No. 23-726 and 23-727

IN THE

Supreme Court of the United States

MIKE MOYLE, Speaker of the Idaho House of Representatives, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF IDAHO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR MORAL LAW, THE LUTHERAN CENTER FOR RELIGIOUS LIBERTY, LUTHERANS FOR LIFE, AND TWO KINGDOMS MINISTRY, IN SUPPORT OF PETITIONERS

John A. Eidsmoe*
**Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Darden
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
Counsel for *Amici Curiae*

February 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Codes, Constitutions, Executive Orders, Regulations, & Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Foundation for Moral Law (www.morallaw.org) is an Alabama nonprofit corporation located in Montgomery, Alabama, which defends the strict interpretation of the Constitution as intended by its Framers and which defends religious liberty and the sanctity of life.

Amicus Curiae The Lutheran Center for Religious Liberty (www.lcrlfreedom.org) provides input, education, advice, advocacy, and resources in areas of life, marriage, and religious liberty.

Amicus Curiae Lutherans for Life (lutheransforlife.org) is a national organization dedicated to equipping Lutherans and their neighbors to be Gospel-motivated voices for life.

Amicus Curiae Two Kingdoms Ministry (www.2kingdomsministry.org) is an organization of pastors and laymen of the Association of Free Lutheran Congregations that exists to encourage and equip Christians to effectively engage in Church and Society.

Amici Curiae have an interest in this case because they believe that the United States Department of Health and Human Services' guidance mandating abortion in violation of Idaho

---

[1] Pursuant to Rule 37.6, *Amici Curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

law violates the Tenth Amendment guarantee that the powers not delegated to the federal government are reserved to the States, and they believe that Idaho law reflects the sanctity of life recognized by Scripture, Church tradition, the Constitution, and medical science.

SUMMARY OF THE ARGUMENT

This is a classic case of radical pro-abortion ideologues trying to slip through the back door and undo what this Court did in *Dobbs v. Jackson Women's Health Organization*, which was to restore authority over abortion legislation to the States where, under the Constitution, it properly belongs. 597 U.S. 215 (2022).

This Court held in *Dobbs* at 302 that the Constitution does not include protection for the right to abortion, either explicitly or implicitly: "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. [*Roe v. Wade*, 410 U.S. 113 (1973)] and [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)] arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."

However, Health and Human Services (HHS) Secretary Xavier Becerra would use the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA), 42 U.S.C. § 1395dd—actually not EMTALA, but HHS "Guidance" purporting to interpret EMTALA—to require a doctor to perform an abortion under vaguely-defined "emergency medical conditions," even if the doctor has religious

or moral objections to abortion, and even though that abortion is expressly prohibited by Idaho law.

Idaho's abortion statutes, Idaho Code §§ 18-622, 18-8804, and 18-8807(1), prohibit abortion with certain exceptions. In *Planned Parenthood v. State of Idaho*, the Idaho Supreme Court upheld the constitutionality of these laws, ruling that the Idaho Constitution does not guarantee a right to abortion. 522 P.3d 1132 (2023).

Disregarding this Court and the Idaho Supreme Court, HHS has sought to circumvent Idaho law and impose abortion on the people of Idaho. *Amici* ask this Court to uphold the constitutional right of the people of Idaho to establish their own abortion policies, a power reserved to them by the Tenth Amendment, and further supported by the Sovereignty Clause of Article VI Section 2.

ARGUMENT

I. The Tenth Amendment reserves to the State of Idaho the right to regulate abortion.

The Tenth Amendment states simply, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *United States v. Darby*, this Court said concerning the Tenth Amendment,

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and

> state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. 100, 124 (1941).

Although the language may seem dismissive, it is accurate. The Tenth Amendment changed nothing; it set in stone the clear understanding of the Framers from the beginning—that the federal government has no powers other than those which the people have delegated to it through the Constitution.

So, may Idaho regulate abortion? And may the federal government interfere with Idaho's regulation of abortion?

Our analysis of the Tenth Amendment begins with the question, does any provision of the Constitution delegate to the federal government the power to regulate abortion? The answer must be "no." A careful reading of Article I Section 8, which delegates powers to Congress, reveals no power to regulate abortion; nor is there any such power delegated to the federal government by any other portion of the Constitution.

