a perfunctory opinion, the Oklahoma Supreme Court has withheld Initiative Petition No. 395 ("IP 395") from the voters of Oklahoma. The initiative reads:

> BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA THAT A NEW ARTICLE 2, SECTION 38 OF THE OKLAHOMA CONSTITUTION BE APPROVED:
>
> RIGHTS OF THE PERSON.
>
> A "PERSON" AS REFERRED TO IN ARTICLE 2, SECTION 2 OF THIS CONSTITUTION SHALL BE DEFINED AS ANY HUMAN BEING FROM

> THE BEGINNING OF THE BIOLOGICAL DEVELOPMENT OF THAT HUMAN BEING TO NATURAL DEATH. THE INHERENT RIGHTS OF SUCH PERSON SHALL NOT BE DENIED WITHOUT DUE PROCESS OF LAW AND NO PERSON AS DEFINED HEREIN SHALL BE DENIED EQUAL PROTECTION UNDER THE LAW DUE TO AGE, PLACE OF RESIDENCE OR MEDICAL CONDITION.

After finding without explanation that IP 395 was "clearly unconstitutional pursuant to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)," the Court then found that "[t]he only Course available to this Court is to follow what the United States Supreme Court, the final arbiter of the United States Constitution has decreed." *In re Initiative Petition No. 395, State Question No. 761*, 2012 OK 42, __ P.3d __ (Okla. Apr. 30, 2012). Nevertheless, the "only course" legally available to the Oklahoma Supreme Court, or any court, is to follow the Constitution.

I. THE OKLAHOMA SUPREME COURT NEGLECTED ITS DUTY AS AN ARBITER OF THE CONSTITUTION TO JUDGE THE PERSONHOOD AMENDMENT ACCORDING TO THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

Petitioner ably demonstrates in its petition that the Oklahoma Supreme Court's pre-ballot ruling on IP 395's constitutional validity was improperly

premature and contrary to this Court's precedent. *See, e.g., Webster v. Reprod. Health* Services, 492 U.S. 490, 499 (1989). The Oklahoma Court compounded its error, however, by failing to apply the Constitution to this case.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles: "it is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803). All judges take their oath of office to support *the Constitution itself*—not a person, office, government body, or judicial opinion.

As a written instrument the Constitution's meaning "does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the

text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865).

Justice Joseph Story concurred:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

This Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution's provisions are not open to expansion or contraction: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821. The people ratified the Constitution and made it the supreme law of the land, superior to presidents, politicians, judges, and citizens alike.

B. According to the Constitution, IP 395 is Plainly Constitutional.

In *Roe*, the Court correctly determined that its task was "to resolve the issue by constitutional measurement," but the Court did no such thing. *Roe v. Wade*, 410 U.S. 113, 116 (1973). The *Roe* Court began its legal analysis by admitting that "[t]he Constitution *does not explicitly mention any right of privacy*." *Id.* at 152 (emphasis added). The Court did not even know from where precisely in the Constitution the right to abortion was to be extracted. Apparently, it did not matter:

> This right of privacy, *whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people*, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe, 410 U.S. at 153 (emphasis added). The *Roe* Court "felt" that the right to abortion was protected by the "broad" right to privacy, which was *somewhere* in the

Constitution or its "penumbras," ultimately pinning its new abortion right on the Due Process Clause of the Fourteenth Amendment. *See id.* at 153. Thus, a Texas criminal statute prohibiting abortions (except to save the life of the mother) was "violative of the Due Process Clause of the Fourteenth Amendment," specifically the "right of personal privacy." *Id.* at 164, 154.

There is no mention of abortion anywhere in the Fourteenth Amendment, leaving the *Roe* Court to instead "find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting); *see also Doe v. Bolton*, 410 U.S. 179, 763 (1973) (finding "nothing in the language or history of the Constitution to support the Court's . . . new constitutional right") (White, J., dissenting). *Roe* did not *find* the existence of a previously unseen right in the plain text of the Constitution—it was unilaterally *created*.

Yet even *Roe* recognized that this created right vanished if the preborn child were considered a person:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well known facts of fetal development. *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.* The appellant [Roe] conceded as much on reargument.