We next ask, does any provision of the Constitution forbid the States to regulate abortion? Again, the answer must be "no." A careful reading of Article I Section 10, which prohibits the States from doing certain things, contains no mention of

abortion; nor is there any such power prohibited to the States by any other portion of the Constitution.

Roe v. Wade held that the Constitution guarantees a right to abortion, and that this right limited the power of the States to regulate abortion. 410 U.S. 113 (1973). But *Dobbs* overruled *Roe* and held that nothing in the Constitution guarantees a right to abortion, and that therefore the States are free to regulate abortion.

Because nothing in the Constitution delegates power over abortion to the federal government, and nothing in the Constitution prohibits the States from exercising power over abortion, power over abortion is reserved to the States by the Tenth Amendment. As this Court said in *R. J. House v. Joel Mayes*,

> while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that, among the powers of the state, not surrendered, which power therefore remains with the state, is the power to so regulate the relative rights and

> duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good, and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.

219 U.S. 270, 282 (1911).

This Court also stated in *Medtronic. v. Lohr* that in areas "the States have traditionally occupied," the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* To succeed on a preemption claim, the challenger therefore "must . . . present a showing . . . of a conflict . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough Cnty. v. Auto. Med. Labs.*, 471 U.S. 707, 716 (1985).

This Court's *Dobbs v. Jackson*, 597 U.S. 215 (2022), decision gives added support to the Tenth Amendment's reservation of power over abortion to

the States. The Court stated at 225: "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens." On page 256 the Court said,

> the people of the various States may evaluate those interests [the interest of a woman who wants an abortion and the interests of what they termed "potential life"] differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. § 41-41-191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

"We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at 292. "It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Id.* at 300.

The Court concluded at 302, "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey*

arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." The decision even included a 30-page appendix citing the abortion statutes of the various States.

We must remember that, prior to *Roe v. Wade* in 1973, abortion regulation was almost entirely a state matter. When *Dobbs* speaks repeatedly of returning the power to regulate abortion to "the people and their elected representatives," this means returning the power to regulate abortion to the States.

The message of the Tenth Amendment, *House v. Mayes*, and *Dobbs v. Jackson* is clear: The power to regulate abortion is reserved to the States.

II. The Supremacy Clause of Article VI Section 2 supports the States' authority to regulate abortion.

Article VI Section 2 states,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Some read the Supremacy Clause to say that federal power is everywhere supreme, but upon closer analysis, we will see that that is not its meaning at all.

What part of the Constitution is the "supreme law of the land"? Obviously, all of it.

Does that include the amendments? Clearly it does, because according to Article V, amendments when ratified are "valid to all intents and purposes, as part of this Constitution."

If so, then the Tenth Amendment, as part of the Constitution, is part of the supreme law of the land.

Wherever the Constitution delegates a power to the federal government, according to the Tenth Amendment, that is the supreme law of the land.

Wherever the Constitution reserves a power to the States, according to the Tenth Amendment, that is equally the supreme law of the land.

As asked before, does any provision of the Constitution delegate power over abortion to the federal government? The answer, especially after *Dobbs,* is "no."

Does any provision of the Constitution prohibit the States from regulating or prohibiting abortion? Again, the answer is "no."

Then, according to the Tenth Amendment, the power over abortion is reserved to the States, and that, according to the Supremacy Clause, is the supreme law of the land.

James Iredell, a delegate to the North Carolina Ratifying Convention and later a U.S. Supreme Court Justice, explained that the Supremacy Clause "appears to me merely a general clause, the amount of which is that, when they pass an act, if it be in the

execution of a power given by the Constitution, it shall be binding on the people, otherwise not."[2]

William Richardson Davie, a delegate to the 1787 Philadelphia Convention and to the North Carolina Ratifying Convention, explained further that "This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land. . . . [I]t is not the supreme law in the exercise of a power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations."[3]

Alexander Hamilton, a leading Federalist of his day and an advocate of expanded federal power, echoed the same theme:

> [T]he word *supreme* imports no more than this—that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government. The states, as well as individuals, are bound by these laws; but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding. In the same manner the states have certain independent powers, in which their laws are supreme; for example, in

---

[2] 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 179 (Jonathan Elliot ed., 2d ed. 1836).
[3] *Id.* at 182.

> making and executing laws concerning the punishment of certain crimes, such as murder, theft, etc., the states cannot be controlled. With respect to certain other objects, the powers of the two governments are concurrent, and yet supreme.[4]

Let us remember that the final form of the Supremacy Clause was offered on the Convention floor by Luther Martin, the anti-federalist delegate from Maryland who was a strong opponent of federal power.[5] The purpose of the clause was not to expand federal power but rather to delineate the proper roles of the federal and state governments in our constitutional system.

III. EMTALA, properly interpreted, does not conflict with Idaho's abortion law.

To the extent that EMTALA conflicts with Idaho's abortion law, it is an unconstitutional violation of the Tenth Amendment. As applied to doctors and other medical personnel with religious objections to abortion, it also violates the Free Exercise Clause of the First Amendment and Idaho's Religious Freedom Restoration Act (Idaho Code §§ 73-401 through 404), which provides heightened protection to free exercise of religion.

Properly understood, however, EMTALA does not conflict with Idaho law. The conflict, rather, is

---

[4] 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 362 (Jonathan Elliot ed., 2d ed. 1836).

[5] Edwin Meese III, *The Heritage Guide to the Constitution* 291 (Matthew Spalding & David Forte eds., 2005).

between Idaho law and the "Guidance" issued by the Department of Health and Human Services (HHS) and endorsed by HHS Secretary Xavier Becerra, interpreting EMTALA's requirement that States provide "emergency medical care" to include abortions.

Secretary Becerra's Guidance goes far beyond the language and intent of EMTALA, which nowhere defines "emergency medical care" to include abortions. *Amici* believe EMTALA would be unconstitutional if it required abortions, because the power to regulation abortion is reserved to the States and is part of the States' police power.

The federal government has no police power. *Hamilton v. Ky. Distilleries & Warehouse Co.,* 251 U.S. 146 (1919). Federal legislation that infringes upon the States' exercise of their police power should, if upheld at all, be narrowly construed. As Jefferson said in 1823,

> I wish for no straining of words against the general government, nor yet against the states. I believe the states can best govern our home concerns, the general government our foreign ones. I wish therefore to see maintained that wholesome distribution of powers established by the constitution for the limitation of both: & never to see all offices transferred to Washington.[6]

---

[6] Letter from Thomas Jefferson to William Johnson (Jun. 12, 1823), *in* 15 *The Writings of Thoms Jefferson* 450–51 (Albert Ellery Bergh ed., 1907).

Since this litigation began, in a very similar case, the Fifth Circuit upheld a District Court's injunction against enforcement of the HHS Guideline. *Texas v. Becerra*, No. 23-10246 (5th Cir. Jan. 2, 2024). Citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1996), the court said that Congress had not clearly mandated abortion procedures through EMTALA, and therefore the HHS Guideline could not go beyond EMTALA and mandate abortions. *Id.* at 18–20. The court also noted that "[u]nder the Medicare Act, an agency is required to conduct notice-and-comment rulemaking when promulgating any 'rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing' . . . 'the eligibility of individuals, entitles, or organizations to . . . receive services or benefits.'" *Id.* at 23. Because the Guidance "establishes or changes a substantive legal standard," it could not be adopted without notice-and-comment and is therefore invalid for that reason as well.

Without the invalid HHS Guideline, EMTALA itself does not conflict with Idaho law. Therefore, even if EMTALA is valid, there is no reason for this Court to strike down the Idaho abortion law.

IV. Idaho's protection of the life of the unborn child is consistent with Scripture, Church tradition, common law tradition, and medical science.

Much of Western legal tradition has been shaped by the Bible. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible," and the President signed the bill into law. The opening clause of the bill was: "Whereas Biblical

teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States." [7] Although many today no longer believe the Bible is an authoritative source of law, the evidence establishes that most of those who framed our Constitution and our civil institutions did regard the Bible as an authoritative source of law, as did most of the jurists and legal philosophers the Framers quoted and relied upon.[8]

Joshua Berman, Senior Editor at Bar-Ilan University, in his 2008 book *Created Equal: How the Bible Broke with Ancient Political Thought*, explained how fundamental the Pentateuch is to our "history and tradition." It was particularly significant to the development of the ideas that underly the Fourteenth Amendment Due Process Clause because it was the world's first model of a society in which politics and economics embrace egalitarian ideals. Berman wrote,

---

[7] Joint Resolution, Pub. L. No. 97-280, 96 Stat. 1211 (1982), https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1211.pdf.