Roe, 410 U.S. at 156-157 (emphasis added). Thus, in the very case that first introduced a constitutional "right" to abort preborn children, the Court conceded that if the child is considered a legal "person," he or she would enjoy the protections of the Fourteenth Amendment. Personhood amendments like Oklahoma IP 395 are simply taking the Court up on this suggestion in *Roe*, so they should hardly be dismissed as "plainly unconstitutional."

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), a small plurality of this Court reaffirmed the essential holding in *Roe*, upheld some abortion regulations in the Pennsylvania Abortion Control Act of 1982 (such as the informed consent and parental consent requirements), but struck down others (such as the husband notification provision). The *Casey* plurality rejected the trimester framework of *Roe* in favor of a fetal viability standard to determine when a State's right to regulate abortion begins, and held that regulations on abortion performed on viable fetuses could not be an "undue burden" on the woman's choice. *Id.* at 873-879.

The *Casey* plurality made it clear that the "right to abortion" did not have its basis in the text of the Constitution, but rather in the Court's philosophical—and ever-expanding—notions of "liberty." To the extent it could be considered a real definition, the

Casey decision offered this infamous formulation of "liberty": "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851.

As *Roe* and *Casey* took liberty to conceive and affirm a "right" to abort preborn children never written in the Constitution, the Oklahoma Supreme Court's reliance upon *Casey* is to plant one's feet firmly in mid-air: there is no right to abort children in the Constitution.

C. The Constitution Does Not Designate the Supreme Court as the Sole Arbiter of the Constitution.

According to Article III, Sec. 1 of the United States Constitution, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This judicial power, given to this Court and all federal courts, "extend[s] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." *Id.* at § 2. With a few exceptions, the Supreme Court exercises this judicial power as appellate jurisdiction over the cases arising under Section 2.

This Court has famously declared, "It is emphatically the province and duty of the judicial

department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). As every law student is taught, this case established the power of federal judicial review. Chief Justice John Marshall held that constitutional interpretation is *emphatically* the responsibility of the judiciary—but he did not say it is *exclusively* the responsibility of the judiciary. Nor did Marshall claim that judicial review is the power to say what the law *ought* to say.

The Constitution does not give a special oath to federal judges, instead requiring that every legislator "and all 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. Indeed, the President—not the Supreme Court—is constitutionally charged with swearing a separate, more vigorous oath to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1. Thus, just as each federal official, of every branch, has a constitutional duty to support the Constitution, it follows that each federal branch likewise has the power to interpret the Constitution it must support.

The Founders expected each branch to support the Constitution and "review" laws, not just the judicial branch. Luther Martin of Maryland expressed reservations about granting this extra power to the judiciary, stating:

> A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature.

James Madison, *Notes of Debates in the Federal Convention of 1787,* at 340 (Ohio Univ. Press, 1985) (1893) (footnote omitted).

In his Farewell Address, President George Washington emphasized that those in government must "confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create . . . a real despotism." George Washington, "Farewell Address 1796," I *Compilation of Messages and Papers of the Presidents* 211 (J.D. Richardson, ed., 1897). Our third president, Thomas Jefferson, frequently warned of judicial usurpation of power, and once wrote, "[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere

of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch." Thomas Jefferson, Letter to Abigail Adams, Sept. 11, 1804, 11 *The Writings of Thomas Jefferson* 51 (Albert Ellery Bergh, ed., 1907). President Andrew Jackson vetoed a national bank bill, even after this Court had upheld the bank's constitutionality, and issued a veto message explaining:

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled....
>
> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each 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. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme

> judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Andrew Jackson, "Veto Message, July 10, 1832," III *Compilation of Messages and Papers of the Presidents,* 1144-45.

Of course, in *Cooper v. Aaron,* 358 U.S. 1, 18 (1958), this Court made the claim that *Marbury*

> 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. . . ."

Respectfully, *Cooper*'s assertion went too far by equating the Constitution—which *is* the supreme law of the land—with this Court, which has a duty to apply the Constitution in those cases before it but is not itself the law. This equivalence is hardly

"indispensable" and in fact does violence to the separation of powers. Ironically, in using the *Marbury* case, which affirmed the power of judicial review, *Cooper* stretched *Marbury* to say something it never said: that this Court and the Constitution are one and the same. What *Marbury* did say was that "it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts* .... [A]nd that *courts,* as well as other departments, are bound by that instrument." *Marbury,* 5 U.S. (1 Cranch) at 180-81.