[8] *See* Daniel L. Driesbach & Mark David Hall, *Great Jurists in American History* (2018); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984); I & II Charles S. Hyneman & Donald S. Lutz, *American Political Writing During the Founding Era* (1983); I, II, & III John Eidsmoe, *Historical and Theological Foundations of Law* (2012); John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (1987).

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[9]

Chief Justice John Marshall wrote, "The American population is entirely Christian, and with us Christianity and Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations with it.[10]

A. The Bible on Preborn Children

The Bible treats the preborn child as a living human being. 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." Holy Bible, *Luke* 1:44 (King James). That doesn't sound like a

---

[9] Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* 175 (2008); *see also* John Marshall Gest, *The Influence of Biblical Texts Upon English Law,* an address delivered before the Phi Beta Kappa and Sigma xi Societies of the University of Pennsylvania, 16 (Jun. 14, 1910) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7211&context=penn_law_review) ("The law of England is not taken out of Amadis de Gaul, nor the Book of Palmerin, but out of the Scripture, of the laws of the Romans and the Grecians") (quoting Sir Francis Bacon).

[10] *The Papers of John Marshall* 278 (Charles Hobson ed., 2006).

fetus or fertilized egg; that sounds like a child! It reminds us of Rebekah, of whom we read: "And the children struggled together within her." *Genesis* 25:22. 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 Greek words used for child, *brephos* connotes a baby or very small child. That is the word attributed to Elizabeth: "The babe [*brephos*] leaped in my womb for joy." We see the same word in the next chapter: "Ye shall find the babe [*brephos*] wrapped in swaddling clothes, lying in a manger." *Luke* 2:12. And in *II Timothy* 3:15, Paul uses the same word: "From a child [*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 son [*huios*]." And the angel tells Mary in *Luke* 1:31, "thou shalt conceive in thy womb, and bring forth a son [*huios*]." This sentence contains 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.

This is also true in the Old Testament Hebrew. The same word used in *Genesis* 25:22 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 said 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" (*Isaiah* 49:1), and in *Jeremiah* 1:5 we read, "before *thou* camest forth out of the womb I sanctified *thee*, and I ordained *thee* a prophet unto the nations." They do not say "the fetus that became me"; that person in the womb was "me."

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!" *Job* 10:18. How could a preborn child die if he or she is not alive?

And David says, "[b]ehold, 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; 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 personhood all the way back to conception.

Clearly, the Bible (especially in its original languages) treats the preborn child the same way it does a child already born. The Bible knows nothing about "potential human beings"; to the authors of Scripture, there are only human beings with potential.

Some will argue that, because *Genesis* 2:7 says, "God breathed into his nostrils the breath of life; and man became a living soul," man does not really become human until he takes that first breath. *Amicus* believes this is a mistaken interpretation of Scripture for two reasons.

(1) *Genesis* 2:7 is not normative about how and when human life begins. 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.

(2) Even if we were to conclude that without the "breath of life" we are not fully human, the preborn child takes in oxygen through a placenta. Birth constitutes a dramatic change of environment coupled with the ability to breathe for oneself; other than that, birth is simply one more step on the road to maturity.

So, the Bible, taken as a whole, teaches that the preborn child is a living human being. Viability is not even a factor in determining the beginning of personhood.

B. Church Tradition on Preborn Children

Church tradition has also been instrumental in the formation of Western law.[11] For this reason, and because Justice Blackmun in *Roe v. Wade*, 410 U.S. 113, 130 (1973), and Justice Stevens in his *Webster v. Reproductive Health Services* dissent, 492 U.S. 490, 567–69 (1989), cited Catholic Church teaching to justify *Roe v. Wade*, *Amici* will briefly survey church history and its effect on Western law.

The *Didache*, or *Teaching of the Twelve Apostles*, a manual of instruction dating possibly as early as 50 A.D.,[12] commanded, "You shall not murder a child by abortion nor kill that which is born."[13] The Church Father Tertullian, writing around 197 A.D., cited extensively from Old Testament and New Testament Scriptures.[14] He declared firmly, "It is not permissible for us to destroy the seed by means of illicit manslaughter once it has been conceived in the womb, so long as blood remains in the person."[15] St. Hippolytus, writing around 228 A.D., condemned those who resorted to drugs "so to expel what was being conceived on account of their not wishing to

---

[11] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); Eidsmoe, *Historical and Theological Foundations of Law*, *supra* note 8.

[12] *Didache*, Early Christian Writings (Roberts-Donaldson Eng. Trans.), www.earlychristianwritings.com/didache.html.

[13] *Id.*

[14] *See* Julian Andrew Barr, *Tertullian's Attitude towards the Human Foetus and Embryo*, Theses submitted for the degree of Doctor of Philosophy at the University of Queensland, Australia (2014), https://core.ac.uk/download/pdf/43359605.pdf

[15] Tertullian, *Apologia* chap. 25, line 4 (197 A.D.).

have a child," declaring them guilty of "adultery and murder at the same time."[16] And St. Basil wrote in his *First Canonical Letter*,

> The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed. In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself, because in most cases women who make such attempts die. The destruction of the embryo is an additional crime, a second murder, at all events, if we regard it as done with intent.[17]

The Canon Law of the Roman Catholic Church provides, "A person who procures a completed abortion incurs a *latae sententiae* [automatic] excommunication."[18] The Canon Law developed in the early centuries of the Christian Church out of early Church documents such as the *Didache* and was based on and interacted with the Scriptures, Roman and Greek Law, Byzantine Law,

---

[16] Hyppolytus (228 A.D.), *in* V *The Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325* 131 (Alexander Roberts & Sir James Donaldson eds., 1903).

[17] St. Basil, *First Canonical Letter* (330–379 A.D.), *in* VIII *A Select Library of Post-Nicene Fathers of the Christian Church* 225 (Philip Schaff & Henry Wace eds., 1895).

[18] Code of Canon Law, Book VI, Part II, Title VI, *Offences Against Human Life, Dignity And Freedom (Cann. 1397–1398)*, https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html.

the Justinian Code, the decrees of emperors, and other sacred and secular legal documents.[19] The above citation from the *Didache* is evidence that the prohibition against abortion was part of the Canon Law from the beginning and consistently thereafter.

No wonder Orthodox scholar Alexander F.C. Webster wrote that abortion "is one of only several moral issues on which not one dissenting opinion has ever been expressed by the Church Fathers."[20]

Nor was this view limited to the Church Fathers or to the Roman Catholic Tradition. Martin Luther stated his position forcefully: "For those who have no regard for pregnant women and who do not spare the tender fruit are murderers and infanticides."[21] John Calvin was just as clear: "If it

---

[19] *See* Kenneth Pennington, *A Short History of the Canon Law from Apostolic Times to* 1917, http://legalhistorysources.com/Canon%20Law/ShortHistoryCanonLaw.htm (although Martin Luther initially rejected the Canon Law, as his thinking developed, he came to appreciate the value of Roman Catholic Canon Law legal scholarship and concluded that that scholarship should be applied to the civil law and the common law); John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* 55–85 (2002); III John Eidsmoe, *Historical and Theological Foundations of Law* 983–84 (2012).

[20] James Lamb, *Abortion and the Message of the Church: Sin or Salvation?*, LutheransforLife.org (Jun. 30, 2004), http://www.lutheransforlife.org/article/abortion-and-the-message-of-the-church-sin-or-salvation/ (quoting Alexander F.C. Webster, *An Orthodox Word on Abortion* at 8–9 (Paper delivered at the Consultation on The Church and Abortion, Princeton, 1992)).

[21] *Id.* (quoting II Ewald M. Plass, *What Luther Says: An*

seems more horrible to kill a man in his own house than in a field, because a man's house is his most secure refuge, it ought surely to be deemed more atrocious to destroy the unborn in the womb before it has come to light."[22] And Pennington notes that when King Henry VIII (1491–1547 A.D.) separated the Church of England from the Roman Catholic Church, he proclaimed that "he, not the pope, was the source of all canon law henceforward." [23] Pennington adds, "[c]onsequently, the Anglican Church preserved the entire body of medieval canon law and converted it into a national legal system."[24]

C. Common Law on Preborn Children

As the common law developed, "quickening" became the test for homicide prosecutions. Quickening is different from viability; Quickening is the time when the mother first feels the child move within her. One could be convicted of homicide for the killing of an unborn child, only if quickening had already taken place.