The Constitution is the supreme law of the land, and this rule of law rather than men is the "indispensable feature of our constitutional system," which both *Cooper* and the Oklahoma Supreme Court in this case too eagerly forfeit. The Supreme Court is an arbiter of the Constitution when exercising its judicial power, but it is not the sole and final arbiter for other branches. "Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches." Thomas Jefferson, 9 *The Writings of Thomas Jefferson* 517 (Paul Leicester Ford, ed., 1898) (emphasis added). Water cannot rise higher than its source and this Court's power does not rise higher than the Constitution from which its power is derived.

II. THE OKLAHOMA SUPREME COURT'S OPINION CONFLICTS WITH THE STATES' AND THE PEOPLE'S POWER TO PROTECT THE LIFE, DIGNITY, AND PERSONHOOD OF PREBORN CHILDREN.

States like Alabama protect preborn life through a variety of criminal laws and court decisions that do not restrict or prohibit abortion. The Oklahoma Supreme Court's knee-jerk rejection of a Personhood amendment like IP 395 places Oklahoma in conflict with those state laws that recognize the unalienable right to life of the preborn child.

In the United States Constitution, the Tenth Amendment reserves to the states or to the people "[t]he powers not delegated to the United States by the Constitution." Traditionally the states have employed their police powers to protect life. "'The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.'" *Washington v. Glucksberg*, 521 U.S. 702, 715 (1997) (*quoting Martin v. Commonwealth*, 184 Va. 1009, 1018-1019, 37 S.E. 2d 43, 47 (1946)). *See also* 1 William Blackstone, *Commentaries on the Laws of England* 125 (1765) (Univ. Chi. Press 1979) ("Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."). This Court has long acknowledged this power of the states: "By the settled doctrines of this court the police power extends, at least, to the protection of the

lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights." *Patterson v. State of Kentucky*, 97 U.S. 501, 504 (1878). At the core of the police power is the state's protection of the lives of its citizens from crime, especially violent crimes such as murder. "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Thus, the states have a recognized and fundamental duty to protect life in accordance with their police powers.

Moreover, the Fourteenth Amendment requires the states to equally protect under law all "persons." The Amendment defines "citizens of the United States" to be "[a]ll persons *born* or naturalized in the United States . . . ." U.S. Const. amend. XIV, § 1 (emphasis added). However, the language of the Equal Protection Clause of the Amendment expressly applies to "any *person*" within a state's jurisdiction, not just "citizens." *Id.* (emphasis added). This language implies that personhood—and therefore the protection of the Equal Protection Clause—is not dependent upon being born or naturalized. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth Amendment to the constitution is not confined to the protection of citizens"); *Civil Rights Cases*, 109 U.S. 3, 31 (1883) ("The fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or

to *any individual*, the equal protection of the laws." (emphasis added)). A plain reading of the Equal Protection Clause indicates that preborn children must enjoy the protection of the laws as much as born children.

Such comprehensive protection of the preborn as persons under the law is precisely what Oklahoma IP 395 attempts to do. The text of the initiative extends the right to due process of law and equal protection under the law to "any human being from the beginning of the biological development of that human being to natural death." If this were enacted, a preborn person in Oklahoma would have the same protection as a born person. But because the Oklahoma Supreme Court myopically focused on only IP 395's impact on *abortion* and concluded that the entire initiative therefore ran afoul of *Casey*, it disregarded the myriad ways that states like Alabama are currently protecting unborn life as persons.

Just this year, the Alabama Supreme Court affirmed "that each person has a God-given right to life," *Hamilton v. Scott,* ___ So. 3d. ___, 2012 WL 1760204, n.4 (Ala. May 18, 2012), as recognized in the Alabama Constitution's Declaration of Rights: "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; *that among these are life,* liberty and the pursuit of happiness." Ala. Const. 1901, § 1 (emphasis added). *See also* Ala. Code 1975 § 26-22-1(a) ("The public policy of the State of Alabama is to protect life,

born, and unborn.") In 2006, Alabama's homicide statute was amended to define "person" to include "an unborn child in utero at any stage of development, regardless of viability." Ala. Code 1975 § 13A-6-1(a)(3). "The [Alabama] legislature has thus recognized under that statute that, when an 'unborn child' is killed, a 'person' is killed." *Hamilton, id.* at *9 (Parker, J., concurring specially). *See also Ankrom v. State,* ___ So.3d ___, 2011 WL 3781258, *9 (Ala. Crim. App. Aug. 26, 2011) (homicide statute "does apply to unborn children"). Alabama is not alone: the vast majority of states protect preborn children from homicide, 28 of which do so from conception:

> At least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception. *See State v. Courchesne,* 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n. 46 (2010) ("'[As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, *Fetal Homicide Laws* (March 2010) (alterations in *Courchesne*))).