But this common law rule did not mean that the child became a person only at quickening or that there was a right to abortion before quickening. Rather, it was a procedural matter of proof. One can be guilty of homicide only if the homicide victim was alive at the time of the alleged killing, and at that

---

Anthology 905 (1959)).

[22] *Id.* (quoting III John Calvin, *Commentaries on the Four Last Books of Moses* 41–42 (Charles William Bingham trans., 1950)).

[23] Pennington, *supra* note 19.

[24] *Id.*

stage in the development of the common law, medical science had no way of proving the child was alive until the mother had felt the child move within her.[25]

D. Medical Advances on Preborn Children

As medical science advanced, so did protection for preborn children. In the 1800s, when medical science was able to determine that the preborn child was in fact alive from the time of conception, laws were enacted in England and in the United States to prohibit abortion from being performed at any time after conception. For example, Lord Ellenborough's Act of 1803 prohibited abortion after quickening as a capital offense and punished abortion prior to quickening with fines, imprisonment, pillory, whipping, or banishment for up to fourteen years.[26] In 1837, Lord Ellenborough's Act of 1803 was amended to abolish the distinction between pre-quickening and post-quickening and make abortion a crime regardless of when performed.[27]

---

[25] *See* I William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* 125–26 (U. Chi. Fascsimile ed. 1979); *Hicks v. State*, No. 1110620, 2014 WL 1508698 (Ala. Apr. 18, 2014) (Moore, C.J., concurring); *see also* III John Eidsmoe, *Historical & Theological Foundations of Law* 1197 n.110 (2012).

[26] Lord Ellenborough's Act (1803), *in* 44 Danby Pickering, *The Statutes at Large: From the Magna Charta, to the End of the Eleventh Parliament of Great Britain, Anno 1761. Continued.* (1804), https://books.google.co.uk/books?id=3C7LBu9moYYC.

[27] Charles L. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. DET. MERCY L. REV. 51, 60 (2006).

In 1857, the American Medical Association issued a report stating: "The independent and actual existence of the child before birth as a living being is a matter of objective science." [28] In the 1860s, American medical doctors led a movement to criminalize abortion at all stages of pregnancy, and this movement led to the passage of laws prohibiting abortion in all 50 states.[29] Since that time, medical science has advanced further in its understanding of the unborn child, from the discovery of chromosomes (1879–83),[30] the location of genetic material within chromosomes of a cell (1902)[31] and the components of DNA (1929)[32], and much more.

The Bible, Church tradition, and common law, coupled with modern medical science, have exerted a great influence on American law, and they recognize the personhood of the preborn child. Idaho is therefore fully justified in exercising its police power to protect the lives of its preborn children.

CONCLUSION

The foremost duty of a State is to protect the lives of its people. This duty is inherent in the State's police power and is reserved to the States by the

---

[28] *See Roe v. Wade*, 410 U.S. 113, 141 (1973).

[29] I Amy Lind & Stephanie Brzuzy, *Battleground: Women, Gender, and Sexuality* 3 (2008).

[30] *See, e.g.*, *Genetic Timeline*, National Human Genome Research Institute, https://www.genome.gov/Pages/Education/GeneticTimeline.pdf.

[31] Robert Snedden, *DNA & Genetic Engineering* 44 (2002).

[32] *See, e.g.*, Charles H. Calisher, *Sequences vs. viruses: producer vs. product, cause and effect*, 48 CROAT. MED. J. 103 (2007), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080495/.

Tenth Amendment, which, under the Supremacy Clause, is part of the "supreme law of the land." Idaho may choose to protect unborn children based upon Scripture, Church tradition, common law, and current medical science.

Idaho has fulfilled its duty to protect the lives of its people by adopting its abortion laws. To the extent that EMTALA and the HHS Guideline encroach upon Idaho's right and duty to protect its people, they are unconstitutional and invalid.

Amici Curiae urge this Court to uphold the Idaho law and invalidate any federal laws or regulations to the contrary.

Respectfully submitted,

John A. Eidsmoe*
**Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Darden
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
Counsel for *Amici Curiae*

February 23, 2024