Hamilton, id. at *9 (Parker, J., concurring specially).

Alabama's courts have also affirmed that laws against chemical endangerment of minors applies to unborn children as well as born. Alabama Code § 26-15-3.2(a)(1) makes it a felony when a "responsible person . . . [k]nowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance,

chemical substance, or drug paraphernalia." In at least two different cases in 2011, the Alabama Court of Criminal Appeals held the term "child" as used in the statute unambiguously included the preborn exposed to controlled substances by her mother:

> [W]e do not see any reason to hold that a viable fetus is not included in the term "child," as that term is used in § 26–15–3.2, Ala. Code 1975. Not only have the courts of this State interpreted the term "child" to include a viable fetus in other contexts, the dictionary definition of the term "child" explicitly includes an unborn person or a fetus. In everyday usage, there is nothing extraordinary about using the term "child" to include a viable fetus.

Ankrom, 2011 WL 3781258 at *8. *See also Kimbrough v. State*, CR-09-0485 (Ala. Crim. App. Sept. 23, 2011) (unpublished).

In tort law, the Alabama Supreme Court has held that Alabama's "Wrongful Death Act permits an action for the death of a previable fetus." *Mack v. Carmack,* 79 So. 3d 597, 611 (Ala. 2011); *see also id.* at 611 (it is arbitrary to "draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of a fetus injured that, as a result of those injuries, does not survive to viability"). "These developments in Alabama match a larger pattern; currently, at least nine other states permit recovery

for the wrongful death of previable unborn children, five by judicial construction—Missouri, Oklahoma, Utah, South Dakota, and West Virginia—and four by statute—Illinois, Louisiana, Nebraska, and Texas. Georgia and Mississippi permit recovery of damages for the wrongful death of a 'quick' unborn child previability." *Hamilton, id.* at *9 (Parker, J., concurring specially) (footnotes omitted). Justice Parker in *Hamilton* explained in his special concurrence, joined by three other Alabama Supreme Court justices, that such protection of the unborn is not precluded by *Roe* or *Casey*:

> *Roe* does not prohibit states from protecting unborn human lives. To the contrary, in *Casey,* the Supreme Court acknowledged that "the State has legitimate interests from the outset of the pregnancy" in protecting the unborn child, 505 U.S. at 846, 112 S. Ct. 2791, and a "substantial state interest in potential life throughout pregnancy." 505 U.S. at 876, 112 S.Ct. 2791. Thus, unless a state's law conflicts with a woman's "right" to an abortion, the state law does not conflict with *Roe*. *See also Gonzales v. Carhart,* 550 U.S. 124, 158, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (noting that "the State, from the inception of the pregnancy," has an interest "in protecting the life" of the unborn child). *Webster v. Reproductive Health Servs.,* 492 U.S. 490, 516, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989); and *Harris v. McRae,* 448 U.S. 297, 313, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)

Id. at 10.

In all these ways—whether criminal law, civil law, legislative policy, judicial opinions, and other methods—states like Alabama may elevate preborn persons within their jurisdictions to an equal basis with born persons. The Oklahoma Supreme Court erred in blocking Oklahoma voters from IP 395. Its ruling conflicts with laws and cases in Alabama and many other states, and it casts a chilling effect on states who wish to exercise Tenth and Fourteenth Amendment powers and duties to protect preborn children.

III. THE HOLY BIBLE RECOGNIZES THE PERSONHOOD OF THE PREBORN CHILD.

The objections to legalized abortion are often cast by those in favor of abortion "rights" as only a "religious opinion" relegated to the arena of "subjective faith." Yet it was the *Roe* Court who dabbled in a discussion of various religious views of abortion and preborn life with such categorical statements as "[a]ncient religion did not bar abortion," 410 U.S. 113, 130; and it was the *Roe* Court which then attempted to wash its hands of the matter:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and *theology* are unable to arrive at any consensus, the judiciary, at this point in the development of man's

> knowledge, is not in a position to speculate as to the answer.

Id. at 159 (emphasis added). (Of course, by ruling that a woman's right to privacy trumped the right to life of the preborn child, *Roe* resolved the question of when life begins and imposed the answer of "birth.") *Roe* erred in its premise that ancient religion did not bar abortion and that Biblical theology does not provide an answer.

The Holy Bible recognizes preborn children as persons, in both the Old and New Testaments. *See* John Eidsmoe, *God and Caesar: Biblical Faith and Political Action* 172-180 (1997). When Elizabeth, the mother of John the Baptist, came into the presence of Mary who was carrying Jesus in her womb, Elizabeth declared that "the babe leaped in my womb for joy." *Luke* 1:44 (King James Version and hereafter). The Bible speaks of a pregnant Rebekah, "And the children struggled within her. . . ." *Genesis* 25:21-26. These preborn children displayed traits that would follow them most of their lives.

The original languages used in these accounts make no distinction between born and preborn children. Of all of the Greek words used for child, *brephos* connotes a baby or very small child. That is the word attributed to Elizabeth: "The *brephos* leaped in my womb for joy." The same word is used in the next chapter: "Ye shall find the *brephos* wrapped in swaddling clothes, lying in a manger." And in 2

Timothy 3:15 Paul uses the same word: "From a *brephos* thou hast known the holy Scriptures. . . ." The same word is used for a child in the womb, a child newly born, and a child sometime after birth.

Another Greek word used for "son" is *huios*. In *Luke* 1:36 the angel tells Mary, "And, behold, thy cousin, Elizabeth, she hath also conceived a *huios*." And the angel tells Mary in Luke 1:31, "Thou shalt conceive in thy womb, and bring forth a *huios*." Two verbs, "conceive" and "bring forth," with the same direct object, a "son" or *huios*. And years later, when Jesus is a young man, God the Father says to Him, "Thou art my beloved *huios*." *Luke* 5:22. Again, the same Greek word used for a preborn child, a newborn child, and a young man.

The same is true of the Old Testament Hebrew. The same word used for the preborn children in Rebekah's womb, *bne*, is also used for Ishmael when he is 13 years old (*Genesis* 17:25) and for Noah's adult sons (*Genesis* 9:19). And Job says in his anguish, "Let the day perish wherein I was born, and the night in which it was said, There is a man child (*gehver*) conceived." *Job* 3:3. The Old Testament uses *gehver* 65 times, and usually it is simply translated "man." *Job* 3:3 could be accurately translated, "There is a man conceived."

The biblical authors identify themselves with the preborn child. In *Psalm* 139:13 David says, "Thou hast covered me in my mother's womb." Isaiah says, "The

Lord hath called me from the womb" (49:1), and in *Jeremiah* 1:5 the prophet declares, "before thou camest forth out of the womb I sanctified thee, and I ordained thee a prophet unto the nations." The prophets do not say, "the fetus that *became* me;" but the plain meaning is that the person in the womb *is* "me."

Ancient Job wished he could have died before he was born: "Wherefore then hast thou brought me forth out of the womb? Oh that I had given up the ghost, and no eye had seen me!" (10:18) How can the preborn Job die if he or she is not alive?

And David says, "Behold, I was shapen in iniquity; and in sin did my mother conceive me." *Psalm* 51:5. There was nothing sinful about the act of David's conception; rather, this passage establishes that the preborn child has a sinful nature. How can a non-person have a sinful nature? And while other verses establish the child's personhood before birth, this passage shows his or her humanity back to his biological beginning, conception.[2]

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[2] Some argue that, because *Genesis* 2:7 says, "God breathed into his nostrils the breath of life; and man became a living soul," man doesn't really become human until he takes that first breath. But Genesis 2:7 is not normative about how and when human life begins. The first man, Adam, was never a preborn child; he was formed out of the dust of the ground as a mature adult human being. No one else was formed out of the dust of the ground; even Eve was formed out of Adam's rib, and we never read that God breathed the breath of life into her nostrils, or those of anyone else.

Clearly the Holy Bible, especially in its original languages, treats the preborn child the same as a child already born. The Bible says nothing about "potential human beings;" to the authors of Scripture, there are only human beings with potential. *Roe*'s theological muddling notwithstanding, the Bible, taken as a whole, teaches that the preborn child is a living human being.

CONCLUSION

For the reasons stated, this Honorable Court should grant Petitioner's writ of certiorari to review the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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August 31, 2012